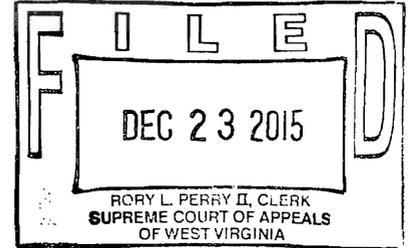


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0898

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 132
HEALTH AND WELFARE FUND, ET AL.,

Plaintiffs Below
Petitioners,



v.

L.A. PIPELINE CONSTRUCTION COMPANY, INC., Defendant Below; and UNITED BANK, INC., Intervenor Below,

Respondents.

BRIEF OF RESPONDENT UNITED BANK, INC.

Upon a Certified Question from the
United States District Court for the Southern District of West Virginia
(Civil Action No. 3:13-0537)

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Respondent, United Bank, Inc. (“United Bank”), intervenor in the proceedings in the United States District Court for the Southern District of West Virginia (“district court”), respectfully submits this brief in support of its answer to the question certified to this Court by the district court.

United Bank issued Letter of Credit A-09-01 (“Letter of Credit”) on January 13, 2009 following Respondent L.A. Pipeline Construction Company, Inc.’s (“L.A. Pipeline”) application for a letter of credit to satisfy its obligations under the West Virginia Wage Payment and Collection Act (“WVWPCA”). United Bank issued the Letter of Credit as a perpetual irrevocable letter of credit naming the West Virginia Division of Labor (“WVDOL”) as its beneficiary. Under the Uniform Commercial Code (“UCC”), as adopted by the West Virginia Legislature, a “perpetual” letter of credit expires five years after its date of issuance. More than six years after the Letter of Credit was issued, the Petitioners began efforts to draw upon the Letter of Credit.

As explained below, this Court should answer the district court’s certified question by finding that a letter of credit that states it is perpetual expires five years after its date of issuance and that nothing within the WVWPCA requires a different conclusion. In reaching this conclusion, this Court should find that the arguments made by the Petitioners and the WVDOL are readily distinguishable. Moreover, this Court should find that this answer to the certified question will do nothing to hamper the WVDOL’s ability to enforce the salutary purposes of the WVWPCA.

QUESTION CERTIFIED BY THE DISTRICT COURT

On September 17, 2015, Chief Judge Robert C. Chambers of the U.S. District Court for the Southern District of West Virginia certified the following question to this Court:

Does “[a] letter of credit that states that it is perpetual expire[] five years after its stated date of issuance, or if none is stated, after the date on which it is issued” as provided by the 1996 version of West Virginia Code § 46-5-106(d), or does such letter remain in effect outside the five-year time period until “terminated” by the Commissioner of the Division of Labor pursuant to West Virginia Code § 21-5-14(g)?

[App. 1.]

STATEMENT OF THE CASE

The Letter of Credit issued, and became effective, on January 13, 2009. [See WVDOL Br. at 2; *see also* App. at 79.] It was issued on what was then the WVDOL's standard letter of credit form and it named the WVDOL as its beneficiary. [See WVDOL Br. at 2; *see also* App. at 79.]¹ Tellingly, the Letter of Credit's formal title is "Perpetual Irrevocable Letter of Credit/Wage Bond." [See App. at 79.] Similarly, the Letter of Credit states that:

This *perpetual* letter of credit is posted as a wage bond pursuant to West Virginia Code § 21-5-14, and is subject to the provisions thereof, and the laws of the State of West Virginia. As a wage bond, *it may be drawn against* by the [WVDOL] at any time *for wages and/or fringe benefits which came due during the effective dates thereof*, unless earlier released in writing by the Commissioner pursuant to West Virginia Code § 21-5-14. This *perpetual* irrevocable letter of credit/wage bond may only be terminated with the approval of the Commissioner of the [WVDOL] pursuant to the terms and conditions of West Virginia Code § 21-5-14(g).

[App. at 79 (emphasis added).] In addition, the Letter of Credit provided the following mechanism for drawing against it: "[w]hen drafts are presented for payment, they must bear on their face the phrase 'Drawn under Credit Number A-09-01 dated January 13, 2009 . . . and include the [WVDOL]'s written statement certifying that L.A. Pipeline . . . failed to pay in accordance with their [sic] obligations.'" [App. at 79.] Lastly, the Letter of Credit's final sentence required United Bank

to notify the Commissioner in writing by certified mail no earlier than one hundred and twenty (120) days and no later than ninety (90) days prior to the five (5) year anniversary of the issuing date so that the Commissioner can determine if the wage bond may be terminated pursuant to West Virginia Code § 21-5-14(g).

[*Id.*]

¹ The Letter of Credit indicates that the WVDOL form upon which it was prepared was "Revised March 31, 2005." *See* App. at 79. Notably, the WVDOL's current standard form is fundamentally different from the form at issue in this action. *See* www.wvlabor.com/newwebsite/Documents/wageforms/Final%20LC%20WB-102114.pdf

Under the UCC, as adopted by the West Virginia Legislature in 1996, a “perpetual” letter of credit expires “five years after its stated date of issuance, or if none is stated, after the date on which it is issued.” The Letter of Credit did not contain an automatic renewal provision, which is sometimes referred to as an “evergreen” clause.² As a result, based upon an issuance date of January 13, 2009, the Letter of Credit’s statutory expiration date occurred on or about January 12, 2014.

According to the Petitioners’ brief, L.A. Pipeline did not pay certain employees’ fringe benefits for the month of April 2011 and has not employed operating engineers in West Virginia since April 2011. [Pet. Br. at 2.] In September 2011, more than two years before the Letter of Credit’s statutory expiration date, the Petitioners notified the WVDOL that L.A. Pipeline had not paid certain fringe benefits for the month of April 2011. [See *id.*] Apparently, the WVDOL “advised the Petitioners to obtain a court judgment in order to obtain payment by means of the Letter of Credit/Wage Bond held by the [WVDOL].” [Pet. Br. at 3.]

Based on the WVDOL’s apparent directions, the Petitioners filed a complaint in the district court on January 10, 2013 – more one year before the Letter of Credit’s statutory expiration date – seeking payment for fringe benefits for the month of April 2011. [Pet. Br. at 3.] More than one year later, in April 2014, after the statutory expiration of the Letter of Credit, the Petitioners and L.A. Pipeline reached an agreement that resulted in the district court’s entry of an Agreed Judgment Order on April 8, 2014. [See *id.*] On March 12, 2015, almost one full year after the district court entered the Agreed Judgment Order and more than one year after the Letter of Credit’s statutory expi-

² “Many credits renew automatically under evergreen clauses that provide that the credit shall extend from year to year until the issuer gives notice. Most evergreen clauses stipulate that the notice shall be given sufficiently in advance of the credit year’s end for the beneficiary to obtain a new credit from the applicant or to draw on the credit.” John F. Dolan, Law of Letters of Credit ¶ 5.03[3][E] (Mar. 2013); *see also infra* § II.A.

Notably, the WVDOL’s current standard form contains what can be described as an evergreen clause. *See* www.wvlabor.com/newwebsite/Documents/wageforms/Final%20LC%20WB-102114.pdf (stating “That Bank or Credit Union will automatically renew the Perpetual Irrevocable Letter of Credit until the Perpetual Irrevocable Letter of Credit is released by the express written authorization of the Commissioner of the West Virginia Division of Labor.”).

ration date, the Petitioners filed a writ of suggestion in the district court seeking to draw upon the Letter of Credit. [*See id.*] On April 2, 2015, the WVDOL responded that:

1. L.A. Pipeline had posted a *Perpetual* Irrevocable Letter of Credit/Wage Bond issued on January 13, 2009 in the amount of \$500,000.00 by United Bank.
2. That the sum of \$117,500.00 to the West Virginia Laborers' Pension Fund, et al., was paid out from the Letter of Credit/Wage Bond pursuant to a prior order of the USDC, leaving the wage bond with a balance of \$382,500.00.
3. That pursuant to W. Va. Code § 21-5-14(g), the Perpetual Irrevocable Letter of Credit/Wage Bond has not been approved for termination by the Commissioner of the Division of Labor and therefore remains in effect.
4. "To the extent that W. Va. Code § 46-5-106 (1963) conflicts with W. Va. Code § 21-5-14 (1989), the provisions of the latter are controlling with regard to the termination of an irrevocable letter of credit serving as a wage bond. In other words, an irrevocable letter of credit serving as a wage bond pursuant to W. Va. Code § 21-5-14 (1989) can only be terminated with the approval of the Commissioner of the Division of Labor." Syl. Pt. 6, *Leary v. McDowell County National Bank*, 210 W. Va. 44, 552 S.E.2d 420 (2001).
5. Accordingly, the Division has determined that the Plaintiffs' suggested amount of \$129,273.90 against the Defendant's Wage Bond is eligible for release upon further order from the Court, as long as the suggested amount is for "unpaid wages; unpaid fringe benefits; or damages or expenses incurred or arising out of actual injury." W. Va. Code § 21-5-14a.

[App. at 26-27 (emphasis added).]

A few days later, on April 7, 2015, L.A. Pipeline moved to quash the suggestion arguing that the Letter of Credit "has expired and is legally unenforceable." [App. at 32.] L.A. Pipeline asserted that because the Letter of Credit was denominated as "perpetual," it expired five years after its issuance due to W. Va. Code § 46-5-106(d) (1996), which provides that "[a] letter of credit that states that it is perpetual expires five years after its stated date of issuance." [*Id.*] L.A. Pipeline also criticized the WVDOL for confusing "termination and expiration." [*Id.*] According to L.A. Pipeline, "[a]pproval from the Division . . . is only required if the bank or its customer attempts to termi-

nate the letter of credit during its five (5) year term. A letter of credit may expire at the end of its term regardless of whether it was ever terminated.” [*Id.* at 2.] Lastly, L.A. Pipeline argued that reliance on *Leary* “is misplaced” because it dealt with the 1963 version of W. Va. Code § 46-5-106, which has been replaced by a fundamentally different statute. [*Id.* at 32-34.]

On May 6, 2015, the Petitioners responded to L.A. Pipeline’s motion to quash. [App. at 39.] Although the Petitioners acknowledged that *Leary* dealt with a superseded version of the UCC, they argued that the Supreme Court’s “cited reasons . . . would equally apply to the 1996 revised [UCC] section.” [*Id.* at 40.] “Otherwise, [according to the Petitioners,] the result would be contrary to the Wage Payment and Collection Act which was designed to protect working people and assist them in the collection of unpaid wages and benefits.” [*Id.*] Thereafter, L.A. Pipeline filed a reply memorandum in support of its motion to quash on May 14, 2015. [App. at 43.]

United Bank then filed its motion to intervene in the district court litigation, along with its supporting memorandum of law and its reply to the Petitioners’ suggestion and the WVDOL’s answer to the suggestion. [App. at 63-90.] On September 17, 2015, the district court granted United Bank’s motion to intervene and accepted its reply to the Petitioners’ suggestion. [App. at 91.] On the same day, the district court issued its certification order to this Court. [App. at 1-7.] Thereafter, this Court issued its Scheduling Order on September 23, 2015.

SUMMARY OF ARGUMENT

This Court should respond to the district court’s certified question by finding that a letter of credit that states that it is perpetual expires five years after its date of issuance as a matter of law under W. Va. Code § 46-5-106(d) and that nothing within the WVVPCA compels a different answer to the certified question. In reaching this conclusion, this Court should find that *Leary v. McDowell County National Bank* is inapplicable to the Letter of Credit before this Court and that the policy grounds relied upon by the *Leary* Court are equally inapplicable. Indeed, this Court should

find that applying W. Va. Code § 46-5-106(d) as it is written will do nothing to hamper the WVDOL's ability to enforce the salutary purposes of the WVVPCA.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rules 17(b)(3), 18(a), and 20 of the Rules of Appellate Procedure, United Bank, Inc. respectfully requests oral argument.

ARGUMENT

This Court should first find that a letter of credit that states it is perpetual expires five years after its date of issuance as a matter of law under W. Va. Code § 46-5-106(d) and that nothing within the WVVPCA requires a different result. In addition, this Court should reject the arguments made by the Petitioners and the WVDOL in the district court and in this Court based upon their inapplicability. Lastly, this Court should find that the legal authorities cited by the WVDOL in this action do not support its position and, actually, support United Bank.

I. This Court should answer the district court's certified question by finding that a letter of credit that is stated to be "perpetual" expires five years after its issuance, even if it is issued in satisfaction of the WVVPCA's "wage bond" requirements.

As explained below, W. Va. Code § 46-5-106(d) (1996) expressly provides that a letter of credit with a stated perpetual duration expires five years after its issuance. Moreover, although the UCC (as adopted by the West Virginia Legislature) expressly allows parties to opt out of many of its requirements, the UCC expressly precludes opting out of the five-year expiration rule for "perpetual" letters of credit. Nothing within the WVVPCA explicitly or implicitly modifies these fundamental principles of the UCC. Lastly, the UCC's five-year expiration rule for perpetual letters of credit is a fundamentally important rule to the business of banking because it protects banks from unsafe and unsound banking practices, such as issuing letters of credit of unlimited duration.

A. Under the UCC, a "perpetual" letter of credit expires five years after issuance.

Although the Letter of Credit does not contain an express expiration date, its title states that it is a "*Perpetual* Irrevocable Letter of Credit/Wage Bond." [See App. at 79 (emphasis

added).] Moreover, the Letter of Credit’s text repeatedly refers to it as a “perpetual irrevocable letter of credit.” [See *id.*] The Letter of Credit’s repeated use of the term “perpetual” has important consequences as a matter of law regarding its expiration.

As a matter of public policy, the West Virginia Legislature recognized that “all letters of credit should specify the date on which the issuer’s engagement expires.” See Cmt. 4, W. Va. Code § 46-5-106 (1996). The absence of an expiration date, however, is not fatal because the UCC prescribes default expiration dates. “If there is no stated expiration date or other provision that determines its duration, a letter of credit expires one year after its stated date of issuance” W. Va. Code § 46-5-106(c) (1996). More importantly, the statute specifically provides that where a letter of credit “states that it is *perpetual*[,] it] expires five years after its stated date of issuance” W. Va. Code § 46-5-106(d) (1996) (emphasis added). In the commercial banking world, the use of the term “perpetual” is a deliberate drafting choice intended to incorporate the UCC’s five-year expiration rule. See James E. Byrne, 6B Hawkland UCC Series § 5-106:24 [Rev] (noting that “the provision that an undertaking is perpetual is a deliberate drafting choice seeking a longer period and was deemed to require a period of longer than one year, namely five years from the date of issuance stated or the actual date of issuance if none is stated”). Moreover, the five-year expiration rule for “perpetual” letters of credit is one of a tiny number of UCC rules that cannot be abrogated by private agreement. See W. Va. Code § 46-5-103(c) (1996) (“With the exception of this subsection, subsections (a) and (d), sections 5-102(a)(9) and (10), 5-106(d), and 5-114(d), and except to the extent prohibited in sections 1-302 and 5-117(d), the effect of this article may be varied by agreement”); see also James E. Byrne, 6B Hawkland UCC Series § 5-106:24 [Rev] (stating that the five-year expiration rule for “perpetual” letters of credit “is one of the few provisions under the U.C.C. § 5-102(c) [Rev] (Scope) that cannot be varied.”).

In sum, the Letter of Credit's repeated use of the term "perpetual" is a fact of vital legal significance that cannot be ignored, especially given the sophistication of the WVDOL. *See* John F. Dolan, *Law of Letters of Credit* ¶ 5.03[3][E] (Mar. 2013). ("courts must understand that the strict expiry rule is not a trap for unwary beneficiaries. Any well-advised beneficiary must know that early presentment of documents is the best way to guard against expiry problems.").

B. Nothing within the West Virginia Wage Payment and Collection Act can be reasonably construed to trump the Uniform Commercial Code.

The Petitioners and the WVDOL have argued that the WVVWPCA trumps the UCC's expiration date provisions. In essence, they have argued that the wage bond statute creates a special type of letter of credit that is incapable of expiration. In fact, the WVVWPCA neither legislates the standards with respect to letters of credit nor abrogates the five-year expiration rule.

At its core, the WVVWPCA merely requires certain employers to post "wage bonds"; it does not regulate the form or substance of letters of credit. *See* W. Va. Code § 21-5-14(a) ("[w]ith the exception of those who have been doing business in this state actively and actually engaged in construction work . . . for at least five consecutive years . . . every employer . . . engaged in or about to engage in construction work . . . shall . . . furnish a bond on a form prescribed by the commissioner payable to the state of West Virginia . . ."). The only express references to letters of credit are in the statute's provision prescribing how the wage bond requirement may be satisfied: "[t]he bond may include, with the approval of the commissioner, surety bonding, collateral bonding (including cash and securities), letters of credit, establishment of an escrow account or a combination of these methods." W. Va. Code § 21-5-14(c). Thus, the WVVWPCA only states that letters of credit are one of a variety of devices that employers and the WVDOL may use to satisfy the statute's requirements. Fundamentally, this Court should find that much more specificity should be required before holding that a labor and employment statute displaces a uniform statute specifically applicable to letters of credit that was enacted to bring national uniformity to the law of letters of credit.

In short, this Court should find that the WVWPCA is not a letter of credit statute and that it neither regulates letters of credit nor abrogates the UCC's five-year expiration rule.

C. The conclusion that the Letter of Credit expired five years after its issuance is further supported by fundamental banking principles that require the maintenance of “safe and sound” banking practices.

The Petitioners and the WVDOL essentially argue that letters of credit posted in satisfaction of the WVWPCA have no absolute expiration dates and only expire when the WVDOL says so. As noted above, this argument is utterly inconsistent with W. Va. Code § 46-5-106(d) (1996). Moreover, this Court should further find that the UCC's expiration provisions exist to ensure safe and sound banking practices, which protect banks and the public, and that the assertion of the Petitioners and the WVDOL is contrary to public policy. *See, e.g.*, James E. Byrne, 6B Hawklund UCC Series § 5-106:19 [Rev] (“The letter of credit is a specialized undertaking that embodies considerable risks to the issuer. Apart from general commercial law interests in the limitation of rights, there is an added safety and soundness concern with respect to the expiration of a letter of credit.”); James E. Byrne, 6B Hawklund UCC Series § 5-106:23 [Rev] (“For public policy and safety and soundness reasons, there are serious concerns about unlimited obligations.”). As noted by Professor Dolan, the “firm expiry” rule serves various important bank needs:

The nature of credits is such that issuers must know when their obligations expire. Often issuers take security from their customers, and they need to know exactly when they can release the security. . . . The Comptroller of the Currency's regulation on letters of credit specifically requires that letters of credit include, as a matter of sound banking practice, an expiration date, or that they be effective only for a definite term. . . . Banking regulations that require banks to aggregate standby letters of credit in applying statutory lending limits and in publishing their financial statements would become problematic if courts permitted beneficiaries to draw on a credit after it expired. Banks would not know when to delete a standby from a customer's list of loans. In short, there are a number of reasons for enforcing the expiry strictly.

John F. Dolan, Law of Letters of Credit ¶ 5.03[3][E] (Mar. 2013).. Based upon the importance of firm expiration dates to safe and sound banking practices, the West Virginia Legislature clearly did

not intend for the WVWPCA to abrogate W. Va. Code § 46-5-106(d) (1996)'s five-year expiration rule.

In sum, the Court should find that the assertions of the Petitioners and the WVDOL are foreclosed by the five-year expiration rule and safe and sound banking practices.

II. This Court should find that the Petitioners' and WVDOL's efforts to avoid the Letter of Credit's expiration lack merit as a matter of law and are in inescapable conflict with West Virginia statutory and case law and the Letter of Credit itself.

A. The "holding" of *Leary v. McDowell County National Bank* is inapplicable to letters of credit subject to W. Va. Code § 46-5-106 (1996).

Both the WVDOL and the Petitioners assert that this Court's decision in *Leary v. McDowell County National Bank*, 210 W. Va. 44, 552 S.E.2d 420 (2001) requires a finding that the Letter of Credit does not have an expiration date. The WVDOL's answer to the suggestion in the district court litigation quoted the following syllabus point from *Leary*:

"To the extent that W. Va. Code § 46-5-106 (1963) conflicts with W. Va. Code § 21-5-14 (1989), the provisions of the latter are controlling with regard to the termination of an irrevocable letter of credit serving as a wage bond. In other words, an irrevocable letter of credit serving as a wage bond pursuant to W. Va. Code § 21-5-14 (1989) can only be terminated with the approval of the Commissioner of the Division of Labor." Syl. Pt. 6, *Leary v. McDowell County National Bank*, 210 W. Va. 44, 552 S.E.2d 420 (2001).

[App. at 27 (emphasis added).] Syllabus Point 6, however, does not apply here because it was expressly limited to the 1963 version of UCC § 5-106.

Indeed, the *Leary* Court deliberately refused to apply the 1996 version of UCC § 5-106 to the letter of credit at issue there because it had been issued in 1990. *See* 210 W. Va. at 51, 552 S.E.2d at 427 (citing W. Va. Code § 46-5-119 (1996) for the proposition that the revised article 5 "does not apply to a transaction, event, obligation, or duty arising out of or associated with a letter of credit that was issued before the first day of July, one thousand nine hundred ninety-six.")). According to the *Leary* Court, the 1996 statute only applies to letters of credit issued on or after its ef-

fective date. *See id.* 552 S.E.2d at 427.³ In addition, the *Leary* Court made clear that its decision did not consider W. Va. Code § 46-5-106 (1996): “We note that our decision today is limited in that it was not necessary for us to address W. Va. Code § 46-5-106 (1996).” *Id.* at 51 n. 9, 552 S.E.2d at 427 n. 9. This Court’s refusal to consider the applicability of W. Va. Code § 46-5-106 (1996) is important because the 1996 statute’s expiration rules, and the public policies supporting them, were not features of the 1963 version of the UCC construed in *Leary*. Nevertheless, the Petitioners have argued that the *Leary* Court’s “cited reasons . . . would equally apply to the 1996 revised [UCC] section.” [App. at 40.] The Petitioners, however, are wrong because the two grounds relied upon by the *Leary* Court in support of its construction of W. Va. Code § 46-5-106 (1963) do not apply to the 1996 version of the statute.

The *Leary* Court’s first ground stemmed from the limited scope of the 1963 version of the UCC. As noted in *Leary*, W. Va. Code § 46-5-102(3) (1963) stated that the UCC dealt “with some but not all of the rules and concepts of letters of credit as . . . have developed prior to the effective date of this chapter [July 1, 1964] The fact that this article states a rule does not by itself require, imply, or negate application of the same or a converse rule” 210 W. Va. at 51, 552 S.E.2d at 427. On this basis, the *Leary* Court implicitly recognized that parties to letters of credit subject to the 1963 version of the UCC were free to displace otherwise applicable provisions of the UCC. But the same is not true with respect to the 1996 version of the UCC. Crucially, in stark contrast to the 1963 version of the UCC, the 1996 version expressly provides that the five-year expiration rule for perpetual letters of credit cannot be avoided by agreement. *See* W. Va. Code § 46-5-

³ Here, the Letter of Credit was issued on January 13, 2009, which was more than 10 years after the 1996 version of the UCC became operative in West Virginia.

103(c) (1996) (indicating that the applicability of the five-year expiration rule regarding “perpetual” letters of credit (i.e., § 5-106(d)) cannot “be varied by agreement.”)⁴

In addition, the inapplicability of *Leary* is further demonstrated by the significant differences between the 1963 version of W. Va. Code § 46-5-106 and the current version. The 1963 version stated that “[u]nless otherwise agreed once an irrevocable credit is established as regards the customer it can be modified or revoked only with the consent of the customer and once it is established as regards the beneficiary it can be modified or revoked only with his consent.” [App. at 4 n. 3 (quoting W. Va. Code § 46-5-106(2)).] In contrast, the current version of the statute goes much further by addressing revocability and the expiration of letters of credit.⁵

Likewise, the second ground for the *Leary* Court’s decision is also inapplicable as applied to W. Va. Code § 46-5-106(d) (1996). *See* 210 W. Va. at 51, 552 S.E.2d at 427 (“Secondly, such a result would be contrary to the Wage Payment and Collection Act which was designed to protect working people and assist them in the collection of unpaid wages and benefits.”). Importantly, giving effect to the five-year expiration rule set forth in W. Va. Code § 46-5-106(d) does not require the sacrifice of the protections provided by the WVVPCA. Indeed, the Letter of Credit at issue in this case required United Bank to provide the WVDOL with notice “no earlier than one hundred and twenty (120) days and no later than ninety (90) days prior to the five (5) year anniversary of the issuing date so that the Commissioner can determine if the wage bond may be terminated pursuant to West Virginia Code § 21-5-14(g).” [App. at 79.] If the WVDOL had acted diligently, there is no

⁴ The WVDOL’s brief relies, in part, upon a provision of the 1996 UCC that is generally comparable to W. Va. Code § 46-5-102(3) (1963). [*See* WVDOL Br. at 8.] In doing so, however, the WVDOL ignores the inconvenient existence of W. Va. Code § 46-5-103(c) (1996), which expressly limits its ability to avoid the consequences of the five-year expiration rule. Indeed, W. Va. Code § 46-5-103(c) is dispositive of the WVDOL’s argument.

⁵ Importantly, the version of W. Va. Code § 46-5-106 enacted by West Virginia in 1963 created significant uncertainty in the law of letters of credit with respect to revocability. *See* John F. Dolan, Law of Letters of Credit ¶ 5.03[1] (Mar. 2013) (“The 1962 Code left the question [of revocability] to the courts; and the courts, preferring a binding promise to an illusory one, usually held the credit to be irrevocable. The 1995 Code follows that line of authority and renders a credit irrevocable unless it is designated as revocable.”). W. Va. Code § 46-5-106, in its current form, reflects a fundamentally different approach. *See id.*

reason to believe that it could not have conducted an investigation before the expiration of the Letter of Credit and either required L.A. Pipeline to post new security as a wage bond or drawn upon the Letter of Credit before it expired. Indeed, according to the Petitioners, the WVDOL had notice of L.A. Pipeline's failure to pay fringe benefits for the month of April 2011 in September of 2011.

Indeed, the difficulty encountered in this case could have been avoided by adding to the Letter of Credit's provision requiring United Bank to provide notice of the Letter of Credit's expiration at least 90 days prior to its expiration. As noted by Professors White, Summers, and Hillman, timing difficulties such as those posed by the WVVPCA are not uncommon and there are ways of addressing them:

Expiration deadlines present a special problem when standby letters of credit are used to back up obligations of long-term or indefinite duration. Issuers do not like to have a standby letter outstanding more than three years. . . . A beneficiary might see to it that the underlying bargain compels the applicant to get the standby letter renewed and to do so at least 60 days before the letter's expiration. Since the failure to extend the letter of credit will not itself be a default on the underlying obligation, it is necessary to make the letter payable on the presentation of documents that either (a) show default or other necessary condition, or (b) *show that the date 60 days prior to expiration has passed without renewal*. Typically, such a letter of credit would have an 'evergreen' clause, sometimes called an 'extend or pay' clause.

James J. White, Robert S. Summers, & Robert A. Hillman, 3 White, Summers, & Hillman, Uniform Commercial Code § 26:17 (6th ed. updated Nov. 2014). Thus, the WVDOL could have required L.A. Pipeline to renew the Letter of Credit 90 days before its expiration or suffer a draw upon the Letter of Credit before its expiration.

Similarly, as noted above, timing problems are commonly dealt with by using evergreen clauses. "Many credits renew automatically under evergreen clauses that provide that the credit shall extend from year to year until the issuer gives notice. Most evergreen clauses stipulate that the notice shall be given sufficiently in advance of the credit year's end for the beneficiary to obtain

a new credit from the applicant or to draw on the credit.” John F. Dolan, Law of Letters of Credit ¶ 5.03[3][E] (Mar. 2013).⁶ Notably, the WVDOL’s current standard form letter of credit contains what can be characterized as an evergreen clause.⁷

In sum, the Court should find that the WVDOL’s ability to perform its duty does not require abrogation of W. Va. Code § 46-5-106(d) (1996)’s firm expiration rule with respect to “perpetual” letters of credit.

B. This Court should find that the Letter of Credit expired as a matter of law five years after its issuance in accordance with its express terms.

The Petitioners seek to avoid the Letter of Credit’s statutory expiration date by arguing that the Letter of Credit expressly provides that it could be drawn upon “at any time” and that United Bank somehow agreed that the Letter of Credit could not expire until the Commissioner of the WVDOL gave his approval. [Pet. Br. at 8-9.] Neither argument has merit. Moreover, the Letter of Credit’s express terms are inconsistent with the notion that it is an obligation without expiration.

The Letter of Credit states that, “[a]s a wage bond, it may be drawn against by the Division of Labor at any time for wages and/or fringe benefits which came due *during the effective dates thereof, unless earlier released in writing by the Commissioner pursuant to West Virginia Code § 21-5-14.*” [App. at 79 (emphasis added).] Plainly, the Letter of Credit’s use of the phrase “during the effective dates” is an indication that it was to be governed by a definite term. In addition, it is a bedrock principle of letter of credit law that a letter of credit is “terminated upon its expiration if no qualifying documents have been presented before that date. . . . Should the expiry date pass without a complying presentation, the issuer’s duty to pay terminates. No later documents,

⁶ Notably, one of the cases relied upon by the WVDOL in its brief involved an evergreen clause with a twist in that it “contained an evergreen clause renewing the credit automatically after each year and giving the *beneficiary* the power to cancel the credit but not giving the issuer that power, as evergreen clauses traditionally do and should do.” John F. Dolan, Law of Letters of Credit ¶ 5.03[3][E] (Mar. 2013) (referring to *Golden West Refining Co. v. SunTrust Bank*).

⁷ See www.wvlabor.com/newwebsite/Documents/wageforms/Final%20LC%20WB-102114.pdf (stating “That Bank or Credit Union will automatically renew the Perpetual Irrevocable Letter of Credit until the Perpetual Irrevocable Letter of Credit is released by the express written authorization of the Commissioner of the West Virginia Division of Labor.”).

not even documents drawn to perfection, will revive the duty.” 3 White, Summers, & Hillman, Uniform Commercial Code § 26:17.

Moreover, the following language is compelling evidence that the Letter of Credit, as a “perpetual” letter of credit, expired five years after its issuance:

The issuing bank further agrees to notify the Commissioner in writing by certified mail no earlier than one hundred and twenty (120) days and no later than ninety (90) days prior to the five (5) year anniversary of the issuing date so that the Commissioner can determine if the wage bond may be terminated pursuant to West Virginia Code § 21-5-14(g).

[*Id.*] In particular, the Court should find that this language indicates that the parties to the Letter of Credit knew it would expire five years after its issuance. In addition, this language was almost certainly intended to provide the WVDOL with a reasonable period of time to determine whether L.A. Pipeline should be required to post a new wage bond before the expiration of the Letter of Credit. *See supra* § II.A. Notably, United Bank did in fact provide the notice required by the Letter of Credit to the WVDOL. [WVDOL Br. at 3.]

Finally, the Petitioners’ argument invoking W. Va. Code § 21-5-14(g) confuses cancellation of a letter of credit before its expiration and expiration. It is a commonly accepted principle that an irrevocable letter of credit may be cancelled before its expiration date, if the parties to it consent to its cancellation. *See* John F. Dolan, *Law of Letters of Credit* ¶ 5.03[1] (Mar. 2013) (“Irrevocable credits may be revoked by the agreement of all parties.”). Although it might be reasonable to argue that W. Va. Code § 21-5-14(g), and language within the Letter of Credit referring to it, govern cancellation before expiration, it cannot be reasonably construed to abrogate the statutory expiration date mandated for “perpetual” letters of credit under W. Va. Code § 46-5-106(d) (1996).

III. This Court should find that the arguments and legal authorities cited by the WVDOL are misplaced, do not support its position, and, actually, undermine its position.

The WVDOL’s brief generally relies upon four propositions. First, that the WWPCCA’s wage bond “termination” provisions “are essential to fulfilling the statute’s . . . legisla-

tive purpose of protecting the wages of working people.” [WVDOL Br. at 5.] Second, that the *Leary* Court’s reasoning with respect to the 1963 version of the UCC “remains valid.” [See *id.* at 7.] Third, that the Letter of Credit’s reference to W. Va. Code § 21-5-14(g) somehow abrogates W. Va. Code § 46-5-106(d) and that the Letter of Credit is not really “perpetual.” [See *id.* at 9-12.] Fourth, that the WVVPCA is a more specific statute governing letters of credit and trumps the UCC. [See *id.* at 12.] None of these propositions have merit.

With respect to the WVDOL’s first proposition, which is tantamount to the notion that the UCC’s five-year expiration rule for “perpetual” letters of credit hampers the WVDOL’s ability to perform its mission, it should be rejected on the same grounds discussed above. *See supra* § II.A. As noted above, there is no need to sacrifice W. Va. Code § 46-5-106(d) to effectuate the salutary purposes of the WVVPCA. Indeed, both statutes can be effectuated through a myriad of means, including timely enforcement by the WVDOL before a letter of credit expires and the use of “evergreen” clauses to avoid expiration issues.

In addition, the notion that the Commissioner of the WVDOL must approve the “termination” of a “wage bond” does not support the WVDOL’s proposition. [WVDOL Br. at 6.] Indeed, this fact is generally consistent with letter of credit law, which recognizes that an irrevocable letter of credit can be cancelled with the consent of its issuer and beneficiary. *See* John F. Dolan, *Law of Letters of Credit* ¶ 5.03[1] (Mar. 2013) (“Irrevocable credits may be revoked by the agreement of all parties.”). This argument also improperly conflates two separate and distinct concepts: cancellation of a letter of credit before its expiration, on one hand, and expiration, on the other. Although it might be reasonable to construe W. Va. Code § 21-5-14(g) as governing the cancellation of a letter of credit before its expiration, it cannot be reasonably construed to preempt the UCC’s expiration rules in general or the five-year expiration rule for perpetual letters of credit in particular.

Lastly, the WVDOL's argument ignores the distinction between terminating the obligation of an employer to maintain a wage bond in general and the cancellation or expiration of a particular document posted as a wage bond. In fact, as applied to the facts of this case, the WVDOL could have required L.A. Pipeline to post a new wage bond or ordered a limited draw upon the Letter of Credit before its expiration at the end of the five-year period provided by W. Va. Code § 46-5-106(d). That is, a continuing obligation to maintain a wage bond does not mean that a particular document posted as a wage bond cannot be replaced with another document.

As to the WVDOL's second proposition, as noted above, *Leary* is not binding with respect to the Letter of Credit before this Court. The Letter of Credit before this Court was issued on January 13, 2009 – more than 10 years following the revision of the UCC in 1996. Moreover, the *Leary* Court's syllabus clearly indicated that its holding was limited to the 1963 version of the UCC, and, to remove any doubt, the Court noted in a footnote that it was not construing W. Va. Code § 46-5-106 (1996). *See* 210 W. Va. at 51 n. 9, 552 S.E.2d at 427 n. 9 (“We note that our decision today is limited in that it was not necessary for us to address W. Va. Code § 46-5-106 (1996).”). In addition, as discussed above, the grounds relied upon by the *Leary* Court are not applicable to the Letter of Credit before this Court or to the 1996 version of the UCC.

Shifting to the WVDOL's third proposition, nothing within the Letter of Credit supports the WVDOL's assertion that the Letter of Credit did not expire five years after its expiration. The fact that the Letter of Credit required United Bank to provide notice to the WVDOL at least 90 days prior to the Letter of Credit's expiration does not support the assertion that it did not expire in accordance with the provisions of W. Va. Code § 46-5-106(d). [WVDOL Br. at 10.] In fact, as noted above, if the WVDOL had acted diligently, the notice provision would have allowed it to facilitate its statutory mission without disregarding the requirements of the UCC.

With respect to the WVDOL's argument that the Letter of Credit is not a perpetual letter of credit, the cases it relies upon are readily distinguishable and support United Bank's position. [WVDOL Br. at 10-11.] In *Golden West Refining Company v. SunTrust Bank*, 538 F.3d 1233 (9th Cir. 2008), the court held that the letter of credit at issue in that case was not a perpetual letter of credit because it did not state that it was perpetual and, instead, contained an automatic renewal provision. *See* 538 F.3d at 1237 ("We agree with the district court and hold that the plain language of UCC § 5-106(d) requires that a letter of credit state that it is perpetual to qualify as a perpetual letter of credit."). The core holding in *Michigan Commerce Bank v. TDY Industries, Inc.* is identical to that of the Ninth Circuit in *Golden West Refining Company*. Critically, the Letter of Credit in this case repeatedly states that it is "perpetual." Moreover, *Golden West Refining Company* and *TDY Industries, Inc.* illustrate the ease with which the WVDOL can accomplish its statutory mission by using common letter of credit provisions (i.e., evergreen clauses) without sacrificing the UCC.

Finally, the WVDOL's assertion that the WVVPCA takes precedence over the UCC lacks merit as a matter of law. As noted above, the WVVPCA is not a letter of credit statute. *See supra* § I.B. At most, the WVVPCA contains a couple of fleeting references to letters of credit. This Court should require much more before holding that a labor and employment statute trumps a statute specific to letters of credit that has been enacted to bring national uniformity to the law of letters of credit. Moreover, as noted above, there a myriad of ways in which the WVDOL may perform its duty without abrogating fundamental requirements of the UCC. *See supra* § II.A.

CONCLUSION

As explained above, this Court should first find that where a letter of credit states that it is perpetual, it expires five years after its date of issuance as a matter of law under W. Va. Code § 46-5-106(d) and that nothing within the WVVPCA compels a different result.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 132 HEALTH AND WELFARE FUND, ET AL.,

Plaintiffs Below
Petitioners,

v.

L.A. PIPELINE CONSTRUCTION COMPANY, INC., Defendant Below; and UNITED BANK, INC., Intervenor Below,

Respondents.

Case No. 15-0898

CERTIFICATE OF SERVICE

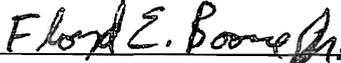
I, Floyd E. Boone Jr., counsel for United Bank, Inc., do hereby certify that service of the foregoing **Brief of Respondent United Bank, Inc.** was made upon all parties, or their counsel of record, by United States mail, postage pre-paid to the following on this 23d day of December, 2015:

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