

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
[BUSINESS COURT DIVISION]

VIKING VIDEO & MUSIC INC.,
a West Virginia Corporation,

Plaintiff,

v.

[Kanawha County Circuit Court
Civil Action No. 12-C-2134]

SUMMIT COMMUNITY BANK, INC.

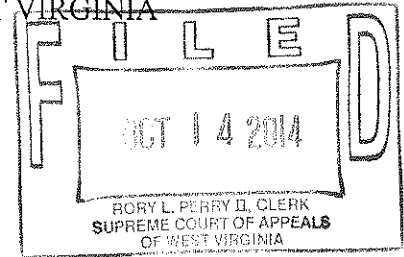
Defendant.

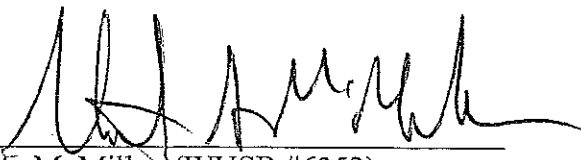
**Summit Community Bank, Inc.'s Motion to Refer to the
Business Court Division**

Defendant, Summit Community Bank, Inc. ("Summit"), by counsel, respectfully submits Summit Community Bank, Inc.'s Motion to Refer to Business Court Division ("Summit's Motion"). This civil action centers around significant transactions concerning bids for video lottery permits and commercial lending between two (2) West Virginia corporations: Plaintiff, Viking Video & Music, Inc., and Summit. As set forth in the accompanying Memorandum of Law in Support, the Business Court Division possesses jurisdiction under West Virginia Trial Court Rule 29.04(a)(1)-(3). Therefore, Summit respectfully requests that this Court refer this matter to the Business Court Division.

SUMMIT COMMUNITY BANK, INC.,

By Counsel,





Stuart A. McMillan (WVSB #6352)

Patrick C. Timony (WVSB #11717)

BOWLES RICE LLP

600 Quarrier Street

Post Office Box 1386

Charleston, West Virginia 25325-1386

(304) 347-1100

(304) 343-3058 – facsimile

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VIKING VIDEO & MUSIC INC.,
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[Kanawha County Circuit Court
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SUMMIT COMMUNITY BANK, INC.

Defendant.

**Memorandum of Law in Support of Summit Community Bank,
Inc.'s Motion to Refer to the Business Court Division**

Defendant, Summit Community Bank, Inc. ("Summit"), by counsel, respectfully submits this Memorandum of Law in Support of Summit Community Bank, Inc.'s Motion to Refer to Business Court Division ("Summit's Motion"). This civil action involves a business dispute between two West Virginia corporations, Plaintiff, Viking Video & Music, Inc. ("Viking"), and Summit. Essentially, the parties dispute whether Summit owed Viking a duty, contractual or through common law, to ensure Viking's February 18, 2011, video lottery bids complied with the procedures under West Virginia Code § 29-22B-1101, *et al.* For the reasons set forth below, this issue represents a significant transaction between business entities, which requires specialized treatment. Therefore, this Court should grant Summit's Motion and refer this litigation to the Business Court Division.

Statement of Facts

On or around February 11, 2011, Viking approached Summit to obtain an irrevocable line of credit to support its bidding efforts during second round bidding for video

lottery permits. Previously, Viking submitted bids for one hundred ten (110) video lottery permits; however, Viking mistakenly failed to contemporaneously tender copies of its bids to the West Virginia Department of Administration and the State Auditor. Pursuant to West Virginia Code § 29-22B-1107, the West Virginia Lottery Commission ("Lottery Commission") rejected Viking's bids and awarded Viking no permits. This missed opportunity led Viking to press Summit to lend Viking additional credit for Viking to obtain its video lottery permits during second round bidding.¹

Based on its collateral, Summit agreed to lend Viking Seven Hundred Forty-Three Thousand Five Hundred Dollars (\$743,500.00) in working capital ("the Line of Credit"). With this Line of Credit, Viking wanted to submit two (2) bids as follows:

- 1.) 13 permits for \$106,080.00; and
- 2.) 70 permits for \$637,420.00.

While executing the loan documents, Viking's principal, Dennis O. Kerns ("Mr. Kerns"), asked Summit to prepare these two (2) bids. Mr. Kerns gave his bid information and bids forms to Tammy Ward, a former loan assistant for Summit, with instructions to type his bids.² While the first, and smaller bid, complied with the statutory procedures, the second bid failed, because the bid bond was insufficient to cover the bid. Specifically, the typed bid requested seventy (70) permits at a per terminal cost of Nine Thousand One Hundred Sixty Dollars (\$9,160.00) rather than Nine Thousand One Hundred Six Dollars (\$9,106.00). This miscalculation created a Three

¹ The legislature limited the available video lottery permits, and the Lottery Commission only made seven thousand five hundred (7,500) available during the three (3) rounds of bidding. Further, the Lottery Commission released five thousand (5,000) permits during the first round.

² The bid forms require the following information: (i) bidder's name; (ii) bidder's address; (iii) telephone number; (iv) LVL license; (v) number of permits requested; (vi) per terminal bid; (vii) total bid; and (viii) amount of bid bond. The

Thousand Seven Hundred Eighty Dollars (\$3,780.00) deficiency, and this deficiency led to the bid's disqualification on February 25, 2011.

In its Complaint filed on October 22, 2012, Viking blames Summit for this disqualification. Further, Viking asserts that Summit's alleged mistake caused Viking over Four Hundred Nine Thousand Ten Dollars (\$409,010.00+) in damages, as Viking needed to spend Fifteen Thousand Three Dollars (\$15,003.00) per permit to obtain the seventy (70) permits through match bidding. The parties have engaged in limited discovery and a scheduling order was entered on September 30, 2014, following denial of Summit's Rule 41(b) Motion to Dismiss. This litigation creates a conflict amendable to resolution from the Business Court Division.

Argument

A. The principal claims involve matter of significance to the transactions between Viking and Summit.

Rule 29.04(a)(1) of the West Virginia Trial Court Rules defines business litigation to include matters in which "the principal claim or claims involve matters of significance to the transactions, operations, or governance between business entities." W. VA. T. CT. R. 29.04(a)(1). While the West Virginia Trial Court Rules never define the word transaction, Black's Law Dictionary defines transaction to mean "[t]he act or an instance of conducting business or other dealings; esp. the formation, performance, or discharge of a contract. Something performed or carried out; a business agreement or exchange." BLACK'S LAW DICTIONARY, Transaction (9th ed. 2009). This matter involves two (2) similar, but separate, transactions between West Virginia corporations: (i) a commercial loan; and (ii) the video lottery bid. As a matter of law, the court decides whether the commercial lending transaction between Viking and Summit imposed a

duty, contractual or otherwise, for Summit to determine the procedural correctness of Viking's submissions to the Lottery Commission. Syl. pt. 1, *Hunt v. Shamblin*, 179 W. Va. 663, 371 S.E.2d 591 (1988); syl. pt. 5, *Aikens*, 208 W. Va. 486, 541 S.E.2d 576 (2000). Further, the transaction represents a matter of significance to both parties. For Viking, it must successfully obtain video lottery permits every ten (10) years to stay in business; for Summit, it frequently enters into commercial transactions and its ability to continue this practice depends on knowing its obligations to its commercial clients. Therefore, West Virginia Trial Court Rule § 29.04(a)(1) allows this Court to refer this litigation to the Business Court Division.

B. The dispute presents commercial and/or technology issues for which specialized treatment is likely to improve the expectation of a fair and reasonable resolution.

Rule 29.04(a)(2) of the West Virginia Trial Court Rules defines business litigation to include matters in which:

the dispute presents commercial and/or technology issues in which specialized treatment is likely to improve the expectation of a fair and reasonable resolution of the controversy because of the need for specialized knowledge or expertise in the subject matter of familiarity with some specific law or principals that may be applicable.

W. VA. TR. CT. R. 29.04(a)(2). Summit respectfully submits that specialized knowledge of commercial lending and video lottery gambling "is likely to improve the expectation of a fair and reasonable resolution of the controversy. . . ." First, expertise and familiarity in commercial lending will aid the court in determining the existence of a duty. Undoubtedly, no written provision in the commercial loan documents required Summit to confirm Viking complied with West Virginia's statutory bidding procedures; therefore, if a contractual duty exists, it arises from an inference in the terms. Because the Business Court Division more frequently

experiences and adjudicates commercial lending disputes, this litigation meets the criteria of Rule 29.04(a)(2).

Second, specialized knowledge of video lottery gaming is important. No dispute of fact exists that the Lottery Commission disqualified Viking's first bids for failure to contemporaneously deliver copies of the bids to the West Virginia Department of Administration and the State Auditor. This missed opportunity impacts Viking's damages. Before Viking submitted its second bids, the Lottery Commission possessed less than two thousand (2000) permits. Furthermore, the permits Viking previously obtained were set to expire June 30, 2011, and the four (4) month period between first and second round bids likely created uncertainty and impacted Viking's ability to re-negotiate contracts with existing lessors as well as obtain new business. Thus, the Business Court Divisions' specialized knowledge on video lottery gaming further meets the criteria of Rule 29.04(a)(2). For these reasons, Summit requests this Court grant Summit's Motion and refer this litigation to the Business Court Division.

C. The claims at issue are not expressly excluded under the West Virginia Trial Court Rules.

Finally, Rule 26.04(a)(3) specifically excludes certain cases from the jurisdiction of the Business Court:

the principal claim or claims do not involve: consumer litigation, such as products liability, personal injury, wrongful death, consumer class actions, actions arising under the West Virginia Consumer Credit Act and consumer insurance coverage disputes; non-commercial insurance disputes relating to bad faith, or disputes in which an individual may be covered under a commercial policy, but is involved in the dispute in an individual capacity; employee suits; consumer environmental actions; consumer malpractice actions; consumer and residential real estate, such as landlord-tenant disputes; domestic relations; criminal cases; eminent domain or condemnation; and administrative disputes with government organizations and regulatory agencies,

provided, however, that complex tax appeals are eligible to be referred to the business Court Division.

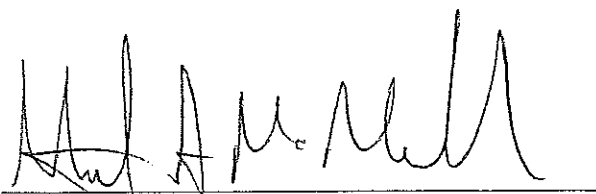
W. VA. TR. CT. R. 29.04(a)(3). As set forth in the above provision, the West Virginia Trial Court Rules never excluded Viking's breach of contract, special relationship, and assumption of duty claims against Summit from the Business Court Division's jurisdiction. For this reason, Summit respectfully requests this Court refer this matter to the Business Court Division.

Conclusion

For the reasons stated throughout this the Memorandum of Law and Summit's Motion and for any reasons that become apparent to this Court, Summit respectfully requests this Court grant Summit's Motion.

SUMMIT COMMUNITY BANK, INC.,

By Counsel,

A handwritten signature in black ink, appearing to read 'Stuart A. McMillan', is written over a horizontal line.

Stuart A. McMillan (WVSB #6352)
Patrick C. Timony (WVSB #11717)
BOWLES RICE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-1100
(304) 343-3058 – facsimile

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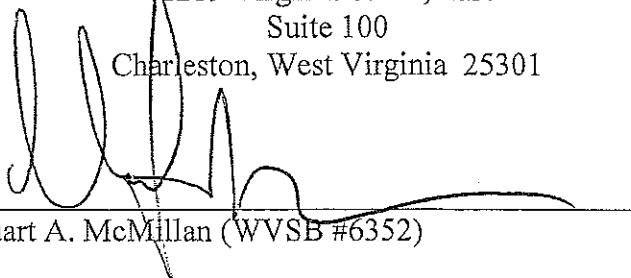
CERTIFICATE OF SERVICE

The undersigned, counsel for Summit Community Bank, Inc. does hereby certify that I have served a true and accurate copy of the foregoing *Summit Community Bank, Inc.'s Motion to Refer to the Business Court Division* and *Memorandum of Law in Support of Summit Community Bank, Inc.'s Motion to Refer to Business Court Division* on the 10th day of October, 2014, via first class United States mail, postage pre-paid to:

Berkley County Judicial Center
Business Court Division
Suite 2100
380 W. South Street
Martinsburg, West Virginia 25401
Attn: Carol A. Miller, Business Court
Executive Director

The Honorable James C. Stucky
Circuit Court of Kanawha County
Kanawha County Judicial Building
Post Office Box 2351
111 Court Street
Charleston, West Virginia 25301

Michael J. Del Giudice, Esquire
Ciccarello, Del Giudice & LaFon
1219 Virginia Street, East
Suite 100
Charleston, West Virginia 25301



Stuart A. McMillan (WVSB #6352)

VIKING VIDEO & MUSIC INC., vs. SUMMIT COMMUNITY BANK, INC.,

LINE	DATE	ACTION
1	10/22/12	# CASE INFO SHEET; COMPLAINT; ISSUED SUM & 2 CPYS; F FEE;
2		# RCPT 495150; \$155.00
3	11/07/12	# LET FR SS DTD 11/1/12; SUM W/RET (11/1/12 SS) AS TO SUMMIT
4		# COMM. BANK INC., TO SUMMIT COMM. BANK INC., DTD 11/5/12
5	11/13/12	# E-CERT FR SS AS TO SUMMIT COMM. BANK INC., DTD 11/5/12
6		# SIGNED BY LYNNETTE WILKINS
7	11/16/12	# ENTRY OF APPEARANCE W/COS
8	12/04/12	# ANS OF D W/COS
9	01/10/13	# COS AS TO D'S 1ST REQ FOR ADM'S, INTERROG'S & REQ FOR PROD
10	02/08/13	# COS AS TO RESP TO SUMMIT COMM. BANK'S 1ST REQ FOR ADM'S,
11		# INTERROG'S & REQ FOR PROD TO VIKING VIDEO & MUSIC INC.,
12	04/11/13	# COS AS TO P'S 1ST INTERROG'S & REQ FOR PROD TO D
13	05/16/13	# COS AS TO D'S ANS' & RESP'S TO P'S 1ST INTERROG'S & REQ FOR
14		# PROD OF DOCS
15	09/08/14	# D'S MOT TO DIS; MEMO OF LAW IN SUPP OF MOT W/EXH'S & COS
16	09/17/14	# P'S RESP IN OPPOS TO D'S MOT TO DIS W/COS
17	09/17/14	# NOT OF SCHED CONF W/COS (9/29/14 @ 11:00 AM)
18	09/18/14	# NOT OF HRG W/COS (9/29/14 @ 11:00 AM)
19	09/26/14	# REPLY IN SUPP OF SUMMIT COMMUNITY BANK'S MOT TO DIS W/EXH'S
20		# & W/COS
21	10/07/14	O DEL./M.DELGUIDICE, S.MCMILLIAN S/09/30/14 TBL

A TRUE COPY

TESTED
Circuit Court of Kanawha County, WVA
G. Hughes

IN THE CIRCUIT COURT OF KANAWHA COUNTY WEST VIRGINIA

VIKING VIDEO & MUSIC INC.,
A West Virginia Corporation,

PLAINTIFF,

VS.

SUMMIT COMMUNITY BANK, INC.,
a West Virginia corporation,

DEFENDANT.

2012 OCT 22 PM 3:26

CATHY S. SATON, CLERK
KANAWHA CO. CIRCUIT COURT

CIVIL ACTION NO. 12-C-2134

COMPLAINT

Now comes the Plaintiff, Viking Video & Music Inc., by counsel, who for its cause of action against the Defendant, Summit Community Bank, Inc., states as follows:

PARTIES

1. Plaintiff, Viking Video & Music Inc. ("Viking"), now is and at all times hereinmentioned was a West Virginia corporation doing business in Kanawha County, West Virginia.

2. The Defendant, Summit Community Bank, Inc. ("Summit"), now is and at all times hereinmentioned was a West Virginia corporation doing business in Kanawha County, West Virginia.

JURISDICTION AND VENUE

3. Jurisdiction and venue are proper in this Court in that all of the acts and omissions that occurred by Defendant were in Kanawha County, West Virginia and Defendant does business in Kanawha County, West Virginia.

STATEMENT OF FACTS

4. Viking is in the business of owning and leasing limited video lottery terminals.

5. On or about February 11, 2011, Viking anticipated submitting a bid to the West Virginia Lottery Commission ("Lottery Commission") in an attempt to obtain licenses for 70 limited video lottery terminals at a bid price of \$9,160.00 per terminal ("Bid").

6. In anticipation of making such Bid, Viking approached Summit to obtain financing for said bid.

7. The financing that was to be obtained was an Irrevocable Letter of Credit to be provided by Summit to the Lottery Commission in the full amount of the Bid submitted by Viking.

8. The Bid and accompanying Letter of Credit was to be for the sum of \$641,200.00 (70 terminals x \$9,160.00).

9. On and before February 11, 2011, Viking, by and through its owner, Dennis O. Kerns ("Kerns"), went to Summit at its Southridge location and advised its Senior Vice President, Jason D. Koontz ("Koontz") of his intentions.

10. After proper collateral had been placed by Mr. Kerns, Summit agreed to provide an Irrevocable Letter of Credit for Viking Video for the total amount of the Bid.

11. Mr. Koontz had his assistant, Tammy LNU ("Tammy"), prepare an Irrevocable Letter of Credit for the bank to submit on behalf of Viking's Bid.

12. In addition, Summit, by and through its employee, Tammy voluntarily assumed the duty of performing the mathematical calculation and placing it on the Bid.

13. In preparing the Irrevocable Letter of Credit and performing the mathematical calculation for the Bid for Viking, Tammy erroneously multiplied 70 terminals by \$9,106.00 rather than \$9,160.00. In so doing, the amount placed on the Bid was \$637,420.00 and inconsistent with the bid price per machine. In addition, the Irrevocable Letter of Credit to support the Bid contained the same error.

14. The bid of \$9,160.00 per terminal would have been sufficient for Viking to receive licenses from the Lottery Commission for all 70 terminals had the Bid and Irrevocable Letter of Credit been correct.

15. As a result of the error, the Lottery Commission did not award Viking a license for those 70 terminals.

16. At all times hereinmentioned, Tammy and Koontz were acting within the scope of their employment with Summit, and therefore Summit is liable for their wrongful acts and omissions under the Doctrine of Respondeat Superior.

17. As a result of said errors, Viking has incurred substantial monetary losses as set forth hereinbelow.

COUNT I

(Breach of Contract)

18. Plaintiff realleges, reasserts and incorporates by reference each and

every allegation set forth in Paragraph 1 through 17 of this Complaint as if fully set forth herein.

19. Summit and Viking entered into a contract whereby Summit would provide an Irrevocable Letter of Credit to the Lottery Commission for Viking to support its Bid and provide other related services in exchange for which Viking would compensate Summit through various fees and charges.

20. Implied within this contract was a duty by Summit to undertake its obligations in a reasonably prudent manner and without negligence.

21. Summit breached said duty by miscalculating the total amount of the Bid and Irrevocable Letter of Credit.

22. As a direct and proximate result of said breach of contract, Plaintiff has incurred damages as set forth hereinbelow.

COUNT II

(Special Relationship)

23. Plaintiff realleges, reasserts and incorporates by reference each and every allegation set forth in Paragraph 1 through 22 of this Complaint as if fully set forth herein.

24. There existed by and between Summit and Viking a "special relationship" that extended beyond their contract.

25. Summit had a duty to perform all tasks relating to or on behalf of Viking in a reasonably prudent manner.

26. Summit breached said duty by negligently creating documents which

contained erroneous information.

27. As a direct and proximate result of the Defendant's negligence, Plaintiff has incurred damages as set forth hereinbelow.

COUNT III

(Assumption of Duty)

28. Plaintiff realleges, reasserts and incorporates by reference each and every allegation set forth in Paragraph 1 through 27 of this Complaint as if fully set forth herein.

29. Defendant assumed the duty of calculating the amount of the Bid and Letter of Credit and preparing the documents associated therewith.

30. By assuming said duty, Defendant was required to perform said duty in a reasonably prudent manner.

31. Defendant breached said duty by negligently calculating the amount of the Bid and Letter of Credit and negligently preparing the Bid and Letter of Credit.

32. As a direct and proximate result of said breach of its duty, Defendant is liable to Plaintiff for damages as set forth hereinbelow.

DAMAGES

33. As a direct and proximate result of the Defendant's wrongful conduct as set forth hereinabove, Plaintiff has incurred damages for having to obtain licenses for 70 terminals at the matching price of \$15,003.00 per terminal for a total of \$1,050,200.10, which was \$409,010.00 greater than the amount for which

it should have received the licenses, if no error by the Defendant had been made. In addition, Plaintiff is entitled to additional interest charges that it has and may pay in the future on the difference in the amount of money borrowed to obtain 70 terminals. Furthermore, the additional \$409,010.00 could have been used by Plaintiff to bid for other terminals which would have generated additional income for ten years. Plaintiff is also entitled to attorney fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment of and against the Defendant for compensatory damages as to be determined by a jury. Plaintiff requests that the Court award it costs and expenses incurred in bringing this suit, including reasonable attorney fees, and such other relief as the Court deems just.

PLAINTIFF DEMANDS TRIAL BY JURY!

VIKING VIDEO & MUSIC, INC.

By Counsel,

CICCARELLO, DEL GIUDICE & LAFON

By: 

Michael J. Del Giudice (WV#982)
1219 Virginia Street, East, Suite 100
Charleston, West Virginia 25301
Phone: (304) 343-4440
Attorney for Plaintiff

FILED
IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VIKING VIDEO & MUSIC INC.,
A West Virginia Corporation,

2012 DEC -4 AM 11:28

CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

Plaintiff,

v.

CIVIL ACTION NO. 12-C-2134
Judge Stuckey

SUMMIT COMMUNITY BANK, INC.

Defendant.

ANSWER AND AFFIRMATIVE DEFENSES OF
SUMMIT COMMUNITY BANK, INC. TO
COMPLAINT OF VIKING VIDEO & MUSIC INC.

COMES NOW Summit Community Bank, Inc. ("Summit") by Counsel, Bowles Rice LLP, Edward D. McDevitt and Patrick C. Timony and by way of Answer and Affirmative Defense to the Complaint (the "Complaint") of Viking Video & Music Inc. ("Viking") states as follows:

First Affirmative Defense

The Complaint of Viking fails to state a cause of action upon which relief may be granted and should be dismissed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

Second Affirmative Defense

Viking's Complaint is barred, in whole or in part, by the doctrine of laches.

Third Affirmative Defense

Viking alleged damages, Summit denying the existence same, were not proximately caused by any act or omission of Summit but by the intervening acts or omissions of other persons for whose actions Summit is not legally responsible.

Fourth Affirmative Defense

Viking did not rely to its detriment on any alleged act or failure to act by Summit or its officers, agents, servants, workmen or employees.

Fifth Affirmative Defense

All actions of Summit were undertaken in good faith.

Sixth Affirmative Defense

Viking's Complaint fails to join an indispensable party pursuant to Rule 12(b)(7) of the West Virginia Rules of Civil Procedure.

Seventh Affirmative Defense

Viking's Complaint should be dismissed in whole or in part since there is insufficient evidence to support Viking's allegations.

Eighth Affirmative Defense

Viking's Complaint is barred, in whole or in part, by the parol evidence rule.

Ninth Affirmative Defense

Viking's Complaint is barred, in whole or in part, by the doctrine of waiver.

Tenth Affirmative Defense

Viking's Complaint is barred, in whole or in part, by virtue of the doctrine of estoppel.

Eleventh Affirmative Defense

Viking's Complaint is barred, in whole or in part, by virtue of assumption of the risk.

Twelfth Affirmative Defense

Viking's Complaint is barred, in whole or in part, by the acts or failures to act of its officers, agents, servants, workmen or employees.

Thirteenth Affirmative Defense

Viking's Complaint is barred, in whole or in part, by Viking's own acts or failures to act.

Fourteenth Affirmative Defense

Viking by its own acts and/or omissions failed to mitigate its damages.

Fifteenth Affirmative Defense Answer

PARTIES

1. The averments of paragraph 1 of the Complaint are admitted.
2. The averments of paragraph 2 of the Complaint are admitted.

JURISDICTION AND VENUE

3. The averments of paragraph 3 of the Complaint are denied as stated. Summit admits it is subject to the jurisdiction and venue of the Circuit Court of Kanawha County, West Virginia. Summit denies there are any "acts and omissions" that would give rise to the invoking of the Courts jurisdiction and venue. Strict proof is demanded of Viking as to all relevant and material matters.

STATEMENT OF FACTS

4. The averments of paragraph 4 of the Complaint are admitted.
5. The averments of paragraph 5 of the Complaint are *inter alia* conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.
6. The averments of paragraph 6 of the Complaint are denied as stated. Strict proof is demanded of Viking as to all relevant and material matters.
7. The averments of paragraph 7 of the Complaint are denied as stated. Strict proof is demanded of Viking as to all relevant and material matters.
8. The averments of 8 of the Complaint are conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

9. The averments of paragraph 9 of the Complaint are denied as stated. Strict proof is demanded by Viking as to all relevant and material matters.

10. The averments of paragraph 10 of the Complaint are denied as stated. Strict proof is demanded by Viking as to all relevant and material matters.

11. The averments of paragraph 11 of the Complaint are admitted.

12. The averments of paragraph 12 of the Complaint are denied as stated. Strict proof is demanded by Viking as to all relevant and material matters.

13. The averments of paragraph 13 of the Complaint are denied as stated. Strict proof is demanded by Viking as to all relevant and material matters.

14. The averments of paragraph 14 of the Complaint are *inter alia* conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

15. The averments of paragraph 15 of the Complaint are *inter alia* conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

16. The averments of paragraph 16 of the Complaint are denied as stated. By way of further response Summit specifically denies any "wrongful acts and omissions" by "Tammy and Koontz" who Summit admits were at times herein relevant Summit's employees. Strict proof is demanded of Viking as to all relevant and material matters.

17. The averments of paragraph 17 of the Complaint are *inter alia* conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

COUNT I
(Breach of Contract)

18. Summit in answer to paragraph 18 of the Complaint herewith adopts and incorporates by referenced its responses to paragraphs 1 through 17 of the Complaint as if herein set out at length and in their entirety.

19. The averments of paragraph 19 of the Complaint are denied as stated. Strict proof is demanded of Viking as to all relevant and material matters.

20. The averments of paragraph 20 of the Complaint are conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

21. The averments of paragraph 21 of the Complaint are conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

22. The averments of paragraph 22 of the Complaint are conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

COUNT II
(Special Relationships)

23. Summit in answer to paragraph 23 of the Complaint herewith adopts and incorporates by reference its responses to paragraphs 1 through 22 of the Complaint as if herein set out at length and in their entirety.

24. The averments of paragraph 24 of the Complaint are *inter alia* conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

25. The averments of paragraph 25 of the Complaint are *inter alia* conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

26. The averments of paragraph 26 of the Complaint are *inter alia* conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

27. The averments of paragraph 27 of the Complaint are *inter alia* conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

COUNT III **(Assumptions of Duty)**

28. Summit in answer to paragraph 28 of the Complaint herewith adopts and incorporates by reference its responses to paragraphs 1 through 27 of the Complaint as if herein set out at length and in their entirety.

29. The averments of paragraph 29 of the Complaint are *inter alia* conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

30. The averments of paragraph 30 of the Complaint are *inter alia* conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

31. The averments of paragraph 31 of the Complaint are *inter alia* conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent

a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

32. The averments of paragraph 32 of the Complaint are *inter alia* conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters.

DAMAGES

33. The averments of paragraph 33 of the Complaint are *inter alia* conclusions which require no response pursuant to the West Virginia Rules of Civil Procedure. To the extent a response is deemed necessary, same are denied and strict proof is demanded of Viking as to all relevant and material matters. Further Summit states that not only is it not responsible for the putative damages alleged by Viking and that same are speculative in nature and not provable under the internal laws of the State of West Virginia.

Sixteenth Affirmative Defense

Summit reserves the right to assert at trial any other matters constituting affirmative defenses if the same are warranted by information developed during discovery.

WHEREFORE, Summit demands judgment of dismissal as no cause per action and requests that it be awarded its cost and attorneys' fees incurred in defending this action.

SUMMIT COMMUNITY BANK, INC.

By Counsel,



Edward D. McDevitt (WVSB #2437)
Patrick C. Timony (WVSB #11717)
BOWLES RICE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-1100
(304) 343-3058 – facsimile

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VIKING VIDEO & MUSIC INC.,
A West Virginia Corporation,

Plaintiff,

v.

SUMMIT COMMUNITY BANK, INC.

Defendant.


2012 DEC -4 AM 11:27
CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT
CIVIL ACTION NO. 12-C-2134
Judge Stuckey

CERTIFICATE OF SERVICE

The undersigned, counsel for Summit Community Bank, Inc. does hereby certify that I have served a true and accurate copy of the foregoing *Answer and Affirmative Defenses of Summit Community Bank Inc. to Complaint of Viking Video & Music Inc.*, on the 3rd day of December, 2012, as follows:

Michael J. Del Giudice, Esquire
Ciccarello, Del Giudice & LaFon
1219 Virginia Street, East
Suite 100
Charleston, West Virginia 25301

Via Hand Delivery


Edward D. McDevitt (WVSB #2437)

IN THE CIRCUIT COURT OF KANAWHA, COUNTY, WEST VIRGINIA

VIKING VIDEO & MUSIC INC.,
A West Virginia Corporation,

Plaintiff,

v.

Civil Action No. 12-C-2134
Judge Stuckey

SUMMIT COMMUNITY BANK, INC.

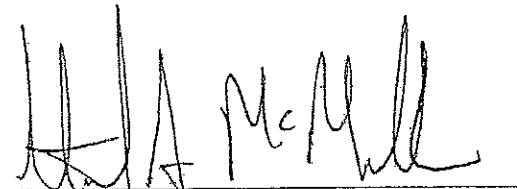
Defendant.

SUMMIT COMMUNITY BANK, INC.'S RULE 41(b) MOTION TO DISMISS

Defendant, Summit Community Bank, Inc. ("Summit"), by counsel, respectfully moves this Court to dismiss Plaintiff's Complaint pursuant to West Virginia Rule of Civil Procedure 41(b) ("Summit's Motion"). Simply put, this Court should dismiss Plaintiff's Complaint because Plaintiff has failed to take any action in this matter in over a year in violation of Rule 41(b). Therefore, sufficient grounds exist for this Court to grant Summit's Motion.

SUMMIT COMMUNITY BANK, INC.,

By Counsel,



Stuart A. McMillan (WVSB #6352)
Patrick C. Timony (WVSB #11717)
BOWLES RICE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-1100
(304) 343-3058 – facsimile

IN THE CIRCUIT COURT OF KANAWHA, COUNTY, WEST VIRGINIA

VIKING VIDEO & MUSIC INC.,
A West Virginia Corporation,

Plaintiff,

v.

Civil Action No. 12-C-2134
Judge Stuckey

SUMMIT COMMUNITY BANK, INC.

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF SUMMIT COMMUNITY
BANK, INC.'S RULE 41(b) MOTION TO DISMISS

Defendant, Summit Community Bank, Inc. ("Summit"), by counsel, respectfully moves this Court to dismiss Plaintiff's Complaint pursuant to West Virginia Rule of Civil Procedure 41(b) ("Summit's Motion"). As set forth more fully below, Plaintiff, Viking Video & Music, Inc. ("Viking"), failed to take any action in this matter in over a year in violation of the West Virginia Rules of Civil Procedure. Based on Viking's prolonged inactivity in this matter, this Court should grant Summit's Motion.

PROCEDURAL HISTORY

On October 22, 2012, Viking filed a Complaint against Summit. In this Complaint, Viking alleged that Summit employees, Jason D. Koontz ("Mr. Koontz") and his assistant Tammy Ward ("Ms. Ward"), erroneously prepared Viking's bid for video lottery permits, which, ultimately, led to their disqualification by the West Virginia Lottery Commission.¹ [Cmpl. at ¶¶ 9-15.] Consequently, Viking alleged that this negligence caused it to

¹ Based on this alleged conduct, Viking's Complaint stated three (3) causes of action against Summit: (i) negligence; (ii) special relationship; and (iii) assumption of duty.

suffer damages of at least Four Hundred Nine Thousand Ten Dollars (\$409,010.00). [Cmpl. at ¶ 33.]

On December 3, 2012, Summit answered the Complaint and denied the allegations. Thereafter, on January 9, 2013, Summit served Plaintiff with its discovery requests. [Jan. 9, 2013, Certificate of Service to Summit Community Bank, Inc.'s First Set of Reqs. for Admis., Interrogs. and Reqs. for Prod. of Docs. to Viking Video & Music, Inc., attached hereto as Ex. A.] On February 7, 2013, Viking responded to Summit's discovery requests. [Feb. 7, 2013, Resps. to Summit Community Bank, Inc.'s First Set of Reqs. for Admis., Interrogs. and Requests for Prod. of Docs. to Viking Video & Music, Inc., attached hereto as Ex. B.] Thereafter, on April 10, 2013, Viking served discovery requests on Summit, to which Summit responded to on May 15, 2013. [Apr. 10, 2013, Certificate of Service to Pl.'s First Set of Reqs. for Admis., Interrogs. and Reqs. for Prod. of Docs. to Def., attached hereto as Ex. C]; [May 15, 2013, Def. Summit Community Bank, Inc.'s Answers and Resps. to Pl.'s First Set of Interrogs. and Reqs. for Prod. of Docs., attached hereto as Ex. D.]

Following Summit's responses to Viking's discovery requests, no other activity has occurred in this matter.

ARGUMENT

- A. This Court should dismiss Viking's Complaint because this civil action remained inactive for over a year.

Rule 41(b) of the West Virginia Rules of Civil Procedure allows "[a]ny court in which is pending an action wherein for more than one year there has been no order or proceeding . . . in its discretion, order such action be struck from its docket; and it shall thereby be discontinued." W. VA. R. Civ. P. 41(b). "This rule functions as a docket-clearing mechanism

which enables trial courts to purge themselves of stale cases, while prodding dilatory plaintiffs to proceed to trial.” Franklin D. Cleckley, Robin Jean Davis, Louis J. Palmer, Jr., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE, § 41(b), 938 (4th ed. 2012). Indeed, in recent years, the Supreme Court of Appeals has approved of the decisions by this Court to dismiss cases pursuant to the inactivity for over a year provision of Rule 41(b). *See Meade v. W. Va. Div. of Corrs.*, No. 13-0983, 2014 WL 1672938 (W. Va. Apr. 24, 2014) (memorandum decision); *see also Raab v. Marshall*, No. 13-0249, 2013 WL 5966372 (W. Va. Nov. 8, 2013) (memorandum decision).

In *Meade*, plaintiff, on October 29, 2010, filed a complaint against the West Virginia Division of Corrections (“Division of Corrections”) and correctional officer Rees² alleging they committed sexual misconduct against her. 2014 WL 1672938 at *1. Thereafter, defendants served plaintiff with discovery requests, which plaintiff responded. This exchange of discovery began on February 22, 2011, with defendant Rees serving requests, and concluded with plaintiff answering the Division of Corrections’ discovery requests on May 5, 2011. *Id.* From May 5, 2011 through June 18, 2012, no other activity occurred. Thereafter, the Division of Corrections moved to dismiss plaintiff’s complaint pursuant to Rule 41(b), which this Court granted due to lack of activity within the one (1) year time frame set forth in the Rules. *Id.* at *2. In upholding this Court’s dismissal, the Supreme Court of Appeals stated:

The record demonstrates that between the time petitioner answered discovery and the filing of the first motion to dismiss, she took no action whatsoever to prosecute her case. . . . Clearly, the period of inactivity exceed one year. As for the personal circumstances that petitioner belatedly claims constitute good cause for the inactivity, she was represented by counsel throughout the pendency of her

² Plaintiff named two (2) additional defendant correctional officers, Crawford and Smithson, but never served them with her complaint. Ultimately, this Court dismissed officers Crawford and Smithson under Rule 4(k) of the West Virginia Rules of Civil Procedure. *Id.* at *1 n.1.

lawsuit, and her counsel had the ability to seek a stay in the case to protect petitioner's interests. . . . All that is left by way of explanation is her counsel's assertion at the February 26, 2013, hearing that the case 'slip[ped] through the cracks' in his office. Therefore, we cannot find that the circuit court abused its discretion in failing to find good cause for the inactivity in the case.

Id. at *3 (brackets in original).

Additionally, in *Raab*, the Supreme Court of Appeals upheld this Court's dismissal of a complaint for inactivity and failure to prosecute. 2013 WL 5966972 at *2. *Raab* involved plaintiff suing their architect, Paul D. Marshall Architects & Engineers, Inc. ("Marshall"), for allegedly defective work on plaintiffs' residence. *Id.* at *1. On January 28, 2008, plaintiffs filed the action against Marshall alleging: (i) breach of contract; (ii) negligence; (iii) breach of fiduciary duty; and (iv) misrepresentation. *Id.* For over three (3) years, the matter proceeded to the May 2, 2011, trial date; however, on or around February 17, 2011, plaintiff requested postponement of their liability expert's deposition because of an apparent emergency. Defendant Marshall agreed to the postponement of the expert deposition, with the caveat that the parties seek a continuance of the trial date.³ Following this continuance, from April 6, 2011 to May 6, 2011, no activity occurred. *Id.* On May 7, 2011, Marshall moved to dismiss for inactivity, which this Court granted. *Id.* at *2. In upholding this dismissal, the Supreme Court of Appeals found no good cause existed for the inactivity by plaintiffs during the calendar year.⁴ *Id.* at *4.

³ This Court granted the parties a continuance through entry of an agreed order. *Id.*

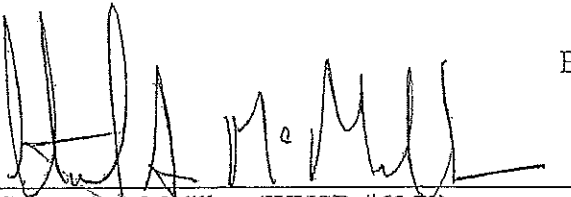
⁴ Plaintiffs argued good cause existed because they moved for a scheduling conference and also paid the Twenty Dollars (\$20.00) active docket fee. *Id.* at *3. The Supreme Court of Appeals found neither justification persuasive. First, plaintiffs noticed the scheduling conference after Marshall moved to dismiss for inactivity. Second, the Supreme Court of Appeals found payment of the docket charge did not count as activity under Rule 41(b) of the West Virginia Rules of Civil Procedure.

In this instance, the last activity in this case occurred on May 15, 2013, when Summit served Viking with Defendant Summit Community Bank, Inc.'s Answers and Responses to Plaintiff's First Set of Interrogatories and Requests for Production of Documents. From May 15, 2013, to the filing of this Motion and Memorandum of Law in Support, no activity has occurred in this civil action. This lack of activity over the one (1) year time period set forth in Rule 41(b) justifies this Court's dismissal of Viking's Complaint. Consequently, this Court should grant Summit's Motion.

CONCLUSION

For the reasons stated throughout this Memorandum of Law and for any reasons that become apparent to this Court during the oral argument, Summit respectfully requests this Court grant Summit's Motion.

SUMMIT COMMUNITY BANK, INC.,

A handwritten signature in black ink, appearing to read 'Stuart A. McMillan', is written over a horizontal line.

By Counsel,

Stuart A. McMillan (WVSB #6352)
Patrick C. Timony (WVSB #11717)
BOWLES RICE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-1100
(304) 343-3058 -- facsimile

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VIKING VIDEO & MUSIC INC.,
A West Virginia Corporation,

Plaintiff,

v.

CIVIL ACTION NO. 12-C-2134
Judge Stuckey

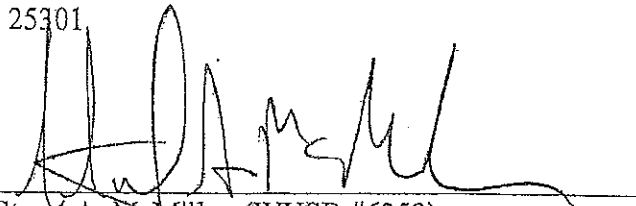
SUMMIT COMMUNITY BANK, INC.

Defendant.

CERTIFICATE OF SERVICE

The undersigned, counsel for Summit Community Bank, Inc. does hereby certify that I have served a true and accurate copy of the foregoing *Summit Community Bank, Inc.'s Rule 41(b) Motion to Dismiss* and *Memorandum of Law in Support of Summit Community Bank, Inc.'s Rule 41(b) Motion to Dismiss* on the 5th day of September, 2014, via United States First Class Mail, postage pre-paid to:

Michael J. Del Giudice, Esquire
Ciccarello, Del Giudice & LaFon
1219 Virginia Street, East
Suite 100
Charleston, West Virginia 25301


Stuart A. McMillan (WVSB #6352)

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VIKING VIDEO & MUSIC INC.,
A West Virginia Corporation,

Plaintiff,

v.

CIVIL ACTION NO. 12-C-2134
Judge Stuckey

SUMMIT COMMUNITY BANK, INC.

Defendant.

CERTIFICATE OF SERVICE

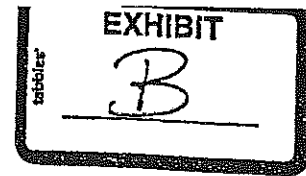
The undersigned, counsel for Summit Community Bank, Inc. does hereby certify that I have served a true and accurate copy of the foregoing *Summit Community Bank, Inc.'s First Set of Requests for Admissions, Interrogatories and Requests for Production of Documents to Viking Video & Music, Inc.*, on the 9th day of January, 2013, as follows:

Michael J. Del Giudice, Esquire
Ciccarello, Del Giudice & LaFon
1219 Virginia Street, East
Suite 100
Charleston, West Virginia 25301

Via Hand Delivery

Edward D. McDevitt
Edward D. McDevitt (WVSB #2437)





IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VIKING VIDEO & MUSIC, INC.,
a West Virginia corporation,

PLAINTIFF,

VS.

CIVIL CASE NO. 12-C-2134

SUMMIT COMMUNITY BANK, INC.,
a West Virginia corporation,

DEFENDANT.

RESPONSE TO SUMMIT COMMUNITY BANK, INC.'S FIRST SET OF
REQUESTS FOR ADMISSIONS, INTERROGATORIES AND REQUESTS FOR
PRODUCTION OF DOCUMENTS TO VIKING VIDEO & MUSIC, INC.

REQUEST FOR ADMISSIONS

1. Admit or deny that Viking submitted a bid of \$610,000.00 for 100 video lottery terminals permits to the West Virginia Lottery on or before October 18, 2010.

RESPONSE:

Admitted.

2. Admit or deny that Viking submitted a bid for \$56,000.00 for 10 video lottery terminal permits to the West Virginia Lottery on or before October 18, 2010.

RESPONSE:

Admitted.

3. Admit or deny that the West Virginia Lottery disqualified Viking's \$610,000.00 and \$56,000.00 bids on or around October 19, 2010 because Viking failed to comply with West Virginia Code §§29-22B-1107(j) and 29-22B-1107(k).

RESPONSE:

Plaintiff admits the reason provided by the West Virginia Lottery for disqualifying its bids was that it violated these two statutes; however, Viking denies it did violate the statutes and believes the submission of its bids was appropriate. Viking chose not to challenge it in the Court system due to the lengthy nature of the proceedings, questionable outcome and its necessity to obtain licenses for video lottery terminals to continue doing business.

4. Admit or deny that on or around February 11, 2011, Viking requested Summit provide an irrevocable letter of credit in the fixed amount of \$637,420.00 in favor of the State of West Virginia for the use of the State Lottery Commission.

RESPONSE:

Denied.

5. Admit or deny that on or around February 11, 2011, Summit did provide Viking an irrevocable letter of credit in the fixed amount of \$637,420.00 in favor of the State of West Virginia for the use of the State Lottery Commission.

RESPONSE:

Admitted.

6. Admit or deny that Viking submitted a bid for \$8,160.00 for 13 video lottery terminal permits to the West Virginia Lottery on or around February 11, 2011.

RESPONSE:

Denied.

7. Admit or deny that the West Virginia Lottery rejected Viking's bid of

\$8,160.00 for 13 video lottery terminal permits on or around February 18, 2011 for failing to exceed the minimum adjusted per-terminal bid.

RESPONSE

Denied.

8. Admit or deny that Dennis Kerns read, reviewed and signed both February bids entitled Bid for Limited Video Lottery Terminal Permit prior to submitting the bid to the West Virginia Lottery.

RESPONSE:

Admitted.

9. Admit or deny that on or around March 7, 2011, Viking requested Summit provide an irrevocable letter of credit in the fixed amount of \$750,150.00 in favor of the State of West Virginia for the use of the State Lottery Commission.

RESPONSE:

Admitted.

10. Admit or deny that on or around March 7, 2011, Summit did provide Viking an irrevocable letter of credit in the fixed amount of \$750,150.00 in favor of the State of West Virginia for the use of the State Lottery Commission.

RESPONSE:

Admitted.

INTERROGATORIES

1. When did Viking first qualify as an operator of video lottery terminals?

ANSWER:

Viking first qualified as an operator of video lottery terminals in or about 2001.

2. Prior to the 2010-2011 West Virginia Lottery bidding process, please describe, in detail, the procedures Viking uses in determining a) how many permits to bid on; b) which round to bid on these permits; c) what amount per permit to bid; and d) how to make sure the bids comply with West Virginia Code §§29-22B-1101 through 29-22B-1113?

ANSWER:

Viking has no set procedure for submission of the bidding process. Decisions as to how many permits to bid on is made by Dennis Kerns and is based upon the number of video lottery terminals he needed to sufficiently supply its retailers and the money available to finance the purchases of those licenses and terminals. Viking chose to bid on the first round in the hopes it would receive terminals for a lesser price and the same would be true for the second round. As to the third round, Viking chose the option to purchase the terminals at a set price to ensure it would obtain the terminals it needed.

As to determine what amount to bid, that was decided by Dennis Kerns based upon his years of experience in the business. As far as compliance with West Virginia Code, Dennis Kerns read the documents provided by the West Virginia Lottery Commission and attempted to comply with those statutes as best as possible. At all times he believed he was complying with the West Virginia statutes.

3. For the 2010-2011 West Virginia Lottery bidding process, please

describe, in detail, the procedures Viking uses in determining a) how many permits to bid on; b) which round to bid on these permits; c) what amount per permit to bid; and d) how to make sure the bids comply with West Virginia Code §§29-22B-1101 through 29-22B-1113?

ANSWER:

Interrogatory No. 3 appears to be identical to Interrogatory No. 2. Plaintiff's response, therefore, would be the same.

4. Since April 21, 2001 to the present, please list each and every bid Viking submitted to the West Virginia Lottery Commission. In this answer, please include: a) the date of the bid; b) the total amount of the bid; c) the price per terminal; d) whether the West Virginia Lottery Commission accepted, disqualified or rejected the bid; and e) the method Viking secured its bid pursuant to West Virginia Code §29-22B-1109.

ANSWER:

Plaintiff does not recall each and every bid submitted to the West Virginia Lottery since April 21, 2001. All of this information is available through the West Virginia Lottery Commission. What information is in Plaintiff's possession is attached as Exhibit D.

5. Since April 21, 2001 to the present, please list each and every retailer or fraternal organization Viking has contracted with to supply them with video lottery terminals. In this answer, please include: a) the date of the contract(s); b) the name of the retailer(s) or fraternal order(s); c) the total amount of the

contract(s); d) the number of video lottery terminals provided; e) the length of the contract(s); and f) whether the contract(s) was renewed or renegotiated.

ANSWER:

Plaintiff is not sure whether or not it has retained all of the information contained in Interrogatory No. 5. Attached hereto as Exhibit A is a list provided by the West Virginia Lottery which identifies all of the locations where Viking had contracts over the years and identifies whether they are active or inactive. Attached hereto as Exhibit B is a form contract Viking has used for most, if not all, of those years. Once again, if the actual contracts are needed for each location, this information is available through the West Virginia Lottery Commission if Defendant wants to seek each and every contract. As to the total amount of the contracts, Plaintiff is unsure of what is being requested. There are no amounts in the contracts. As to the number of video lottery terminals provided, that varies depending on availability of terminals and whether the terminals are being economically utilized.

6. Since 2009 to the present, please list each and every retailer or fraternal organization Viking contacted related to Viking providing the retailer or fraternal organization with video lottery terminals at a future place and time. In this answer, please include: a) the date of the contact(s); b) the name of the retailer(s) or fraternal order(s); c) the number of video lottery terminals discussed; and d) the amount(s) discussed.

ANSWER:

As to the lengths of the contracts, the standard contract entered into by Viking was for ten years. Some of them have been renewed, while others have been terminated. Plaintiff presumes that Defendant is seeking information with regard to retailer with which it does not have contracts. Plaintiff has no records of retailers with whom it had contact to provide video lottery terminals at future places and times. Viking has been in contact with retailers in efforts to increase its business; however, to identify

any particular location, the Plaintiff has no records of the same. Currently, Plaintiff is in the process of placing terminals in Iva's.

7. Since April 21, 2001, please list each and every manufacturer Viking contracted with to provide Viking with video lottery terminals. In this answer, please provide a) the name of the manufacturer(s); b) the number of video lottery terminal(s) provided; c) the amount of the contract(s); and d) the services the manufacturer(s) agreed to provide in the contract(s).

ANSWER:

Over the years, Viking has contacted the following manufacturers of video lottery terminals:

Spielo
Summit Games
IGT
Williams
Scientific Games

As to the number of video lottery terminals purchased from each of those, Plaintiff does not know the exact number, but does assert that most of its terminals have been purchased through IGT. The amount of the contracts would vary over the year depending on how many terminals were purchased at any one time. As to the service the manufacturers agree to provide, Viking has its own personnel qualified to work on these terminals and the only service the manufacturers are required to do is to install the machines and/or take them out of service.

8. Since 2009 to the present, please list each and every manufacturer Viking contacted with to provide Viking with future video lottery terminals. In this answer, please provide a) the name of the manufacturer(s); b) the number of video lottery terminal(s) provided; c) the amount of video lottery terminals discussed; and d) the total amount(s).

ANSWER:

See Exhibit D attached hereto.

9. Since April 21, 2001 to the present, please describe, in detail, how Viking "demonstrated the training, education, business ability and experience necessary to establish, operate and maintain . . ." Viking's business as set forth in West Virginia Code §29-22B-503(a)(2).

ANSWER:

Viking has been in operation since 1984. Dennis Kerns started the business as providing vending machines and amusement machines. The business has been successful over 29 years and to various businesses that demonstrates Viking's ability, experience to operate video lottery terminals. In addition, Dennis Kerns has attended seminars, training and in-house classes provided by various manufacturers. IGT is where most of his training and knowledge is derived.

In addition, Viking has three employees. All three employees have also received training, education and classes from various manufacturers, with IGT being the predominant one. Furthermore, all three of Viking's employees are certified by the State of West Virginia to work on video lottery terminals.

10. Please describe, in detail, Viking's banking relationship with Summit. In this answer, please include: a) the date the banking relationship began; b) the services Summit provided Viking; and c) the date that Summit provided its services to Viking.

ANSWER:

To the best of Plaintiff's recollection, Viking's relationship with Summit Community Bank originated in or around 2000-2001. Plaintiff does not recall all of the services provided by Summit, but asserts they have varied over the years. Plaintiff does not recall the exact dates the services were

provided to Summit, but that information should be of record with Summit.

Summit agreed to provide sufficient funding for Viking to obtain the lottery terminals bid in February, 2011. Dennis Kerns gave Summit's employees the amount of video lottery terminals he wanted to bid and the amount he wanted each machine to bid at. Employees at Summit then took those two pieces of information and performed the calculation for the total. Unfortunately, one or more of the employees at Summit transposed the amount per bid when calculating the total amount of the line of credit needed to back the bid submitted by Viking. Plaintiff acknowledges he missed the error prior to submission to the Video Lottery Commission, which then rejected it.

11. Please describe, in detail, what specific provisions of the lending contract Viking is alleging Summit breached as set forth in Viking's Complaint paragraphs 18 through 22.

ANSWER:

Summit Community Bank put the incorrect number on the bed Letter of Credit.

12. Please describe, in detail, why Viking believes it is possessed a "special relationship" with Summit. In this answer, please include: a) the source of the relationship; and b) the specific events that gave rise to that relationship.

ANSWER:

Plaintiff's "special relationship" evolved over the years. In many, if not all, of the dealings between Summit and Viking, Summit oversaw the process and provided assistance to Viking. This assistance not only included lending money, but also in preparing documents on behalf of Viking.

On this particular occasion, the documents to be submitted to the Video Lottery Commission were provided to Summit by Viking in blank form. Summit then created the documents due to the "special relationship" that had been formed.

Furthermore, it was clearly foreseeable by the bank that these numbers had to be consistent or otherwise Viking would not obtain the licenses sought in the bidding process. Dennis Kerns advised the employees at Summit as to how particular the process was and explained to them how the first time around, the Lottery Commission accused him of failing to comply with the proper procedure because his bid envelope was dropped off at the wrong office in State Government. Summit had reason to know of the potential consequences of any errors because of Viking's conveying that to Summit employees. Therefore, it was eminently foreseeable to Summit that any errors could cause great loss to Viking.

Furthermore, the bank was significantly involved in the bid submitted by Viking. It physically prepared all of the documents that were submitted, calculated the math on those documents and provided assurance to Viking that the documents were correct.

Because of the "special relationship" that had formed over the years, Viking relied on the good services Summit had provided in the past and believed those good services would continue and would be without error. The services provided by Summit were better and more personal than those provided by other banks with which Viking had dealt. Finally, Summit possessed information of no interest to society in general, but of great interest to Viking.

REQUEST FOR PRODUCTION OF DOCUMENTS

1. Please provide Summit with each and every bid Viking submitted which the West Virginia Lottery disqualified since April 21, 2001.

RESPONSE:

Viking is not in possession of all of these bids. A search by Viking has found documents related to this response and is attached as Exhibit C.

2. Please provide Summit with each and every bid Viking submitted which the West Virginia Lottery rejected since April 21, 2001.

RESPONSE:

Viking is not in possession of all of these bids. A search by Viking has found documents related to this response and is attached as Exhibit C.

3. Please provide Summit with each and every bid Viking submitted which the West Virginia Lottery accepted since April 21, 2001.

RESPONSE:

Viking is not in possession of all of these bids. A search by Viking has found documents related to this response and is attached as Exhibit C.

4. Please provide Summit a copy of each and every permit Viking has received from the West Virginia Lottery since April 21, 2001.

RESPONSE:

Attached hereto as Exhibit A is a list of the retailers with whom Viking has had contracts and a standard contract is attached as Exhibit B. Viking is not sure whether or not it has maintained all of the past contracts which have expired.

5. Please provide Summit a copy of each and every contract which

Viking entered into with a license video lottery realtor or fraternal organization pursuant to West Virginia Code §29-22B-1110(c) since April 21, 2001.

RESPONSE:

See response to Request No. 4.

6. Please provide a copy of Viking's tax returns from 2001 to the present.

RESPONSE:

Plaintiff will provide this information upon entry of a satisfactory Protective Order entered by the Court.

7. Please provide any and all documents and communications which relate to any bid Viking made during the 2010-2011 West Virginia Lottery bidding process.

RESPONSE:

Other than the documents submitted to the West Virginia Lottery, Plaintiff is unaware of any other such documents.

8. Please provide any and all documents and communications related to any contract negotiations Viking entered into with any retailer of fraternal order after October 8, 2011.

RESPONSE:

Plaintiff is unaware of any such documents.

9. Please provide any and all documents and communications related

to any preliminary discussions with any retailer or fraternal order about future video lottery terminals.

RESPONSE:

Plaintiff is unaware of any such documents.

10. Since April 21, 2001 to the present, please provide any and all documents and communications which demonstrate that the Chief Executive Officer of Viking and a majority of its officers, directors, members or partners are citizens of the United States and resided in West Virginia for the four-year period immediately preceding Viking's application.

RESPONSE:

The only owner of Viking is Dennis Kerns. He has been a lifelong resident of West Virginia and has numerous documents to prove that, but it would be burdensome for him to present all of the various utility bills and other filings with the Court. Notwithstanding all of that, attached hereto as Exhibit F is his birth certificate and available at the West Virginia Lottery Commission are Affidavits submitted by him of residency in West Virginia.

11. Since April 21, 2001 to the present, please provide any and all documents and communications related to Vikings' demonstration to the West Virginia Lottery that Viking processed the training, education, business ability and experience necessary to operate video lottery terminals as provided in West Virginia Code §29-22B-503(a)(2).

RESPONSE:

Plaintiff has no records of the various training, education and seminars that the employees attended; however, the West Virginia Lottery Commission has

documentation to show that its employees have been certified to work on video lottery terminals.

12. Since April 21, 2001 to the present, please provide any and all financing or refinancing agreements related to the lease or other acquisition of video lottery terminals and associated equipment as provided in West Virginia Code §29-22B-503(a)(4).

RESPONSE:

Plaintiff is not in possession of any such documents.

13. Since April 21, 2001 to the present, please provide any and all current or proposed agreements between Viking and any video lottery terminal manufacturer as provided in West Virginia Code §29-22B-503(a)(5).

RESPONSE:

The most current purchase by Viking of video lottery machines occurred in December, 2012 and the documentation associated therewith is attached as Exhibit D.

14. Please produce any and all documents and communications you relied on in answering these Request for Admissions, Interrogatories and Request for Production.

RESPONSE:

Attached hereto as Exhibit G are miscellaneous documents generated by Summit and provided to Plaintiff.

DENNIS O. KERNS

By Counsel,

CICCARELLO, DEL GIUDICE & LAFON

By: 

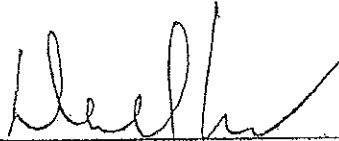
Michael J. Del Giudice (WV#982)
1219 Virginia Street, East, Suite 100
Charleston, West Virginia 25301
Phone: (304) 343-4440
Attorney for Plaintiff

VERIFICATION

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

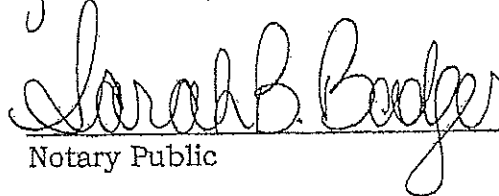
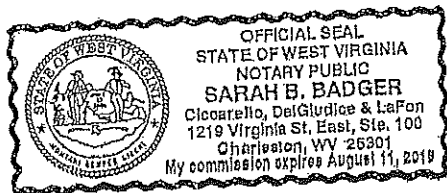
I, Dennis Kerns, as the owner of Viking Video & Music, Inc., named in the foregoing "Response to Summit Community Bank, Inc.'s First Set of Requests for Admissions, Interrogatories and Requests for Production of Documents to Viking Video & Music, Inc." being first duly sworn, says that the facts and allegations contained therein are true, except insofar as they are therein stated to be upon information and belief, and that insofar as they are therein stated, he believes them to be true.



DENNIS KERNS, as the owner of Viking Video & Music, Inc.

Taken, subscribed, and sworn to before me this 7th day of February, 2013.

My commission expires: August 11, 2019



Notary Public

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VIKING VIDEO & MUSIC, INC.,
a West Virginia corporation,

PLAINTIFF,

VS.

CIVIL CASE NO. 12-C-2134

SUMMIT COMMUNITY BANK, INC.,
a West Virginia corporation,

DEFENDANT.

CERTIFICATE OF SERVICE

I, Michael J. Del Giudice, do hereby certify that the foregoing "Response to Summit Community Bank, Inc.'s First Set of Requests for Admissions, Interrogatories and Requests for Production of Documents to Viking Video & Music, Inc." has been served upon counsel of record by placing a true copy thereof in the United States mail; postage prepaid, on the 2nd day of February, 2013, addressed as follows:

Edward D. McDevitt, Esq.
P.O. Box 1386
Charleston, West Virginia 25325-1386
Attorney for Defendant

CICCARELLO, DEL GIUDICE & LAFON

By: 

Michael J. Del Giudice (WV#982)
Attorney for Plaintiff

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VIKING VIDEO & MUSIC INC.,
a West Virginia corporation,

PLAINTIFFS,

VS.

CIVIL ACTION NO. 12-C-2134

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CERTIFICATE OF SERVICE

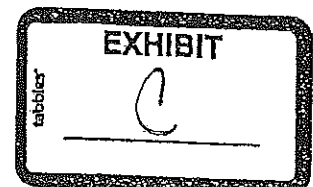
I, Michael J. Del Giudice, do hereby certify that the foregoing "Plaintiff's First Set of Interrogatories and Request for Production of Documents to Defendant" have been served upon all parties by depositing a true and exact copy thereof in the United States Mail, postage pre-paid, addressed as follows on this 10th day of April, 2013:

Edward D. McDevit, Esq.
600 Quarrier Street
P.O. Box 1386
Charleston, West Virginia 25325-1386
Attorney for Defendant

CICCARELLO, DEL GIUDICE & LAFON

By: 

Michael J. Del Giudice (WV #982)
1219 Virginia Street, East, Suite 100
Charleston, West Virginia 25301
Phone: (304) 343-4440
Attorney for Plaintiff



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VIKING VIDEO & MUSIC INC.,
a West Virginia Corporation,

Plaintiff,

v.

CIVIL ACTION NO. 12-C-2134
Judge Stuckey

SUMMIT COMMUNITY BANK, INC.

Defendant.

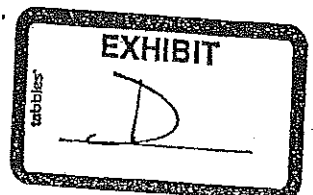
DEFENDANT SUMMIT COMMUNITY BANK, INC.'S ANSWERS AND
RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES
AND REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Rules 26, 33 and 34 of the West Virginia Rules of Civil Procedure, Defendant, Summit Community Bank, Inc. (hereafter "Summit"), by counsel, provides its answers and responses to *Plaintiff's First Set of Interrogatories and Request for Production of Documents to Defendant*. In so responding, Defendant does not waive, but expressly reserves, all privileges, including, but not limited to, those arising out of the attorney-client relationship, and under the work product and self-critical analysis doctrines. By responding to the following discovery requests, Defendant does not concede the relevance of any matter at issue in the discovery requests and Defendant expressly reserves the right to amend or supplement these answers and responses to reflect information acquired through discovery or other means.

INTERROGATORIES

1. Please state the full name and current title of all person(s) involved in providing information to respond to this Discovery.

ANSWER: Brad Richie, President of Summit; Michele Dillon, assistant to Brad Richie. Both may be contacted by and through counsel at counsel's address.



2. If Summit has have ever been a party to a civil lawsuit since January 1, 2000, state the parties, the civil action number and the name of the Court where each proceeding was filed.

ANSWER: OBJECTION. As drafted, this Interrogatory is not limited in time or subject matter to the allegations raised in the Complaint nor does it otherwise seek information that is relevant to the claims and defenses asserted. Therefore, this Interrogatory is not "reasonably calculated to lead to the discovery of admissible evidence" as required by Rule 26 of the West Virginia Rules of Civil Procedure and, therefore, not discoverable.

3. If any investigation was conducted concerning the incident referred to in the Complaint, please state the name, address and title of the person(s) who conducted such investigation.

ANSWER: Summit hired Bowles Rice LLP¹ to investigate Plaintiff's "Notice of Claim" letter submitted to Summit on May 23, 2011.

4. Please state the full name of the assistant to the Senior Vice President, J.D. Koontz, her job title and job duties.

ANSWER: Tammy Ward was a loan officer for J.D. Koontz. Ms. Ward helped with the processing of loans and other clerical responsibilities, such as printing loan documents for Mr. Koontz's review.

5. State the full name and last known address and telephone number of every person or witness known to you or your attorney, who has or may have, any knowledge

¹ On August 7, 2012, Bowles Rice McDavid Graff and Love, LLP changed its name to Bowles Rice LLP.

regarding the facts, circumstances or alleged damages surrounding the incident referred to in the Complaint.

ANSWER: OBJECTION. This Interrogatory seeks information prematurely. As of the filing of these responses, the Circuit Court in this litigation as yet to enter in a Scheduling Order. This Scheduling Order will provide a date certain for Summit to provide Plaintiff with the names of individuals with knowledge of the facts and defenses in this litigation. Pursuant to Rule 26(e) of the West Virginia Rules of Civil Procedure, Summit will provide this information pursuant to the Circuit Court's Scheduling Order. Without waiving this objection, the following individuals may possess personal knowledge regarding the facts of this case: (1) Dennis O. Kerns; (2) J.D. Koontz; and (3) Tammy Ward

6. If you intend to have any individual testify in the capacity as an expert during the trial of this matter, please state:

- (a) The name(s) and address(es) of each expert;
- (b) The information required by Rule 26(b)(4) (A)(i) of the West Virginia Rules of Civil Procedure (the subject matter on which the expert(s) is expected to testify, the substance of the facts and opinions to which the expert(s) is expected to testify, and a summary of the grounds for each opinion).

ANSWER: OBJECTION. This Interrogatory seeks information prematurely. As of the filing of these responses, the Circuit Court as yet to enter in a Scheduling Order. This Scheduling Order will provide a date certain for Summit to provide Plaintiff with the names of

its experts. Pursuant to Rule 26(e) of the West Virginia Rules of Civil Procedure, Summit will provide this information pursuant to the Circuit Court's Scheduling Order.

7. If you, your attorney, agents or representatives have knowledge of, possession or custody of any statement(s), or memorandum of statements, either oral or written, made or allegedly made by Dennis Kerns or any other agent, employee or representative of Viking, state the name of the person making the statement, the name and address of the person who took or received each statement and the date of each statement.

ANSWER: OBJECTION. This Interrogatory seeks attorney client privilege and work product information. Summit's attorneys previously interviewed employees of Summit and recorded their statements, thoughts and impressions. A summary of this information has been documented in the attached privilege log.

8. Please state the name, address and telephone number of each and every person you intend to call as a witness at the trial of this action and a brief summary of each witness' proposed testimony.

ANSWER: OBJECTION. This Interrogatory seeks attorney work product information. Moreover, this Interrogatory requests information prematurely. As of the filing of these responses, the Circuit Court as yet to enter in a Scheduling Order. This Scheduling Order will provide a date certain for Summit to provide Plaintiff with the names of individuals with knowledge of the facts and defenses in this litigation. Pursuant to Rule 26(e) of the West Virginia Rules of Civil Procedure, Summit will provide this information pursuant to the Circuit Court's Scheduling Order.

REQUEST FOR PRODUCTION OF DOCUMENTS

1. Please produce copies of all internal emails regarding Viking or its owner Dennis O. Kerns ("Kern") from January 1, 2001 until the present.

RESPONSE: OBJECTION. As drafted this Request for Production seeks information not "reasonably calculated to lead to the discovery of admissible evidence" as required by Rule 26 of the West Virginia Rules of Civil Procedure. This Request for Production is unreasonably burdensome because to provide every email related to Viking Video or Dennis O. Kerns would require the production of tens of thousands of pages. Many of the attachments to these emails also contain other individuals personal financial information, which 12 U.S.C. § 3401 et al. expressly prohibits Summit from disclosing. As drafted, this Request for Production pursues email communications unrelated to the claims and defenses at issue and also requests emails exchanges protected under the attorney client privilege.

2. Please produce copies of any reports, statements, recordings, memoranda, or testimony, whether signed or not, by any witnesses or purported witnesses or persons believed to be or understood by you to have knowledge of the events which is the subject matter of this case, which is in the possession, custody or control of the defendant or the defendant's attorney.

RESPONSE: OBJECTION. As drafted this Request for Production seeks confidential communications between Summit and its attorneys in violation of the attorney client privilege and also impermissibly seeks attorney work product. A summary of the privilege content and the privilege asserted can be found in the attached privilege log.

3. Please produce copies of all notes including hand-written notes with calculations relating to the subject matter of this litigation.

RESPONSE: Any notes and calculations have been produce in response to Request for Production 5. Please see documents Bates Numbered Summit 0001 - 334.

4. Please produce the personnel files of J.D. Koontz and his assistant. Plaintiff agrees to execute reasonable Confidentiality Order and not use said files for any purpose other than this litigation.

RESPONSE: OBJECTION. This litigation involves the alleged negligence of Summit in executing a letter of credit for Plaintiff's bid with the lottery commission. Therefore, the contents of Mr. Kootz and Ms. Ward's personnel folders have no bearing, whatsoever, on any claim or defense in this litigation. Furthermore, this Request for Production is not limited in time or to the subject matter of this action and, instead, seeks information indefinitely.

5. Please produce loan documents, letters of credit and all files that Summit has with regard to all dealings between it and Viking from July 1, 2001 until the present.

RESPONSE: Please see documents Bates Numbered Summit 0001 - 334.

6. Please produce any and all other documents and communications you relied on in answering these Interrogatories and Requests for Production of Documents.

RESPONSE: Please see documents Bates Numbered Summit 0001 - 441.

7. Please provide all manuals and/or documents provided to employees of Summit which provide said employees guidance and/or instruction on issuing loans and/or lines of credit to its customers.

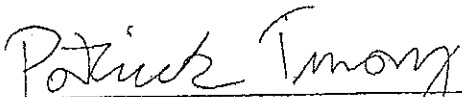
RESPONSE: OBJECTION. This litigation involves the alleged negligence of Summit in executing a letter of credit for Plaintiff's bid with the lottery commission. Therefore, the personnel manuals have no bearing, whatsoever, on any claim or defense in this litigation. Moreover, this Request for Production fails to specify a time period and, thus, seeks information indefinitely. This Request for Production is unduly burdensome based on the needs of the case. Summit's loan processing manual is voluminous. Because Plaintiff merely alleges that Summit, through its employees, miscalculate the amount necessary for its letter of credit, the producing of Summit's loan processing manual will not lead "to the discovery of admissible evidence."

8. Please provide a copy of the Declarations Page for insurance issued to Summit for errors and omissions, including any deductibles and/or self-insured portions thereof.

RESPONSE: Please see the Zurich Insurance Policy bates numbered Summit 000335-435.

SUMMIT COMMUNITY BANK, INC.,

By Counsel,



Edward D. McDevitt (WVSB #24377)
Patrick C. Timony (WVSB #11747)
BOWLES RICE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
(304) 347-1100
(304) 343-3058 -- facsimile

Privilege Log

Date	Subject	Bates Number	Privilege Asserted
06/08/2011	Attorney notes from conversation with J.D. Koontz regarding the allegations in Viking Video's Notice of Claim	Summit 000439-441	Attorney Client Communications/ Attorney Work Product
06/20/2011	Statement from Tammy Ward replying to Attorney inquiry regarding the allegations in Viking Video's Notice of Claim	Summit 000438	Attorney Client Communications/ Attorney Work Product
06/21/2011	Attorney notes from conversation with J.D. Koontz regarding Dennis Kearns subsequent visit to Summit seeking financing for his third bid with the Lottery Commission	Summit 000436-437	Attorney Client Communications/ Attorney Work Product

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VIKING VIDEO & MUSIC INC.,
A West Virginia Corporation,

Plaintiff,

v.

CIVIL ACTION NO. 12-C-2134
Judge Stuckey

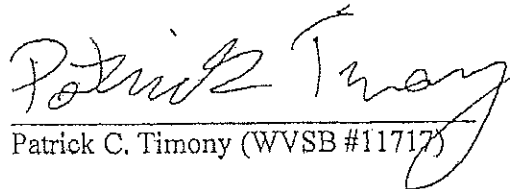
SUMMIT COMMUNITY BANK, INC.

Defendant.

CERTIFICATE OF SERVICE

The undersigned, counsel for Summit Community Bank, Inc. does hereby certify that I have served a true and accurate copy of the foregoing *Defendant Summit Community Bank, Inc.'s Answers and Responses to Plaintiff's First Set of Interrogatories and Request for Production of Documents* on the 15th day of May, 2013, by depositing the same in the United States mail, postage prepaid:

Michael J. Del Giudice, Esquire
Ciccarello, Del Giudice & LaFon
1219 Virginia Street, East
Suite 100
Charleston, West Virginia 25301


Patrick C. Timony (WVSB #11717)