

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  
FILED  
KANSAS CIRCUIT COURT  
CIVIL ACTION NO. 12-C-2134  
Judge Stuckey

**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.

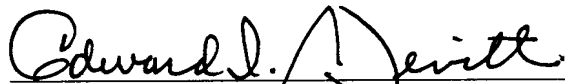
### **Sixteenth Affirmative Defense**

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)

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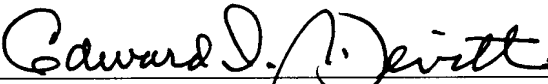
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CERTIFICATE OF SERVICE

The undersigned, counsel for Summit Community Bank, Inc. does hereby certify that I have served a true and accurate copy of the foregoing *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)