

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 Stucky

SUMMIT COMMUNITY BANK, INC.

Defendant.

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

Defendant, Summit Community Bank, Inc. ("Summit"), by counsel, respectfully replies in support of its Rule 41(b) Motion to Dismiss. As stated *infra*, Plaintiff, Viking Video & Music, Inc. ("Viking"), has failed to carry its burden of demonstrating good cause necessary for it to overcome the length of inactivity. Alternatively, even if Viking demonstrated good cause, Summit's prejudice outweighs the good cause proffered by Viking. For these reasons, this Court should grant Summit's Motion.

**ARGUMENT**

**A. Viking has failed to demonstrate good cause for the over one (1) year delay in prosecuting Viking's Complaint.**

"The law aids those who are diligent, not those who sleep upon their rights." See *Taylor v. Smith*, 171 W. Va. 665, 667, 301 S.E.2d 621, 624 (1983).

It is equally clear that it is the plaintiff's obligation to move his or her case to trial, and where the plaintiff fails to do so in a reasonable manner, the case may be dismissed as a sanction for the unjustified delay. To be clear, we squarely hold that a plaintiff has a continuing duty to monitor a case from the filing until the final judgment, and where he or she fails to do so, the plaintiff acts at his or her own peril.

19-20

*Dimon v. Mansy*, 198 W. Va. 40, 45, 479 S.E.2d 339, 344 (1996) (emphasis added). “The plaintiff bears the burden of going forward with evidence as to good cause for not dismissing the action. . . . In weighing the evidence of good cause and substantial prejudice, [this Court] should also consider:

- (1) the actual amount of time involved in the dormancy of the case,
- (2) whether the plaintiff made any inquiries to his or her counsel about the status of the case during the period of dormancy, and
- (3) other relevant factors bearing on good cause and substantial prejudice.”

Syl. pt. 3, in part, *id.* In this instance, Viking concedes that no activity occurred within a year; however, Viking proffers good cause exists to excuse its inactivity based solely on the “excusable neglect on behalf of the Plaintiff’s counsel for not obtaining a Scheduling Order.” [Pl.’s Resp. at p. 3.] This failure, in and of itself, cannot satisfy Viking’s burden to establish good cause necessary to avoid a Rule 41(b) dismissal for inactivity.

In *Meade v. West Virginia Division of Corrections*, plaintiff proffered excusable neglect as the reason no activity occurred within a year. No. 13-0983, 2014 WL 1672938 (W. Va. Apr. 24, 2014) (memorandum decision). Specifically, plaintiff alleged good cause existed, because during the inactivity: (i) plaintiff twice attempted to commit suicide; (ii) overdosed on heroine which resulted in a four (4) month hospital stay; and (iii) attended rehab for approximately three (3) month period. *Id.* at \*3. Further, plaintiff’s counsel informed this Court that his office contributed to the delay by failing to timely serve discovery on defendants. Ultimately, the Supreme Court of Appeals found none of these reasons satisfied plaintiff’s burden to show good cause:

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 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.* (brackets in original). Likewise, in *Raab v. Marshall*, plaintiffs asserted that this Court erred in dismissing plaintiffs' claims, because this Court's Rule 41(b) dismissal occurred two (2) months after plaintiffs requested a scheduling conference and obtained a scheduling order. No. 13-0249, 2013 WL 5966972 \*3 (W. Va. Nov. 8, 2013) (memorandum decision). In upholding this Court's dismissal under Rule 41(b), the Supreme Court of Appeals held that plaintiffs "set this scheduling conference and obtained this order *after* the Rule 41(b) motion was filed. Inasmuch as the motion to dismiss was pending, and more than a year of inactivity had already occurred, we do not find this after-the-fact action by the Raabs to be persuasive." *Id.* (italics in original).

*Meade* and *Raab* compare similarly to this matter. In all three (3) instances, counsel represented plaintiffs. However, despite this representation, none of the plaintiffs undertook any action or initiative to contact their attorneys regarding their case despite the enormous delay. Under *Dimon* and its progeny, this Court strongly considers "whether the plaintiff made any inquiries to his or her counsel about the status of the case during the period of dormancy" in determining whether good cause existed for the inactivity. Because Viking presents no evidence that it made any inquiries, this Court should grant Summit's Motion and dismiss Viking's Complaint.

In addition to presenting no evidence that Viking made any inquiries to counsel concerning the status of its case, the length of time of inactivity supports dismissal. Syl. pt. 3, in part, *Dimon*, 198 W. Va. 40, 479 S.E.2d 339. Four hundred seventy-eight (478) days elapsed between Summit's service of its discovery answers and its filing of Summit's Motion. This length of time exceeds the inactivity at issue in *Meade*, *Rabb*, and *Whiting v. Marion County Sheriff's Department*, three (3) recent decisions from the West Virginia Supreme Court of Appeals, all of which upheld the Circuit Court's Rule 41(b) dismissals for over a year's worth of inactivity.<sup>1</sup> Thus, the length of the delay weighs against a finding of good cause.

Finally, Viking offers no other circumstance or evidence of good cause for its delay. Viking is a sophisticated litigant. In fact, Viking frequently appears before this Court. [See, April 12, 2013, Cmpl. against Travelers and Derrick Properties, attached hereto as Ex. A]; [May 29, 2014, Cmpl. against Naylor and Pat's Bar & Grill, attached hereto as Ex. B]; [Jan. 15, 2008, Cmpl. against the Charter Oak Fire Insurance Company and BB&T Insurance Services, attached hereto as Ex. C.]<sup>2</sup> Furthermore, Viking pursued prosecution in two civil actions (13-C-720 & 14-C-720) during the dormancy and inactivity of this matter. These other proceedings provided Viking frequent opportunities to discuss this litigation with counsel and, notwithstanding these opportunities, Viking failed to do so. Given the length of the delay, lack of effort to communicate with counsel about the status of the case, and no other evidence to justify the delay, this Court should dismiss Viking's Complaint pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure.

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<sup>1</sup> *Meade*, 2014 WL 1672938 at \*1 (inactivity of three hundred (385) eighty-five days); *Raab*, 2013 WL 5966972 (inactivity of three hundred sixty-six (366) days); *Whiting*, No. 11-0575, 2012 WL 4373177 (W. Va. Sept. 21, 2012) (memorandum decision) (inactivity for three hundred eighty-six (386) days).

<sup>2</sup> In addition to these three (3) matters and this current litigation, Viking also appeared before this Court twice as a defendant in tax delinquency proceedings (Civil Action Nos. 99-C-1599, 01-C-1192). In all, since 1999, Viking has appeared as a party before this Court on at least eight (8) separate occasions.

**B. Summit suffered prejudice as a consequent of Viking's failure to prosecute.**

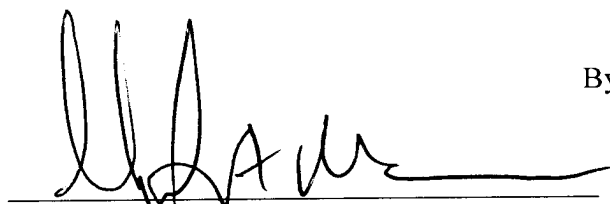
Even if Viking met its burden of establishing good cause for delay, Summit's prejudice outweighs Viking's good cause. Since Viking commenced this action against Summit, the two (2) employees allegedly responsible for Summit's negligence, J.D. Koontz ("Mr. Koontz") and Tammy Ward ("Ms. Ward"), have left their employment. This prejudices Summit as Summit no longer has unobstructed access to these individuals in preparation of its defenses. Furthermore, the passage of time has caused this matter to go stale. Because Viking proffered no good cause for its inactivity, Summit's prejudice outweighs any alleged good cause provided. Therefore, this Court should dismiss Viking's Complaint pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure.

**CONCLUSION**

For the reasons stated throughout this Reply in Support, the Memorandum of Law and Summit's Motion 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.,

By Counsel,

A handwritten signature in dark 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

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

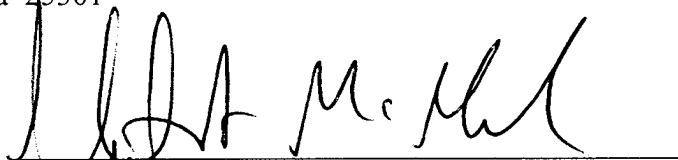
SUMMIT COMMUNITY BANK, INC.

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 *Reply in Support of Summit Community Bank, Inc.'s Rule 41(b) Motion to Dismiss* on the 26th day of September, 2014, via hand delivery:

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

  
Stuart A. McMillan (WVSB #6352)

FILED  
2014 SEP 26 AM 11:14  
CATHY S. BRISCH, CLERK  
KANAWHA COUNTY CIRCUIT COURT

**CIVIL CASE INFORMATION STATEMENT  
CIVIL CASES**

**IN THE CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA**

**I. CASE STYLE:**

**In Re:**

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

**PLAINTIFF(S)**

**VS.**

**THE TRAVELERS INDEMNITY  
COMPANY, INC., a corporation,  
and DERRICK PROPERTIES, INC.,  
a corporation,**

**DEFENDANT(S)**

**Days to**

**Service  
Answer**

**THE TRAVELERS INDEMNITY  
COMPANY, INC.  
c/o Corporation Service Company  
209 West Washington Street  
Charleston, West Virginia 25302**

**30**

**Secretary of State**

**DERRICK PROPERTIES, INC.  
c/o Eugene R. Hoyer  
22 Capitol Street  
Charleston, West Virginia 25301**

**30**

**Secretary of State**

**EXHIBIT  
A**

PYMT Type K  
Rcpt # 501637 \$155 ☒ \$135  
Iss. Sum. # 7 cc No Sum. Iss  
☒ Ret. to Atty. \$20cm X  
Mailed CM/RM \$5 clk X  
Mailed to sos w/ck#  
Sent to w/ck#

**Original of Complaint and 2 copies furnished herewith.**

2013 APR 12 PM 3:35  
CLERK OF COURT  
KANAWHA COUNTY  
CSM  
FILED  
Bloom

**PLAINTIFF(S): VIKING VIDEO & MUSIC INC.,**  
**a West Virginia corporation**

**CASE NO.**

**DEFENDANT(S): THE TRAVELERS INDEMNITY COMPANY, INC., a**  
**corporation, and DERRICK PROPERTIES, INC., a corporation**

**II. TYPE OF CASE:**

<input type="checkbox"/> ASBESTOS	<input type="checkbox"/> ADOPTION	<input type="checkbox"/> APPEAL FROM MAGISTRATE COURT
<input type="checkbox"/> PROFESSIONAL MALPRACTICE	<input type="checkbox"/> CONTRACT	<input type="checkbox"/> PETITION FOR MODIFI- CATION OF MAGISTRATE SENTENCE
<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> REAL PROPERTY	<input type="checkbox"/> MISCELLANEOUS CIVIL
<input type="checkbox"/> PRODUCT LIABILITY	<input type="checkbox"/> MENTAL HEALTH	<input checked="" type="checkbox"/> OTHER
<input type="checkbox"/> OTHER TORT	<input type="checkbox"/> APPEAL OF ADMINISTRATIVE AGENCY	

**III. JURY DEMAND** ☒ YES ☐ NO

**CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR):** \_\_\_\_\_

**IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE?**

☐ YES ☒ NO

**IF YES, PLEASE SPECIFY;**

- ☐ Wheelchair accessible hearing room and other facilities.
- ☐ Interpreter or other auxiliary aid for the hearing impaired.
- ☐ Reader or other auxiliary aid for the visually impaired.
- ☐ Spokesperson or other auxiliary aid for the speech impaired.
- ☐ Other: UNKNOWN

**Attorney Name:** Frank T. Litton, Jr., #2223

**Representing:**

**Firm:** LITTON LAW OFFICE

☒ Plaintiff ☐ Defendant

**Address:** 1215 Quarrier Street  
Charleston, West Virginia 25301-1839

**Telephone:** (304) 343-4627

**Dated:** \_\_\_\_\_

**Signature**

\_\_\_\_\_  
**Pro Se**



**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**

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

**PLAINTIFF,**

**VS.**

**CIVIL ACTION NO. 13-C-720**

**THE TRAVELERS INDEMNITY  
COMPANY, INC., a corporation,  
and DERRICK PROPERTIES, INC.,  
a corporation,**

**DEFENDANTS.**

**COMPLAINT**

Now comes the Plaintiff, Viking Video & Music Inc., by counsel, who for its cause of action against the Defendants, The Travelers Indemnity Company, Inc. and Derrick Properties, Inc., state as follows:

**PARTIES**

1. The 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, The Travelers Indemnity Company, Inc. ("Travelers"), now is and at all times hereinmentioned was an insurance company doing business in Kanawha County, West Virginia.

3. The Defendant, Derrick Properties, Inc. ("Derrick"), now is and at all times hereinmentioned was corporation doing business in Kanawha County, West Virginia.

2013 APR 2 PM 3:35  
KANAWHA COUNTY CIRCUIT COURT  
CSM  
Bloom

### **JURISDICTION AND VENUE**

4. Jurisdiction and venue are proper in this Court in that there does not exist diversity by and among the Plaintiff and the Defendants, the Defendants both do business in Kanawha County, West Virginia and all of the acts and omissions that occurred by Defendants were in Kanawha County, West Virginia.

### **STATEMENT OF FACTS**

5. Plaintiff was the tenant of a parcel of property located at 1535 West Washington Street, Charleston, West Virginia ("Premises").

6. Defendant Derrick now is and all times hereinmentioned was the owner of the adjacent piece of property located at 1537 West Washington Street, Charleston, West Virginia.

7. At all times relevant hereto, the Plaintiff insured its personal property located within the Premises with a commercial insurance policy issued by Defendant Travelers.

8. On April 14, 2011, a storm caused damage to the roof of Defendant Derrick's property which caused water to leak into the Premises and damage the personal property of the Plaintiff.

9. In addition, the storm caused damage to the roof of the Premises which also caused water to leak into the Premises and damage the Plaintiff's personal property.

10. The Plaintiff made a claim for the damage to its personal property

with Defendant Travelers as a result of the water damaging its personal property.

11. By letter dated June 1, 2011, Defendant Travelers denied the claim.

### **COUNT I**

#### **(Defendant Derrick - Negligence)**

12. The Plaintiff realleges, reasserts and incorporates by reference each and every allegation set forth in Paragraph 1 through 11 of this Complaint as if fully set forth herein.

13. Defendant Derrick had a duty to inspect, maintain and repair its property so as not to cause injury or damage to the Plaintiff's personal property.

14. Defendant Derrick breached said duty by failing to properly inspect, maintain and repair its property.

15. As a direct and proximate result of Defendant Derrick failing to properly inspect, maintain and repair his property, the Plaintiff has incurred damages to its personal property.

### **COUNT II**

#### **(Defendant Travelers - Breach of Contract)**

16. The Plaintiff realleges, reasserts and incorporates by reference each and every allegation set forth in Paragraph 1 through 15 of this Complaint as if fully set forth herein.

17. Defendant Travelers entered into an insurance contract with the Plaintiff to provide insurance for losses and damages to its personal property

caused by storms and/or negligence of other parties.

18. Defendant Travelers had a duty under said contract to provide insurance coverage for the losses sustained by Plaintiff as a result of the storm damage on April 14, 2011.

19. Defendant Travelers breached said contract by failing to provide coverage for the damage the Plaintiff incurred.

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

### **COUNT III**

#### **(Defendant Travelers - Bad Faith)**

21. The Plaintiff realleges, reasserts and incorporates by reference each and every allegation set forth in Paragraph 1 through 20 of this Complaint as if fully set forth herein.

22. Pursuant to the contract of insurance entered into by and between Plaintiff and Defendant Travelers, Defendant Travelers had a duty of good faith and fair dealings in its conduct and actions with the Plaintiff.

23. Defendant Travelers breached said duty of good faith and fair dealings by denying the Plaintiff's claim.

24. As a direct and proximate result of Defendant Traveler's breach of its duty of good faith and fair dealings with the Plaintiff, the Plaintiff has incurred damages as set forth hereinbelow.

#### **COUNT IV**

##### **(Defendant Travelers - Unfair Claims Settlement Practices)**

25. The Plaintiff realleges, reasserts and incorporates by reference each and every allegation set forth in Paragraph 1 through 24 of this Complaint as if fully set forth herein.

26. Pursuant to West Virginia Code §33-11-1, et seq., Defendant Travelers had a statutory prohibition against unfair claims settlement practices.

27. Defendant Travelers violated its statutory prohibition against unfair claims settlement practices by not effectuating a prompt, fair and equitable settlement of the Plaintiff's claim after liability had become reasonably clear; in compelling the Plaintiff to institute this litigation to recover amounts due under the insurance policy; and such other acts and omissions as may be discovered.

28. As a direct and proximate result of Traveler's unfair claims settlement practices, the Plaintiff has incurred damage as set forth hereinbelow.

#### **COUNT V**

##### **(Defendant Travelers - Punitive Damages)**

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

30. Traveler's conduct in handling the Plaintiff's claim and wrongfully denying the same was intentional, willful, wanton and with reckless disregard for

the Plaintiff's interest.

31. As a direct and proximate result of Defendant Traveler's intentional, willful, wanton and reckless disregard for the Plaintiff's interest, the Plaintiff is entitled to punitive damages from and against Defendant Travelers.

#### **DAMAGES**

32. As a direct and proximate result of the Defendants' wrongful conduct as set forth hereinabove, the Plaintiff is entitled to the following damages:

- A. Value of personal property lost;
- B. Pre and post-judgment interest;
- C. Punitive damages of and against Defendant Travelers;
- D. Attorney fees and costs; and
- D. Such incidental and other damages that may be determined at a later date.

#### **PRAYER FOR RELIEF**

**WHEREFORE**, the Plaintiff demands judgment of and against the Defendant Derrick for compensatory damages and judgment of and against the Defendant Travelers for compensatory and punitive damages, all as to be determined by a jury. The Plaintiff further requests that the Court award its 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,**

**LITTON LAW OFFICES**

By: 

Frank T. Litton, Jr. (WV#2223)  
1215 Quarrier Street  
Charleston, West Virginia 25301-1839  
Phone: (304) 343-4627  
Attorney for Plaintiff

**CIVIL CASE INFORMATION STATEMENT  
CIVIL CASES**

CDD  
**FILED**

**IN THE CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA 11:55**

CLERK OF COURT  
KANAWHA COUNTY CIRCUIT COURT

**I. CASE STYLE:**

**In Re:**

**VIKING VIDEO & MUSIC, INC.,**

**PLAINTIFF(S)**

**CASE #** 14-C-996  
Stucky

**VS.**

**JOHN P. NAYLOR a/k/a  
Pat Naylor, and PAT'S BAR  
& GRILL, LLC,**

**DEFENDANT(S)**

	<u>Days to</u>	<u>Service</u> <u>Answer</u>
<b>JOHN P. NAYLOR a/k/a Pat Naylor 1648 Ivydale Road Clay, West Virginia 25043</b>	<b>20</b>	<b>Personal</b>
<b>PAT'S BAR &amp; GRILL, LLC c/o Pat Naylor 1648 Ivydale Road Clay, West Virginia 25043</b>	<b>30</b>	<b>Secretary of State</b>

**Original of Complaint and 4 copies furnished herewith.**

**EXHIBIT  
B**



**PLAINTIFF(S): VIKING VIDEO & MUSIC, INC.**

**CASE NO.**

**DEFENDANT(S): JOHN P. NAYLOR a/k/a Pat Naylor, and PAT'S BAR & GRILL, LLC**

**II. TYPE OF CASE:**

<input type="checkbox"/> ASBESTOS	<input type="checkbox"/> ADOPTION	<input type="checkbox"/> APPEAL FROM MAGISTRATE COURT
<input type="checkbox"/> PROFESSIONAL MALPRACTICE	<input type="checkbox"/> CONTRACT	<input type="checkbox"/> PETITION FOR MODIFICATION OF MAGISTRATE SENTENCE
<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> REAL PROPERTY	<input type="checkbox"/> MISCELLANEOUS CIVIL
<input type="checkbox"/> PRODUCT LIABILITY	<input type="checkbox"/> MENTAL HEALTH	<input checked="" type="checkbox"/> OTHER
<input type="checkbox"/> OTHER TORT	<input type="checkbox"/> APPEAL OF ADMINISTRATIVE AGENCY	

**III. JURY DEMAND** ☒ YES ☐ NO

**CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR):** \_\_\_\_\_

**IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE?**

☐ YES ☒ NO

**IF YES, PLEASE SPECIFY;**

- ☐ Wheelchair accessible hearing room and other facilities.
- ☐ Interpreter or other auxiliary aid for the hearing impaired.
- ☐ Reader or other auxiliary aid for the visually impaired.
- ☐ Spokesperson or other auxiliary aid for the speech impaired.
- ☐ Other: UNKNOWN

**Attorney Name:** Michael J. Del Giudice, #982

**Firm:** CICCARELLO, DEL GIUDICE & LaFON

**Address:** 1219 Virginia Street, East, Suite 100  
Charleston, West Virginia 25301

**Telephone:** (304) 343-4440

**Dated:**

5-28-14  
**Pro Se**

**Representing:**

☒ Plaintiff ☐ Defendant

  
**Signature**

**IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA**  
**VIKING VIDEO & MUSIC, INC.,**

**PLAINTIFF,**

**VS.**

**JOHN P. NAYLOR a/k/a  
Pat Naylor, and PAT'S BAR  
& GRILL, LLC,**

**DEFENDANTS.**

**CIVIL ACTION NO. 14-C-996**

*Stucky*

**COMPLAINT**

Now comes the Plaintiff, Viking Video & Music, Inc., by counsel, who for its causes of action against the Defendants states as follows:

**PARTIES**

1. Plaintiff, Viking Video & Music, Inc., now is and at all times hereinmentioned was a corporation duly licensed and registered in West Virginia and doing business in Kanawha County, West Virginia.
2. Defendant, John P. Naylor a/k/a Pat Naylor (hereinafter referred to as "Defendant Naylor"), now is and all times hereinmentioned was the owner of Pat's Bar and Grill, LLC and conducted business in or about Kanawha County, West Virginia.
3. Defendant, Pat's Bar & Grill, LLC (hereinafter referred to as "Defendant Pat's") now is and all times hereinmentioned was a West Virginia corporation doing business in Kanawha County, West Virginia.

### **STATEMENT OF FACTS**

4. Plaintiff is in the business of leasing video lottery machines to various establishments, and in particular, leases video lottery machines to Defendants.

5. Defendants own establishments in Clendenin, West Virginia and Big Otter, West Virginia in which they have video lottery machines and other coin-operated devices which they lease from Plaintiff.

6. As of May 23, 2014, Defendants owed Plaintiff \$971.00 for its share of the lottery proceeds derived from the video lottery machines located at the Big Otter location.

7. As of May 23, 2014, Defendants owed Plaintiff \$1,878.00 for its share of the lottery proceeds derived from the video lottery machines located at the Clendenin location.

8. Between July 23, 2013 and October 29, 2013, Defendants wrote Plaintiff three bad checks which totaled \$9,757.00.

9. Defendants have been paying down those three bad checks on a weekly basis and as of May 23, 2014, Defendants owe \$4,603.00 for those three bad checks.

10. For all of these said debts set forth hereinabove, Defendants owe Plaintiff the total sum of \$7,452.00.

11. Plaintiff has requested Defendants pay said sums; however, Defendants have refused and continue to refuse to pay said sums.

**WHEREFORE**, Plaintiff demands judgment of and against Defendants in the amount of \$7,452.00, plus pre and post-judgment interest, costs in bringing this action, including reasonable attorney fees, and such other relief as the Court deems just.

**DENNIS O. KERNS**

**By Counsel,**

**CICCARELLO, DEL GIUDICE & LAFON**

By: 

Michael J. Del Giudice (WV #982)  
1210 Virginia Street, East, Suite 100  
Charleston, West Virginia 25301  
Phone: (304) 343-4440  
Attorney for Plaintiff

CIVIL CASE INFORMATION STATEMENT  
CIVIL CASES

FILED

IN THE CIRCUIT COURT, KANAWHA COUNTY, WEST VIRGINIA

2008 JAN 15 AM 9:39

CW

I. CASE STYLE:

In Re:

VIKING VIDEO & MUSIC, INC.,

Plaintiff(s)

Case # 08-C-87  
Walker

v.

THE CHARTER OAK FIRE INSURANCE  
COMPANY, A CONNECTICUT CORPORATION;  
THE TRAVELERS GROUP, A CONNECTICUT  
CORPORATION; AND BB&T INSURANCE  
SERVICES, INC., A WEST VIRGINIA  
CORPORATION

Defendant(s)

Days to

Service  
Answer

THE CHARTER OAK FIRE INSURANCE COMPANY  
One Tower Square  
Hartford, Connecticut 06115

30

Secretary of the State

THE TRAVELERS GROUP  
c/o Ernest J. Wright  
P.O. Box 990027  
One City Place  
Hartford, Connecticut 06199-0024

30

Secretary of the State

BB&T INSURANCE SERVICES, INC.  
c/o CT Corporation System  
707 Virginia Street, East  
Charleston, West Virginia 25301

30

Secretary of the State

Original of Complaint and 2 copies furnished herewith.

EXHIBIT  
C

PYMT Type K  
Rcpt # 424882 \$145 ☒ \$135  
Iss. Sum. + cc No Sum. Iss  
☒ Ret. to Atty. \$20cm X  
Mailed CM/RM \$5 clk X  
Mailed to sos w/ck#  
Sent to w/ck#

PLAINTIFF(S): VIKING VIDEO & MUSIC, INC.  
DEFENDANT(S): THE CHARTER OAK FIRE INSURANCE  
COMPANY, A CONNECTICUT CORPORATION; THE  
TRAVELERS GROUP, A CONNECTICUT CORPORATION;  
AND BB&T INSURANCE SERVICES, INC., A WEST VIRGINIA  
CORPORATION

CASE NO.

II. TYPE OF CASE:

<input type="checkbox"/> ASBESTOS	<input type="checkbox"/> ADOPTION	<input type="checkbox"/> APPEAL FROM MAGISTRATE COURT
<input type="checkbox"/> PROFESSIONAL MALPRACTICE	<input type="checkbox"/> CONTRACT	<input type="checkbox"/> PETITION FOR MODIFI- CATION OF MAGISTRATE SENTENCE
<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> REAL PROPERTY	<input type="checkbox"/> MISCELLANEOUS CIVIL
<input type="checkbox"/> PRODUCT LIABILITY	<input type="checkbox"/> MENTAL HEALTH	<input checked="" type="checkbox"/> OTHER
<input type="checkbox"/> OTHER TORT	<input type="checkbox"/> APPEAL OF ADMINISTRATIVE AGENCY	

III. JURY DEMAND ☒ YES ☐ NO

CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR): \_\_\_\_\_

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE SPECIAL  
ACCOMMODATIONS DUE TO A DISABILITY OR AGE?

☐ YES ☒ NO

IF YES, PLEASE SPECIFY;

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- ☐ Interpreter or other auxiliary aid for the hearing impaired.
- ☐ Reader or other auxiliary aid for the visually impaired.
- ☐ Spokesperson or other auxiliary aid for the speech impaired.
- ☐ Other: UNKNOWN

Attorney Name: Michael J. Del Giudice, #982

Firm: CICCARELLO, DEL GIUDICE & LaFON

Address: 1219 Virginia Street, East, Suite 100  
Charleston, West Virginia 25301

Telephone: (304) 343-4440

Dated: January 14, 2008

\_\_\_\_ Pro Se

Representing:

☒ Petitioner Defendant

  
\_\_\_\_\_  
Signature

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

VIKING VIDEO & MUSIC, INC.,  
A WEST VIRGINIA CORPORATION,

PLAINTIFF,

VS.

CIVIL ACTION NO.

FILED

2008 JAN 15 AM 9:39

DAIRY S. RAYSON, CLERK  
KANAWHA CO. CIRCUIT COURT

08-C-87

Walker

THE CHARTER OAK FIRE INSURANCE  
COMPANY, A CONNECTICUT CORPORATION;  
THE TRAVELERS GROUP, A CONNECTICUT  
CORPORATION; AND BB&T INSURANCE  
SERVICES, INC., A WEST VIRGINIA  
CORPORATION,

DEFENDANTS.

COMPLAINT

Now comes the Plaintiff, Viking Video & Music, Inc., by counsel, who for its causes of action against the Defendants states as follows:

PARTIES

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

2. The Defendant, The Charter Oak Fire Insurance Company ("Charter Oak"), now is and at all times herein mentioned was a Connecticut corporation doing business in Kanawha County, West Virginia. Upon information and belief, Charter Oak is a wholly owned subsidiary of The Travelers Group.

3. The Defendant, The Travelers Group ("Travelers"), now is and all

times herein mentioned was a Connecticut corporation doing business in Kanawha County, West Virginia, and at all times herein mentioned was the parent corporation and agent for Charter Oak.

4. The Defendant, BB&T Insurance Service, Inc. ("BB&T"), now is and at all times herein mentioned was a West Virginia corporation doing business in Kanawha County, West Virginia, and the agent for Charter Oak.

#### **STATEMENT OF FACTS**

5. Viking has been a longstanding customer of BB&T and has for many years relied upon BB&T to provide it insurance coverage for its various needs.

6. In reliance upon BB&T's advice and counseling, Viking purchased an insurance policy from Charter Oak, Policy Number IO660-1346C935, and such policy was in effect on January 15, 2007.

7. On January 15, 2007, Viking experienced a fire loss for damage to, inter alia, personal property located at 1531-1533 West Washington Street, Charleston, West Virginia.

8. Due to the fire loss suffered by Viking, it made a claim under its insurance policy issued by Charter Oak, Claim Number CDH2009.

9. When the claim was received, it was assigned to Robert P. Hilgartner, a Claims Representative employed by Travelers.

10. After a lengthy and prolonged investigation, Travelers partially paid the claim; however, denied coverage for \$13,386.57 of personal property owned



by Viking that was lost and/or damaged in the fire.

11. Pursuant to the insurance policy issued by Charter Oak, these items should have been covered losses.

12. Viking has requested that it be reimbursed for these additional losses; however, Travelers has denied and continues to deny payment for said losses.

**FIRST CAUSE OF ACTION**  
**(Breach of Contract)**

13. Plaintiff reasserts, realleges and incorporates by reference each and every allegation set forth in Paragraphs one through 12 of this Complaint as if full set forth herein.

14. Charter Oak entered into an insurance contract with Viking to provide insurance for losses of personal property.

15. Charter Oak had a duty under that contract to provide insurance coverage to Viking for losses of personal property.

16. Charter Oak breached that contract by failing to provide coverage for personal property losses sustained by Viking.

17. As a result of that breach of contract, Viking has incurred damages as set forth hereinbelow.

**SECOND CAUSE OF ACTION**  
**(Bad Faith)**

18. Plaintiff reasserts, realleges and incorporates by reference each and every allegation set forth in Paragraphs one through 17 of this Complaint

as if fully set forth herein.

19. Pursuant to the contract of insurance entered into by and between Viking and Charter Oak, Defendants, Charter Oak and Travelers, had a duty of good faith and fair dealings in their conduct and actions with Viking.

20. Both Charter Oak and Travelers breached their duties of good faith and fair dealings with Viking in the handling of Viking's insurance claim.

21. As a direct and proximate result of the Defendants, Charter Oak and Traveler's, breach of their duties to act in good faith and fair dealings with Viking, Viking has incurred damages as set forth hereinbelow.

**THIRD CAUSE OF ACTION**  
**(Unfair Settlement Practices)**

22. Plaintiff reasserts, realleges and incorporates by reference each and every allegation set forth in Paragraphs one through 21 of this Complaint as if fully set forth herein.

23. Pursuant to West Virginia Code, § 33-11-1, *et seq.*, the Defendants, Charter Oak and Travelers, had a statutory prohibition against unfair claim settlement practices.

24. Defendants, Charter Oak and Travelers, violated their statutory prohibition against unfair claim settlement practices by:

- a) Failing to affirm coverage of the Viking claim within a reasonable time after proof of loss statement had been submitted;
- b) Not attempting in good faith to effectuate a prompt, fair and equitable settlement of the Viking claim after liability had become

adequately protect its personal property in the event of a foreseeable fire loss.

28. To the extent that the insurance policy issued to Viking by Charter Oak through Charter Oak's agent, BB&T, does not cover Viking's personal property, then BB&T and Charter Oak breached their duty to provide adequate insurance coverage to Viking and were otherwise negligent in providing Viking an insurance policy that did not adequately protect its property interests.

29. As a direct and proximate result of the negligence of BB&T and Charter Oak, Viking has incurred damages as set forth hereinbelow.

**FIFTH CAUSE OF ACTION**  
**(Punitive Damages)**

30. Plaintiff reasserts, realleges and incorporates by reference each and every allegation set forth in Paragraphs one through 29 of this Complaint as if fully set forth herein.

31. As a direct and proximate result of the Defendants, Charter Oak and Traveler's, intentional and wrongful conduct including bad faith and unfair claim settlement practices, Plaintiff is entitled to punitive damages from and against those two Defendants.

**DAMAGES**

32. As a direct and proximate result of the Defendants' wrongful conduct as set forth herein above, Plaintiff is entitled to the following damages:

- a. loss of personal property;
- b. attorneys' fees and costs;
- c. punitive damages; and

d. such incidental and other damages that may be determined at a later date.

**PRAYER FOR RELIEF**

Wherefore, Plaintiff demands judgment of and against the Defendants, and each of them, for compensatory and punitive damages as requested hereinabove. Plaintiff requests that it be awarded its costs and expenses incurred in bringing this action, including reasonable attorneys' fees, and such other relief as the Court deems just.

**PLAINTIFF DEMANDS TRIAL BY JURY.**

Respectfully submitted,

**VIKING VIDEO & MUSIC, INC.**

**By Counsel**

**CICCARELLO, DEL GIUDICE & LAFON**

By: 

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