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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOUNTAINEER FIRE & RESCUE EQUIPMENT, LLC, BRIAN CAVENDER, and WALTER CAVENDER,

Defendants/Counter and Cross-Claim Plaintiffs Below, Petitioners,

v.

CITY NATIONAL BANK OF WEST VIRGINIA,

Plaintiff/Counter-Claim Defendant Below, Respondent,

and

JOE BEAM

Defendant/Cross-claim Defendant Below, Respondent.

From the Circuit Court of Kanawha County, West Virginia
Honorable Charles E. King
Civil Action No. 18-C-7

PETITIONERS' REPLY BRIEF

Mountaineer Fire & Rescue Equipment, LLC,
Brian Cavender, And Walter Cavender, *by counsel*

Michael D. Weikle (04982)
51 Gibson Court
Tiffin, OH 44883
Phone: (734) 358-1876
Facsimile: (888) 482-6732
mikeweikle@weiklelaw.com

Counsel for Petitioners

I. INTRODUCTION

City National opens its reply with its of own statement of the case and footnote rebuke of Petitioners' counsel claiming "**nothing in the Petitioners' "Statement of the Case" should be accepted at face value without cross-referencing any assertion with the actual record.**" It is an extraordinarily specious admonition[1] considering the Court's refusal of Respondents' first motion to dismiss[2] following Mountaineer's exposure of Respondents' material[3] false statements of fact[4] claimed in support; and refusal of its second pending motion as moot.

In light of Respondents' pejorative record on appeal in filing two baseless motions to dismiss, which the Court refused, Mountaineer expected Respondents would finally respond to Mountaineer's

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[1] The admonition appears to be intended to divert the Court's recollection of Respondents waste of the Court's time, and substantial disruption of Mountaineer's efforts to perfect its appeal and the Court's scheduling order in filing a cryptic motion to dismiss premised on an order it not only failed to identify, it intentionally withheld from the Court's consideration. An order, on its face revealed their motion was premised on knowingly false statements of material facts, its claimed references did not support. **(JA II 182)**

[2] City National first threatened to file its motion on November 1, 2018 claiming in cryptic fashion: "You do realize that the dismissal of one of multiple parties in a case is not an appealable order," twice accusing Mountaineer's counsel of submission of a false statement of material fact with its Notice of Appeal, ending with a threat of sanctions.

After the tortured exchange of several emails, Mountaineer was able to extract sufficient information to determine City National's threat was based on a claimed issue that was not litigated below or claimed in either proposed orders for dismissal signed and entered by the Circuit Court as submitted on September 26, 2018 at 1:04PM. Thus, Mountaineer stated it did not agree, and encouraged City National to file its motion early. City National, however, did not file its motion as it repeatedly claimed it was going forward with its motion, and later repeat its threat of filing it and claim sanctions. Thus, substantially distracting Mountaineer's efforts to perfect its appeal to research and expose as inapplicable doctrine and case law City National claimed in support of its threatened motion.

City National's threats of filing its motion ended on November 29, 2018 after City National agreed to sign a ministerial order that its counsel re-captioned "Agreed Final Order," which Respondents' counsel falsely represented as resolving Joe Beam's motion to dismiss. Although, Joe Beam's counsel did not file the first motion to dismiss this appeal, he joined in the motion the next day expressing his full support, without disclosure or discussion of his most recent filing of Nov. 1, 2018 with the Circuit Court admitting both the Interpleader Order and the Order Granting ... Joe Beam's Motion to Dismiss the Cross-Claims Against Him" (the "**Bean Order**") were appealable when entered on September 26, 2018.

[3] ***Lynch v. Wexford Health Sources,* at page 3** (S.D. W.Va., 2018) ("A fact is material when it 'might affect the outcome of the suit under the governing law.'"), *quoting*. ***Strothers v. City of Laurel,*** 895 F.3d 317, 326 (4th Cir. 2018), *quoting* ***Anderson v. Liberty Lobby, Inc.,*** 477 U.S. 242, 248 (1986)).

[4] In submitting this false material statement of fact, City National's counsel violated the West Virginia Rules of Professional Conduct. Specifically, **Rule 8.3 Candor Toward the Tribunal**: (a) A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal.

arguments it refused to address below, inviting error giving rise to this appeal. Petitioners' expectations were quickly dashed by the sheer hypocrisy of City National's footnote admonition; and misguided examples offered in support of its submission of a separate Statement of the Case. In its first effort to support its submission of a separate Statement of the Case, City National argues:

> [I]nstead of refuting' it point-by-point, the Respondent will present a Statement of the Case that is actually supported by the record. But to provide some examples, the first three full paragraphs in the Petitioners' "Statement of the Case" cites as support for the assertions contained therein (JA I 10-11), but **none of the assertions in those three full paragraphs** are supported anywhere on pages ten and eleven of the Appendix.

The assertion is true, but intentionally misleading. Only the Appendix reference is in error. The factual statements presented therein are true; have never been in dispute; and fully supported in the record.[5] City National's suggestion otherwise is less than forthcoming. In its next offering in support of its submission of a separate "Statement of the Case" likewise fails when exposed to the record of City National's motion to dismiss.[6]

City National next claims: "The fifth full paragraph in the Petitioners' "Statement of the Case" contains no reference to the record" is rather obvious, and Petitioners agree it failed to reference the record. City National's claim "there is nothing in the record to support the factual allegations contained in the fifth full paragraph" is revealed as knowingly false by its own motion to dismiss.

In its motion to dismiss, City National assumed as true, and repeated verbatim 16 of Mountaineer's 100 factual allegations. In presenting its fifth full paragraph argument, City National has apparently overlooked its acceptance as true and verbatim restatement of Mountaineer's allegations stated in paragraphs **40** and **42**[7] of Mountaineer's Answer, Counter Cross-claims ("**Mountaineer's Answer**") and failed to notice the fifth full paragraph of Mountaineer's Statement of the Case is a near verbatim

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[5] **JA I 15-16 at ¶¶ 21-31.**

[6] **JA I 36.**

[7] **JA I 37 at ¶¶ 1(d) and 1(c).**

restatement of ¶¶ 41 and **42**[8] accepting and restating verbatim ¶¶ 40 and **42.** As such, in claiming there is nothing in the record to support it, City National, has again been hoisted with its own petard.[9]

City National's footnote rebuke of the veracity of Mountaineer's arguments was intended to gain the Court's rejection of Mountaineer's Statement of the Case and legal errors claimed. City National's like efforts below were successful in inviting error compelling the reversal of the Circuit Court's dismissal of all of Mountaineer's claims against the Respondents on a claimed Rule 12(b)(6) motion to dismiss.[10]

City National also claims for the first time: Despite Petitioners' representations to the contrary, City National stated that it assumed the allegations of the counterclaims for purposes of its motion to dismiss.[6] [[11]] City National references the correct page in the Appendix, but the most cursory review of (JA I 37) reveals the argument as knowingly false, as to accept it as true would

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[8] **JA I 18.**

[9] JA I 92. For 'tis the sport to have the engineer ***Hoist with his own petard, an't shall go hard But I will delve one yard below their mines and blow them at the moon.*** *Hamlet*, Act 3, scene 4, 202-209 (Shakespearean idiom meaning "to cause the bomb maker to be blown up with his own bomb, or fall into one's own trap.")

[10] At bottom, Mountaineer invites the close review of its references to the record, with a metaphor: The farmer should remain suspicious of the fox's claims regarding the hens' well-being.

[11] The "Statement of the Case" contained in the Petitioners' Brief **is so untethered to what appears in the record** that instead of refuting' it point-by-point, the Respondent will present a Statement of the Case that is actually supported by the record. **But to provide some examples, the first three full paragraphs in the** Petitioners' "Statement of the Case" cites as support for the assertions contained therein (JA I 10-11}, but **none of the assertions in those three full paragraphs** are supported anywhere on pages ten and eleven of the Appendix.

[City National does not claim "those three full paragraphs" present any information that is not fully supported by the record, but the clear intent is to suggest as much in his reference to them as supporting its false claim of the Petitioner's statement of the case as having no support in the record. The correct reference to the record should have been [JA I representations having no that his reference to the representations are false, but intentionally misrepresents the

stretch the most aggressive imagination beyond all reasonable limits.. City National begins its Motion to Dismiss as follows:

¶ 1. City National's Motion to Dismiss **assumes the factual allegations in the Counter-Claims as follows:**

> a. 35. Mountaineer Fire first opened its City National checking account number 8006593589 ("Authorized Account No. 8006593589") on March 18, 2011.
>
> b. 36. At the time Authorized Account No. 8006593589 was opened, Mountaineer Fire members Joe Beam and Brian Cavender executed and returned to City National its form resolution titled "Limited Liability Company Banking Resolution" (referred to herein as the "Mountaineer Fire Resolution of 2011 ")

City National continues with the assumption of 14 additional factual allegations of Mountaineer's for a total acceptance as true, of 16 out of 100 factual allegations. Having failed to consider 84 of Mountaineer's factual allegations, it is not difficult to understand how Respondents' counsel erroneously claim Mountaineer did not identify a single contract term breached by City National; or any breach of fiduciary duty by Joe Beam in the embezzlement of tens of thousands of dollars of its funds.

> In their answer, Mountaineer Fire and the Cavenders asserted counterclaims against City National based on the false allegation that the Cavenders were unaware of the commercial checking account that was the subject of the interpleader.[12] **[Reference (n.4) does not support the argument]**

City National's claim Mountaineer falsely claimed the Cavenders were not aware Joe Beam opened the **2013 Unauthorized Account** is premised on its inclusion in its motion and attachment thereto of dozens of checks drawn on the **2013 Unauthorized Account** during 2017, and issued by Joe Beam payable to, and cashed by, Brian Cavender in 2017 as revealing Brian Cavender was at all times aware of the existence of the **2013 Unauthorized Account** is not logical. **(JA II 255 (Exhibit E) and JA II 279 (Exhibit F))**

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[12] 4[App. At 31-33]

Standing alone, the checks cashed in **2017** on the **2013 Unauthorized Accounts** did not prove Brian Cavender was aware of the existence of the **2013 Unauthorized Account** when it was first opened on June 28, 2013. Moreover, as discussed herein, all checks issued by Joe Beam to Brian Cavender on the **2013 Unauthorized Account** only create an issue of fact for jury determination as to when Brian Cavender learned of the existence of the **2013 Unauthorized Account.**

Prior to filing its Complaint for Interpleader, City National, in response to Mountaineer's request, produced the account opening documents on both the **2013 Unauthorized Account (JA II 232 – 253)** and the **2011 Authorized Account (JA II 221- 231).** It did not produce any of the account statements and cancelled checks on the **2013 Unauthorized Account** attached to its motion to dismiss. **(JA II 255 (Exhibit E) and JA II 279 (Exhibit F))**

Whereas, to understand the entire relationship between the two accounts, and prove Mountaineer's claim the Cavenders were not aware of the existence of the **2013 Unauthorized Account** until its existence was inadvertently exposed to Brian Cavender by City National, which the limited production City National ultimately produced revealed the **2011 Authorized Account was closed in December 2017** after City National inadvertently disclosed the existence of a second account Cavender was previously unaware. **(JA I 97) (JA II 305 – 307).**

Thus, Mountaineer requested City National produce the account statements and copies of cancelled checks on both accounts from the date opened to the present date, which as Mountaineer's counsel was aware was simply a matter of City National instructing its computer system to electronically produce the requested records in a .pdf file. **(JA I 65-68 (Mountaineer's first Request for Documents City National incorporated in its Motion to Stay)**

After Mountaineer pointed out in response to City National's motion to stay that City National attached account records to its Motion to Dismiss (statements and cancelled checks -- entirely different from the deposit contract documents (account opening documents) **(JA II 221-231 - 2011Authorized**

Account) and **(JA II 232 – 254 - 2013 Unauthorized Account)** it had not produced, much less the account records requested.

After Mountaineer exposed as false City National's claim that *"a stay is appropriate* given that *the depository account documents, which constitute the entire universe of documents relevant to the subject counterclaims have already been produced,"* **(JA I 71 at ¶¶ 4-5)** City National hastily produced some of the documents requested in response to 4 of Mountaineer's 34 requests for documents. City National produced **partial** account records on both accounts from the beginning until the account closing date on the **2011 Authorized Account**. These documents revealed City National inadvertently disclosed to Brian Cavender it held two accounts in Mountaineer's name in December of 2017. When Brian Cavender confronted Joe Beam about the existence of a second account he was told it was necessary, claiming two people writing checks out of the same account was confusing.

The limited records City National did produce revealed City National's several negligent or reckless actions that substantially assisted Joe Beam's conversion of its funds in addition to its opening of the **2013 Unauthorized Account** without the required authorization of the majority of Mountaineer's members. First, City National allowed Joe Beam to keep the **2011 Authorized Account open. It was not closed when the 2013 Unauthorized Account** was opened as **City National's counsel claimed at ¶38 of its motion to dismiss. (JA I 97) (JA II 305 – 307)**

City National's allowing Beam to keep the 2011 **Authorized Account opened substantially assisted** Joe Beam's efforts to conceal the opening of the second account. Joe Beam, by allowing the Brian Cavender to continue to use and write checks out of the authorized account, he did not become aware of the **2013 Unauthorized Account until December 2017.** Mountaineer's checking and deposit activity volume did not justify opening a second account without an identified special purpose such as (payroll or income taxes) and leaving the account it replaced open assisted Joe Beam's efforts to conceal the **2013 Unauthorized Account. (JA I 97) (JA II 305 – 307)**

City National assisted those efforts by allowing Joe Beam to order identical style checks for the **2013 Unauthorized Account, Brian** Cavender continued to use on occasion with the **2011 Authorized Account** with the only difference between the checks used on both accounts being the different MICR encoded account numbers at the bottom of the check specially developed for high speed computer processing included in the string of MICR encoded numbers at the bottom of the check, which would not ordinarily draw the user or recipients notice without notice of their being two accounts with identical checks in use at the same time. Brian Cavender, not being aware, was without reason to examine same. At bottom, this question is for jury determination alone. **(JA I 97) (JA II 305 – 307)**

Even if Brian Cavender subsequently became aware of the existence of a second account, City National allowed Joe Beam to send Mountaineer's electronic account statements (vs. paper statements) directly to his employee/accountant David Young as reflected in the account opening documents as: dyoung.beam@earthnet.net. Thus, City never made available the monthly account statements issued on the **2013 Unauthorized Account** to Brian Cavender and Mountaineer eliminating certain defenses that might otherwise have been available City under the UCC in the absence of its bad faith in opening the unauthorized account in violation of its own procedures and reasonable commercial banking practices; **(JA I 97) (JA II 305 – 307)**

City National also ignores its strict liability under the "time-honored principles of strict liability which underlie the UCC [that] mandate [City], rather than the [Mountaineer], is the proper party to bear responsibility for the funds which [Joe Beam] wrongly directed to" his personal and related business interests deposit accounts" opened by with knowledge it opened the unauthorized account at the request of Joe Beam without authorization by Mountaineer's members. *City. O'Mara Enterprises, Inc. v. People's Bank of Weirton.*14 "*Federal and state courts across the country*] **(JA I 97)**

City National produced partial records and rejected several requests claiming bank secrecy laws it failed at first to identify, and its later efforts to identify the supposed secrecy laws revealed its

counsel claimed the bank was prohibited from disclosure of these non-party records under **Gramm Leach Bliley Act** ("**GLBA**") or the **Right to Financial Privacy Act ("RFPA").**[13] City National's arguments revealed its counsel's arguments are not supported by the **GLBA; RFPA** or City National's statement of **"Terms and Conditions of Your Account" (JA II 235 -242)** agreed between City National and Mountaineer and City National's other checking account customers. (JA II**(JA II 305 – 307)**

First, City National's Account Terms and Conditions, with respect requests for customer's account records by subpoena or similar process states:

> **Legal Actions Affecting Your Account.** If we are served with a **subpoena**, restraining order, writ of attachment or execution, levy, garnishment, search warrant, **or similar order** relating to your account (termed "legal action" in this section), we will comply with that legal action. Or, in our discretion, we may freeze the assets in the account and not allow any payments out of the account until a final court determination regarding the legal action. We may do these things even if the legal action involves less than all of you.

The fractional records produced with respect to the **2013 Unauthorized Account** also revealed additional conversions/embezzlements of Mountaineer's funds internally transferred (via telephone authorization) to other City National deposit accounts identified by account number only. City National failed to produce these records of the transfer Mountaineer's funds without explanation.

When pressed by Mountaineer to identify the banking privacy laws prohibiting its production of the relevant bank records, City National identified the Right to Financial Privacy Act (the "RFPA") and the Gramm, Leach Bliely Act (the "GBLA"). In response to City National's claimed reliance on the RFPA and GLBA, Mountaineer's counsel provided City National's counsel the relevant language from each act that reveals the RFPA applies **only** to a request for the bank's records of its customer's

[13] To see the full discussion between City National and Mountaineer's counsel regarding the bank record exceptions to the **"Gramm Leach Bliley Act" and the Right to Financial Privacy Act** see JA II 319 – 320 ;

bank transactions by a government agency; and the GLBA provides a specific exception for a request for such records by subpoena or other judicial process.

In *United States v. Miller* (also identified to City National) the U.S. Supreme Court held: that a bank customer had no legitimate expectation of privacy in his bank records." 425 U.S. 435, 442-43, 96 S.Ct. 1619, 1623-24, 48 L.Ed.2d 71 (1976), which, effectively overruled *Valley Bank of Nevada* relied on by City National in refusing to produce these records based on the *Valley Bank* Court's holding the banks depositor have constitutionally protected privacy interests in these records.

Thus, following *Miller*, "when a federal agency issued a subpoena for customer records from a bank, the customer could not successfully challenge the subpoena on fourth amendment grounds." *Chao v. Community Trust Co.*, 474 F.3d 75, 80 (3rd Cir., 2007). In response to Congressional concerns for the abusive collection of financial records by a government agency unfettered by judicial process following the Supreme Court's ruling in *Miller*, Congress enacted the RFPA, as a limited means by which bank customers can shield their financial records from government scrutiny. ***Id.***

The RFPA expressly states that unless a statutory exception applies: 'no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless ...." *Id.* (Emphasis added.) It has no application to a request for the bank's records of its records of its customer's banking transaction in connection with a subpoena issued in a civil action or other valid Judicial process such as a request for City National's records (as a party to this action) of its records of its customer's banking transactions.

The exceptions to production of such records in a civil action under the GLBA are straight-forward: 15 U.S.C. §1603 of the GLBA, provides:

(e) GENERAL EXCEPTIONS. Subsections (a) and (b) **shall not prohibit the disclosure of nonpublic personal information**— ...

> **(8) to comply with Federal, State, or local laws, rules, and other applicable legal requirements; to comply with a properly authorized civil, criminal, or regulatory**

> **investigation or subpoena** or summons by Federal, State, or local authorities; or to respond to judicial process or government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law. **(JA II 299 – 300)**

With respect to, the limited discovery City National did produce on the unauthorized account, revealed Joe Beam had converted Mountaineer's funds that had been deposited into the **2013 Unauthorized Account** and issued checks out of the account payable to himself and his related business interests. Indeed, the limited accounts statements produced on the unauthorized account for 2017 revealed separate conversions of its funds by Joe Beam in a single day (March 16, 2017) in the amount of $38,285.

At the time Mountaineer made its January 12, 2018 settlement demand on City National in the amount of $100,000, Mountaineer did not have the first 10 months of statements [City National] attached to its motion to dismiss as Exhibits E or Exhibit F. In light of Exhibit E revealing separate conversions in a single day in the amount of $38,285, Mountaineer's counsel's settlement demand for the conversion of its funds going back to the date the **2013 Unauthorized Account** was opened in the amount of $100,000 may prove to be a very low estimate of its actual losses.

At the very least Exhibit E confirms City National's request for sanctions (as discussed below) unwarranted and the charge by its counsel of Mountaineer's demand as attempted extortion at best reckless. [14] **(JA I 75)**

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[14] Below, **after Mountaineer revealed City National's counsel claim that Mountaineer and its counsel attempt to extort $100,000 from his client was unsupported by the facts. City National did not go forward with its request for sanctions** when it submitted its proposed order of dismissal to the Court. Thus, City National's counsel's renewal of his now knowingly false claim as attempted extortion is unfortunately, just one of several knowingly false statements of material fact City National's counsel has made to this Court.

Mountaineer's counsel having grown weary of these **false charges by both Respondents' counsel, requested the Circuit Court refer the conduct of both counsel to the Disciplinary Board for investigation** and independent report to the Circuit Court. **Respondents' counsels remained silent and did not voice any support for it.** Mountaineer counsel is not aware of any action taken by the Circuit Court with respect to his request. **(JA II** 307)

Regardless, **City National's counsel's repetition of his knowingly false claim of extortion** on appeal, appears to be retaliatory in nature and related to his being upset at Mountaineer's description of his arguments as **double speak**. A descriptive term this Court as well as other courts nationally have used the term to describe like

City National also claims the account records it attached to its motion to dismiss were integral to Mountaineer's complaint. To be clear, as Respondents' counsels are referring to **Exhibit E (Account statements on the 2013 Unauthorized Account** and **Exhibit F - cancelled checks drawn on the 2013 Unauthorized Account.** Mountaineer did not rely on Exhibits E or F in preparing its Answer Counter and Cross-Claims. Mountaineer never had possession and certainly did not rely on these account records in preparing it Answer, Counter, and Cross-Claim. Moreover, City National emailed the account statements on the account Mountaineer did not know existed to Joe Beam's

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conduct. *Cathe A. v. Doddridge County Bd. of Educ.*, 490 S.E.2d 340, 200 W.Va. 521 (W. Va., 1997)("Yet, these statements amount to nothing more than doublespeak....").

Judicial Watch, Inc. v. U.S. Dep't of State (D. D.C., 2018)

> **"When the government last appeared before the Court, counsel claimed "it's [not] true to say we misled either Judicial Watch or the Court." 10/12/18 Tr. 15:6-8. When accused of "doublespeak," counsel** denied vehemently. [Page 4] **feigned offense**, and **averred complete candor.** 10/12/18 Tr. 16-17. **When asked why State masked the inadequacy of its initial search, counsel claimed that the officials who initially responded to Judicial Watch's request didn't realize Clinton's emails were missing... When asked why it took so long for State to own-up to the missing emails and to its initial search's deficiency, counsel cited "normal FOIA practice."** (Trancript Citations Omitted) **Counsel's responses strain credulity. And even before this recent chicanery, the Court found enough signs of government wrongdoing to justify discovery,... including into whether Clinton used her private email to intentionally flout *FOIA* *Judicial Watch, Inc. v. U.S. Dep't of State*** (D. D.C., 2018)

U.S. v. Bauer, 956 F.2d 693 (7th Cir., 1992) "**Only in a world of Doublespeak** does ...."; ***Wright v. Brown***, 993 F.2d 1541 (4th Cir., 1993) "The reports are highly partisan, **written in bureaucratic doublespeak, and stray far from the issue at hand.**"); ***Bernard v. Grefer* (E.D. La., 2015)** ("**Plaintiffs also ... contend that Exxon-Mobil's Opposition consists entirely of doublespeak. Plaintiffs contend** that "**Defendant's attempt** ... is more **doublespeak and diversion.**"); ***Freeman v. Central States, Southeast and Southwest Areas Pension Fund,*** 32 F.3d 90 (4th Cir., 1994) ("**We will not venture to interpret such dense doublespeak** until and unless our duty to resolve a case or controversy compels it."); ***Dermody v. Sticco***, 465 A.2d 948, 191 N.J.Super. 192, 201 (N.J. Super., 1983)("Fourth, his treatment of the preferred stock dividend arrearages was pure double-speak.") *People v. Lawson*, 165 Cal.Rptr. 764, 107 Cal.App.3d 748, 757 (Cal. App., 1980)(**This assertion is Orwellian "double-speak.**") *Sloan v. Pugh*, 351 F.3d 1319, 1321 (10th Cir., 2003)("In adopting the magistrate's recommendation ... the district court criticized the respondents' arguments in support of their computation and in opposition to Sloan's petition as a **"flagrant specimen of bureaucratic double-speak"** and "a **tortured and legally-untenable view** of the BOP's internal policy statements."); *Wooten v. Bank of Am., N.A.*, 290 Va. 306, 309-10, 777 S.E.2d 848, 850 (2015) (**To protect against such double-speak,** Virginia law does not require "a showing of prejudice" as a "prerequisite to the application of judicial estoppel."); *Mississippi Bar v. Shelton.* 890 So.2d 827, 831 (Miss., 2003) (Our review of that petition and the argument and facts set forth..., results in the inevitable conclusion that, no matter what Shelton entitled his plea, and **notwithstanding his double speak regarding what it meant, it** clearly is a guilty plea); *See. also. Henderson v. Stalder*, 281 F.Supp.2d 866, 872 (E.D. La., 2003).

employee (dyoung.bram.earthlink.net **(JA II 252, 308)** Mountaineer agrees Exhibits **C and D – the account opening documents for the** 2011 Authorized Account **and** 2013 Unauthorized Account are integral to its claims, Mountaineer actually had these documents in its possession and referred to and quoted from them in preparing their Answer, Counter and Cross-Claims against the Respondents.

Joe Beam Was Not At All Times a Mountaineer Member

Mountaineer alleged:

> ¶ 78. On or about May 31, 2017, Joe Beam agreed to withdraw as a member of Mountaineer Fire, and then claimed Mountaineer Fire owed additional money for other services Joe Beam claims to have been performed for Mountaineer Fire in the approximate amount of $90,000.
>
> ¶80. Joe Beam did not claim any amount owed to his related business interests by Brian Cavender personally. Thus, it was in Joe Beam's interest to withdraw as a member of Mountaineer Fire in light of his intent to pursue collection of the additional amounts claimed to be owed by Mountaineer Fire.
>
> ¶81. The withdrawal of Brian Cavender and Walt Cavender as members of Mountaineer Fire would force Mountaineer Fire to cease operations as Joe Beam does not have sufficient knowledge of fire safety and rescue equipment or a vendor relationship necessary to continue on his own with Mountaineer Fire's only income generating activity -- the sale of fire safety and rescue equipment.
>
> 92. On June 8, 2017, Brian Cavender filed Mountaineer Fire's Annual Report for 2017 with the Secretary of State of West Virginia listing its members as Brian Cavender and Walt Cavender.
>
> 108. Brian Cavender subsequently learned that on December 20, 2017, Joe Beam filed (electronically) an Address/Officer Change filing on behalf of Mountaineer Fire through the West Virginia Secretary of State's website adding his name as a member of Mountaineer Fire and falsely certified he was a member of Mountaineer Fire.

(JA I 24-26)

As proof of Joe Beam being a member at all times, City National attached Exhibit B which no surprise lists Joe Beam as a member as of 1/04/18. At all relative times to Mountaineer's claims of tortious interference and aiding and abetting tortious interference, Joe Beam was not listed as being a member of Mountaineer and was not a member. Mountaineer demanded City National close the account. City National failed close the account. After refusing the demand Joe Beam used

the account to deposit funds he collected from Mountaineer's customers. It was only after Mountaineer discovered City National allowed Beam to continue to deposit Mountaineer's funds he had collected from Mountaineer's past due accounts, Joe Beam filed a false statement with the Secretary of State claiming he was a member. Thus, Mountaineer's claims of tortious interference and aiding abetting are viable claims.

Respondents' continue to rely on their tortured impermissible rewriting of the contract documents, by combining these separate provisions to concoct authority the deposit contract document – the Limited Liability Company Banking Resolution does not provide. .

> **Further Acts.** *The above named agents are authorized and empowered to execute such other agreements* including but not limited to special depository agreements and arrangemements regarding the manner, condition or purpose for which funds, checks or items of Account Holder may be deposited, collected or withdrawn and to perform such other acts *as they deem reasonably necessary to carry out the provisions of these resolutions. The other agreements and other acts may not be contrary to the provisions contained in this Resolution.*
>
> *BE IT FURTHER RESOLVED, that the authority hereby conferred upon the above named Agents shall be and remain in force and effect until written notice of any amendment or revocation thereof shall have been delivered to and received by the Financial Institution* at each location where an account is maintained. Financial Institution shall be indemnified and held harmless from any loss suffered or any liability incurred by it in continuing to act in accordance with this resolution. Any such notice shall not affect any items in process at the time notice is given.

By opening the 2013 Unauthorized Account without authorization by the majority of the members, City National violated the above contractual provisions and the provision requiring written notice from Mountaineer of any amendment to or revocation of Brian Cavender's authority. City National admits Brian Cavender's signing authority was never revoked by Mountaineer's majority members, but foolishly argue pursuant to the above provisions as rewritten and explained, Brian Cavender authorized Joe Beam to open an account without his being an authorized signer. City National's counsel does not appear to be aware the account opening documents make up the terms of deposit

contract between City National and its customer.

As stated therein:

> **Terms and Conditions of Your Account**
> **Agreement. This document, along with any other documents we give you pertaining to your account(s), is a contract** that establishes rules which control your account(s) with us.

Mountaineer Responded To Motions to Dismiss Necessarily With Motion to Stay

Finally both counsel argue, Mountaineer did not respond to their motion to dismiss. This argument is revealed as intentionally misleading, in Mountaineer's response to City National's Motion to Stay, which states therein:

City National has not filed a motion to dismiss under Rule 12(b)(6) as its motion artfully suggests. City National seeks to dispose of Mountaineer's compulsory counterclaims against it with a motion the Court must treat as motion for summary judgment under Rule 56. As such, City Nation's motion to dismiss is premature under Rule 56, and its request to stay discovery is unwarranted.

The purpose of a Rule 12(b)(6) motion is "to test the sufficiency of the" complaint, counterclaim or cross-claim. 8 "'The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to "[A] trial court should not dismiss a complaint where sufficient facts have been alleged that, if proven, would entitle the plaintiff to relief.'"11 "'[M]otions to dismiss under Rule[15] Mountaineer's argument against the Motion to Dismiss are necessarily included with its response to its motion to stay. **(JA I 70 – 87)**

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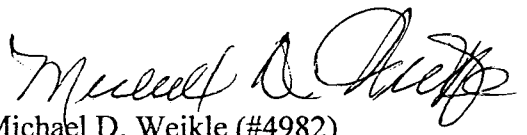
[15] 8 *J.F. Allen Corp., supra*, 237 W.Va. at __, 785 S.E.2d 627, 631 (W.Va., 2016).*quoting John W. Lodge Distributing Co., Inc. v. Texaco, Inc.*, 245 S.E.2d 157, 161 W.Va. 603, 606 (W.Va., 1978)*quoting* Syl. pt. 3, *Chapman v. Kane Transfer Company*, 236 S.E.2d 207 (W.Va. 1977).
9 *J.F. Allen Corp., supra*, 237 W.Va. at __, 785 S.E.2d 627, 631 (W.Va., 2016).*quoting John W. Lodge Distributing Co., Inc., supra.* 245 S.E.2d at ___161 W.Va. at 605 (W.Va., 1978) *quoting* Syl. pt. 3, *Chapman v. Kane Transfer Company*, 236 S.E.2d 207 (W.Va. 1977), *Fucillo v. Kerner*, 231 W.Va. 195, 744 S.E.2d 305 (W.Va., 2013),
10 *John W. Lodge Distributing Co., Inc. , supra,* 245 S.E.2d at __,161 W.Va. at 603.

For all the reasons stated herein and Petitioners' Brief, Mountaineer requests the Circuit Courts orders dismissing its claims pursuant to Rule 12(b)(6) be reversed. Respectfully submitted, on this 6th day of June, 2019.



Michael D. Weikle (#4982)
51 Gibson Court
Tiffin, OH 44883
Phone: (734) 358-1876
Facsimile: (888) 482-6732
mikeweikle@weiklelaw.com
Counsel for Appellant