IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 18-0984

MOUNTAINEER FIRE & RESCUE EQUIPMENT, LLC, BRIAN CAVENDER, and WALTER CAVENDER,
Defendants-Below, Petitioners

v.

CITY NATIONAL BANK OF WEST VIRGINIA,
Plaintiff-Below, Respondent

JOE BEAM,
Defendant-Below, Respondent

Hon. Charles E. King, Jr, Judge
Circuit Court of Kanawha County
Civil Action No. 18-C-17

BRIEF OF RESPONDENT CITY NATIONAL BANK

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I. STATEMENT OF THE CASE[1]

The Respondent, City National Bank of West Virginia ["City National"] instituted an interpleader action against the Petitioners, Mountaineer Fire & Rescue Equipment, LLC ["Mountaineer Fire"], Brian Cavender, and Walter Cavender [collectively, "Cavenders"], and the Respondent, Joe Beam ["Mr. Beam"], after a dispute arose among those parties as to Mountaineer Fire's commercial checking account.[2] The balance in the account was $5,150.[3]

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.[4] City National then filed a timely motion to dismiss the counterclaims.[5] 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]

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[1] 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. The fifth full paragraph in the Petitioners' "Statement of the Case" contains no reference to the record because there is nothing in the record to support the allegations contained in the fifth full paragraph. On page seven of the Petitioners' Brief, a statement is made that an account was opened "without the Majority Members being aware of it," when the Petitioners know from the record that multiple checks from the account were issued to and cashed by majority members. Again, without a line-by-line or paragraph-by-paragraph analysis, suffice it to say that it is the Respondent's position that nothing in the Petitioners' "Statement of the Case" should be accepted at face value without cross-referencing any assertion with the actual record.

[2] [App. at 1-5]

[3] [App. at 10]

[4] [App. at 31-33]

[5] [App. at 36-62]

[6] [App. at 37]

The core factual problem with the counterclaims against City National, as discussed in its motion to dismiss, is that despite the claim that the Cavenders were unaware of the subject corporate checking account, many checks had been written to and cashed by the Cavenders over a period of many months from an account they claimed to have no knowledge.[7] In addition to this fundamental factual problem, there were also a number of legal issues with the counterclaims.

First, as to the counterclaim for breach of contract, the counterclaims identified no contractual provision allegedly breached by City National[8] and, without a breach of contract, there can be no breach of any implied covenant of good faith and fair dealing.[9] Second, there are no causes of "aiding and abetting breach of fiduciary duty"[10] or "aiding and abetting tortious interference,"[11] which are not briefed by the Petitioners and, thus, have been abandoned.

A hearing was scheduled on City National's motion to dismiss for May 22, 2018, and although the Petitioners counsel appeared at the hearing, the Petitioners filed no response to the motion prior to the hearing.[12] So, following the hearing, something called a "Summary of Mountaineer's Response" was filed repeatedly referencing "Rule 12(b)(7)," which has nothing to

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[7] [App. at 42-55] What makes the circumstances of this case even more egregious is not only do the Cavenders falsely assert in their counterclaims that they were unaware of an account for which they were the primary beneficiaries for the transactions involved, their counsel tried to extort a $100,000 pre-counterclaim settlement of $100,000 by falsely claiming the Cavenders were unaware of a corporate checking account in which they had personally cashed dozens of checks [App. at 285-287] and even though, like any financial institution, City National Bank has nothing to do with the transactions in corporate checking accounts opened by its customers other than posting and reporting on those transactions.

[8] [App. at 56]

[9] [App. at 56]

[10] [App. at 57-58]

[11] [App. at 58-60]

[12] [App. at 91]

do with City National's Rule 12(b)(6) motion.[13] For example, the "Summary" stated, "City has not denied Rule 12(b)(7) requires the Court to treat its motion as one for summary judgment under Rule 56,"[14] which is wrong because (a) Rule 12(b)(7) deals with a failure to join indispensable parties and (b) City National's motion was limited to the allegations of the counterclaims and documents referenced in those counterclaims which is permissible under Rule 12(b)(6).

Substantively, the "Summary" (1) identified no contractual provision allegedly breached by City; (2) explained how a claim for breach of an implied covenant can proceed without a breach of contract; or (3) identified any legal authority in support of the existence of causes of action called "aiding and abetting breach of fiduciary duty" or "aiding and abetting tortious interference."[15] Rather, it can best be described as making a disjointed stream-of-consciousness attempted refutation of the indisputable documentation eventually producing the following admission: "Even if Brian Cavender subsequently became aware of the existence of a second account . . . ."[16]

In its reply, City National noted that (1) Petitioners repeatedly referenced the wrong rule in their "Summary;"[17] (2) cases involving summary judgment, like *Elliott v. Schoolcraft*, 213 W. Va. 69, 576 S.E.2d 796 (2002), relied on by the Petitioners, have no application to cases involving motions to dismiss;[18] (3) there are legions cases in which this Court has affirmed Rule 12(b) dismissal where no discovery had been undertaken;[19] (4) the only documents contested by the

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[13] [App. at 91, 92]

[14] [App. at 92]

[15] [App. at 91-101] Again, those causes of action have not been briefed by Petitioners on appeal.

[16] [App. at 97]

[17] [App. at 109]

[18] [App. at 109]

[19] [App. at 109]

Petitioners relative to City National's motion to dismiss "are account records that are both referenced in the Counter-Claims and are integral to" them;[20] (5) "Mr. Cavender . . . made cash withdrawals" from the account he initially claimed not to have any knowledge of "that required him to know about the new account and the new account number despite his representations to the contrary;[21] (6) "City National could include . . . dozens of more checks and other account documents from 2013, 2014, 2015, and 2016, but suffice it to say that Counter-Plaintiffs have once again blatantly misrepresented to the Court the facts known by them;"[22] (7) "the Counter-Plaintiffs falsely state, 'City never made available the monthly account statements issued on the 2013 Unauthorized Account to Brian Cavender and Mountaineer' [Response at 7] because as the documents in Exhibit A show from the inception of the subject account monthly statements were sent to 'Mountaineer Fire & Rescue Equipment, LLC, P.O. Box 489, Poca, WV 25159' which was the same address on the dozens of checks cashed by the Cavenders;"[23] (8) "nowhere in their Response do the Counter-Claimants identify a single provision of any contract between the Counter-Claimants and City National alleged to have been violated by City National;"[24] (9) "because the Counter-Claims state no cause of action for breach of contract, it states no cause of action for breach of the implied covenant of good faith and fair dealing;"[25] (10) "City National had no duty to monitor the depository accounts which are the subject of this litigation and, accordingly, the Counter-Claims state no cause of action against City National for aiding and abetting breach of

[20] [App. at 110]

[21] [App. at 110-111]

[22] [App. at 112]

[23] [App. at 112]

[24] [App. at 114]

[25] [App. at 115]

fiduciary duty;"[26] (11) "the Counter-Claims state no cause of action against City National for aiding and abetting tortious interference with some unspecified contract or business relationship to which neither the Counter-Plaintiffs, Defendant Beam, or City National were parties;"[27] and (12) "there is no dispute that Mr. Cavender executed the 2001 Resolution agreeing to give Mr. Beam the right to conduct Mountaineer Fire's banking business vis-à-vis City National; that such right including opening new accounts; that both Cavenders received dozens of checks and/or made cash withdrawals from the new account; and that monthly statements were provided to Mountaineer Fire."[28]

The Petitioners then filed something it called a "corrected reply"[29] not addressing any of the substantive defects on the face of their counter-claims, but complaining about things such as City National's failure "to produce training materials"[30] even though none of the Petitioners' causes of action have anything to do with any training materials; City National's refusal to produce "records of its customer deposit transactions held in the name of Joe Beam's related business interest,"[31] even though those business interests are not a party to this litigation and the Petitioners remedy, if any, against such business interest is to bring an action against the same and seek such records from that interest; and challenging the Litigation Handbook on the West Virginia Rules of

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[26] [App. at 117]

[27] [App. at 119]

[28] [App. at 125]

[29] [App. at 290]

[30] [App. at 297]

[31] [App. at 297]

Civil Procedure as an authoritative treatise because "Mountaineer does not currently have access to this treatise;"[32] and similar non-responsive non sequitur arguments.

On September 27, 2018, the Circuit Court entered an "Interpleader Order" making the following findings of fact based on documents either attached to the Petitioners' counter-claims or fairly incorporated by reference:

> First, the original depository agreements executed by the Defendants, BRIAN CAVENDER and JOE BEAM on behalf of MOUNTAINEER FIRE & RESCUE EQUIPMENT, LLC, state that "**any one (1) of the Authorized Signers**," which were Defendant Beam and Defendant Brian Cavender, "listed above **may enter into any such agreements and perform such acts as they deem reasonably necessary** . . . and **those agreements will bind the Company** . . and as its act and deed be, and they hereby are, authorized and empowered . . . To deliver and execute to the Financial Institution . . . **other account opening documents** . . . ," which authorized Defendant, JOE BEAM, to open a new depository account without the signature of Defendant, BRIAN CAVENDER.
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> Second, the original depository agreements executed by the Defendants, BRIAN CAVENDER and JOE BEAM on behalf of MOUNTAINEER FIRE & RESCUE EQUIPMENT, LLC, state that "**Any one of such Agents** is authorized to endorse all checks, drafts, notes and other items payable to or owned by this Company . . . and to accept drafts and other items payable at the Financial Institution. The Financial Institution is hereby directed to accept and pay **without further inquiry** . . . "
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> Finally, the original depository agreements executed by the Defendants, BRIAN CAVENDER and JOE BEAM on behalf of MOUNTAINEER FIRE & RESCUE EQUIPMENT, LLC, state that "the authority hereby conferred upon the above named Agents **shall remain in full force and effect until written notice of any amendment or resolution thereof shall have been delivered to and received by the Financial Institution**" and no written notice of any amendment or resolution is alleged to have been provided; and . . . the original depository agreements executed by the Defendants, BRIAN CAVENDER and JOE BEAM on behalf of MOUNTAINEER FIRE & RESCUE EQUIPMENT, LLC, state that "Financial Institution shall be indemnified and held harmless from any loss suffered or liability incurred by it in continuing to act in accordance with this resolution," which binds all of the Defendants.[33]

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[32] [App. at 302-303]

[33] [App. at 171-172] (emphasis in original)

In other words, the gravamen of the Petitioners' causes of action is the allegation that one of the members of their limited liability company, Joe Beam, opened a depository account without the knowledge of the other two members, but not only is this factually incorrect as all three members actively participated in transactions involving the new account, the original depository agreements **expressly permitted Mr. Beam to open new accounts** without the endorsement of the other members and the two members who opened the original account **expressly agreed to hold City National harmless from any act taken by Mr. Beam pursuant to the original depository agreements, which would include opening a new account**.

The Circuit Court then analyzed the causes of action set forth in the counterclaims.

First, concerning the breach of contract claim, the Circuit Court concluded:

> [I]n West Virginia, "the elements of breach of contract are (1) a contract exists between the parties; (2) a defendant failed to comply with a term in the contract; and (3) damage arose from the breach." Wittenberg v. Wells Fargo Bank, N.A., 852 F. Supp. 2d 731, 749 (N.D. W. Va. 2012). Here, neither Count VII of Counter-Plaintiffs' Counter-Claims nor their Response identify a single term of the contract allegedly breached by CITY NATIONAL BANK OF WEST VIRGINIA and, for the reasons previously discussed, CITY NATIONAL BANK OF WEST VIRGINIA breached no term of any contract relative to the Counter-Plaintiffs.[34]

Second, concerning the implied covenant claim, the Circuit Court concluded:

> [U]nder West Virginia law, "An implied contract and an express one covering the identical subject-matter cannot exist at the same time. If the latter exists, the former is precluded." Syl. pt. 3, Rosenbaum v. Price Construction Company, 117 W. Va. 160, 184 S.E. 261 (1936). In other words, there is no implied covenant of good faith and fair dealing independent from a breach of contract. See Highmark West Virginia, Inc. v. Jamie, 221 W. Va. 487, 655 S.E.2d 509 (2007)("an implied covenant of good faith and fair dealing does not provide a cause of action apart from a breach of contract claim"). Indeed, specifically with respect to banks, our Court has held, "West Virginia law, a bank has no implied duty of good faith and fair dealing absent a breach of contract . . . ." Brozik v. Parmer, 2017 WL 65475 (W.

[34] [App. at 172]

Va.)(memorandum); see also Evans v. United Bank, Inc., 235 W. Va. 619, 775 S.E.2d 500 (2015). Here, because the Counter-Claims state no cause of action for breach of contract, they state no cause of action for breach of the implied covenant of good faith and fair dealing.[35]

Third, concerning the "aiding and abetting breach of fiduciary duty" claim, the Circuit Court concluded:

> [U]nder West Virginia law, a bank owes no fiduciary duty to a borrower or a depositor because those relationships are grounded in contract. See Brozik, supra at *17 (bank had no duty to borrower that could support a breach of fiduciary duty claim arising out of transaction in which borrower obtained loan in order to purchase debt owed by borrower's nephew's business; bank acted as nothing more than a lender); Peters v. Peters, 191 W. Va. 56, 443 S.E.2d 213 (1994)(bank owes no fiduciary duty to holders of depository accounts). Here, the Counter-Claims do not allege breach of fiduciary duty, but aiding and abetting breach of fiduciary duty which is contrary to law because a bank has no duty to monitor depository accounts, such as the ones at issue in this case, and even with respect to fiduciary accounts, a "depository bank has no duty to monitor fiduciary accounts maintained at its branches in order to safeguard funds in those accounts from fiduciary misappropriation," but instead is entitled "to presume that the fiduciary will apply the funds to their proper purposes." Lerner v. Fleet Bank, N.A., 459 F.3d 273, 287 (2d Cir. 2006); see also In re Agape Litigation, 773 F.Supp.2d 298, 325 (E.D. N.Y. 2011)(same); Home Sav. of Am., FSB v. Amoros, 233 A.D.2d 35, 661 N.Y.S.2d 635, 637 (N.Y. App. Div. 1997) ("[A] depository bank has no duty to monitor fiduciary accounts . . . to safeguard the funds in those accounts from fiduciary misappropriation.")[36]

Finally, concerning the "aiding and abetting tortious interference" claim, the Circuit Court concluded:

> "'To establish prima facie proof of tortious interference," however, "a plaintiff must show: (1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages." Syl. pt. 2, Torbett v. Wheeling Dollar Sav. & Trust Co., 173 W. Va. 210 314 S.E.2d 166 (1983). Here, the Counter-Claims identify no contractual or business relationships alleged to have been interfered with by Defendant Beam; rather, the second Count VIII references only fiduciary duties and a fiduciary duty

[35] [App. at 172]

[36] [App. at 173]

is neither a contractual or business relationship no more so than the duty not to negligently operate one's motor vehicle is a contractual or business relationship and an automobile accident constitutes tortious interference with that contractual or business relationship between motorists on the highway. Moreover, the Counter-Plaintiffs, Defendant Beam, and City National were all parties to any contractual relationships among the parties, and one cannot tortiously interfere with one's own relationship. See, e.g., Hatfield v. Health Management Associates of West Virginia, 223 W. Va. 259, 267, 672 S.E.2d 395, 403 (2008)("Because they were acting within the scope of their employment, appellees Ms. Atkins and Ms. Ball were acting on the hospital's behalf—and, as our law is clear, the appellee hospital cannot be held liable for tortious interference with its own contract with the appellant."). Finally, this principle has been held to apply to defeat tortious interference claims against banks where they are parties to the depository and/or other accounts upon which such claim were predicated. See Fillmore E. BS Fin. Subsidiary LLC v. Capmark Bank, No. 11 Civ. 4491 (PGG), 2013 WL 1294519, at *15 (S.D.N.Y. Mar. 30, 2013) (dismissing tortious interference with contract claim after even the plaintiff acknowledged that defendants were parties to the agreement), aff'd, 552 Fed. Appx. 13 (2d Cir. 2014).[37]

Finally, the Circuit Court concluded:

[C]oncerning Counter-Plaintiffs' arguments under O'Mara Enterprises, Inc. v. People's Bank of Weirton, 187 W. Va. 591, 420 S.E.2d 727 (1992), the Court notes that case turned on the existence of restrictive endorsements and none of the checks in this case had any restrictive endorsements, and that many courts have that where a corporate resolution opening a depository account gives signature authority over the depository account, such as the one given by Mountaineer Fire to Mr. Beam in this case, the depository bank is not liable for embezzlement by one of those signatories[38] even where a bank fails to follow its own policies requiring corporate

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[37] [App. at 173-174]

[38] See C-Wood Lumber Co., Inc. v. Wayne County Bank, 233 S.W.3d 263, 287 n.63 (Tenn. Ct. App. 2007) (bank acted in good faith when it accepted checks for deposit into fiduciary's personal accounts, given customer's bank resolution filed with bank); Signet Graphic Products, Inc. v. First Nat. Bank of Clayton, 570 S.W.2d 717 (Mo. Ct. App. 1978)(depository bank properly found to be not liable to corporation for money lost by corporation through bookkeeper's embezzlement scheme when bank cashed check payable to corporation and deposited proceeds in employees' organization account pursuant to terms of corporate resolution filed with depository bank); Atlanta Sand & Supply Co. v. Citizens Bank, 276 Ga. App. 149, 622 S.E.2d 484 (2005)(corporate resolution and signature card authorized employee to make deposits and withdraw cash from corporate account, and thus, bank was not liable for employee's embezzlement of funds from account, even though employee was not designated as an "officer" as described in resolution and corporation claimed bank was put on notice by employee's suspicious activities; resolution specifically gave employee authority to make deposits and withdrawals from account, employee's signature on signature card granted employee authority even though employee was not designated as an "officer," and employee's authorized actions regarding account did not put bank on notice of embezzlement); Peoples Nat. Bank of

resolutions if the officer had the ostensible authority to open accounts and conduct business,[39] which Mountaineer Fire gave to Mr. Beam in the 2011 Resolutions.[40]

It is from these rulings that the Petitioners have appealed against City National.

II. SUMMARY OF ARGUMENT

None of the Petitioners' three assignments of error have any merit.

First, the only documents referenced in the Circuit Court's dismissal order were the original depository agreements which are referenced multiple times in the Petitioners' counterclaims and, therefore, properly subject to consideration by the Circuit Court.

Second, nowhere in the Petitioners' brief, consistent with the pleadings it filed in Circuit Court, does it identify a single contractual provision allegedly violated by City National.

Mora v. BWHC, LLC, 2010 WL 3632209 at *6 (Minn. Ct. App.)("Absent actual knowledge of Sohl's embezzlement, the bank was presumptively required to follow the corporate authorization resolution. Caselaw makes clear: 'Under the Minnesota version of the UCC, an account holder is generally barred from recovering from the bank the value of a series of forged checks written on the account by a single forger if the account holder does not exercise reasonable promptness in examining his or her account statements and notifying the bank of any forged checks.' Stowell v. Cloquet Co-op Credit Union, 557 N.W.2d 567, 570 (Minn. 1997) (quotation omitted). The underlying rationale is that an account holder is 'in a better position to uncover a pattern of forgery by a trusted employee' than the bank. Id. at 572 (quotation omitted). **As long as account statements were mailed to BWHC-and it is undisputed that they were and that they were never inspected by any BWHC shareholders or employees other than Sohl-then the risk of fraud or embezzlement should be borne by BWHC rather than the bank**.") [Emphasis supplied].

[39] Family Partners Worldwide, Inc. v. SunTrust Bank, Atlanta, 242 Ga. App. 618, 620, 530 S.E.2d 742, 744 (2000)("Family Partners argues that SunTrust is precluded from relying on McGrew's inherent agency power because SunTrust failed to follow its own internal policy requiring a corporate resolution or certificate of authority to establish a corporate account. We agree, however, with the United States District Court for the Northern District of Georgia that 'a bank's failure to follow its own internal operating procedures [regarding opening accounts] cannot give rise to legal liability' for embezzlements from that account. Trust Co. explained: 'While we agree the bank could easily protect its interests by requiring a proper corporate resolution showing the agent's authority to act for the corporation, that method is not the exclusive one for establishing the existence either of authority or of inherent agency power to open a bank account for the corporation.' The undisputed evidence showed that McGrew had the inherent agency power to open the accounts and withdraw deposited funds. Pursuant to OCGA § 7-1-352(a), SunTrust is protected from liability for the alleged conversion by McGrew.") [Footnotes omitted]

[40] [App. at 174-175] (footnotes and emphasis in original)

Finally, the Petitioners have not briefed and, therefore, have abandoned their claims for the non-existent causes of action for "aiding and abetting breach of fiduciary duty" and "aiding and abetting tortious interference."

III. STATEMENT CONCERNING ORAL ARGUMENT AND DECISION

Because this appeal presents no substantial question of law, no prejudicial error has been identified, and just cause exists for summary affirmance, it is appropriate for summary affirmance under R. App. P. 21(c) without oral argument.

IV. ARGUMENT

A. STANDARD OF REVIEW

Contrary to the inapplicable standards of review referenced in the Petitioners' brief,[41] this Court has held that, "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.*"[42] Here, because the Circuit Court's dismissal of the Petitioners' counterclaims was proper, its order should be summarily affirmed.

B. THE CIRCUIT COURT PROPERLY CONSIDERED THE DEPOSITORY AGREEMENTS REFERENCED IN THE PETITIONERS' COUNTERCLAIMS.

It is telling that the Petitioners' first argument is not a substantive one - because they neither made any substantive arguments below or on appeal - but a procedural one, i.e., that the Circuit Court allegedly erred in referencing the depository agreements that controlled the contractual relationship between Mountaineer Fire, the depositor, and City National, the depository bank. The key to understanding why it was perfectly appropriate for the Circuit Court

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[41] Petitioners' Brief at 14-15.

[42] Syl. pt. 2, *State ex rel. McGrow v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

to consider the depository agreements are the following allegations in the Petitioners' counterclaims which were the subject of City National's motion to dismiss:

> On January 4th and 5th, 2018, City National produced the account documentation for City National checking account no. 9010397389 and 8006593589, respectively. By email dated January 2, 2018, counsel for Brian Cavender alleged that Joe Cavender [sic] had not wrongfully removed Mr. Cavender as a signatory [because Mr. Cavender was a signatory on both accounts], but had wrongfully closed the Mountaineer Fire account in 2013 and improperly opened a new Mountaineer Fire account at that time [which was consistent with the original depository agreement and produced a new account in which Mr. Cavender actively participated][43]
>
> As set forth herein, City National, however, was not at all relevant times aware that it opened and/or activated Unauthorized [it was expressly authorized under the original depository agreement] Account No. 9010397389 at the direction of Joe Beam knowing or being grossly negligent in not known that Mountaineer Fire and/or its Majority Members did not authorize the opening of the account [when, as the Circuit Court properly held, was authorized by the original depository agreement][44]
>
> Mountaineer Fire first opened its City National checking account number 8006593589 ("**Authorized Account No. 8006593589**") on March 18, 2011.[45]
>
> 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" . . . .[46]
>
> Included in the account documentation for **Authorized Account No. 8006593589** was a copy of Mountaineer Fire's Articles of Organization . . . .[47]
>
> On or about June 27, 2013, Joe Beam . . . directed City National to open City National checking account number 9010397389 (the "**Unauthorized Account No. 9010397389**") in Mountaineer Fire's name [except, opening new accounts was

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[43] [App. at 8]

[44] [App. at 9]

[45] [App. at 16] (emphasis in original)

[46] [App. at 16] (emphasis in original and supplied)

[47] [App. at 18] (emphasis in original)

expressly authorized, as the Circuit Court correctly found, in the original depository agreements].[48]

With Mountaineer Fire Resolution of 2011 remaining in force, City National's opening and/or activation of **Unauthorized Account No. 9010397389**, did not revoke Brian Cavender's full authority over **Unauthorized Account No. 9010397389** [which is why, for years, Brian Cavender actively used Account No. 9010397389, negotiating dozens of checks without complaint, until having some fallout with fellow LLC member, Joe Beam].[49]

Joe Beam opened **Unauthorized Account No. 9010397389** in violation of West Virginia Code § 31B-4-404(a)(1) which, in relevant part, provides: "Each member has equal rights in the management and conduct of the company's business" [which obviously states for the opposition proposition advanced by Mountaineer Fire as the statute allows all members, including Joe Beam, to conduct the company's business, including opening and closing depository accounts, subject only the company's governing documents].[50]

The account documentation reveals City National either activated **Unauthorized Account No. 9010397389** or failed to close it after the Form Resolution 2013 was returned to it without the necessary signature attestation of at least two of Mountaineer Fire's three members [which the Circuit Court correctly held did not apply as the original account was closed by an authorized member and the new account was opened by an authorized member in accordance with the terms of the original depository agreements].[51]

Brian Cavender has never received any payment for any services provided to Mountaineer Fire [which is contrary to dozens of checks written to Mr. Cavender on the new account which Mr. Cavender cashed, and which are included in the appellate record].[52]

City National subsequently allowed Brian Cavender to change Mountaineer Fire's mailing address [because, as noted, Brian Cavender was a signatory on the new account, actively conducted transactions in the new account, and under the original

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[48] [App. at 18] (emphasis in original)

[49] [App. at 20] (emphasis in original)

[50] [App. at 20] (emphasis in original)

[51] [App. at 21] (emphasis in original)

[52] [App. at 23]

> depository agreements had the right, as did Mr. Beam, to take actions relative to the old and new accounts].[53]
>
> Certain of City National's acts and omissions . . . constitute City National's breaches of its contractual obligations to Mountaineer Fire and violations of the implied duty of good faith implied in every contract [although Mountaineer Fire has never identified a single contractual provision allegedly violated by City National].[54]

By making multiple references to the account documents in their counterclaims and relying on those documents to allege breach of contract and the implied duty of good faith and fair dealing, the Petitioners brought those account documents within the purview of a motion to dismiss without converting the same to a motion for summary judgment.

It is well-settled that, "When reviewing a motion to dismiss for failure to state a claim, a trial court should limit its consideration to: (1) factual allegations in the complaint; (2) documents attached to the complaint **or incorporated in it by reference**; (3) matters of which judicial notice may be taken; and (4) **documents that are integral to the complaint**."[55] More specifically, "a court may consider (in addition to the pleadings) documents annexed to it, **and other materials fairly incorporated within it**."[56]

Thus, the Petitioners' statement in their brief that, "The pleadings only are to be considered on a motion under Rule 12(b)(6),"[57] like the rest of their brief relative to legal arguments, is simply wrong. And, to add insult to injury, the Petitioners' brief later acknowledges that matters "incorporated by reference" into a pleading or "integral to the complaint" may be

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[53] [App. at 26]

[54] [App. at 31]

[55] Palmer & Davis, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 5TH at 12(b)[8] (2017)(emphasis supplied, and footnote omitted).

[56] Id. at 409. (footnote omitted).

[57] [Petitioners' Brief at 19]

considered on a motion to dismiss,[58] but then attempts to minimize this correct statement of law by arguing that "the holding is not the primary holding in the case"[59] cited by the treatise in support as if that makes any difference.

The Petitioners counterclaimed against City National for breach of contract and breach of the implied covenant of good faith and fair dealing arising from their contractual relationship. The idea that the only contracts between City National and Mountaineer Fire are not integral to their counterclaim for their breach is preposterous. One cannot sue for breach of a contract, as have the Petitioners, and then claim that the contract itself is not "integral" to the pleading asserting the claim as reference to the contract would have been required, consistent with R. Civ. P. 11, before asserting a breach of contract claim.

Of course, this explains why this[60] and other courts[61] hold that consideration of the terms of a subject contract may be considered on motion to dismiss a suit for breach of contract as such

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[58] [Petitioners' Brief at 20]

[59] [Petitioners' Brief at 20]

[60] See *J.F. Allen Corp. v. Sanitary Bd. of City of Charleston*, 237 W. Va. 77, 80 n.4, 785 S.E.2d 627, 630 n.4 (2016)("In ruling upon the motion to dismiss, the circuit court examined the contract at issue, which was attached as an exhibit to CSB's motion to dismiss. . . . we . . . note that consideration of the contract itself was proper.")(citation omitted).

[61] See *Gladwell Government Services, Inc. v. County of Marin*, 265 Fed. Appx. 624, 625 (9th Cir. 2008) ("Our review is generally limited to the contents of the complaint, but we 'may consider evidence on which the complaint "necessarily relies" if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.'"); *Broder v. Cablevision Systems Corp.*, 418 F.3d 187, 196 (2nd Cir. 2005)("Where a plaintiff has 'reli[ed] on the terms and effect of a document in drafting the complaint,' and that document is thus 'integral to the complaint,' we may consider its contents even if it is not formally incorporated by reference."); *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005)("Appellants claim that Horsley does not apply because the form dealership contract is not central to their complaint. We disagree. The appellants' references to the dealership contract are a necessary part of their effort to make out a claim that the relationship between U-Haul and its independent dealers is not a genuine agency, but a sham agency. This issue is at the very heart of the appellants' resale price maintenance claim."); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153-54 (2d Cir. 2002)(thirteen contracts governing relationship between musicians and recording companies submitted with defendants' motion to dismiss were "integral" to the complaint as

terms are always "integral" to the suit. This rule has been applied to suits against financial institutions based on their contractual relationships with their customers,[62] and specifically with

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plaintiffs relied on their terms and effect in drafting their complaint); *Wilson v. Kellogg Co.*, 111 F.Supp.3d 306, 311-312 (E.D.N.Y. 2015)("The Terms and Conditions submitted by Kellogg herein meets the foregoing standard. In connection with the submission of his idea through Kellogg's online portal, Plaintiff agreed to the Terms and Conditions listed on the website. Plaintiff does not deny that he agreed to the Terms and Conditions; in fact, he acknowledges agreeing to them in his Second Amended Complaint. Despite this, Plaintiff asserts that the Court should not consider the Terms and Conditions because he only vaguely mentions them in his complaint, which, according to Plaintiff, is not enough to incorporate them by reference. The Court disagrees. . . . Given Plaintiff's knowledge of the Terms and Conditions and his deliberate decision to avoid any substantive reference to them in his complaint, the Court deems the Terms and Conditions incorporated into the Second Amended Complaint by reference, particularly since it is 'integral to [plaintiff's] ability to pursue' his cause of action.")(citation omitted); *Coon v. Wood*, 68 F.Supp.3d 77, 83 (D.D.C. 2014)(dismissing breach of contract suit where, after examining contract integral to plaintiff's claim for breach of contract, the court determined that with respect to the contractual obligation alleged by the plaintiff "the contract contains no language or provision creating such an obligation"); *Nieto-Vicenty v. Valledor*, 984 F.Supp.2d 17, 20 (D. P.I. 2013)("Lexington asks the Court to consider documents pertaining to Zurqui's maritime insurance policy because they were integral to the plaintiffs' claims against Lexington and referenced in the complaint. (Docket Nos. 66 & 66-1.) The Court agrees that the insurance policy documents attached to Lexington's motion to dismiss can be considered without converting the motion into one for summary judgment."); *Discover Grp., Inc. v. Lexmark Int'l, Inc.*, 333 F.Supp.2d 78, 82-83 (E.D.N.Y. 2004) (explaining that "[w]hen a document is integral to the complaint, a plaintiff is on notice that it might be considered by the court in a motion to dismiss," and plaintiff cannot avoid consideration of the integral document by choosing not to attach it to the complaint).

[62] See *White v. First Franklin Financial Corporation*, 2019 WL 1492294 at *5 (E.D.N.Y.)("Submitted by Defendants FFFC and BANA are the following documents . . . a copy of an adjustable rate note . . . a copy of a mortgage . . . a copy of an assignment . . . The Court finds each of these documents are properly considered on the Rule 12(b)(6) motions as they are documents integral to the complaint."); *Akins v. U.S. Bank, National Association*, 2019 WL 1495300 at *4 (W.D. Tenn.)("The Court may consider the Note, the Deed of Trust, Chase's proof of claim, and the Corporate Assignment because those documents are attached to U.S. Bank's Motion to Dismiss, they are referred to in the Complaint, and they are integral to Akins's claims."); *Barr v. Flagstar Bank, FSB*, 303 F.Supp.3d 400, 411 (D. Md. 2018)("because the Revised LMA is the contract upon which the Barrs base their breach of contract claim and the Barrs detail several of its terms in the Amended Complaint, the Court concludes that it can consider the Revised LMA"); *Hilton v. Bank of New York Mellon*, 2016 WL 234851 at *8 (N.D. N.Y.)("a motion to dismiss a complaint for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) may be based on documents incorporated by reference in, or integral to, the complaint. Here, the Note, the Mortgage, the PSA and the Mortgage Loan Schedule were incorporated by reference in, or at the very least integral to, Plaintiff's Adversary Complaint."); *Tinsley v. OneWest Bank, FSB*, 4 F.Supp.3d 805, 819-820 (S.D. W. Va. 2014)("Here, the Home Equity Deed of Trust . . . is properly considered by the Court in its resolution of the instant Motion to Dismiss because it is integral to and explicitly relied upon in the Complaint, and there is no dispute as to its authenticity . . . and the Deed gives rise to Plaintiff's breach of contract claim"); *Schnall v. Marine Midland Bank*, 225 F.3d 263, 266 (2d Cir. 2000) (explaining, in case in which plaintiff brought a putative class action under various federal lending laws arising out of his contract with the bank defendant, that although "[o]rdinarily our consideration [on a Rule 12(b)(6)] is limited to the face of the complaint and

respect to account documents.[63] As the Third Circuit astutely noted, this rule is necessary because, "Otherwise, a plaintiff with a legally deficient claim could survive a motion to dismiss simply by failing to attach a dispositive document on which it relied."[64]

Accordingly, the Circuit Court did not err by considering the contract documents in ruling on City National's motion to dismiss, among other things, the Petitioners' counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing.

C. THE CIRCUIT COURT PROPERLY DISMISSED PLAINTIFFS' CLAIMS FOR BREACH OF CONTRACT AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING WHERE PETITIONERS IDENTIFIED NO CONTRACTUAL PROVISION BREACHED BY CITY NATIONAL.

The gravamen of the Petitioners' counterclaims against City National is that it breached some still unspecified contractual provisions because a member of Mountaineer Fire who was a signatory to its commercial checking account opened another commercial checking account in which the other two members of Mountaineer Fire actively transacted business for over three years after it was opened until a dispute arose among the three members which precipitated City National's freezing the account and filing an interpleader action.

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documents attached to the complaint or incorporated by reference, ... here we may also consult [the plaintiffs] Cardholder Agreement, account history and monthly statements because they are integral to his claims and [plaintiff] had notice of that information.").

[63] See *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1160 (9th Cir.2012)("Specifically, courts may take into account 'documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading.' ")(citation omitted, alternation in original); *Napleton v. Great Lakes Bank, N.A.*, 408 Ill.App.3d 448, 452, 945 N.E.2d 111, 115, 348 Ill. Dec. 804, 808 (2011)("Here, the parties agree that pursuant to the terms of the Account Agreement, the plaintiff's duty to 'promptly notify' the bank of any unauthorized charges was modified to mean 30 days from the date the Monthly Statement was mailed to plaintiff. Although we did not find any Illinois cases directly addressing this issue, decisions from other jurisdictions indicate that such an alteration in the notification period is clearly permissible.").

[64] *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (internal citation omitted).

First, with respect to the Petitioners' breach of contract claims, the Circuit Court correctly concluded as a matter of law:

> [I]n West Virginia, "the elements of breach of contract are (1) a contract exists between the parties; (2) a defendant failed to comply with a term in the contract; and (3) damage arose from the breach." Wittenberg v. Wells Fargo Bank, N.A., 852 F. Supp. 2d 731, 749 (N.D. W. Va. 2012). Here, neither Count VII of Counter-Plaintiffs' Counter-Claims nor their Response identify a single term of the contract allegedly breached by CITY NATIONAL BANK OF WEST VIRGINIA and, for the reasons previously discussed, CITY NATIONAL BANK OF WEST VIRGINIA breached no term of any contract relative to the Counter-Plaintiffs. [65]

As this Court will look in vain in the record or the Petitioners' brief for the identification of any contractual provision breached by City National, the Circuit Court correctly dismissed the Petitioners' breach of contract claim.

Second, with respect to the Petitioners' breach of the implied warranty of good faith and fair dealing, the Circuit Court correctly concluded as a matter of law:

> [U]nder West Virginia law, "An implied contract and an express one covering the identical subject-matter cannot exist at the same time. If the latter exists, the former is precluded." Syl. pt. 3, Rosenbaum v. Price Construction Company, 117 W. Va. 160, 184 S.E. 261 (1936). In other words, there is no implied covenant of good faith and fair dealing independent from a breach of contract. See Highmark West Virginia, Inc. v. Jamie, 221 W. Va. 487, 655 S.E.2d 509 (2007)("an implied covenant of good faith and fair dealing does not provide a cause of action apart from a breach of contract claim"). Indeed, specifically with respect to banks, our Court has held, "West Virginia law, a bank has no implied duty of good faith and fair dealing absent a breach of contract . . . ." Brozik v. Parmer, 2017 WL 65475 (W. Va.)(memorandum); see also Evans v. United Bank, Inc., 235 W. Va. 619, 775 S.E.2d 500 (2015). Here, because the Counter-Claims state no cause of action for breach of contract, they state no cause of action for breach of the implied covenant of good faith and fair dealing.[66]

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[65] [App. at 172]

[66] [App. at 172]

Again, without identifying any contractual provision breached by City National, the Petitioners cannot, as a matter of law, have any viable claim for breach of the implied covenant of good faith and fair dealing.

Finally, as the Petitioners concede in their brief,[67] the subject contract documents expressly state that, "any one (1) of the Authorized Signers," which included Mr. Beam, "may enter into any such agreements and perform such acts they deem reasonably necessary . . . and those agreements will bind the Company . . . and they are hereby authorized and empowered . . . To deliver and execute to the Financial Institution . . . other account opening documents submitted by the Financial Institution." As the Circuit Court correctly determined the Petitioners cannot allege breach of contract because Mr. Beam opened an account when the contract expressly authorized Mr. Beam to open accounts.[68]

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[67] [Petitioners' Brief at 24]

[68] Indeed, *APCOA, Inc. v. Fidelity Nat. Bank*, 703 F. Supp. 1553 (N.D. Ga. 1998), relied on by the Petitioners in their brief [Petitioners' Brief at 26 n.28], supports the Circuit Court's ruling in this case. The company opened several checking accounts at Fidelity National Bank in Atlanta using the same type of forms used to open Mountaineer Fire's account with City National. Id. at 1556. "The Designation and Authorization forms provided that Fidelity was authorized to pay checks on drafts 'made or drawn against any funds at any time standing to the credit of [APCOA] in any account carried under the name of [APCOA]' when the checks and drafts were signed by two of the four designated individuals. . . . No employee of APCOA in Atlanta was listed as an authorized signatory on these accounts." Id. at 1556. The company's bookkeeper, an employee and non-signatory to the accounts, then opened another company account which she used to embezzle funds: "On September 18, 1982 Dolly Ison opened an account at Fidelity entitled 'APCOA—Special Account'. This was the first account used for the embezzlement. The account was opened by Fidelity employee Doris Moore. There were no corporate resolutions, authorizations, or certificates executed by any officers or authorized officials of APCOA in connection with the opening of this Special Account. The signature card for this account listed Victor Toledo and Dolly Ison as authorized signatories. The mailing address was APCOA's local mailing address in Atlanta. There is no evidence that Cleveland ever became aware of this account until the defalcation was discovered. In March of 1983 the mailing address on the Special Account was changed to a post office box that was not maintained in the name of APCOA." Id. at 1557. Using this initial unauthorized account as a foundation, the bookkeeper then "walked into Fidelity's Peachtree Center branch and without forms, documents or any evidence of authority opened two accounts in APCOA's name. Mr. Sharon Denney, the Branch Manager of Fidelity's Peachtree Center branch testified that authorizations were not obtained because the bank already had authorizations on file for APCOA. There is no dispute that those documents do not authorize

Identifying no contractual provision breached and with the contract expressly providing that "any one (1) of the Authorized Signers," which included Mr. Beam, could open accounts, the Circuit Court correctly dismissed the breach of contract and implied covenant claims.

D. THE PETITIONERS HAVING FAILED TO ALLEGE ANY ERROR OR BRIEF THE DISMISSAL OF THEIR NOVEL "AIDING AND ABETTING BREACH OF FIDUCIARY" AND "AIDING AND ABETTING TORTIOUS INTERFERENCE" CLAIMS, HAVE WAIVED THOSE ISSUES FOR PURPOSES OF APPEAL.

As noted, two of the Petitioners' claims against City National were "aiding and abetting breach of fiduciary duty" and "aiding and abetting tortious interference," which the Circuit Court properly dismissed because (1) "under West Virginia law, a bank owes no fiduciary duty to a borrower or a depositor because those relationships are grounded in contract"[69] and (2) "the

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Dolly Ison or Victor Toledo to withdraw funds from APCOA's account." Id. She then used those accounts to embezzle over $250,000 from the company. Id. Expressly rejecting the only argument advanced by the Petitioners to render the new City National account "unauthorized," the court held, "The absence of a corporate resolution does not establish defendant's liability. Requiring a corporate resolution before opening an account is a way for the bank to protect itself from liability for mishandling funds deposited to the credit of a corporation." Id. at 1558. Instead, contrary to the facts of the instant case where Mr. Beam had authority to open the new account and was a named "Authorized Signer" for the account, the ruling in APCOA turned on the ruling that, "A bank only incurs liability when it allows individuals access to corporate funds when they have no 'authority' or 'inherent agency power,'" and because the bookkeeper, unlike Mr. Beam, was never given authority by the company and lacked inherent agency with the company to open accounts in its name, the bank, Fidelity, could be determined not to have acted in a commercially reasonable manner. Id. at 1558. As will be later discussed, the Petitioners consistently in their brief cite cases that stand for propositions completely contrary to those advanced by the Petitioners.

[69] [App. at 173] (citing *Brozik v. Parmer*, 2017 WL 65475 at *17 (W. Va.)(memorandum)(bank had no duty to borrower that could support a breach of fiduciary duty claim arising out of transaction in which borrower obtained loan in order to purchase debt owed by borrower's nephew's business; bank acted as nothing more than a lender); *Peters v. Peters*, 191 W. Va. 56, 443 S.E.2d 213 (1994)(bank owes no fiduciary duty to holders of depository accounts); see also *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 287 (2d Cir. 2006)(a bank has no duty to monitor depository accounts and even with respect to fiduciary accounts a "depository bank has no duty to monitor fiduciary accounts maintained at its branches in order to safeguard funds in those accounts from fiduciary misappropriation, but instead is entitled "to presume that the fiduciary will apply the funds to their proper purposes."); *In re Agape Litigation*, 773 F.Supp.2d 298, 325 (E.D. N.Y. 2011)(same); *Home Sav. of Am., FSB v. Amoros*, 233 A.D.2d 35, 661 N.Y.S.2d 635, 637 (N.Y. App. Div. 1997) ("[A] depository bank has no duty to monitor fiduciary accounts . . . to safeguard the funds in those accounts from fiduciary misappropriation.")

Counter-Plaintiffs, Defendant Beam, and City National were all parties to any contractual relationships among the parties, and one cannot tortiously interfere with one's own relationship."[70] Moreover, by failing to assign the dismissal of those claims as error or to substantively brief them, the Petitioners have waived the issue.[71]

E. THE PETITIONERS ASSERTED NO CLAIM UNDER THE UNIFORM COMMERCIAL CODE IN THEIR COUNTERCLAIMS AND WAIVED ANY CLAIM WHEN THEY NEVER AMENDED THEIR COMPLAINT IN RESPONSE TO THE MOTION TO DISMISS.

The Petitioners asserted only three "COUNTER CLAIMS AGAINST CITY NATIONAL"[72] - "Breach of Contract and Covenant of Good Faith and Fair Dealing;"[73] "Aiding and Abetting Breach of Fiduciary Duty,"[74] and "Aiding and Abetting Tortious Interference."[75] Nowhere in the Petitioners' pleading is any claim under the UCC asserted against City National and, indeed, nowhere in the Petitioners' pleading is the UCC ever mentioned.

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[70] [App. at 173-174] (citing *Hatfield v. Health Management Associates of West Virginia*, 223 W. Va. 259, 267, 672 S.E.2d 395, 403 (2008)("Because they were acting within the scope of their employment, appellees Ms. Atkins and Ms. Ball were acting on the hospital's behalf—and, as our law is clear, the appellee hospital cannot be held liable for tortious interference with its own contract with the appellant.")

[71] See R. App. P. 10(c)(7) (providing that petitioner's brief "must contain appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal. The Court may disregard errors that are not adequately supported by specific references to the record on appeal"); *Evans v. United Bank, Inc.*, 235 W. Va. 619, 629, 775 S.E.2d 500, 510 (2015) (observing that petitioners' argument failed to meet requirements of Rule 10(c)(7), and concluding, therefore, "the issue has been waived for purposes of appeal"); *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996) (stating that "[a]lthough we liberally construe briefs in determining issues presented for review, issues ... mentioned only in passing but are not supported with pertinent authority, are not considered on appeal."); *State v. Allen*, 208 W. Va. 144, 162, 539 S.E.2d 87, 105 (1999) (stating that "[i]n the absence of supporting authority, we decline further to review [these] alleged error[s] because [they have] not been adequately briefed.").

[72] [App. at 31]

[73] [App. at 31]

[74] [App. at 32]

[75] [App. at 33]

As noted, the Petitioners filed no response to City National's motion to dismiss their counterclaims prior to the properly noted hearing on the motion. Rather, it first filed any response to the motion to dismiss after the hearing.[76] It was in that belated response that the Petitioners first tried to deal with the issue of their earlier false statements about not being aware until 2017 of an account opened in 2015 which the account records demonstrated dozens of checks being negotiated by them making the following argument:

> Even if Brian Cavender subsequently became aware of the existence of a second account . . . City never made available the monthly account statements . . . to Brian Cavender and Mountaineer eliminating certain defenses that might have otherwise been available City under the UCC . . . City also ignores its strict liability . . . [under] 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 . . . *O'Mara Enterprises, Inc. v. People's Bank of Weirton*[77]

Although difficult to unpack, this was not the assertion of a cause of action, but rather (1) an acknowledgment in the face of dozens of cancelled checks negotiated by Brian Cavender that he either knew or should have known of the new checking account and (2) an argument that because monthly accounts statements were not mailed directly to Mr. Cavender, City National loses a defense it has never asserted to the Petitioners' breach of contract and implied covenant claims, which makes no sense.

The Circuit Court properly denied the Petitioners' breach of contract and implied covenant claims not because City National asserted that the Petitioners were charged with the notices provided in the monthly account statements mailed to Mountaineer just as they had been

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[76] [App. at 91]

[77] [App. at 97]

done with the original account,[78] but that (1) the Petitioners identified and still have identified no provision of any contract between the Petitioners and City National that had been breached by City National and (2) the contracts that existed between Mountaineer Fire and City National expressly authorized Mr. Beam to open new accounts for Mountaineer Fire.

Beyond the obvious point that negation of a defense never raised by City National is somehow an independent cause of action, if the Petitioners wanted to try to assert the negation of a defense never raised a separate cause of action, their remedy was to amend their complaint,[79] but

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[78] Like many of the assertions by the Petitioners and their counsel, the contention that statements were not mailed to Mountaineer Fire is demonstrably false in the face of the account documents, which is why courts allow their consideration on a motion to dismiss. The notice of process address for Mountaineer Fire in the Office of the Secretary of State for West Virginia is "**Brian Cavender. P.O. Box 489, Poca, WV, 25159**." [App. at 220] And, where were the monthly statements sent for years on an account that Brian Cavender now claims he had no knowledge? They were sent to "**Mountaineer Fire & Rescue Equipment LLC, P.O. Box 489, Poca WV 25159**." [App. at 255, 257, 259, 263, 265, 267, 268, 271, 273, 275, 277, 278] And, the reason the monthly account statements were mailed to Brian Cavender's Post Office Box for an account the Petitioners claim was secretly established by Mr. Beam? **It was Brian Cavender's Post Office Box that was listed as the address for Mountaineer Fire on the new account**. [App. at 248] The Petitioners never explain, nor could they credibly, how City National was supposed to know that Mountaineer Fire's official address in the Secretary of State's Office for which Brian Cavender was listed as the recipient to which City National was sending monthly statements for an account opened by one of the authorized signers for Mountaineer Fire that would not allegedly become known to Brian Cavender, who was also cashing dozens of checks on the new account, for years. The documents substantiate that the contention that the Petitioners were unaware of the new account is a complete fabrication.

[79] See, e.g., *Sigman v. Discover Bank*, 2017 WL 1345247 at *2 (W. Va.)(memorandum decision)("On January 8, 2016, respondent moved to dismiss the amended complaint. Petitioner filed a response on January 19, 2016. The circuit court heard oral argument on February 18, 2016. On the morning of the hearing, petitioner filed a motion to amend his amended complaint.'); *A2C2 Partnership, LLC v. Constellation Software Inc.,* 2015 WL 6143409 at *1 (W. Va.)(memorandum decision)("In response to the motion to dismiss, petitioner filed an amended complaint on May 1, 2013, making the same allegations as in its original complaint, but adding Jonas as a defendant and invoking an "alter-ego" theory of liability against respondent."); *Mountain State Sales and Elec. Service, Inc. v. Raleigh County Bd. of Educ.*, 2015 WL 3672474 at *1 (W. Va.)(memorandum decision)("Respondent, pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, filed a motion to dismiss petitioner's complaint, and argued that it was immune from petitioner's claims by virtue of the West Virginia Governmental Tort Claims and Insurance Reform Act, West Virginia Code §§ 29-12A-1 to -18. In response, petitioner filed a motion to amend its complaint."); *Hinerman v. Rodriguez*, 2013 WL 2157766 at *1 (W. Va.)(memorandum decision)("The original complaint

they did not do so, which means that they have waived any cause of action that is not contained in their complaint which was the subject of the successful motion to dismiss.[80]

Because the Circuit Court could not have committed error regarding a cause of action never asserted in the Petitioners' counterclaims, this Court should affirm the dismissal of those counterclaims.

F. THIS CASE DID NOT INVOLVE ANY ISSUE CONCERNING RESTRICTIVE ENDORSEMENTS, AND THE PETITIONERS' INVOCATION OF THE *O'MARA* CASE MAKES NO SENSE.[81]

As noted, the Petitioners invoked this Court's decision in *O'Mara Enterprises, Inc. v. People's Bank of Weirton*, 187 W. Va. 591, 420 S.E.2d 727 (1992), in response to City National's motion to dismiss, but as the Circuit Court held:

> [C]oncerning Counter-Plaintiffs' arguments under O'Mara Enterprises, Inc. v. People's Bank of Weirton, 187 W. Va. 591, 420 S.E.2d 727 (1992), the Court notes that case turned on the existence of restrictive endorsements and none of the checks in this case had any restrictive endorsements, and that many courts have that where a corporate resolution opening a depository account gives signature authority over the depository account, such as the one given by Mountaineer Fire to Mr. Beam in this case, the depository bank is not liable for embezzlement by one of those signatories even where a bank fails to follow its own policies requiring corporate

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in the underlying matter was filed on December 27, 2010 against Mr. and Mrs. Rodriguez who filed a motion to dismiss on December 30, 2010. Petitioners filed an amended complaint on January 7, 2011.").

[80] See, e.g., *In re L.L.*, 2018 WL 1721908 (W. Va.)(memorandum decision)("Our general rule is that nonjurisdictional questions ... raised for the first time on appeal, will not be considered.")(quotation marks and citations omitted); *Hundley v. Mirandy*, 2018 WL 1641118 at *2 n.5 (W. Va.)(memorandum decision)(same); *Sadeghzadeh v. Knode*, 2018 WL 317354 at *3 n.3 (W. Va.)(memorandum decision)(same); *Fruth v. Powers*, 239 W. Va. 809, 815, 806 S.E.2d 465, 471 (2017)(same); *Haynes v. Antero Resources Corporation*, 2016 WL 6542734 at *5 (W. Va.)(memorandum decision)("The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we have the benefit of its wisdom ")(citation omitted).

[81] City National notes that less than two pages of the Petitioners' brief are devoted to this issue. [Petitioners' Brief at 26-27.

resolutions if the officer had the ostensible authority to open accounts and conduct business, which Mountaineer Fire gave to Mr. Beam in the 2011 Resolutions.[82]

The *O'Mara* case involved the embezzlement by a company's controller of more than $41,000.[83] The scheme was perpetrated even though the checks involved contained a restrictive endorsement indicating that they were for payment of the company's tax obligations.[84] The company's theory of recovery had absolutely nothing to do with the circumstances of the instant case whereby a company's member, specifically authorized by the depository agreement to open new accounts, opened a new account where thereafter monthly statements were mailed to the company's address and the other company's members actively used the new account. Instead, the company's theory was as follows:

> Appellant contends that the tax checks were wrongly accepted for deposit into the GSD account and further that the drawee banks which honored those checks are liable to O'Mara for transferring such funds because the restrictive endorsement prevented the checks from being properly payable pursuant to the Uniform Commercial Code, West Virginia Code §§ 46-1-101 to 46-11-108 (1966 & Supp.1991) [hereinafter "UCC"], provisions on negotiability.[85]

As this Court correctly held:

> The UCC cogently addresses the issue of endorsements: "If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; ..." W. Va. Code § 46-3-202(1). "Negotiation takes effect only when the indorsement is made...." W. Va. Code § 46-3-201(3). The UCC requires that a check which is drawn "Pay to the Order of Ohio Bank" must be properly endorsed by the named payee (e.g. Ohio Bank) to be negotiable. A restrictive endorsement that precedes the endorsement required by the named payee on a check drawn "Pay to the Order of" prevents the commercial instrument from being negotiable pursuant to the provisions of the UCC. Accordingly, to preserve negotiability, a restrictive endorsement can only follow the endorsement intended by the check's drawer.

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[82] [App. at 174-175] (footnotes omitted)

[83] *O'Mara*, supra at 592, 420 S.E.2d at 728.

[84] Id.

[85] Id.

> It is axiomatic that absent negotiability, there is no transfer of rights to the funds represented by the commercial instrument. **Since the checks were not negotiable because of non-compliance with UCC provisions regarding endorsement, the rights to the funds represented by the checks at issue were never transferred to the Bank**. The Bank, therefore, became only a possessor of the checks and not a holder. See W. Va. Code § 46-1-201(20). Absent the necessary holder status required by the UCC to transfer rights in a commercial instrument, the Bank was not entitled to collect the funds at issue from the West Virginia banks upon which the tax checks were drawn. See W. Va. Code §§ 46-3-301; see also *O'Mara Enters., Inc. v. Mellon Bank*, 601 F. Supp. 565, 571 (W.D. Pa. 1985) ("because of GSD's indorsement, Heritage [Bank] did not become a holder, notwithstanding that the checks were originally payable to Heritage's order"). **By placing a restrictive endorsement on checks drawn "Pay to the Order of Ohio Bank" which preceded endorsement by the named payee, the checks became non-negotiable pursuant to the UCC provisions**.[86]

Of course, as the Circuit Court in this case correctly held, this law has nothing whatsoever to do with the circumstances of the instant case as no restrictive endorsements or the negotiability of the checks - many of which were made payable to and cashed by the Cavenders - are at issue.[87]

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[86] Id. at 594, 420 S.E.2d at 730 (emphasis supplied).

[87] Additionally, none of the other cases cited in the UCC section of the Petitioners' brief have anything to do with this case, and do not stand for the propositions asserted. For example, the Petitioners cite *Fidelity & Cas. Co. v. First City Bank of Dallas*, 675 S.W.2d 316 (Tex. Ct. App. 1984), for the proposition that "The general purpose of the Code is to allocate the loss, among innocent parties, to the person who is closest to the individual causing the loss and who, presumably, has the best opportunity to prevent it," [Petitioners' Brief at 26 n.27], but leaves out the following sentence, "Thus, § 3.405 allocates the loss to the employer of the faithless employee," where the liability of the bank was not predicated upon its status as a bank, **but on its status of the employer of an employee who committed fraud**. It is unconscionable that the Petitioners would cite this case to have any application whatsoever in this case. The Petitioners next cite *Travelers Cas. and Sur. Co. v. Washington Trust Bank*, 86 F.Supp.3d 1148, 1155 (E.D. Wash. 2015), for the proposition that, "bank was 'in the first and best position to discover the problem," [Petitioners' Brief at 26 n.27], but that was not a holding in *Travelers*, but from another case, which like *O'Mara*, involved a bank ignoring restrictive endorsements. Indeed, like the Petitioners did relative to the Fidelity case, they left out the following words immediately preceding those quoted in the Petitioners' brief: "See for example *DelJack v. U.S. Bank*, 2012 WL 4482049 (D. Idaho 2012) (customer had no duty to report **bank's failure to honor restrictive endorsement** as bank was "in the first and best position to discover the problem")(emphasis supplied). The Petitioners' next cite *Old Republic Nat. Title Ins. Co. v. Bank of East Asia Ltd.*, 291 F.Supp.2d 60 (D. Conn. 2003), for the proposition that, "Bank of East Asia 'was in the best position to prevent the fraud because it" ... "allowed Lee to open joint accounts in the name of Nancy Chang, without Chang's knowledge or consent," [Petitioners' Brief at 26 n.27], but again, like they did relative to *Fidelity* and *Travelers*, the Petitioners' left out this significant language: "**In this case, Old**

Instead, the Petitioners' complaint as to City National is that it permitted Mr. Beam to exercise what was his contractual right as a member and "Authorized Signer" on Mountaineer Fire's account to open new accounts violating absolutely no provision of the Uniform Commercial Code.

Republic alleges that the Bank of East Asia was in the best position to prevent the fraud because it was the Bank of East Asia that: (a) allowed Lee to open joint accounts in the name of Nancy Chang, without Chang's knowledge or consent" (emphasis supplied). So, **what the Petitioners have told this Court was a holding in Old Republican was not a holding at all, but one of the parties' arguments**. And, the suit in *Old Republic* was not between a commercial checking account holder and a bank, but between a title insurer, as subrogee of its insured, and the only holding of the case that the subrogee had standing to bring its claim. The Petitioners next cite *Guardian Life Ins. Co. of Am. v Chemical Bank*, 94 N.Y.2d 418, 727 N.E.2d 111, 705 N.Y.S.2d 553 (2000), for the proposition that, "UCC 'shifts the risk of loss to "the party best able to prevent the loss,"'" [Petitioners' Brief at 26 n.27], but the appellate court in Guardian Life **affirmed an award of summary judgment to the bank against a commercial checking account customer whose employee forged checks cashed by bank with the appellate court holding, "As noted by Supreme Court, the result we reach here is consistent with the purposes of UCC 3-405 (1) (c), because Guardian was in a better position than defendant to prevent these forgeries."** In other words, the *Guardian Life* ultimately stands for exactly the opposite position advanced by the Petitioners. The Petitioners next cite *Perini Corp. v. First Nat. Bank of Habersham County, Georgia*, 553 F.2d 398 (5th Cir. 1977), for the proposition that, "UCC's strict liability policy of allocating loss to party in the best position to prevent it 'serves the notion that commerce will be facilitated by bringing to the swiftest practical conclusion the processing of a check transaction," [Petitioners' Brief at 26 n.27], but again, the Petitioners have left out this significant language: "In sum, the Code, while allowing for some modification on the basis of fault or agreement, sets up a system of strict liability rules allocating loss according to the type of forgery. The system uneasily rests on two policy bases. First, it incorporates **an at least partially outmoded notion** of the relative positions of drawee banks and prior parties in the collection chain with respect to detecting different types of forgeries. Second, **it incompletely serves the notion** that commerce will be facilitated by bringing to the swiftest practicable conclusion the processing of a check transaction" (emphasis supplied), and, again, ignores the ultimate holding of the Fifth Circuit in *Perini*, supra at 420, a forgery case, which reaches the opposite result advanced by the Petitioners: "**it would be a sham to fasten liability on the defendant banks, which operate in a world of electronic impulses and encoded integers, on the basis of the eyeball to eyeball mercantile confrontations of halcyon days. Minute examination of checks for forgeries is an old banker's tale; two hundred years after Price v. Neal, bankers do not purport to be graphologists**." (emphasis supplied). As noted earlier, the Petitioners persisted in advancing the fabricated factual allegation that they were unaware of an account that was mailed to their Post Office Box and in which they actively participated. As can been by the foregoing analysis of the cases cited by their attorney, their legal arguments are similarly complete mischaracterizations of the cases cited.

Indeed, this explains why **not a single provision of the Uniform Commercial Code is cited in the Petitioners' brief**,[88] again constituting a waiver of any issue regarding the same on appeal.[89]

Indeed, although not raised by City National in its motion to dismiss, not only does its commercial checking account agreements not violate any provision of the UCC, the UCC provisions that do govern commercial checking accounts place the liability on Mountaineer Fire to the extent it contends that Mr. Beam engaged in any unauthorized transactions, which would be a frivolous contention as he was a member of Mountaineer Fire and an "Authorized Signer" with contractual authority to act unilaterally to open new accounts, expressly place the risk of loss on Mountaineer Fire, not City National:

> (c) If a bank sends or makes available a statement of account or items pursuant to subsection (a), the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.
>
> (d) If the bank proves that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (c), the customer is precluded from asserting against the bank:

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[88] [Petitioners' Brief at Table of Contents, Statutes, ii] What the Petitioners have done is transparent. They located a case in which a commercial checking account customer prevailed against a bank in a case involving embezzlement. And, then, even though the facts and the law of that case have absolutely nothing to do with this case, rely upon it for the proposition that if a commercial checking account customer is the victim of unauthorized transactions by one of its employees, it is the bank that is responsible, which is not only not the law, but which is absurd. It is correct that in Syllabus Point 4 of *O'Mara*, this Court correctly held, "A bank cannot, through the use of a preprinted corporate resolution form, negate its Uniform Commercial Code responsibilities to exercise good faith and ordinary care with respect to its customers," but the Petitioners have identified not a single sentence of the corporate resolution forms in this case which violate the UCC. Instead, they make the frivolous leap across the requirement that some provision violate the UCC, to land on the assertion that banks are "to exercise good faith and ordinary care," which again was not asserted in any of the Petitioners' counterclaims and, more importantly, does not arise unless and until a corporate resolution provision is determined to violate the Uniform Commercial Code, which is not the case here.

[89] See supra note 70.

> (1) The customer's unauthorized signature or any alteration on the item, if the bank also proves that it suffered a loss by reason of the failure; and
>
> (2) The customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding thirty days, in which to examine the item or statement of account and notify the bank.[90]

Or, simply stated, there is nothing in the Uniform Commercial Code that would support any cause of action by the Petitioners against City National even had the Petitioners tried to assert one.

V. CONCLUSION

Because the only documents referenced in the Circuit Court's dismissal order were the original depository agreements which are referenced multiple times in the Petitioners' counterclaims and, therefore, properly subject to consideration by the Circuit Court; nowhere in the Petitioners' brief, consistent with the pleadings it filed in Circuit Court, does it identify a single contractual provision allegedly violated by City National; and the Petitioners have not briefed and, therefore, have abandoned their claims for the non-existent causes of action for "aiding and abetting breach of fiduciary duty" and "aiding and abetting tortious interference," the order of the Circuit Court of Kanawha County dismissing the Petitioners' counterclaims against City National should be summarily affirmed.

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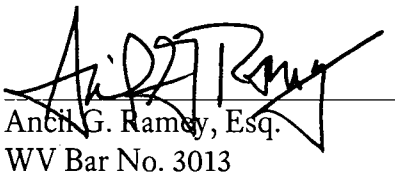
[90] W. Va. Code §§ 46-4-406(c) and (d); see also Syl. pt. 2, *Leonard v. National Bank of W. Va. at Wheeling*, 150 W. Va. 267, 145 S.E.2d 23 (1965)("If a check is drawn in such manner that it can readily be raised or altered and such alteration cannot be detected by the use of ordinary care, the drawee bank is not liable for the payment of such check.").

CITY NATIONAL BANK OF WEST VIRGINIA

By Counsel



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