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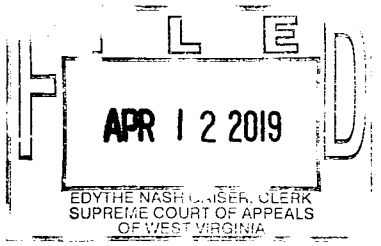

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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' BRIEF

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

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1. City National Filed Its *De Facto* Motion For Summary Judgment Less Than A Month After Petitioner Filed Its Answer And Counterclaim, Respondent Moved To Stay Petitioner's Timely Request For Documents Necessary To Respond To Motion, Circuit Court Committed Reversible Error In Dismissing Petitioner's Claims Without Granting Petitioner's Request In Response For Order Compelling City National To Produce Requested Documents And Order Requiring The Parties Submit A Proposed Scheduling Order The Circuit Court Was Required To Enter Pursuant To Rule 16(b).

2. The Circuit Court Circuit Court committed Reversible Error With Its Entry Of Respondents' Orders to Dismiss For Failure To State A Cause of Action Without Consideration of Petitioner's Factual Allegations Pled In Its Answer and Counterclaims and Incorporated By Reference Into Each Cause Of Action Separately Pled As If Fully Restated Therein.

B. The Circuit Court Failed to Apply Well Settled Contract Law Regarding Contract Interpretation And Committed Reversible Error With Its Acceptance of City National's Tortured Construction of Its Primary Deposit Contract Document With Substantial Violence To Its Other Key Provisions Rather Than Application of Its Clear and Unambiguous Terms As Written.

C. The Circuit Court Committed Reversible Error In Its Failure To Consider Petitioner's Arguments For Holding City National Time Honored Principle of Strict Liability Under West Virginia's Uniform Commercial Code when it was in the first and best position to prevent Mountaineer's conversion losses.

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[1] *Fucillo v. Kerner*, 231 W.Va. 195 n. 4, 744 S.E.2d 305 (W. Va., 2013)

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

App. Rule 19(a)(1)

Oral argument as provided under Appellate Rule 19(a)(1) is appropriate in this appeal as it involves two assignments of error of well settled areas of law requiring reversal driven by invitation of the Respondents with the Circuit Court's entry, as submitted, of Respondents' *pseudo* Rule 12(b)(6) orders dismissing Petitioners' counter-claims and cross-claims.

Respondents proposed orders merely carried forward Respondents' misstatements or avoidance of all discussion of well settled law applicable to their *de facto* motions for summary judgment pursuant to Rule 12(b) and contract interpretation violating well settled law concerning the basic rules of contract interpretation, including the first rule requiring clear and unambiguous contracts are to be applied as written with consideration given to the dismiss entered by the trial court as submitted settled areas of law requiring denial of their motions.

For example, in Mountaineer's Reply to City National's Motion to Stay Discovery, it was also necessary to respond to City National's supposed Rule 12(b)(6) Motion to Dismiss Counter-Claims to expose it as one it is well settled the Circuit Court was required by Rule 12(b) to treat as motion for summary judgment.

City National first identified Rule 12(b)(6) in its reply in which it seized on Mountaineer's scrivener's error in identifying Rule 12(b) as Rule 12(b)(7), with a verbatim quote of Rule 12(b) provided directly under the reference in error to Rule 12(b). **(JA I 77-78)**

In its reply City National argued:

> (Mountaineer's) Response references R. Civ. P. 12(b)(7) [Response at ll, but City National's motion is pursuant to R. Civ. P.12(b)((6), not R. Civ. P. 12(b)(7). R. Civ. P. 12(b)(7) governs "failure to join a party under Rule 19" or the indispensable party rule, having nothing whatsoever to do with City National' s motion under R. Civ. P.

12(b)(6) involving the "failure to state a claim upon which relief can be granted."

In support of its response to City National's *de facto* motion for summary judgment, Mountaineer referenced *Elliott v. Schoolcraft*, 213 W.Va. 69, 576 S.E.2d 796 (2002). *Elliott* reversed the error of the trial court in granting summary judgment where plaintiff had taken depositions, but had not been allowed adequate time for additional discovery needed to defend summary judgment as the defendants filed their motions for summary judgment only 4 months after plaintiff's filed their complaint. The court also noted, reversal was also appropriate because the trial court had not entered the mandatory scheduling required by Rule 16(b).

Below, Mountaineer filed its counter-claims against City National and Joe Beam on February 28, 2018. City National filed its *de facto* motion for summary judgment less than one month later on March 14, 2018. On March 21, 2018, Mountaineer served its first request for documents on City National. On March 23, 2018, City National filed a motion to stay.

Mountaineer filed its reply to the motion to stay, which included a necessary response to City National's motion to dismiss to expose it as one the Circuit Court was required by Rule 12(b) to treat as one for summary judgment with its rejection of 84 of Mountaineer's 100 factual allegations; and the replacement of the majority of them with flawed factual inferences drawn from the selective materials submitted outside the pleadings. Like *Elliott,* the Circuit Court had not entered the scheduling order required by Rule 16(b).

Accordingly, Mountaineer referenced *Elliott* as supporting its response and request for an order compelling City National to respond to Mountaineer's request for documents; request to order the parties to submit a proposed scheduling within 30 days; and appointment of a discovery master with expertise in banking to resolve City Nation's claimed failure to see any relationship between Mountaineer's request for documents and claims pled.

As with Mountaineer's discovery requests, City National scoffed at the reference to *Elliott* claiming it "makes no sense" as *Elliott* involved a motion for summary judgment, and its motion was for dismissal pursuant to (and for the first time City National identified its motion as submitted under) Rule 12(b)(6).

Not to be outdone, Joe Beam's counsel topped City National's dubious argument with his effort to take advantage of a citation error. Mountaineer argued Joe Beam violated his fiduciary obligations of loyalty and care owed to Mountaineer and its members pursuant to W.Va. Code §31B-4-409, but misstated the applicable subsections. Joe Beam's counsel argued:

> West Virginia Code 31B-4-409(a)(l) and (2)(a)(b) and (c)" **do not exist;** accordingly, Joe Beam, nor any other-person or entity, could be assigned any certain or specific duties thereunder.
>
> **Since West Virginia Code 31B-4-409(a)(l) and (2)(a)(b) and (c) do not exist, and thus are not valid law** under which relief could be granted or under which duties could be assigned, Defendants

In reply, Mountaineer argued counsel was not confused as the entire statute West Virginia Code 31B-4-409 entire statute is six sentences in length. Moreover, Mountaineer corrected the error in its reply, but the correction was ignored by Joe Beam (JA I 94) in his proposed order, and the Circuit entered Joe Beam's (and City National's) specious if not nonsensical arguments and findings verbatim. (JA II 193)

Accordingly, Mountaineer believes this appeal involves several assignments of error of well settled areas of law of the type Rule 19(a)(1) intended for oral argument. The fact the Circuit Court's errors were driven by the Circuit Court's verbatim acceptance of Respondents' arguments provides further support for oral argument.

App. Rule 20(a)

Mountaineer also believes oral argument pursuant to Ap. Rule 20(a) is appropriate for three

reasons. First, this case presents an issue of first impression, whether a commercial bank should be held strictly liable under W.Va.'s Uniform Commercial Code for losses suffered by a West Virginia member managed limited liability company ("LLC") from the member's conversion of the its funds when it was in the first and best position to prevent the loss.

City National is the proper party in this case to bear the loss from the conversion of Mountaineer's funds from the **2013 Unauthorized Account** City National opened in violation of its own reasonable commercial bank procedures, knowing Joe Beam did not have the authority to open the account.

III. STATEMENT OF THE CASE

A. Statement of Facts

As of March 2011, Brian and Walt Cavender were experienced firemen and EMTs with combined experience in the sale of fire and rescue equipment and had developed a substantial customer base consisting primarily of Volunteer Fire Departments throughout West Virginia and elsewhere, and Joe Beam was a successful businessman with a substantial and long standing relationship with City National Bank of West Virginia ("City National"). (JA I 10 – 11)

On March 11, 2018, the Cavenders and Joe Beam, organized Mountaineer Fire & Rescue Equipment, LLC ("Mountaineer") as a **member run** West Virginia Limited Liability Company ("LLC"). For their respective percentage ownership membership interests (Joe Beam (40%); Brian Cavender (50%); and Walt Cavender (10%.)). The Cavenders also contributed equipment valued at $115,000 and a substantial customer base; and Joe Beam agreed to provide Mountaineer with office space and accounting services using his employee David Young to maintain Mountaineer's books and records and the preparation of all necessary governmental reports, Walt Cavender served as an advisor but was not active in Mountaineer's day to day operations. Brian Cavender was responsible for the production of Mountaineer's sales and service fee revenues. (JA I 10 - 11)

On or about March 18, 2011 Joe Beam and Brian Cavender requested City National open a checking account in its name (the **"2011 Authorized Account")**. As required by its account opening procedures and in accord with reasonable commercial banking procedures followed by other federally insured financial institutions, City National, using information provided by Joe Beam and Brian Cavender, partially completed its "account opening documents" for the **2011 Authorized Account,** and submitted them to Brian Cavender and Joe Beam for execution and return to City **National. (JA I 10 - 11)**

The "account opening documents"[2] (JA II 221-224) City National submitted, included its form resolution titled: "**LIMITED LIABILITY COMPANY BANKING RESOLUTION ("2011 Authorized Resolution"),** executed by Joe Beam and Brian Cavender "jointly, and severally, and on behalf of" Mountaineer certifying: they had been named as Mountaineer's members granted co-equal authority to sign for Mountaineer; and the resolutions set forth therein had been adopted by Mountaineer's members. (JA I 16-17, JA II 223)

During 2013, Brian Cavender was hospitalized for approximately one month due to an unexpected illness. Following his discharge from the hospital Brian had an extended in home recovery. During Cavender's extended absence, on or about June 27, 2013, Joe Beam, without notice to or authorization of Mountaineer or the majority of its members requested City National open a second account in Mountaineer's name

City National, following its own commercially reasonable account opening procedures in place when it opened the **2011 Authorized Account,** partially completed the account opening documents, which included City National's new form document titled "**Limited Liability**

[2] On January 4, 2018, City National voluntarily produced its account opening documents for the **2013 Unauthorized Account** to Mountaineer's counsel. On January 5, 2018, City National produced its account opening documents for the **2011 Authorized Account** it maintained at a separate location.

Company Authorization Resolution" (the "**Form Resolution of 2013**") for adoption of the resolutions set forth on page 2; the designation of its members authorized to sign; and execution by "**CERTIFICATION OF AUTHORITY**" with the signature attestations of at least two members. (JA I 18, and JA II 244-45)

On July 1, 2013, Joe Beam returned the **2013 Form Resolution** naming himself as the only member authorized to sign on behalf of Mountaineer. However, Joe Beam returned the **2013 Form Resolution** without having presented it to Mountaineer's members and without even one of the two member signatures required. In that event, the **2013 Form Resolution further** provided: **EFFECT ON PREVIOUS RESOLUTIONS.** This resolution .... If not completed, all resolutions remain in effect leaving the **2011 Authorized Resolution** in force. (JA I 19)

The account opening documents confirm City National accepted the unexecuted **2013 Form Resolution** for its files without further inquiry and opened the **2013 Unauthorized Account** in violation of its own account opening procedures and reasonable commercial banking practices. (JA I 19). From the unauthorized account, Joe Beam converted tens of thousands of dollars of Mountaineer's funds he deposited into the account, without the Majority Members being aware of existence.

City National opened the **2013 Unauthorized Account** with Joe Beam as the only Mountaineer member with authority over Mountaineer's accounts and funds on deposit with City National knowing or acting with reckless indifference in not knowing: (a) the **2013 Unauthorized Account** had not been authorized by Mountaineer and/or its Majority Members; and (b) Joe Beam opened the account in violation of certain of his fiduciary duties of loyalty and care as set forth under WV Code § 31B-4-409; and 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." (JA I 20)

With **Mountaineer Fire Resolution of 2011** remaining in force, City National's opened the **2013 Unauthorized Account** accepting the risk of loss in allowing a single member of a member run Limited Liability to open a deposit account without the authorization or knowledge of its other members of the opening of the account. The special circumstances presented here giving rise to City National's knowledge of Joe Beam's violation of his fiduciary duties to Mountaineer and its other members placed a limited fiduciary duty on City National to disclose Joe Beam's violation of his fiduciary duties owed to Mountaineer's Majority Members.[3] (JA I 20)

During March to mid April 2017, Brian Cavender questioned Joe Beam and his employee David Young several times about a large payment expected from the sale of a fire truck, and was told each time the payment had not been received. As a result of City National allowing Joe Beam's unauthorized revocation of Brian Cavender's authority over all Mountaineer's deposit accounts and funds on deposit with City National, Brian Cavender could no longer confirm Mountaineer's deposits of its sales income or payments made directly with City National. (JA I 21)

During late April, Brian Cavender went to Mountaineer's office after hours to search Mountaineer's sales records maintained by David Young and located the sales file. The sales record entries revealed Mountaineer had received full payment from the customer approximately $55,000 through undisclosed disbursements to Joe Beam and his related

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[3] *State v. Morgan Stanley & Co.,* Inc., 459 S.E.2d 906, 194 W.Va. 163 (W.Va., 1995)("A party who concerts, or unites with a fiduciary in any act contrary to the duty of such fiduciary, becomes pa[r]ticeps criminis and will be held liable accordingly." *quoting* Syllabus Point 2, *Wooddell v. Bruffy's Heirs*, 25 W.Va. 465 (1885). *Bailey v. Vaughan*, 359 S.E.2d 599, 178 W.Va. 371 (W.Va., 1987) *See also, Am. Bank Ctr. v. Wiest,* 793 N.W.2d 172, 182-184 (N.D. 2010)*; See, e.g., Richfield Bank v. Sjogren*, 309 Minn. 362, 367 (Minn. 1976); State v. Morgan Stanley & Co., Inc., 459 S.E.2d 906, 194 W.Va. 163 (W.Va., 1995.

business interests. When Brian Cavender confronted Joe Beam about the conversion of Mountaineer's funds, Joe Beam claimed the disbursements were repayments for services and loans he claimed had been provided to Mountaineer but never disclosed. Joe Beam's payments to himself, if not an unlawful conversion, his failure to disclose these payments to the Majority Members violated Joe Beam's fiduciary duties owed to the limited liability company and its members.

On or about this same time, Brian Cavender discovered Joe Beam's conversion of Mountaineer's funds, Brian Cavender also discovered Joe Beam sold equipment owned by Mountaineer Fire that had been contributed by Brian Cavender and failed to disclose these sales or account for payments received or deliver the payments received to Mountaineer Fire. (JA I 21-24)

Following this discovery, Brian Cavender advised Joe Beam he was not going to continue with Mountaineer, and form his own company. Joe Beam stated it was not necessary as he would withdraw as a member. After agreeing to withdraw, Joe Beam claimed Mountaineer owed Joe Beam an additional $90,000 for other services he claimed had been provided to Mountaineer. Joe Beam did not claim Brian Cavender personally owed any amount to Joe Beam's related business interests. (JA II 24)

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. Thus, it was in Joe Beam's interest to withdraw as a member of

Mountaineer in light of his intent to pursue collection of the additional amounts claimed to be owed by Mountaineer. (JA II 24)

Following Joe Beam's agreed withdrawal, Joe Beam directed David Young to provide Brian Cavender the necessary information to file Mountaineer Fire's Annual Report with the West Virginia Secretary of State's Office. On May 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. **(JA I 25)**

During May of 2017, Brian Cavender opened a checking account in Mountaineer Fire's name with Chase Bank with whom he had maintained his personal checking account for several years. After opening Mountaineer Fire's new account with Chase Bank, on or about June 1, 2017, Brian Cavender presented City National with a copy of Mountaineer Fire's Annual Report for 2017 (**"2017 Annual Report")** naming Walt Cavender and Brian Cavender as its only members and demanded City National close the **2013 Unauthorized Account. (JA I 26)**

This verifiable information and City National's own knowledge the **2011 Authorized Resolution's** grant of co- equal grant of authority to Brian Cavender over Mountaineer's funds was still in effect, notwithstanding, City National refused, making the false or reckless claim Brian Cavender did not have authority to close **the account. (JA I 26)**

On or about September 2017, Joe Beam and Brian Cavender hired separate counsel to discuss settlement of their mutually disputed claims. At the initiation of these discussions, Joe Beam's counsel reported Joe Beam claimed to have the supporting documentation for the disputed claims. The settlement discussions ended after Joe Beam failed to produce a single supporting document. **(JA I 26)**

On or about December 3, 2017, Brian Cavender received the November 30, 2017 account statement from City National for **2013 Unauthorized Account.** The November 30, 2017 account statement reflected new deposits and a balance of approximately $5,130 as of November 30, 2017. Brian Cavender subsequently learned Joe Beam had interfered with Mountaineer Fire's business and collected certain long outstanding balances owed to Mountaineer Fire by certain of its customers, and deposited the amounts collected into the **2013 Unauthorized Account** after Cavender demanded its closure. Brian Cavender then made repeated demands on City National to close the **2013 Unauthorized Account,** and issue its check payable to Mountaineer for the balance in the account as of November 30, 2017. **(JA I 26-27)**

City National, its knowledge Brian Cavender's authority over Mountaineer Fire's funds on deposit with City National as granted by the **Mountaineer Fire Resolution of 2011** was still in force notwithstanding, again refused Brian Cavender's demand. **(JA I 26-27)**

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. **(JA I 28)**

B. Procedural History

Mountaineer filed its Answer and Counterclaim on February 28, 2018, and City National filed its *faux* Rule 12(b)6) motion to dismiss on March 14, 2018, attaching several exhibits of materials presented outside the pleadings as **Exhibits** B **(JA II 231),** D **(JA II 255),** E **(JA II 279)** and F. **(JA II 285,** and began its motion to dismiss with its assumption of only 16 of Mountaineer's approximately 100 factual allegations as true. **(JA I 37-38).**

On March 21, 2018, Mountaineer served its first request for documents on City National Mountaineer needed to respond to the questions of fact raised by City National's flawed factual inferences. City National filed its motion to stay on March 23, 2018 claiming it had produced the "entire universe of relevant account documents" and, therefore, suggesting Mountaineer did not need any discovery to defend its action to interplead the $5,000 remaining in the **2013 Unauthorized Account,** and avoiding all discussion of its liability for the losses suffered by Mountaineer from the conversion of its funds City National allowed Joe Beam to deposit into the unauthorized account, while at the same time leaving the **2011 Authorized Account** open as a decoy. (JA I 65).

After receiving Mountaineer's request for documents, City's counsel advised "We're not going to answer discovery until we get a ruling on that motion. Please advise as to whether you are willing to stay discovery." Mountaineer's counsel responded:

> You attached extraneous materials for consideration in connection with your 12(b) (6) Motion to Dismiss. As such, City National's responses are necessary to respond to your references to the documents attached to your motion. If you will withdraw and refile your motion without attachment or reference to the extraneous materials, and allow the Court to test the sufficiency of the Complaint without reference to these documents, I will agree to stay discovery. Otherwise, I will need City National's responses to prepare for the hearing on your motion.

In relevant part, City's counsel responded: "I'll get the motion filed and then contact Judge King's office about how he wants to handle it." City did not provide Mountaineer the information, if any, he obtained from Judge King's office. Based on these discussions, Mountaineer's counsel assumed City would start the hearing with its Motion to Stay, and go forward from there.

City started and ended with its Motion to Dismiss, and Mountaineer responded to its motion to Dismiss and Motion to Stay at the hearing presenting the same arguments necessarily presented

in its response to City's Motion to Stay, attacking, to the extent possible without discovery, each of City's primary factual inferences drawn from the materials attached to its motion. Mountaineer also responded to City's flawed factual inferences drawn from its impermissible alteration of the primary contract document, the **2011 Mountaineer Resolution. (JA I 93 – 94)**

Procedurally, the hearing on the Motion to Dismiss/Motion to Stay was the final hearing. Mountaineer presented it Post Hearing Brief and Reply to City National's Response. The Trial Court entered Respondent's proposed orders on September 26, 2018 without a formal ruling on City National's Motion to Stay and Mountaineer was denied all relief requested, including responses to discovery outstanding and, opportunity to obtain additional discovery following entry of Rule 16(b) Scheduling Order as proposed by the parties, Mountaineer requested the Circuit Court order in response.

IV. SUMMARY OF ARGUMENT

This appeal involves the Respondents' invited errors of two well settled areas of law, and an issue that appears to be well settled law under the Uniform Commercial Code across the country, that appears to be one of first impression for this Court.

As to the first two errors of well settled law, Petitioners request reversal of the Circuit Court's entry of orders dismissing all their claims pursuant to Rule 12(b)(6). Each of Respondents' motions, however, attached materials outside the pleadings, which, pursuant to Rule 12(b), if not excluded by the Circuit Court, required the court treat each[4] motion "as one for summary judgment and disposed of as provided in Rule 56, and "the parties given a reasonable opportunity [Mountaineer was not given any opportunity, much less the required] reasonable opportunity to

[4] Joe Beam's motion did not require a separate response. For the most part, Joe Beam's motion largely praises certain of City National, and adopts those that bear some relationship to his own motions with additional verbiage added to suggest independent thought. The single issue independently below based on an insignificant scrivener's error carried into Joe Beam's proposed order entered by the Circuit Court as submitted is addressed under the 19(a) Statement on Oral Argument and Discussion herein.

[conduct discovery needed to] present materials made pertinent to such a motion pursuant to Rule 56.

The Circuit's Court's dismissal of the majority of Mountaineer's claims against City National turned on its acceptance of City National's tortured construction of the terms of its form deposit contract document, with substantial violence to its other provisions. Whereas, it was not claimed by Mountaineer or City National the document was not clear and unambiguous as written. As a matter of law, the Circuit Court's interpretation of the **2011 Resolution** cannot be sustained as it violates the basic rules of contract construction.

The Circuit Court committed reversible error in its failure to address Mountaineer's claim of City National being strictly liable under the UCC for the loss of funds converted by its member Joe Beam deposited into an account City National opened without authorization or knowledge of Mountaineer.

V. ARGUMENT

A. Standard of Review

This case involves a dismissal pursuant to Rule 12(b)(6) where the respondent's analysis accepted only 16 of Petitioner's 100 factual allegations as true, replacing them with flawed factual inferences drawn from the materials submitted outside the pleading, requiring conversion of the motion to one for summary judgment as required by Rule 12(b), with opportunity to respond; and trial court's failure to enter the mandatory scheduling order required by Rule 16(b) after Petitioner's requested an order requiring the parties to submit a proposed Rule 16(b) scheduling order.

"An interpretation of the West Virginia Rules of Civil Procedure presents a question of law subject to a *de novo* review."[5] A circuit court's entry of summary judgment is reviewed de novo."[6] "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' [7]

The dismissal of Petitioner's breach of contract claim was dismissed on the basis of the Circuit Court's erroneous interpretation of the contract document at issue. "Our review is also plenary to the extent our analysis requires us to examine the circuit court's interpretation of a contract. [8] Interpretation of written contract is the province of the court. [9]

B. The Circuit Court Committed Reversible Error In Dismissing Petitioner's Claims Pursuant To Rule 12(b)(6), When It Considered Material Respondents Submitted Outside The Pleadings And Failed To Convert To Rule 56 Motion for Summary Judgment; And Petitioners Were Not Given Any Opportunity Much Less A Reasonable One To Present All Material Made Pertinent To Such A Motion By Rule 56 As Required By Rule 12(b)"[10] When:

    1. Less Than A Month After Petitioner Filed Its Answer And Counterclaim, Respondent City National Filed Its *De Facto* Motion For Summary Judgment And Moved To Stay Petitioner's Timely Request For Documents Necessary To Respond To Motion, Trial Court Committed Reversible Error In Dismissing Petitioner's Claims Without Granting Petitioner's Request For Order Compelling City National To Produce Requested Documents, And request for Order Requiring The Parties Submit A Proposed Scheduling Order The Circuit Court Was Required To Enter Pursuant To Rule 16(B).

    2. The Circuit Court Circuit Court committed Reversible Error With Its Entry Of Respondents' Orders to Dismiss For Failure To State A Cause

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[5] *Riffle v. C.J. Hughes Constr. Co.*, 226 W.Va. 581, 587, 703 S.E.2d 552, 558 (W. Va., 2010) *quoting* Syl. Pt. 4, *Keesecker v. Bird,* 200 W.Va. 667, 490 S.E.2d 754 (1997).

[6] Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994)

[7] Syllabus Point 3, Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).

[8] *G & G Builders, Inc. v. Lawson*, 238 W.Va. 280, 794 S.E.2d 1, 4 (W. Va., 2016) *Zimmerer v. Romano* , 223 W.Va. 769, 777, 679 S.E.2d 601, 609 (2009) ("We apply a de novo standard of review to [a] circuit court's interpretation of [a] contract.")

[9] *Orteza v. Monongalia County General Hosp.*, 173 W.Va. 461, 318 S.E.2d 40 (1984).

[10] *Fucillo v. Kerner*, 231 W.Va. 195 n. 4, 744 S.E.2d 305 (W. Va., 2013)

of Action Without Consideration of Petitioner's Factual Allegations Pled In Its Answer and Counterclaims and Incorporated By Reference Into Each Cause Of Action Separately Pled As If Fully Restated Therein.

The Circuit Court, as invited by the Respondents, dismissed all of Mountaineer's claim pursuant to Rule 12(b)(6) motions and proposed orders entered on September 26, 2018. The purpose of a Rule 12(b)(6) motion is "to test the sufficiency of the" complaint, counterclaim or cross-claim.[11] "'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 relief.'"[12] It "is a liberal standard, and few complaints fail to meet it."[13]

"[A] trial court should not dismiss a complaint where sufficient facts have been alleged that, if proven, would entitle the plaintiff to relief.'"[14] "'[M]otions to dismiss under Rule 12(b)(6) are "viewed with disfavor and [should be] rarely granted."'[15] The trial court's analysis of a Rule 12(b)(6) motion begins with the Court's construction of the counterclaim "in the light most favorable to the plaintiff, and its allegations are to be taken as true.'"[16]

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[11] *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).

[12] *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).

[13] *John W. Lodge Distributing Co., Inc. , supra,* 245 S.E.2d at_,161 W.Va. at 603.

[14] *Cantley, supra,* 221 W.Va. at 470, 655 S.E.2d at 492.

[15] *Evans v. United Bank, Inc.*, 235 W.Va. 619, 627, 775 S.E.2d 500, 508 (W.Va., 2015).

[16] *Cantley, supra,* 221 W.Va. at 470, 655 S.E.2d at 492 (2007); *see, also Brown v. Fluharty*, 231 W.Va. 613, 748 S.E.2d 809, 811 (W. Va., 2013)**("Inasmuch as this case was decided on a motion for judgment on the pleadings, West Virginia Rule of Civil** Procedure 12(c), we construe the complaint in a light most favorable to the plaintiffs, petitioners herein, and take the factual allegations contained in the complaint as true.").

City National begins paragraph 1 of its supposed Rule 12(b)(6) analysis with its assumption of only 16 out of 100 of Mountaineer's factual allegations as true. (JA I 36-37) Thus, on its face, from its opening paragraph, City National's motion precluded any Rule 12(b)(6) analysis by the Circuit Court, much less its dismissal of all of Mountaineer's claims pursuant to Rule 12(b)(6) with its entry of Respondents' proposed Rule 12(b)(6) orders.

Of the 84 of Mountaineer's factual allegations it rejected, City National replaced the majority of them with flawed factual inferences drawn from the materials submitted with its motion to dismiss as Exhibits: B (JA II 219); E (JA II 255); F(JA II 279); and G (JA II 285); Moreover, City National did not once identify Rule 12(b)(6) in its Motion to Dismiss, merely suggesting it in what initially appeared to be odd paraphrase of Rule 12(b)(6) in its prayer for relief requesting dismissal for a claimed failure of Mountaineer to "state a cause of action upon which relief can be granted." **(JA I 61)**

A paraphrasing continued in its proposed orders, which the Circuit entered as submitted on September 26, 2018 considering only the allegations stated under each cause of action plead, and without consideration of the supporting factual allegations incorporated into each cause of action pled as if fully restated therein. Finding in error as invited by the Respondents the cause of action to not state supporting facts. **(JA II 171)**

Beyond the sheer pretense of its artfully captioned motion and its claim for "relief for [Mountaineer's] failure to state a cause of action upon which relief can be granted," City National's analysis reveals it is not a Rule 12(b)(6) motion. City National's motion does not once mention the liberal standard Mountaineer must satisfy to overcome a Rule 12(b)(6) motion, or even pretend to test the sufficiency of the Mountaineer's counterclaims under Rule 12(b)(6).

Indeed, its analysis precludes all such consideration by the Court under Rule 12(b)(6). City National does not request the Court test the sufficiency of the allegations set forth in Mountaineer's claims, nor could it, with the exclusion from its analysis 84 of Mountaineer's 100 factual allegations, and replacement of the majority of them with flawed factual inferences drawn from its gross misstatements of the contract documents and other materials submitted with its motion and misapplication of these facts to the law, which if considered, Rule 12(b)required the Circuit Court to treat its motion "as one for summary judgment."[17]

In relevant part, Rule 12(b) provides:

> If, on a Rule 12(b)(6) motion "to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and *Mountaineer given a reasonable opportunity to [conduct discovery needed to] present all material made pertinent to such a motion by Rule 56.* (Emphasis added.)

In relevant part, Rule 56 (c) provides:

> The judgment sought shall be rendered forthwith ***if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,*** if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Emphasis added.)

The law regarding the mandatory treatment of Rule 12(b)(6) motions as one for summary judgment pursuant to Rule 12(b) where matters outside the pleadings are considered is well settled.

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[17] *Cf. Riffle v. C.J. Hughes Const. Co.,* 226 W.Va. 581, 586–87, 703 S.E.2d 552, 557–58 (2010); *Fucillo v. Kerner ex rel. J.B.,* 231 W.Va. 195, 199, 744 S.E.2d 305, 309 (2013). *Brown v. Fluharty*, 231 W.Va. 613, 748 S.E.2d 809 (W. Va., 2013)

"Once the court decides to accept matters outside the pleading, it must convert the motion to dismiss into one for summary judgment...." [18]The pleadings only are to be considered on a motion under Rule 12(b) (6). [19] It is also well settled "s*ummary judgment is appropriate only after the non-moving party has enjoyed "adequate time for discovery."*[20]

Materials Attached Were Not Integral to Complaint (JA II 302)

City National's Exhibit B (JA II 219 – 220) is dated January 4, 2018. Joe Beam agreed to withdraw as a Member of Mountaineer in late April 2017. Mountaineer filed its 2017 Annual Report with the Secretary of State removing Joe Beam as a member on May 8, 2017; and on December 20, 2017, Joe Beam filed a false member change report with the Secretary of State naming himself as a member and giving a false sworn statement of his being authorized to file the report. The Circuit Court relied on Exhibit B in finding at all times Joe Beam was a member, therefore he could not as a matter of law interfere with Mountaineer's business, and City National could not aid and abet it.

City National obtained the document on January 4, 2018 and outside the relevant timeline of the events described in City National's Complaint for Interpleader and Mountaineer's Answer, Counterclaim and Cross-claim occurring March 18, 2011 through December 31, 2017. It is not relevant to any claim of City National of Joe Beam's authority relating to events occurring during the relevant timeline of the events described in Mountaineer's Answer, Counterclaims and Cross-Claims or City National's Complaint for Interpleader. Accordingly, the document is not subject to judicial

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[18] *Chapman v. Kane Transfer Co., Inc.,* 160 W.Va. 530, 236 S.E.2d 207, 211 (1977), *quoting, Phillips v. Columbia Gas of West Virginia*, 347 F.Supp. 533 (S.D.W.Va.1972), affirmed 4 Cir., 474 F.2d 1342; *Smith v. Blackledge*, 451 F.2d 1201 (4th Cir. 1971).

[19] *Brittian v. Belk Gallant Co.*, 301 F.Supp. 477 (D.C.Ga.1969)

[20] *Celotex Corp. v. Catrett*, 477 U.S. 317 at 322, 106 S.Ct. 2548 at 2552 (1986); *Anderson v. Liberty Lobby Inc*, 477 U.S. 242 at 250 n. 5, 106 S.Ct. 2505, 2511 n. 5 (1986).

notice as it is not relevant to this action and is not integral to Mountaineer's claims. The Court's consideration of this document alone, compels conversion of City National's Rule 12(b)(6) motion to a Rule 56 motion for summary judgment.

The fact Mountaineer never received a copy of any cancelled checks or statements on the **2013 Unauthorized Account** notwithstanding, City National also claimed these materials Exhibits E (JA II 255) and F (JA II 279) were integral to and, therefore, not outside the pleadings. Thus, City National argued the Circuit Court was not required by Rule 12(b) to convert Respondents' motions to motions for summary judgment and disposed pursuant to Rule 56. City Claimed support for this misguided argument with its quotation of a short excerpt from L. Palmer & R. Davis, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE ST" at§ 12(b)[8] (2017). In the treatise, the authors write: (as quoted by City National)

> "When reviewing a motion to dismiss for failure to state a claim, a trial court" may consider "the factual allegations **in** the complaint; (2) documents attached to the complaint as exhibits **or incorporated by reference to it;** (3) **matter of which judicial notice may be taken;** and (4) **documents that are integral to the complaint.**" [21]

This excerpt references the standards to be applied when a Court considers a document presented outside of the pleadings is integral to the complaint and does not require conversion of a Rule 12(b)(6) motion to dismiss. This excerpt from the treatise, is from Justice Davis' opinion in *Forshey v. Jackson*, 671 S.E.2d 748, 753, 222 W.Va. 743 (W. Va., 2008)

In Forshey, Justice Davis presented a sound, easy to understand explanation of the circumstances in which conversion of a Motion to Dismiss to one for summary judgment is not required by the attachment of documents considered by the Court to be integral to the complaint. Although the holding is not the primary holding in the case, Justice Davis seized the opportunity to resolve the occasional misinterpretation

[21] *Forshey v. Jackson*, 671 S.E.2d 748, 753, 222 W.Va. 743 (W. Va., 2008)

of the standard for consideration of material extraneous to the complaint that do not require conversion of a Rule 12(b)(6) motion into one for summary judgment under Rule 56.

Justice Davis analysis begins with: (1) a general notation of the Court's concern for the potential harm in considering a document outside the pleadings without requiring the conversion; (2) a discussion of documents that unquestionably qualify as being integral complaint; (3) a statement of the Court's notice the standard has been occasionally misinterpreted; and (4) ends with a reiteration in definite terms what qualifies a document as being integral to the complaint and what does not. With respect to no (4), Justice Davis wrote:

> **Because this standard has been misinterpreted on occasion, we reiterate here that a plaintiff's reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough.** (Emphasis added.) *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002).

An evaluation of City National's attachment of Exhibits E and F [22] under *Forshey*, unequivocally confirms, these documents are not in any way integral to Mountaineer's claims for the following reasons: (a) they are not attached to Mountaineer's Answer, Counterclaim and Cross-claim; (b) these documents are not incorporated by reference in Mountaineer's Answer, Counterclaim and Cross-claim; (c) the documents were not in Mountaineer's possession when Mountaineer drafted and filed its Answer, Counterclaim and Cross-claim; and (d) Mountaineer did not reference these documents in its Answer, Counterclaim and cross-claim.

Inasmuch as the testing of the sufficiency of a complaint to state a claim under Rule 12(b)(6) begins with the Court's acceptance of all of the factual allegations in the complaint, Brian Cavender's allegation of his not being aware of the existence of the second account, City National's reference to

[22] The analysis of Exhibit B revealing it is dated January 4, 2017 and therefore outside the relevant time frame (March 18, 2011 through December 31, 2017) and therefore not subject to judicial notice as to being relevant to any event occurring during the relevant time frame is discussed below. **Exhibits E (JA II 255) and F (JA II 279)**

these documents as supporting its claim of Brian Cavender's awareness mandates the conversion of its Rule 12(b)(6) motion to a Rule 56 motion for summary judgment pursuant to Rule 12(b) and reversal of the Circuit Courts orders of September 26, 2018.

Although the Court has a long history of declining to give advisory opinions, when the entire matter can be reversed on a single error. It has, however, in the past, gone further, when reversal has been obtained on summary judgment and the mandatory scheduling order required by Rule 16(b) had not been entered; and, the plaintiff has also been denied a reasonable opportunity to [conduct discovery needed to] present all "material made pertinent to such a motion by Rule 56. For example, in *Drake v. Snider*, 608 S.E.2d 191, 216 W.Va. 574 (W. Va., 2004) this Court held:

> Although we have determined that this case must be reversed to permit Ms. Drake to engage in discovery, we must nevertheless address the merits of the trial court's decision to grant summary judgment based upon the evidence that was produced in the underlying wrongful death case.

The Circuit Court's invited failure to discuss or apply well settled law and its entry of orders dismissing all of Mountaineer's claims pursuant to Rule 12(b)(6); when, pursuant to Rule 12(b) its consideration of the materials presented outside the pleadings is sufficient basis alone for reversal of the Circuit Court's orders dismissing its claims pursuant to Rule 12(b)(6) when the plaintiff was not allowed any, much less a reasonable opportunity, to conduct discovery needed to present responsive materials as contemplated by Rule 56(c).

Rule 56(c) contemplates the pleadings and discovery will be closed before summary judgment is entered. A "decision for summary judgment before discovery has been completed must be viewed as precipitous." [23] "Thus, summary judgment before any discovery whatsoever has been allowed must be viewed as blatantly unfair.

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[23] *Board of Ed. of Ohio County v. Van Buren and Firestone, Architects, Inc.*, 267 S.E.2d 440, 443,165 W.Va. 140 (W.Va., 1980).

C. The Circuit Court Failed to Apply Well Settled Contract Law Regarding The Construction of a Written Contract And Committed Reversible Error With Its Acceptance of City National's Tortured Construction of Its Primary Deposit Contract Document With Substantial Violence To Its Other Key Provisions Rather Than Application of Its Clear and Unambiguous Terms As Written.

(JA I 83-87)

City National opened a City National deposit account in Mountaineer's name (the "**2011 Authorized Account**" on March 18, 2011, pursuant to the terms of its form "account opening documents" given by City National to Mountaineer to execute and return to it, and other documents Mountaineer was required to provide to City National to open the account.

City National's primary account opening document for Limited Liability Company ("LLC") like Mountaineer, on March 18, 2011, was its form account opening document titled "**Limited Liability Company Banking Resolution**" ("**2011 Authorized Resolution**"). The **2011 Authorized Resolution,** was given, by Mountaineer to City National as required – complete with signatures of 2 of its 3 members. (**JA II 223**)

On June 27, 2013, Joe Beam requested City National to open a second account in Mountaineer's name. In accordance with its reasonable commercial bank procedures in effect on March 18, 2011, City National provided Joe Beam with the account opening documents it required to open a new account. Included in the **account opening documents** Beam was required to return to City National was its new form account resolution document titled "**Limited Liability Company Authorization Resolution**" ("**2013 Form Resolution**") and basically the same as the **2011 Authorized Resolution** in a different format (JA II 244-45).

Like the **2011 Authorized Resolution,** it required Mountaineer to designate its members authorized to sign and signatures of two of its three members to make it binding. Without it, City National did not have the required authorization from Mountaineer to open up the second account,

and by its own sound banking procedures, City National was required to obtain it; or refuse to open the second account.

In apparent deference to its longstanding account relationships with Joe Beam, City National ignored its procedures, and opened the **2013 Unauthorized Account** knowing it had not been authorized by Mountaineer. Thus, City National assumed all risk of loss from all Mountaineer funds deposited into and improperly paid out of the account.

City National admits Mountaineer did not authorize the account, but claims support for its action in the **2011 Authorized** Resolution, it has substantially rewritten to concoct the authority claimed the **2011 Authorized Resolution**, when applied as written **(JA II 223)** does not provide.

City National relies on the following provisions of the **2011 Authorized Resolution**, to support its claimed authority to open the **2013 Unauthorized Account** it opened at Joe Beam's request without the knowledge of Mountaineer.

> BE IT FURTHER RESOLVED any one (1) of the Authorized Signers [Joe Beam and Brian Cavender] listed above may enter into any such agreements and perform such acts as they deem reasonably *necessary to carry out the provisions of the Agreement with Financial Institution, and those agreements will bind the Company and acting for and on behalf of the Company as its act* and deed be, and they are hereby authorized and empowered:
>
> **Execute Documents**. To deliver and execute to the Financial Institution the form of Limited Liability Company Banking Resolution and other account opening documents submitted by Financial Institution, confirming the nature and existence of Account Holder and evidencing the terms of the agreement between Financial Institution and Account Holder.

City National substantially and impermissibly combined the above provisions removing its limiting terms (limited to the account opening documents) to concoct authority open the **2013 Unauthorized Account** at Joe Beam's request. City National argues:

> The Form clearly states: **"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** ...."

The claimed clarity of the combined provisions, notwithstanding, City National was compelled to explain what it clearly states as follows:

> **In other words**, Defendant **Brian Cavender**, as a member of Mountaineer Fire, **authorized Defendant Beam**, as a member of Mountaineer Fire, **to execute whatever documents** in the judgment of **Defendant Beam he so desired to open new accounts with City National.**
>
> (JA I 39-40) Emphasis added.

As rewritten and then explained "in other words," City National's desperate interpretation of the **2011 Authorized Resolution** does not provide Joe Beam the authority to open up the **2013 Unauthorized Account,** much less any account "he so desired." City National's construction of the clear and unambiguous[24] **2011 Authorized Resolution** violates the first rule of contract interpretation.

> 'In construing a deed, will, or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principle of law inconsistent therewith.' It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them. [25]

As a matter of law, the Circuit Court's acceptance of City National's self serving construction of the **2011 Authorized Resolution** cannot be sustained.

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[24] Neither City National, nor Mountaineer claimed the **2011 Authorized Resolution** was not clear and unambiguous as written.

[25] Syl. Pt. 3, *Young v. McIntyre*, 672 S.E.2d 196, 201, 223 W.Va. 60 (W.Va., 2008), quoting, Syllabus Point 3, *Farley v. Farley*, 215 W.Va. 465, 600 S.E.2d 177 (2004).

D. The Circuit Court Committed Reversible Error In Its Failure To Consider Petitioner's Arguments For Holding City National Time Honored Principle of Strict Liability Under West Virginia's Uniform Commercial Code when it was in the first and best position to prevent Mountaineer's conversion losses.

The Circuit Court also ignored City National's 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 account at the request of Joe Beam without authorization by Mountaineer's members. *O'Mara Enterprises, Inc. v. People's Bank of Weirton.*[26] *"Federal and state courts across the country have consistently interpreted the UCC's provisions* as favoring the finality of payment in commercial banking transactions and *placing the loss on the party in the best position to prevent the loss."*[27] (Emphasis added.);

> In this case, City National "is responsible for three acts which basically provided the system through which the embezzlement was carried out: 1) the opening of the [] unauthorized accounts, 2) the deposit of checks payable to [Mountaineer] into [the **2013 Unauthorized Account]** and 3) the acceptance of checks written on these accounts on the single signature of [Joe Beam]. **If [City] had prevented any one of these events, the embezzlement scheme would have been thwarted."** [28]

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[26] *O'Mara Enterprises, Inc. v. People's Bank of Weirton* 420 S.E.2d 727, 732, 187 W.Va. 591, 596, 18 UCC Rep.Serv.2d 1158 (1992).

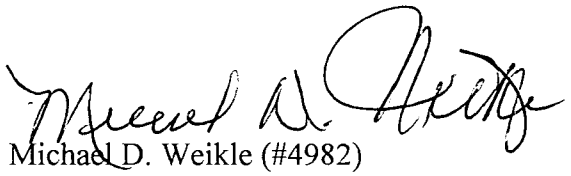
[27] *Fidelity & Casualty Co. v. First City Bank*, 675 S.W.2d 316, 318 (Tex. Ct.App.1984) (("**The general purpose of the Code is to allocate the loss, among innocent parties, to the person who is closest to the individual causing the loss and who, presumably, has the best opportunity to prevent it.**"); *Travelers Cas. & Sur. Co. v. Wash. Trust Bank*, 86 F.Supp.3d 1148, 1155 (E.D. Wash., 2015) ('**bank was "in the first and best position to discover the problem**"); *Old Republic Nat. Title Ins. v. Bank of East Asia*, 291 F.Supp.2d 60, 68 (D. Conn., 2003) (**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.**"); *Guardian Life Ins. Co. of Am. v. Chemical Bank*, 94 NY2d 418, 422 (2000) (**UCC "shifts the risk of loss to "the party best able to prevent the loss"**); *Perini Corp. v. First Nat. Bank of Habersham County, Georgia*, 553 F.2d 398, 405, 21 U.C.C.Rep. 929 (C.A.11 (Ga.), 1977) (**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 practicable conclusion the processing of a check transaction."**); (All emphasis added.)

[28] *Apcoa, Inc. v. Fidelity Nat. Bank*, 703 F.Supp. 1553, 1558 (N.D. Ga., 1988); *affirmed, Apcoa, Inc. v. Fidelity Nat. Bank*, 906 F.2d 610 (C.A.11 (Ga.), 1990) ("The issues before the district court were properly decided on

In addition to the above 3 events, City opened the account knowing Joe Beam did not have the authority to open it. City National, without question in the first and best, and only position to prevent Mountaineer's conversion losses, by simply following its own procedures and refused to open the **2013 Unauthorized Account** when Joe Beam returned the required resolution without it having been signed by two of its three members..

VI **Conclusion**

For all the reasons stated herein, Mountaineer requests the Circuit Courts order's dismissing its claims pursuant to Rule 12(b)(6) be reversed.



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summary judgment grounds. The district court carefully analyzed Fidelity's conduct finding that the bank violated its contractual agreement with Apcoa, violated its own internal policies and procedures in opening the unauthorized accounts, failed to inquire as to Dolly Ison's authority, admitted that it was relying on corporate resolutions which did not authorize Dolly Ison's conduct, and admitted that the accounts in question were not to receive deposits of Apcoa's funds. For the reasons stated above, we AFFIRM the district court's granting of summary judgment in favor of Apcoa as the bank failed to present a "genuine" issue of material fact for trial.").