IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 22-ICA-4

PITA, LLC, AND MILAN PUSKAR REVOCABLE TRUST RESTATED 9/28/11,
Plaintiffs Below, Petitioners

v.

SCOTT S. SEGAL,
Defendant Below, Respondent.

and

No. 22-ICA-46

SCOTT S. SEGAL,
Defendant Below, Petitioner

v.

PITA, LLC, AND MILAN PUSKAR REVOCABLE TRUST RESTATED 9/28/11,
Plaintiffs Below, Respondents

and

UNITED BANK,
Third-Party Defendant Below, Respondent

PETITIONERS' BRIEF

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I. INTRODUCTION

This is an appeal by the Petitioners, PITA, LLC ("PITA") and the Milan Puskar Revocable Trust Restated 9/28/11 ("Trust") (collectively, "Petitioners") from a Circuit Court of Monongalia County judgment of $1,291,518.83 against the Respondent, Scott S. Segal ("Segal") in favor of the Trust, but against the PITA relative to its claims against Segal for breach of his guaranty, and against PITA and the Trust relative to their claims against Segal for fraud.

The practical effect of the Circuit Court's summary judgment against PITA relative to its claims against Segal for breach of his personal guaranty contract as that it has been deprived of the recovery of contractual interest, late fees, and legal expenses incurred in enforcing the guaranty.

The practical effect of the Circuit Court's summary judgment against PITA and the Trust relative to their claims against Segal for fraud is that they have been deprived of a jury trial on those claims that Segal's banking fraud expert testified presented jury issues.

The Petitioners therefore request that this Court reverse the judgment of the Circuit Court and remand with directions to enter judgment in favor of PITA against Segal for breach of contract, and for a jury trial on PITA's and the Trust's claims of fraud against Segal.

II. ASSIGNMENTS OF ERROR

1. The Circuit Court erred in granting summary judgment to the Respondent Segal on the Petitioners' fraud claim.

2. The Circuit Court erred in granting summary judgment to the Respondent Segal on the Petitioner PITA's breach of contract claim.

3. The Circuit Court erred in crediting the Respondent Segal on the contribution claim by the Petitioner Trust with a partially-funded settlement by one of Segal's coguarantors.

III. PROCEDURAL HISTORY

After Segal refused to honor his personal guaranty obligations on a loan by United Bank to Protea Biosciences, Inc. ("Protea") sold to PITA, PITA and the Trust filed suit against Segal and two personal coguarantors.[1] Segal and the other two personal coguarantors[2] then filed a motion to dismiss and a motion for a more definite statement,[3] which was denied.[4] Thereafter, Segal and the other two personal guarantors filed a third-party complaint against United Bank ("United"), acknowledging that they had personally guaranteed the United loan to Protea, but arguing that (1) United had misled them – two of whom were attorneys – about the contents of written contracts they had executed; (2) United had promised, despite the clear language of the written guaranties they signed and later affirmed, that United would resort to collateral before enforcing their personal guaranties; and (3) United impaired the loan collateral "[b]y not utilizing the pledged collateral for the Note," ignoring the fact that it was PITA not United who held the Protea Note at the time of Protea's default and sued the three personal guarantors.[5]

Thereafter, PITA and the Trust filed an amended complaint against Segal and the other two personal guarantors, further articulating their claims.[6] Specifically, related to their fraud claims against Segal and the other two coguarantors, PITA and the Trust asserted that, now that Segal and the other coguarantors were claiming some oral side agreements outside their 2017

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[1] App. 14.

[2] The other two coguarantors were Leonard P. Harris and Stanley M. Hostler, each of whom died either before or during the litigation. App. 30-31 and 32-33.

[3] App. 56.

[4] App. 79.

[5] App. 81-87.

[6] App. 89.

written affirmations of their 2009 personal guaranties despite the fact that each of them disclaimed any such side oral agreements when they reaffirmed them in 2017, PITA, the Trust, and United had been fraudulent induced to reaffirm their respective obligations vis-à-vis the Protea Note in 2017 when Segal and the other two personal guarantors had no intention of honoring theirs.[7]

Segal and the other two personal guarantors then moved to dismiss the amended complaint (1) reiterating their arguments, previously rejected, relative to the fraud claims; (2) arguing that the Trust – as a coguarantor – had no right to seek contribution even though it fully-funded the acquisition of the defaulted Protea Note by PITA from United; and (3) contending that a party cannot sue for both breach of contract and fraudulent inducement.[8] On December 2, 2019, the Circuit Court denied the motion to dismiss the amended complaint.[9]

Thereafter, Segal and the other two personal guarantors answered the amended complaint and asserted counterclaims against the Trust which substantiate PITA's and the Trust's claims against Segal for fraud in the inducement.[10] Specifically, even though Segal and the other two personal guarantors signed a 2017 agreement reaffirming their 2009 personal guaranties, they alleged in their counterclaims against the Trust that, before his death in 2011, six years before they reaffirmed their personal guaranties in 2017, "Mr. Puskar told the Bank that he wanted to be a 100% guarantor for the note."[11] Moreover, Segal and the other two personal guarantors alleged that the Trust was part of a civil conspiracy involving PITA and United to "sue [the] alleged

[7] App. 99-102.

[8] App. 137.

[9] App. 155.

[10] App. 186.

[11] App. 187.

guarantors for the full balance of the note [which] is illegal under state law."[12] In their response to a motion to dismiss their counterclaims, Segal and the two other personal guarantors further argued that (1) PITA and the Trust somehow owed them fiduciary duties and[13] (2) neither the holder of a note nor a co-guarantor can sue other guarantors of the note for breach of contract or contribution because to do so somehow violates the Uniform Commercial Code.[14]

On November 6, 2020, United filed its summary judgment motion relative to the third-party complaint.[15] First, it noted that the personal guarantors expressly waived any claims against United as Protea's lender.[16] Second, it observed that any rights or duties it may have had vis-à-vis the guarantors had been assumed by PITA, as a matter of law, when United assigned the Protea Note to PITA.[17] Finally, United noted that it was inconsistent for the personal guarantors to file bankruptcy claims against the defaulted borrower, Protea, at the same time contending that those guarantors had no rights or obligations relative to the Protea Note.[18]

On April 15, 2021, PITA and the Trust filed a motion for partial summary judgment against Segal and the other two personal guarantors. First, like United, PITA noted that Segal had waived any claims against the "Lender" and as PITA had been assigned the Protea Note, it now stood in the shoes of the "Lender."[19] Second, again like United, PITA argued that the personal guarantors

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[12] App. 189.

[13] App. 205-206.

[14] App. 206-207.

[15] App. 214.

[16] App. 225-226.

[17] App. 226-227.

[18] App. 228-229.

[19] App. 300-302.

were estopped from denying their contractual obligations while, at the same time, making bankruptcy claims predicated on those contractual obligations.[20]

On June 3, 2021, Segal responded to United's summary judgment motion, arguing that (1) the guarantors did not knowingly waive their claims against United as "Lender" because United's conduct forming the basis of their claims occurred after they signed and reaffirmed their guaranties;[21] (2) United somehow impaired the collateral by selling the Protea Note for its face value to PITA before Protea's default;[22] (3) this impairment of collateral – which was nothing more than the sale of a note to a third-party – somehow violated the UCC;[23] and (4) filing bankruptcy claims pursuant to a note was not inconsistent with alleging its invalidity.[24]

On June 9, 2021, the Circuit Court held a hearing on United's, PITA's, and the Trust's summary judgment motions,[25] and held that (1) Segal and the other co-guarantors waived any claims against United or its successor-in-interest PITA;[26] (2) the two co-guarantors affirmed their understanding regarding the validity of the Protea Note by filing claims in the Protea bankruptcy;[27] (3) neither Segal nor the other co-guarantors had submitted a Rule 56(f) affidavit and no discovery could overcome the plain language of their personal guaranties relative to waiver;[28] (4) because

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[20] App. 303-304.

[21] App. 318-319.

[22] App. 319-320.

[23] App. 320-321.

[24] App. 321-324. Segal and his co-guarantors filed a similar response to PITA's and the Trust's motion for partial summary judgment. App. 366-379.

[25] App. 474.

[26] App. 510.

[27] *Id.*

[28] App. 510-511.

United had the legal right to sell the Protea Note to PITA and PITA assumed all of United's rights and obligations as "Lender" under the personal guaranties, Segal and the other two co-guarantors lacked standing to assert any third-party claims against United;[29] and (5) there was no impairment of collateral under the UCC as United had sold the Protea Note to PITA before the default.[30] On August 13, 2021, the Circuit Court entered its order granting PITA's and the Trust's motion for partial summary judgment and United's motion for summary judgment.[31]

Segal and his co-guarantors responded on August 11, 2021, by filing a motion for reconsideration reiterating their arguments that (1) waiver does not apply to claims arising after execution of the waiver;[32] (2) "the Trust, via Milan Puskar, guaranteed the entire amount of the debt;"[33] and (3) the sale of the Protea Note by United to PITA constituted an impairment of collateral in violation of the UCC.[34] Moreover, at a hearing conducted on the reconsideration motion on September 2, 2021, Segal argued (1) the assignment of the Protea Note by United to PITA was "illegal and unenforceable;"[35] (2) PITA did not exist at the time of the 2009 personal guaranties or their 2017 reaffirmations and, thus, cannot benefit from their waivers;[36] (3) PITA was not approved as a company licensed to do business in West Virginia until a week after the

[29] App. 511.

[30] App. 512.

[31] App. 586.

[32] App. 605-609.

[33] App. 607.

[34] App. 609.

[35] App. 680.

[36] App. 682.

assignment;[37] and (4) PITA is not a registered debt collector and, therefore, cannot sue for breach of the personal guaranties.[38]

At the hearing, the Circuit Court explored the absurdity of these arguments noting that (1) "anybody or any entity could purchase that note," to which Segal made the ridiculous argument that "only a registered debt collector" can purchase a note;[39] (2) "when they [the guarantors] signed the guaranty … they agreed not to make the defense that you're making now," to which Segal argued, "I don't think that waiver can carry forward to PITA and the Trust;"[40] and (3) "So then the Trust pays the debt and the guarantors walk? … Well, they did free up the debt," to which Segal responded by reiterating his argument, which was non-responsive to the Circuit Court's questioning, that the assignment was not valid or enforceable.[41] Following the hearing, the Circuit Court entered an order denying Segal's reconsideration motion.[42] At that point in the litigation, United Bank was no longer an active party and discovery proceeded on PITA's and the Trust's claims against Segal and the other personal guarantors.

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[37] App. 682-683. This assertion, however, is factually incorrect. App. 420; see also App. 2401 ("But it is in the record that PITA had been registered with the Secretary of State's Office and had received its EIN number prior to execution of that assignment."); App. 2562 ("We make sure that they are in good standing with the Secretary of State to do business when we do loans.").

[38] App. 683. Indeed, Segal literally argued at the hearing that, "So you don't get to become a bank and assert we're only dealing in notes and loans and debt collection or anything like that without being properly approved of and regulated by the state. Banking is a highly regulated industry. And you can't just create an LLC and say, well, now I'm a bank." App. 684. Of course, this is preposterous as no contracting party could sue for breach unless it was a registered debt collector. This is but one of several examples of frivolous claims and defenses raised by Segal.

[39] App. 686.

[40] *Id.*

[41] App. 689.

[42] App. 713.

At the close of discovery, PITA and the Trust filed a motion for partial summary judgment on their claims for breach of contract and contribution,[43] and Segal and his coguarantors filed a cross motion for summary judgment.[44] Relative to new defenses[45] raised by Segal in his summary judgment motion, PITA and the Trust filed a response noting:

> (1) W. Va. Code § 45-5-1, which gives a guarantor the right to demand that a creditor sue the borrower before proceeding against the guarantor, has no application here where PITA made a bankruptcy claim against Protea;[46]
>
> (2) W. Va. Code § 45-1-2, which requires creditors to file suit against solvent borrowers before pursuing guarantors, has no application where Protea filed for bankruptcy protection because it was insolvent;[47]
>
> (3) PITA was not required to sue the Trust where (a) it was merely a coguarantor on the Protea Note; (b) it funded PITA's $3.3 million acquisition of the Protea Note; and (c) the guaranties expressly permit the Lender to elect its remedies against one or more guarantors;[48]
>
> (4) *Segal's banking fraud expert* had eviscerated Segal's claims and defenses by testifying that (a) the Protea Note – always alleged by Segal not to be transferrable to anyone other than a registered debt collector – was saleable and transferable, including to Segal had he wanted to purchase it;[49] (b) once acquired and assigned – notwithstanding Segal's arguments to the contrary – the assignee acquired all the rights and remedies held by United;[50] (c) until all the indebtedness was satisfied – contrary to Segal's arguments – the legal obligations of the coguarantors persisted;[51] (d) the owner of the Protea

[43] App. 984.

[44] App. 717.

[45] Indeed, even though this lawsuit was instituted in 2018, Segal did not make a demand under W. Va. Code § 45-1-1, which has no application to this matter, until October 21, 2021. App. 1664. This is yet another example of Segal placing frivolous roadblocks against the enforcement of what his own expert testified was an industry standard personal guaranty.

[46] App. 1384.

[47] App. 1384-1385.

[48] App. 1386-1389.

[49] App. 1387.

[50] App. 1388.

[51] *Id.*

Note, under the terms of the guaranties – again contrary to Segal's arguments – had the right to elect and compromise among the coguarantors their contractual obligations;[52] (d) the coguarantors had a clear and unambiguous contractual obligation to pay the owner of the Protea Note interest, late charges, and collection costs, including attorney fees, in connection with enforcement of the guaranty agreements;[53] (e) the owner of the Protea Note – again contrary to Segal's arguments – had the contractual right to pursue the personal guaranties instead of the collateral for the loan;[54] (f) the owner of the Protea Note – again contrary to Segal's arguments – could elect to sue some but not all guarantors;[55] (g) the waivers contained in the personal guaranties – again contrary to Segal's arguments – was industry standard language waiving all defenses "Except the defense of payment in full;"[56] (h) Segal should not have signed the 2017 reaffirmation of his 2009 guaranty if he had some alleged unwritten oral agreement with Milan Puskar that impacted Segal's contractual obligations under the 2009 guaranty and 2017 reaffirmation agreements – despite Segal's arguments to the contrary;[57] and (i) United's and the Trust's reliance on Segal's representation in 2017 that he had no unwritten agreements impacting his guaranty obligations when he now contends that an unwritten agreement existed creates a dispute for "the trier of fact to resolve;"[58]

(5) PITA, as assignee of the Protea Note, was entitled to summary judgment on its claim for breach of contract; and

(6) The Trust was entitled to contribution as it paid more than its share of the Protea Note when it was acquired from United.[59]

[52] App. 1389.

[53] App. 1389-1390.

[54] App. 1390.

[55] App. 1391.

[56] App. 1391-1392.

[57] App. 1392.

[58] App. 1393.

[59] App. 1399.

On January 13, 2022, a hearing was conducted on the parties' cross-motions for summary judgment.[60] On the eve of this hearing, PITA and the Trust reached a settlement with one of the three coguarantors.[61] At the conclusion of the hearing, the Circuit Court requested both sides to submit proposed orders.[62] Then, on March 7, 2022, the Circuit Court conducted a pretrial conference.[63] On the eve of this conference, PITA and the Trust reached a settlement with the second of the three coguarantors,[64] leaving only Segal as the holdout.[65] During this hearing, the Circuit Court ruled:

(1) W. Va. Code § 45-1-1 has no application as PITA filed a claim against Protea in bankruptcy;[66]

(2) W. Va. Code § 45-1-2 has no application as Protea is insolvent;[67]

(3) PITA had no duty to sue the Estate of Milan Puskar as a coguarantor because he died in 2011 and his Estate was closed before Protea's default;[68]

(4) Once Protea defaulted on the note, the obligations of the four coguarantors, Segal, Hostler, Harris, and the Trust, were triggered;[69]

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[60] App. 1797.

[61] App. 1799. A dismissal of Lorie Morrell as Executrix of the Estate of Leonard P. Harris was entered on January 28, 2022. App. 1845. The amount of the settlement was $537,500. App. 1974.

[62] App. 1841.

[63] App. 1893.

[64] App. 1895. A dismissal of Carl Hostler, as Executor of the Estate of Stanley M. Hostler, was entered on March 10, 2022. App. 1921. The amount of the settlement was $175,000 and 90 percent of asbestos attorney fees received by the Estate, less taxes, and administrative costs, with a cap of $537,500. App. 1968. As of the date of the filing of this brief, no additional payments have been received.

[65] Segal made clear throughout the proceedings that he did not intend to honor his 2009 guaranty or 2017 reaffirmation agreements but would appeal any judgment entered against him. *See, e.g.,* App. 1896 ("MR. RAMEY … But there is no prospect for a settlement unfortunately with Mr. Segal. … MR. RUBY: … I think I'll have to agree with Mr. Ramey. … Mr. Segal's desire to appeal ….").

[66] App. 1906-1907.

[67] App. 1907.

[68] *Id.*

[69] App. 1908.

(5) The fraud claim against Segal could not be sustained because "The loan has been paid off. And so, I don't see how the bank or PITA have been damaged;"[70] and

(6) The Protea Note was properly assigned by United to PITA and Segal breached his guaranty with the only remaining issue the amount of PITA's damages for Segal's breach of contract.[71]

The Circuit Court concluded the pretrial conference by stating, "I believe that resolves all of the motions for summary judgment. And the only thing left is damages, which does include interest, late fees, administrative fees, and collection costs, including attorney fees."[72]

On March 11, 2022, the Circuit Court entered an order directing briefing on PITA's and the Trust's damages for breach of contract and contribution,[73] and the parties' submissions were filed on March 12, 2022,[74] March 28, 2022,[75] and April 4, 2022.[76] Then, on April 29, 2022, the Circuit Court entered an order indicating that it was reconsidering its rulings of March 7, 2022 and scheduling a hearing for May 27, 2022.[77]

At the hearing on May 27, 2022, the Circuit Court affirmed its previous rulings, but reversed its prior ruling relative to PITA's breach of contract claim, holding that because the Trust funded PITA's acquisition of the Protea Note, "PITA and the Trust is the same" and that "This matter is not founded on contract, but on principles of equity and … this is nothing more than a

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[70] *Id.*

[71] App. 1909.

[72] App. 1910.

[73] App. 1923.

[74] App. 1925.

[75] App. 2328.

[76] App. 2337.

[77] App. 2383.

contribution case."[78] Based on these rulings, the Circuit Court entered judgment on July 21, 2022,[79] from which PITA, the Trust, and Segal have appealed. The practical effect is that the Trust has a judgment of $1,291,518.83 against Segal as of July 21, 2022, with post-judgment interest accruing at the statutory rate of four percent.

IV. STATEMENT OF THE CASE

Despite the preceding procedural history, the relevant facts of this case are straightforward.

In 2009, Scott S. Segal, Leonard P. Harris, and Stanley M. Hostler, signed contracts personally, absolutely, and unconditionally guaranteeing the repayment obligation of the debtor, Protea Biosciences Group, Inc., under a $3 million note.[80] In 2017, these three coguarantors signed an agreement reaffirming their contractual obligations under their personal, absolute, and unconditional guaranties, and affirmatively representing the non-existence of any alleged oral agreements modifying those personal, absolute, and unconditional guaranties.[81] Eventually, United Bank, which owned the Protea Note, sold it to PITA, LLC, and assigned its rights, including the guaranties and reaffirmation agreement.[82] After Protea filed for bankruptcy protection and defaulted on the Note, PITA sent a demand letter to the three coguarantors.[83]

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[78] App. 2427. Following the hearing, Segal filed a "motion to strike" prejudgment interest, making the curious argument that a suit for a sum certain under a contract is not "special damages" under W. Va. Code § 56-6-31. App. 2440. PITA and the Trust responded to this motion, noting that the cases relied on by Segal held that coguarantors were entitled to prejudgment interest in identical circumstances and that economic damages for breach of contract are "special damages" under the prejudgment interest statute. App. 2446.

[79] App. 2603.

[80] App. 109-114. Milan Puskar also signed a personal guaranty of the Protea Note. App. 1939.

[81] App. 115-116. The Trust also executed the 2017 reaffirmation agreement. App. 35.

[82] App. 117-124.

[83] App. 125-136.

When the guarantors refused to honor their contractual obligations, PITA filed suit for breach of contract and the Trust,[84] which funded PITA's acquisition of the Protea Note from United, filed suit for contribution.[85] Moreover, because United and the Trust had relied on written statements by the three coguarantors in 2017 that no unwritten oral statements existed that would impact their contractual obligations under their 2009 guaranties, PITA and the Trust further sued the three coguarantors for fraud in the inducement.[86]

The Circuit Court has correctly ruled that Segal's defenses, as the only remaining coguarantor who has not settled, against the Trust's claim for contribution have no merit and has entered judgment against him for $1,291,518.83. However, the Circuit Court has (1) incorrectly ruled that PITA's and the Trust's fraud claims present no trialworthy issue; (2) PITA cannot sue Segal for his breach of contract because the Trust funded its purchase of the Protea Note from United; and (3) Segal is entitled to a $537,000 setoff of PITA's and the Trust's settlement with the Estate of Hostler even though only $175,000 of that settlement has been or ever may be funded.

V. SUMMARY OF ARGUMENT

The Circuit Court erred in granting summary judgment to the Respondent Segal on the Petitioners' fraud claim; in granting summary judgment to the Respondent Segal on the Petitioner

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[84] The Milan Puskar Foundation is the sole beneficiary of the Trust. App. 741. The Foundation awards grants to West Virginia 501(c)(3) charitable organizations or government agencies which "Provide health, training, and educational benefits to improve the quality of life within the state of West Virginia … Provide care for the homeless … Provide prevention, treatment, counseling and care services for those struggling with addiction [or] Support efforts to improve the current lives and future outlook for the youth in West Virginia." https://puskarfoundation.org/grantmaking/guidelines/ The Trust formed PITA as a wholly-owned subsidiary to hold the Protea Note as an asset. App. 742. Anything collected by PITA relative to the Protea Note is transferred to the Trust and then to the Foundation for its charitable purposes. App. 743.

[85] App. 13.

[86] *Id.*

PITA's breach of contract claim; and in crediting the Respondent Segal on the contribution claim by the Petitioner Trust with a partially-funded settlement by one of Segal's coguarantors.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

As the Circuit Court's summary judgment rulings relative to PITA and the Trust are contrary to established West Virginia law, oral argument under R. App. P. 19 and resolution by published opinion are appropriate.

VII. ARGUMENT

A. STANDARD OF REVIEW.

As the three assignments of error by PITA and the Trust are from the award or denial of summary judgment, the applicable standard of review is *de novo*.[87]

B. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENT SEGAL ON THE PETITIONERS' FRAUD CLAIM WHERE SEGAL'S BANKING EXPERT AGREED THEY PRESENTED AN ISSUE FOR THE TRIER OF FACT AND THE EVIDENCE SATISFIED THE STANDARDS FOR A FRAUD IN THE INDUCEMENT CLAIM.

A Protea director, investor, and creditor,[88] Segal signed an industry-standard, form[89] personal guaranty of the Protea note on September 28, 2009.[90] Over fifteen years later, on March

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[87] Syl. pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*.").

[88] Protea trumpeted the expertise and involvement of its directors and investors, including Harris, Hostler, and Segal in public submissions to the SEC, referring to Segal as follows: "Scott Segal joined the Board of Directors in February 2008. … Mr. Segal has extensive relationships within the State of West Virginia and is considered by the Company to be an expert in several areas which may have use for the Company's technology, including forensics and occupational health, which led the Board to determine that he should serve as a director of the Company." App. 218-219. At the time of these public filings, Hostler owned almost 7 percent, Harris owned almost 3 percent, and Segal owned 2.5 percent of all Protea's outstanding shares of stock. App. 219. In addition, all three had loaned various sums to Protea. App. 219-220.

[89] Segal's expert acknowledged that the form guaranty signed by Segal was provided Bankers System, Inc. App. 1149.

[90] App. 27-28.

14, 2017, Segal reaffirmed his obligations under his 2009 guaranty.[91] Critically, he represented to the other parties to this reaffirmation[92] as follows:

ORAL AGREEMENTS DISCLAIMER. This Agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

ADDITIONAL PROVISIONS.

By signing this Agreement, each Borrower and Guarantor and Hypothecator acknowledges reading, understanding, and agreeing to all its provisions, and receiving a copy.

Protea Biosciences, Inc.

3/14/17
By: Stephen C Turner Date
Its: President

3/14/17
Scott S Segal Date
Individually

3/14/17
Leonard P Harris Date
Individually

3/14/17
Stanley M Hostler Date
Individually

Milan Puskar Revocable Trust Restated 9/28/11

2/3/17
Johanna Puskar Date
Trustee for Milan Puskar Revocable Trust Restated 9/28/11

2/3/17
Kyle M Pratt Date
Trustee for Milan Puskar Revocable Trust Restated 9/28/11

Milan Puskar Revocable Trust Restated 9/28/11

2/3/17
Johanna Puskar Date
Trustee for Milan Puskar Revocable Trust Restated 9/28/11

2/3/17
Kyle M Pratt Date
Trustee for Milan Puskar Revocable Trust Restated 9/28/11

By signing this Agreement, Lender acknowledges reading, understanding, and agreeing to all its provisions.

United Bank, Inc.

3/14/17
By: Randall Williams Date
Its: SVP Commercial Loans

As United's representative, Randall Williams, who signed the reaffirmation agreement on behalf of the lender testified that it relied on Segal's representation that "There are no unwritten oral agreements between the parties" in extending Protea's credit line in 2017. *First,* he testified that the purpose of the 2017 agreement was to permit collateral being held in a brokerage account

[91] App. 34-35.

[92] App. 35.

to be deposited into a money market account where it would accrue more interest.[93] *Second,* he testified that it is not uncommon for a coguarantor to acquire the underlying note from the creditor.[94] *Finally,* he testified (1) the lender relied on Segal's guaranty when it extended a $3 million credit line to Protea;[95] (2) United is unaware of any document releasing Segal from his guaranty or of any authorization by the lender to permit Milan Puskar to release Segal from his guaranty;[96] and (3) United relied on Segal's representations in the 2017 reaffirmation agreement: "Did United rely on Scott Segal's representations by executing the Change in Terms Agreement on January 26, 2017? … Yes."[97] The Trust, as another coguarantor, likewise relied upon Segal's representations that (1) he would honor his 2009 personal guaranty and (2) he had no "unwritten oral agreement" with any other party, including Mr. Puskar, impacting the enforceability of Segal's personal guaranty. Finally, as assignee, PITA is entitled to the benefit of the representations to the lender upon which it relied relative to Segal's 2017 reaffirmation agreement.

Segal's expert witness, a banking fraud expert,[98] testified that Segal should not have executed the 2017 reaffirmation agreement if he had some "unwritten oral agreement" with Mr.

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[93] App. 1325-1326.

[94] App. 1327-1328.

[95] App. 1352.

[96] App. 1352-1354.

[97] App. 2569; see also App. 2570-2571 ("Did United assume when Scott Segal signed the Change in Terms Agreement … that Scott Segal would honor his obligations as the guarantor? … Yes. … Would United [have] continued the $3 million Protea note if it knew that Scott Segal did not intend to honor the terms of the Change in Terms Agreement when he signed it, but that he intended to contend that Mike Puskar had released him from his obligations as guarantor? … no …").

[98] *In re Tomahawk Oil*, No. 14-15055-SAH, 2016 WL 4435609, at *1 (Bankr. W.D. Okla. Aug. 19, 2016) ("Harry Potter ('Potter'), a certified public accountant, certified fraud examiner and certified forensic accountant engaged by Mustang as an expert."); *In re Am. Hous. Found.*, No. 09-20232-RLJ-11,

Puskar that allegedly relieved Segal of his contractual obligations under his 2009 personal guaranty:

> Q Right. And if Segal, Harris, or Hostler believed they had some unwritten oral agreement with Milan Puskar relative to the agreement they had that they were signing in which they ratified the obligations they had under that 2009 agreement. Right? Then it would have been inaccurate for them to tell United Bank there were no such agreements. …
>
> THE WITNESS: **If there were another agreement, they shouldn't have signed that there wasn't -- there were no oral agreements** -- …
>
> Q Okay. And you've testified in the past or have offered opinions that when a borrower or a guarantor or other person signs a written agreement with a bank making representations, that the bank is permitted to rely on that representation. Right?
>
> A It's a little bit more involved than that, but yeah**, I don't think you should mislead a bank**. However, I'm not in the minds of these people, and so I don't understand. **I don't know why they signed this**.
>
> Q Right. But what I'm saying to you now is would you not agree with me -- **Let's say the loan had never been sold to PITA -- the note had never been sold by United Bank to PITA, and United Bank had sued the three guarantors, Segal, Hostler, and Harris. And all of a sudden the three defendants in this case, the co-guarantors, said to United, "Oh, no. Oh, no, United Bank. We signed a document in 2017 telling you, quote, 'There are no unwritten oral agreements between the parties,' but we had an oral agreement with another party, Milan Puskar on behalf of the Trust." You're telling me that on behalf of the bank or FDIC you wouldn't say, "Hey, that's a false representation upon which the bank relied to its detriment."** …
>
> A Okay. There would be a lot of things involved in that. **Certainly the bank would assert that position as defined -- as described in this agreement.**

2012 WL 4622310, at *7 (Bankr. N.D. Tex. Sept. 30, 2012), supplemented, No. 09-20232-RLJ-11, 2012 WL 5430988 (Bankr. N.D. Tex. Nov. 7, 2012) ("As the Court noted, the testifying expert, Harry Potter, concluded that AHF and AHF Development was being run by Steve Sterquell as a Ponzi scheme."); *In re AHF Dev., Ltd.*, 462 B.R. 186, 192 (Bankr. N.D. Tex. 2011) ("Potter is a Certified Forensic Accountant, a Certified Fraud Examiner, and a Certified Public Accountant."); *MVB Mortg. Corp. v. F.D.I.C.,* No. 2:08-CV-771, 2010 WL 654051, at *8 (S.D. Ohio Feb. 19, 2010) ("The declaration of Harry Potter, who is a certified public accountant, a certified fraud examiner, and a certified forensic accountant, indicates that he also reviewed the Bank's records.").

However, the defendants can assert their defenses, and it will be up to the court to decide.

Q And thank you. So what you're acknowledging is that United in my hypothetical had the defense of this oral -- alleged oral written agreement between Hostler -- I don't know. I haven't seen evidence it included Harris and Segal, but for purposes of my question assume it included all three -- that **if they had asserted this oral agreement with Milan Puskar, the bank could have said, "Well, you made a fraudulent representation." What you say is, and I agree with you, "I can't opine on that. That's up to the trier of fact to resolve." Is that a fair summary**?

A **Yes**.[99]

The Circuit Court offered two erroneous rationales in granting summary judgment the fraud claims against Segal: (1) fraud cannot be predicated on a promise not performed[100] and (2) the damages recoverable by the Trust for contribution – which is Segal's proportionate share of the Protea debt – are the same as recoverable by PITA and the Trust for fraud.[101]

First, "'The essential elements in an action for fraud are: '(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it.'"'[102] Here, all those elements are present as (1) Segal signed the 2017 reaffirmation agreement stating he had no oral agreements with any other party; (2) that statement has proved to be false as Segal now alleges an unwritten oral agreement with Mr. Puskar; (3) United Bank and the Trust were justified in relying upon Segal's representation he had

[99] App. 1177-1180 (emphasis supplied).

[100] App. 2650.

[101] App. 1908, 2650.

[102] Syl. pt. 1, *Lengyel v. Lint*, 167 W. Va. 272, 280 S.E.2d 66 (1981).

no oral agreement; and (5) PITA, as successor-in-interest to United Bank has been damaged because it has been forced to litigate the defense of an alleged oral agreement with Mr. Puskar.

Second, it is axiomatic that a "fraud in the inducement" claim[103] is not defeated due the existence of the underlying contractual relationship between the fraudster and the defrauded. Indeed, our Supreme Court of Appeals has held that although "[f]raud cannot be predicated on a promise not performed," here for Segal to honor his 2009 personal guaranty, "a false assertion in regard to some *existing* matter," here Segal's representation that he had no "unwritten oral agreements" with any other party, "by which a party," like United and the Trust, "is induced to part with his money or his property,"[104] will support a cause of action for fraud in the inducement.[105] For example, in *Fluharty, Tr. of Ests. of Johnson v. Peoples Bank, NA*,[106] the court held that a genuine issue of fact was presented where borrowers asserted that they were fraudulently induced into entering certain loan agreements by a lender's allegedly fraudulent misrepresentations regarding the accuracy of certain appraisals.[107]

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[103] Which is what PITA and the Trust are asserting, i.e., their predecessor-in-interest and the Trust were fraudulently induced to (1) extend the $3 million Protea credit lien and (2) reaffirm the Trust's coguarantor obligations by Segal's false representations that he had no "unwritten oral agreements" with any other party impacting Segal's obligations under his 2009 personal guaranty.

[104] Syl. pt. 4, *Janssen v. Carolina Lumber Co.*, 137 W. Va. 561, 73 S.E.2d 12 (1952) (emphasis in the original).

[105] Stated differently, "the representation required, in order that there be actionable fraud, must ordinarily relate to a past or existing fact, or to an alleged past or existing fact, and not to future occurrences." *Janssen v. Carolina Lumber Co.*, supra at 567, 73 S.E.2d at 17.

[106] No. 3:16-BK-30063, 2018 WL 10593642 (S.D.W. Va. Sept. 17, 2018).

[107] See also *Heslep v. Americans for Afr. Adoption, Inc.*, 890 F. Supp. 2d 671, 685 (N.D.W. Va. 2012) ("The plaintiffs' claims thus allege more than a mere failure to fulfill a future promise; they assert that the defendants knowingly made materially false statements about past events and present facts related to their adoption of Sam. The Hesleps allege that they relied on those misrepresentations and claim resulting damages. (Id. at ¶¶ 87, 90). As such, they have stated a plausible claim of fraud under West Virginia law."); *Powell v. Bank of Am., N.A.*, 842 F. Supp. 2d 966, 980 (S.D.W. Va. 2012) ("The specific allegations of fraud—that defendants induced plaintiffs to agree to the loan by misrepresenting that the interest rate and

Finally, the only damages awarded to the Trust against Segal for contribution is Segal's allocable share of the Protea debt and prejudgment interest, whereas available damages for fraud for both PITA and the Trust would include collection costs and punitive damages.[108]

Accordingly, as there was sufficient evidence for a trier of fact relative to the fraud claim, and the damages for fraud are not the same as for the Trust's contribution claim, the Circuit Court's judgment relative to PITA's and the Trust's fraud claims should be reversed and this matter remanded for a trial on those claims.

C. THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE RESPONDENT SEGAL ON THE PETITIONER PITA'S BREACH OF CONTRACT CLAIM.

As noted, the Circuit Court initially granted PITA summary judgment on its breach of the personal guaranty claim against Segal as there is no dispute that he breached the guaranty. Rather,

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payments would not increase, by suppressing from plaintiffs that the loan was an adjustable rate mortgage, and by misrepresenting that plaintiffs could refinance after one year—are sufficient to permit the inference that defendants did not intend to fulfill any of those terms or representations at the time made."); *Russell v. Bank of Am., N.A.*, No. 3:11-CV-88, 2012 WL 13028202, at *5 (N.D.W. Va. Jan. 18, 2012) ("At the core of the plaintiffs' fraud claim are the allegations that BofA represented that they would be granted a permanent loan modification as long as they first fell behind on their mortgage by three of four payments and successfully completed a trial period, that BofA nonetheless sought foreclosure, and that BofA made this false representation with deliberate disregard for their rights. Drawing all reasonable inferences in the plaintiffs' favor, this Court construes their allegations to assert that BofA had "no intention to fulfill the promise at the time it was made."); *Corder v. Countrywide Home Loans, Inc.*, No. CIV.A. 2:10-0738, 2011 WL 289343, at *6 (S.D.W. Va. Jan. 26, 2011) ("Viewed in this light, Corder's fraud claim is premised not on the breach of an alleged oral contract concerning the sale or lease of land, but on defendant's knowingly false statements of material fact. Thus, under West Virginia law, Corder's fraud claim is precluded neither by the statute of frauds nor the bar on promissory fraud.").

[108] See *Coffield v. McArdle*, No. 21-0569, 2022 WL 3905239 (W. Va. Aug. 30, 2022) (memorandum) (affirming award of legal expenses and punitive damages); Syl. pt. 4, *(Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W. Va. 468, 425 S.E.2d 144 (1992) ("Where it can be shown by clear and convincing evidence that a defendant has engaged in fraudulent conduct which has injured a plaintiff, recovery of reasonable attorney's fees may be obtained in addition to the damages sustained as a result of the fraudulent conduct."); *Boyd v. Goffoli*, 216 W. Va. 552, 569, 608 S.E.2d 169, 186 (2004) ("An obvious purpose of awarding attorney fees and costs in a case involving fraud is that intentional conduct such as fraud should be punished and discouraged. As reasoned by the circuit court, however, Appellant has been sufficiently discouraged from future fraudulent conduct by the sizable punitive damages awarded by the jury. As a result, an award of attorney fees and costs is not necessary to perform this function.").

Segal argues that even though PITA acquired the Protea Note from United and, with it, assumed United's rights under Segal's 2009 personal guaranty, PITA is barred from enforcing the contract against him because the Trust, a coguarantor, created PITA for purposes of holding the Protea Note, and funded PITA's acquisition of the Protea Note from United. As noted in PITA's response in opposition to Segal's proposed judgment order raising, for the first time, an argument regarding alter ego or veil piercing, "[T]he Defendant never raised the defense of alter ego/veil piercing, never briefed the issue of alter ego/veil piercing, and his proposed order contains no discussion of the elements of alter ego/veil piercing."[109] Nevertheless, the Circuit Court predicated its summary judgment ruling against PITA on its breach of contract claim agaisnt Segal solely on an issue never raised as a defense, argued, or briefed:

> The Plaintiffs allege that Defendant never raised the defense of alter ego/veil piercing and that the evidence is undisputed that PITA, LLC, is a West Virginia limited liability company with a separate corporate existence from the Trust. This Court finds the facts of the case clearly show that PITA and the Trust are the same as aforesaid, and Plaintiffs' argument relative to alter ego/veil piercing is rejected by the Court. The Court finds that this matter is not a contract claim but a claim for contribution based upon principles of equity.
>
> Accordingly, PITA's claim for breach of contract against Defendant is dismissed with prejudice. Payment of the Note balance on November 21, 2017, by PITA/Trust, was a satisfaction

[109] App. 2467. The only prior references to "alter ego" in the record were in conjunction with Segal's counterclaims, App. 188-189, which he abandoned. Segal never raised the issue of veil piercing at any time before including it in his proposed judgment order.

of the Note as far as United Bank was concerned, and the assignment of the Note to PITA was not to a non-interested independent third party. PITA, alone, cannot now assert a breach of contract claim against other guarantors.[4] Plaintiffs are limited as a matter of law to the contributive share of its co-guarantors under its claim for contribution. [110]

This Court will look in vain for any legal authority, legal analysis, or legal support for this ruling in any of the briefs, hearings, orders, or judgment. The Circuit Court simply concluded in its judgment that PITA is the alter ego of the Trust or that piercing PITA's corporate identity is appropriate.

First, PITA has been deprived of the due process right to notice of Segal's affirmative defense of alter ego/veil piercing and to engage in discovery on the issue. For this reason, theories of alter ego or veil piercing that are not asserted, as in this case, as affirmative defenses, have been waived.[111]

Second, in addition to waiver, none of the nineteen factors set forth by the Court in *Laya v. Erin Homes, Inc.,*[112] were developed during discovery or briefed by the parties. Moreover, there is nothing in the record to support their satisfaction:

> "Piercing the corporate veil" is an equitable remedy, the propriety of which must be examined on an ad hoc basis. See 1 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 41.25 (rev.perm.ed. 1983). "[D]ecisions to look beyond, inside and

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[110] App. 2650-2651.

[111] *Fritts v. Selvais*, 103 N.C. App. 149, 151, 404 S.E.2d 505, 506 (1991) ("Defendant's contention that plaintiff's action for a deficiency is barred on the basis that Tarheel is plaintiff's alter ego is an affirmative defense."); *Hess v. Biomet, Inc.*, No. 3:16-CV-208 JD, 2021 WL 5492616, at *2 (N.D. Ind. Nov. 23, 2021) ("The Distributors never pled veil-piercing, Biomet never asserted it as an affirmative defense …."); *Fox v. Seiden*, 2016 IL App (1st) 141984, ¶ 48, 53 N.E.3d 1005, 1018 ("Defendants did not even initially raise the issue of collateral estoppel and piercing the corporate veil as an affirmative defense in this case."); *JZK, Inc. v. Coverdale*, 192 Wash. App. 1022, n.2 (2016) ("Coverdale pleaded the following affirmative defenses … piercing the corporate veil and alter ego ….").

[112] 177 W. Va. 343, 352 S.E.2d 93 (1986).

through corporate facades must be made case-by-case, with particular attention to factual details." *Southern Electrical Supply Co. v. Raleigh County National Bank*, 173 W. Va. 780, ---, 320 S.E.2d 515, 523 (1984).

Some of the factors to be considered in deciding whether to pierce the corporate veil are:

> (1) commingling of funds and other assets of the corporation with those of the individual shareholders;
>
> (2) diversion of the corporation's funds or assets to noncorporate uses (to the personal uses of the corporation's shareholders);
>
> (3) failure to maintain the corporate formalities necessary for the issuance of or subscription to the corporation's stock, *348 such as formal approval of the stock issue by the board of directors;
>
> (4) an individual shareholder representing to persons outside the corporation that he or she is personally liable for the debts or other obligations of the corporation;
>
> (5) failure to maintain corporate minutes or adequate corporate records;
>
> (6) identical equitable ownership in two entities;
>
> (7) identity of the directors and officers of two entities who are responsible for supervision and management (a partnership or sole proprietorship and a corporation owned and managed by the same parties);
>
> (8) failure to adequately capitalize a corporation for the reasonable risks of the corporate undertaking;
>
> (9) absence of separately held corporate assets;
>
> (10) use of a corporation as a mere shell or conduit to operate a single venture or some particular aspect of the business of an individual or another corporation;
>
> (11) sole ownership of all the stock by one individual or members of a single family;
>
> (12) use of the same office or business location by the corporation and its individual shareholder(s);
>
> (13) employment of the same employees or attorney by the corporation and its shareholder(s);
>
> (14) concealment or misrepresentation of the identity of the ownership, management or financial interests in the corporation, and concealment of personal business activities of the shareholders

> (sole shareholders do not reveal the association with a corporation, which makes loans to them without adequate security);
>
> (15) disregard of legal formalities and failure to maintain proper arm's length relationships among related entities;
>
> (16) use of a corporate entity as a conduit to procure labor, services or merchandise for another person or entity;
>
> (17) diversion of corporate assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors, or the manipulation of assets and liabilities between entities to concentrate the assets in one and the liabilities in another;
>
> (18) contracting by the corporation with another person with the intent to avoid the risk of nonperformance by use of the corporate entity; or the use of a corporation as a subterfuge for illegal transactions;
>
> (19) the formation and use of the corporation to assume the existing liabilities of another person or entity.[113]

Moreover, there is no record evidence regarding:

(1) Commingling of any assets and, indeed, PITA opened a new checking account upon its creation;[114]

(2) Diversion of PITA's funds or assets to any noncorporate use and, indeed, PITA's funds are transferred to the Trust to be used solely for the Foundation's charitable purposes;[115]

(3) Failure to observe corporate formalities and, indeed, PITA was formed with the assistance of counsel;[116]

(4) Any representations by any individual that they would be responsible for PITA's debts;

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[113] *Laya*, 177 W.Va. at 347–48, 352 S.E.2d at 98–99.

[114] App. 613 ("Janie has our checking account for the LLC set up now."); App. 1433 ("Are there copies of checks from PITA, LLC, for these payments? … Yes."); App. 1449 ("She set up our checking account for PITA.").

[115] App. 1645.

[116] App. 1440 ("We were advised. … Who advised you? … Counsel. … And by counsel, you mean legal counsel? … Yes.").

(5) PITA's failure to maintain corporate minutes or adequate corporate records and, indeed, PITA is current in its filings with the Secretary of State;[117]

(6) Identical equitable ownership in PITA and the Trust;[118]

(7) Identity of the directors and officers for PITA and the Trust;[119]

(8) Failure to capitalize PITA;

(9) Absence of separately held assets by PITA and, indeed, the evidence is that PITA was created to separately hold assets;

(10) Use of PITA for a single venture and, indeed, the evidence is that it was created to hold the Protea Note as a Trust asset for the charitable purposes of the Foundation;[120]

(11) Sole ownership of all the stock by one individual or members of a single family and, indeed, the evidence is that both PITA and the Trust serve only charitable purposes through the Foundation;

(12) Use of the same office or business location by PITA and its individual shareholder and although PITA and the Trust share the same business location,[121] there is no individual shareholder involved in PITA or the Trust;

(13) Employment of the same employees or attorney by the corporation and its shareholders and, indeed, there are no shareholders in PITA or the Trust;

(14) Concealment or misrepresentation of the identity of the ownership, management or financial interests in the corporation, or the concealment of personal business activities of the shareholders and, indeed, as noted, there are no individual shareholders in PITA or the Trust and both have been

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[117] https://apps.wv.gov/SOS/BusinessEntitySearch/Details.aspx?Id=navIqHXTgGdWLSxv8JEBIA==&Search=pdgxkaBPeM075MtV8x9I5g==&Page=0

[118] There is no identical equitable ownership of PITA and the Trust as the former is a subsidiary of the latter.

[119] Kyle Pratt is the manager of PITA and Joshua Rogers was the organizer. https://apps.sos.wv.gov/business/corporations/organization.aspx?org=373011. Johanna Puskar is the record owner of the Trust. https://apps.sos.wv.gov/business/corporations/organization.aspx?org=395340

[120] App. 1415.

[121] App. 1443.

completely transparent relative to PITA's creation and the funding of its acquisition of the Protea Note from United;

(15) Disregard of legal formalities and failure to maintain proper arm's length relationships between PITA and the Trust and, indeed, in addition to opening a checking account, and registering with the Secretary of State, PITA obtained an EIN from the IRS;[122]

(16) Use of PITA as a conduit to procure labor, services or merchandise for another person or entity;

(17) Diversion of PITA's assets by or to a stockholder or other person or entity to the detriment of creditors, or the manipulation of assets and liabilities between entities to concentrate the assets in one and the liabilities in another;

(18) Contracting by PITA with another person with the intent to avoid the risk of nonperformance by use of the corporate form; or the use of a corporation as a subterfuge for illegal transactions; or

(19) Formation and use of PITA to assume the existing liabilities of another person or entity.

Indeed, the concept of alter ego/veil piercing is to permit one asserting a claim, not defending one, to impose liability on a non-contracting party by demonstrating that the contracting party is a mere alter ego of the non-contracting party against which liability is sought to be imposed. Thus, it has no application in the context of this case and the Circuit Court erred in relying on it.

Moreover, the fact that the Trust was involved in creating PITA as a separate LLC and funded PITA's acquisition of the Protea Note and Segal personal guaranty is plainly insufficient to deprive PITA of its right to sue Segal for breach of his personal guaranty:

> Under the "alter ego doctrine," the legal separation between the entity and its members and managers may be disregarded when the LLC is used by one or more individuals to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose. To prove that a limited liability company is the alter ego of a member of the company, and pierce the veil of the limited liability

[122] App. 1449 ("We had the IRS notice with our EIN, which the bank requires, as of that date.").

> company, a claimant must demonstrate (1) a unity of interest and ownership to a degree that the separate personalities of the company and individual no longer exist, and (2) fraud, injustice, or an inequitable result would occur if the veil is not pierced. Thus, a court may disregard the separate limited liability company entity and the protective veil it provides to an individual member when that member, in order to defeat justice or perpetrate fraud, conducts his or her personal and LLC business as if they were one by commingling the two on an interchangeable or joint basis or confusing otherwise separate properties, records, or control.[123]

With regard to corporate veil piercing in general, our Court has held that, "The law presumes that two separately incorporated businesses are separate entities and that corporations are separate from their shareholders."[124] In *Southern Elec.*, for example, relative to the two corporations involved, a single individual was the sole or majority shareholder in both; the two corporations had the same offices; and a single individual controlled both companies.[125] Nevertheless, our Court held that one corporation was not the alter ego of the other:

> The law presumes that two separately incorporated businesses are separate entities and that corporations are separate from their shareholders.15 1 Fletcher, supra at §§ 25, 41.30, 41.35. 18 Am.Jur. *Corporations* § 14; 18 C.J.S. *Corporation*s § 5; H. Ballantine, *Corporations* § 122 (rev. ed. 1946); H. Henn, *Law of Corporations*, §§ 68, 252 (2d ed. 1970); F. Powell, *Parent and Subsidiary Corporations* § 1 (1931); N. Lattin, *The Law of Corporations* § 11 (2d ed. 1971).
>
> Raleigh County National Bank did not submit sufficient evidence to overcome this presumption. Our state law permits close corporations, with one shareholder, so we cannot disregard a corporation solely because it has one or two, and the same, shareholders. Nothing in our law prohibits one man or group from starting or owning two separate corporations with common purposes. See, *Kap-Tex, Inc. v. Romans*, 136 W.Va. 489, 67 S.E.2d 847, 852 (1951).

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[123] 51 Am. Jur. 2d *Limited Liability Companies* § 20 (footnotes omitted).

[124] Syl. pt. 3, in part, *S. Elec. Supply Co. v. Raleigh Cnty. Nat. Bank*, 173 W. Va. 780, 320 S.E.2d 515 (1984).

[125] *S. Elec. Supply Co. v. Raleigh Cnty. Nat. Bank*, supra at 786, 320 S.E.2d at 521 ("This bank justified its actions by arguing that the Southern Electrical account and Gibson Electric account were in reality one (or should be viewed as one) because both corporations were the alter egos of William Gibson. He was sole or majority shareholder in both corporations, they had the same officers and same office address, and Gibson controlled both companies.").

> Each of Gibson's corporations served a separate purpose although their businesses were related. That relationship does not justify disregarding their separateness. Nor does common ownership or common management without evidence of fraudulent conduct, total control, or a "dummy" corporation justify piercing a corporate veil.
>
> The court was shown no evidence that either corporation was undercapitalized, none that funds were commingled, nor that one corporation controlled the other, but only that Gibson owned all the stock in one and three-fourths of the other's. See *Southern States Co-operative*, supra. Accord, *Ramsey v. Adams*, 4 Kan.App.2d 184, 603 P.2d 1025 (1979). But see *Talen's Landing v. M/V Venture II*, 656 F.2d 1157 (5th Cir.1981); *Zaist v. Olson*, 154 Conn. 563, 227 A.2d 552 (1967). …
>
> Having moved for summary judgment on this point, the bank has precluded itself from introducing more evidence to support its position. We find as a matter of law that the evidence introduced was insufficient to allow a court to treat both corporations as one entity.[126]

This case demonstrates the peril in deciding a case based on an affirmative defense of alter ego/veil piercing that was never asserted, developed, briefed, argued, or analyzed in the Circuit Court's judgment. Had that occurred, it is readily apparent that Segal failed to satisfy his "heavy burden" of proving alter ego/veil piercing as an affirmative defense.[127]

It is important to place into context PITA's claim against Segal for breach of his personal guaranty. *First*, PITA acquired the Protea Note before Protea's default.[128] *Second*, Protea was negotiating with an investment bank to avoid default.[129] *Third*, after those negotiations failed, Protea filed for bankruptcy protection on December 1, 2017.[130] *Fourth*, PITA notified Segal by

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[126] *S. Elec. Supply Co. v. Raleigh Cnty. Nat. Bank*, supra at 788–90, 320 S.E.2d at 523–25 (footnotes omitted).

[127] *In re Gulf Fleet Holdings, Inc.*, 491 B.R. 747, 785 (Bankr. W.D. La. 2013) ("if allegations of fraud are absent, a party bears 'a heavy burden of proving that the shareholders disregarded the corporate entity to such an extent that it ceased to become distinguishable from themselves.'") (citation omitted).

[128] App. 18.

[129] *Id.*

[130] App. 19.

letter dated December 8, 2017, that it was exercising its rights under his 2009 guaranty.[131] *Finally*, Segal refused to honor his 2009 personal guaranty, necessitating a lawsuit by PITA to enforce it.[132]

Had Segal honored his 2009 personal guaranty upon PITA's demand in December 2017, PITA would not have incurred over $400,000 in collection costs, a portion of which are allocable to Segal.[133] Moreover, Segal would have avoided contractual interest and late fees of nearly $500,000, a portion of which are allocable to Segal.[134] Instead, Segal disclaimed any liability, raising the cornucopia of defenses previously discussed, necessitating a suit against him which his other two coguarantors settled.

Finally, it is significant to note that the legal authority relied upon by Segal before inserting the alter ego/veil piercing theory in his proposed judgment order actually supports the Trust's right to fund PITA's purchase of the Protea Note and then, upon Protea's default, for PITA to sue the coguarantors for breach of their guaranty agreements. This explains why Segal's assertion of of alter ego/veil piercing was a Hail Mary in this case.

The primary case relied on by Segal, *Matter of Pirani*, 824 F.3d 483 (5th Cir. 2016), is perplexing because contrary to his briefs, it did not affirm a 2014 decision of the United States Bankruptcy Court for the Eastern District of Texas precluding a guarantor from bringing an action after obtaining an assignment of the underlying note. Instead, the Fifth Circuit reinstated the guarantor's claims:

> Pirani next challenges the district court's affirmance of the bankruptcy court's dismissal of his breach-of-guaranty claim against Gilani, Baharia, Lalani, and HNM. The bankruptcy

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[131] *Id.*

[132] App. 22.

[133] App. 2381.

[134] App. 2377.

> court dismissed the breach-of-guaranty claim on the ground that Pirani should not be permitted to sue the defendants for breach of a guaranty agreement from which he had promised to have them released. This result was correct with respect to Gilani, Baharia, and Lalani. As shown above, Pirani promised to have them released from their personal guaranties—a promise he had the power to fulfill as soon as he received title to the note and guaranty agreement. He cannot "profit from [his] own breach," *Berryman's S. Fork, Inc. v. J. Baxter Brinkmann Int'l Corp.*, 418 S.W.3d 172, 186 (Tex.App.2013), by suing them under a guarantee agreement that he had the obligation and power to release them from. This logic does not extend to HNM, however, because the settlement agreement does not include a promise to release HNM from its guaranty obligations; it promises to release only Gilani, Baharia, and Lalani from their personal guaranties**. Hence Pirani's claim for breach-of-guaranty may go forward against HNM**.[135]

Indeed, the Fifth Circuit stated:

> **Texas law permits a guarantor to purchase an underlying note and guaranty agreement and assert, as assignee, a cause of action against his coguarantors**. *See Byrd v. Estate of Nelms*, 154 S.W.3d 149, 163 (Tex.Ct.App.2004). In that situation, the guarantor's right to sue as an assignee on the note and guaranty agreement is "limited as a matter of law to the contributive share of its co-guarantors." *Id.* at 165. Contributive shares are calculated by taking the total amount of liability and dividing by the number of coguarantors. See id. Here, there were six guarantors: Aziz and Pirani; Gilani, Baharia and Lalani; and HNM. **Thus, from each coguarantor, Pirani would be able to recover one-sixth of the amount for which he can make a claim for under the note and guaranty. *See id.* ("There are six guarantors; therefore, Byrd's contributive share would be one-sixth of the note.").[136]**

Of course, that is precisely what occurred in this case, PITA purchased the Protea Note from United and sued Segal for his contributive share. Accordingly, *Pirani* supports PITA's breach of contract claim against Segal on his guaranty and change in terms agreements, which may explain why the Circuit Court never mentions the *Pirani* case in its judgment. Likewise, none of the other cases cited by Segal support his argument that PITA's acquisition of the Protea Note are mentioned in the Circuit Court's judgment because none preclude PITA from enforcing the guaranty and change in terms agreements; instead, to the contrary, each supports PITA's breach

[135] *Pirani,* supra at 498 (emphasis supplied).

[136] *Id.* at 499 (emphasis supplied).

of guaranty claim[137] because if coguarantors can satisfy the principal debt obligation and then sue other coguarantors for their pro rata shares, as they clearly do,[138] they also have the right to acquire the promissory note and guaranties either directly or indirectly through another entity.[139]

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[137] *First*, the case of *Byrd v. Est. of Nelms*, 154 S.W.3d 149 (Tex. App. 2004) is cited by the Fifth Circuit in *Pirani, supra* at 499 (emphasis supplied), for the proposition, "**Texas law permits a guarantor to purchase an underlying note and guaranty agreement and assert, as assignee, a cause of action against his coguarantors**." *Second*, the case of *Wiggins v. Ellis*, No. 2:12-CV-02705-SGC, 2020 WL 2840091 (N.D. Ala. June 1, 2020), relied on by Segal below, was overturned on reconsideration, No. 2:12-CV-02705-SGC, 2021 WL 535536 (N.D. Ala. Feb. 12, 2021), and the ultimate decision in *Wiggins*, 2021 WL 535536, at *10 (emphasis supplied), supported summary judgment against Segal:

> Likewise, in a key case on the rights of coguarantors against each other, *Mandolfo v. Chudy*, 564 N.W.2d 266 (Neb. Ct. App. 1997), the Nebraska Court of Appeals noted, "**The fact that the [plaintiffs] attempted to maneuver themselves into a different position by becoming the creditors does not erase their coguarantor status with [the defendant] … [T]he [plaintiffs'] action in voluntarily buying the note from American does not affect or expand [defendant's] liability as a coguarantor**." Id. at 271.

Third, in *In re Basil St. Partners, LLC*, No. 9:11-BK-19510-FMD, 2012 WL 6101914, at *17 (Bankr. M.D. Fla. Dec. 7, 2012) (emphasis supplied and footnote omitted), the court, as with the other cases cited by Segal, affirmed the right of a co-guarantor to acquire the underlying debt obligation, including through the use of a separate corporate entity, but merely held that the co-guarantor cannot recover more than it paid:

> Antaramian characterizes the acquisition price of the BSP Loan as being the payment of his fair share of the Note under his Guaranty obligation. In other words, Antaramian argues that he has not escaped liability on his Guaranty, because he paid real dollars out of his own pocket to discharge that liability. But, Antaramian paid less than $9 million to Regions, an amount that would be more than offset by the profit he stands to gain if he is awarded a judgment of $15,000,000.00 against each of PZS. The Court cannot countenance this unjust enrichment at the expense of Antaramian's co-guarantors, who would each end up being liable to Antaramian for more than what he alone paid to Regions. The amount of a claim for contribution is based on the amount paid to acquire an assignment of the underlying debt. **The Court holds that Antaramian is entitled to seek contribution from PZS based solely on the amount of his payment**.

Finally, in another decision relied on by Segal, the court held in *Mandolfo v. Chudy*, 5 Neb. App. 792, 798-99, 564 N.W.2d 266, 271-72 (1997) (emphasis supplied), aff'd, 253 Neb. 927, 573 N.W.2d 135 (1998), as follows:

> In determining the amount that can be recovered when contribution is sought from a coguarantor, the court in Marshall stated: "'**A … co-obligor … is entitled to no more by way of contribution than will put him on an equality of loss with others in view of his share of the obligation undertaken. This is true even though he obtains an assignment from the creditor….**'" *Id.* at 61, 22 N.W.2d at 410–11. …

> At the heart of the matter is the fact that the Mandolfos' action in voluntarily buying the note from American does not affect or expand Chudy's liability as a coguarantor.

Just as the court held in *Mandolfo*, PITA is entitled to recover from Segal his pro rata share of the Protea Note's principal, interest, and late fees, as well as all the legal and accounting costs associated with enforcing Segal's contractual obligations. Similarly, the other legal authorities relied upon below by Segal support the Trust's contribution claim. *First*, RESTATEMENT OF THE LAW OF RESTITUTION § 81 states: "a person who has discharged more than his proportionate share of a duty owed by himself and another as to which, between the two, neither had a prior duty of performance, is entitled to contribution from the other." Here, the Trust not only paid more that its proportionate share of the Protea Note – it paid all of it. *Second*, in *Homback v. BioDigestor Indus.*, 2001 U.S. Dist. LEXIS 18504, the court held as follows:

> The Court has little difficulty concluding that Homback is liable to Lunseth as assignee of Alerus on the personal guaranty he signed September 30, 1999, and that his liability extends to the full amount of the guarantee. An assignee may proceed in place of the assignor on a personal guaranty. … By the terms of the guarantee, therefore, it is apparent that Homback is liable to Lunseth for the full amount of the guarantee….
>
> The Court holds that Homback must pay more than his pro rate share of the guarantee obligations before seeking contribution.

Third, in *Lestorti v. DeLeo*, 298 Conn. 466, 4 A.3d 269 (2010) (citation omitted), the court stated, "'[when] one of two or more sureties for the same obligation has paid **more than his share of the debt**, he is entitled to contribution ... for **the excess paid over his share'**" [emphasis added] and, here, the Trust paid more than its share of the debt, it paid all of it. *Fourth*, in *Uhlmann v. Richardson*, 48 Kan. App. 2d 1, 11, 287 P.3d 287, 294 (2012), the court similarly held, "Uhlmann had guaranteed 60% of the bank loan but paid 100% of the loan deficiency to the bank. The Richardsons had guaranteed 24% of the loan, so their share would be 24% and that share can be easily calculated" and, likewise, in the present case, the Trust paid off the Protea Note by acquiring it through PITA, and Segal's shares can be easily calculated. *Fifth*, in *Backman v. Hibernia Holdings, Inc.*, No. 96 CIV. 9590 (LAP), 1998 WL 427675, at *5-6 (S.D.N.Y. July 28, 1998), the court held:

> Far from prohibiting assignment, the McDonald Guaranty specifically contemplates assignment. Accordingly, the McDonald Guaranty is assignable and may be enforced by Backman, as assignee, against McDonald, as guarantor. …
>
> New York law is clear that a guarantor who has paid off a claim on which he was legally liable may thereafter proceed against a coguarantor for contribution. … Accordingly, in an action based in contribution Backman would be entitled to recover from McDonald to the extent that Backman's Citibank transaction constitutes a payment on the note in excess of the amount that Backman was obligated to pay.

Finally, in *Sound Built Homes, Inc. v. Windermere Real Est./S., Inc.*, 118 Wash. App. 617, 634, 72 P.3d 788, 797 (2003), as amended on denial of reconsideration (Oct. 7, 2003), the court held, "Sound Built was forced to pay the entire judgment, although Windermere should have paid half. Accordingly, Sound Built is now entitled to a judgment against Windermere for one half of the amount that Sound Built paid to discharge Mastro's judgment," which is precisely what the Trust sought in this case.

[138] "As a general rule a guarantor who has paid more than his or her proportionate share of the debt guaranteed may obtain from his or her coguarantors contribution of an amount sufficient to make the payment of all equal or sufficient to satisfy the requirements of an agreement fixing the relative liability of

Throughout this litigation, Segal has intimated that there was something nefarious about the Trust's creation of PITA and its funding of PITA's acquisition of the Protea Note.[140] Indeed, in addition to suing United for fraud in this case,[141] Segal has filed a federal lawsuit against Dinsmore & Shohl, in part, for assisting the Trust in its formation of PITA.[142] As PITA has made

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the guarantors." 38A C.J.S. *Guaranty* § 154. "In an action by a guarantor, who has paid more than his or her proportionate share under a guaranty which is joint and several, to compel contribution by some of the coguarantors, the latter are not entitled to question the omission, as defendants, of other coguarantors, where defendants are held liable only for their proper shares." 38A C.J.S. *Guaranty* § 159 (footnote omitted).

[139] See, e.g., *Sterling Sav. Bank ex rel. Northwest Lending Partners, LLC v. Emerald Development Co.*, 266 Or. App. 312, 338 P.3d 719 (2014) (coguarantor's purchase of a promissory note and guaranties, and a creditor's assignment of its rights under those instruments to the coguarantor, does not extinguish the obligation, and instead, the coguarantor, as assignee of the creditor, can maintain an action to enforce the guaranty agreements against his or her coguarantors; however, equitable principles limit the guarantor-assignee's recovery against his or her coguarantors to their pro rata contributive share of what the purchasing-guarantor paid the creditor); *Morris v. Haas*, 659 So. 2d 804 (La. Ct. App. 5th Cir. 1995) (contributing guarantors' right to recourse against coguarantors who did not pay was unaffected by contributing guarantors' purchase rather than payment of underlying corporate note); see also 38A C.J.S. *Guaranty* § 154 ("The assignment of an underlying note and guaranty agreement to a guarantor does not change the status of the guarantor in relation to his or her coguarantors, which relationship restricts recovery on the guaranty to each coguarantor's contributive share.") (footnotes omitted); *id.* ("Where the contract of guaranty allows the creditor to release a guarantor without releasing the coguarantors, the creditor's release of a guarantor does not extinguish the remaining coguarantors' right to contribution from the released guarantor.") (footnote omitted); 38 Am. Jur. 2d *Guaranty* § 21 ("As a general rule, a guarantee is assignable absent express language to the contrary") (footnote omitted); 38 Am. Jur. 2d *Guaranty* § 22 ("In accordance with the rule that the assignment of a debt passes to the assignee any security for its payment, a transfer of the underlying primary obligation operates as an assignment of a guaranty of it. … Thus, an assignment of a promissory note will ordinarily have the effect of also assigning the guaranty of that promissory note.") (footnotes omitted); 38 Am. Jur. 2d *Guaranty* § 74 ("A coguarantor's purchase of a promissory note and guaranties, and a creditor's assignment of its rights under those instruments to the coguarantor, does not extinguish the obligation, and instead, the coguarantor, as assignee of the creditor, can maintain an action to enforce the guaranty agreements against the coguarantors; however, equitable principles limit the guarantor-assignee's recovery against the coguarantors to their pro rata contributive share of what the purchasing-guarantor paid the creditor.") (footnote omitted).

[140] As PITA's representative testified, it would be absurd for PITA to demand the Trust to reimburse PITA for the over $3 million PITA paid United for the Protea Note when the Trust funded PITA's acquisition of the Note. App. 1432.

[141] App. 84.

[142] App. 547-548 ("Those wrongs commenced when Defendants chose to prefer the interests of its larger, more lucrative client – the Milan Puskar Revocable Trust Restated 9/28/11 … over those of Mr. Segal. Defendants devised a scheme to divest Mr. Segal of the protection of the collateral of a business loan;

clear, however, it was always looking to the Trust, as one of four coguarantors, to share in its proportionate share of the contractual obligations to make PITA whole in the event of a Protea default.[143] What Segal, in contrast, is seeking is total and complete absolution of any of his contractual obligation as a coguarantor, and the Petitioners will leave to this Court's sound judgment as to whom among these parties has operated in bad faith.

Accordingly, this Court should reverse the judgment of the Circuit Court of Monongalia County relative to PITA's claim for breach of contract against Segal and reinstate the Circuit Court's initial summary judgment in favor of PITA against Segal finding that he breached his 2009 personal guaranty and 2017 reaffirmation agreements, and that PITA should be awarded its contractual interest, late fees, and collection costs.

D. THE CIRCUIT COURT ERRED IN CREDITING THE RESPONDENT SEGAL ON THE CONTRIBUTION CLAIM BY THE PETITIONER TRUST WITH A PARTIALLY-FUNDED SETTLEMENT BY ONE OF SEGAL'S COGUARANTORS.

PITA and the Trust settled with one of the coguarantors, the Estate of Harris, for $537,500, which was fully-funded and paid by the Estate of Harris.[144] PITA and the Trust settled with one

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to have the Trust renege on its own loan guaranty; to sue Mr. Segal for fraud, demanding punitive damages; and to attempt to obtain through misrepresentation and subterfuge Mr. Segal's waiver of the manifest conflict of interest that should have shut down the scheme before it could start."). Ultimately, Segal's expert repudiated much of this as (1) the loan documents and general commercial lending practices permit a lender to choose among various forms of satisfying a defaulted debt obligation, including collateral or guaranties; (2) the Trust never sought to renege on its guaranty, but to only recover from the other coguarantors their proportionate share of the debt obligation; and (3) there was sufficient evidence of fraud by Segal to present an issue for the trier of fact.

[143] App. 1422 ("Has PITA forgiven the guarantee of the Trust? … No."); App. 1451 ("PITA would like to collect from the guarantors with what they are entitled to pay per their guarantee, and then anything remaining, PITA assumes that they will be – or the trust assumes they will be responsible for. … Meaning that we have these other guarantors … and we want to collect what's owed per each of them and then beyond that, the trust would be responsible for, per their guarantee.").

[144] App. 1826, 1876, 2429.

of the other coguarantors, the Estate of Hostler, with only $175,000 funded and a cap of $537,500 dependent upon the speculative receipt of a percentage of contingency fees arising from the interest of the Estate of Hostler in certain asbestos cases.[145] Incredibly, although there was no dispute that neither PITA nor the Trust may ever receive more than the $175,000 paid by the Estate of Hostler, Segal argued that he was entitled to full credit for the $537,500: "[W]hat the plaintiffs got was a combination of immediate cash and right to future payments in the amount of $537,500. So it's not that they got nothing. … And so the Court's crediting that amount is appropriate."[146] Just as with the alter ego/veil piercing argument Segal never raised, briefed, or argued, he offered absolutely no legal authority in support of his argument that he was entitled to a credit for monies never paid to the Trust by one of his coguarantors. Indeed, at the hearing, Segal meekly offered "we can brief that as well"[147] and "we respectfully request the chance to brief it,"[148] which he never did. Again, in the Circuit Court's judgment order, it cites no legal authority in support of its crediting Segal with $362,500 the Estate of Hostler never paid the Trust, but simply states: "The Estate of Hostler and the Estate of Harris each paid (or agreed to pay over time) $537,500 to the Plaintiffs … leaving a principal balance of $1,951,904.16. Dividing the principal balance equally between the Trust and Segal leaves Defendant Segal responsible for $975,952.08."[149] This is simply wrong.

[145] App. 2432.

[146] App. 2433.

[147] App. 2432.

[148] App. 2434.

[149] App. 2634.

The RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY § 57 (1996) (emphasis supplied) provides:

> (1) Subject to subsection (2) and to any express or implied agreement between or among the cosureties, a cosurety's contributive share **is the aggregate liability of the cosureties to the obligee divided by the number of cosureties**.
>
> (2) When the terms of a cosurety's secondary obligation limit the cosurety's liability to an amount less than its contributive share determined pursuant to subsection (1), **or the contribution that can be obtained from a cosurety is less than that amount, the contributive shares of the cosureties are reapportioned as follows**:
>
> * * *
>
> (b) **When, because of** insolvency, lack of personal jurisdiction, or **other reasonable circumstances, the contribution obtained from a cosurety after reasonable collection efforts is less than that cosurety's contributive share, the contributive shares of the other cosureties as among themselves are recalculated pursuant to subsection (2)(a) as though the secondary obligation of the former cosurety limited its liability to the contribution obtained from that cosurety**.

Once the Trust, as a coguarantor, settled with the Estate of Harris for $537,500, the Protea debt was reduced by that amount and the balance reallocated among the Trust, the Estate of Hostler, and Segal. Once the Trust, as a coguarantor, settled with the Estate of Hostler for $175,000, the Protea debt was reduced by that amount and the balance reallocated between the Trust and Segal. The Trust has stipulated that, if it receives any additional payments from the Estate of Hostler, the Protea debt will be reduced by that amount upon receipt of those payments, and the balance reallocated between Segal and the Trust. Until such receipt, however, there is nothing to "recalculate" and "reapportion" under Section 57 of the RESTATEMENT (THIRD) OF SURETYSHIP & GUARANTY and the Circuit Court clearly erred in crediting Segal with payments never received by the Trust from the Estate of Hostler and which may never be

received,[150]particularly when Segal signed a guaranty in 2009 and reaffirmed it in 2017 promising to pay up to $1 million towards the Protea Note upon default and, in addition, contractual interest, late fees, and collection costs.

Accordingly, this Court should reverse the judgment of the Circuit Court of Monongalia County and remand for entry of a judgment in favor of the Trust against Segal allocating to Segal one-half of the actual payment of $175,000 made by the Estate of Hostler towards the Protea debt and one-half of any future payments, and not with one-half of the $362,500 the Estate of Hostler never paid the Trust.

VIII. CONCLUSION

WHEREFORE, the Petitioners, PITA, LLC and the Milan Puskar Revocable Trust Restated 9/28/11, respectfully request that this Court reverse the judgment of the Circuit Court of Monongalia County and remand with directions to (1) schedule a jury trial on the fraud claims of the Petitioners against the Respondent, Scott S. Segal; (2) enter judgment in favor of PITA against Segal for breach of contract and for the award of contractual interest, late fees, and collection costs; and (3) enter judgment in favor of the Trust allocating one-half of the actual payment of $175,000 made by the Estate of Hostler towards the Protea debt and one-half of any future payments, and not with one-half of the $362,500 the Estate of Hostler never paid the Trust.

PITA, LLC, AND THE MILAN PUSKAR REVOCABLE TRUST

By Counsel:

[150] As of the date of this brief, no additional payments have been received by the Trust or PITA from the Estate of Hostler.

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2022, I served the foregoing **"PETITIONERS' BRIEF"** upon the following counsel of record using the E-Filing System:

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