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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1725

BANK OF AMERICA, N.A.,

Plaintiff - Appellee,

v.

JERICHO BAPTIST CHURCH MINISTRIES, INC., Jericho DC,

Defendant - Appellant,

and

JERICHO BAPTIST CHURCH MINISTRIES, INC., Jericho MD; DENISE KILLEN; CLIFFORD BOSWELL; GLORIA MCCLAM-MAGRUDER; CLARENCE JACKSON; LYNDA PYLES,

Defendants.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Paula Xinis, District Judge. (8:15-cv-02953-PX)

Submitted: September 30, 2022 Decided: October 19, 2022

Before AGEE, WYNN, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Donald M. Temple, Washington, D.C., for Appellant. Matthew A. Fitzgerald, Richmond, Virginia, Ava E. Lias-Booker, Melissa O. Martinez, MCGUIREWOODS LLP, Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Bank of America, N.A., filed an interpleader action as a disinterested stakeholder seeking protection from liability relating to deposit accounts established in 1999 and 2002 by Jericho Baptist Church Ministries, Inc. (the "Church"). The accounts were the subject of litigation between two factions of the Church, Jericho DC and Jericho MD; each faction claimed ownership of the Church and purported to be authorized to access the accounts held by Bank of America. Jericho DC filed a counterclaim against Bank of America, alleging breach of contract, negligence, and gross negligence in Bank of America's handling of the Church's account. Jericho DC appeals from the district court's order granting summary judgment to Bank of America and denying its motion for reconsideration of the court's prior order excluding Jericho DC's expert witness. Finding no error, we affirm.

Jericho DC first contends that the district court erred in excluding its expert witness, Susan Riley, based on her lack of qualifications and the unreliability of her opinions. "We review a district court's decision[] on the admissibility of expert testimony for abuse of discretion." *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 958 (4th Cir. 2020); *see Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 138-39 (1997) (applying abuse of discretion standard to district court's exclusion of expert testimony). Rule 702 of the Federal Rules of Evidence sets forth the requirements for qualifying a witness as an expert. When determining the reliability of experiential expert testimony for purposes of Rule 702, a court must "require an experiential witness to explain how [her] experience leads to the conclusion reached, why [her] experience is a sufficient basis for the opinion, and how [her] experience is

reliably applied to the facts." *United States v. Wilson*, 484 F.3d 267, 274 (4th Cir. 2007) (internal quotation marks omitted).

Because Riley only worked with customers at an operational bank for a short period of time prior to 1985, the district court did not abuse its discretion in finding her unqualified to offer an expert opinion on the industry standard of care for verifying client signature cards on corporate accounts decades later. *See Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 800 (4th Cir. 1989) (finding that expert witness with no education, training, or experience in the area in which she testified failed to satisfy Rule 702 and should have been excluded). Moreover, Riley could not explain how her experience supported her conclusions, nor was she able to point to any industry standards that supported her opinions. As such, the district court did not abuse its discretion in deeming her opinions unreliable.

Jericho DC next argues that the district court abused its discretion by refusing to reopen discovery to allow Jericho DC to designate another expert after the court excluded Riley. A trial court necessarily has wide discretion in managing pretrial discovery, and an appellate court should not disturb its orders absent a clear abuse of discretion. *Ardrey v. United Parcel Serv.*, 798 F.2d 679, 682 (4th Cir. 1986). The Federal Rules of Civil Procedure generally permit a court to extend a deadline "on motion made after the time has expired if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B); *see Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993) (listing factors courts consider in excusable neglect determination). Because Bank of America had already spent two days deposing Riley, discovery had been closed for over a

year, the district court had previously extended the discovery period, and Jericho DC had the opportunity to look for an alternate expert once Riley's qualifications were questioned by the district court during the first summary judgment hearing, the district court did not abuse its discretion in denying Jericho DC's request to reopen discovery.

Next, Jericho DC contends that the district court erred in ruling that it was required to present expert testimony to establish Bank of America's standard of care. Rule 601 of the Federal Rules of Evidence provides that "state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision." Maryland law, which governs Jericho DC's breach of contract and negligence claims, provides that "[a]dding an individual's name to a bank account involves an understanding of internal bank procedures that the trier of fact cannot be expected to appreciate" and that "expert testimony was necessary to explain to the jury the reasonable commercial standards prevailing in the area with respect to adding names to a customer's checking account and verifying the identities of the signatories." *Schultz v. Bank of Am., N.A.*, 990 A.2d 1078, 1080-81, 1085-86 (Md. 2010). Based on its straightforward application of Maryland law, the district court did not err in determining that the standard of care could not be established without an expert.

Finally, Jericho DC argues that the district court erred by considering unauthenticated records submitted by Bank of America that constituted inadmissible hearsay. A district court may consider materials at the summary judgment stage that would be inadmissible at trial if the proponent "shows that it will be possible to put the information into an admissible form." *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*,

790 F.3d 532, 538 (4th Cir. 2015) (cleaned up). The business records exception to the rule against hearsay provides that a record of a regularly conducted activity is not excluded by the rule against hearsay if certain requirements are met. Fed. R. Evid. 803(6). "Rule 803(6) does not require that the records be created by the business having custody of them." *Gen. Ins. Co. of Am. v. U.S. Fire Ins. Co.*, 886 F.3d 346, 358 (4th Cir. 2018) (cleaned up). In this case, Bank of America showed that the records in question could be authenticated at trial and fell into the business records hearsay exception. The district court therefore did not abuse its discretion in considering the records in its summary judgment determination.

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

	*	
BANK OF AMERICA, N.A.,	*	
Plaintiff,	*	Case No. PX 15-02953
v.	*	
	*	
JERICHO BAPTIST CHURCH MINISTRIES, INC. *et al.*,	*	
Defendants.	*	

******

MEMORANDUM OPINION

Currently pending and ripe for resolution is Bank of America ("BOA")'s renewed motion for summary judgment on all claims asserted by Jericho Baptist Church Ministries, Inc. ("Jericho D.C."). ECF No. 244. Also pending is Jericho D.C.'s Motion for Reconsideration. ECF No. 249. For the following reasons, the Court grants BOA's motion and denies Jericho D.C.'s motion.

I. Background

The Court has previously set out the relevant facts, procedural posture, and appropriate standard of review in its earlier memorandum opinion addressing the propriety of summary judgment. ECF No. 201. The Court incorporates its previous opinion and will not repeat itself here. The Court's initial denal of summary judgment rested on the assumption that Jericho D.C. could offer at trial a qualified expert in commercial banking procedures to establish the standard of ordinary care in the banking industry by which the jury could measure BOA's course of conduct. ECF Nos. 201, 202. Since that ruling, BOA successfully moved to exclude Jericho

D.C.'s only proffered expert on this topic, Susan Riley. ECF Nos. 243, 251-1 at 98. In light of the Court having excluded Riley, BOA now renews its summary judgment motion.

Jericho D.C. also moves for the Court to reconsider its ruling as to Riley. Because this reconsideration motion potentially affects the outcome of BOA's summary judgment motion, the Court first addresses the propriety of reconsideration and then turns to the merits of BOA's summary judgment motion.

II. Jericho D.C.'s Motion for Reconsideration

Jericho D.C. urges this Court to either reconsider its ruling or allow an out-of-time designation of a new expert. ECF No. 249. Both requests are unfounded.

Regarding re-designation of a new expert, Jericho D.C. has established no good cause for reopening discovery, which closed August 6, 2018. ECF. No 181. During discovery, the Court had granted multiple extensions of time and had given both parties ample opportunity to prepare their respective cases. *See, e.g.*, ECF Nos. 148, 167, 181. Jericho D.C. chose to designate Susan Riley as its sole standard-of-care expert and vigorously persisted in her bona fides. Now that BOA succeeded in excluding Riley, the Court will not allow Jericho D.C. a "do-over."

As for urging the Court to reconsider exclusion, Jericho D.C. cites not one scintilla of procedural law in support of its position. The Court begins with the Federal Rules of Civil Procedure. Rule 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities . . . may be revised at any time before the entry of a judgment adjudicating all the claims and the parties' rights and liabilities." Fed. R. Civ. P. 54(b). When assessing whether revision is proper, the Court looks to the standard for reconsideration articulated in Rules 59(e) and 60(b).

A motion for reconsideration brought under Rule 59(e) need not be granted unless the Court finds "an intervening change of controlling law, that new evidence has become available, or that there is a need to correct a clear error or prevent manifest injustice." *Robinson v. Wix Filtration Corp., LLC*, 599 F.3d 403, 411 (4th Cir. 2010). "Rule 59(e) motions may not be used, however, to raise arguments which could have been raised prior to the issuance of the judgment. . . ." *Pacific Ins. Co. v. American Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). "[I]f a party relies on newly discovered evidence in its Rule 59(e) motion, the party must produce a legitimate justification for not presenting the evidence during the earlier proceeding. In general, reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." *Id.* (internal citations and quotation marks omitted).

Rule 60(b) sets forth broader but overlapping bases for reconsideration, none of which apply here. As with Rule 59(e), "Rule 60(b) does not authorize a motion merely for reconsideration of a legal issue." *United States v. Williams,* 674 F.2d 310, 312 (4th Cir. 1982); *see also Bank v. M/V "Mothership"*, No. ELH-18-3378, 2019 WL 2192488, at *4 (D. Md. May 20, 2019) ("Rule 60(b) was not intended as a substitute for a direct appeal from an erroneous judgment.") (citation omitted).[1]

Jericho D.C.'s motion makes no attempt to comply with the rules. Rather, the motion rests largely, if not exclusively, on the notion that this Court erred in considering "inadmissible hearsay" related to the circumstances of Riley's prior employment. ECF No. 249. However, the Court's exclusion of Riley did not depend on this challenged evidence. The Court agrees with BOA that, at best, the documents in question are relevant as to only Riley's lack of relevant

[1] BOA points out that this motion must be stricken as untimely. Local Rule 105.10 requires that motions for reconsideration be filed within 14 days of the entry of any applicable order. Here, Jericho D.C. waited almost three months to move for reconsideration. Clearly, the motion is untimely and thus can be stricken on this basis alone.

experience, not the substance of her opinions. To be sure, the Court excluded Riley based on her lack of qualifications and stands by that decision. But independently, the Court determined that Riley's opinions were unreliable and lacking in foundation and methodology. ECF No. 251-1 at 103. ("Next, and in the alternative, even if I were to find that Ms. Riley was sufficiently trained, educated and experienced, the opinions that she laid out . . . simply are not reliable"). Thus, even if somehow the Court erred in admitting the challenged documents, the decision to exclude Riley remains on solid footing. Jericho D.C. has failed to justify that reconsideration is warranted. The motion is denied.

III. BOA's Renewed Motion for Summary Judgment

BOA contends that summary judgment on all claims is warranted because without an expert to opine on the relevant industry standard of care and BOA's breach of the same, no reasonable juror could find in favor of Jericho D.C. The Court agrees.

To prevail on either its implied contractual duty or negligence claims[2] at trial, Jericho D.C. bears the burden of demonstrating that BOA breached its duty of ordinary care owed to Jericho D.C. by continuing to disburse bank account funds as directed by Jericho M.D. and its representative Denise Killen. ECF No. 192 at 18; *see also Gillen v. Md. Nat'l Bank*, 274 Md. 96, 102–03 (1975). The duty of ordinary care in this context means the "reasonable commercial standards which prevail in the area in which the Bank is located, with respect to banking." *Schultz v. Bank of Am., N.A.*, 413 Md. 15, 40 (2010) (citing Md. Code, Com. Law § 3-103(a)(7)). BOA maintains that Jericho D.C. must submit expert testimony to establish the relevant industry

[2] As to Jericho D.C.'s negligence claim, the question for the trier of fact is the same as for the implied contractual duty claim. *Schultz*, 413 Md. at 28 ("A bank customer may bring a negligence suit against a bank for a violation of this duty of ordinary care."); *see also Taylor v. Equitable Tr. Co.*, 269 Md. 149, 155–56 (1973).

standards as well as how BOA breached those standards, which it cannot do now that Riley's opinions have been stricken.

In response, Jericho D.C. advances two arguments for why summary judgment is unwarranted. First, Jericho D.C. argues that because the 2009 BOA account records that reflect Denise Killen as an authorized account signatory are "unauthenticated" business records, the Court must not consider them. Without such documents, says Jericho D.C., no evidence supports that BOA maintained any authority to disburse funds at Killen's direction. Second, and alternatively, Jericho D.C. contends that because BOA's standard-of-care violations were so patent, this case is not one in which expert testimony is necessary. The Court addresses each argument in turn.

A. The 2009 Bank Records are Properly Considered at Summary Judgment

As to the 2009 bank records, BOA rightly points out that Jericho D.C. relies exclusively on authority which pre-dates the current applicable Federal Rules of Civil Procedure as amended in 2010. ECF No. 247 at 10–11. The operative version of Rule 54(b) provides that at the summary judgment stage, the Court may consider documents which have not yet been properly authenticated, subject to the non-moving party's objection. *See* Fed. R. Civ. P. 54(b), (c). If the non-movant objects on authenticity grounds, the Court must determine whether the moving party *can* produce authenticated documents at trial. *Id. See also Sall v. Wells Fargo Bank, N.A.*, No. DKC 10-2245, 2012 WL 5463027, at *1 n.1 (D. Md. Nov. 7, 2012); *Ridgell v. Astrue*, No. DKC 10-3280, 2012 WL 707008, at *9 (D. Md. Mar. 2, 2012) ("the 2010 amendments to Rule 56 changed the procedure for submitting materials on summary judgment. The new rule eliminated the 'unequivocal requirement that documents submitted in support of a summary judgment motion must be authenticated.'").

Here, BOA has submitted record evidence that it can and would authenticate the documents in question at trial. *See* ECF No. 248 at 6 n.2. The 2009 records bear the mark of BOA's electronic document management system, ImageView, which is the repository for account documents. Jericho D.C. does not contest that BOA could call a records custodian at trial to testify as to BOA's document retention policy and thus authenticate the documents without difficulty. *Id.* Finally, BOA's 30(b)(6) witness testified at deposition that the documents were kept in the ordinary course of BOA's business. ECF No. 188-8 at 291, 319, 321. On this record, nothing before the Court suggests that BOA "*cannot* provide authenticated versions of their exhibits." *Sall,* at *1 n.1 (emphasis in original). Jericho D.C., therefore, has failed to convince the Court that, pursuant to Rule 56(c), it must disregard the 2009 documents. The Court will consider them as part of the record evidence.[3]

B. Banking Industry Standard of Care Testimony is Necessary to Jericho D.C.'s Case

This leaves the question of whether Jericho D.C. can, without expert testimony, sustain its burden of demonstrating that BOA's reliance on Killen's authority to honor requested disbursements from the church bank accounts violated the applicable industry standard of care. As previously discussed, ECF No. 201 at 13, the Court is guided principally by *Schultz*, in which the Maryland Court of Appeals analyzed whether expert testimony concerning the standard of care is necessary to sustain a banking negligence case involving alleged unauthorized account disbursements. 413 Md. at 19. There, the plaintiff, the personal representative of the deceased account holder, contended that the bank breached its duty of due care when it added a signatory to the bank account and allowed that signatory to negotiate withdrawals on her own behalf. *Id.*

[3] The Court finds similarly unavailing Jericho D.C.'s argument that the documents constitute "inadmissible hearsay."

at 21. The plaintiff did not offer any expert testimony on the professional standards applicable to banking officers when adding signatories to a checking account. Instead, the plaintiff relied on evidence demonstrating that the signature card adding the signatory had been forged and other irregularities from which the jury could infer the bank negligently disbursed the funds in question. *Id.* at 34.

The court, in reversing the jury's award in favor of plaintiff, held that expert testimony was indeed required for the plaintiff to sustain his burden at trial. In reasoning that the standards applicable to a bank in authorizing account signatories is beyond the ken of the average layperson, the court explained,

> [W]e cannot say with any certainty that most people have added someone's name to their bank accounts. Petitioner supports this contention by asserting that '[l]ay people are frequently called upon in today's society to prove their identifications.' We disagree that these experiences provide a sufficient basis to conclude what the trier of fact would know because such experiences may vary widely from the reasonable standards in the banking industry. Furthermore, the relevant activity in this case was by the bank itself, not a bank customer. Even if most people have added a name to their bank accounts, most people have certainly not acted as a bank officer adding a name to a customer's bank account. That process may occur behind closed doors, out of the sight of the customer, and may involve numerous unknown procedures. To explain this process, a plaintiff must produce expert testimony from someone familiar with the process from a bank's perspective. Petitioner also failed to provide evidence of the reasonable commercial banking standards that prevail specifically in the relevant geographical area of the Bank, as required by the ordinary care standard. Finally, banking practices are changing in the era of the Internet and other electronic banking practices. Bank procedures may not be the same today as they were just a few years ago, which also means that an expert may be necessary to explain to the trier of fact what duty a bank owes to a customer.

Id. at 34–35.

Accordingly, the *Schultz* Court concluded that the trial court erred in submitting the case to the jury absent expert testimony as to the pertinent standards of care and the bank's violation of the same. *Id.* at 35.

In this respect, *Schultz* is on all fours with this case. As did the plaintiff in *Schultz*, Jericho D.C. contends that BOA violated its duty of due care when adding Denise Killen as a

signatory on the church bank accounts and thereafter allowing her to authorize disbursement of account funds. Jericho D.C. further contends that BOA breached similar duties in refusing to honor Joel Peebles' request to deny Killen such authority. When viewed most favorably to Jericho D.C., the Court cannot discern how a trier of fact would be able to ascertain the proper standards of care applicable to BOA officers and, without the benefit of expert testimony, whether such officers fell below such standards. For this reason, as in *Schultz*, the case simply cannot reach the jury.

Jericho D.C. rightly contends that the *Schultz* Court recognized such expert testimony is not required where "the alleged negligence, if proven, would be so obviously shown that the trier of fact could recognize it without expert testimony." *Schultz*, 413 Md. at 29. By way of illustration, the *Schultz* Court noted that expert testimony is unnecessary where the bank's acts and omissions are as obviously negligent as "where a dentist extracts the wrong tooth, a doctor amputates the wrong leg or leaves a sponge in a patient's body, or an attorney fails to inform his client that he has terminated the representation of his client." *Id.* at 30. In such rare situations, the breach in the relevant standard of care need no further expert elaboration.

That is not this case. In trying to convince the Court otherwise, Jericho D.C. points to two Maryland Court of Special Appeals cases, each of which were discussed in *Schultz.* ECF No. 249 at 22; *Schultz*, 413 Md. at 29–30. As the *Schultz* Court emphasized, *Saxon v. Harrison*, 186 Md. App. 228 (2009) involved a bank's disbursing funds on a check that had been indorsed with only part of the payee's name. The other case, *Free State Bank & Trust v. Ellis*, 45 Md. App. 159 (1980) concerned a bank's release of collateral without authority. *Schultz* was careful to distinguish such patent transgressions from the more complex question of when a bank may

honor the directives of additional or alternative signatories on a bank account. 413 Md. at 30–31. Thus, as in *Schultz*, neither *Saxon* or *Ellis* advance this Court's analysis.

Jericho next attempts to distinguish the facts of *Schultz* from this case. If anything, such attempts highlight that perhaps expert testimony is as critical here, if not more, than in *Schultz*. Jericho D.C. ably demonstrates that which neither party disputes—a war for church control had been waging between Jericho D.C. and Jericho M.D. for years. During this time, courts of law disagreed over which faction controlled the church and, by extension, church bank accounts. BOA honored the most recent, operative bank records which conferred on Killen authority to direct the disbursement of bank funds, albeit over Joel Peebles' protestations. Thus, the ultimate trial question for which Jericho D.C. bears the burden of proof is whether BOA's acceptance of and honoring Killen as an authorized signatory on the church bank accounts violated bank industry standards of care.

But without an expert, Jericho D.C. can marshal *no evidence* as to the standards of care applicable to BOA and the highly regulated industry of commercial banking, or as to how BOA breached such standards. Accordingly, without the benefit of expert testimony and viewing the remaining evidence most favorably to Jericho D.C., no reasonable trier of fact could conclude that BOA's conduct breached the relevant industry standard of care. Because such proof is necessary to sustain either the breach of implied contractual duty or the companion negligence claims, the Court is constrained to grant summary judgment in BOA's favor as to all remaining counts.

IV. Conclusion

For the foregoing reasons, Bank of America, N.A.'s motion for summary judgment is granted and Jericho Baptist Church Ministries, Inc.'s motion for reconsideration is denied.

A separate Order follows.

1/10/2020
Date

/S/
Paula Xinis
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

	*	
BANK OF AMERICA, N.A.,	*	
Plaintiff,	*	Case No. PX 15-02953
v.	*	
	*	
JERICHO BAPTIST CHURCH MINISTRIES, INC. *et al.*,	*	
Defendants.	*	

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MEMORANDUM OPINION

Currently pending and ripe for resolution are the parties' cross-motions for summary judgment. ECF Nos. 188, 189. The issues have been fully briefed, and the Court held a hearing on February 5, 2019. For the reasons articulated below, the Court GRANTS in part and DENIES in part Counter-Defendant Bank of America's ("BOA") motion and DENIES Counter-Plaintiff Jericho Baptist Church Ministries' ("Jericho D.C.") motion.

I. Background

A. Procedural History

This case originated as an interpleader action filed by BOA seeking Court determination of who rightfully owns the funds held in various BOA accounts. At the center of this case is the longstanding dispute over the control and governance of Jericho Baptist Church Ministries, Inc. ("the Church"), located in Landover, Prince George's County, Maryland. BOA asked this Court to determine which of two warring Church factions, Jericho D.C. or Jericho M.D., rightfully owned account funds held in the name of the Church. In the same action, Jericho D.C. filed

three counterclaims against BOA for breach of contract, negligence and gross negligence. ECF Nos. 19, 48.

As to the initial interpleader action, the Court determined that Jericho D.C. was the rightful owner of the BOA account funds. Applying principles of collateral estoppel, the Court held that the decision reached in *George v. Jackson*, No. 2013 CA 007115 B (D.C. Super. Ct. July 7, 2015), declaring Jericho D.C. the controlling Board as of 2009, compelled the same result with regard to the BOA bank accounts. As a result, Jericho D.C.'s counterclaims alleging BOA mishandling of the accounts necessitated resolution.

Turning to the Counterclaims, the Court denied BOA's motion to dismiss and set a discovery schedule. ECF No. 108. While discovery has been protracted and fraught with difficulty, it has concluded. The parties' cross-motions for summary judgment have been briefed comprehensively and the Court held a hearing. Based on the record evidence, the following facts are undisputed unless otherwise noted.

B. Factual Background

Betty Peebles and her husband, Reverend James R. Peebles, incorporated the Church in 1962. ECF No. 188-3. After James Peebles' death in 1996, Betty Peebles assumed control over the Board governing the Church, referred to in this opinion as Jericho D.C. Peebles maintained such control uninterrupted until her death in 2010. ECF No. 188-4.

In September and October of 2002, the Church opened two deposit accounts with BOA. In connection with those accounts, the Church granted Betty Peebles authority to enter into agreements with BOA, to "appoint and delegate" others to enter into agreements with the Bank, and to "take any other actions pursuant to such agreements in connection with said accounts that

the officer or employee deems necessary." ECF Nos. 188-7, 188-9. Betty Peebles, therefore, retained broad powers to transact business with BOA on behalf of Jericho D.C.

On March 15, 2009, Trustees from Jericho D.C. executed Resolution I-09, which purportedly recognized the Church Board of Trustees to be Betty Peebles, Dorothy Williams, Gloria McClam-MacGruder, Denise Killen, Clarence Jackson, Jennie Jackson, Bruce Landsdowne, Norma Lewis, and Lashonda Terrell. ECF No. 188-23. This Resolution completely changed the composition of the controlling Board, most notably removing Joel Peebles as a Trustee. BOA, however, was unaware of Resolution I-09 until Denise Killen produced it to BOA in October 27, 2010, nearly 18 months after the resolution purported to take effect. ECF No. 189-8. Joel Peebles was equally in the dark. ECF No. 189-22.

On October 19, 2009, Betty Peebles executed several documents which collectively overhauled the Church accounts with BOA. The first, entitled "Deposit Account Documentation Banking Resolution and Certificate of Incumbency," permitted Betty Peebles or Denise Killen (identified as Trustee/Secretary) "acting alone (a) to establish accounts" as well as to "operate and close such accounts" and to "designate persons to operate each such account." ECF No. 188-10. The Certificate plainly states that it "will apply to all accounts you maintain with us." *Id.* The second was an updated signature card that added Killen as a signatory. ECF No. 188-10 at 2. The signature card granted Killen "authority to operate an account," which included "authority to sign checks, and other items and to give us other instructions to withdraw funds; to endorse and deposit checks and other items payable to or belonging to you to the account; and to transact other administrative business related to the account, including closing the account." *Id.* Betty Peebles also authorized Killen to be the "designated account signer" on all BOA accounts

associated with the Church. ECF No. 188-20. These documents, in conjunction with the Deposit Agreement, formed the contract between BOA and Jericho DC. ECF No. 188-10.

Prior to the execution of these documents, however, Joel Peebles was granted similar signatory authority on the Church operating account ending in #8458. ECF No. 188-18.[1] The parties vigorously disagree as to whether the documents executed in 2009 removed Joel Peebles as an authorized signatory for this account or simply added Denise Killen as an authorized signatory. Further, the testimony in this respect is less than clear. BOA Regional Executive, Patricia Brooks-Nobles, who was personally involved in the Jericho dispute, testified that she "did not see anything" in the BOA account documents "that deleted Joel Peebles as an authorized signatory for the Church operating account"; however, she also testified that the corporate resolution documents executed in 2009 "supersede[]" the prior signature card, and so it was "unnecessary" for the bank to do anything more to effectuate Joel Peebles' removal as a signatory. ECF No. 189-29 at 18, 39. Further, the 2009 signature card for the operating account, on its face, notes that Killen was added to the account, but nowhere does the card indicate Joel Peebles was "deleted," even though the form of the signature card provides for such notation. ECF No. 188-19 (Deposit Account Documentation Signature Card noting an "update" and "adding" Denise Killen as signatory).

A year after the documents were executed, Betty Peebles died. On November 5, 2010, Joel Peebles wrote BOA expressing thanks for BOA's condolences for his mother's passing and discussing the Church's relationship with BOA. ECF No. 188-24. He further instructed BOA that "as the authorized representative of the governing body of the Jericho Baptist Church

[1] At this time, the Bank was Nationsbank, N.A. Betty Peebles had sole signatory authority on all other accounts. ECF Nos 188-19 (account ending in #1589); ECF No. 188-22 (account ending in #0008); ECF No. 188-20 (account ending in #8445).

Ministries, Inc. I am the only person authorized to make financial transactions with your bank; that includes drafting checks, money transfers, etc." *Id.* On November 9, 2010, Brooks-Nobles of BOA responded to Joel Peebles in writing, stating that because his assertions contradicted the operative account documents executed on October 9, 2009, the Bank required further documentation to confirm the switch of authority. ECF No. 188-25.

On March 4, 2011, Joel Peebles responded to Brooks Nobles, first alerting her that he had just received her correspondence two days prior because "sadly your communication was intercepted." ECF No. 188-26. Peebles also included for BOA's records "Resolution from the board of directors/trustees which names Joel Peebles as . . . the sole authorized signer for the Jericho Baptist Church Ministries, Inc." and "the only person authorized to make financial transactions with the Bank," as well as Board meeting minutes and organizational documents confirming the same. *Id.* Curiously, this Board resolution was signed by the same individuals who signed Resolution I-09. *Compare id.*, *with* ECF No. 189-8.

Brooks-Nobles concedes that at this time she clearly recognized "that there was a conflict" regarding Church control. ECF No. 189-29 at 23 (acknowledging a draft email which documents a "sincere hope that the church will come to a resolution in the near future. It is not the desire of the bank to be placed *in the middle of this division*.") (emphasis added). BOA had also received a flurry of corroborative correspondence that the two Church factions were embroiled in a series of legal disputes over Church control. BOA had received a subpoena for bank records (ECF No. 188-27); had been warned by attorneys for both the Board of Jericho D.C. and of Jericho M.D. that each regarded its own Board as in control of the funds held with BOA (ECF Nos. 189-12, -23); and BOA had begun internal discussions as to the status of pending litigation that BOA expected would only "get messier before it gets better." ECF Nos.

189-17, 189-18. Joel Peebles also carefully laid out the status of such litigation by separate correspondence. ECF No. 189-22; *see also* ECF No. 189-23 (letter from Jericho D.C. attorney Timothy Maloney identifying two separate pending court cases concerning Church control and warning that BOA's continued disbursements to "Dorothy Williams, Denise Killen or anyone working on their behalf" may result in litigation against the Bank).

On September 4, 2011, Jericho D.C. filed suit against BOA on almost identical grounds as those asserted in the current counterclaims pending before this Court. *See Jericho Baptist Church Ministries, Inc. v. Bank of America, N.A.*, 8:11-cv-2618-AW (D. Md. 2011) ("2011 suit"). While the 2011 suit was pending, however, the Circuit Court for Prince George's County, Maryland declared Denise Killen and the other Jericho M.D. Board members to be the lawful Board governing the Church. ECF No. 188-28.[2] Jericho D.C., as a result, voluntarily dismissed the federal suit without prejudice to refile. Then, on September 19, 2012, the Court of Special Appeals of Maryland reversed the Prince George's County Circuit Court's grant of summary judgment and remanded for further proceedings, finding that genuine issues of fact precluded determination as a matter of law as to the Board in rightful control of the Church. ECF No. 188-29. Throughout this time, BOA continued to allow Denise Killen to disburse church funds.

On October 15, 2013, Jericho D.C. filed suit in Superior Court of the District of Columbia, seeking a declaration that it was the Board rightfully in control of the church. ECF No. 188-30. Jericho D.C. more particularly maintained that Resolution I-09 was procured unlawfully and that it, rather than Jericho M.D., was the Board under whose authority the Church

[2] In late October 2010, Jericho M.D. had filed suit in Prince George's County Circuit Court seeking declaratory relief. ECF No 188-28. In connection with that litigation, the Circuit Court granted Jericho M.D.'s motion for temporary restraining order on July 15, 2011. *Id.* Although BOA highlighted this restraining order at the hearing, the Court notes the order was narrowly circumscribed to "stop [Joel] Peebles from taking the collection plate and to stop a performance from occurring at the Church facility." *Id.* It had nothing to do with control of BOA account funds, and instead underscored for BOA that the fight for Church control promised to be bitter and protracted.

operated. During this litigation, BOA continued to allow Denise Killen and her associates to disburse church funds.

Two years later, after a three-day bench trial, the D.C. Superior Court invalidated Resolution I-09, and found that the D.C. Board was the lawful church Board as of 2009. ECF No. 188-31. Only after the D.C. Superior Court issued its decision did BOA file an interpleader action with this Court. The interpleader functioned to freeze the BOA bank assets held in the pertinent Church accounts by requiring the funds to be deposited in the Court registry pending resolution of the case. Jericho D.C. filed its counterclaims against BOA for breach of contract, negligence and gross negligence, essentially contending that the bank violated its duty of care to Jericho D.C. by allowing Denise Killen to transact bank business from 2009 until the filing of the interpleader action. The Court examines each counterclaim in turn.

II. Standard of Review

Summary judgment is appropriate when the court, viewing the evidence in the light most favorable to the non-moving party, finds no genuine disputed issue of material fact, entitling the movant to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008). "A party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of [his] pleadings,' but rather must 'set forth specific facts showing that there is a genuine issue for trial.'" *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir. 2003) (quoting former Fed. R. Civ. P. 56(e)). "A mere scintilla of proof . . . will not suffice to prevent summary judgment." *Peters v. Jenney*, 327 F.3d 307, 314 (4th Cir. 2003). Importantly, "a court should not grant summary judgment 'unless the entire record shows a right to judgment with such clarity as to leave no room for controversy and establishes affirmatively

that the adverse party cannot prevail under any circumstances.'" *Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 55 (4th Cir. 1994) (quoting *Phoenix Sav. & Loan, Inc. v. Aetna Casualty & Sur. Co.*, 381 F.2d 245, 249 (4th Cir. 1967)). Where the party bearing the burden of proving a claim or defense "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment against that party is likewise warranted. *Celotex*, 477 U.S. at 322.

III. Analysis

A. Breach of Contract (Count I)

In the parties' cross motions for summary judgment, each professes victory based on a largely undisputed record. Jericho D.C. contends that the facts construed most favorably to BOA demonstrate that BOA violated its implied contractual duty of due care, while BOA contends no breach—express or implied—occurred in its adherence to the 2009 customer agreement executed by Betty Peebles and Denise Killen. As to BOA's motion, as Jericho D.C. concedes, summary judgment is appropriate as to the breach of express contract claim. Furthermore, and construing the facts most favorably to Jericho D.C., the Court finds that genuine issues of material fact exist at this stage as to whether BOA breached its implied contractual right to exercise ordinary care in the disbursement of bank funds. For the same reasons, and construing the facts most favorably to BOA, the Court denies Jericho D.C.'s motion for summary judgment.

The Court first addresses the breach of express contract claim. It is well settled that "[t]he relationship between a bank and its customer is contractual." *G&D Furniture Holdings Inc. v. SunTrust Bank*, No. TDC-16-2020, 2017 WL 2963350, at *2 (D. Md. July 11, 2017) (citing *Lema v. Bank of America N.A.*, 375 Md. 625, 638 (2003)). A signature card and deposit agreement constitute the operative written contract between the Bank and customer. *Lema*, 375

Md. at 638; *Harby ex rel. Brooks v. Wachovia Bank, N.A.*, 172 Md. App. 415, 422 (2007). As to the operative contract, no dispute exists that as of 2009, Betty Peebles retained authority to negotiate contractual terms with BOA on the Church's behalf. It is equally undisputed that Betty Peebles executed a series of documents with BOA that bound both parties to its terms. *Kiley v. First Nat. Bank of Md.*, 102 Md. App. 317 (1995) (stating that authorized party executing new signature cards and agreements to add wife to account "either created a new contract with the Bank or modified their original contract"). Based on these documents, Peebles authorized Denise Killen to transact business with the Bank on the Church's behalf, to include authorizing disbursements of funds held in church accounts. Although at the hearing, Jericho D.C. argued that the manner in which these documents were executed is evidence demonstrating BOA failed to exercise due care, Jericho D.C. also agreed it is not claiming breach of any express contractual provision. Summary judgment on any theory of breach of express contractual terms is thus granted in BOA's favor.

Jericho D.C.'s primary theory of liability, however, is that BOA breached an "implied contractual duty of ordinary care that it owed to its customer, here Jericho D.C." by continuing to disburse funds even after being placed on notice of the fight for control between the two Boards. ECF No. 192 at 18. The implied contractual right for a bank to exercise ordinary care in the disbursement of customer funds "includes an obligation to pay funds only as authorized." *G&D Furniture Holdings*, 2017 WL 2963350, at *3 (quoting *Univ. Nat'l Bank v. Wolfe*, 279 Md. 512, 521 (1977)) (internal quotation marks omitted). A customer may bring a breach of contract claim where a bank has failed to exercise ordinary care in disbursing the depositor's funds. *Gillen v. Md. Nat'l Bank*, 274 Md. 96, 101–102 (1975). Importantly, a bank cannot contract away its obligation to exercise ordinary care. *Id.* Even where express contractual terms have not

been broken, the bank still may have violated its implied obligation to exercise due care in disbursing funds. As to the duty a Bank owes to its customers, ordinary care "means observance of the reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged." Md. Code, Com. Law § 3-103(a)(7); *see also Schultz v. Bank of Am., N.A.*, 413 Md. 15, 40 (2010)

Jericho D.C. contends that sufficient evidence demonstrating BOA's dereliction of this duty exists to reach the trier of fact because BOA was on notice as early as October 2010 that Killen may not have been duly authorized to act on the Church's behalf. Jericho D.C. more particularly argues that BOA's failure to take any action to preserve the funds in the Church accounts, despite ample actual knowledge of a bona fide dispute as to which faction controlled the Church, violates the Bank's implied contractual duty to exercise ordinary care. The Court agrees.

Viewed in the light most favorable to Jericho D.C., a reasonable finder of fact could determine that BOA breached its duty of ordinary care to Jericho D.C. by allowing Killen to disburse funds in the face of mounting evidence of the Church's internecine war. A reasonable fact-finder could conclude that BOA knew Joel Peebles had been a signatory on the Church operating account, and that the 2009 documents do not, on their face, clearly remove Joel Peebles' authority. Thus, the trier of fact may find probative that BOA gave short shrift to Joel Peebles' claimed authority after Betty Peebles' death, at least with respect to the operating account.

Further, when Betty Peebles died, BOA was immediately notified that Joel Peebles would assume control of the Church, a not altogether unreasonable ascension in light of his longstanding role in the Church. Most critically, Joel Peebles notified the church that he retained

full and exclusive control of the bank accounts, and when asked, provided BOA the requested documents to confirm his representations. BOA also knew of the protracted legal battle the Church factions were waging in multiple courts with differing outcomes. At the same time, attorneys for both Boards continued to contact BOA setting forth each Board's respective position as to which Board retains control of the funds. BOA personnel acknowledged at that time and in connection with this litigation, that the fight for Church control would only get "messier" before it gets better. Despite the mounting evidence of the Boards' legal battles for control, BOA for the next four years allowed Denise Killen to authorize disbursements, in direct contradiction to the documents presented by Joel Peebles. On this record, a reasonable trier of fact *could* find that the Bank failed to exercise ordinary care when it permitted such disbursements after March 2011.

BOA, however, forcefully argues that the Maryland adverse claims statute, as a matter of law, precludes Jericho D.C.'s claim completely. Section 5-306(a) states that,

> (a) Except as provided in subsection (b) of this section, a banking institution is not required to recognize or take any action on any claim to a deposit or to money or property held by it or contained in a safe-deposit box, if that claim is adverse to the interests of any person who, on its records, appears to be entitled to the deposit, money, or property.
>
> (b) If, in an action to which the adverse claimant is a party, a court order or decree involving a claim to the deposit, money, or property is served on the banking institution, the banking institution may or, if required by the court, shall impound the deposit, money, or property, subject to further order of the court, without any liability on its part to anyone for doing so.

Md. Code, Fin. Inst. § 5-306. This statute is designed to provide to banks certainty in proceeding when presented with third-party claims to account funds. *Parkville Fed. Sav. Bank v. Md. Nat'l Bank*, 343 Md. 412, 422 & n.5 (1996).

BOA contends that because the statute states that a bank is "not required to recognize or take any action on any claim to a deposit . . . if that claim is adverse to the interests of any person who, *on its records*, appears to be entitled to the deposit, money, or property," then legally it cannot be held liable even if the Bank's choice not to act constitutes a failure to exercise ordinary care. *See* Md. Code, Fin. Inst. § 5-306(a) (emphasis added). The Court is not convinced, and BOA has provided no authority, to support that this statute vitiates the common law implied duty of ordinary care as applied to this case. To read the statute as BOA suggests would effectively immunize the Bank from suit so long as its conduct is consistent with some documents in its possession.

The fallacy of this contention is made plain by first focusing on the term "records" in the statute. BOA contends that the statute applies here because Jericho D.C.'s "claim" to the bank deposit funds was "adverse" to the interests of the Board as represented by Resolution I-09, and the corresponding bank documents executed by Denise Killen and Betty Peebles. However, also in the Bank's "records" was the previous signature card authorizing Joel Peebles to negotiate the Church operating account, as well as the Board resolution and meeting minutes reflecting that Joel Peebles retained sole authority to transact business on the account. Because this Court cannot, as a matter of law, pick and choose which "records" fall within the ambit of the adverse claims statute, the Court likewise cannot find Jericho D.C.'s claim "adverse." Put differently, this statute is simply not applicable where two warring factions of an entity, each claiming control of the entity and thus its bank account funds, present for the Bank "records" proof that each is rightfully in control. Indeed, in none of the authority cited by BOA or found by the Court was an "adverse" claimant also a signatory on the account, rather than a third-party. The adverse

claims statute, therefore, does not bar this suit. Summary judgment is denied on the implied contractual claim.

The Court's determination is not without limits, however. This decision is contingent on whether the Court permits Jericho D.C.'s "expert" analysis of Susan Riley to be admitted at trial. The Court is mindful that, pursuant to *Schultz v. Bank of America, N.A.*, 413 Md. 15, 19 (2010), Jericho D.C. may very well not be able to meet its evidentiary burden on whether the bank violated industry standards of "ordinary care." *Id.* As in *Schultz*, expert testimony appears "necessary to establish the standard of care" in the banking industry with respect to the execution of the new resolutions and signature cards in 2009 and the propriety of allowing Killen to authorize disbursements while the war between the Boards waged on. *Id.* at 27.

As the Court discussed with the parties during the hearing, the Court is skeptical that Riley is qualified to testify as an expert in the banking industry, and if even she is qualified, that her opinions lack sufficient evidentiary basis. BOA challenges the admissibility of Riley's opinions, albeit indirectly. ECF No. 193 at 16. The Court, therefore, will permit BOA to move to strike Riley as an expert, the outcome of which may further narrow or eliminate the vitality of Jericho D.C.'s claims altogether.[3] However, at present the Court is obligated to draw all inferences in favor of Jericho D.C. as the nonmoving party, and so is not prepared to grant summary judgment in BOA's favor. This is especially so given the unique constellation of circumstances—two competing Boards claiming power over the Church, spawning multiple lawsuits concerning Church control, each at different points emerging victorious. A reasonable trier of fact could find that BOA failed to exercise ordinary care in simply allowing disbursement

[3] The parties noted at the hearing the protracted discovery disputes had impacted BOA's ability to depose Ms. Riley. The parties agreed that BOA will depose Riley by the end of March 2019, at which time the Court will set a briefing schedule on BOA's motion to exclude.

of funds at the behest of Killen and Jericho M.D. representatives. The parties' cross-motions for summary judgment as to the breach of the implied contract claim are denied, subject to this Court revisiting the claim after the Court has resolved BOA's motion to exclude Riley.

B. Negligence and Gross Negligence (Counts II and III)

For similar reasons, the Court cannot grant summary judgment on the negligence claims. To prove negligence under Maryland law, a plaintiff must demonstrate that: (1) the defendant was under a duty to protect the plaintiff from injury; (2) the defendant breached that duty; (3) the plaintiff suffered actual injury or loss; and (4) the loss or injury proximately resulted from the defendant's breach of the duty. *Valentine v. On Target, Inc.*, 353 Md. 544, 549 (1999). Maryland courts have defined gross negligence as:

> [A]n intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another, and also implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them. Stated conversely, a wrongdoer is guilty of gross negligence or acts wantonly and willfully only when he inflicts injury intentionally or is so utterly indifferent to the rights of others that he acts as if such rights did not exist.

Romanesk v. Rose, 248 Md. 420, 423 (1968) (quoting 4 Blashfield, Cyclopedia of Automobile Law and Practice § 2771 (1946 ed.)); *see also Liscombe v. Potomac Edison Co.*, 303 Md. 619, 634–37 (1985).

A bank customer may bring a negligence suit where the bank wrongfully disburses its customer's funds in a manner that violates the duty of ordinary care. *Schultz*, 413 Md. at 28 ("A bank customer may bring a negligence suit against a bank for a violation of this duty of ordinary care."); *see also Taylor v. Equitable Tr. Co.*, 269 Md. 149, 155–56 (1973). Whether the bank "was negligent in paying an item, that is, whether the bank paid the item in accordance with reasonable commercial standards is one which must be decided upon the facts of each particular

case." *Bank of S. Maryland v. Robertson's Crab House, Inc.*, 39 Md. App. 707, 714 (1978) (citations omitted) (citing Md. Code, Com. Law §§ 3-406, 4-406; *Dominion Constr., Inc. v. First Nat'l Bank of Md.*, 271 Md. 154, 166 (1974)). "[W]hat constitutes a negligent payment," is based on the "special circumstances that characterize each separate case," and is thus "one of fact for the jury if the evidence is conflicting." *Commonwealth Bank of Balt. v. Goodman*, 97 A. 1005, 1008 (1916) (quoting 3 Ruling Case Law 709).

The difference between negligence and gross negligence is one of degree, and thus is also quintessentially a question of fact. *Artis v. Cyphers*, 100 Md. App. 633, 652 (1994) ("[U]nless the facts are so clear as to permit a conclusion as a matter of law, it is for the trier of fact to determine whether a defendant's negligent conduct amounts to gross negligence."); *see also Romanesk*, 248 Md. at 424–25 (holding that whether operation of motor vehicle under existing conditions was grossly negligent was question for jury).

Based on the same factual predicate, the Court discerns no meaningful difference between the evidence supporting BOA's breach of its implied contractual duty of due care, and the due care sounding in negligence.[4] BOA contends, however, that summary judgment must be granted in its favor because the negligence claims are barred by the economic loss doctrine. The economic loss doctrine recognizes that "[a] contractual obligation, by itself, does not create a tort duty"; tort claims must allege a duty of care arising independent of the contractual relationship. *Mesmer v. Md. Auto. Ins. Fund*, 353 Md. 241, 253 (1999). This rule safeguards the "bedrock principle" that damages stemming from a contract dispute are limited to those contemplated by the parties at the time of the creation of the contract. *City of Richmond, Va. v. Madison Mgmt.*

[4] Contributory negligence is not an available defense to BOA because "no amount of negligence on [the customer's part] ought to relieve the bank of its duty to use ordinary care." *Goodman*, 97 A. at 1009; *see also Robertson's Crab House*, 39 Md. App. at 722–24.

Grp., Inc., 918 F.2d 438, 446 (4th Cir. 1990); *see also Rotorex Co. v. Kingsbury Corp.*, 42 F. Supp. 2d 563, 575 (D. Md. 1999) (holding that when sophisticated parties enter into a commercial transaction, their damages are limited to the ones contemplated in the contract).

The economic loss rule cannot bar suit here. In determining whether to apply the economic loss rule, the Court considers (1) "the nature of the harm likely to result from a failure to exercise due care" and (2) "the relationship that exists between the parties." *Jacques v. First Nat'l Bank of Md.*, 307 Md. 527, 534 (1986). The nature of the harm in this case does not arise from BOA's breach of an *express* contractual provision. Rather, it stems from its breach of the implied duty of care arising from the relationship between the bank and its customers. This harm squarely sounds in negligence as well as implied contractual duties. *See Schultz*, 415 Md. at 28; *Honeycutt v. Honeycutt*, 150 Md. App. 604 (2003) (suit sounding in both contract and negligence concerning unauthorized disbursements). The nature of the relationship between the parties—depositor and bank—has time and again given rise to negligence claims where the only loss is money. This likely is so because the relationship gives rise to an implied duty that the Bank must exercise due care in allowing disbursements. Thus, based on the facts viewed most favorably to Jericho D.C., the economic loss doctrine does not bar Jericho's claims from proceeding to trial. However, as with the implied contract claim, the Court may revisit this decision if Jericho D.C.'s expert on banking industry standard of care is excluded.

C. Punitive Damages

Lastly, BOA argues that Jericho cannot pursue punitive damages. To recover punitive damages in any tort action, the plaintiff must marshal "facts sufficient to show *actual malice* must be pleaded and proven by clear and convincing evidence." *Scott v. Jenkins*, 345 Md. 21, 29 (1997) (emphasis in original). Actual malice means "'evil motive, intent to injure, ill will, or

fraud.'" *Id.* at 31 (quoting *Owens–Illinois v. Zenobia*, 325 Md. 420, 460 (1992)). The evidence, construed most favorably to Jericho D.C., simply does not support that BOA acted intentionally to harm Jericho D.C., or with ill will, or bad motive. Accordingly, Jericho D.C. will not be permitted to seek punitive damages at trial.

V. Conclusion

For the foregoing reasons, Counter-Defendant Bank of America, N.A.'s motion for summary judgment is granted in part and denied in part (ECF No. 188) and Counter-Plaintiff Jericho Baptist Church Ministries, Inc.'s motion for summary judgment is denied. ECF No. 189. A separate Order follows.

2/8/2019
Date

/S/
Paula Xinis
United States District Judge

APPENDIX D

FILED: December 30, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1725
(8:15-cv-02953-PX)

BANK OF AMERICA, N.A.

Plaintiff - Appellee

v.

JERICHO BAPTIST CHURCH MINISTRIES, INC., Jericho DC

Defendant - Appellant

and

JERICHO BAPTIST CHURCH MINISTRIES, INC., Jericho MD; DENISE KILLEN; CLIFFORD BOSWELL; GLORIA MCCLAM-MAGRUDER; CLARENCE JACKSON; LYNDA PYLES

Defendants

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX E

STATUTES AND RULES INVOLVED

28 U.S.C. § 1254
Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

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28 U.S.C. § 2107
Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a

court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is—

(1) the United States;

(2) a United States agency;

(3) a United States officer or employee sued in an official capacity; or

(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

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U.S. Sup. Ct. R. 10
Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings,

or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

****

Fed. R. App. P. 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order — but before the entry of the

judgment or order — is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

> (A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure—and does so within the time allowed by those rules—the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
>
> > (i) for judgment under Rule 50(b);
> >
> > (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;
> >
> > (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
> >
> > (iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)

(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date

when its order to reopen is entered, but only if all the following conditions are satisfied:

> (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
>
> (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and
>
> (C) the court finds that no party would be prejudiced.

(7) Entry Defined.

> (A) A judgment or order is entered for purposes of this Rule 4(a):
>
> > (i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or
> >
> > (ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the

judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or

- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order — but before the entry of the judgment or order — is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order — but before it disposes of any of the motions referred to in Rule 4(b)(3)(A) — becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective — without amendment — to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may — before or after the time has expired, with or without motion and notice

— extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746—or a notarized statement—setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of

that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

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Fed. R. App. P. R. 26.
Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

> (1) Period Stated in Days or a Longer Unit. When the period is stated in days or a longer unit of time:
>
> > (A) exclude the day of the event that triggers the period;
> >
> > (B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and
> >
> > (C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) Period Stated in Hours. When the period is stated in hours:

> (A) begin counting immediately on the occurrence of the event that triggers the period;
>
> (B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and
>
> (C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Inaccessibility of the Clerk's Office. Unless the court orders otherwise, if the clerk's office is inaccessible:

> (A) on the last day for filing under Rule 26(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or
>
> (B) during the last hour for filing under Rule 26(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) "Last Day" Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

> (A) for electronic filing in the district court, at midnight in the court's time zone;
>
> (B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;
>
> (C) for filing under Rules 4(c)(1), 25(a)(2)(A)(ii), and 25(a)(2)(A)(iii)—and filing by mail under Rule 13(a)(2)—at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and
>
> (D) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next Day" Defined. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "Legal Holiday" Defined. "Legal holiday" means:

> (A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day,

> Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;
>
> (B) any day declared a holiday by the President or Congress; and
>
> (C) for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

> (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or
>
> (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after being served, and the paper is not served

electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a).

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Md. Code Ann., Com. Law § 3-103
Definitions

(a) In this title:

(1) "Acceptor" means a drawee who has accepted a draft.

(2) "Drawee" means a person ordered in a draft to make payment.

(3) "Drawer" means a person who signs or is identified in a draft as a person ordering payment.

(4) Reserved.

(5) "Maker" means a person who signs or is identified in a note as a person undertaking to pay.

(6) "Order" means a written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order

unless the person authorized to pay is also instructed to pay.

(7) "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this title or Title 4.

(8) "Party" means a party to an instrument.

(9) "Promise" means a written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay the obligation.

(10) "Prove" with respect to a fact means to meet the burden of establishing the fact (§ 1-201(b)(8)).

(11) "Remitter" means a person who purchases an instrument from its issuer if the instrument is payable to an identified person other than the purchaser.

(b) Other definitions applying to this title and the sections in which they appear are:

"Acceptance" § 3-409

"Accommodated party" § 3-419

"Accommodation party" § 3-419

"Alteration" § 3-407

"Anomalous indorsement" § 3-205

"Blank indorsement" § 3-205

"Cashier's check" § 3-104

"Certificate of deposit" § 3-104

"Certified check" § 3-409

"Check" § 3-104

"Consideration" § 3-303

"Draft" § 3-104

"Holder in due course" § 3-302

"Incomplete instrument" § 3-115

"Indorsement" § 3-204

"Indorser" § 3-204

"Instrument" § 3-104

"Issue" § 3-105

"Issuer" § 3-105

"Negotiable instrument" § 3-104

"Negotiation" § 3-201

"Note" § 3-104

"Payable at a definite time" § 3-108

"Payable on demand" § 3-108

"Payable to bearer" § 3-109

"Payable to order" § 3-109

"Payment" § 3-602

"Person entitled to enforce" § 3-301

"Presentment" § 3-501

"Reacquisition" § 3-207

"Special indorsement" § 3-205

"Teller's check" § 3-104

"Transfer of instrument" § 3-203

"Traveler's check" § 3-104

"Value" § 3-303

(c) The following definitions in other titles apply to this title:

"Bank" § 4-105

"Banking day" § 4-104

"Clearing house" § 4-104

"Collecting bank" § 4-105

"Depositary bank" § 4-105

"Documentary draft" § 4-104

"Intermediary bank" § 4-105

"Item" § 4-104

"Payor bank" § 4-105

"Suspends payments" § 4-104

(d) In addition, Title 1 contains general definitions and principles of construction and interpretation applicable throughout this title.

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Md. Code Ann., Com. Law § 4-103
Variation by agreement; measure of damages; certain action constituting ordinary care

(a) The effect of the provisions of this title may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.

(b) Federal Reserve regulations and operating circulars, clearing-house rules, and the like have the effect of agreements under subsection (a), whether or not specifically assented to by all parties interested in items handled.

(c) Action or nonaction approved by this title or pursuant to Federal Reserve regulations or operating circulars is the exercise of ordinary care and, in the absence of special instructions, action or nonaction consistent with clearing-house rules and the like or with a general banking usage not disapproved by this title, is prima facie the exercise of ordinary care.

(d) The specification or approval of certain procedures by this title is not disapproval of other procedures that may be reasonable under the circumstances.

(e) The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care. If

there is also bad faith it includes any other damages the party suffered as a proximate consequence.

CERTIFICATE OF WORD COUNT

No. TBD

Jericho Baptist Church Ministries, Inc.,

Petitioner,

v.

Bank of America, N.A.,

Respondents.

_____

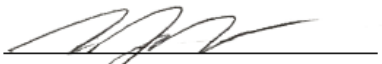
STATE OF MASSACHUSETTS)
COUNTY OF NORFOLK) SS.:

Being duly sworn, I depose and say:

1. That I am over the age of 18 years and am not a party to this action. I am an employee of the Supreme Court Press, the preparer of the document, with mailing address at 1089 Commonwealth Avenue, Suite 283, Boston, MA 02215.

2. That, as required by Supreme Court Rule 33.1(h), I certify that the JERICHO BAPTIST CHURCH MINISTRIES, INC. PETITION FOR WRIT OF CERTIORARI contains 4794 words, including the parts of the brief that are required or exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.



Lucas DeDeus

March 30, 2023

CERTIFICATE OF SERVICE

No. TBD

Jericho Baptist Church Ministries, Inc.,

Petitioner,

v.

Bank of America, N.A.,

Respondents.

_____

STATE OF MASSACHUSETTS)
COUNTY OF NORFOLK) SS.:

Being duly sworn, I depose and say under penalty of perjury:

1. That I am over the age of 18 years and am not a party to this action. I am an employee of the Supreme Court Press, the preparer of the document, with mailing address at 1089 Commonwealth Avenue, Suite 283, Boston, MA 02215.

2. On the undersigned date, I served the parties in the above captioned matter with the JERICHO BAPTIST CHURCH MINISTRIES, INC. PETITION FOR WRIT OF CERTIORARI, by mailing one (1) true and correct copy of the same by USPS Priority mail, prepaid for delivery to the following address which counsel avers covers all respondent party or parties.

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Richmond, VA 23219
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Counsel for Respondent

Lucas DeDeus

March 30, 2023