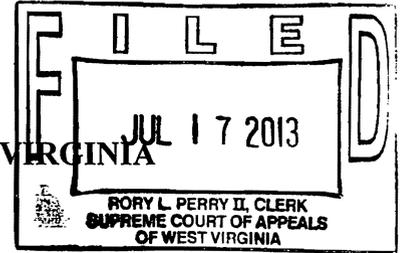


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1505



(Mineral County Circuit Court, Civil Action No. 12-C-62)

**KEYSER HOUSE BONDS, LLC,**

**Petitioner,**

**v.**

**KEYSERHOUSE ASSOCIATES, LTD  
PARTNERSHIP, and  
THE CITY OF KEYSER,**

**Respondents.**

**KEYSER HOUSE BONDS, LLC'S  
OMNIBUS REPLY BRIEF**

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## I. STATEMENT OF THE CASE

Petitioner respectfully files this Reply Brief to address Respondents' arguments and to correct any obfuscation caused by Respondents' briefing. Four critical facts control the entire outcome of this litigation.

1. Petitioner owns a 100% interest in a series of municipal bonds tied to the creation of a low income housing project ("Keyserhouse") in Keyser, West Virginia; [R. at 118 (Complaint at ¶ 14); 169 (Indenture Art. I, § 1(a)-(c))];
2. Prior to filing this litigation, Keyserhouse remained in a state of disrepair and unfit for human habitation under HUD's standards; [R. at 234-39 (Dec. 4, 2007, Report); 246-50 (June 4, 2010, Report); 261-68 (Jan. 25, 2012, Report)];
3. The bonds matured on April 24, 2012;<sup>1</sup> [R. at 221 (Feb. 29, 2012, Lt. from Petitioner to KAP Respondent); 304 (Reorganization Plan)] and
4. An excess of Six Hundred Fifty Thousand Dollars (\$650,000.00+) is still owed on the matured bonds.

These facts are uncontroverted. When reviewed in conjunction with the Indenture, a sufficient basis exists for this Court to reverse and remand the Circuit Court's Orders.

## II. STATEMENT REGARDING ORAL ARGUMENT

Petitioner renews its request for oral argument under Rule 20 of the Revised Rules of Appellate Procedure, as both Petitioner and Respondents agree that this litigation involves issues of first impression and fundamental public importance. W. Va. R. App. P. 20(a). [Pet'r Br. at 12-13; KAP Resp't Br. at 9; City Resp't Br. at 7.]

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<sup>1</sup> Under the Indenture, the bonds originally planned to mature on July 10, 2011. [R. at 169 (Indenture Art. I § 1(c)).] However, the Bankruptcy Reorganization Plan pushed back the maturity date. [R. at 304 (Reorganization Plan).]

### III. ARGUMENT

- A. The Circuit Court's Order to Enjoin Petitioner from Foreclosing Violated the Terms of the Indenture, West Virginia Code and West Virginia Public Policy.**
- i. The Indenture does Not Require Petitioner Provide KAP Respondent with Notice and an Opportunity to Cure.**

Respondents argue that Petitioner failed to provide KAP Respondent notice and an opportunity to cure the events of default, and these failures prohibited Petitioner from seeking relief under the Indenture. This argument ignores that the Indenture creates an unconditional right to sue when the bonds reach maturity, but the bondholders have not received full payment:

Nothing in the Indenture contained shall, however, affect or impair the right of the holders of the Bonds to enforce the payment of the principal of and interest on the Bonds at and after the maturity thereof, or the obligation of the Issuer to pay the principal of and interest on the Bonds to the holders thereof at the time, place, from the source and in the manner in the Bonds expressed.

[R. at 194 (Indenture Art. VI, § 13).] The record establishes that the bonds matured on April 24, 2012, and an excess of Six Hundred Fifty Thousand Dollars is owed. [R. at 221 (Feb. 29, 2012, Lt. from Petitioner to KAP Respondent); 304 (Reorganization Plan).] It is axiomatic that the maturity of the bonds and failure to pay in full allowed Petitioner to pursue relief in civil litigation under Article VI, section thirteen of the Indenture.

Indeed, indentures typically contain provisions that allow bondholders to initiate litigation to recover payment and interest owed at and after maturity. *See Brady v. UBS Fin. Servs., Inc.*, 538 F.3d 1319, 1324 (10th Cir. 2008). In *Brady*, a holder of a Series B bond initiated litigation for payment on the bond, as the bond passed the maturity date set forth in the

indenture. 538 F.3d at 1323. Agreeing with the *Brady* plaintiff, the Tenth Circuit Court of Appeals found the indenture contained an unconditional right-to-sue clause:

The plain language of § 9.12, however, demonstrates that Brady did have an unconditional right to sue on the Stated Maturity of his bond. The district court's reading of § 9.12 would render it moot after the exercise of the acceleration provision.<sup>2</sup> The provision clearly states, however, that '[n]otwithstanding any other provision in this Indenture' there is an absolute right to payment on the Stated Maturity and an individual right to sue for such payment. Allowing the acceleration clause to eviscerate § 9.12 would be contrary to the 'notwithstanding' clause. By its clear terms, the right guaranteed in § 9.12 can only be impaired with the consent of the bondholders.

*Id.* at 1325. The clause at issue in *Brady* compares favorably with the one at issue in this litigation.<sup>3</sup> *Id.* at 1324.

Respondents' interpretation of Article VI, section thirteen of the Indenture, compares similarly to the interpretation the Tenth Circuit rejected in *Brady*. *Compare id.* at 1323-24 *with* [KAP Resp't Br. at 13-14; City Resp't Br. at 20-21.] Respondents' interpretation attempts to eviscerate the language "[n]othing in the Indenture contained shall, however, affect or impair the right of the bondholders to enforce payment . . . ." A guiding principle of West Virginia contract interpretation requires that the words used have meaning. *See syl. pt. 3, Dunbar Fraternal Order of Police, Lodge No. 119 v. City of Dunbar*, 218 W. Va. 239, 624 S.E.2d 586 (2005) ("Specific words or clauses of an agreement are not to be treated as

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<sup>2</sup> In *Brady*, the Series A bondholders accelerated the debt in 1993 after the defendants committed a default event.

<sup>3</sup> *Brady* clause § 9.12 reads: "Notwithstanding any other provision in this Indenture, the Holder of any Bond shall have the right which is absolute and unconditional to receive payment of the principal of (and premium if any) and interest on such Bond on the respective Stated Maturities expressed in such Bond (or, in the case of redemption, on the Redemption Date) and to institute suit for the enforcement of any such payment, and such rights shall not be impaired without the consent of such Holder." *Compare id.* at 1324 *with* [R. at 194 (Indenture Art. VI, § 13).]

meaningless, or to be discarded, if any reasonable meaning can be given them consistent with the whole contract.”). To suggest that Article VI, section thirteen of the Indenture is subject to Article VI, section two renders the phrase “[n]othing in the Indenture shall, however, affect or impair” superfluous, and such an interpretation is contrary to West Virginia law. *See* syl. pt. 6, *Columbia Gas Transmission Corp. v. E. I. du Pont de Nemours & Co.*, 159 W. Va. 1, 217 S.E.2d 919 (1975) (“Each word in a contract is presumed to have a unique meaning and, thus, no word or clause is to be treated as a redundancy, if any meaning reasonable and consistent with other parts can be given to it.”)

For this reason, Respondents and the Circuit Court incorrectly interpreted the provisions of the Indenture by requiring conditions inconsistent with the terms expressed within the Indenture. This error requires this Court reverse and remand this litigation.

**ii. The Record Demonstrates that KAP Respondent Received Sufficient Notice of the Events of Default.**

Notwithstanding the argument made *supra*, the record reflects that KAP Respondent received sufficient notice of the events of default. In an attempt to show deficient notice existed, KAP Respondent distorts and misapplies the provisions in the Indenture. [KAP Resp’t Br. p. 12] Article VI, section twenty of the Indenture provides that the notice be sent by United States mail, either registered or certified.<sup>4</sup> [Indenture Art. VI, § 20.] However, this provision remains silent as to when or who needs notice in the event default occurs. The answer to this question lies within Article VI, section four, and Article VI, section thirteen of the Indenture.

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<sup>4</sup> This provision also provides the name and addresses of the issuer, lessee and initial trustee. [R. at 195 (Indenture Art. VI, § 20).]

Article VI, section four of the Indenture provides:

Whenever an event of default shall occur, the Lessee [KAP Respondent] shall have the right to remedy such default within ninety days after notification of the occurrence thereof, provided that the Lessee shall pay all expenses incurred in the exercise of rights or remedies hereunder and all expenses of remedying such default. The Trustee covenants and agrees promptly to notify in writing the Issuer [City Respondent] and the Lessee of any other default in the Indenture brought to its attention. The exercise of the remedies set forth in Section 2 of this Article is [sic] subject to the right of the Lessee under this Section to remedy a default as in this Section provided and limited.

[R. at 191 (Indenture Art. VI, § 4) (emphasis added).] Therefore, the Indenture required the Trustee, not Petitioner, to provide KAP Respondent and City Respondent with proper notice of the event of default. The record demonstrates that Petitioner twice notified the Trustee of KAP Respondent's default under the Indenture. [R. at 222, (Apr. 19, 2012, Notice of Default Lt. to Nelson and Trustee); R. at 405-06 (Aug. 10, 2012 Second Notice of Default Lt. to Nelson and Trustee).]<sup>5</sup>

However, the Trustee took no action after receipt of the April 19, 2012, letter. When the Trustee refuses to act, or fails to act, within ten (10) days, the Indenture allows the bondholders to seek remedies under the Indenture through the initiation of legal action. [R. at 193-94 (Indenture Art. VI, § 13).]<sup>6</sup> Because the Trustee failed to act within ten (10) days after receipt of notice, the Indenture provided Petitioner with the right to commence legal action. [R. at 223-24 (Civil Case Information Sheet).] Because Petitioner acted properly within the confines of the Indenture, KAP Respondent's notice argument is devoid of merit.

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<sup>5</sup> Incidentally, Petitioner sent both of these letters via certified mail.

<sup>6</sup> To be sure, Article VI, section thirteen, accords further relief to the bondholders after the bonds reach maturity and payment in full has not been received. See *supra* Argument III ¶ A(i).

Additionally, Respondents' argument regarding insufficient notice fails because Respondents received replete notice of the events of default. The record shows that **KAP Respondent received at least six (6) communications from HUD** regarding the multitude of violations KAP Respondent committed. [R. at 232-33 (Dec. 4, 2007, Lt. from HUD to KAP Resp.); 244-45 (June 4, 2010, Lt. from HUD to KAP Resp.); 259-60 (Jan. 25, 2012, Lt. from HUD to KAP Resp.); 231 (May 21, 2012, Email from HUD to KAP Resp.); 407 (Aug. 28, 2012, Lt. from HUD to KAP Resp.); 377-78 (Sept. 10, 2012, Lt. from HUD to KAP Resp.).] In addition to these communications, KAP Respondent received two (2) additional letters from Petitioner regarding their default under the Indenture. [R. at 222, (Apr. 19, 2012, Notice of Default Lt. to Nelson and Trustee); R. at 405-06 (Aug. 10, 2012, Second Notice of Default Lt. to Nelson and Trustee).] Given the plethora of communiqués received, KAP Respondent was on notice of its default under the Indenture. If KAP Respondent received notice, then the Circuit Court erred in its Orders. [R. at 382 (Oct. Order, Finding at ¶ 2); 397 (Nov. Order, Finding at ¶ 4).] For these reasons, the lack of notice argument is devoid of merit and must be rejected in its entirety.

**iii. The Record Demonstrates that KAP Respondent Received an Opportunity to Cure.**

As demonstrated, *supra*, the Indenture never required Petitioner provide notice, and even if the Indenture required Petitioner provide notice, the evidence demonstrates there was sufficient notice of the events of default. In spite of this notice, the record shows that KAP Respondent took no action to cure its defaults. This inaction led HUD to abate its subsidy contract:

**The Owner [KAP Respondent] did not satisfactorily address the Project's [Keyserhouse] unacceptable physical conditions as required by HUD's notice.** A subsequent REAC inspection was performed on M and out of 100 possible points, the Project scored 40(c). That inspection confirmed that the Project remained in unsatisfactory physical condition. **Further, the Owner has not provided HUD with any other acceptable intended action to cure the HAP Contract default.** Therefore, the **Owner has failed to keep and maintain the Project in a decent, safe, and sanitary condition** as required by the Owner's HAP Contract and 24 CFR 886.123.

Effective this date, HUD has determined that the Section 8 subsidy payments for all units covered by the HAP Contract for the Project shall be suspended pursuant to Paragraph 2.21 of the HAP Contract and 24 CFR 886.123(d), and HUD shall hereafter cause Housing Choice Section 8 vouchers to be issued to eligible Project residents (subject to HUD's funding availability). HUD will also provide relocation assistance to eligible families.

[R. at 377 (Sept. 10, 2012, Lt. from HUD to KAP Resp't) (emphasis added).] KAP Respondent's failure to cure its default under its HAP Contract directly correlates with KAP Respondent's failure to cure its default under the Indenture. Both default events stem from the same occurrence: KAP Respondent's inability to maintain Keyserhouse in a state of good repair. [R. at 179 (Indenture Art. V, § 4).] If KAP Respondent cured its default during the ninety (90)-day period, than HUD would not have sent the letter cited, *supra*. If Petitioner received the outstanding debt owed on the mature bonds, then it would have voluntarily dismissed this legal action. Neither of these two events occurred. Because KAP Respondent received an opportunity to cure, the Circuit Court erred in its findings. [R. at 382 (Sept. Order, Finding at ¶ 2); 397 (Oct. Order, Finding at ¶ 4).] For this reason, Respondents' opportunity to cure argument fails.

iv. **The Circuit Court's Interpretation of the Indenture Renders It Non-Negotiable, in Violation of West Virginia Code and Public Policy.**

Finally, the interpretation urged by Respondents and adopted by the Circuit Court renders the bonds non-negotiable.<sup>7</sup> The West Virginia Code requires that the municipal bonds issued be negotiable. W. VA. CODE § 13-2C-3, *et seq.* Likewise, the Indenture requires the municipal bonds issued be negotiable. [R. at 163-66 (Indenture).] Indeed, Respondents agree that the municipal bonds issued needed to be negotiable. [City Resp't Br. at 14-15; KAP Resp't Br. at 19-20.] The Circuit Court's interpretation of the Indenture rendered the bonds non-negotiable and, therefore, reversible error occurred.

In its Orders, the Circuit Court found that Petitioner failed to comply with the terms set forth in the Indenture, and this failure precluded Petitioner from foreclosing on Keyserhouse. [R. at 382 (Oct. Order, Finding at ¶ 2); 397 (Nov. Order, Finding at ¶ 4).] Incidentally, this decision conditioned KAP Respondent's promise to pay on the Amended Maturity Date of April 24, 2012, and destroyed the negotiability of the bonds by requiring payment at an indefinite time. The West Virginia Code defines negotiable instrument as follows:

Except as provided in subsection (c) and (d), 'negotiable instrument' means an **unconditional promise or order to pay** a fixed amount of money with or without interest or other changes described in the promise or order, if it:

(1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) **Is payable on demand or at a definite time;** and

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<sup>7</sup> Respondents argue that Petitioner never argued negotiability of the bonds below. The record reveals that Petitioner repeatedly argued that the Indenture never conditioned Petitioner's right to sue upon maturity. [R. at 42-44.] This action alerted the tribunal to the defect and, therefore, preserved the error assigned. *See State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 228 W. Va. 252, 719 S.E.2d 722 (2011) (error preserved when tribunal alerted). Respondents' contentions, therefore, lack merit.

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (1) an undertaking or power to give, maintain or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

See W. VA. CODE § 46-3-104(a). The West Virginia Code goes on to define payable on demand or at a definite time to mean that the instrument:

is payable on elapse of a definite period of time after sight or acceptance or **at a fixed date or dates or at time or times readily ascertainable** at the time the promise or order is issued, subject to rights of (i) prepayment, (ii) acceleration, (iii) extension at the option of the holder or (iv) extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

W. VA. CODE § 46-3-108(b) (emphasis added). Petitioner never provided an extension. As no definite time for payment exists, the bonds are nonnegotiable. Over a year has passed since the bonds matured, and yet an excess of Six Hundred Fifty Thousand Dollars (\$650,000.00+) is still owed on the municipal bonds. No one knows when, or if, Petitioners will ever get paid the amount owed on the bonds. Without a definite date of payment, the bonds are non-negotiable. This non-negotiability violates the West Virginia Code and deprives Petitioner, and any subsequent holder of in due course status. See *Carper v. Kanawha Banking & Trust Co.*, 157 W. Va. 477, 506, 207 S.E.2d 897, 915 (1974) (“One who holds a nonnegotiable instrument is not a holder in due course.”). Such a result is untenable and necessitates reversal from the Court.

**B. The Circuit Court's Order Enjoining Petitioner from Foreclosing Left Petitioner without an Avenue for Relief except through an Appeal.**

In their briefs, Respondents erroneously suggest that the Circuit Court provided Petitioner an opportunity for redress below, provided that Petitioner amend its Complaint and add a necessary party. [City Resp't Br. at 22-24; KAP Resp't Br. at 23-24.] Such an assertion, however, ignores the ramifications and impact of the Circuit Court's Orders.

In October, the Circuit Court held as follows:

- That the Court has a serious concern regarding whether the Plaintiff properly complied with all of the requirements set forth in the Indenture of Trust regarding the Defendant, Keyserhouse Associates' right to cure default and notice with regard thereto.
- That the Defendant, Keyserhouse Associates, LTD is free to immediately proceed to enter into a property management agreement with RLJ Management, Inc. for the operation of the Keyserhouse property commencing on Monday, September 24, 2012.
- That the Defendant, Keyserhouse Associates, LTD and the City of Keyser are free to immediately proceed to negotiate and enter into a purchase agreement with RLJ Management, Inc. or its parent company, Buckeye Community Hope Foundation, for the purchase and sale of the property of Keyershouse Associates, LTD.

[R. at 382 (Oct. Order).] In essence, the Circuit Court's Order implicitly endorsed Respondents' plan to sell Keyserhouse to RLJ Management, Inc. and/or Buckeye Community Hope Foundation. Indeed, when Petitioner, complied with the terms of the Indenture and received the express consent of the Trustee to foreclose,<sup>8</sup> and the Circuit Court prohibited the sale. In fact, the Circuit Court expressly held that:

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<sup>8</sup> Mr. Llewellyn: "However, since we are in this Court, we've [Trustee] come to an understanding with the bondholders as to how they can operate within the terms of the Indenture of Trust. **And because they have done that, now we're active with those terms.**" [R. at 93-94 (Oct. 29, 2012 Hr'g) (emphasis added).]

- The Plaintiff [Petitioner] is hereby enjoined from foreclosing on the Keyser House [sic], and accordingly, neither the Plaintiff nor anyone acting on the Plaintiff's behalf may proceed with a foreclosure against the Keyserhouse without further order of this Court.
- The Plaintiff [Petitioner] shall not seek to hinder or otherwise interfere with any purchase agreement among the sellers, the City and Keyershouse Associates [Respondents], and their respective purchaser(s).

[R. at 397 (Order Nov. 13, 2012).] The Circuit Court ordered that Petitioner could not seek, hinder or interfere, whether through an amended complaint or otherwise, with Respondents' sale of Keyserhouse. Therefore, any efforts by Petitioner to resume this matter in Circuit Court would violate this prohibition. This led Petitioner to seek relief from this Honorable Court. Therefore, Respondents' contention that the Circuit Court left open the possibility for redress, if and when Petitioner amended their Complaint to add a necessary party, is devoid of merit and warrants little, if any, consideration by this Court.

**C. The Circuit Court Clearly Erred in Failing to Take Evidence before Calculating KAP Respondent's Monthly Payment Obligation.**

Finally, Respondents argue that Petitioner's assigned error regarding the monthly payments the Circuit Court arbitrarily calculated is moot,<sup>9</sup> because Respondents currently pay Petitioners Eight Thousand Dollars (\$8,000.00) a month, rather than the Five Thousand Dollars (\$5,000.00) ordered. [KAP Resp't Br. at 22-23; City Resp't Br. at 25-27.] "Whether a case [or issue] has been rendered moot depends upon an examination of the particular facts . . . ." *See State ex rel. Bluestone Coal Corp. v. Mazzone*, 226 W. Va. 148, 155, 697 S.E.2d 740, 747 (2010). "[T]he simple fact of apparent mootness, in and of itself, does not automatically preclude our consideration of [a] matter." *See Hall v. Nat. Athletic Ass'n*, 209 W. Va. 543, 550

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<sup>9</sup> Black's Law Dictionary defines moot to mean "[h]aving no practical significance; hypothetical or academic." BLACK'S LAW DICTIONARY, Moot (9th ed. 2009). "

S.E.2d 79, 84 (2001). Respondents' current payment of Eight Thousand Dollars (\$8,000.00) per month to Petitioner does not render the issue moot.

The issue is not moot for two reasons. **First**, without a court order to pay a higher amount, nothing prevents Respondents from suddenly deciding to pay less. After all, the Circuit Court's current Order only requires Petitioner pay Five Thousand Dollars (\$5,000.00) per month, and Respondents' decision to pay Three Thousand Dollars (\$3,000.00) less per month would not be contravene to this Order. **Second**, assuming Respondents continue to pay Eight Thousand Dollars (\$8,000.00) per month, every month the municipal bonds will be paid off in approximately sixteen and a half (16.5) years.<sup>10</sup> The Indenture already provided for a thirty (30)-year period to pay the bonds in full. [R. at 169 (Indenture Art. I, § 1(c)).] Bondholders should not have to wait over fifty (50) years to receive payment in full.

Because the Circuit Court's calculation is not moot, this Court must determine if the Circuit Court abused its discretion in calculating the monthly payment amount and whether the facts underpinning the Circuit Court's ruling were clearly erroneous.<sup>11</sup> See syl. pt. 1, *Robertson v. BA Mullican Lumber & Mfg. Co., L.P.*, 208 W. Va. 1, 537 S.E.2d 317 (2000). In determining the amount to award Petitioner in monthly payments, the Circuit Court stated:

The Court: I'm just going to pull a number out of the air that seems reasonable, so that we don't have further

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<sup>10</sup> This calculation assumes a payment of \$8,000 per month at an interest rate of 12%. If this occurs, the bonds will be paid in full in 198.44 months, or 16.54 years. If the payments decrease to \$5,000, the payments are insufficient to pay the interest on the bonds.

<sup>11</sup> The Circuit Court abuses its discretion when it acts in an arbitrary and irrational manner. See *Wells v. Key Comm'ns, L.L.C.*, 226 W. Va. 547, 551, 703 S.E.2d 518 522 (2000). "A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Syl. pt. 1, in part, *In Interest of Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996).

argument over it, and I'm going to say \$5,000.00 a month.

[R. at 77 (Sept. Hr'g).] Nothing could be more arbitrary than “pull[ing] a number out of the air.”<sup>12</sup> For this reason, this Court should reverse and remand this action.<sup>13</sup>

**D. The Circuit Court Erred by Holding Petitioner in Contempt during a Status Conference.**

Finally, Respondents argue that the Circuit Court never held Petitioner in contempt of the Circuit Court's Order. [KAP Resp't Br. at 23-24; City Rep't Br. 23-24.] Black's Law Dictionary defines civil contempt as “[t]he failure to obey a court order that was issued for another party's benefit.” BLACK'S LAW DICTIONARY, Contempt (9th ed. 2009).

Whether a contempt is classified as civil or criminal does not depend upon the act constituting such contempt because such act may provide the basis for either a civil or criminal contempt action. Instead, whether a contempt is civil or criminal depends upon the purpose to be served by imposing a sanction for the contempt and such purpose also determines the type of sanction which is appropriate.

Syl. pt. 4, *Boarman v. Boarman*, 210 W. Va. 155, 556 S.E.2d 800 (2001).

Following the “status conference” on October 27, 2012, the Court made the following finding:

- By proceeding with a foreclosure sale whereby the Plaintiff's [Petitioner] counsel is advertised as agent, Plaintiff, Plaintiff's counsel, and

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<sup>12</sup> Respondents argue that the Circuit Court did not err because Petitioner allegedly presented insufficient evidence to the Circuit Court and, therefore, no error occurred. [City Resp't Br. at 26-27; KAP Resp't Br. at 21-23.] This argument ignores that the Circuit Court explicitly told the parties that it did not want further argument on the issue. [R. at 77 (Sep't Hr'g).]

<sup>13</sup> Petitioner contends that KAP Respondent owes them payment in full on the mature bonds and, therefore, argues this error in the alternative.

Huntington [Trustee] **are clearly in violation of, as well as the purpose and intent of, the Court's October 11, 2012 Order.**

....

Based on the foregoing, it is now duly ADJUDGED and ORDERED as follows:

- The Plaintiff is hereby enjoined from foreclosing on the Keyser House [sic], and accordingly, neither the Plaintiff nor anyone acting on the Plaintiff's behalf may proceed with a foreclosure against the Keyserhouse without further order of this Court.

[R. at 396-97 (Nov. Order) (emphasis added).] The November Order indicates that the Circuit Court punished Petitioner for its perceived violation of the October Order, and the punishment enjoined Petitioner, or anyone acting on Petitioner's behalf, from foreclosing on Keyserhouse. This is civil contempt. As argued in its initial Brief to this Court, Petitioner never received any notice that the Circuit Court planned to entertain evidence and argument on whether Petitioner violated the October Order. Instead, Petitioner merely received a Notice of Status Conference.

[R. at 389 (Notice of Status Conference).] Even the most cursory review of the transcript of the hearing demonstrates that the hearing evolved beyond that of a status conference. [R. at 90-93 (Oct Hr'g).] The evolution of the hearing befuddled Petitioner and their counsel:

Mr. Sites: **I don't know that I'm prepared to respond right now or what to;** I'm curious why the issue and lessee removed the Trustee, and I haven't seen that.

[R. at 97 (Oct. Hr'g) (emphasis added).] Without notice of its alleged contempt actions, the Circuit Court improperly deprived Petitioner of the opportunity to provide a proper defense. *See Doctors Mem'l Hosp., Inc. v. Woodruff*, 165 W. Va. 324, 326, 267 S.E.2d 620, 621 (1980). This error requires reversal and remand of this action.

#### IV. CONCLUSION

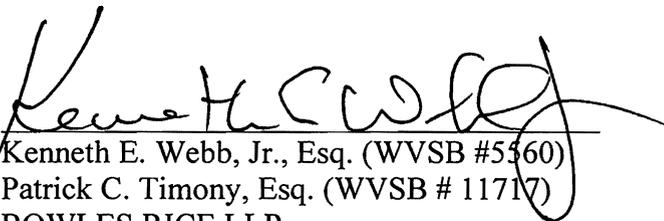
As demonstrated *supra*, the Circuit Court misapplied the Indenture to the facts, and this created reversible error. The Indenture afforded Petitioner an unconditional right to sue Respondents, if the bonds matured and Petitioner failed to receive payment in full. Therefore, Respondents' arguments regarding lack of notice and lack of opportunity to cure the default events lack merit. Even assuming *arguendo* that the Indenture required Petitioner to provide notice and an opportunity to cure to KAP Respondent, Petitioner satisfied these requirements. KAP Respondent received a plethora of notices from Petitioner and HUD regarding their numerous violations of HUD. Despite receiving these notices as early as December 2007, KAP Respondent did nothing. Therefore, Respondents' arguments regarding lack of notice and opportunity to cure are, again, devoid of merit. Moreover, the Circuit Court's Orders rendered the bonds non-negotiable in violation of the West Virginia Code and public policy. By enjoining Petitioner from foreclosing, based on lack of payment on the matured bonds, the Circuit Court created an undefined time period for payment. This amorphous time frame makes the bonds non-negotiable. This is an untenable result. Therefore, this Court must reverse and remand this litigation.

Finally, no available redress with the Circuit Court existed following the November Order. The Circuit Court enjoined Petitioner from foreclosing on Keyserhouse and from acting in any manner that jeopardized or threatened the potential sale. Therefore, the only redress available to Petitioners is through this Honorable Court. For this reason, Petitioner pursued appellate relief.

Based on the arguments set forth herein and in Petitioner's Brief, Petitioner respectfully requests that this Court reverse and remand this action with specific instruction to the Circuit Court to enforce the Indenture based on the aforementioned facts and to permit Petitioner to foreclose on Keyserhouse. In the alternative, Petitioner respectfully requests that this Court remand this action for the Circuit Court to hold an evidentiary hearing on the amount to award Petitioner monthly for the matured bonds.

KEYSER HOUSE BONDS, LLC,

By Counsel,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1505

(Mineral County Circuit Court, Civil Action No. 12-C-62)

KEYSER HOUSE BONDS, LLC,

Petitioner,

v.

KEYSERHOUSE ASSOCIATES, LTD  
PARTNERSHIP, and  
THE CITY OF KEYSER,

Respondents.

CERTIFICATE OF SERVICE

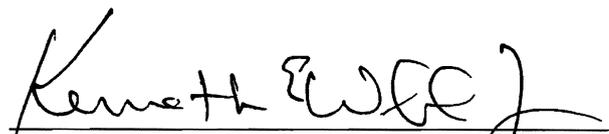
I, Kenneth E. Webb, Jr., do hereby certify that I have caused copies of the hereto attached *Keyser House Bonds, LLC's Omnibus Reply Brief* to be served upon the following:

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by first class mail, postage pre-paid on this **18th day of July 2013.**

  
Kenneth E. Webb, Jr. (WVSB # 5560)