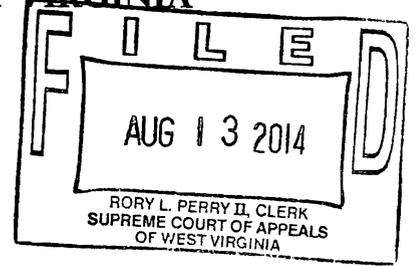


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 14-0215



**LEXON INSURANCE COMPANY,
Defendant Below, Petitioner**

v.

**COUNTY COUNCIL OF BERKELEY COUNTY, WEST VIRGINIA,
and BERKELEY COUNTY PLANNING COMMISSION
Plaintiffs Below, Respondents**

Hon. Gray Silver, III, Judge
Circuit Court of Berkeley County
Civil Action No. 11-C-973

REPLY BRIEF OF PETITIONER

Counsel for Petitioner

Ancil G. Ramey, Esq.
WV Bar #3013
Steptoe & Johnson PLLC
P.O. Box 2195
Huntington, WV 25722-2195
Tel: (304) 526-8133
ancil.ramey@steptoe-johnson.com

Eric J. Hulett, Esq.
WV Bar #6332
Steptoe & Johnson PLLC
1250 Edwin Miller Blvd., Suite 300
Martinsburg, WV 25404
Tel: (304) 262-3519
eric.hulett@steptoe-johnson.com

Counsel for Respondents

William J. Powell, Esq.
WV Bar #2961
Jackson Kelly PLLC
310 West Burke Street
P.O. Box 1068
Martinsburg, WV 25402
Tel: (304) 263-8800
wpowell@jacksonkelly.com

TABLE OF CONTENTS

I.	STATEMENT OF CASE.....	1
II.	SUMMARY OF ARGUMENT	1
III.	ARGUMENT	
A.	STANDARD OF REVIEW	2
B.	THE CIRCUIT COURT ERRED IN RULING THAT PETITIONER’S MOTION TO SET ASIDE THE NEARLY \$3.5 MILLION DEFAULT JUDGMENT WAS UNTIMELY UNDER THE CIRCUMSTANCES OF THIS CASE.....	3
C.	THE CIRCUIT COURT ERRED IN FAILING TO SET ASIDE A NEARLY \$3.5 MILLION DEFAULT JUDGMENT UNDER R. CIV. P. 60(B)(1) WHERE (1) RESPONDENTS DID NOT SUFFER SIGNIFICANT PREJUDICE FROM PETITIONER’S DELAY IN ANSWERING THEIR COMPLAINT; (2) THERE ARE MATERIAL ISSUES OF FACT AND MERITORIOUS DEFENSES PRESENT; (3) A DEFAULT JUDGMENT OF NEARLY \$3.5 MILLION IS SIGNIFICANT; AND (4) PETITIONER WAS NOT INTRANSIGENT, BUT CONTINUED TO ACTIVELY ENGAGE IN SETTLEMENT NEGOTIATIONS WITH RESPONDENTS	6
1.	The County Suffered No Substantial Prejudice As a Result of Any Delay Between When It Made an Open-Ended Request that Lexon Answer the Complaint and When Lexon Filed Its Answer.....	7
2.	There Are Obviously Material Issues of Fact and Material Defenses When the County Concedes that Alternative Cure Remedies Are Available to Lexon under the Two Bonds	10
3.	It is Difficult to Think of a More “Significant” Default Judgment than One Involving Almost \$3.5 Million	12
4.	Where Lexon Actively Engaged in Settlement Negotiations Before the Motion for Default Judgment Was Filed and After the Default Judgment Was Entered, It was Not “Intransigent”	14

D.	THE CIRCUIT COURT ERRED IN FAILING TO SET ASIDE THE DEFAULT JUDGMENT UNDER R. CIV. P. 60(B)(1) WHERE THERE WAS NO NOTICE OF HEARING NOR WAS A HEARING CONDUCTED ON DAMAGES DESPITE THE PETITIONER’S RIGHT TO ELECT A METHOD OF CURING THE DEFAULT OF ITS PRINCIPAL AND, ACCORDINGLY, THE AMOUNT OF THE RESPONDENTS’ DAMAGES WERE UNLIQUIDATED.....	16
E.	THE CIRCUIT COURT ERRED IN FAILING TO SET ASIDE THE DEFAULT JUDGMENT UNDER R. CIV. P. 60(B)(4) WHERE RESPONDENTS DID NOT SERVE THEIR SUMMONS AND COMPLAINT ON PETITIONER THROUGH THE SECRETARY OF STATE; THROUGH ITS REGISTERED AGENT; OR THROUGH AN OFFICER, DIRECTOR, TRUSTEE, OR AUTHORIZED AGENT OF PETITIONER, BUT SIMPLY MAILED THE SUMMONS AND COMPLAINT TO PETITIONER’S DIRECTOR OF CONSTRUCTION, WHERE ITS RECEIPT WAS ACKNOWLEDGED BY A RECEPTIONIST	19
IV.	CONCLUSION.....	20

TABLE OF AUTHORITIES

CASES

<i>Barber v. Turberville</i> , 218 F.2d 34 (D.C. Cir. 1954)	15-16
<i>Beane v. Dailey</i> , 226 W. Va. 445, 701 S.E.2d 848 (2010)	20
<i>Broadcast Music, Inc. v. MP Restaurants, Inc.</i> , 2013 WL 6564309 (E.D. Cal.)	16
<i>Cales v. Wills</i> , 212 W. Va. 232, 569 S.E.2d 479 (2002)	9, 12
<i>Cook v. Channel One, Inc.</i> , 209 W. Va. 432, 549 S.E.2d 306 (2001)	9
<i>County of Yuba v. Central Valley Nat. Bank, Inc.</i> , 20 Cal.App.3d 109, 97 Cal. Rptr. 369 (1971)	11
<i>Friedman & Feiger, L.L.P. v. ULofts Lubbock, LLC</i> , 2009 WL 3378401 (N.D. Tex.)	16
<i>Gonzalez v. City of New York</i> , 104 F.Supp.2d 193 (S.D. N.Y. 2000)	16
<i>Groves v. Roy G. Hildreth and Son, Inc.</i> , 222 W. Va. 309, 664 S.E.2d 531 (2008)	8
<i>Hardwood Group v. Larocco</i> , 219 W. Va. 56, 631 S.E.2d 614 (2006)	13
<i>Hinerman v. Levin</i> , 172 W. Va. 777, 310 S.E.2d 843 (1983)	13
<i>Impala African Safaris, LLC v. Dallas Safari Club, Inc.</i> , 2013 WL 7083924 (N.D. Tex.)	16
<i>Indigo America, Inc. v. Big Impressions, LLC</i> , 597 F.3d 1 (1st Cir. 2010)	15

<i>J & J Sports Productions, Inc. v. Brewster "2" Cafe, LLC,</i> 2013 WL 6150708 (E.D. Ark.)	16
<i>Johnson v. City of Kankakee, Ill.,</i> 397 Fed. Appx. 238 (7th Cir. 2010).....	9-10
<i>Lee v. Gentlemen's Club, Inc.,</i> 208 W. Va. 564, 542 S.E.2d 78 (2000)	12
<i>Leslie Equipment Co. v. Wood Resources Co., L.L.C.,</i> 224 W. Va. 530, 687 S.E.2d 109 (2009)	2-3
<i>Linkov v. Golding,</i> 2013 WL 5922974 (E.D. N.Y.).....	16
<i>Livingston v. Wheeling Pittsburgh Steel Corp.,</i> 238 F.3d 422 (6th Cir. 2000)	10
<i>Peoples v. Fisher,</i> 299 F.R.D. 56 (W.D. N.Y. 2014)	10
<i>Realco Ltd. Liability Co. v. Apex Restaurants, Inc.,</i> 218 W. Va. 247, 624 S.E.2d 594 (2005)	8, 13
<i>State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada,</i> 374 F.3d 158 (2nd Cir. 2004)	14
<i>Synovus Bank v. County of Henderson,</i> 729 S.E.2d 731 (N.C. App. 2012)	19
<i>Tudor's Biscuit World of America v. Critchley,</i> 229 W. Va. 396, 729 S.E.2d 231 (2012).....	15, 19-20
<i>Westchester Fire Ins. Co. v. City of Brooksville,</i> 731 F.Supp.2d 1298 (M.D. Fla. 2010).....	11
<i>Whitman v. U.S. Lines, Inc.,</i> 88 F.R.D. 528 (E.D. Tex. 1980).....	16
<i>Young v. Bowen,</i> 328 Fed. Appx. 534 (9th Cir. 2009)	10

RULES

R. Civ. P. 6(d)(1)(A)17

R. Civ. P. 6(d)(2).....4

R. Civ. P. 55(b)(1)17, 18, 19

R. Civ. P. 55(b)(2)4, 5, 16

R. Civ. P. 55(c)3

R. Civ. P. 60(b).....4

R. Civ. P. 60(b)(1)4, 5

R. Civ. P. 60(b)(4).....4, 5

OTHER

Adam O'Donnell, *Facebook Wins \$873 Million Judgement Against Spammer*,
<http://www.zdnet.com/blog/security/facebook-wins-873-million-judgement-against-spammer/2216>.....14

F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF
CIVIL PROCEDURE 4TH § 4(d)(5)(A)[2][a] (2012).....19

F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF
CIVIL PROCEDURE 4TH § 4(d)(7)[2] (2012).....19

F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF
CIVIL PROCEDURE 4TH § 12(b)(5)[2] (2012)3

F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF
CIVIL PROCEDURE 4TH § 55(b)(2)[a] (2012)5, 17

F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF
CIVIL PROCEDURE 4TH § 55(b)(2)[b] (2012)10, 17

F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF
CIVIL PROCEDURE 4TH § 55(c)[2] (2012)6, 7, 19

F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 4TH § 55(c)[2][b] (2012)7

F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 4TH § 55(c)[2][d] (2012)11

F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 4TH § 60(b)(1)[3] (2012)4

F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 4TH § 60(b)(4)[2] (2012).....4

Wright & Miller, 10A FED. PRAC. & PROC. CIV. § 2683 (3d ed.)(2014)18

I. STATEMENT OF CASE

This case arises under bonds executed by Petitioner, Lexon Insurance Company [“Lexon”], in connection with a 255-lot, five-phase subdivision in Berkeley County. [App. 85-86] At the time the developer defaulted, only ten lots had been sold in Phase 1 and no other homes are likely to be constructed. Id. If the default judgment is not set aside, it will result in an enormous windfall to the new owner, NLP Finance, LLP, which would otherwise be responsible for the remaining improvements if and when the property is ever further developed.

Moreover, the default judgment of nearly \$3.5 million to Respondents, the County Council of Berkeley County and Berkeley County Planning Commission [“County”], was entered despite the fact that Lexon acknowledged the suit; reached an agreement extending the time for answering the suit; engaged in good faith settlement negotiations; had not been properly served with the summons and complaint; and default judgment was entered without notice or hearing.

Because Lexon’s motion to set aside the default judgment was timely under the circumstances; the Circuit Court misapplied the established standards relative to a Rule 60(b)(1) motion; the Circuit Court conducted no hearing on damages as was required; and the summons and complaint were not properly served, the nearly \$3.5 million default judgment should be set aside and this case remanded for further proceedings.

II. SUMMARY OF ARGUMENT

Service of a summons and complaint on any name and address provided by a foreign corporation to a plaintiff is insufficient. The County could easily have served Lexon through the Secretary of State. The County could easily have served Lexon through its designated agent

for service of process identified on the Secretary of State’s website. The circumstances of this case present no reason for this Court to depart from its previous precedent and it should again hold that service on a corporate secretary, receptionist, or other person not specifically designated to accept service of process is inadequate. The County’s argument that Lexon somehow waived its right to proper service, which is necessary to have acquired jurisdiction over Lexon, by allowing a default judgment to be entered against it, lacks any merit and for this reason alone, the default judgment should be set aside.

Additionally, where a plaintiff consents to an indefinite extension of time for a defendant to answer a complaint where settlement negotiations are ongoing and where a plaintiff’s complaint does not expressly seek a monetary judgment, but specific performance of a contract which affords the defendant the right to elect between remedies in the event of a breach, a default judgment should not be entered merely by the serving of a motion for default judgment, twenty-two days prior to entry of default judgment, without notice of hearing or any hearing being conducted. The County’s argument that no writ of inquiry on damages was required because Lexon’s defenses lack merit (1) ignores the election of remedies provisions of the subject bonds; (2) ignores law disfavoring forfeiture that creates a windfall; and (3) ignores the law requiring a writ of inquiry on damages.

III. ARGUMENT

A. STANDARD OF REVIEW

This Court has held, “We review a decision by a trial court to award a default judgment pursuant to an abuse of discretion standard. . . . Where, however, ‘the issue on appeal from the circuit court is clearly a question of law . . . we apply a *de novo* standard of review.’” *Leslie*

Equipment Co. v. Wood Resources Co., L.L.C., 224 W. Va. 530, 532-533, 687 S.E.2d 109, 111-112 (2009)(Citations omitted). Here, particularly where the Circuit Court entered a default judgment of nearly \$3.5 million without a hearing and then attempted to cure the procedural defect by modifying that judgment to provide for a refund of any unused portion of the default judgment to Lexon, this case presents issues of law and not the exercise of discretion.¹

With respect to the sufficiency of service of process, it has been noted, “Appellate review of a Rule 12(b)(5) dismissal is *de novo*.” F. Cleckley, R. Davis & L. Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE 4TH § 12(b)(5)[2] (2012)(Footnote omitted)(hereinafter “LITIGATION HANDBOOK”). Here, the Circuit Court’s ruling that service upon a receptionist at an address of an employee who had been dealing with the County was sufficient even though neither had been designated by statute or Lexon as an agent for service of process is wrong as a matter of law.²

B. THE CIRCUIT COURT ERRED IN RULING THAT PETITIONER’S MOTION TO SET ASIDE THE NEARLY \$3.5 MILLION DEFAULT JUDGMENT WAS UNTIMELY UNDER THE CIRCUMSTANCES OF THIS CASE.

With respect to the timeliness of a motion to set aside the default, R. Civ. P. 55(c) provides, “For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).” Accordingly, with respect to a motion to set aside an entry of default, there is no timeliness

¹ The County’s argument in the Standard of Review section of its brief that an abuse of discretion standard applies [Response at 4] is obviously inconsistent with its statement in the Summary of Argument section of its brief that “Lexon’s brief only raises two legal questions . . .” [Response at 5] Accordingly, Lexon reiterates its position, supported by the County’s own brief, that a *de novo* standard applies to its appeal of the Circuit Court’s failure to conduct a hearing on damages or to set aside the default judgment.

² The Standard of Review section of the County’s brief is silent on the *de novo* standard of review applicable to service of process issues.

requirement, but only a good cause requirement, and with respect to a motion to set aside a default judgment, the only timeliness requirement is derived from R. Civ. P. 60(b) which provides, “The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.”

In this regard, it has been noted that a one-year limitation would apply to the extent a defendant’s motion to set aside is made under R. Civ. P. 60(b)(1) and its motion was obviously made well within this time period. See LITIGATION HANDBOOK, *supra* at § 60(b)(1)[3] (2012)(Rule 60(b)(1) governs motions to set aside default judgments).

Moreover, to the extent a defendant’s motion to set aside is made under R. Civ. P. 60(b)(4), there is no limit limitation applicable. *Id.* at § 60(b)(4)[2] (“A motion under Rule 60(b)(4) is . . . not constrained by the one year period provided for in the other provisions of Rule 60(b). . . . A void judgment is from its inception a legal nullity.”)(Footnotes omitted).

Finally, R. Civ. P. 55(b)(2) provides: “In all other cases the party entitled to a judgment by default shall apply to the court therefor. . . If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party’s representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. . . .”

The reason Rule 55(b)(2) requires service of a motion for default on a party “at least 3 days prior to the hearing on such application” is that R. Civ. P. 6(d)(2) provides, “Unless a different period is set by these rules or by the court, any response to a written motion, including any supporting brief or affidavits, shall be served as follows . . . at least 4 days before the time set for the hearing, if served by mail”

Here, not only was the County's motion filed a mere twenty-two days prior to entry of default judgment, as no hearing was noticed on the County's motion, Lexon was not required under the rules to respond to the County's motion.

With respect to failure to notice the motion for hearing as required by R. Civ. P. 55(b)(2) and afford Lexon an opportunity to respond to the motion prior to its entry, it has been noted:

The purpose of this rule is to provide a party defendant with a timely opportunity to urge reasons against entry of default judgment. As a general rule, the Supreme Court has held that "[a] party should not be deprived of his opportunity to be heard on the merits when he failed to appear for lack of notice."

Failure to provide the 3 days notice when it is required is considered a serious procedural error that should permit, but not require, reversal or the setting aside of a default judgment. . . . Appellate "review of the sufficiency of service of notice of a motion for default judgment is de novo."

LITIGATION HANDBOOK, *supra* at § 55(b)(2)[a] (Footnotes omitted).

Here, the County's argument that Lexon's motion to set aside the default judgment was untimely must be tempered by the County's failure to schedule the motion for hearing and provide the required three days' notice under R. Civ. P. 55(b)(2) which may have allowed Lexon to interpose its arguments in opposition to the motion prior to entry of default judgment.

Accordingly, because Lexon's motion to set aside the default judgment was filed well within the one-year period provided in R. Civ. P. 60(b)(1) and the one-year time period does not apply under R. Civ. P. 60(b)(4), the Circuit Court erred in ruling that Lexon's motion was untimely under the circumstances presented.

In its brief, the County skirts around the legal defects in the Circuit Court's analysis of the timeliness issue and its response to this separate assignment of error within a section of its brief in which it asserts that the Circuit Court's ruling should be affirmed because, according to

the County, the issue of the timeliness of Lexon's motion was an evidentiary issue. [Response at 5-11] Obviously, the issues of whether a motion to set aside filed within one year of entry of default is subject to a "reasonable time" analysis; whether a motion to set aside based upon a void default judgment because of defective service is subject to any time limitation; or whether a motion to set aside a default judgment entered without notice or a hearing on damages is subject to any time limitation, are not "evidentiary" issues,³ but "legal" issues.⁴

C. THE CIRCUIT COURT ERRED IN FAILING TO SET ASIDE A NEARLY \$3.5 MILLION DEFAULT JUDGMENT UNDER R. CIV. P. 60(B)(1) WHERE (1) RESPONDENTS DID NOT SUFFER SIGNIFICANT PREJUDICE FROM PETITIONER'S DELAY IN ANSWERING THEIR COMPLAINT; (2) THERE ARE MATERIAL ISSUES OF FACT AND MERITORIOUS DEFENSES PRESENT; (3) A DEFAULT JUDGMENT OF NEARLY \$3.5 MILLION IS SIGNIFICANT; AND (4) PETITIONER WAS NOT INTRANSIGENT, BUT CONTINUED TO ACTIVELY ENGAGE IN SETTLEMENT NEGOTIATIONS WITH RESPONDENTS.

"Public policy favors litigation results," it has been noted, "that are based on the merits of a particular case and not on technicalities." LITIGATION HANDBOOK, supra at § 55(c)[2] (Footnote omitted). Accordingly, "If any doubt exists as to whether relief from a default or a default judgment should be granted, such doubt should be resolved in favor of setting aside

³ The County's discussion of the "evidence" in the context of Lexon's legal arguments regarding the applicability of a "reasonable time" test is particularly confusing relative to its "two permissible views" and "declined opportunity to have evidentiary hearing" arguments. [Response at 6-7] First, the issue of when Lexon's motion to set aside was filed relative to entry of the default judgment is resolved by looking at the calendar of which there are no "two permissible views." Second, Lexon needed to submit no "evidence" regarding the timing of either the default judgment or its motion to set it aside. Finally, no one disputes any of the facts set forth in Lexon's Statement of the Case in its original brief upon which relies, including the County. [Response at 1-2] Accordingly, the County's "evidentiary" arguments relative to the issue of timeliness are a non sequitur. Likewise, the Court will notice that (1) the County's statement that "Lexon explicitly declined Judge Silver's offer to hold an evidentiary hearing" is unaccompanied by any record reference; (2) it is immediately followed by a reference to the Circuit Court's order which stated that Lexon's motion would be decided, inter alia, on the "exhibits" tendered by Lexon; and (3) the County's statement that "Lexon submitted no evidence at all on any of these issues" is obviously incorrect as the Circuit Court's order references Lexon's exhibits. [Response at 7, 8]

⁴ Here, the County presumably recasts Lexon's legal assignment of error regarding the timeliness issue into an evidentiary assignment of error because it has no legal arguments to the assignment of error actually made by Lexon.

the default or default judgment in order that the case may be heard on the merits.” Id. (Emphasis supplied and footnote omitted). Finally, ““The policy of the law . . . looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of mistake, surprise, inadvertence, or neglect of his adversary.’” Id. (Footnote omitted).

With respect to whether Lexon established good cause, it has been noted, “In determining whether a default judgment should be vacated upon a Rule 60(b) motion, the trial court should consider: (1) the degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; and (4) the degree of intransigence on the part of the defaulting party.” LITIGATION HANDBOOK, *supra* at § 55(c)[2][b] (Footnote omitted).⁵

1. The County Suffered No Substantial Prejudice As a Result of Any Delay Between When It Made an Open-Ended Request that Lexon Answer the Complaint and When Lexon Filed Its Answer

With respect to the first factor, the County successfully argued below that, “DLM declared default and stopped work on Chandler’s Glen nearly three years ago, and since that time, the little work that was completed in the subdivision has been left to rot” App. 380. This is not the relevant time period, however, as the cases require focus on “the delay in answering.” See LITIGATION HANDBOOK, *supra* at § 55(c)[2][b].

Here, the County does not dispute on April 20, 2012, they asked only that Lexon “answer at your earliest convenience.” App. 380. Thereafter, by letter dated May 9, 2012, the County only asked, “when I might expect your answer [?]” App. 380 and App. 425. On June 14, 2012, the County filed its motion for default, but conceded below that Lexon contacted them a week

⁵ It the County’s brief, it does not dispute this is the proper standard. [Response at 4].

later indicating that a settlement proposal was imminent. App. 380. Consequently, the County suffered no prejudice between the date Lexon's answer was due, sometime in late May 2012, and July 5, 2012, when the default judgment was entered, a period of only a few weeks.

In support of its argument that "delay in answering" is not the proper focus of the prejudice analysis under the first-prong of *Parsons*, the County cites four per curiam opinions, none of which obviously overruled *Parsons*. [Response at 11]

Indeed, in Syllabus Point 5 of *Groves v. Roy G. Hildreth and Son, Inc.*, 222 W. Va. 309, 316, 664 S.E.2d 531, 538 (2008), the first per curiam opinion referenced in its brief, this Court restated *Parson's* "delay in answering" test and set aside a \$704,000 default judgment expressly rejecting one of the County's primary arguments in this case by stating, "[T]he fact that a party may be required to undergo the expense of preparing and conducting a trial on the merits is an insufficient basis for denying relief from default." Again, the focus is on delay in answering, not whether the default judgment recipient will be required to prove up its claims.

In Syllabus Point 2 of *Realco Ltd. Liability Co. v. Apex Restaurants, Inc.*, 218 W. Va. 247, 624 S.E.2d 594 (2005), the second per curiam opinion referenced in the County's brief, this Court restated *Parson's* "delay in answering" test and even though it upheld an approximately \$47,000 default judgment where the defendant failed to answer the complaint for a year and then after default judgment was entered waited another year and three months to move to set it aside, this Court nevertheless held that plaintiff would not "be prejudiced by vacation of the default judgment" despite the passing of a year and not a matter of weeks as in this case. Again, the issue of prejudice focuses on the delay in answering.

In *Cales v. Wills*, 212 W. Va. 232, 241, 569 S.E.2d 479, 488 (2002), the third per curiam opinion referenced in the County's brief, this Court restated *Parson's* "delay in answering" test **and set aside a default judgment of about \$114,000** determining that the defendant, like Lexon in the present case, "was entitled to notice of the proceeding to obtain default damages." Again, with respect to the "delay in answering" issue, this Court held, "All that Mr. Cales has shown is that setting aside the judgment of default as to liability would mean further delay in obtaining full compensation for his injuries. There has been no suggestion by Mr. Cales that evidence or witness testimony would be lost," *id.* at 242, 569 S.E.2d at 489, rejecting one of the arguments advanced by the County in this case.

In Syllabus Point 2 of *Cook v. Channel One, Inc.*, 209 W. Va. 432, 549 S.E.2d 306 (2001), the last per curiam opinion referenced in the County's brief, this Court restated the "delay in answering" test **and set aside a default even though the motion to set aside was filed nine months after entry of default** and not seven months as in the present case. Again, with respect to the "delay in answering" issue, this Court focused on the time between when the answer was due and when it was filed and entry of default, "Nor are we convinced that such an inordinate amount of time has elapsed so as to make the issue of witness availability and memory an insurmountable hurdle for Ms. Cook's case." *Id.* at 435 n.9, 549 S.E.2d at 309 n.9.

In the present case, the County misdirected the Circuit Court regarding "prejudice" contrary to the "delay in answering" test set forth in *Parsons* and applied in the very cases cited by the County in its brief.⁶ Here, by letter dated May 9, 2012, the County only asked, "when I

⁶ As this Court has frequently observed, the "delay in answering" test of "prejudice" is routinely applied in federal court. See, e.g., *Johnson v. City of Kankakee, Ill.*, 397 Fed. Appx. 238, 239-240 (7th Cir. 2010) ("On appeal Johnson argues that the district court should have granted his motion for a default judgment against the municipal defendants. That argument is a nonstarter, however, because a district

might expect your answer [?]" App. 380 and App. 425. Then, only a few weeks later, default judgment was entered on July 5, 2012, and Lexon contacted the County immediately upon its receipt. Plainly, there was no "prejudice" attendant to any "delay in answering."

2. There Are Obviously Material Issues of Fact and Material Defenses When the County Concedes that Alternative Cure Remedies Are Available to Lexon under the Two Bonds

With respect to the second factor, the County argued below that, "Lexon wrote, priced, and guaranteed the bonds, promising that should DLM fail to complete the work, it would either complete it or pay the bonds." App. 386 (emphasis supplied). Thus, even assuming the County will ultimately prevail on the issue of liability, it concedes that the subject bonds provide two alternative remedies for Lexon, *i.e.*, to complete the project or pay the face value of the bonds. Accordingly, if the cost of completion is less, Lexon's liability will be less.

It has been noted, "A trial court is required to hold a hearing in order to ascertain the amount of damages, if the plaintiff's claim involves unliquidated damages. . . . The failure to conduct a hearing on the damage issue when the plaintiff's claim is unliquidated is reversible error." LITIGATION HANDBOOK, *supra* at § 55(b)(2)[b] (Footnotes omitted). Here, by definition, the County's claims were "unliquidated" in the sense that it may cost less than the face value of the bonds to cure DLM's default. Moreover, the County's own complaint did not

court's decision to tolerate a defendant's harmless delay in answering a complaint cannot be an abuse of discretion."); *Young v. Bowen*, 328 Fed. Appx. 534 at *1 (9th Cir. 2009)("The district court did not abuse its discretion by denying Young's motion for a default judgment because Young failed to demonstrate any prejudice resulting from the delay in answering his first amended complaint."); *Livingston v. Wheeling Pittsburgh Steel Corp.*, 238 F.3d 422 at *4 (6th Cir. 2000)("[T]he district court properly declined to enter a default judgment against defendant because Livingston did not show that he had been prejudiced by the delay in answering the complaint . . ."); *Peoples v. Fisher*, 299 F.R.D. 56, 61 (W.D. N.Y. 2014)("While vacating the default judgment will result in some delay, 'delay standing alone does not establish prejudice.' . . . Rather, it must be shown that delay will 'result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion.'")(Citations omitted).

specifically pray for monetary damages in the amount of the face value of the bonds. Rather, it prayed for “specific performance” of the bonds, which alternatively includes completing the project. Under those circumstances, it is clear that, at most, the circuit court was authorized to enter a default awarding the County the relief prayed for, i.e., specific performance, and not a monetary judgment. LITIGATION HANDBOOK, supra at § 55(c)[2][d].

The County’s response to this issue is substantively a non-response: “Lexon is contractually liable to pay \$3,438,565.20” [Response at 13] Nowhere does the County address the actual terms of the bonds which provide for alternative relief. Nowhere does the County address the fact that even as the Circuit Court eventually had to acknowledge, Lexon has no contractual obligation to pay the face value of the bonds. Rather, it makes what it acknowledges elsewhere is an inaccurate statement, i.e., it is automatically entitled to judgment for the full amount of the bonds, which even the Circuit Court ultimately rejected.⁷

This case is a perfect example of the wisdom of the principles this Court and other courts have established for the entry of default judgments. The County’s complaint was not a suit for damages, but for specific performance. Yet, a default judgment was entered awarding it relief it never requested. Consequently, this Court should set aside its default judgment.

⁷Moreover, as the developer abandoned the project in the first phase of a five-phase development, courts have recognized that to forfeit surety bonds in their entirety would result in a windfall. See, e.g., *Westchester Fire Ins. Co. v. City of Brooksville*, 731 F.Supp.2d 1298, 1307 (M.D. Fla. 2010)(“Levitt abandoned the Cascades before beginning construction on Phase Two. The Phase Two land remains unimproved, and no home exists that requires the City’s utility services. Because no homeowner exists in Phase Two for whom the City must ensure the availability of utility services, requiring payment on the bonds both creates a cash windfall.”); *County of Yuba v. Central Valley Nat. Bank, Inc.*, 20 Cal.App.3d 109, 97 Cal. Rptr. 369 (1971)(bank held not liable to county on letter of credit to secure subdivider’s completion of improvements which subdivider agreed to make on tract pursuant to subdivision agreement where development had not been commenced and allowing county to recover full amount of letter of credit would be such a windfall as to constitute forfeiture). Similarly, in the present case, to require payment of the entire amount of the bonds where the project was abandoned in its first phase and the final four phases had not even been initiated would constitute an improper taking and/or forfeiture.

3. **It is Difficult to Think of a More “Significant” Default Judgment than One Involving Almost \$3.5 Million**

With respect to the third factor, the County conceded below that, “the Court’s default judgment award is significant.” Response at 10. Although the County compared the amount of the almost \$3.5 million default judgment with the financial condition of Lexon’s corporation parent, it cited no authority in support of this argument and the authority it did reference involved default judgments not exceeding percent of the amount in this case. App. 386. Plainly, the Circuit Court erred in minimizing the significance of the interests at stake for Lexon.

In its response, the County cites five opinions by this Court in support of its argument that an almost \$3.5 million default judgment is insignificant. [Response at 14]

In the first, *Cales*, supra at 241, 569 S.E.2d at 488, this Court actually **set aside a default judgment of about \$114,000** determining that the defendant, like Lexon in the present case, “was entitled to notice of the proceeding to obtain default damages.” So, Lexon is uncertain as to why the County relies on this case.

In the second, *Lee v. Gentlemen's Club, Inc.*, 208 W. Va. 564, 568, 542 S.E.2d 78, 82 (2000), the amount of the default judgment was only about \$320,000, not almost \$3.5 million which is over ten times as large, and the circumstances completely different: “Mr Lee contends that the Club was intransigent in failing to timely answer the complaint for two reasons. First, Mr. Lee points out that the Club knew he was seriously injured when he fell on the premises. Yet, the Club made no inquiry into his condition. Second, Mr. Lee contends that it is simply implausible to believe that the Club did not receive and understand the nature of the two certified communications forwarded to it. Yet, the Club received and responded to the regularly mailed notice of default judgment.”

Here, Lexon never denied liability; rather, it engaged in extensive settlement negotiations with the County, including multiple agreements to extend the time for the filing of its answer. The County's requests for service of an answer were initially ambiguous. The County's motion for default was made while the parties were actively negotiating a settlement. There was no notice of hearing and/or inquiry on damages. Lexon immediately acknowledge receipt of the default and continued settlement negotiations. The County changed attorneys during the intervening months which delayed response to Lexon's inquiries, and after it eventually became clear that a negotiated resolution could not be achieved, Lexon timely filed and prosecuted its motion to set aside the default judgment.

In the third opinion of this Court relied upon by the County, *Hinerman v. Levin*, 172 W. Va. 777, 310 S.E.2d 843 (1983), no specific sum is even mentioned and the circumstances involved the collection of an attorney fee for which an intransigent former client would have had no defense and for which the attorney would be collecting such fee from the client's union. Obviously, the circumstances, a 20 percent workers' compensation fee award, have no parallel to the present case where the amount involved is almost \$3.5 million.

The fourth opinion of this Court relied upon by the County, *Hardwood Group v. Larocco*, 219 W. Va. 56, 631 S.E.2d 614 (2006), the amount involved was less than \$20,000.

The final opinion of this Court relied upon by the County, *Realco*, supra, involved only about \$47,000.

The cases relied upon by the County regarding the issue of whether the almost \$3.5 million verdict in this case is significant suffer additional infirmities. For example, a default judgment of \$873 million in favor of Facebook against a Canadian spammer with no ability to pay

and which simply ignored Facebook's lawsuit is hardly persuasive authority.⁸ Likewise, the adjudication of a case on the merits on a motion for reconsideration of the merits of a judgment rather than a motion to set aside a default judgment is of no relevance to this case.⁹ Finally, the County cites no authority for the proposition that the determination of whether the amount of a default judgment is "significant" can be determined by examining press releases by an entity different than the one against whom a default judgment has been entered. Plainly, a default judgment of almost \$3.5 million in this case is "significant" and warrants it being set aside.

4. Where Lexon Actively Engaged in Settlement Negotiations Before the Motion for Default Judgment Was Filed and After the Default Judgment Was Entered, It was Not "Intransigent"

With respect to the final factor, the County argued below that "Lexon has been willfully intransigent in defending itself in this case." App. 387. In their response to Lexon's motion to set aside the default judgment, however, the County conceded that "Lexon responded to communications about settlement but ignored the County's demands that Lexon appear and defend itself in this action." Id.

Although as previously noted, Lexon could have acted with more alacrity in filing its answer to the County's complaint, nevertheless, there had been many months of negotiations; the County initially agreed to an indefinite extension of Lexon's time to answer; the County

⁸ See Adam O'Donnell, *Facebook Wins \$873 Million Judgement Against Spammer*, <http://www.zdnet.com/blog/security/facebook-wins-873-million-judgement-against-spammer/2216> ("It goes without saying that it is unlikely that Facebook will see anywhere near \$873 million.").

⁹ See *State Street Bank and Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 179(2nd Cir. 2004)("Here, the default judgment was entered on the docket on December 4, 2001. Not long thereafter, the defendants brought their first motion to vacate the default judgment. Although they litigated that motion for many months, the defendants failed to argue that the default judgment was void for any reason related to the district court's award of damages. Instead, the defendants advanced such an argument for the first time in the second Rule 60(b) motion they filed in February 2003.").

made equivocal demands of Lexon as to filing an answer; the County failed to notice its motion for default judgment for hearing;¹⁰ Lexon extended a settlement offer before it learned of entry of the default judgment; and Lexon engaged in negotiations with the County regarding withdrawal of the default judgment and a potential settlement of the case.

In its response on this issue, the County concedes that (1) it was actively engaged in settlement negotiations with Lexon as late as April 20, 2012; (2) its communications with Lexon regarding the filing of an answer may have been “unclear;” (3) Lexon “extended a settlement offer” immediately after default judgment was entered and “attempted to ‘confirm that Lexon’s time to respond to the lawsuit continues to be extended while we discuss the terms of a settlement;’” and (4) Lexon offered to complete “the improvements adjacent to the finished lots.” [Response at 17-18] Clearly, unlike many of the cases upon which the County relies, this was not a situation in which Lexon was being intransigent and, indeed, the fact that the County repeatedly extended the time for Lexon’s answer for many months establishes that point.

Many courts have recognized it is inappropriate to enter default judgment where the parties have actively engaged in pre-answer negotiations that included either express or implied extensions of time,¹¹ but that is precisely what happened in this case.

¹⁰ This Court has recently considered a party’s failure to provide notice of a hearing on a motion for default judgment in determining whether the non-moving party has been intransigent for purposes of a motion to set aside default judgment. See *Tudor’s Biscuit World of America v. Critchley*, 229 W. Va. 396, 407, 729 S.E.2d 231, 242 (2012).

¹¹ See, e.g., *Indigo America, Inc. v. Big Impressions, LLC*, 597 F.3d 1, 4 (1st Cir. 2010) (“Indigo waited over eight months before requesting that the court default Big Impressions, even engaging Big Impressions in settlement negotiations during this time span. Although no bad faith is suggested in Indigo’s delay in seeking an entry of default here, finding prejudice under these circumstances could have the unfortunate consequence of incentivizing parties to ambush opponents on the basis of self-induced prejudice.”); *Barber v. Turberville*, 218 F.2d 34, 36 (D.C. Cir. 1954) (“That negotiations for settlement in *Turberville v. Turberville* were conducted over a protracted period is not disputed. The peculiar circumstances at least convince us that it was not unreasonable for the defendant to assume that

D. THE CIRCUIT COURT ERRED IN FAILING TO SET ASIDE THE DEFAULT JUDGMENT UNDER R. CIV. P. 60(B)(1) WHERE THERE WAS NO NOTICE OF HEARING NOR WAS A HEARING CONDUCTED ON DAMAGES DESPITE THE PETITIONER’S RIGHT TO ELECT A METHOD OF CURING THE DEFAULT OF ITS PRINCIPAL AND, ACCORDINGLY, THE AMOUNT OF THE RESPONDENTS’ DAMAGES WERE UNLIQUIDATED.

As in other aspects of its brief, the County’s response to this issue is non-responsive.

Specifically, R. Civ. P. 55(b)(2) provides:

If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party’s representative) **shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application.** If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, **the court may conduct such hearings or order such references as it deems necessary.**

settlement negotiations admittedly in progress in *Turberville v. Turberville*, related to the instant case as well.”); *Broadcast Music, Inc. v. MP Restaurants, Inc.*, 2013 WL 6564309 at *3 (E.D. Cal.)(where parties had engaged in settlement negotiations, the court set default aside stating, “Although plaintiffs contend that defendants filed this motion both after the parties agreed-upon deadline and after plaintiffs’ filing of a motion for default judgment . . . , this tardiness does not render defendants’ failure to respond intentional. Because defendants provide a good faith explanation for the fact they did not file responsive pleadings, the court finds defendants did not act culpably.”); *Impala African Safaris, LLC v. Dallas Safari Club, Inc.*, 2013 WL 7083924, at *2 (N.D. Tex.)(“Plaintiffs’ request to conduct early discovery confirmed Defendant’s belief that he did not have to answer until Plaintiffs filed an amended complaint and the parties agreed on an answer date.”); *J & J Sports Productions, Inc. v. Brewster "2" Cafe, LLC*, 2013 WL 6150708, at *3 (E.D. Ark.)(“The record supports Patterson’s assertion that she was involved in discussions with Riley since 2009, including with the assistance of an attorney provided through a pre-paid legal services program, and courts have held that a reasonable belief that settlement negotiations would resolve a dispute without resort to a court is grounds to set aside a default.”); *Linkov v. Golding*, 2013 WL 5922974 at *4 (E.D. N.Y.)(“Because defendant and his counsel attest that the failure to respond to the complaint stemmed from the parties’ efforts to resolve this matter in another forum, the Court finds that the default is ‘satisfactorily explained’ and was not willful.”); *Friedman & Feiger, L.L.P. v. ULofts Lubbock, LLC*, 2009 WL 3378401, at *2 (N.D. Tex.)(defendant’s mistaken reliance on settlement negotiations constituted excusable neglect warranting setting aside default); *Gonzalez v. City of New York*, 104 F.Supp.2d 193, 196 (S.D. N.Y. 2000)(denying motion for default judgment where “defendants’ counsel held the reasonable belief that the action would be settled, thereby obviating the need for a formal response,” noting that while “defendants should have answered despite the settlement negotiations, their failure to do so does not evince the type of bad faith which would warrant default judgments”); *Whitman v. U.S. Lines, Inc.*, 88 F.R.D. 528 (E.D. Tex. 1980)(vacating entry of default where default was result of defendant’s belief that settlement negotiations were ongoing).

(Emphasis supplied). Here, it cannot be seriously argued that Lexon had not “appeared” for purposes of R. Civ. P. 55(b)(2) where it has been noted:

Under this rule if the party against whom judgment by default has “appeared in the action,” the party must be served with written notice of the application for judgment. The phrase “appeared in the action” for purposes of Rule 55(b)(2) is quite different from an appearance for other purposes, such as establishing personal jurisdiction. An appearance for purposes of Rule 55(b)(2) may consist only of letters or conversations between the parties. . . . This liberal construction of the phrase allows for the resolution of litigation on its merits, not technical pleading rules.

LITIGATION HANDBOOK, supra at § 55(b)(2)[a] (Footnotes omitted). Obviously, as the County does not dispute extensive communications with Lexon, including extensions of time for Lexon to file its answer, Lexon had “appeared” for purposes of Rule 55.

Indeed, the County served a motion for default judgment on Lexon’s counsel, but no notice of hearing was served or hearing conducted. And, the County does not contest that under the Rules of Civil Procedure, Lexon had no obligation to file a response to the motion for default judgment until a hearing on the motion was scheduled. R. Civ. P. 6(d)(1)(A).

“A trial court is required to hold a hearing in order to ascertain the amount of damages, if the plaintiff’s claim involves unliquidated damages. . . . The failure to conduct a hearing on the damage issue when the plaintiff’s claim is unliquidated is reversible error.” LITIGATION HANDBOOK, supra at § 55(b)(2)[b] (Footnotes omitted). Because notice and hearing are essential elements of due process, it has been observed with respect to Rule 55(b)(2) that, “The failure of the trial court to conduct a hearing on the damage issue when the plaintiff’s claim is unliquidated is reversible error.” Id. (Footnote omitted).

To attempt to avoid the requirements of notice and hearing, the County argues that its motion was not under Rule 55(b)(2), but under Rule 55(b)(1). [Response at 20]

First, Rule 55(b)(1), which is the only rule the County referenced in its motion [App. at 53], states, “When the plaintiff’s claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the court upon request of the plaintiff and upon affidavit of the amount due shall direct the entry of judgment **by the clerk . . .**,” [Emphasis supplied], but the judgment entered here was by the Court not “by the clerk.” *Second*, as previously noted, the County’s complaint did not seek a sum certain or any monetary damages at all, but specific performance. [App. at 10] *Third*, the reason the County’s complaint did not seek a sum certain or any monetary damages at all became painfully obvious to the County when the Circuit Court, confronted with the plain language of the bond, eventually altered the default judgment awarding the County less than a sum certain: “any unused portion of those proceeds will be returned to Lexon.” [App. at 36] *Finally*, and most importantly, Rule 55(b)(1) only permits default judgments “by the clerk . . . **if the defendant has been defaulted for failure to appear,**” [Emphasis supplied], as has been noted, “The reason for this limitation on the clerk’s authority is the fact that judgments by default are viewed with disfavor. . . . Thus, a default judgment only should be entered by the clerk as a matter of course **when defendant clearly has defaulted and has displayed no interest in participating in the action.**”¹²

It is absurd for the County to suggest that its suit involved a claim for a “sum certain” where no “sum certain” was ultimately awarded, but under the Circuit Court’s final order, Lexon’s obligation to the County depends upon the very contractual contingencies that preclude

¹² Wright & Miller, 10A FED. PRAC. & PROC. CIV. § 2683 (3d ed.)(2014)(Emphasis supplied and footnotes omitted).

both entry of default judgment and the award of a sum certain.¹³ This Court should decline the County's request that it ignore the plain language of Rule 55(b)(1) upon which the County relies as well as the decisions of this and other courts interpreting it.

E. THE CIRCUIT COURT ERRED IN FAILING TO SET ASIDE THE DEFAULT JUDGMENT UNDER R. CIV. P. 60(B)(4) WHERE RESPONDENTS DID NOT SERVE THEIR SUMMONS AND COMPLAINT ON PETITIONER THROUGH THE SECRETARY OF STATE; THROUGH ITS REGISTERED AGENT; OR THROUGH AN OFFICER, DIRECTOR, TRUSTEE, OR AUTHORIZED AGENT OF PETITIONER, BUT SIMPLY MAILED THE SUMMONS AND COMPLAINT TO PETITIONER'S DIRECTOR OF CONSTRUCTION, WHERE ITS RECEIPT WAS ACKNOWLEDGED BY A RECEPTIONIST

Because the County cannot credibly argue that it complied with the decisions of this Court regarding service of process on a foreign corporation,¹⁴ it argues that "Lexon waived its objection to service of process by permitting a default judgment to be entered." [Response at 27] None of the cases it cites, however, supports this proposition.¹⁵ Indeed, in *Tudor's Biscuit World of America v. Critchley*, supra at 406, 729 S.E.2d at 241, this Court reversed a default judgment for

¹³ In its brief, the County references an opinion in *Synovus Bank v. County of Henderson*, 729 S.E.2d 731 (N.C. App. 2012), but (1) that unpublished opinion is not considered controlling authority even in North Carolina and its "Citation is disfavored;" (2) it involved the interpretation of North Carolina statutes, which are different than the West Virginia statutes; and (3) the Circuit Court in the very order the County asking this Court to affirm rejected the County's argument on this point.

¹⁴ See LITIGATION HANDBOOK, supra at § 4(d)(5)(A)[2][a] ("The critical aspect of direct service here is that it must, in fact, be made directly on an officer, director or trustee . . ."); LITIGATION HANDBOOK, supra at § 4(d)(7)[2] ("[i]f an appointed agent or attorney-in-fact was not authorized by such appointment to receive service of process on behalf of a foreign corporation, service on such an agent or attorney-in-fact is insufficient under Rule 4(d)(7).") (Footnote omitted); LITIGATION HANDBOOK, supra at § 55(c)[2] ("A default judgment rendered upon a defective substituted service of process is void for want of jurisdiction.").

¹⁵ For example, much of the County's brief addresses cases establishing that Lexon had minimum contacts with West Virginia that could have supported the exercise of personal jurisdiction over it, but Lexon does not contest that the Circuit Court **could have** obtained personal jurisdiction. Rather, the question is whether the Circuit Court **did** obtain personal jurisdiction over it when it was not served with the summons and complaint in accordance with West Virginia law. Finally, the County's reference to Wright & Miller's commentary on a default party's ability to file Rule 12(b) motions [Response at 29] has nothing to do with this case as a motion to set aside a default is not filed under Rule 12(b).

the very reason asserted by Lexon, i.e., the “exacting standards” required for service of process on a corporation were not complied with.

Quite simply, where a court has not acquired personal jurisdiction over a defendant because a plaintiff has failed to properly serve, any default judgment thereafter entered is void and must be set aside.¹⁶ Accordingly, the default judgment in this case must be set aside.

IV. CONCLUSION

The petitioner, Lexon Insurance Company, respectfully requests that this Court set aside the default judgment entered by the Circuit Court of Berkeley County in this case and remand so that the case can proceed upon its merits.

LEXON INSURANCE COMPANY

By Counsel



Ancil G. Ramey, Esq.

WV Bar #3013

Steptoe & Johnson PLLC

P.O. Box 2195

Huntington, WV 25722-2195

Tel: (304) 526-8133

ancil.ramey@steptoe-johnson.com

Eric J. Hulett, Esq.

WV Bar #6332

Steptoe & Johnson PLLC

1250 Edwin Miller Blvd., Suite 300

Martinsburg, WV 25404

Tel: (304) 262-3519

eric.hulett@steptoe-johnson.com

¹⁶ See *Beane v. Dailey*, 226 W. Va. 445, 452, 701 S.E.2d 848, 855 (2010) (“Having determined that the service of process was defective and therefore void, it necessarily follows that the circuit court did not thereby obtain jurisdiction over Mr. Dailey as proper service of process is necessary to confer jurisdiction upon a circuit court. . . . Thus, we reverse the circuit court and hold that its July 22, 2003, entry of default, and its January 8, 2008, default judgment orders be set aside.”).

CERTIFICATE OF SERVICE

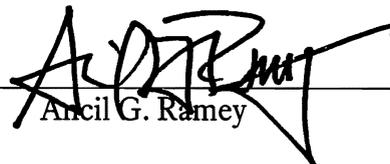
I hereby certify that on August 13, 2014, I served the foregoing **REPLY BRIEF OF PETITIONER** upon all counsel of record via email and by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope addressed as follows:

William J. Powell, Esq.
Jackson Kelly PLLC
310 West Burke Street
P.O. Box 1068
Martinsburg, WV 25402
*Counsel for County Council of Berkeley
County, West Virginia, and Berkeley County
Planning Commission*

Dale Buck, Esq.
Law Office of Buck & Prentice, PLLC
306 West Burke Street
Martinsburg, WV 25401
Counsel for DLM, LLC

Charles F. Printz, Jr., Esq.
J. Tyler Mayhew, Esq.
Bowles Rice LLP
P.O. Drawer 1419
Martinsburg, WV 25402-1419
Counsel for NLP Finance, LLC

Richard G. Gay, Esq.
Nathan P. Cochran, Esq.
Law Office of Richard G. Gay, L.C.
31 Congress Street
Berkeley Springs, WV 25411
Counsel for Noel Morrison


Ancil G. Ramey