

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 15-1056

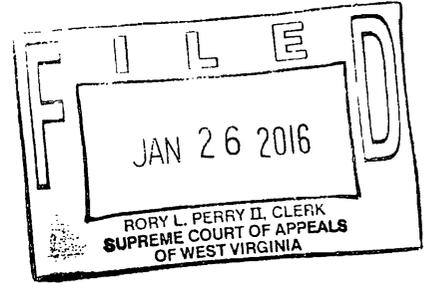
**CRED-X, INC., a West Virginia corporation
d/b/a The Credit Corp. of America,**

Petitioner,

v.

**CABELL-HUNTINGTON HOSPITAL, INC.,
a West Virginia corporation,**

Respondent.



*Appeal from the Circuit Court of Kanawha County, West Virginia
Civil Action No. 06-C-1209 "Kaufman, Judge"*

PETITIONER'S BRIEF

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TABLE OF CONTENTS

Table of authorities iii

ASSIGNMENT OF ERROR NO. 1 2

ASSIGNMENT OF ERROR NO. 2 2

ASSIGNMENT OF ERROR NO. 3 2

ASSIGNMENT OF ERROR NO. 4 2

ASSIGNMENT OF ERROR NO. 5 2

ASSIGNMENT OF ERROR NO. 6 2

ASSIGNMENT OF ERROR NO. 7 3

ASSIGNMENT OF ERROR NO. 8 3

ASSIGNMENT OF ERROR NO. 9 3

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 7

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 8

ARGUMENT 8

A. THE CIRCUIT COURT ERRED IN DISMISSING PETITIONER’S CLAIMS ON TECHNICALITIES WITHOUT A TRIAL ON THE MERITS THROUGH DENIAL OF THE MOTION TO REINSTATE 8

B. THE LOWER COURT ERRED IN APPLYING LACHES TO DENY REINSTATEMENT OF PETITIONER’S CASE AND REFUSING TO ALLOW PETITIONER A TRIAL ON THE MERITS OF ITS CLAIMS 11

C. THE LOWER COURT ERRED IN NOT REFERRING THE CASE TO THE BUSINESS COURT DIVISION AS AN ALTERNATIVE TO REFUSING TO REINSTATE THE CASE 16

D. THE LOWER COURT ERRED IN DISMISSING THE PETITIONER’S CASE BEFORE THE SETTLEMENT WAS APPROVED BY THE BANKRUPTCY COURT 17

CONCLUSION 17

TABLE OF AUTHORITIES

West Virginia cases:

<i>Cred-X, Inc.</i> , Case No. 2:07-bk-20164 (S.D.W.Va.)	4
<i>Foster v. Good Shepherd Interfaith Volunteer Caregivers, Inc.</i> , 202 W. Va. 81, 83-84, 502 S.E.2d 178, 180-81 (1998)	9
<i>McDaniel v. Romano</i> , 155 W.Va. 875, 190 S.E.2d 8 (1972)	9
<i>Davis v. Sheppe</i> , [187 W.Va. 194, 417 S.E.2d 113 (1992)]	9
<i>Durham v. Florida East Coast Ry. Co.</i> , 385 F.2d 366, 368 (5th Cir.1967)	
<i>Davis v. Sheppe</i> , 187 W.Va. at 197, 417 S.E.2d at 116	
<i>Reizakis v. Loy</i> , 490 F.2d 1132, 1135 (4th Cir.1974)	
<i>Murray v. Roberts</i> , 183 S.E.2d 688 (1936)	
<i>Daley v. County of Butte</i> , 227 Cal.App.2d 380, 38 Cal.Rptr. 693 (1964)227 Cal.App.2d at 391-92, 38 Cal.Rptr. at 700-701 (1964)	
<i>Toler v. Shelton</i> , 157 W.Va. 778, 204 S.E.2d 85 (1974)	
<i>Hoffman v. Wheeling Sav. & Loan Ass'n</i> , 133 W. Va. 694, 707, 57 S.E.2d 725, 732 (1950)	
<i>State ex rel. Webb v. W. Virginia Bd. of Med.</i> , 203 W. Va. 234, 235, 506 S.E.2d 830, 831 (1998)	
<i>Laurie v. Thomas</i> , 294 S.E.2d 78 (W.Va. 1982)	

<i>Stuart v. Lake Washington Realty Corporation,</i> 141 W.Va. 627, 92 S.E.2d 891 (1956)	
<i>Carlone v. United Mine Workers of America,</i> 242 S.E.2d 454 (W.Va.1978)	
<i>Condry v. Pope,</i> 152 W.Va. 714, 166 S.E.2d 167, 171 (1969)	
<i>Kuhn v. Shreeve,</i> 141 W.Va. 170, 89 S.E.2d 685 (1955)	
<i>Acker v. Martin,</i> 136 W.Va. 503, 68 S.E.2d 721 (1951)	
<i>Hoglund v. Curtis,</i> 134 W.Va. 735, 61 S.E.2d 642 (1950)	
<i>Hoffman v. Wheeling Savings & Loan Association,</i> 133 W.Va. 694, 57 S.E.2d 725 (1950)	
<i>Hamilton v. Republic Casualty Co.,</i> 102 W.Va. 32, 135 S.E. 259 (1926)	
<i>Security Loan & Trust Co., v. Fields,</i> 110 Va. 827, 67 S.E. 342 (1910)	
<i>Province v. Province,</i> 196 W. Va. 473, 484, 473 S.E.2d 894, 905 (1996)	
<i>Arlan's Dep't Store of Huntington, Inc. v. Conaty,</i> 162 W. Va. 893, 893, 253 S.E.2d 522, 523 (1979)	
Miscellaneous:	
<i>W.Va. Code § 56-8-12</i>	7
<i>W.Va. R.Civ.P. 41(b)</i>	
<i>W.Va. Code § 56-6-27</i>	

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ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The Circuit Court erred in refusing to reinstate the case to the active docket.

ASSIGNMENT OF ERROR NO. 2: The Circuit Court erred in finding that delay in filing a Motion denominated as a Motion to “Reinstate” by Petitioner’s former counsel is imputed to Petitioner and Petitioner is responsible for his counsel’s delay such that its claims may not be reinstated.

ASSIGNMENT OF ERROR NO. 3: The Circuit Court erred in concluding there was a fifteen (15) month delay in seeking reinstatement, and that Respondent was prejudiced thereby.

ASSIGNMENT OF ERROR NO. 4: The Circuit Court erred in applying laches to an action at law.

ASSIGNMENT OF ERROR NO. 5: The lower court erred in concluding the lapse of time, unaccompanied by factual circumstances sufficient to create a presumption that the right to reinstate has been abandoned, constituted “laches” and barred Petitioner’s right to reinstate its case.

ASSIGNMENT OF ERROR NO. 6: The Circuit Court erred in concluding Petitioner should be “presumed” to have waived its right to reinstate the case.

ASSIGNMENT OF ERROR NO. 7: The Circuit Court erred in concluding Petitioner did not show good cause and/or mistake as reasons the case should be reinstated.

ASSIGNMENT OF ERROR NO. 8: The Circuit Court erred in refusing to transfer the case to the Business Court Division as an alternative to denying the motion to reinstate the case

ASSIGNMENT OF ERROR NO. 9: It was plain error for Circuit Court to dismiss the case prior to the U.S. Bankruptcy Court approved the settlement.

STATEMENT OF THE CASE

As background, Petitioner brought claims of breach of contract, fraud and misrepresentation against the Respondent in 2006. App. at 1-5. Petitioner had a written contract with Respondent to provide servicing on delinquent accounts owed to Respondent. App. at 1. The Petitioner contends the written contract required Respondent to pay a percentage of the monies recovered by Petitioner, and prohibited Respondent from giving the delinquent accounts to another company to service. Petitioner contends Respondent breached the contract by removing the delinquent accounts from Petitioner, giving them to another company to service, and refused to pay contractual compensation amounts. App. at 1-5. In 2007, as a consequence of Respondent's wrongful acts and omissions in breaching its contract with Petitioner, it was forced to seek bankruptcy protection, thereby staying the instant lawsuit pursuant to the tenants of federal bankruptcy law requiring a mandatory stay of litigation proceedings when a party thereto seeks bankruptcy protection. *In re Cred-X, Inc.*, Case No. 2:07-bk-20164 (S.D.W.Va.).

Notwithstanding the mandatory stay resultant from the bankruptcy filing, the Petitioner sought and in 2009 received permission of the United States Bankruptcy Court to lift the mandatory stay in order to continue litigating the underlying case in the Circuit Court of Kanawha County. When the United States Bankruptcy Court granted the motion to lift the stay, it placed the United States Bankruptcy Trustee in control of the Petitioner's claims against Respondent, and the parties thereafter litigated to the eve of a scheduled trial (to the point where dispositive motions of Respondent were denied, and motions in limine were filed). At that point (in March of 2013), Respondent and the U.S. Bankruptcy Trustee negotiated a *tentative* settlement of Petitioner's underlying claims in return for payment to Petitioner of \$133,000, an amount that was less than the

amount Petitioner claimed as damages in the case, but an amount that would have been sufficient to pay Petitioner's creditors in bankruptcy. App. at 40. Judge Kaufman was informed of the tentative settlement, and on March 12, 2012 Judge Kaufman entered an Order *dismissing* (as opposed to staying) the case, stating,

“[w]hile this Court understands that the settlement reached on all of the claims is subject to approval of the Bankruptcy Court, the Court is still dismissing the case from the Circuit Court docket. **Should the Bankruptcy Court reject the settlement, the parties may petition the Court for reinstatement of this action.**”

App. at 21 (emphasis added).

In the U.S. Bankruptcy Court, Mr. Ron Davis, Petitioner's sole shareholder, formally objected to the tentative settlement amount as being woefully insufficient. The United States Bankruptcy Court found merit to Mr. Davis' objection to the tentative settlement (App. at 50-52), allowed Mr. Davis to “buy out” Petitioner's claims for an amount sufficient to pay the creditors (App. at 58), removed this case from the control of the U.S. Bankruptcy Trustee and assigned Cred-X's claims to Mr. Davis by Order entered on January 3, 2013. App. at 59. Shortly thereafter, Respondent moved the United States Bankruptcy Court to clarify its Order, App. at 60-75, which it did by Order entered on February 21, 2013. App. at 76-77.

Four months after the U.S. Bankruptcy Court's February 21, 2013 Order, Petitioner, by its former counsel, requested a hearing and moved the Circuit Court of Kanawha County to refer the underlying case to the then-newly created Business Court. App. at 78-79. Petitioner's former counsel, Hal Albertson, while requesting in the motion that Judge Kaufman schedule a hearing, did not notice the motion for hearing, and the motion was not responded to by Respondent (whose counsel avers it never was received).¹

¹The Petitioner's Motion to Refer this case to the Business Court never was addressed by Judge Kaufman until his September 25, 2015 Order, in which it was stated in cursory form that

While the Motion to Refer the case to the Business Court was pending, the license to practice law of Petitioner's former counsel, Hal Albertson, was annulled by Order of this Court entered on January 14, 2014. App. at 80-81. Upon learning of his counsel's impending disbarment, Petitioner sent a letter to his former counsel, Mr. Albertson, terminating him and requesting the return of his case file, App. at 82. Petitioner promptly sought replacement counsel, and thereafter retained the undersigned, who noticed an appearance on April 10, 2014, App. at 83-84, and moved to reinstate the case to the active docket on April 14, 2014. App. at 85-88. Respondent filed an opposition to that motion on May 2, 2014. App. at 89-102.

By Order entered June 30, 2014, App. at 103-111, the lower court denied the Motion to Reinstate, wrongly finding, "Plaintiff essentially seeks to take advantage of the bankruptcy proceeding and twice enhance himself," App. at 106. And despite the finding of the bankruptcy court already determining it to be "the fairest possible resolution" to return the asset of lawsuit to Mr. Davis, App. at 50, Judge Kaufman wrongly concluded it was, "inequitable in both fact and law" to reinstate this case because, "Plaintiff received due process that resulted in a most reasonable settlement," App. at 106-07, ignoring both the fact that Petitioner did not receive the constitutional due process of having his case decided on the merits and that the tentative settlement was not approved by the bankruptcy court. In fact, Petitioner received *nothing*, and Petitioner's claims, although worked up to the eve of trial, never received a determination on the merits.

Judge Kaufman wrongly concluded laches applied to bar reinstatement because of the speculative possibility Respondent might conceivably be exposed to prejudgment interest, App at 107-08, wholly ignored the pending Motion to Refer the Case to Business Court, and additionally

"(1) this case has not been reinstated and, therefore, there is no active case to transfer and (2) even if it had been reinstated, the procedural requirements for referring a case to Business Court have not been satisfied." App. at 174.

invoking Rule 41(b) and *W.Va. Code* § 56-8-12 as reasons to deny reinstatement. App. at 108-09. Petitioner timely moved to alter or amend under Rule 59(e) to alter the judgment to allow reinstatement, App. at 112-25, and over a year later Judge Kaufman denied that motion. App. at 167-74. It is from Judge Kaufman's orders denying reinstatement and thereby dismissing the case that Petitioner now timely appeals.

SUMMARY OF ARGUMENT

The crux of this appeal is whether Judge Kaufman erred in dismissing this case on the basis that it had been informed of a tentative settlement, and then refusing to reinstate it to its active docket after the tentative settlement was rejected. The tentative settlement was subject to approval by the United States Bankruptcy Court, and that Court reviewed and ultimately rejected the tentative settlement. Approximately four months after the federal bankruptcy court's last order clarifying the rejection of the settlement, rather than making a motion with the word "reinstatement" in it, Petitioner's former counsel, Mr. Albertson, filed a "Motion to Refer This Matter to the West Virginia Business Court Division," wherein Judge Kaufman was asked to set a hearing date. Judge Kaufman never assigned a hearing date for that Motion.²

Unfortunately, about six months after the filing of Petitioner's "Motion to Refer This Matter to the West Virginia Business Court Division," Petitioner's former counsel, Mr. Albertson, was disbarred, and Petitioner was forced to find new counsel.³ Petitioner promptly searched for new

²Like the request for a hearing on the Motion to Refer to the Business Court, no hearing date was set by Judge Kaufman for Petitioner's Motion to Reinstate, nor was one set for the Motion to Alter or Amend that followed. Had the Court allowed the Petitioner the hearing when requested in the Motion to Refer to the Business Court, the rejection of the tentative settlement by the bankruptcy court and Petitioner's desire to move forward with this case would have been put on the record at that time, and the availability and application of the doctrine of laches would never have been an issue.

³During the course of those six (6) months, Petitioner's former counsel Hal Albertson had numerous related personal issues, including himself filing for bankruptcy, having ethics charges

counsel and retained the undersigned, who noticed their appearance for Petitioner and filed a Motion to Reinstate, but the Court denied the request and found laches applied to bar reinstatement. Upon Petitioner's timely Motion to Alter or Amend that order, Judge Kaufman held the Motion to Refer to the Business Court did not show Petitioner intended to reinstate the case because it was not denominated as a motion to "reinstate," and further found that the law *presumes* the Petitioner did *not* intend to pursue its claims (despite objecting to the tentative settlement, the buying of the claims out bankruptcy and filing the motion to refer to the business court).⁴ The dismissal and refusal to reinstate the case was error by Judge Kaufman, and this Court should correct these errors by reversing those orders and remanding with instructions to reinstate the case for a trial on the merits.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests oral argument and states that the criteria for making oral argument unnecessary pursuant to Rule 18(a) is unmet. This case should be set for Rule 19 argument, and is not appropriate for a Memorandum Decision.

ARGUMENT

A. THE CIRCUIT COURT ERRED IN DISMISSING PETITIONER'S CLAIMS ON TECHNICALITIES WITHOUT A TRIAL ON THE MERITS THROUGH DENIAL OF THE MOTION TO REINSTATE

Dismissal of a case is the harshest of sanctions, and West Virginia law is abundantly clear that sanctioning dismissal is appropriate only in "extreme circumstances." As this Court explained

filed against by the Office of Disciplinary Counsel and then being charged criminally in federal court for tax evasion (to which he later pled guilty).
<http://www.wvgazette.com/News/201311200121> Mr. Albertson's disbarment was not related to this case.

⁴Judge Kaufman also applied the wrong standard of review to the Motion to Alter and Amend.

in *Foster v. Good Shepherd Interfaith Volunteer Caregivers, Inc.*, 202 W. Va. 81, 83-84, 502 S.E.2d 178, 180-81 (1998),

“In . . . dismissal cases we have stated that **public policy favors results based on the merits of a particular case and not on technicalities.** “Although courts should not set aside default judgments or dismissals without good cause, it is the policy of the law to favor the trial of all cases on their merits.” Syllabus Point 2, *McDaniel v. Romano*, 155 W.Va. 875, 190 S.E.2d 8 (1972). In accord, Syllabus Point 3, *Davis v. Sheppe*, [187 W.Va. 194, 417 S.E.2d 113 (1992)].

In *Davis v. Sheppe, supra*, the plaintiff's attorney failed to appear for trial and the circuit court granted the defendant's motion to dismiss the case for failure to prosecute. The plaintiff appealed the circuit court's dismissal without filing a motion pursuant to *West Virginia Rule of Civil Procedure, Rule 60(b)*. We treated the plaintiff's appeal as an appeal from a Rule 60(b) motion and determined that the judge abused his discretion in dismissing the matter.

Looking to the federal courts and other jurisdictions this Court has made clear that a **dismissal is the harshest of sanctions and should be rendered only in extreme situations.** In *Davis* we said:

Rightfully, courts are reluctant to punish a client for the behavior of his lawyer.... Therefore, in situations where a party is not responsible for the fault of his attorney, dismissal may be invoked only in extreme circumstances.... Indeed, it has been observed that ‘[t]he decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff.’ *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir.1967). Appellate courts frequently have found abuse of discretion when trial courts failed to apply sanctions less severe than dismissal.... And generally lack of prejudice to the defendant, though not a bar to dismissal, is a factor that must be considered in determining whether the trial court exercised sound discretion.

Davis v. Sheppe, 187 W.Va. at 197, 417 S.E.2d at 116, quoting *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir.1974) (citations omitted).”

(Emphasis added).

The instant case hardly falls into the category of an “extreme circumstance” warranting dismissal. Instead of following the applicable foregoing caselaw, Judge Kaufman called Petitioner “disingenuous” for pointing out the neglect of his former counsel, Mr. Albertson, and relied on the

1936 decision of this Court in *Murray v. Roberts*, 183 S.E.2d 688 (1936) to hold that, “inaction—even if a result of their attorney—is imputed to the Plaintiff and it is responsible.” App at 109-10, 173. That finding violates the holdings of *Foster, supra*, and *Davis, supra*.⁵ There was no factual or legal basis for Judge Kaufman court to impute his counsel’s inaction to Petitioner, and Judge Kaufman erred by so holding and by dismissing Petitioner’s claims refusing to reinstate.

The same standard and policy considerations apply in the case at bar as in *Foster, supra*, and *Davis, supra*. The dismissal of Petitioner’s claims was *not* on the merits, App. at 21, and the dismissal order itself recognizes reinstatement should occur if the sole reason for the dismissal order (*i.e.*, the tentative settlement) changed. *Id.* The law clearly favors a determination of claims on the

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Alternatively, this Court could apply the positive misconduct rule articulated in *Daley v. County of Butte*, 227 Cal.App.2d 380, 38 Cal.Rptr. 693 (1964) 227 Cal.App.2d at 391-92, 38 Cal.Rptr. at 700-701 (1964):

“Clients should not be forced to act as hawklike inquisitors of their own counsel, suspicious of every step and quick to switch lawyers. The legal profession knows no worse headache than the client who mistrusts his attorney. The lay litigant enters a temple of mysteries whose ceremonies are dark, complex and unfathomable. Pretrial procedures are cabalistic rituals of the lawyers and judges who serve as priests and high priests. The layman knows nothing of their tactical significance. He knows only that his case remains in limbo while the priests and high priests chant their lengthy and arcane pretrial rites. He does know this much: that several years frequently elapse between the commencement and trial of lawsuits. Since the law imposes this state of puzzled patience on the litigant, it should permit him to sit back in peace and confidence without suspicious inquiries and without incessant checking on counsel.”

Where the attorney's neglect is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence, the client should not be imputed the attorney’s mistake. This rule is premised upon the concept the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship, App. at 82, and for this reason his negligence should not be imputed to the client. The positive misconduct rule should apply here to allow Petitioner to litigate the merits of his case because any delay in moving to reinstate was the fault of his former, disbarred counsel.

merits (“it is the policy of the law to favor the trial of all cases on their merits” *Foster, supra*, 202 W. Va. at 83, 502 S.E.2d at 180.). Moreover, as held in *Syllabus* Point 2 of *Foster, supra*,

“‘A court, in the exercise of discretion given it by the remedial provisions of Rule 60(b), *W. Va. R. C. P.*, should recognize that the rule is to be liberally construed for the purpose of accomplishing justice and that it was designed to facilitate the desirable legal objective that cases are to be decided on the merits.’ *Syllabus* Point 6, *Toler v. Shelton*, 157 W. Va. 778, 204 S.E.2d 85 (1974).”⁶

A reading of Judge Kaufman’s orders (App. at 103-111, 167-74), make clear that it was not “liberally construing” Petitioner’s reinstatement request, nor was it attempting to “accomplish justice . . . to facilitate the desirable legal objective that cases are to be decided on the merits.” *Syllabus* Point 2 of *Foster, supra*. Thus, Judge Kaufman erred and abused his discretion in refusing to reinstate this case.

Judge Kaufman erred also by failing to recognize or apply the foregoing hornbook policy considerations, and abused its discretion by refusing to recognize obvious good cause for the reinstatement (the bankruptcy court’s rejection of the tentative settlement). Pursuant to *Foster, supra*, and *Davis, supra*, the motion to reinstate should have been granted to avoid the obviously inequitable result of dismissing the case without a trial on the merits.

B. THE LOWER COURT ERRED IN APPLYING LACHES TO DENY REINSTATEMENT OF PETITIONER’S CASE AND REFUSING TO ALLOW PETITIONER A TRIAL ON THE MERITS OF ITS CLAIMS

Instead of construing Petitioner’s request liberally and trying to accomplish justice and decide the case on the merits, Judge Kaufman strained to apply laches to bar reinstatement, first refusing

⁶Judge Kaufman’s March 12, 2012 dismissal order does not specify the standard it would apply to its ruling that, “[s]hould the Bankruptcy Court reject the settlement, the parties may petition the Court for reinstatement of this action[.]” App at 21, and Rule 60(b) is the only procedural rule that would apply to a motion to reinstate this case following rejection of the tentative settlement.

to acknowledge Petitioner's filing of the Motion to Refer to the Business Court Division, and then justifying the application of laches because the Motion to Refer was not denominated as a motion to "reinstate." To justify the denial of reinstatement, Judge Kaufman inaccurately concluded Petitioner had delayed taking action to reinstate the case for fifteen (15) months, when in fact Petitioner's counsel had filed a Motion to Refer to the Business Court after only four months.

First, Petitioner's claims sound at law, not in equity. It is hornbook law that, "[a] defense of laches may not be invoked in a law action[.]" *Hoffman v. Wheeling Sav. & Loan Ass'n*, 133 W. Va. 694, 707, 57 S.E.2d 725, 732 (1950). That clear principle of equity bars the application of laches to the Plaintiff's motion for reinstatement. Judge Kaufman acknowledged the foregoing, but in a footnote refused to apply this rule on the basis that this Court had made a narrow exception and allowed laches to apply in an administrative licensure proceeding before the West Virginia Board of Medicine. App. at 170. Judge Kaufman cited the clearly distinguishable *State ex rel. Webb v. W. Virginia Bd. of Med.*, 203 W. Va. 234, 235, 506 S.E.2d 830, 831 (1998), wherein this Court held, "[t]he doctrine of laches may be applicable in proceedings by and before the West Virginia Board of Medicine . . . and the doctrine should be applied narrowly and conservatively." Not only does this Court's narrow exception to the rule that laches is inapplicable to a law action not apply broadly to any claim at law, as found by Judge Kaufman, even if it did so apply, the lower court erred by not applying the doctrine, "narrowly and conservatively." Thus, Judge Kaufman's application of laches to deny reinstatement was reversible error.

Even assuming *arguendo* that consideration of the doctrine of laches was available in this case, Judge Kaufman was obligated to apply the criteria in *Syllabus* Point 4 of *Laurie v. Thomas*, 294 S.E.2d 78 (W.Va. 1982), wherein this Court set forth the general rules with regard to the equitable defense of laches:

“The general rule in equity is that **mere lapse of time, unaccompanied by circumstances which create a presumption that the right has been abandoned, does not constitute laches.**’ *Syllabus* Point 4, *Stuart v. Lake Washington Realty Corporation*, 141 W.Va. 627, 92 S.E.2d 891 (1956).”

(Emphasis added). See also syl. pt. 3, *Carlone v. United Mine Workers of America*, 242 S.E.2d 454 (W.Va.1978); *Condry v. Pope*, 152 W.Va. 714, 166 S.E.2d 167, 171 (1969); syl. pt. 7, *Kuhn v. Shreeve*, 141 W.Va. 170, 89 S.E.2d 685 (1955); syl. pt. 1, *Acker v. Martin*, 136 W.Va. 503, 68 S.E.2d 721 (1951); syl. pt. 2, *Hoglund v. Curtis*, 134 W.Va. 735, 61 S.E.2d 642 (1950); syl. pt. 1, *Hoffman v. Wheeling Savings & Loan Association*, 133 W.Va. 694, 57 S.E.2d 725 (1950). Judge Kaufman also failed to recognize that the law never presumes a waiver of a right. *Hamilton v. Republic Casualty Co.*, 102 W.Va. 32, 135 S.E. 259 (1926). “A waiver of legal rights will not be implied, except clear and unmistakable proof of an intention to waive such rights.” *Security Loan & Trust Co., v. Fields*, 110 Va. 827, 67 S.E. 342 (1910).

Applying the foregoing criteria, other than the mere lapse of time, Judge Kaufman could not identify any circumstances that could create a presumption the Petitioner “abandoned” its right to reinstate this case. In fact, Judge Kaufman erred by finding that the lapse of time, alone, did warrant applying the doctrine of laches. App. at 108 (“[T]he more than fifteen month delay by [Petitioner] is sufficient to warrant the presumption that Cred-X waived its rights.”). To the contrary, the undisputed record of the circumstances of this case shows the opposite is true – it is undisputed the Petitioner intended to proceed with its claims, that Petitioner, by its sole shareholder, Mr. Davis, objected and asked the federal bankruptcy court to reject the inadequate settlement (advocated by Defendant) of its claims in return for \$133,000. App. at 35-36. The federal bankruptcy court held that the objection to the settlement “had merit,” App. at 58, and stated on the record that the parties could “duke it out” by litigating the merits of the case in the state court action. App at 55. Thus, the

express purpose of the rejection of the settlement by the bankruptcy court was to allow this case to be reinstated and decided on its merits (as opposed to simply satisfying Plaintiff's debts owed to creditors in the bankruptcy).

Not only does the undisputed fact that Mr. Davis bought the claims of Cred-X out of bankruptcy in order to "duke it out" on the merits in state court directly contradict any conceivable "presumption" that Cred-X abandoned its claims against Respondent, the filing of the Motion to Refer the Case to the West Virginia Business Court Division likewise is inconsistent with such a presumption. App. at 78-79. The record of this case shows that the termination letter Petitioner sent to former counsel, Hal Albertson, also contradicts any presumption of abandoning Petitioner's claims. App. at 82. Under these undisputed circumstances, there can be no "presumption" of waiver or abandonment of Petitioner's claims such that the equitable doctrine of laches applies because Petitioner took numerous actions inconsistent with any "presumption" that its claims were abandoned or waived. There are no "circumstances which create a presumption that the right has been abandoned." *Syllabus* Point 4, *Laurie, supra*. Thus, Judge Kaufman's insistence on applying laches despite the circumstances of this case and fact that the standard for applying the doctrine of laches was unmet, was error.

The Respondent has the burden of proving laches. *Province v. Province*, 196 W. Va. 473, 484, 473 S.E.2d 894, 905 (1996) ("The burden of proving unreasonable delay and prejudice is upon the litigant seeking relief."). Respondent has not met its burden of proving any "circumstances" that might create a presumption Petitioner had abandoned its claims.

Judge Kaufman also wrongly found that *W.Va. R.Civ.P.* 41(b) and *W.Va. Code* § 56-8-12 supported a "presumption" of waiver, even though neither is a factual "circumstance," and thus can not be used a "circumstance" from which abandonment or waiver may be presumed. Judge

Kaufman’s reliance upon Rule 41(b) to support laches, however, is misplaced because the Petitioner filed its Motion to Refer the case to the West Virginia Business Court approximately four (4) months after the last bankruptcy court order, and therefore a year did not pass before Petitioner sought to prosecute its case. Moreover, pursuant to *Syllabus* Point 1 of *Arlan's Dep't Store of Huntington, Inc. v. Conaty*, 162 W. Va. 893, 893, 253 S.E.2d 522, 523 (1979), the time periods in *W.Va.R.Civ.P.* 41(b) and *W.Va. Code* § 56-8-12 do not apply, “where good cause is shown such as fraud, accident, or mistake.”

The filing of the Motion to Refer the Case to the West Virginia Business Court without denominating it as a motion to “reinstate” (assuming *arguendo* that such denomination is necessary), can be understood *only* as a mistake – this is because a *prerequisite* to the relief sought in the Motion to Refer (a hearing and/or reference to the Business Court Division) is reinstatement of the case. Thus, the failure to denominate the Motion to Refer as a “Motion to Reinstate and Refer,” was a technical or procedural mistake such that the time periods in Rule 41(b) and the statute it replaced, *W.Va. Code* § 56-8-12, do not apply. *Arlan’s, supra*. Under all the undisputed facts in this case, it was error and an abuse of discretion for Judge Kaufman to not reinstate Petitioner’s case.

Arguendo, even if there were factual “circumstances” in addition to the lapse of time sufficient to presume Petitioner meant to abandon its claims, Respondent did not point to any legally cognizable “disadvantage” it sustained proximately caused by the timing of the filing of motion to reinstate the case. Respondent never suggested, let alone proved, it suffered any of the traditional bases of prejudice relied upon by courts to justify the application of laches, such as death of parties, loss of evidence, change of title or condition of the subject-matter, intervention of equities, or other similar causes. At best, Respondent asserted a novel, never before recognized theory of alleged “prejudice” – that it could, potentially, be subject to an additional amount of “interest” on a

judgment. It cites *no case from any jurisdiction* where the possibility of the imposition of additional prejudgment interest on damages for a limited time period was found to be a cognizable form of disadvantage or prejudice sufficient to support a claim of laches. Simply put, potential prejudgment interest is not a “circumstance” or a legally sufficient “disadvantage” constituting prejudice that can support the application of laches to bar reinstatement of Petitioner’s claims. It was error for Judge Kaufman to so find.

Additionally, whether “pre-judgment interest” is awarded to Cred-X if it prevails on its contract claims is *not mandatory* – it is a *jury question*. *W.Va. Code* § 56–6–27. Thus, it is up to the jury to determine the factors that are relevant in considering whether to award any prejudgment interest at all, and thus Respondent can not be said to be prejudiced.

Lastly, even if *arguendo* the potential for prejudgment interest could be said to be the kind of disadvantage or prejudice that somehow could support laches, equity commands that such laches should apply narrowly and *only* to that limited period of time during the purported delay when prejudgment interest accrued, not to the entirety of Plaintiff’s claims. Simply put, the discussion of a presumption of waiver or abandonment of Petitioner’s right to proceed is a false, artificial construction that is contradicted by all the facts in this case. If “equity” applies in this case in any way, shape or form, it should apply to reinstate Petitioner’s claims, not bar them.

C. THE LOWER COURT ERRED IN NOT REFERRING THE CASE TO THE BUSINESS COURT DIVISION AS AN ALTERNATIVE TO REFUSING TO REINSTATE THE CASE

There is no dispute that the Petitioner made a Motion to Refer this case to Business Court Division within four months of the bankruptcy court’s last order. There was nothing untimely about the filing of that Motion, and laches could not be applied to it. Judge Kaufman erred in not treating the Motion to Refer, which specifically requested a hearing and/or referral to the Business Court, as

a Motion to Reinstate, or alternatively, in not scheduling the hearing as requested and/or granting the motion as an alternative to the harsh sanction of dismissal by refusal to reinstate.

D. THE LOWER COURT ERRED IN DISMISSING THE PETITIONER'S CASE BEFORE THE SETTLEMENT WAS APPROVED BY THE BANKRUPTCY COURT

Judge Kaufman's March 12, 2012 Order dismissing the case was error. There is no legal basis to dismiss a case on the merits based on a tentative settlement that is subject to approval of a different court. If Judge Kaufman had wanted to hold the case in place until such time as the settlement was approved, the proper procedure was not dismissal, but an order *staying* the proceedings until the federal bankruptcy court approved or rejected the settlement. The 2012 dismissal order was not appealed at that time (obviously because the lower court stated the parties could petition for reinstatement if the tentative settlement was rejected). However, because of the facts of the case and the nature of the dismissal order, especially the sentence allowing the parties to petition to reinstate the case if the settlement was rejected, this Court should treat the appeal period as being tolled until such time as the petition for reinstatement was denied. Simply put, the dismissal order was not entered on the merits, should never have been entered, and this Court can and should use its inherent power to rectify and reverse that mistaken order of dismissal.

CONCLUSION

For all of the foregoing reasons, the Court should grant this Petition for Appeal, and reverse and remand the denial of reinstatement with instructions to reinstate the case for a resolution on the merits.

CRED-X, INC.,

Petitioner, By Counsel



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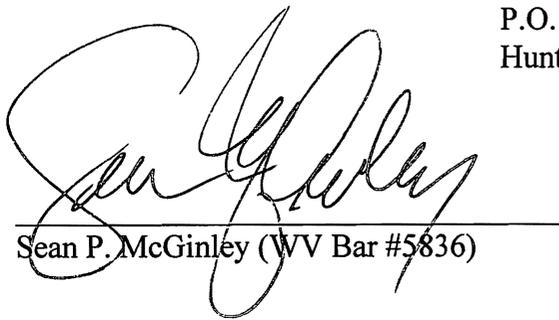
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CERTIFICATE OF SERVICE

I, Sean P. McGinley, counsel for the defendant herein, do hereby certify that a true and correct copy of the foregoing **PETITIONER'S BRIEF** was served upon the following counsel of record by placing same in the United States Mail, postage prepaid, this 26TH day of January, 2016, and addressed as follows:

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