FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMI IN A CIVIL CASE

CASE NUMBER: 2013CP4006571

Ashely S Griffith

PLAINTIFF(S)

Professional Pathology Services PC
Pathology Service Associates LLC

DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** *(CHECK REASON)*: ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** *(CHECK REASON)*: ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 30 December 2014 to attorneys of record or to parties (when appearing pro se) as follows:

J. Todd Kincannon

Michael David Hoffer
Elizabeth Scott Moise

Erin Richardson Stuckey
William C. Wood Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

William C. Wood Jr.
1320 Main Street, 17Th Floor
PO Box 11070
Columbia, SC 29211

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
Ashely S. Griffith,	)	Civil Action No. 2013-CP-40-05741
Plaintiff,	)	
vs.	)	
Pathology Service Associates, LLC,	)	
Defendant.	)	

ORDER SETTING ASIDE ENTRY OF DEFAULT AND DEFAULT JUDGMENT

This matter is before the Court upon the motion of the named defendant in this matter, Pathology Service Associates, LLC ("PSA"), to set aside the default judgment filed June 20, 2014. A hearing on Defendant's Motion was held on October 8, 2014. The default was obtained on an Amended Complaint filed against PSA on April 9, 2014 ("Amended Complaint"). For the reasons set forth below, the motion is granted.

I.

Procedural and Factual Background

On October 28, 2013, Plaintiff filed this lawsuit alleging that Professional Pathology Services PC ("PPS") wrongfully placed two credit charges totaling $98 on her credit report. She claims this action caused her $245,000 in damages. The complaint against PPS alleged two claims: defamation and violation of the South Carolina Unfair Trade Practices Act (SCUTPA"). PPS answered the complaint on November 25, 2013 (filed November 25, 2013).

On April 9, 2014, Plaintiff filed a document captioned as an Amended Complaint. She deleted PPS from the caption and body of the complaint and added PSA as the defendant. She alleged the same two claims for the credit reports, but deleted footnote 5 of the original complaint which referenced another case, *Dana Eiser v. JPMorgan Chase Bank, N.A.*, (filed in Richland County, SC Court of Common Pleas on September 11, 2013, No. 2014-CP-4005476 and removed to the South Carolina federal district court, No. 3:13-cv-02751-JFA (D.S.C.), filed by Plaintiff's counsel, which claimed that Eiser, not Plaintiff, suffered the same $245,000 in damages claimed by Plaintiff in this case and specifically stated that Plaintiff had been able to "evade the payment" of the $245,000.00 "she had been contractually required to provide to Eiser." Plaintiff did not make a motion to amend the complaint to drop and add parties or otherwise get Court approval for the amendment, and she filed no document dismissing PPS from the case under Rule 41.

The Amended Complaint names only "Pathology Service Associates LLC" as a party and specifically states it is a "South Carolina limited liability company with a principal place of business in Florence County, South Carolina." (Amended Compl. ¶ 2.) Neither the summons nor the Amended Complaint mentions PST Services, Inc., which both parties agree is a Georgia corporation that emerged as the survivor of a merger of PSA and PST. The pleadings contain no reference to any mergers, corporate affiliations, use of trade names, or other facts suggesting that any party other than the named and described party was being sued. The named and described entity in the pleadings, Pathology Service Associates LLC, was dissolved and terminated as a matter

of law on January 21, 2014, as reflected in the public records of the South Carolina Secretary of State.

On June 10, 2014, Griffith filed a Motion for Entry of Default and Judgment by Default against PSA, seeking a default judgment in the amount of $1,038,961.57 plus interest. Thereafter, on June 20, 2014, based on Plaintiff's submissions and without a hearing, this Court issued the Default Judgment Order. Even though the pleadings upon which default was taken were devoid of any reference to PST or any allegations of mergers, corporate affiliations, use of trade names, or other facts suggesting that any party other than the named and described party was being sued, the Default Judgment Order referred to the Defendant as both "Pathology Service Associates LLC" and "Defendant Pathology Service Associates now known as PST Services, Inc."

On August 12, 2014, PSA filed a motion to set aside the default judgment and amended and supplemented the motion on September 26, 2014.

On August 15, 2014, Plaintiff obtained a Transcript of Judgment, which was filed in the Florence County Court of Common Pleas on August 26, 2014. In the typed transcript, the judgment debtor was originally shown to be "PST Services, Inc. formerly known as Pathology Service Associates, LLC," but Plaintiff's counsel had marked through the words "PST Services, Inc. formerly known as" (and initialed the changes), leaving the party's name as "Pathology Service Associates, LLC." The Execution Against Judgment identifies the judgment debtor as "Pathology Service Associates, LLC."

Plaintiff recently unilaterally—and again without leave of court—began changing the caption in numerous filings in this case to change the name of the defendant to "Pathology Service Associates, LLC n/k/a PST Services, Inc."

Plaintiff filed two memoranda on September 29, 2014, arguing that the Court should not allow PSA's counsel to represent PSA at the hearing, based on *McCullar Estate of Campbell*, 381 S.C. 205, 672 S.E.2d 784 (2009), and also arguing that because PSA was a dissolved corporation, PSA did not have standing to file anything in the Court, which did not have subject-matter jurisdiction.

II.

Legal Discussion

PSA's motion is granted and the default judgment is vacated for the following reasons.[1]

A.

Rule 21 of the South Carolina Rules of Civil Procedure governs amendment of a complaint to add or drop parties to a lawsuit. *See* S.C. R. Civ. P. 21 ("Parties may be

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[1] At or near the time of the hearing on the motion, Plaintiff filed a purported stipulation of dismissal. Even though Plaintiff named only one defendant and an appearance has been made on behalf of the named defendant in this proceeding, Plaintiff's motion proceeds upon the premise that that there is more than one defendant and that she can stipulate to a dismissal and end the Rule 60 proceedings without voluntarily dismissing her case in its entirety. A Rule 60(b) motion is considered a continuation of the original case so long as it seeks nothing more than relief from the judgment. *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755, 760-63 (6th Cir. 2002). Because Plaintiff's stipulation dismisses a defendant and there is only one named defendant in the case, Plaintiff's stipulation effectively ends all pending matters against the only named defendant. Thus, Plaintiff has voluntarily terminated the entire lawsuit, including the default judgment, which is of no further legal effect. Alternatively, the stipulation as stated is simply a nullity due to its faulty initial premise.

dropped or added by order of the court on motion of any party or on its own initiative . . . ."; *see also South Dakota v. Burlington N. & Santa Fe Ry.*, 280 F. Supp. 2d 919, 924 (D.S.D. 2003); *Commodity Futures Trading Com'n v. Am. Metal Exchange Corp.*, 693 F. Supp. 168 (D.N.J. 1988) ("[A] proposed second amended complaint that adds parties not named in the original complaint can be amended only with leave of court."); *Kelly v. Echols*, No. CIV-F-05-118 AWI DLB, 2007 WL 4284760 (E.D. Cal. Dec. 5, 2007) (holding that if an amended pleading cannot be made as of right and is filed without leave of court or consent, the amended pleading is a nullity and without legal effect); James F. Flanagan, *South Carolina Civil Procedure* at 173 (3d ed. 2010) ("A motion is the proper method to add a party.").

Plaintiff originally sued a different defendant—Professional Pathology Services PC (PPS)—on October 28, 2013. PPS filed its answer on November 25, 2013. Over four months later, Plaintiff filed the Amended Complaint on April 9, 2014, which dropped PPS, added "Pathology Service Associates LLC" as the sole defendant in the caption of the summons and complaint, and described that party specifically as a "South Carolina limited liability company with a principal place of business in Florence County, South Carolina." However, she failed to make a motion to get court approval to amend her complaint under Rule 21, and therefore, the attempted amendment—and in turn, the entry of default and default judgment—are void and, therefore, vacated.

B.

Even if the amendment adding PSA had been validly made by Plaintiff, the further proceedings leading to the default were a nullity because the entity named in the caption and described in the body of the amended complaint was, at the time of the

filing of the amended complaint, a dissolved and terminated legal entity under South Carolina law as stated in the records of the South Carolina Secretary of State submitted at the hearing. *See* S.C. Code Ann. § 33-44-805. Under South Carolina law, an action against a nonexistent defendant is a legal nullity in its entirety. *See McCullar v. Estate of Campbell*, 381 S.C. 205, 207-08, 672 S.E.2d 784, 785 (2009); *see also Glenn v. E. I. DuPont De Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157-58 (1970) ("A civil action may be maintained only in the name of a person in law, an entity, which the law of the forum may recognize as capable of possessing and asserting a right of action. A suit brought in a name which is not a legal entity is a nullity and the action fails."); *Blackwood v. Spartanburg Commandery No. 3, Knights Templar*, 185 S.C. 56, 193 S.E. 195, 197 (1937) ("'But if there is a lack of legal entity, the whole action fails. . . . If an action is brought in the name of that which under the lex fori has no legal entity, it is as if there was no plaintiff in the record and therefore no action before the Court.'" (quoting *Commercial & Sav. Bank of Lake City v. Ward*, 146 S.C. 77, 143 S.E. 546, 548 (1928))). Pathology Service Associates LLC—the only named Defendant, which was alleged to be a South Carolina limited liability company—did not exist at the time Plaintiff filed her Amended Complaint, so the proceedings subsequent to its attempted addition as a party-defendant are nullities in their entirety.

Plaintiff asserts that this is a "misnomer" situation in which he mistakenly sued the wrong entity, citing *McCall v. IKON*, 363 S.C. 646, 611 S.E.2d 315 (Ct. App. 2005). A misnomer situation does not occur when the plaintiff knows she is naming a nonexistent entity rather than the correct corporation. A misnomer situation occurs if the plaintiff names a legally existing entity as a defendant, but inadvertently makes a

mistake regarding that entity's name. *See Tri-Cnty. Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 239, 399 S.E.2d 779, 781 (1990) (explaining that misnomer situation arises when a plaintiff makes a clerical error in describing the named defendant when a plaintiff was unaware of the real name of a company operating under a trade name); *Tunstall v. The Lerner Shops, Inc.*, 160 S.C. 557, 159 S.E. 386 (1931) (misnomer when plaintiff identified defendant "as best they could discover" and then served the entity it intended to sue).

When Plaintiff served the Amended Complaint, she knew PSA had been domiciled in South Carolina and that the Secretary of State's records for South Carolina showed that PSA's existence had terminated.[2] I find as fact that Plaintiff's counsel was aware of the public filings regarding the status of PSA as evidenced by his filings with the Court, which showed that PSA had dissolved and had not merely changed its name, at the time of service. Therefore, because Griffith knowingly chose to proceed against a non-existent South Carolina entity, the subsequent proceedings, including the default judgment, are a nullity and vacated.

Further, as set forth more fully below in discussing the excusable neglect standard, I find that Plaintiff's decision to plead in the manner chosen, despite knowledge of the merger and termination, caused confusion and prejudiced those potentially responsible for responding on behalf of Defendant, its successors, or other

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[2] *See, e.g.*, Cover Letter to CSC (directing CSC to serve "PST Services, Inc. f/k/a Pathology Services Association, LLC" even though Summons and Amended Complaint named Pathology Service Associates LLC as sole defendant and described it as a South Carolina limited liability company), attached to Defendant's Memorandum at Exhibit Q.

affiliated entities. *See McCall*, 363 S.C. at 653, 611 S.E.2d at 318 (finding of misnomer requires showing of no prejudice to misnamed party).

C.

PSA, even if properly added to and named in the suit, is entitled to relief from default because the amended complaint fails to state a claim upon which relief may be granted. "A party seeking a default judgment is entitled to only such relief as is framed by his pleading, and then only to the extent requested therein. . . . It follows that if a complaint fails to state a cause of action, the rendering of a default judgment thereon is without authority of law and therefore reversible error." *Mutual Sav. & Loan Ass'n v. McKenzie*, 274 S.C. 630, 632, 266 S.E.2d 423, 424 (1980); *see also Joe Hand Promotions, Inc. v. Yakubets*, No. 12-4583, 2014 WL 960787, at *4 (E.D. Pa. Mar. 11, 2014) (quoting 10A Charles Alan Wright, Arthur R. Miller, et al., *Federal Practice and Procedure* § 2688 (3d ed. 2013) (holding that in a default, the court's initial inquiry must be " 'whether the unchallenged facts constitute a legitimate cause of action.' " and that "[c]onclusory allegations and the parties' legal theories or 'conclusions of law' are not entitled to the same presumption and are not deemed admitted.").

To recover on a South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. § 39-5-10 *et seq.*, claim, a plaintiff must prove four elements, by a preponderance or greater weight of the evidence: (1) a violation of SCUTPA; (2) proximate cause; (3) damages. *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 471, 482, 458 S.E.2d 431, 438 (Ct. App. 1995).

In addition, a claimant must further allege and prove that the defendant's actions

adversely affected the public interest. *See Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004). This adverse impact "must be proved by specific facts." *Jeffries v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994). Therefore, conduct that only affects the parties to a transaction will not serve as a basis for a SCUTPA claim. *Id.* "Without proof of specific facts disclosing that . . . members of the public were adversely affected by [the unfair conduct] or that they were likely to be, all we are left with is a 'speculative [claim] of adverse public impact' and that will not suffice for a recovery under the UTPA." *Id.* at 527, 451 S.E.2d at 23. Although a claimant may prove an adverse impact on the public interest by showing that the acts or practices have the potential for repetition, the potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence;[3] or (2) by showing the [Defendant's] procedures created a potential for repetition of the unfair and deceptive acts." *Singleton*, 358 S.C. at 379, 595 S.E.2d at 466. However, courts have also noted that "[i]n the course of human endeavor, every action has some potential for repetition. The mere proof that the actor is still alive and engaged in the same business is not sufficient to establish this element." *Jeffries*, 316 S.C. at 529, 467

[3] The factors to be considered in determining the admissibility of prior similar conduct in SCUTPA claims are (1) the length of time between each of the past incidents, and the incident under consideration; (2) the degree of similarity between the facts of previous incidences and the incident under consideration; (3) the degree of similarity between the conduct of the defendant in each of the incidents; (4) the degree of similarity between the advantage foreseeably obtained under the facts of each prior incident by the unfair conduct in each case; (5) the degree of similarity of harm to others in each incident; and (6) the number of prior incidents as compared with the relative number of prior opportunities to conduct the unfair conduct. *See Burbach v. Investors Mgmt. Corp. Int'l*, 326 S.C. 492, 498, 484 S.E.2d 119, 122 n.3 (Ct. App. 1997).

S.E.2d at 24.

In *Bracken v. Simons First National Bank*, 2014 WL 2613175, at *6-7 (D.S.C. June 9, 2014), the court dismissed a SCUTPA claim based on the defendant's omissions of facts on the plaintiff's credit reports for failure to allege the "public interest" element. The court stated that "[w]ithout proof of specific facts disclosing that members of the public were adversely affected by the unfair conduct or that they were likely to be so affected, the result is a " 'speculative claim of adverse public impact' and that will not suffice under the UPTA." *Id.* at *7 (quoting *Jeffries*, 316 S.C. at 528, 451 S.E.2d at 23); *see also Ameristone Tile, LLC v. Ceramic Consulting Corp.*, 966 F. Supp. 2d 604, 621-22 (D.S.C. 2013) (dismissing a SCUTPA claim when the complaint merely stated that "Defendants' acts have the potential for harmful effects to the public interest because they are capable of repetition," holding that the allegations were conclusory and without facts demonstrating that the defendants conducted the same kind of actions in the past or that their procedures or business practices created a potential for repetition in the future); *Ethox Chem., LLC v. Coca Cola Co.*, No. 6:12-cv-01682-TMC, 2013 WL 41001, at *3 (D.S.C. Jan. 3, 2013) (finding insufficient to establish adverse effects on public interest the allegation that "Coca-Cola has been accused of engaging in unfair methods of competition and deceptive business practices" in the past and that "there is a legitimate threat that Coca-Cola will continue to engage in unfair practices and repeat its deceptive business practices, and, as a result, Coca-Cola's actions adversely affect the public interest").

In this case, Plaintiff's complaint merely alleged that PSA's conduct "is obviously capable of repetition" (Am. Compl. ¶ 16, *Griffith I*) and did not allege facts

to prove that PSA's actions proximately caused her damages. Therefore, even if Defendant is deemed to have admitted the allegations in the complaint, default judgment cannot be entered on that claim, the claim upon which the default judgment was rendered. Therefore, the default is vacated.

Further, recovering treble damages under a SCUTPA claim is not automatic. Rather, section 39-5-140(a) requires the Court to make a specific finding that the defendant committed a "willful or knowing violation of [the SCUTPA]." S.C. Code Ann. § 39-5-140(a). Here, the Amended Complaint does not make any factual allegations that PSA willfully or knowingly committed an unfair trade practice. Instead, the Amended Complaint says that as soon as PSA learned of the alleged credit reporting error, it acted to correct it. (Am. Compl. ¶ 15 ("As soon as Plaintiff . . . communicated the errors to Defendant, Defendant did correct the mistakes on Plaintiff's credit report.").) Likewise Griffith's Affidavit of Amount Due merely states that she is seeking "treble damages." (Aff. of Amt. Due ¶ 6.) It does not contend that PSA acted willfully or knowingly. Finally, the default judgment order does not make any finding that PSA committed a willful or knowing violation of the SCUTPA.

Because the Order did not make a finding that PSA committed a willful or knowing violation of the SCUTPA, and because none of the "evidence" or pleadings before the Court could support such a finding, Griffith was not entitled to treble damages. Therefore, the default judgment should be set aside.

D.

Assuming PSA was properly added and named and the amended complaint adequately stated a claim under the South Carolina Unfair Trade Practices Act, the

default judgment must nonetheless be aside because a hearing was not held to determine Plaintiff's unliquidated damages and attorneys fees, and notice was not mailed to PST's last known address as required under Rule 55(b) SCRCP.

1.

"Even [i]n a default case . . . the plaintiff must prove . . . the amount of his damages, and such proof must be by a preponderance of the evidence." *Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC*, 408 S.C. 87, 90, 757 S.E.2d 557, 558 (2014). A plaintiff must prove damages regardless of whether the damages are liquidated or unliquidated, and she cannot rely on the complaint's allegations to meet her burden of proof. *Id.* at 90, 757 S.E.2d at 558-59 ("It is common knowledge . . . that in a tort action the amount stated in the prayer for relief often bears little relation to the amount which the plaintiff is entitled to recover. The prayer in an action may not serve as a substitute for proof.").

If a case involves unliquidated damages, the Court should "conduct such hearing or order such references as it deems necessary" to ascertain the amount of damages, and notice must be given by first class mail to the defendant's last known address. *See* 55(b)(2) SCRCP.

Under South Carolina law, "[a] claim for . . . damages is 'liquidated' in character if [the] amount thereof is [1] fixed, [2] has been agreed upon, or [3] is capable of ascertainment by mathematical computation or operation of law." *Marion Amphitheatre, 408 S.C.* at 91, 757 S.E.2d at 559; *see also Beckmann Concrete Contractors v. United Fire Cas. Co.*, 360 S.C. 127, 131-32, 600 S.E. 2d 76, 78-79 (Ct. App. 2004) (same). Damages are not liquidated if their amount can be impacted

by the presentation of conflicting evidence. *See Beckman Concrete Contractors*, 360 S.C. at 131-32, 600 S.E.2d at 78-79 (damages are not liquidated if they "can[] be changed by proof.").

In this case, the judgment was entered on a claim for unfair trade practices. This type of claim does not traditionally give rise to liquidated damages. *See Lewis v. Congress of Racial Equality*, 275 S.C. 556, 559, 274 S.E.2d 287, 289 (1981) ("Liquidated damages more often grow out of actions ex contractu rather than actions ex delicto."). Indeed, Griffith does not allege that PSA owed her a specific amount of money. Instead, she claims PSA's actions caused her to incur additional costs during a land transaction. (*See* Am. Compl. ¶ 13.)

Causes of action concerning real estate transactions generally do not give rise to liquidated damages claims. *See Marion Amphitheatre*, 408 S.C. at 92, 757 S.E.2d at 559 ("[T]he value of real estate . . . is not liquidated, not a sum certain, and cannot be made certain by mathematical calculation, [and therefore] the special referee erred in awarding damages without conduct a damages hearing."). The purported damages underlying the default judgment relate to a 2013 real estate transaction in which it is alleged Griffith was unable to obtain conventional financing because of a negative credit report that forced her to incur $245,000 in additional obligations when purchasing a piece of real estate valued at $120,000. It is far from certain that Plaintiff incurred $245,000 in actual damages. As alleged by Griffith's attorney/husband while representing Dana Eiser in a matter arising from the same transaction, the $245,000 consisted of (1) $30,000 to be paid by Griffith; (2) forgiveness by Griffith's "family" of an outstanding $65,000 obligation that Eiser owed; and (3) provision of

"professional services" valued at $150,000 by Griffith's "family" (NOT by Griffith).[4] Therefore, at most, Griffith only personally assumed $30,000 in additional obligations to purchase the property. Furthermore, as pleaded by Plaintiff's attorney/husband in this case, Griffith admitted in her original Complaint in this case that she ***never*** incurred ***any*** damages because she was able to "evade the payment and provision of services totaling $245,000 she had been contractually required to provide to Eiser." Considering that and the contradictions concerning this same transaction, which arise from the *Eiser* complaint and original complaint in this case, the claim is for unliquidated damages that should have been determined at a properly noticed hearing. For this additional reason, the default judgment should be set aside.

2.

The award of attorneys' fees was also improper, and the default judgment including them is vacated. When attorneys' fees are awarded under a fee-shifting statute as in this case, "an award of fees based on a percentage of the prevailing party's recovery is improper." *Layman v. State*, 376 S.C. 434, 455, 658 S.E.2d 320, 331 (2008). Rather, courts must use "a 'loadstar' approach reflecting the amount of attorney time reasonably expended on the litigation results" to determine "a reasonable fee under a fee-shifting statute." *Id.* at 452, 658 S.E.2d at 330. Under that required approach, the court must examine six factors: "(1) the nature, extent, and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in

[4] *Eiser* Compl. ¶¶ 24, 27, 30. PSA was not a party to the real estate transaction and is, therefore, not obligated to pay Griffith under this purported contract.

the locality for similar services; and (6) beneficial results obtained." *Blumbera v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993); *see also Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991) (addressing the factors to be considered in determining a reasonable attorneys' fee). "The amount of recovery and the contingency of compensation are only two of the six factors to be considered by the trial court in determining an appropriate attorney's fee." *Rice v. Multimedia, Inc.*, 318 S.C. 95, 101, 456 S.E.2d 381, 385 (1995).

In this case, the Affidavit of Amount Due did not set forth evidence to support any factors other than the amount recovered and the contingency. Therefore, the court had no basis for determining a reasonable fee, and a hearing was required. The default judgment simply awarded Griffith attorney's fees under the fee-shifting provisions of S.C. Code Ann. § 39-5-140 in an amount equal to one-third of her actual damages. (Order Granting Default and Judgment by Default ¶ 8.c.) Because South Carolina law does not allow a statutory award of attorneys' fees to be based on a percentage of the total recovery, the default judgment is void and is set aside.

3.

Further due to the unliquidated nature of Plaintiff's damages claims and the request for statutory attorneys fees, a properly noticed hearing under Rule 55(b)(2) of the South Carolina Rules of Civil Procedure was required. Because no proper notice was given, the default vacated on this additional ground.

Rule 55(b) states, in pertinent part:

> Pursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of

> such party whether or not such party has appeared in the action.

The rule further provides that a hearing pursuant to Rule 55(b)(2) for attorneys' fees is required unless (1) the party seeking attorneys' fees specifies in the motion for default judgment that the motion includes a request that the court award attorneys' fees and also files an affidavit of attorneys' fees; (2) notice of such motion and affidavit is provided to the defaulted party by first class mail **to the last known address of the party**; and (3) no objection is filed by the opposing party within 10 days of service of the motion and affidavit. S.C. R. Civ. P. 55(b)(3) (emphasis added). The purpose of mailing to the defendant's last known address is to promote a reasonable probability that the defendant will receive actual notice of the document served. *See, e.g., Conner v. Miller*, 96 N.E.2d 13, 18 (Ohio 1950) ("The obvious purpose of providing . . . for forwarding a copy of the process to the defendant 'at his last known address' is to supply the requirements of due process . . . as necessary in order that there be a 'reasonable probability that if the statutes are complied with, the defendant will receive actual notice'").

Where, as here, a rule requires that a document be served by mail at the party's last known address, Plaintiff is obligated to use reasonable diligence to confirm that the address is actually the last known address of the party to be served:

> The requirement that the copy be mailed to the defendant at his "last-known address" does not mean the last address known to the plaintiff, but does mean the last address of the defendant so far as it is known, that is, by those who under the ordinary circumstances of life would know it. Unless the defendant has departed for parts unknown, it means his actual address; if he has disappeared, it means his last address so far as it is reasonably possible to ascertain it. This address the plaintiff must learn at his

> peril, and only if the copy is mailed to it is there compliance with the statute.

Iglesias v. Dolan, No. MMXCV126007796S, 2013 WL 1943894, *3 (Conn. Super. Ct. Apr. 19, 2013) (quoting *Hartley v. Vitiello*, 154 A. 255, 258 (Conn. 1931)).

"Last known address" for purposes of service of legal documents has been defined as "the last address of the defendant so far as it is known, that is, by those who under the ordinary circumstances of life would know it." *Velazquez v. Eldredge*, No. HHDCV085024354S, 2012 WL 3064599, *7-8 (Conn. Super. Ct. June 25, 2012). The party doing the service must take sufficient effort to identify the proper last known address "so far as it is reasonably possible to ascertain it." *Id.* (finding the court lacked jurisdiction over the defendant because the plaintiff claimed service of process was conduced by mail to the defendant's last known address, but "the plaintiffs offered no evidence of efforts made to discover the address at which the defendants could reasonably be expected to have received service").

Courts have held that it is "incumbent upon the plaintiffs to diligently seek out the proper address of the defendant." *Lekanidis v. Bendetti*, 613 N.W.2d 542, 548 (S.D. 2000) (internal quotation marks omitted). "[W]here a plaintiff has knowledge that the address to which they are mailing may not be the correct address for the defendant, they cannot blindly turn away and immediately run to court and get a default judgment." *Id.* (affirming dismissal of an action because the plaintiff failed to exercise diligence to identify the defendant's last known address when serve legal documents by mail).

Plaintiff's counsel mailed the documents to an invalid address that had not been used for more than two years. The address that Plaintiff used was 181 East Evans

Street, Florence, SC 29506. However, PSA moved in early 2012 from the East Evans Street address to 1362 Celebration Boulevard, Florence, SC 29501. I find that Plaintiff's counsel did not use due diligence to identify the last known address for Defendant so that Defendant could receive actual notice of the attorneys' fees and affidavit.

Even though Plaintiff's counsel admitted he was aware of Defendant's website (because he had visited it before the lawsuit was filed), all he did to determine the address at the time of serving default notices many days later was to conduct a Google search and take an address from the very first search result, which was a Google+ listing. Notably, Plaintiff's counsel's own internet search produced the correct mailing address as the second search result, immediately beneath the incorrect address he chose to use.[5] On the website, the correct mailing address is stated at the bottom of the screen on almost every page. The website also had a "Contact Us" page with the correct mailing address. The correct address has been on Defendant's website since August 2012, which is objectively verifiable at the website http://www.archive.org.[6]

Plaintiff's counsel's affidavit also made unsupported assumptions that PSA "owned" the Google+ listing and was responsible for maintaining it.[7] However, this is

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[5] *See, e.g.*, Exhibit 1 to Affidavit of J. Todd Kincannon Regarding Last Known Address of Defendant (copy of Plaintiff's counsel's Google search results).

[6] This independent website includes a utility called the Way Back Machine that periodically copies and maintains hundreds of billions of internet websites. Any person can use this utility to see the content of a given website at various points in the past. The Way Back Machine has copies of Defendant's website from 190 different dates between October 8, 1999 and June 30, 2014. These copies show that the former East Evans Street address appeared on the website through July 2012. Beginning in August 2012 and continuing at all times though the present, the website has had the Celebration Boulevard address.

[7] Affidavit of J. Todd Kincannon Regarding Last Known Address of Defendant ¶¶ 25,

also wrong, and Plaintiff's counsel cites no authority for his claim other than his own personal opinion. In fact, Google+ is a privately operated, unregulated internet service owned and operated by Google. It is publicly documented that Google created most of the business listings in the Google+ service itself as a private profit-seeking endeavor.[8] Millions of business listings in Google+ were created by Google using information from a variety of sources.

In addition, Plaintiff's claim that the Evans Street address was the only address on the Google+ listing is misleading. To the contrary, Defendant's website, http://www.psapath.com, is also listed on the Google+ page, with a clickable link. Clicking the link shows the same information described above.

The claim that the old Evans Street address "still appears on multiple pages of PSA's website" is also misleading. Plaintiff's counsel strategically singled out four internet pages, which are archived press releases from 2010 and 2011. The press releases included the company's contact information as part of the press release. Changing the substance of an old press release several years later would be illogical and counterintuitive; instead, they state the information from the time the press releases were issued. Every current page on Defendant's website includes the correct mailing address, and even the two press release pages that are not in PDF format include the correct mailing address in the company's information at the bottom of the page.

Because the motion for damages and affidavit for attorneys' fees were not mailed to Defendant's last known address, the default judgment is vacated, even if PSA

26, 31, 32, 33.

[8] *See, e.g.*, Media publications describing Google+ and the sources of information used by Google to compile business listings, attached as Exhibit S to Defendant's memorandum.

had been properly added and named as a defendant and the complaint stated a claim for liability under SCUTPA.

E.

A defendant is entitled to relief from a default judgment upon a showing of "mistake, inadvertence, surprise, or excusable neglect." 60(b) SCRCP. Under Rule 60(b), a defendant must make a more particularized showing of excusable neglect than is required under the "good cause" standard for setting aside an entry of default. *See Sundown v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888-89 (2009). In considering whether to grant relief from a default judgment, the Court should consider (1) the promptness with which relief is sought and the reasons for the failure to act promptly, (2) the existence of a meritorious defense, and (3) the prejudice to the other parties." *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 50, 435 S.E.2d 377, 379 (Ct. App. 1993). In determining whether to grant relief from default, each case must be considered in light of its own attendant circumstances. *Brown v. Weathers*, 251 S.C. 67, 160 S.E.2d 133 (1968).

1.

The Court has carefully considered the affidavits of Michael Gormley, a Senior Legal Specialist for McKesson Corporation ("McKesson"), and Todd Kincannon, Plaintiff's counsel, as well as all the submissions from both parties, and finds that Mr. Gormley's affidavits are reliable and convincing and that Defendant has made a particularized showing of excusable neglect for its failure to answer the complaint prior to default and default judgment being entered.

McKesson Corporation received a copy of Plaintiff's Summons and Amended Complaint in *Griffith I*.[9] Although the service letter, which was delivered to Corporation Service Company, is directed to "PST Services, Inc. f/k/a Pathology Service Associates, LLC," the Summons and Amended Complaint named PSA as the only defendant. As discussed above, PST Services, Inc. was not named in any of the pleadings nor were there any allegations regarding affiliated companies or trade names.[10] At the time McKesson received the documents, Senior Legal Specialist Michael Gormley was not personally familiar with the PSA entity, so he conducted a preliminary investigation and mistakenly concluded that PSA was not a McKesson entity.[11] PSA became an entity owned by McKesson on December 21, 2012, as part of McKesson's acquisition of a company called MED3000 Group, Inc. ("MED3000").[12] It was not directly and independently acquired. At the time of the acquisition of MED3000, one action was pending against PSA, an employment action.[13] However, the employment action was listed in McKesson's litigation database as being associated with MED3000, not PSA, and Gormley did not work on the employment action. To Gormley's knowledge, no other lawsuits were filed against PSA after the MED3000 acquisition, thus there was no entry directly identifying PSA as a McKesson entity.[14] Gormley was personally unfamiliar with PSA.[15]

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[9] 8/12/14 Gormley Aff. ¶ 4.
[10] *Id.* ¶ 5.
[11] *Id.* ¶ 1, 6.
[12] *Id.* ¶ 7.
[13] *Id.*
[14] *Id.* ¶ 8.
[15] *Id.*

Although Mr. Gormley's determination was incorrect, I find that his initial confusion and determination are supported by the record, as well as Plaintiff's pleadings and related documents that exacerbated the confusion. There is no evidence to suggest that PSA, through Gormley, intentionally disregarded the pleadings or neglected to take any care or only slight care to determine whether PSA was a McKesson-related entity for which a response should be made. The "mistake" or "excusable neglect" standard is met in this instance.

2.

Upon learning of the default judgment, PSA contacted its present counsel to investigate the matter and move to set aside the default and default judgment. PSA's counsel then filed the original Motion within three business days of learning of the default judgment. Therefore, PSA has acted in a timely manner and is prepared to proceed and actively participate in the action.

3.

A "meritorious defense" is "one which is worthy of a hearing or judicial inquiry because it raises a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." *Thompson v. Hammond*, 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989). The "defense need not be perfect nor one which can be guaranteed to prevail at a trial." *Id.*; *see also Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) (setting aside default).

In this case, Plaintiff made two claims: defamation and violation of the South

Carolina Unfair Trade Practices Act. I find that Defendant has presented evidence of the following, representative, additional meritorious defenses that it could raise with respect to Plaintiff's claims in the event it was relieved of default in addition to defenses discussed above.

(1) PSA did not place the credit information on Plaintiff's credit report. Instead, a collections agency called SCA Collections, Inc. made the reports according to Exhibit T to the Affidavit of J. Todd Kincannon Regarding Last Known Address of Defendant ¶ 31. Plaintiff's pleadings do not reference SCA Collections, Inc. or allege that the debt collector was Defendant's agent or allege any other basis to impose vicarious liability.

(2) In *Griffith v. Hy Cite Enters. LLC, et al.*, CA No. 2014-CP-32-01379 (filed in Lexington County, SC Court of Common Pleas on April 10, 2014), yet another claim filed by Plaintiff regarding her credit rating from the same time frame, alleges that the defendants in that case reported an unpaid debt of $4,192 to the credit bureaus that was defamatory and caused her damages. Further, Plaintiff's credit report states a number of other factors that lowered her score. Thus, PSA has a third-party or intervening causation defense worthy of further investigation.

(3) State law claims for violation of SCUTPA are preempted by the Fair Credit Reporting Act ("FCRA") and Fair Debt Collection Practices Act ("FDCPA"). *See* 15 U.S.C. § 1681h(e) (FCRA provision preempting "any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, user of information, or any person who furnishes information to a consumer reporting agency"); 15 U.S.C.

§ 1681t(b)(1)(F); *Spitzer v. Trans Union LLC*, 140 F. Supp. 2d 562, 565 (E.D.N.C. 2000), *aff'd*, 3 Fed. App'x 54 (4th Cir. 2001) (dismissing plaintiff's state unfair trade practices claim because it was preempted by the FCRA). Although an exception to this rule occurs when the plaintiff has alleged malice or willful intent to injure, *see* 15 U.S.C. § 1681t(b)(1)(F), the pleadings allege that the errors were corrected when notified by Plaintiff, which contradicts any implication that PSA—or the entity that actually made and changed the report—willfully intended either to report an incorrect negative credit report or to injure Plaintiff.

(4) South Carolina has adopted the defense of qualified privilege with respect to credit reporting. *See Weir v. Citicorp*, 312 S.C. 511, 515, 435 S.E.2d 864, 867 (1993). The elements of qualified privilege for are (1) good faith, (2) an interest to be upheld, (3) a statement limited in scope to this interest, (4) a proper occasion, and (5) publication in a proper manner to proper parties. *Conwell v. Spur Oil*, 240 S.C. 170, 178-79, 125 S.E.2d 270, 274-75 (1962). Unless it is established that PSA acted maliciously or in reckless disregard of its duty to exercise *reasonable care* to make a fair and accurate report, false statements that fall within the qualified privilege are not actionable. *Weir*, 312 S.C. at 515, 435 S.E.2d at 867; *Austin v. Torrington Co.*, 810 F.2d 416, 424-25 (4th Cir. 1987) (applying South Carolina law and holding that an *inference of malice is* not sufficient when the statements are found to be qualifiedly privileged). Any credit data submitted to any credit reporting service fall squarely within the qualified privilege. Plaintiff's claims would be barred absent actual proof establishing malice.

(5) Also, both parties have referenced two other lawsuits, which are related

to the facts alleged in the Amended Complaint and contradict some of the damages and causation allegations made in the lawsuit before this Court. I take judicial notice of the documents filed in *Dana Eiser* and. *HyCite Enterprises* cases as further support for finding that PSA may have meritorious defenses to Plaintiff's claims upon vacation of the default.

4.

Plaintiff will not be prejudiced if the Court sets aside entry of default and allows the parties to proceed on the merits of the case. Prejudice must, at a minimum, be more than the delay resulting from default and the burden of litigating the case on the merits. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997); *see also Berthelsen v. Kane*, 907 F.2d 617 (6th Cir. 1990) (finding that delay alone is insufficient for establishing necessary prejudice to warrant refusal to set aside default judgment).

Plaintiff has advanced several theories of prejudice, most involving her unreasonable and risky dismissal of pending lawsuits or parties, entering into a contract to buy expensive real estate, and quitting her job—all allegedly based on the default judgment that her husband-lawyer would have realized was subject to being set aside because he knew—among other things—that the defendant was a dissolved limited liability company when the Amended Complaint was filed.

For example, Plaintiff claims prejudice from her settlement and dismissal of a lawsuit that she claims was likely to yield a seven-figure verdict against HyCite Enterprises LLC; National Healthsyles Cooking 4 You, Inc.; 21st Century Marketing Concepts; and David's Bridal, Inc. That lawsuit alleged on April 8, 2014 that

defendant National Healthstyles had wrongfully reported $4,193 on her credit and had "intentionally and willfully caused to be published to one or more credit bureaus false and damaging information about Plaintiff that caused and will continue to cause Plaintiff's damages." The lawsuit also claimed damages for failure to deliver cookware that she claims was defective, along with other alleged misrepresentations.

Beyond the fact that the *HyCite* lawsuit shows the $98 charges that were placed on her credit report by SCA Collections did not cause her to lose a bank loan, dismissal of the lawsuit does not prove prejudice. Despite the lengthy affidavit attempting to explain the reasonableness of dismissing an entire pending lawsuit that he claims was worth about $1 million, taking that step without having the judgment money in hand is unreasonable and, instead, appears to be a misguided strategy to manufacture prejudice that does not exist.

She further claims prejudice because she dismissed with prejudice the original defendant in the lawsuit, Pathology Service Associates, LLC, which had "pointed the finger" at PSA. This, again, is not a reasonable course of action when Plaintiff and her counsel would have been aware of the risk of the judgment being set aside and still took the risk.

Plaintiff also claims that she is prejudiced by entering into a contract to purchase a $975,000 property on the lake that she cannot otherwise afford. As with dismissal of the lawsuits discussed above, entering into a contract without having the funds in hand is unreasonable—particularly since she is aware that default judgments are subject to being overturned. Further, no third parties are prejudiced because the contract allows the sellers to continue marketing the property until Plaintiff provides

the necessary funds at closing, and the sellers have the option to terminate the contract at any time and void the contract if the sellers elect to enter into a contract with another party.[16]

Plaintiff also claims that in anticipation of her move to Chapin, she quit her job in West Columbia and began preparing her current house to be marketed and sold to repay Dana Eiser the remaining money owed to her (although the *Eiser* complaint alleged that no payments were to be due for two years) and the original complaint in this matter admitted that Plaintiff has evaded any obligation to Eisner. Again, quitting a job and preparing a house for sale before the money is in hand and the move is made is not reasonable and any prejudice is of Plaintiff's own making.

As illustrated above, PSA has acted in a timely manner, possesses meritorious defenses, and allowing this case to proceed on the merits will result in no prejudice to the Plaintiff or third parties. Therefore, the entry of default and default judgment are vacated and PSA shall be permitted to respond to any amended pleading Plaintiff may file as set forth below.

[16] **Exhibit U**, 7/17/14 Contract of Sale, Residential.

III.

Wherefore, it is ORDERED that entry of default and the default judgment is set aside and vacated. Plaintiff shall have fifteen days from entry of this order to amend the original complaint to add or delete such parties or assert, amend, or delete such claims as she deems appropriate.

Robert E. Hood
Judge, Fifth Judicial Circuit

Columbia, South Carolina

12/18, 2014

CERTIFICATE OF SERVICE

I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Pathology Service Associates, LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Proposed Order Granting Motions to Set Aside Entry of Default and Default Judgment

Counsel Served:

J. Todd Kincannon
The Kincannon Firm
P.O. Box 7901
Columbia, SC 29202

October 24, 2014