THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2018-001845

WFG National Title Insurance Company ..... Respondent,

v.

DataQuick Lending Solutions, Inc. and DataQuick Lending Solutions, LLC..... Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

By this appeal, Appellant DataQuick Lending Solutions, LLC,[1] a Delaware limited liability company ("DataQuick"), challenges a 2016 entry of default and a 2017 default judgment in favor of Respondent WFG National Title Insurance Company ("WFG") for nearly $4 million in unliquidated damages entered without a damages hearing and without the knowledge of DataQuick. WFG, a South Carolina title insurer, brought suit in 2016 against DataQuick, WFG's former agent, even though DataQuick had ceased doing business in early 2014. DataQuick had no actual notice of the lawsuit until October 2017, when it learned of an order granting WFG's motion for entry of default judgment. Within 10 days of receiving notice, DataQuick moved to set aside the default, to vacate the default judgment, and for other relief. The trial judge denied all relief. The issues presented here are:

1. Was it an abuse of discretion for the trial court to refuse to set aside the entry of default despite uncontroverted evidence of excusable neglect, prompt action following actual notice of suit, several meritorious defenses, and lack of prejudice to the plaintiff?

2. Was it an abuse of discretion for the trial court to refuse to grant relief from a default judgment awarding unliquidated damages without a hearing (or notice of same) and without evidence or any independent inquiry?

3. In a contract action between two sophisticated corporations, did the trial court abuse its discretion when it failed to set aside a default judgment that included treble damages under the South Carolina Unfair Trade Practices Act without any allegation or evidence supporting a public impact or a willful or knowing violation of that statute?

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[1] As noted in the Statement of the Case, the suit named both DataQuick Lending Solutions, LLC and DataQuick Lending Solutions, Inc. as defendants, but these entities are one in the same because the corporate form was converted from a corporation to a limited liability company on December 23, 2014. (LaGatta Aff. ¶ 3.) The nominal defendants are collectively referenced herein as "DataQuick" and/or "Appellant."

STATEMENT OF THE CASE

WFG filed this suit in Richland County on August 5, 2016, alleging that DataQuick as underwriting agent breached its Agency Agreement with WFG by improperly performing underwriting obligations with respect to unspecified "real estate located in various states throughout the United States of America," and damaging WFG in the form of unspecified "loss, expense, charges, attorney's fees, allocated loss adjustment expenses and other damages," which were not calculated but asserted to be "in excess of $25,000." (Compl. pp. 2-3.)[2] The Complaint also attached a list of 47 purported internal claim numbers with no associated dollar amounts or other details. (Compl. Ex. A.)

WFG caused CT Corporation (DataQuick's then-statutory agent) to be served with the Summons and Complaint on August 10, 2016, for DataQuick Lending Solutions, LLC (Affidavit of Service), and on August 11, 2016 for DataQuick Lending Solutions, Inc. (Affidavit of Service). WFG applied for, and the trial court entered, DataQuick's default in October 2016. (Order for entry of default).

Eleven months later, on September 15, 2017, WFG filed a Notice of Motion and Motion for Default Judgment with Attorney's Fees along with exhibits including an Affidavit as to Attorneys Fees, an Affidavit of Amount Due, a proposed order for a default judgment, and a proposed Form 4. (Mot. Default J.) That same day, WFG purported to serve DataQuick Lending Solutions, LLC by regular U.S. Mail to Maples Fiduciary Services (Delaware) Inc. ("Maples") in Delaware as well as by regular mail to CT Corporation in Delaware. WFG also purported to serve DataQuick Lending Solutions, Inc. by regular mail through CT Corporation in South Carolina. (Certificate of Service.)

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[2] Based on the same conduct, WFG alleged five causes of action including negligence and violation of the South Carolina Unfair Trade Practices Act. (Compl. pp. 2-6.)

On September 19, 2017, only four days after WFG filed its motion and without any hearing, the trial court signed the proposed order submitted by WFG without modification, and entered a default judgment in the amount of $3,912,550.47. (Order for Default Judgment.) This judgment amount consisted of $1,304,183.49 in damages, including costs and attorneys' fees, which the trial court trebled under the South Carolina Unfair Trade Practices Act to $3,912,550.47. (Order p. 2.)

WFG served the Order for Default Judgment on DataQuick's statutory agent (Certificate of Service), and on October 12, 2017, DataQuick served a Motion for New Trial, to Alter or Amend Judgment, and for Relief from Judgment, on the grounds that it first received actual notice of the lawsuit ten days earlier, on October 2, 2017. (Mot. for Relief from Judgment.)

Ten months later, on August 21, 2018, the trial court heard DataQuick's Motion. (Tr. p. 1.) Both parties submitted a supporting memorandum and affidavit. (Mem. Supp. Mot.; Mem. Opp'n Mot.; Fliss Aff.; Walker Aff.) The trial court received proposed orders from each of the parties (Emails submitting proposed orders), and on September 19, 2018, the trial court denied DataQuick's Motion and signed the proposed order submitted by WFG without revision. (Order Denying Motion.) DataQuick timely filed and served its Notice of Appeal on October 12, 2018. (Notice of Appeal.)

STATEMENT OF FACTS

DataQuick never received the Summons and Complaint from CT Corporation because it had ceased business operations in 2014 (two and a half years earlier, following the sale of all of its assets), no longer had employees, and inadvertently failed to update its address with CT Corporation. (LaGatta Aff. ¶ 5; Fliss Aff. ¶¶ 4, 6, 9, 12, 13.) Thus, CT Corporation forwarded

the Summons and Complaint to old notice addresses that no longer belonged to DataQuick.[3] (LaGatta Aff. ¶ 10; Fliss Aff. ¶¶ 12-18.)

On October 10, 2016, WFG purported to serve CT Corporation as registered agent for DataQuick with a non-notarized Affidavit of Default and with a proposed Order of Entry of Default by regular mail with the U.S. Postal Service. (Certificate of Service.) DataQuick did not receive the affidavit or proposed order because CT Corporation again sent the filing to the old addresses. (LaGatta Aff. ¶ 10; Fliss Aff. ¶¶ 12-18.) On October 19, 2016, a judge signed the proposed order, and both the signed Order of Entry of Default and affidavit were filed on October 27, 2016. (Affidavit of Default; Order of Entry of Default.) The record reflects no attempt by WFG to serve DataQuick with the Order of Entry of Default after it was entered.

After obtaining the entry of default, WFG did nothing for eleven months at which time it filed a motion for a default judgment. (Mot. Default J. and Order Information Form and Coversheet.) The coversheet form represented that no hearing was needed (Order Information Form and Coversheet), and the three-page motion falsely asserted that there were "liquidated" damages of $1,299,888.99, plus costs and attorneys' fees of $4,294.50. (Mot. Default J. p. 2). However, neither the Complaint nor the Motion for Default Judgment—nor the Affidavit of Amount Due—contained any calculation of damages or any data, documents, or information from which a calculation of damages could be made or assessed by a court. (Compl.; Mot. Default J.; Affidavit of Amount Due.) The Affidavit of Amount Due was given by WFG's

[3] CT Corporation's contact information for DataQuick included (1) James Keglovits, a former agent of DataQuick, at an email domain that no longer was in use; and (2) Floricia Orozco, an employee of an accounting firm, HCVT, that was involved in DataQuick's 2014 sale of assets to Stewart Title. When reached by DataQuick to determine what had happened with any notices sent through CT Corporation to Ms. Orozco, HCVT informed DataQuick that she was no longer employed by the accounting firm and could not determine what, if anything, happened to the notices CT had sent to her email account. (Fliss Aff. ¶¶ 14-18.)

"National Claims Counsel" and asserted a total lump sum amount of damages based upon the averment that he "was familiar with the forty-seven claim accounts enumerated in Exhibit A of the Complaint, including the liquidated amounts due thereunder." (Affidavit of Amount Due p. 1.) The referenced Exhibit A of the Complaint contained only a list of internal claim numbers with no supporting data, dollar amounts, or other information. (Compl. Ex. A.) The Agency Agreement was not attached to the Complaint, and none of the relevant provisions were quoted. (Compl.) The Complaint did not allege any specific amount of damages (*id.*), and the record lacks any information concerning the calculation of damages. As such, there was no support for WFG's representation to the trial court that the damages it claimed were liquidated.

The motion also asserted, without citation to any statute or case authority, that "Plaintiff is entitled to treble damages . . . for violations of the South Carolina Unfair Trade Practices Act." (Mot. Default J. p. 2.) Neither the Complaint nor the Motion for Default Judgment described any evidence of, or made any factual allegation respecting, a "willful" or "knowing" violation of the Unfair Trade Practices Act. (Compl.; Mot. Default J.) Neither included any basis entitling WFG to trebled damages. (Compl.; Mot. Default J.) The motion also sought attorneys' fees, (Mot. Default J.), thereby triggering SCRCP 55(b)(3), which requires a damages hearing under Rule 55(b)(2) unless "no objection is filed by the opposing party within 10 days of service of such motion and affidavit."

Despite the lack of any basis for an award of liquidated damages; the absence of any allegation, evidence, or finding supporting an award of treble damages; and the fact that the ten-day objection period of Rule 55(b)(3) had not passed, the trial court granted the motion four days after it was filed and entered a judgment against DataQuick in an amount close to $4 million that

not only included trebled damages but also included attorneys' fees (also trebled). (Order for Default Judgment.)

On October 2, 2017, WFG filed a Certificate of Service indicating that on September 27, 2017, it forwarded the order entering default judgment to Maples and CT Corporation by regular mail. (Certificate of Service.) This time, DataQuick's new agent for service of process in Delaware, Maples, did forward the order entering a default judgment to DataQuick, providing DataQuick with its first actual notice of the lawsuit on October 2. (LaGatta Aff. ¶¶ 8-10; Fliss Aff. ¶¶ 19-25.)[4] Ten days later, on October 12, DataQuick served a Motion for New Trial, to Alter or Amend Judgment, and for Relief from Judgment. (Fliss. Aff. ¶ 26; Motion.)

Through no fault of DataQuick, the trial court delayed a hearing on DataQuick's motion for 10 months until August 21, 2018. (Tr. p. 1.)[5] DataQuick filed a memorandum and affidavit in support of its motion over a month in advance of the hearing (Mem. Supp. Mot.; Fliss Aff.), whereas WFG waited until one hour before the hearing to file its memorandum and affidavit, which it had not served. (Opp'n Mem.; Walker Aff.)

At the hearing, the trial judge immediately demonstrated his tenuous grasp of the record by stating that DataQuick filed a motion four days after an entry of default. (Tr. p. 4.) As counsel attempted to clarify that the motion was made ten days following receipt of notice of a

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[4] Although during wind-down DataQuick had changed registered agents in Delaware (but not South Carolina) from CT Corporation to Maples (and provided correct contact information to Maples), DataQuick did not receive any document from Maples or CT Corporation until Maples forwarded the order entering default judgment on October 2, 2017. (LaGatta Aff. ¶¶ 4-10; Fliss Aff. ¶¶ 10-25.) Maples acknowledged to DataQuick that it received the Motion for Default Judgment on September 18, 2017, and further acknowledged that it has no record of sending it to DataQuick. *Id.*

[5] The hearing initially was scheduled in July 2018, and DataQuick gave notice of the hearing, including Judge Manning's requirement to submit a memorandum "as soon as possible" prior to the hearing. (Notice of Hearing.)

default judgment, the trial judge interrupted to ask whether DataQuick could count to thirty, again demonstrating an incorrect understanding of the facts and issues—as DataQuick's affidavits had made clear that it lacked actual notice of the suit until after the default judgment already had been entered. (Tr. p. 4; Fliss Aff. pp. 2-3; LaGatta Aff. pp. 1-2.)

The trial court then acknowledged that it had not conducted any inquiry into WFG's representation that its damages were "liquidated" or the conclusory representations of its "National Claims Counsel" regarding the claims, records, or valuations underlying them. (Tr. p. 13 ll. 11-13 ("That's why I signed the order. They said it was liquidated. I don't know if it was or not. That's what the order said.").) The court simply signed the proposed order for default judgment drafted by WFG's counsel without modification or analysis. (*Id.*, Proposed Order for Default Judgment; Order for Default Judgment.) Despite uncontroverted evidence that the default judgment was invalid because it was entered for an unliquidated amount without a hearing, the trial judge again signed WFG's proposed order denying DataQuick's motion for relief without a single revision. (Proposed Order Denying 60(b) Motion; Order Denying 60(b) Motion.) This was so even though WFG conceded at the hearing that the trial court entered the order without waiting for the mandatory ten-day objection period to run. (Tr. p. 21.) The trial court's only response was: "I hope that nobody holds the court responsible for being efficient." (Tr. p. 21.) The trial court ultimately cut off DataQuick's counsel mid-sentence and concluded the hearing by requesting proposed orders. (Tr. p. 22.)

As demonstrated by its statements at the hearing, by its wholesale adoption of a faulty proposed order lacking evidentiary support and controlled by errors of law, and by its failure to evaluate the factual basis for the relief sought or address the relevant legal standards, the trial court abused its discretion and must be reversed on appeal.

STANDARD OF REVIEW

The trial court's failures to set aside the entry of default and to grant relief from the default judgment are both reviewed for abuse of discretion. "An abuse of discretion occurs when the order was controlled by an error of law or when the order is without evidentiary support." *Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 101-02 (Ct. App. 2004). "'Determining the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law de novo.'" *South Carolina Lawyers Weekly ex rel. Dolan Pub. Co. v. Wilson,* 423 S.C. 144, 148, 813 S.E.2d 527, 529 (Ct. App. 2018) (alteration in original; quoting *Lambries v. Saluda Cty. Council,* 409 S.C. 1, 7, 860 S.E.2d 785, 788 (2014)).

"It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981); *CEL Prods., LLC v. Rozelle*, 357 S.C. 125, 130, 591 S.E.2d 643, 645 (Ct. App. 2004) ("When a trial judge is vested with discretion but his ruling reveals no discretion was in fact exercised, an error of law has occurred."); *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216-17 (Ct. App. 1997) ("This decision in and of itself does not show the judge exercised discretion, especially where the Supreme Court has articulated the legal analysis which should be utilized." (citing *Smith*, 276 S.C. at 498, 280 S.E.2d at 202 ("[T]he mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis that discretion was exercised.")).

ARGUMENT

There is no contention—let alone evidence—that DataQuick was actually aware of this litigation and either deliberately or negligently failed to act. Indeed, the record is plain that DataQuick first received actual notice of the lawsuit in October 2017 and served detailed papers

within 10 days explaining what had transpired and seeking relief. In the first quarter of 2014—nearly two and a half years before this suit was filed—DataQuick had sold its assets to a different company (Stewart Title) after which DataQuick ceased doing business while its affairs were wound up and it had no employees.[6] The DataQuick employee who had been the contact for CT Corporation was no longer employed by DataQuick (nor was anyone else), and DataQuick neglected to designate a successor during its wind-down period. Thus, when this action was filed in the latter half of 2016, CT Corporation sent the Summons and Complaint to the former employee who was not there to receive it. DataQuick acknowledged below that this oversight—though inadvertent—was a form of neglect. But under the circumstances, and consistent with applicable law, DataQuick had a right to have the trial court carefully consider whether that neglect was excusable. The record amply demonstrates that the trial judge displayed impatience rather than careful discretion. At the very beginning of the hearing below he asked DataQuick's counsel: "Let me ask you this. Your client have trouble counting to thirty?" (Tr. p. 4 ll. 12-13.) When DataQuick's counsel attempted to respond, the Court cut him off: "MR. WILSON: Your Honor, our client --- THE COURT: This is the question. Does your client have trouble counting up to thirty?" (*Id.*)

That, of course, was not the pertinent question; DataQuick's "neglect" was undisputed. The central issue—never addressed by the trial court—was whether, following its cessation of business operations, DataQuick's inadvertent failure to appoint someone new as a point of contact for CT was *excusable*. DataQuick's counsel respectfully tried to refocus the court despite the judge's staccato interjections. Finally, the court assured DataQuick's counsel he

[6] As shown in the court below, once DataQuick's assets had been sold in March 2014, it ceased doing business. Because DataQuick had no employees after the asset sale, it submitted affidavits from attorneys employed by a corporate parent whose affiliate owns DataQuick. (Fliss Aff. ¶ 2.)

would allow him to proceed: "I'll let you finish. Go ahead." (Tr. p. 5 l. 23.) Yet when DataQuick's counsel attempted to discuss pertinent case authority that had been cited in the DataQuick brief, the trial court continued to interject with questions that suggested the court was unfamiliar with DataQuick's brief, and the cases therein cited. (*E.g.,* Tr. p. 7 ll. 3-8 ("And there is case law that says that --- THE COURT: What case law? Name two cases. MR. WILSON: Yes, Your Honor. THE COURT: Do you cite it in your memo? MR. WILSON: Yes, sir, they're cited in the memo. THE COURT: All right.").)

When DataQuick's counsel sought to explain that even if the original default were not set aside, at minimum an evidentiary hearing was required to liquidate the claimed damages, the court again interrupted: "THE COURT: That's why I signed the order [of default judgment]. They [WFG] said it was liquidated. *I don't know if it was or not.* That's what the order said." (Tr. p. 13 ll. 11-13 (emphasis added).) The trial court thus acknowledged that it failed to even evaluate the veracity of WFG's unsupported (and false) assertion that the damages were liquidated—much less independently assess whether the calculation was appropriate or whether trebling was warranted under applicable law. Rather than actually exercise its discretion, the court simply signed WFG's order without carrying out its judicial role.

I. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SET ASIDE THE ENTRY OF DEFAULT DESPITE UNCONTROVERTED EVIDENCE OF EXCUSABLE NEGLECT, PROMPT ACTION FOLLOWING ACTUAL NOTICE OF SUIT, SEVERAL MERITORIOUS DEFENSES, AND LACK OF PREJUDICE TO THE PLAINTIFF.

The trial court abused its discretion in refusing to set aside the default. The court appeared more interested in learning whether DataQuick could "count to thirty" than in examining the core issue: whether it was it excusable neglect for a dissolving company—no longer doing business and with no employees—to forget to appoint a replacement agent for receiving notice of lawsuits. The order denying relief states only that "DataQuick's registered

agents had actual knowledge of instant lawsuit and DataQuick *presented no excuse for this internal negligence*." (Order Denying Motion p. 4 (emphasis added).) That assertion is flatly contrary to the record. DataQuick submitted unrebutted, detailed evidence explaining how and why the mistake was made. (Fliss Aff. ¶¶ 6-25.)

A trial court has discretion to set aside a default where there is proof of mistake, inadvertence, surprise, or excusable neglect. S.C. R. Civ. P. 60(b); *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 606, 681 S.E.2d 885, 888 (2009) (Toal, C.J.). "The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge." *Id.* Lacking any authority to support its position that DataQuick's mistake should not be excused, WFG resorted to *ipse dixit:* "That is because there is no excuse for this internal negligence—this is a clear-cut case of inexcusable neglect." (Opp'n p. 3.) But whether relief from mistake should have been granted is governed by South Carolina law, not WFG.

"In determining whether to grant a motion under Rule 60, the trial judge should consider: (1) the promptness with which relief was sought, (2) the reasons for failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other party." *Mictronics, Inc. v. S.C. Dept. of Rev.*, 345 S.C. 506, 510-511, 548 S.E.2d 223, 226 (Ct. App. 2001). The trial court must examine those factors bearing in mind "South Carolina's policy favoring the disposition of issues on their merits." *Id.* "[W]here there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief." *Id.* (internal quotations omitted). Here, consideration of each of the factors should have caused the trial judge to grant relief.

A. Appellant Acted Promptly Upon Receiving Actual Notice of Suit.

Mictronics directs a reviewing court to first consider the moving party's promptness in seeking relief. The record is clear that as soon as DataQuick actually learned of this lawsuit, it

acted immediately. Within 10 days of learning of the suit, DataQuick located and retained counsel who served and filed a motion for relief and affidavit and, prior to the hearing, submitted a thorough memorandum as well as a *second* affidavit laying out the pertinent facts (Fliss Aff.; LaGatta Aff.). WFG's argument that DataQuick had notice of the suit much earlier because its statutory agent—CT Corporation—had been served begs the very question that the trial judge declined to reach. Where the defendant does not have *actual* notice of the suit because of an inadvertent clerical error, its promptness can only be measured from when it actually receives notice. *See, e.g., Ex Parte Carter*, 422 S.C. 623, 631, 813 S.E.2d 686, 690 (2018) (holding that the trial court abused its discretion in finding a Rule 60 (b) motion to be untimely when filed 6 days after notice and 97 days after final order, and citing *Coleman v. Dunlap*, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992) to provide "where Rule 60(b) motion is filed shortly after the movant becomes aware of the basis therefor and there is no evidence of unreasonable delay, the motion is timely")[7]; *see also Williams v. Watkins*, 384 S.C. 319, 326, 681 S.E.2d 914, 917 (Ct. App. 2009) (finding a motion made within 33 days after the judgment and "as soon as he discovered ... a judgment had been entered" to be sufficient); *see also* 10A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2695 (4th ed.) (relief from default more appropriate "when [the] defendant presents evidence that he received no actual notice of the suit in time to answer") ("Wright & Miller").

Because the evidence is uncontroverted that DataQuick acted within 10 days of receiving actual notice of the lawsuit and within 23 days following entry of the judgment, it was an abuse of discretion for the trial judge to enter WFG's form of order, with no modification or inquiry,

[7] In *Coleman*, the motion was filed on November 17, 1988, following notice obtained at "depositions . . . taken in November 1988." *Coleman*, 306 S.C. at 495, 413 S.E.2d at 17. The date of any deposition was unspecified, and the implication is that a motion within 16 days meets the promptness standard.

"find[ing] that DataQuick lacked promptness." (Order p. 5.) Indeed, there is no case holding that filing a Rule 60(b) motion only ten days after the notice of entry of a default judgment lacks promptness. To the contrary, as cited above, multiple cases hold that motions made within similar time periods following notice are sufficiently prompt. The trial court's order only made reference to the 14 month period between the service of the Complaint and the filing of the Rule 60(b) motion, (*id.*), which was not the relevant period and was the result of WFG's own delay in filing a motion for a default judgment. Thus, the order is without evidentiary support and controlled by an error of law. In sum, the trial court abused its discretion in finding against DataQuick on the first factor.

B. Appellant's Delay Resulted from Its Failure to Update Its Registered Agent in South Carolina, Where It Had Ceased Doing Business.

The second *Mictronics* factor the trial court was required to consider was the reason for DataQuick's failure to promptly respond to the Complaint. Again, there is no dispute that the only reason DataQuick failed to act was its failure to receive actual notice. As soon as it did, it acted. This was not a situation in which DataQuick sought to hide from lawsuits, consciously chose to default, or sat on its rights despite actual knowledge of the lawsuit. Rather, it had ceased doing business, had sold its assets (including those relevant to its business relationship with WFG), and lacked any employees after March 2014. During its wind-down, DataQuick fortuitously switched its registered agent in its home state of Delaware from CT Corporation to Maples in December 2016, which resulted in it receiving service of the order on October 2, 2017. (Fliss Aff. ¶¶ 11, 19.) Once it was on actual notice, DataQuick moved with alacrity to address the matter.

DataQuick's failure to update its address with CT Corporation was unintentional and not the result of a bad faith attempt to avoid lawsuits. (Fliss Aff. ¶ 13.) The fact that DataQuick

appointed a new registered agent in Delaware that had a correct contact address for DataQuick clearly undermines any argument that it was acting in bad faith or trying to avoid being located and served with process. Indeed, DataQuick's actions are clear evidence that the opposite is true—and DataQuick's good faith arguably is the most important factor in determining whether a party's neglect is "excusable." *See* 10A Wright & Miller § 2693 (4th ed.) ("[T]he good or bad faith of the parties may be one of the most important factors in deciding motions [for relief from default].").

The trial court abused its discretion by failing to consider or address in its order the undisputed factual record presented by DataQuick demonstrating its excusable neglect and good faith, and the cited decisions holding that excusable neglect was established in similar cases. Instead, the trial court's order (drafted by WFG) not only was unsupported by evidence—it also was directly contrary to the uncontroverted factual record before the court. In its order, the trial court relied solely on the fact that service was made upon DataQuick's registered agents, (Order p. 4), a conceded fact that did not obviate the question the trial court was required to address: whether DataQuick's having failed to update its registered agent with current contact information, after it had ceased doing business in South Carolina, was excusable. The order also erroneously states "DataQuick presented no excuse for this internal negligence," (*id.*), yet DataQuick had submitted unrebutted evidence explaining how and why the mistake was made, (Fliss Aff. ¶¶ 6-25). DataQuick also cited to federal cases interpreting the standard under the equivalent federal rule[8] that concluded that a mistake in updating a service agent satisfies the excusable neglect standard. *Winslow Marine, Inc. v. J. Supor & Son Trucking & Rigging, Inc.*, No. 2:15-cv-312-NT, 2016 WL 7235670, at *2-3 (D. Me. Dec. 14, 2016); *Miller v. Clear*

[8] *See Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) (noting reliance on decisions interpreting equivalent Federal Rules of Civil Procedure).

Channel Comms., Inc., No. 6:07-89-HMH, 2007 WL 2692180 (D.S.C. Sept. 12, 2007) (analyzing excusable neglect under Fed. R. Civ. P. 55(c)). Thus, the trial court's finding that DataQuick failed to present an excuse is without evidentiary support.

The trial court's order also was controlled by multiple errors of law. For example, the trial court ruled that "DataQuick has failed to provide the Court with conclusive proof to meet the excusable neglect standard provided by Rule 60," relying upon *McClurg v. Deaton*, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008), *aff'd* 395 S.C. 85, 716 S.E.2d 887 (2011). (Order pp. 4-5.) But *McClurg* does not impose a "conclusive proof" standard upon the Rule 60(b) determination. Instead, on the facts before it, *McClurg* at best held that when a defendant challenges the efficacy of service, *lack of service* must be established by "conclusive proof" to rebut evidence that the defendant signed a receipt accepting service (creating a presumption that the rules of service were not violated). *McClurg*, 380 S.C. at 577, 671 S.E.2d at 95. Here, DataQuick did not contest that WFG complied with the rules of service. The issue was whether DataQuick supported the second *Mictronics* factor with reasons why it failed to file a timely answer to the Complaint.

No case has imposed a "conclusive proof" burden upon such an inquiry under Rule 60(b) as the trial court did. Rather, the Rule 60(b) standard requires that DataQuick make a "particularized showing" of its excusable neglect. *Sundown Operating Co.*, 383 S.C. at 608, 681 S.E.2d at 888 (2009). DataQuick made a detailed, specific showing, supported by evidence, to the trial court that it met each of the four factors considered on a Rule 60(b) motion. In holding that DataQuick's burden was one of "conclusive proof" rather than a "particularized showing," the trial court's decision was controlled by an error of law and constitutes an abuse of discretion.

The trial court's decision also was controlled by an error of law in relying on *Richardson v. P.V. Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009) and *Williams v. Vanvolkenburg*, 312 S.C. 373, 440 S.E.2d 408 (Ct. App. 1994), for the proposition that "courts have refused to lift default and judgment even when the neglect was not the actual neglect of the Movant (in this instance, DataQuick), but the neglect was imputed to it through its insurer or attorney." (Order p. 5.) These two cases involved defendants who unequivocally received *actual* notice of the lawsuit and are thus inapposite. *Richardson* involved a defendant hotel where process was delivered directly to the front desk of the hotel and where the person at the front desk called the owner who then told the process server over the phone to leave the papers at the front desk. 383 S.C. at 613, 682 S.E.2d at 264-65. The papers were then forwarded to the insurer who failed to answer. *Id.* at 614, 682 S.E.2d at 265. Similarly, *Williams* involved service upon the defendants who gave the papers to their lawyer who then failed to answer. 312 S.C. at 374, 440 S.E.2d at 409. In both cases, the defendant had actual notice of the suit. Here, by contrast, it is undisputed that DataQuick lacked actual knowledge of the suit; neither *Richardson* nor *Williams* supports the trial court's conclusion that DataQuick's failure to update its address was inexcusable. Indeed, the only case law before the court that directly addressed this issue held that such neglect was excusable. (Mot. for New Trial pp. 5-9.)

C. The Record Supports a Finding that DataQuick Had Several Meritorious Defenses.

The third *Mictronics* factor is whether there is a meritorious defense. "[T]he standard for finding a party raised a meritorious defense is a low one." *McClurg v. Deaton*, 395 S.C. 85, 94, 716 S.E.2d 887, 892 (2011) (Toal, C.J., dissenting) (citing *Mictronics*). "To establish a meritorious defense, a party is not required to show an absolute defense." *Id.* "[A] meritorious defense 'need be only 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.'" *Watkins,* 384 S.C. at 326, 681 S.E.2d at 918. "[T]he key inquiry is merely whether the materials submitted to the trial court reflect, *in any way*, that a contest on the merits might render different results than the result reached by the default judgment." *McClurg*, 395 S.C. at 94, 716 S.E.2d at 892 (Toal, C.J., dissenting) (emphasis added). DataQuick met that standard here.

First, DataQuick identified multiple affirmative defenses in its motion, memorandum, affidavits, and argument at the hearing, including that (1) there was a lack of personal jurisdiction and/or improper venue;[9] (2) the terms of the Agency Agreement would limit the obligations and liability of DataQuick for its conduct before the 2014 sale to Stewart Title; (3) a violation of the South Carolina Unfair Trade Practices Act (SCUTPA) could not be premised upon a breach of contract as a matter of law per *Ardis v. Cox*, 314 S.C. 512, 519, 431 S.E.2d 267, 271 (Ct. App. 1993); and (4) there was no evidence or finding that DataQuick's conduct had the potential for repetition, or constituted a willful or knowing violation of the SCUTPA (which is required in order to treble damages under S.C. Code Ann. § 39-5-140(a)). (Mot. at 10; Fliss Aff. ¶ 27.)

Second, WFG did not attach to its Complaint the Agency Agreement on which it relies, nor did its Complaint set forth any of the governing contractual language. Undoubtedly, the first

[9] WFG's Complaint alleged that "Defendant have [sic] consented to venue and personal jurisdiction in Richland County pursuant to written agreement." Compl. ¶ 4. Were there such a writing, WFG chose not to identify, attach, or quote it. The Complaint did not allege that any of the 47 claims arose in South Carolina, nor was there any such evidence submitted. The September 19, 2018 Order signed by the court (and drafted by WFG) states: "DataQuick wrote title policies in South Carolina which conferred personal jurisdiction when its South Carolina registered agent was served with process, negating any unsupported defense claims of lack of personal jurisdiction and venue." (p. 7). No evidence supported this conclusion. WFG may prefer to litigate claims in its home state, but its preference cannot confer venue where none exists.

order of business in any breach of contract case is to analyze whether the contract sued on supports the claims being made, and whether the contract contains limitations of liability (or damages), allocations of risk, limitations of warranty, forum selection clauses, and the like. Knowing that DataQuick no longer had possession of the contract sued upon (Fliss Aff. ¶ 10), WFG chided DataQuick for not knowing what was in the contract—a perfect Catch-22. (Mem. Opp'n p. 7.) With DataQuick in the dark as to the contract on which it was being sued, WFG successfully persuaded the trial judge to assume that its contents were entirely irrelevant. (Order p. 2.) Although properly alleged *facts* are deemed established by the default, *conclusory allegations* are not, as has been the law in South Carolina for more than a century. *E.g., Gillian v. Gillian*, 65 S.C. 129, 43 S.E. 386, 387 (1903) ("The defendant, by . . . suffering a default to be taken against him, admits the truth of the allegations set out in the plaintiff's . . . complaint . . . . But the default does not admit that the facts pleaded are sufficient to constitute a cause of action . . . . Nor does it admit an allegation which constitutes a mere conclusion of law."); *see also Mut. Sav. & Loan Ass'n v. McKenzie*, 274 S.C. 630, 631-35, 266 S.E.2d 423, 424-26 (1980) (reversing denial of motion to set aside default judgment because facts alleged failed to establish elements of claim pleaded); *Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 254, 321 S.E.2d 194, 196 (Ct. App. 1984) ("We agree that [defendant]'s default did not preclude him from challenging the sufficiency of the complaint as a basis for judgment."). Here, the trial court did not even look at the contract; instead, it assumed the conclusion that it contained no exculpatory provisions, risk allocation, or limitation of liability. If the default is set aside, as it should be, DataQuick will obtain the contract and present *all* of its contractually-based defenses.

Third, DataQuick was deprived of the opportunity to demonstrate the excessiveness of the damages asserted by WFG. As discussed in greater detail *infra*, the South Carolina Unfair

Trade Practices Act may not be used to treble a damages award in a private contractual dispute between sophisticated commercial parties (as here). The record clearly demonstrates that the court committed a further error of law by trebling damages. Although the South Carolina Supreme Court has not expressly so held, it has signaled that, in keeping with neighboring jurisdictions (both state and federal), that a successful Rule 60(b) showing can be made on the basis of "a meritorious defense to the amount of damages awarded" in addition to those challenging liability itself. *McClurg*, 395 S.C. at 97, 716 S.E.2d at 893 (Toal, C.J., dissenting). The fact that the trial court awarded such a significant sum without inquiry is also a factor that is considered significant in deciding whether the lifting of a default is appropriate. *E.g.,* 10A Wright & Miller § 2693 (noting the "reluctance to permit [default judgments] when large sums of money are claimed," the "preference for a trial on the merits," and the "policy of liberality toward motions for relief from default entries and default judgments" under Federal Rules 55(c) and 60(b), and that "all doubts should be resolved in favor of the party seeking relief").

Fourth, the record supports the additional meritorious defense that the limitations period of three years bars WFG's claims. S.C. Code Ann. § 15-3-530(1). WFG waited to file suit until some 2.5 years after DataQuick *stopped doing business under the Agency Agreement or otherwise*. (Fliss Aff. ¶¶ 4, 6, 9.) It is thus highly likely that at least some—if not all—of the 47 claims (identified in an attachment to the Complaint by file number and nothing else) accrued more than three years before WFG filed suit. The Complaint does *not* allege that any of the alleged 47 breaches occurred within three years of the filing date. Instead, the Complaint is completely silent on this critical point—even though it describes a business relationship that started in 1994. Compl. ¶ 6. For all the trial court knew, it was entering default on claims that were time-barred. But the court made no inquiry on this important point. It was improper to

assume timeliness when the Complaint itself made no such allegation and where timeliness was an obvious question that should have been asked—and would have been asked had there been the required damages hearing. For the present purpose, however, the likely existence of complete, statutory defenses to WFG's claims was a factor the trial court was required to, but did not, consider in refusing to lift the default.

For all of these reasons, the trial court's determination that "DataQuick has shown no meritorious defense," (Order p. 8), was an abuse of discretion, as multiple defenses were supported by affidavit and by the record. The standard for presenting a meritorious defense is a low bar merely requiring a prima facie showing of a defense "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." *Watkins,* 384 S.C. at 326, 681 S.E. 2d at 918. This standard was met with respect to multiple meritorious defenses in the instant case, and the trial court's order otherwise was without evidentiary support and controlled by an error of law.

D. Respondent's Prejudice Was Limited to Being Unable to Retain Its Erroneous Judgment, Which Is Not Cognizable.

The fourth *Mictronics* factor also supported setting aside the default. The order denying relief contradicted the record regarding prejudice, stating: "With over two years having elapsed since service of the Summons and Complaint on DataQuick and the Hearing on this Motion for Relief, WFG would suffer significant prejudice due to the dilatory practices and failures of DataQuick." (Order pp. 5-6.) That statement, crafted by WFG, (Proposed Order), ignored that WFG *itself* waited 2.5 years after DataQuick ceased doing business to file suit, then waited over a year after filing the Complaint before seeking to have a default judgment entered in September 2017—the month before DataQuick filed its motion for relief—and that the court did not

schedule the hearing on DataQuick's motion for relief until 10 months after it was filed. (Tr. p. 1.) DataQuick was not responsible for any of those delays. *Cf. Shannon v. Freeman*, 117 S.C. 480, 109 S.E. 406, 409 (1921) (party "cannot take advantage of [a] delay" of its own making) (citing *Cheney v. Libby*, 134 U.S. 68, 78 (1890)).

The sole prejudice to WFG is that it would lose a windfall obtained by falsely claiming—under oath—that its damage claim was "liquidated." (Mot. Default J. p. 2; Dondanville Aff. ¶ 2.) That is not legal prejudice recognized by the cases or commentators deemed reliable by the courts of this state. *E.g.,* Moore, et al., *Moore's Federal Practice* § 55.70(2)(c) (3d ed. 2010) ("Prejudice is not significant unless it is something greater than would be experienced by the ordinary litigant in being required to litigate on the merits. Some delay will necessarily result when a default is reopened, but delay in gaining judgment is not considered by itself[] to be undue prejudice that would justify denying relief."); *Watkins*, 384 S.C. at 327, 681 S.E.2d at 918 ("Finally, we find the degree of prejudice Williams will suffer if relief is granted is not so high as to outweigh the other factors, and we note the law favors the resolution of disputes based upon all parties having their day in court."). This is particularly true, as here, "when large sums of money are claimed." 10A Wright & Miller § 2693 (4th ed.). Were the default set aside, WFG would have a normal opportunity to prove its case. If it prevailed, it would be able to seek the full extent of any financial harm it suffered, including harm resulting from the passage of time and its litigation expenses. Understandably, WFG prefers its windfall, but that preference has no legal significance. The trial court abused its discretion in finding that "WFG would suffer significant prejudice due to the dilatory practices and failures of DataQuick" (Order p. 5-6) because that finding was directly contrary to the evidence and contrary to law regarding

cognizable prejudice—the uncontroverted record showed that DataQuick sought relief less than two weeks after receiving actual notice of suit, and acted promptly on all further proceedings.

In sum, the trial court held that DataQuick could satisfy none of the four *Mictronics* factors, but its conclusions with respect to each of the four factors were without evidentiary support or controlled by one or more errors of law. Rather than exercise its sound discretion, the trial judge adopted uncritically the skewed (and erroneous) order crafted by WFG. In ruling that DataQuick was not entitled to have the default judgment and entry of default set aside, the trial court failed to exercise the discretion given to it, thereby abusing it. "It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly." *Smith,* 276 S.C. at 498, 280 S.E.2d at 202. This Court should reverse and direct the entry of an order vacating the default, allowing DataQuick to respond to WFG's Complaint and defend the action on the merits.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT RELIEF FROM A DEFAULT JUDGMENT THAT HAD AWARDED UNLIQUIDATED DAMAGES (OR NOTICE OF SAME) WITHOUT A HEARING AND WITHOUT EVIDENCE OR ANY INDEPENDENT INQUIRY.

WFG knowingly misrepresented to the trial court that its claims for damages were liquidated, yet in refusing to set aside the default, the trial court accepted that assertion despite confessing its lack of knowledge or independent inquiry regarding that representation: "That's why I signed the order. They [WFG] said it was liquidated. I don't know if it was or not. That's what the order said." (Tr. p. 13 ll. 11-13.) *See also* S.C. R. Civ. P. 60(b)(3) (default may be lifted due to misrepresentation). Respondent's claims for damages were unliquidated, and the trial court's failure to hold a hearing thereon before entering a default judgment resulted in a judgment that is void. *Dymon, Inc. v. Hyman*, 305 S.C. 170, 172, 406 S.E.2d 388, 389 (Ct. App. 1991) ("The order entering [judgment] was void since the trial court issued the order without the

required notice."). Accordingly, the trial court erred in failing to grant DataQuick's motion for relief under Rules 5(a), 55(b), and 60(b).

A. Respondent's Damages Were Not "Liquidated".

Damages are "liquidated" where the amount is "fixed, has been agreed upon, or is capable of ascertainment by mathematical computation or operation of law." *Wells Fargo Bank v. Marion Amphitheatre, LLC* 408 S.C. 87, 91, 757 S.E.2d 557, 559 (Ct. App. 2014) (quoting *Black's Law Dictionary* 839 (5th ed. 1979)); *see also Beckmann Concrete Contractors, Inc. v. United Fire & Cas. Co.*, 360 S.C. 127, 131-32, 600 S.E.2d 76, 78 (Ct. App. 2004) ("*Black's Law Dictionary* defines liquidated damages as '[a]n amount contractually stipulated' in contrast to unliquidated damages which are '[d]amages that . . . cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury.'" (quoting *Black's Law Dictionary* 395-97 (7th ed. 1999) (alterations in original))). "A 'liquidated claim' is '[a] claim for an amount previously agreed on by the parties or that can be *precisely determined* by operation of law or by *the terms of the parties' agreement.*'" *Beckmann Concrete Contractors*, 360 S.C. at 132, 600 S.E.2d at 79 (quoting *Black's Law Dictionary* 240 (7th ed. 1999) (emphasis added)). Such damages must be "certain," meaning that they are "'precise; . . . definitive; . . . unambiguous; or, in law, capable of being identified or made known without liability to mistake or ambiguity, from data already given.'" *Wells Fargo*, 408 S.C. at 92, 757 S.E.2d at 559 (quoting *Black's Law Dictionary* 204 (5th ed. 1979)).

No competent or admissible evidence was submitted below demonstrating that the damages claimed were actually liquidated: no formula, from whatever source, was supplied; no law was cited fixing the amount of damages owed; and the underlying agreement was, as noted, never introduced nor its relevant provisions cited. In fact, the sole evidence in the record was a four-paragraph affidavit from WFG's "National Claims Counsel" stating:

I have access to and am familiar with the business records (the "Records") relating to the Agreement .... I have access to and am familiar with the forty-seven claim accounts enumerated in Exhibit A of the Complaint, including the liquidated amounts due thereunder in the form of loss, expense, charges, attorney's fees and allocated loss adjustment expenses. (Dondanville Aff. ¶ 2.)

Were such testimony offered in a contested proceeding—rather than in the quiet *ex parte* darkness of a motion filed and granted within 96 hours—it would *never* be admitted. Mr. Dondanville, himself a lawyer, stated that he was familiar with WFG's "business records" but he neither identified the records nor laid a foundation from which it could be determined whether they are in fact business records rather than inadmissible hearsay. For a document to constitute a business record, there must be admissible proof of each of the elements of S.C. Code Ann. § 19-5-510 and S.C. R. Evid. 803(6). Mr. Dondanville did not attempt to lay a business records foundation, and it is highly improbable that he had the capacity to do so. The business records foundation would typically require that those who actually prepared the documents in the ordinary course of business—i.e., "the custodian or other qualified witness"—testify "to its identity and the mode of its preparation." S.C. Code Ann. § 19-5-510. Mr. Dondanville's title ("National Claims Counsel") hardly fits the description. Mr. Dondanville merely recited that he was "familiar with the forty-seven claim accounts enumerated in Exhibit A[10] of the Complaint, including the liquidated amounts due thereunder in the form of loss, expense, charges, attorneys' fees and allocated loss adjustment expenses." (Dondanville Aff. ¶ 2.)

Mr. Dondanville's affidavit was incompetent and inadmissible, but even were it admissible, it provided no evidence demonstrating that the damages were actually liquidated.

[10] Exhibit A is just a list of internal file numbers. (Compl. Ex. A.)

Indeed, Mr. Dondanville did not offer *any* evidentiary foundation whatsoever for his conclusory assertion that the amounts were "liquidated," nor did he provide any itemization of the supposed expenses. Instead, his brief description shows the damages claimed were *not* liquidated. For example, the attorneys' fees and allocated loss adjustment expenses are quintessentially unliquidated damages. Unless a contract provides for attorneys' fees at a specific rate, they are unliquidated as a matter of law. *NationsBank v. Scott Farm*, 320 S.C. 299, 305, 465 S.E.2d 98, 101 (Ct. App. 1995) ("In South Carolina, where a contractual obligation provides only that a party is to pay 'reasonable attorney's fees,' the amount is unliquidated"). "Allocated loss adjustment expenses," a term of art in the insurance industry, are similarly unliquidated, because they reflect a judgment as to the amount of expenses incurred and attributable, in the judgment of the insurer, to a particular claim; they necessarily cannot be made certain by formula or contract.[11]

The court's refusal to vacate the default judgment was without evidentiary support and further controlled by an error of law that the damages were properly categorized as liquidated, which constituted a clear abuse of discretion. Because WFG provided no competent, admissible evidence that the $1.3 million it claimed was agreed upon by the parties, fixable by statute, or computable by formula—and therefore liquidated—the trial court's order denying relief does nothing more than repeat Mr. Dondanville's unsupported conclusion. (Order at 8.) Moreover, the trial court's candid acknowledgement at hearing (that he signed the order because WFG said the damages were liquidated) is a textbook example of an error of law—and his failure to correct this error on DataQuick's motion was independent error.

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[11] *See* Julia Kagan, *Allocated Loss Adjustment Expenses (ALAE)*, INVESTOPEDIA (Jan. 17, 2018), *available at* https://www.investopedia.com/terms/a/allocated-loss-adjustment-expenses-alae.asp (last accessed Feb. 8, 2019).

B. The Trial Court Erred in Failing to Hold a Hearing on Respondent's Damages.

This Court, presented with a case where the complaint "alleged a breach of contract by the defendant, but nothing in the allegations of the complaint makes it possible to compute the amount of damages to which plaintiff is entitled by reason of the breach," has held that "the trial court erred in finding the claim made . . . was for liquidated damages or a sum certain. . . . Concomitantly, it was improper for the trial court to enter a default judgment . . . without first conducting a damages hearing after notice . . . pursuant to Rule 55(b)(2) and 5 (a)." *Beckmann Concrete Contractors*, 360 S.C. at 133, 600 S.E.2d at 79.

The trial court was required to determine whether the damages evidence lived up to WFG's representation and not accept the representation at face value. "[T]he principle that a plaintiff must prove his damages even when the defendant is in default applies to *all damages claims* in default cases." *Wells Fargo*, 408 S.C. at 90, 757 S.E.2d at 559 (emphasis added); *see also id.* at 92, 757 S.E.2d at 560 (holding error committed "in awarding damages without conducting a damages hearing"); *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 204, 723 S.E.2d 597, 603 (Ct. App. 2012) ("In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence." (internal quotations omitted)). Further, because the damages were not liquidated, the Court was required as a matter of law to hold a damages hearing at which DataQuick could participate, and the failure to do so entitled DataQuick to relief under Rules 5(a), 55(b), and 60(b). *Beckmann Concrete Contractors*, 360 S.C. at 134, 600 S.E.2d at 80. As in *Beckmann* and *Wells Fargo*, the court below committed error when it entered judgment on an unliquidated claim for damages without holding a hearing—indeed, without even waiting the statutory time to rule. Because that decision was controlled by an error of law and lacked any evidentiary basis, it

constituted an abuse of discretion and, at a minimum, requires that the judgment be vacated and a hearing on damages held.

Even if DataQuick *had* failed to learn of the damages hearing and therefore failed to appear, WFG was still required to submit admissible evidence sufficient to demonstrate to the trial judge that its claimed damages should be awarded. *Solley*, 397 S.C. at 204, 723 S.E.2d at 603; *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 240, 246 S.E.2d 880, 881 (1978) ("The prayer in an action may not serve as a substitute for proof. The plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence."). The trial court erred when it failed to conduct a damages hearing, and again when it failed to correct its error by denying DataQuick's motion requesting a hearing. Even if the order refusing to set aside the underlying entry of default were lawful, this matter would still require reversal and remand for a damages hearing.

III. IN A CONTRACT ACTION BETWEEN TWO SOPHISTICATED CORPORATIONS, THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO SET ASIDE A DEFAULT JUDGMENT THAT INCLUDED TREBLE DAMAGES UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT WITHOUT ANY ALLEGATION OR EVIDENCE SUPPORTING A PUBLIC IMPACT OR A WILLFUL OR KNOWING VIOLATION OF THAT STATUTE.

The court below also erred in trebling the claimed damages under the South Carolina Unfair Trade Practices Act. In a handful of short and conclusory paragraphs, WFG's Complaint alleged that DataQuick's "course of conduct and refusal to reimburse WFG . . . constitutes an unfair method of competition and unfair and deceptive act that affects the public interest." (Compl. ¶ 36.) The Complaint did not describe the conduct as anything other than a "refusal to reimburse" WFG. And while DataQuick's conduct was alleged to "affect the public's ability to afford and obtain title insurance" (*id.* ¶ 38), there were no allegations as to *how* it did so. Nor was there any allegation (let alone evidence) that DataQuick's conduct was "willful" or

"knowing"; rather, its conduct is merely alleged to have been "unfair." (Compl. ¶¶ 36, 40.) Similarly, no evidence exists in the record to support any finding that DataQuick's alleged conduct carried the potential for repetition, nor could it: it was undisputed that DataQuick had ceased all operations 2.5 years before the Complaint was filed. Nevertheless, the trial court signed WFG's proposed judgment awarding relief under the SCUTPA and trebling the damages (and also, for good measure, trebling WFG's fees *and costs*).[12]

The trial court abused its discretion if its order was controlled by an error of law. *Stark Truss Co.*, 360 S.C. at 508, 602 S.E.2d at 101-02. "Determining the proper interpretation of a statute is a question of law, and this [c]ourt reviews questions of law de novo." *South Carolina Lawyers Weekly ex rel. Dolan Pub. Co. v. Wilson,* 423 S.C. 144, 148, 813 S.E.2d 527, 529 (Ct. App. 2018) (alteration in original; quoting *Lambries v. Saluda Cty. Council,* 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014)). This Court thus addresses the question of the SCUTPA's reach *de novo*.

A. The SCUTPA Does Not Reach Private Breaches of Contract.

There is no case that supports WFG's attempt to extend the SCUTPA to an alleged breach of a single commercial contract. The Act applies to "[u]nfair methods of competition and unfair or deceptive acts or practices." S.C. Code Ann. § 39-5-20(a). It is well established that "the Unfair Trade Practices Act is unavailable to redress private wrongs if the public interest is unaffected." *LaMotte v. Punch Line of Columbia, Inc.,* 296 S.C. 66, 71, 370 S.E.2d 711, 713 (1988) (interference with restaurant opening to public not sufficient to affect public interest),

[12] Aware that the trebling of attorneys' fees was clear error, WFG's litigation counsel sought to cure the error by submitting a further declaration attesting to *his belief* that "a reasonable attorney's fee would be" $20,000. (Walker Aff. (8/21/18).) But it was improper as a matter of law for the trial court to treble *any* attorneys' fees as part of a trebling of damages per *Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 489, 693 S.E.2d 27, 32 (Ct. App. 2010) (granting a Rule 60(b) motion on the amount of a default judgment because the attorneys' fees were trebled).

citing *Noack Enters., Inc. v. Country Corners Interiors*, 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986) (same; sale of assets of consignment business); *Ardis*, 314 S.C. at 519, 431 S.E.2d at 271; *Key Co., Inc. v. Fameco Distributors, Inc.*, 292 S.C. 524, 526, 357 S.E.2d 476, 478 (Ct. App. 1987) (intentional breach of contract not sufficient to state claim under UTPA). Where "the cause of action does not involve practices that either directly or indirectly affected the rights of anyone but the contracting parties," even a "deliberate or intentional" breach by one party, "without more, does not constitute a violation of the UTPA." *Id.* Accordingly, a showing that the public interest has been affected by the unfair trade practice through a *pattern of conduct* with the *potential for repetition* is required to state a SCUTPA claim. *Noack Enterprises*, 290 S.C. at 477-79, 351 S.E.2d at 348-50. For treble damages to be awarded, moreover, it must be shown that the violation of the statute was "'willful or knowing.'" *Id.* at 477, 351 S.E.2d at 349 (quoting S.C. Code Ann. § 39-5-140).

B. Respondent's "Public Interest" Hook Is Unsupported by Law or Evidence.

Below, WFG sought to conjure public interest by arguing that South Carolina consumers could be affected by increased premiums to purchase title insurance, which the trial court adopted into its order. (Order p. 6.). Even were this assertion supported by evidence (it was not), courts interpreting the SCUTPA have held such an impact to be "too remote of a consequence to satisfy the public interest requirement." *Power Tools & Supply v. Cooper Power Tools*, No. 05-73615, 2007 WL 1840063, at *5 (E.D. Mich. June 26, 2007) (applying South Carolina law); *Wilson Grp., Inc. v. Quorum Health Res., Inc.*, 880 F. Supp. 416, 427 (D.S.C. 1995) ("Anytime a business allegedly loses revenues the argument can be made that the public is harmed through higher prices, etc. These potential public ramifications are too remote to satisfy the public impact requirement.").

WFG also submitted no evidence to support a finding that the public interest was affected on the theory that DataQuick's alleged actions had the potential for repetition (*Noack Enterprises*, 290 S.C. at 480-81, 351 S.E.2d at 349-50)—nor could it. Earlier this month, the South Carolina Supreme Court confirmed that, when the alleged violator of the SCUTPA has gone out of business, it renders any past practices "incapable of repetition." *Turner v. Kellett*, ___ S.E.2d ___, 2019 WL 455101, at *3 (S.C. Feb. 6, 2019); *see also id.* ("The Kelletts argue their unfair acts had no impact upon the public interest because they were incapable of repetition. Specifically, the Kelletts assert Turner presented no evidence showing similar conduct had occurred in the past, and Carmen fired Finchem and permanently closed Buddy's Garage after dealing with Turner, thereby precluding any future repetition. We agree."). As shown, DataQuick had ceased doing business in South Carolina altogether in 2014. DataQuick is out of the title insurance underwriting business in South Carolina, and whatever actions WFG accuses it of having undertaken, even if they satisfied the other elements of the SCUTPA, have no potential for repetition.

An assertion of a SCUTPA violation also must be supported by *evidence* of a public impact, which was entirely lacking below. The record being devoid of such evidence renders a finding of SCUTPA liability erroneous as a matter of law. *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 974 F.2d 502, 507 (4th Cir. 1992) (applying South Carolina law) ("Omni suggests that the practice . . . inflates costs to the advertisers and hence to consumers. Omni, however, cites no evidence in the record to support this proposition. . . . South Carolina courts have consistently rejected speculative claims of adverse public impact and required evidentiary proof of such effects.") (citing *Florence Paper Co. v. Orphan*, 298 S.C. 210, 212-213, 379 S.E.2d 289, 291 (1989), *Columbia E. Assocs. v. Bi-Lo, Inc.*,

299 S.C. 515, 522, 386 S.E.2d 259, 263 (Ct. App. 1989)). There is no therefore no basis for an award of any damages under the SCUTPA, let alone the treble damages awarded in the court below.

C. The Record Is Devoid of Any Allegation, Let Alone Evidence, of Willful or Knowing Conduct by DataQuick.

Even were the SCUTPA applicable to a private action for breach of contract, the trial court's decision to award treble damages was independently erroneous under the terms of that statute. Under the SCUTPA: "If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation . . . the court shall award three times the actual damages sustained." S.C. Code Ann. § 39-5-140. The Complaint did not allege that DataQuick's (unspecified) conduct was willful or knowing. Moreover, WFG offered no such evidence. Instead, WFG sought to excuse its own failures with illogic: "WFG's UTPA cause of action is deemed admitted as plead and this Court's Order grants the relief requested *and contemplates DataQuick's knowing and willful violation of the UTPA*" (Opp. p. 8 (emphasis added).).

It is unreasonable to construe a pleading as "contemplating" allegations of a knowing and willing violation when no such allegations are present. The Complaint either alleged a knowing and willful violation of that statute, or it did not. WFG either presented evidence of knowing and willful conduct, or it did not. Yet the order prepared by WFG and signed by the trial judge carried forward this same incomprehensible, unsupported, and erroneous approach. (Order p. 6.) WFG's argument that the court could treble damages—even though WFG did not plead the predicate for trebling or present evidence of a willful or knowing violation of the UTPA—was a clear invitation to error that the trial judge accepted. Accordingly, the order trebling damages

was erroneous, and it was an abuse of discretion not to grant the motion for relief from this erroneous judgment.

CONCLUSION

For the reasons given, the trial court's refusals to (1) vacate the entry of default and (2) grant relief from the default judgment constituted an abuse of discretion. Accordingly, Appellant DataQuick respectfully asks this Court to reverse the order below, vacate the default judgment, and set aside the entry of default so that DataQuick can defend the action on the merits. Alternatively, DataQuick requests that the default judgment be vacated, the case remanded, and the trial court directed to conduct a damages hearing as required by South Carolina law, with instructions that damages (including treble damages) are unavailable under the SCUTPA on the facts alleged.

Respectfully submitted,

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Date: February 25, 2019

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

Appellate Case No. 2018-001845

WFG National Title Insurance Company .....Respondent,

v.

DataQuick Lending Solutions, Inc. and DataQuick Lending Solutions, LLC..... Appellants.

PROOF OF SERVICE

The undersigned certifies that the foregoing **INITIAL BRIEF OF APPELLANTS** was served upon all counsel of record by causing a copy of the same to be deposited in the United States mail, postage prepaid, addressed as follows:

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This 25th day of February, 2019.

William Wilson
William M. Wilson III