

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable L. Casey Manning
Trial Court Case No. 2016-CP-40-04718

Appellate Case No. 2018-001845

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SC Court of Appeals

WFG National Title Insurance Company,

Respondent,

v.

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

Appellants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

WHETHER JUDGE MANNING ABUSED HIS DISCRETION WHEN REFUSING TO GRANT DATAQUICK'S REQUEST FOR RELIEF FROM A DEFAULT JUDGMENT AWARDING WFG LIQUIDATED DAMAGES WHEN DATAQUICK'S AFFIDAVITS PROVIDE NO EXCUSE FOR DATAQUICK'S FAILURE TO COMPLY WITH APPLICABLE LAW OR AFTER DATAQUICK FAILED TO MAKE ANY EFFORT TO PRESENT MATERIAL EVIDENCE AMOUNTING TO A PRIMA FACIE SHOWING OF A MERITORIOUS DEFENSE.

STATEMENT OF THE CASE

Respondent (“WFG”) filed suit against Appellants (“DataQuick”) in Richland County on August 5, 2016. (Summons and Complaint.) DataQuick’s registered agents for service in Delaware and South Carolina received the Summons and Complaint on August 10, 2016 and August 11, 2016 per Rule 4(d)(3) SCRCP. (Affidavits of Service.) DataQuick failed to respond to the lawsuit as prescribed in Rule 12(a), SCRCP. WFG submitted a proposed Order of Default and an Affidavit of Default to Richland County. (Affidavit of Default.) WFG served DataQuick’s agents with these on October 10, 2016, and the agents received these notices. (Certificates of Service dated Oct. 10; DataQuick’s Initial Brief, p. 4.) Judge Benjamin’s Order filed an order entering default against DataQuick on October 27, 2016. (Order dated Oct. 19, 2016 and Form 4 dated Oct. 28, 2016.)

WFG moved the trial court for entry of default judgment and attorney’s fees on September 15, 2017, serving DataQuick’s agents – including its new registered agent in Delaware – on the same date. (Notice of Motion for Default Judgment with Attorney’s Fees and Affidavit of Fees.) DataQuick’s agent received actual notice on September 18, 2017. (Aff. of Fliss ¶ 21.) Judge Manning entered default judgment against DataQuick on September 19, 2017. (Form 4 and Order dated Sept. 19, 2017, the “Judgment”.) WFG sent DataQuick’s agents notice of the Judgment on September 27, 2017. DataQuick’s agents received this notice. On October 12, 2017, DataQuick filed its motion for relief from the Judgment and sent a copy to Judge Manning on October 16, 2017. (DataQuick’s Motion for Relief.) Judge Manning received memoranda from all parties, followed by oral argument on August 21, 2018. After the hearing Judge Manning received proposed orders from both parties. (Emails dated August 31, 2018 with attachments). After consideration Judge Manning denied DataQuick’s request for relief from the Judgment by way of a ten-page written order. (Order dated Sept. 19, 2018, the “Order”). This appeal followed.

STANDARD OF REVIEW

While DataQuick discusses setting aside the default under Rule 55(c), SCRCP, there is no question DataQuick filed no motion until after Judge Manning entered the Judgment. It is axiomatic that “[o]nce a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP.” Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009). “The standard for granting relief from a default judgment under Rule 60(b) is more rigorous than the ‘good cause’ standard established in Rule 55(c).” Id. (citing Ricks v. Weinrauch, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App. 1987). “Rule 60(b) requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or ‘other misconduct of an adverse party.’” Sundown Operating Co., 383 S.C. at 608, 681 S.E.2d at 888 (quoting Rule 60(b), SCRCP). “The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default.” Sundown Operating Co., 383 S.C. at 608, 681 S.E.2d at 889.

Whether to grant or deny a motion under Rule 60(b), SCRCP lies within the sound discretion of the trial judge. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). South Carolina’s appellate standard of review, therefore, is limited to determining whether there was an abuse of discretion. Raby Const., L.L.P. v. Orr, 358 S.C. 10, 17–18, 594 S.E.2d 478, 482 (2004). “An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support.” Ware v. Ware, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013).

ARGUMENT

1. Judge Manning did not abuse his discretion by finding DataQuick's neglect inexcusable, and therefore the Order must be affirmed.

DataQuick cannot establish Judge Manning abused his discretion by denying DataQuick relief from the Judgment when it arose solely due to DataQuick's inexcusable failure to comply with South Carolina and Delaware law and its belated response to the lawsuit, the entry of default, and the Judgment. Judge Manning properly found DataQuick's own failures and dilatory practices to be the cause of DataQuick's waiting for over a year to respond to the lawsuit or the default in any manner. While DataQuick concedes its failures to communicate with CT Corporation and DataQuick's other agents are the reason for its dilatory response, DataQuick has provided no good reason either for its untimely failure to coordinate with its registered agents, its failure to maintain accurate registration of agents, or its failure to conduct an orderly withdraw from Delaware or South Carolina after purportedly ceasing business in March 2014 despite the laws mandating that DataQuick do so. Therefore, Judge Manning properly exercised his discretion and found that DataQuick failed to meet the standard for relief under Rule 60(b), SCRCF based on the record presented to him by DataQuick.

a. DataQuick received service, and thereby actual and constructive knowledge of the Summons and Complaint, in August 2016.

DataQuick ignores that it is a fictitious creation of statute, and not an individual, when it misplaces legal relevance upon the fact that some unidentified person acting on its behalf in some unidentified way did not receive the lawsuit or the Judgment until October 2, 2017. Companies, unlike natural persons, only acquire knowledge through those natural persons that act on their behalf. South Carolina has adopted laws and imposed duties on corporate entities to ensure that a person complaining of a corporate entity knows the exact name and address of the agent upon

whom a lawsuit may be served. Compliance with these laws are a pre-requisite for conducting business in South Carolina as a corporate entity.

Foreign corporations that conduct business in South Carolina, such as DataQuick Lending Solutions, Inc., only possess the authority to do so upon complying with S.C. CODE ANN. § 33-15-101 (1976), et seq. See A Fast Photo Exp., Inc. v. First Nat. Bank of Chicago, 369 S.C. 80, 87, 630 S.E.2d 285, 288 (Ct. App. 2006) (“Foreign corporations seeking to conduct business in this state must obtain a certificate of authority from the Secretary of State.”) In relevant part, Article 1 of South Carolina’s foreign corporation statute compelled DataQuick to appoint a registered agent to receive service of process upon DataQuick – and thereby acquire knowledge for DataQuick of the same – and notify South Carolina of changes to either the corporation or its registered agent. S.C. CODE ANN. §§ 33-15-103 through 33-15-110.

Two of DataQuick’s in-house attorneys state that DataQuick Lending Solutions, Inc., the Delaware corporation that possessed a certificate of authority to conduct business in South Carolina prior to December 2014, converted to DataQuick Lending Solutions, LLC on December 23, 2014. (Aff. of LaGatta ¶ 3; Aff. of Fliss ¶ 3.) DataQuick indisputably failed to inform South Carolina of this change despite its duty to do so under South Carolina law. S.C. CODE ANN. §§ 33-15-104. DataQuick offers no excuse for this failure to comply with the law. However, even if DataQuick had properly notified South Carolina that it had converted to an LLC, DataQuick was still required to maintain a registered agent possessing DataQuick’s authority to accept service of legal process in South Carolina. S.C. CODE ANN. §§ 33-44-1002 (1976).

Likewise Delaware, DataQuick’s state of incorporation and organization as a limited liability company (“LLC”), required DataQuick to maintain a registered agent at all times who, among other duties, held DataQuick’s authority to accept service of process and other

communications directed to DataQuick in Delaware, thereby acquiring knowledge of the same for DataQuick. Del. Code Ann. tit. 6, §§ 18-104(a)(2) and (e) (West); *see* Del. Code Ann. tit. 8, § 132 (for corporations). Delaware required any change in DataQuick's registered agent to be filed promptly, in the appropriate form, with Delaware. Del. Code Ann. tit. 6, § 18-104(b); *see* Del. Code Ann. tit. 8, § 133 (for corporations). Neither a Delaware corporation nor LLC can exist without an active registered agent; for example, when a registered agent resigns without the appointment of a successor for thirty (30) days, Delaware declares the company's formation forfeited and its authority to do business revoked. Del. Code Ann. tit. 6, § 18-104(d); *see* Del. Code Ann. tit. 8, § 136 (for corporations).

DataQuick does not dispute that WFG accomplished legal service of the Summons and Complaint twice in August 2016 when WFG served DataQuick's duly appointed registered agents in both South Carolina and Delaware. (DataQuick's Initial Brief p. 2.) Likewise, DataQuick does not dispute its registered agents received the Affidavit of Default and the proposed Order of Entry of Default. (DataQuick's Initial Brief p. 4.) Under South Carolina law, it is "well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority. Crystal Ice Co. of Columbia v. First Colonial Corp., 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979). It is also axiomatic that corporations, as legal entities, can only actually act or acquire knowledge through its appointed agents and servants; therefore, South Carolina imputes the actual knowledge of an agent of a corporation acquired within the scope of the agency to the corporation. *See, e.g., Rearden v. State Mut. Life Ins. Co.*, 79 S.C. 526, 60 S.E. 1106, 1108 (1908) ("An insurance company as a corporate entity must conduct its business through the means of agents; and, where such agents have knowledge of important facts bearing upon the corporate business, the knowledge of such agents is the knowledge of the

corporation, if acquired within the scope of the agency.”)

Therefore, DataQuick received actual and constructive knowledge of this suit through its registered agents in August 2016 and not at some later date. (Affidavits of Service.); S.C. CODE ANN. § 15-9-240. Judge Manning properly exercised his discretion when evaluating the time period of DataQuick’s dilatoriness and the lack of any justifiable reason for it.

b. DataQuick’s failure to comply with South Carolina and Delaware law confirms that Judge Manning properly exercised his discretion in denying DataQuick’s belated request for relief from default.

DataQuick contends it should not be charged with knowledge or notice of the lawsuit or the Affidavit of Default and proposed Order of Entry of Default when those were received by its registered agents because DataQuick had purportedly ceased all business operations and failed to coordinate any transition with its registered agents in Delaware and South Carolina by that time. (Aff. of LaGatta ¶ 5; Aff. of Fliss ¶¶ 4, 6, 9, 12). Therefore, DataQuick contends Judge Manning abused his discretion by not relieving it from the Judgment, misplacing legal significance on October 2, 2017, the date some individual received “actual” notice of the lawsuit. DataQuick provided Judge Manning no information about this person or why this unknown person’s receipt – rather than the registered agents’ various receipts – was of any legal consequence; DataQuick did not provide the name, the employer, or relationship of this individual to DataQuick, which contends it had been without operations or employees for two and a half years by October 2, 2017.

DataQuick urges error in the application of the deferential standard of review required here, because the record provides no excuse, much less a justifiable one, for DataQuick’s failures to either comply with Delaware law and coordinate with its registered agent or comply with South Carolina law by obtaining a certificate of withdrawal and appointing the South Carolina Secretary of State to accept service of process for it when it purportedly ceased operations. Specifically,

DataQuick fails to give any excuse for its neglect to provide CT Corporation the correct contact information or instructions on what to do with legal service or communications received for DataQuick. DataQuick's failure unequivocally violated Delaware law, which mandated that DataQuick:

provide to its registered agent and update from time to time as necessary the name, business address and business telephone number of a natural person who is a member, manager, officer, employee or designated agent of the domestic or foreign limited liability company who is then authorized to receive communications from the registered agent. Such person shall be deemed the communications contact for the domestic or foreign limited liability company.

Del. Code Ann. tit. 6, § 18-104(c). DataQuick provides no justification for its failure to notify CT Corporation that DataQuick's other agents – an outside accounting firm and an agent named James Keglovits – were no longer appropriate points of contact; DataQuick states it simply failed to update this information and keep in contact with its other agents. (Aff. of LaGatta ¶¶ 5, 9, 10; Aff. of Fliss ¶¶ 12, 14-18). Justification is completely absent from the affidavits DataQuick presents.

Moreover, upon ceasing to conduct business in South Carolina in March 2014, S.C. CODE ANN. § 33-15-200 required DataQuick to obtain a certificate of withdrawal from South Carolina. Id. (“A foreign corporation authorized to transact business in this State may not withdraw from this State until it obtains a certificate of withdrawal from the Secretary of State.”) The application DataQuick was required to file in order to withdraw from South Carolina would have specifically revoked the authority of its registered agent, CT Corporation, to accept service on its behalf, and it would have appointed the South Carolina Secretary of State as its agent for service of process. Id. DataQuick failed to present Judge Manning with any evidence that it complied with South Carolina law or notified South Carolina that it was ceasing operations in South Carolina at any time, and it failed to provide any reason why its neglect to perform an orderly withdrawal from South Carolina was excusable.

To the contrary the record demonstrates why DataQuick's failures to comply with South Carolina and Delaware law are inexcusable. Specifically, DataQuick still had competent agents and attorneys working on its behalf after it purportedly ceased operations and employment in March 2014, and these agents and attorneys had both the duty and the opportunity to cause DataQuick to comply with Delaware and South Carolina law. DataQuick provides no justification for these agents' omissions.

First, the record shows DataQuick's agents converted DataQuick's legal form in Delaware from a corporation to an LLC nine (9) months after it purportedly ceased all operations and employment. Yet, DataQuick's agents failed to comply with law and notify South Carolina of this change or coordinate with its registered agents (Aff. of LaGatta ¶ 3; Aff. of Fliss ¶¶ 3, 9, 12). No justification for these failures was provided to Judge Manning.

Second, the record shows that approximately two years later, DataQuick's agents relieved CT Corporation as its registered agent in Delaware and changed its registered agent in Delaware to Maples Fiduciary Services (Delaware) Inc. ("Maples"), even after this lawsuit was served. (Aff. of LaGatta ¶ 3; Aff. of Fliss ¶¶ 3, 9, 12). Yet, DataQuick's agents failed to comply with the law, appoint a current registered agent in South Carolina, or communicate with CT Corporation to learn either of CT Corporation's acceptances of service or its transmissions of the lawsuit and subsequent filings to the other agents of DataQuick. No justification for these failures were provided to Judge Manning.

Since October 2017, DataQuick's agents have demonstrated their ability to act on behalf of DataQuick long after its purported cessation of operations in March 2014. Specifically, these agents have managed to coordinate with DataQuick's other agents (both current and former), investigate the circumstances of the service of this lawsuit and subsequent filings on its various

agents, hire respected and competent legal counsel in South Carolina, and actively engage in the litigation now at hand since October 16, 2017. (Aff. of LaGatta; Aff. of Fliss.) The record failed to demonstrate to Judge Manning why Mr. LaGatta or Mr. Fliss failed to use this same diligence in complying with South Carolina and Delaware law or coordinating and communicating with DataQuick's other agents between March 2014 and October 2017.

Given the record presented to him, Judge Manning did not abuse his discretion in finding DataQuick's neglect in responding to this lawsuit in a timely fashion inexcusable. Under the standard provided by our Supreme Court for Rule 60(b) motions in Sundown Operating Co., *supra*, this court has refused to allow parties (less sophisticated than DataQuick) to claim a lack of "actual" knowledge of the lawsuit as the basis of excusable neglect following proper service of a lawsuit. *See, e.g., ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 494-95, 713 S.E.2d 335, 339 (Ct. App. 2011). Given DataQuick's failures to provide any excuse for its violations of South Carolina and Delaware law, which were specifically designed to ensure orderly and efficient service of process upon corporations and companies like DataQuick, Judge Manning's Order should be affirmed under the deferential standard of review. This is particularly true when the record shows the potential for prejudice to a domestic claimant existing in this case, namely, that the foreign corporation is in the process of shutting itself down and divesting itself of all of its assets. (Aff. of Fliss ¶¶ 4, 5.)

2. DataQuick's failure to make a prima facie showing of any meritorious defense confirms that Judge Manning properly exercised his discretion in denying DataQuick's belated request for relief from default.

While it is not necessary for the court to reach this issue in order to affirm Judge Manning's denial of DataQuick's request for relief under Rule 60(b), SCRCP, *see, e.g., ITC Commercial Funding, LLC*, 393 S.C. at 496, 713 S.E.2d at 340, the record nevertheless demonstrates that

DataQuick also failed to meet its burden to establish a meritorious defense. “[O]ur courts have held that in order to obtain relief from a default judgment under Rule 60(b)(1) or 60(b)(3), not only must the movant make a proper showing he is entitled to relief based upon one of the specified grounds, he must also make a prima facie showing of a meritorious defense.” McClurg v. Deaton, 380 S.C. 563, 574, 671 S.E.2d 87, 93 (Ct. App. 2008), *aff’d*, 395 S.C. 85, 716 S.E.2d 887 (2011).

- a. **A conclusory paragraph by DataQuick’s in-house counsel in an affidavit replete with caveats and assumptions, supported by no other evidence, does not amount to material evidence and a prima facie showing of a meritorious defense.**

The Affidavit of Michael LaGatta, Esq. dated October 12, 2017, which was the affidavit included in the motion for relief filed by DataQuick, contained no reference to any meritorious defense at all. (Aff. of LaGatta). DataQuick attempted to correct this error nine (9) months later by including the following sub-paragraphs in a supplemental affidavit by another DataQuick in-house counsel, Adam Fliss, Esq., who stated:

- a) DataQuick is not a party to the Agency Agreement and therefore cannot be liable to Plaintiff for any breach.
- b) DataQuick has placed Stewart Title (who assumed liability under the Agency Agreement with, upon information and belief, knowledge and consent of Plaintiff) on notice of a claim for indemnity and has a meritorious defense in that it would bring in Stewart Title as a Third Party Defendant under Rule 14 of the South Carolina Rules of Civil Procedure.
- c) Upon information and belief, South Carolina has no personal jurisdiction over DataQuick with respect to the allegations and/or venue in South Carolina is improper.
- d) Upon information and belief, the Agency Agreement most likely includes exculpatory language that would limit the liability of the agent and/or limit any warranties of the agent.

(Aff. of Fliss ¶ 27.)

“The party seeking to set aside the judgment ‘has the burden of presenting evidence

proving the facts essential to entitle him to relief.” ITC Commercial Funding, LLC, 393 S.C. at 495, 713 S.E.2d at 339 (quoting McClurg, 380 S.C. at 575, 671 S.E.2d at 94.) Judge Manning gave proper weight to the conclusory, caveated statements of DataQuick’s attorney, which are not supported by any other evidence at all. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991) (“The general rule is that no court has authority to open or vacate a judgment without some material evidence to support the claims on which the application for relief depends.”) (internal quotation omitted).

Specifically, DataQuick’s in-house counsel concludes that DataQuick “cannot be liable” to WFG for breaching the Agency Agreement because DataQuick is not a party to it; yet earlier in the same affidavit, he caveated this statement by saying that DataQuick was not a party “at the time the Complaint was filed” rather than when the claims actually arose; and he admitted that he did not even have possession of the Agency Agreement at issue. (Aff. of Fliss ¶¶ 8, 10.) DataQuick’s counsel’s lack of knowledge about the Agency Agreement is most evident when he concludes that DataQuick possesses a meritorious defense because the Agency Agreement “most likely includes exculpatory language that would limit the liability” of DataQuick. DataQuick’s counsel’s assumptions about a contract he has not seen do not amount to material evidence.

Likewise, Judge Manning properly disregarded DataQuick’s counsel’s conclusion that DataQuick was not subject to personal jurisdiction in South Carolina or that venue was improper in Richland County upon some unevicenced “information and belief.” These arguments are not only unsupported by material evidence but are facially rebutted by the fact that DataQuick in fact purposefully availed itself of South Carolina law and obtained a certificate of authority to conduct business in South Carolina and maintained a principal office and registered agent in Richland County, South Carolina, where the lawsuit was filed. (Aff. of LaGatta ¶ 5; Certificate of Service

dated Aug. 11, 2016.); *See Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 336, 594 S.E.2d 878, 887 (Ct. App. 2004) (“we perceive no unconstitutional unfairness in requiring [a foreign corporation] to litigate this matter in a forum where it has regularly directed its business.”) Additionally, the Complaint specifically detailed the fact that DataQuick consented to both venue and personal jurisdiction in Richland County in the Agency Agreement, and it alleged that the most substantial acts and omissions occurred in Richland County. DataQuick was required to present more than a one-sentence conclusion, caveated by the statement “upon information and belief,” that personal jurisdiction and venue were improper; DataQuick simply failed to do so.

Likewise, Judge Manning properly disregarded DataQuick’s counsel’s conclusion that its third-party contractual indemnity claim is not a meritorious defense. Whether DataQuick possessed a contractual indemnity claim against Stewart Title does not affect any claim or defense between WFG and DataQuick anymore than whether DataQuick has liability insurance coverage for WFG’s negligence claim. *See First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 448 (1994) (“Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party.”) (internal quotation omitted). No binding authority known to WFG states that Judge Manning was required to consider DataQuick’s voluntary right to engage in third-party practice when deciding whether DataQuick was entitled to relief from the Judgment.

If DataQuick needed additional sources of evidence to make a prima facie showing of a meritorious defense, it had the right and the opportunity to conduct discovery in order to present evidence in support of its motion. *See, e.g. Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 299-300, 721 S.E.2d 430, 435 (2012). Over ten (10) months passed between the time DataQuick filed its motion for relief and the hearing on that motion. However, the record demonstrates that

DataQuick failed to attempt to conduct any actual discovery; DataQuick was as disengaged in presenting material evidence for a prima facie showing of its purported meritorious defense as it was in coordinating with its registered agents after March 2014 or following South Carolina's procedures for withdrawal. DataQuick's criticism of Judge Manning's failure to review a contract that DataQuick failed to provide to him highlights DataQuick's error in grasping the burden of its motion, not any abuse of discretion by Judge Manning. (DataQuick's Initial Brief p. 18.).

DataQuick's Initial Brief also hypothesizes that certain claims might have been time-barred, giving it another meritorious defense. (DataQuick's Initial Brief pp. 19-20.) It does not appear that this argument was raised to Judge Manning. Even if this argument was raised and ruled upon so as to be preserved for appellate review, the record is devoid of any material evidence that DataQuick presented Judge Manning that the claims at issue in the Complaint were time-barred.

b. DataQuick failed to establish a material defense to WFG's SCUPTA claim.

DataQuick also contends that Judge Manning failed to find that it possessed a meritorious defense to WFG's claim under the South Carolina Unfair Trade Practices Act (the "Act"). The Act provides, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. CODE ANN. § 39-5-20(a). The elements of a claim under the Act are: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006).

DataQuick's argument takes a selective and myopic view of the Complaint and improperly conflates WFG's allegations and causes of action into a mere breach of contract claim. The Complaint alleges that DataQuick, WFG's agent and underwriter, undertook duties to conduct a

number of insurance underwriting activities in a prudent, safe, sound and ethical manner and in accordance with recognized title underwriting principles. (Compl. ¶¶ 10, 11, 22, 35.) WFG alleges that DataQuick was willful and wanton in breaching these duties in a number of particular respects, and that DataQuick had failed to make payment for the damages arising out of its willful misconduct. (Compl. ¶¶ 12, 15, 16, 19, 23, 35, 37.) WFG alleges that DataQuick's acts and omissions affect the public interest both by affecting the public's access to title insurance and by being capable of repetition. (Compl. ¶¶ 35, 37, 38.)

DataQuick contends incorrectly that, because WFG's Complaint includes a contractual claim, the Act is not implicated by the Complaint. However, this argument begs the question of whether DataQuick has established it had a meritorious defense to WFG's claim under the Act on the grounds that the public interest is not affected by those allegations of the Complaint deemed admitted by WFG's default. "To be actionable under the [Act], an unfair or deceptive act or practice must have an impact upon the public interest." Wright, 372 S.C. at 29, 640 S.E.2d at 501. "An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the [A]ct's embrace" Noack Enters., Inc. v. Cty. Corner Interiors, Inc., 290 S.C. 475, 479, 351 S.E.2d 347, 349-50 (Ct. App. 1986). "An impact on the public interest may be shown if the acts or practices have the potential for repetition." Singleton v. Stokes Motors, Inc., 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004).

The potential for repetition may be stated in either of two ways: (1) by stating the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by stating that the company's procedures create a potential for repetition of the unfair and deceptive acts. Wright, 372 S.C. at 30, 640 S.E.2d at 502. WFG's Complaint does both. "These two ways are not the only means for showing the potential for repetition or public impact,

and each case must be evaluated on its own merits to determine what a plaintiff must show to satisfy the potential for repetition/public impact prong of the [Act].” *Id.* “Nevertheless, a plaintiff proves an adverse effect on public interests if he proves facts that demonstrate the potential for repetition.” *Id.*

WFG plead that DataQuick’s ongoing misconduct within the marketplace of insurance was ongoing and capable of repetition. Despite DataQuick’s contentions, WFG did not bear the burden of presenting evidence to support this allegation at the motion hearing; these allegations were deemed admitted due to DataQuick’s default. Rather, DataQuick had the burden to present material evidence to disprove these allegations to establish a meritorious defense. DataQuick failed to present any such evidence to Judge Manning.

DataQuick also contends that WFG’s allegations that DataQuick was mishandling underwriting, failing to pay claims for insurance, and undermining the market for title insurance in South Carolina does not give rise to any public interest concern. However, DataQuick ignores prior statements by our supreme court reaffirming the fact that the insurance industry is of strong public interest in South Carolina: “In this jurisdiction it has long been recognized that insurance is a business affected with a public interest.” Hinds v. United Ins. Co. of Am., 248 S.C. 285, 291, 149 S.E.2d 771, 774–75 (1966) (citing La Tourette v. McMaster, 104 S.C. 501, 89 S.E. 398, 399 (1916), *aff’d*, 248 U.S. 465 (1919) (stating “It is important for the protection of the interests of the people of the state that the business should be in the hands of competent and trustworthy persons.”); *see also* Nichols v. State Farm Mut. Auto. Ins. Co., 279 S.C. 336, 340, 306 S.E.2d 616, 619 (1983) (superseded on other grounds) (“The insurance business is affected with a public interest.”). Therefore, Judge Manning gave proper consideration to DataQuick’s impact as a harmful actor in the insurance market where DataQuick failed to present any contrary evidence.

Finally, DataQuick is simply incorrect that the Complaint did not allege willful conduct by it in violation of the Act. (Compl. ¶¶ 12, 15, 16, 19, 23, 35, 37.) These allegations were deemed admitted upon DataQuick's default. DataQuick had the duty to rebut these allegations by presenting evidence of a meritorious defense to WFG's allegations of willful conduct in violation of the Act. DataQuick failed to present any such evidence at all. Therefore, Judge Manning did not abuse his discretion in setting aside the award of treble damages.

3. Judge Manning did not abuse his discretion in awarding WFG's damages.

First, Judge Manning correctly concluded that the actual damages WFG presented were liquidated. "[W]hen a plaintiff makes a claim for liquidated damages, a sum certain, or a sum which can by computation be made certain, he may prove the amount of his damages simply by filing an affidavit of the amount due." Wells Fargo Bank, N.A. v. Marion Amphitheatre, LLC, 408 S.C. 87, 90–91, 757 S.E.2d 557, 559 (Ct. App. 2014); *see also* Rule 55(b)(1), SCRPC. The actual damages were for a sum certain, namely, the specific forty-seven (47) accounts identified by WFG that included amounts already paid by WFG in the form of loss, expenses, charges, attorney's fees, and allocated loss adjustment expenses. WFG presented a sworn affidavit of account, signed by the National Claims Counsel for WFG, affirming his possession and review of the forty-seven (47) accounts and stating the sums certain paid to date by WFG at the time of his sworn affidavit. (Aff. of Jeffrey Dondanville.)

DataQuick suggests that Mr. Dondanville, a lawyer, is incompetent to provide the affidavit testimony. Yet, our Supreme Court allows verifications of accounts to be signed by outside litigation counsel and to be based on that attorneys' review of the client's business records. BB&T of S.C. v. Fleming, 360 S.C. 341, 345, 601 S.E.2d 540, 542 (2004). Again, DataQuick had every opportunity to conduct discovery while its motion was pending to obtain evidence in support of its

motion to set aside its default and challenge the merits of the sum certain provided by Mr. Dondanville, yet the record is devoid of its seeking any evidence to rebut Mr. Dondanville's affidavit. Rule 55(b)(1), SCRCF specifically states that, "upon an affidavit of the amount due" on a sum certain, the court "shall enter judgment for that amount and costs against the party against whom judgment by default is sought." Therefore, Judge Manning did not abuse his discretion when entering the Judgment on the sum certain stated in the unrefuted affidavit of Mr. Dondanville.

Second, Judge Manning did not commit error in awarding reasonable attorneys' fees. DataQuick contends Judge Manning committed error by awarding \$4,000.00 in attorneys' fees on September 19, 2017, less than ten (10) days after receiving the Affidavit of Attorneys' fees dated September 15, 2017. However, this is a harmless error, as DataQuick nevertheless failed to object or seek relief within ten (10) days of receiving the Motion for Default Judgment and the Affidavit of Attorneys' Fees on September 18, 2017, as required by Rule 55(b)(3), SCRCF.

DataQuick states that Judge Manning also committed error when he included in the Judgment \$8,000.00 that resulted from trebling the \$4,000.00 of attorneys' fees paid by WFG to its counsel as of August 30, 2017. However, on August 21, 2018, the date of the hearing, Judge Manning received an Affidavit of Attorney's Fees demonstrating that Rogers Lewis Jackson Mann & Quinn, LLC, counsel for WFG, had expended time and labor in excess of ninety (90) billable hours on the file. (Aff. of Drew Walker). Therefore, the \$12,000.00 of the Judgment attributable to attorney's fees results in a blended hourly rate of \$133.00 per hour for the legal time expended as of August 21, 2018. Therefore, any error that Judge Manning committed by adding \$8,000.00 of attorney's fees to the Judgment is a harmless error, as the total award of attorney's fees included in the Judgment is more than reasonable under any consideration of the Jackson factors. Maybank v. BB&T Corp., 416 S.C. 541, 580, 787 S.E.2d 498, 518 (2016) (discussing the lodestar analysis

under Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997)). Therefore, even if it was an error to include \$8,000.00 of additional attorney's fees in the judgment based upon the affidavit of Mr. Dondanville on August 30, 2017, the unrefuted affidavit of Drew Walker, Esq. a year later evidences that Judge Manning did not commit reversible error in denying to provide DataQuick with relief from that portion of the judgment.

CONCLUSION

For the foregoing reasons, Respondent WFG respectfully requests that the Judgment and the Order be affirmed, that WFG be permitted to submit a petition for costs under Rules 222 and 240, SCACR, and that WFG's costs be added to the remittitur.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENT

WFG NATIONAL TITLE INSURANCE COMPANY

April 26, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable L. Casey Manning
Trial Court Case No. 2016-CP-40-04718

Appellate Case No. 2018-001845

RECEIVED

APR 26 2019

SC Court of Appeals

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 RESPONDENT** and the **RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** were served together upon all counsel of record for the Appellants by causing a copy of the same to be deposited in the United States First Class mail, postage prepaid, addressed as follows:

William M. Wilson, III
Wyche, P.A.
Post Office Box 728
Greenville, SC 29062-0728


Shaun C. Blake (S.C. Bar No. 76349)

April 26, 2019

ROGERS LEWIS

ATTORNEYS AT LAW

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April 26, 2019

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APR 26 2019

SC Court of Appeals

Via Hand Delivery

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

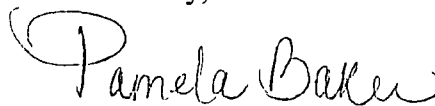
RE: *WFG National Title Insurance Company v. DataQuick Lending Solutions et al.*
Appellate Case No. 2018-001845

Dear Ms. Kitchings:

Enclosed please find an original and one copy of Initial Brief of Respondent, Designation of Matter and Certificate of Service for same. Please file the original and return one clocked copy back to our office via the courier.

Thank you for your assistance. If you have any questions, please do not hesitate to contact me.

Sincerely,



Pamela Baker
Paralegal for Drew Walker

Enclosures

cc: William M. Wilson, III
PO Box 728
Greenville, SC 29602