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 REPLY BRIEF OF APPELLANTS

William M. Wilson III (S.C. Bar No. 15808)
Wyche, P.A.
Post Office Box 728
Greenville, S.C. 29602-0728
(864) 242-8200

Attorneys for Appellants

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INTRODUCTION

WFG's brief fails to overcome the arguments set forth in DataQuick's Initial Brief and shows that the undisputed record requires reversal of the Order below. The parties do not dispute that (1) the first time DataQuick learned of WFG's lawsuit was October 2, 2017; and (2) upon learning of the suit, DataQuick immediately took steps to protect its interests, filing a supported, reasoned motion seeking relief. Neither is there any dispute that the only reason that DataQuick did not act earlier is that, after it had ceased doing business, discharged its employees, and began winding down its operations, it neglected to keep its registered agent (CT Corporation) updated with current contact information. Thus, when CT Corporation sent notices, DataQuick never received them.

WFG argues that these circumstances require that this Court uphold a $4 million default judgment, two thirds of which is the result of improper damages trebling. WFG does not explain how doing so would be fair, just, or in keeping with South Carolina's strong public policy favoring the determination of disputes on their merits.[1] Certainly there are cases in which a defendant with actual notice deliberately elects to default, or in which a defendant's excusable neglect extends beyond the outer one-year period in which the defendant may seek relief—and our system provides a mechanism for reducing such knowing or continuing defaults to judgment

[1] "Furthermore, our decision to reverse the trial court's refusal to set aside the default judgments is consistent with the policy of our state to resolve cases on the merits." *Caldwell v. Wiquist*, 402 S.C. 565, 575, 741 S.E.2d 583, 588–89 (Ct. App. 2013) (citing, e.g., *Rochester v. Holiday Magic, Inc.*, 253 S.C. 147, 152, 169 S.E.2d 387, 390 (1969) (noting that the statute applicable to vacating a default judgment "should be liberally construed to see that justice is promoted and to strive for disposition of cases on their merits" (citation omitted)); *see also Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.*, 616 F.3d 413, 417 (4th Cir. 2010) ("We have repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits."); *Tazco, Inc. v. Dir., Office of Workers Comp. Programs, U.S. Dep't of Labor*, 895 F.2d 949, 950 (4th Cir. 1990) (noting "[t]he law disfavors default judgments as a general matter")).

and for maintaining their finality. But where, as here, an innocent error occurs and the defendant acts promptly within the one-year period, the analysis is different. WFG does not contend (nor could it on this record) that DataQuick sought to hide from lawsuits or gain a tactical advantage from its conduct; the record shows the opposite. Nor does WFG claim that it would suffer cognizable prejudice if DataQuick were allowed its day in court where WFG's claims could be fairly defended—in fact, WFG now has conceded a lack of prejudice. Despite the failure of the trial judge to engage with the issues presented by DataQuick's requests for relief, WFG desperately seeks to hold on to its windfall, arguing that the abuse-of-discretion standard requires that this Court accept the trial judge's unsupported, unreasoned, and legally flawed order—an order drafted by WFG's counsel and adopted wholesale by the court—without meaningful inquiry. The law requires more.

WFG's desperation is evident in its initial brief on appeal, which dwells on uncontested issues concerning the efficacy of serving registered agents—a classic red herring—and then resorts to misstating the record. Rather than directly address the key issues raised, WFG repeats conclusions that are unsupported by (and at times directly contrary to) the record, as if repetition can supplant the record. WFG even fails to address controlling arguments and authority presented by DataQuick: Of the 39 cases cited in DataQuick's Initial Brief, WFG's opposition mentions only five. DataQuick had a right to the trial court's exercise of discretion; had that discretion been exercised, the trial court would have recognized DataQuick's entitlement to have the merits fairly adjudicated. The default should be set aside and DataQuick be allowed to defend on the merits. At a minimum, DataQuick must be allowed a damages hearing.

ARGUMENT

I. The Trial Court Abused Its Discretion in Failing to Set Aside the Default, and WFG's Brief Does Nothing to Show Otherwise.

WFG spends pages arguing that DataQuick was guilty of neglect by failing to designate a new point of contact to receive notice of suit from DataQuick's statutory agent, CT Corporation. DataQuick had ceased doing business in 2014, and the persons to whom CT Corporation formerly sent notices were no longer directly affiliated with DataQuick.[2] Hence, it was and remains uncontroverted that DataQuick remained unaware of WFG's suit until October 2, 2017.[3] DataQuick acknowledged below (Mem. Supp. Mot. Relief from Judgment at 7-8; Tr. at 5-6) and in its Initial Brief on Appeal (at 9) that its failure to appoint a replacement point of contact during wind-down resulted from neglect.[4] The issue presented, however, was not whether DataQuick's conduct was *neglectful*, but whether that neglect was *excusable*. When appropriately entered, defaults are an important part of the legal system. But South Carolina recognizes that disputes—particularly large disputes such as this one—should be determined on their merits unless justice requires otherwise, and our courts have provided an analytical framework for addressing those circumstances when there is excusable neglect and when relief is sought within one year of

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[2] As was made clear below, the two attorneys who submitted declarations on behalf of DataQuick were not DataQuick employees, but rather were affiliated with a corporate parent whose affiliate owns DataQuick. (*E.g.,* Fliss Aff. ¶ 2.) Despite this, WFG continues to falsely imply that DataQuick was still actively doing business at the time of the default below. (Resp. Init. Br. at 10.)

[3] Maples Fiduciary Services, DataQuick's appointed agent in Delaware as of December 2016, was served with WFG's Motion for Default Judgment on September 17, 2017, but inexplicably did not forward it to DataQuick. (Fliss Aff. ¶¶ 19-21.)

[4] WFG argues (Resp. Init. Brief at 4) that DataQuick's neglect included a failure to conduct an "orderly withdraw" [sic] from Delaware and South Carolina. There is nothing in the record to support this assertion, and no authority cited as to how this supposed "failure" is relevant to the inquiry of whether DataQuick's default was excusable.

judgment. S.C.R.C.P. 60(b)(1); *Mictronics, Inc. v. S.C. Dept. of Rev.*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001). Proper application of that framework demonstrates that the default here should not be allowed to stand. As *Mictronics* acknowledges, "where there is a good faith mistake of fact, and no attempt to thwart the judicial system," then "there is basis for relief." *Id.* WFG does not argue, and the record does not support, that DataQuick's conduct was in bad faith or designed to subvert the judicial system. Relief should be granted.

A. Promptness.

Applying the *Mictronics* factors, DataQuick showed that it did not delay unreasonably. Once it had actual notice, it acted immediately to locate counsel, who served and filed a motion for relief within 10 days from DataQuick's first actual notice. WFG repeatedly, and unfairly, accuses DataQuick of engaging in "dilatory practices" (Resp. Init. Brief at 4). The record is clear that DataQuick sought relief immediately upon learning of the lawsuit and related default. WFG seeks to obscure this by arguing that it was dilatory of DataQuick not to act during the time that DataQuick lacked actual knowledge of the litigation, which begs the question. The record is uncontroverted that DataQuick did not learn of the suit until October 2, 2017, and that it then acted immediately. DataQuick cited multiple cases of recent vintage in this state holding that comparable (or longer) time periods in responding to a suit following actual notice is excusable where, as here, relief is sought "shortly after the movant becomes aware of the basis therefore and there is no evidence of unreasonable delay." *Coleman v. Dunlap*, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992); *see also* App. Init. Br. at 12 (collecting cases).

Rather than address *Coleman* or any other such case, WFG repeats its mantra that DataQuick's conduct was "dilatory." (*E.g.*, Resp. Init. Br. at 4.) WFG urges that DataQuick's promptness should be measured from the date its statutory agent received notice, and that service

on the registered agent is the same as actual notice to DataQuick.[5] (*Id.* at 6-7.) Neither the record nor the cases cited by WFG support this position. WFG cites to *Crystal Ice Co. of Columbia v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979), and *Rearden v. State Mut. Life Ins. Co.*, 79 S.C. 526, 60 S.E. 1106 (1908) for the proposition that DataQuick has constructive notice of facts known to its agent, but neither of these cases involved statutory registered agents. *Crystal Ice* involved an attorney acting as an agent in the purchase of a mortgage and his knowledge of a prior purchase-money mortgage, which is inapposite. *Crystal Ice*, 273 S.C. at 309, 257 S.E.2d at 497. And the century-old *Rearden* case held that the trial court properly found that an insurance company was estopped from asserting that the insured had misrepresented his health in his insurance application because the company's sales agent was specifically aware of the true facts. *Rearden*, 79 S.C. at 527, 60 S.E.2d at 1107. *Rearden* has not been cited for nearly 50 years in this state, and the "rule" asserted by WFG has only been applied as against insurance companies in that specific context. *E.g., Marlowe v. Reserve Life Ins. Co.*, 261 S.C. 23, 27, 198 S.E.2d 267 (1973) ("The rule in this State is that *an insurance company* cannot set up forfeiture on account of facts known by the agent of the company to be existing at the time of the making of the contract." (citing *Rearden*; emphasis added)).

WFG stretches *Crystal Ice* and *Rearden* beyond recognition, ignoring authority that registered agents for service of process are not the same as the corporation on whose behalf they receive service. In *Colleton Preparatory Academy, Inc. v. Hoover Universal, Inc.*, a registered agent failed to forward service to a corporate defendant that ultimately defaulted, instead

[5] To be clear, DataQuick acknowledges that formal service on CT Corporation (and later, Maples) was accomplished. WFG, however, behaves as if that were the beginning and end of the inquiry. Were that the case, no motion for relief from default or to vacate a default judgment would ever be meritorious despite the lack of actual notice. Statutory and decisional law hold otherwise, as discussed below.

forwarding it to a different defendant. 616 F.3d 413, 415 (4th Cir. 2010). After the defaulting company's attorney fortuitously learned of the suit and moved to set aside the default, the court measured the defendant's timeliness from when the company actually learned of the lawsuit through its agent attorney, *not* from the time its registered agent learned of the lawsuit. *Id.* at 418. The Fourth Circuit vacated the district court's refusal to lift default because its erroneous analysis "required it to attribute the actions of a corporation's non-attorney agents [who were "hired for the sole purpose of being the company's registered agent for service of process"] directly to the corporation." *Id.* at 420. The court fully acknowledged that service upon the registered agent was proper, *id.* at 421 & n.9, yet it refused to impute the registered agent's knowledge or conduct to the company so as to provide the requisite "personal responsibility" that might justify keeping a default in place, *id.* at 420.

Nevertheless, WFG erroneously persuaded the trial court that service on the agent was indistinguishable from actual notice to DataQuick; hence the trial court's question, "Your client have trouble counting to thirty?" (Tr. p. 4 ll. 12-13.). The Order below erroneously evaluated the promptness factor from the time the registered agent received service of process, and not from the time DataQuick gained actual knowledge of the suit. The trial court's question at the hearing and the subsequent Order demonstrate a misapprehension of the facts and an erroneous application of the law. As a result, there was an abuse of discretion requiring reversal.

WFG's brief also cites *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 681 S.E.2d 885 (2009) and *ITC Commercial Funding, LLC v. Crerar*, 393 S.C. 487, 713 S.E.2d 335 (Ct. App. 2011) for the proposition that less sophisticated parties have not been allowed to claim a lack of knowledge in order to claim excusable neglect. (Resp. Init. Br. at 10.) But those cases have no relevance here. In *Sundown*, the defaulting defendant actually received the process from

its registered agent, 383 S.C. at 605, 681 S.E.2d at 886, and in *ITC*, the defaulting defendant was personally served at her home by the sheriff, 393 S.C. at 495, 713 S.E.2d at 339. Here, DataQuick never received the service from its registered agent until after the default judgment, so these cases do not help WFG.

In sum, DataQuick provided clear evidence showing that it failed to act sooner only because it lacked actual knowledge, and that it acted as soon as it learned of the litigation. The trial court's determination otherwise constituted an abuse of discretion that must be reversed on appeal.

B. Reason for the error.

WFG has stated the Issue on Appeal as follows:

> 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.*

(Resp. Init. Br. at 1 (emphasis added)). WFG then argues that "the record provides no excuse, much less a justifiable one, for DataQuick's failures" resulting in default. (*Id.* at 7.) It is demonstrably untrue that DataQuick failed to offer any excuse, as it provided the trial court with a detailed affidavit clearly explaining how the mistake occurred and why DataQuick failed to update its registered agent with a current address. (Fliss Aff. ¶¶ 6-25). That evidence was unrebutted. But the trial judge ignored this clear evidence and signed an order prepared by WFG stating that "DataQuick presented no excuse" for its failure. (Order p. 4.) That assertion was false and contrary to a record that could not support the trial court's conclusions, demonstrating an abuse of discretion.

In addition to setting forth an excuse for why it did not act sooner, DataQuick's Initial Brief cited persuasive federal cases (given the lack of state authority directly addressing the issue) holding that the very excuse offered by DataQuick—a mistake in updating a service agent—*does* satisfy the excusable neglect standard. *See 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 Channel Comms., Inc.*, No. 6:07-89-HMH, 2007 WL 2692180 (D.S.C. Sept. 12, 2007) (in the related context of Rule 55(c)). Although decided under the Federal Rules of Civil Procedure, reliance on them here is appropriate, *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016), and these cases were presented to the trial court. (Mem. Supp. Mot. Relief at 8-9; Tr. pp. 7-8.) Yet the underlying Order and WFG's brief ignored this authority entirely.

DataQuick also presented direct, unrebutted evidence that its failure to update its address with CT Corporation was unintentional and not the result of a bad faith attempt to avoid service. (Fliss Aff. ¶ 13). Yet again, the underlying Order and WFG's brief ignored this evidence, even though DataQuick's good faith "may be one of the most important factors in deciding" whether its neglect was excusable and merits relief. 10A Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 2693 (4th ed.); *see also Mictronics*, 345 S.C. at 511, 548 S.E.2d at 226 ("We find no evidence in the record that the mistake was anything but a good faith error, as shown by Blocker's explanation coupled with his speed in asking the ALJ for relief.").

DataQuick also showed in its Initial Brief that the trial judge applied an erroneous standard by concluding that "'DataQuick has failed to provide the Court with *conclusive proof* to meet the excusable neglect standard provided by Rule 60.'" (App. Init. Br. 15 (quoting Order at 4-5 (emphasis added).) A conclusive proof standard has never been applied to the establishment

of the criteria of a Rule 60(b) motion. That standard has only been applied where an individual defendant in default challenged the propriety of service despite a signed acknowledgement that service by certified mail in fact was *actually received* by the individual; as a result, the defendant bore the burden to overcome a *presumption* of service by "conclusive proof." *McClurg v. Deaton,* 380 S.C. 563, 577, 671 S.E.2d 87, 95 (Ct. App. 2008), *aff'd*, 395 S.C. 85, 716 S.E.2d 887 (2011). It does not apply here to DataQuick, a corporate defendant that admits that it was served through a registered agent and is not attempting to overcome a presumption of valid service. Rather, DataQuick concedes service but is attempting to establish excusable neglect, as to which no court has required "conclusive proof." The trial court's erroneous application of a "conclusive proof" standard to DataQuick's request for relief was an error of law invited by WFG's improper argument. (Opp. to Mot. for New Trial at 4.) WFG's brief ignores this fundamental error as well.

In sum, DataQuick provided clear evidence showing that its error was inadvertent and excusable.

C. Meritorious defense.

As to the third *Mictronics* factor, DataQuick made a sufficient showing to satisfy the meritorious defense prong. Obviously, if there is no possible meritorious defense, vacating a default would be an empty exercise. WFG contends that DataQuick bears the burden of proving facts showing a meritorious defense, but this burden is not a heavy one under the law, which merely requires that the defendant "**raise**[] a question of law deserving of some investigation and discussion or a real controversy as to real facts arising from conflicting or doubtful evidence." *Williams v. Watkins,* 384 S.C. 319, 326, 681 S.E.2d 914, 918 (Ct. App. 2009) (emphasis added).

Undoubtedly this burden to raise a defense may be met by an affidavit, and DataQuick supplied an affidavit establishing several meritorious defenses. The affidavit raised "a real

controversy as to real facts arising from conflicting or doubtful evidence," including (1) that the liability under the contract was assumed by a purchaser of DataQuick's assets with the knowledge and consent of WFG (which continued working with the new agent, thereby relieving DataQuick of any theoretical liability to WFG) (Fliss Aff. ¶¶ 6-8, 10, 27(a)); (2) that as a result of WFG's knowledge and consent, DataQuick has a right to bring in the party that assumed liability in order to respond to WFG (*id.* ¶ 27(b)); (3) that there is no personal jurisdiction in South Carolina with respect to this dispute (*id.* ¶ 27(c)); and (4) that the Agency Agreement likely includes exculpatory provisions limiting any liability or warranties of the agent (*id.* ¶ 27(d)). The affidavit further showed that DataQuick no longer had possession of the subject Agency Agreement (as a result of the sale of assets and transfer of liability to a purchaser), explaining why DataQuick could not offer even more facts in defense. (*Id.* ¶ 10.). Such factual statements and assertions of legal defenses in a sworn affidavit are sufficient to meet the applicable standard for a party in default to allege a meritorious defense, particularly in the circumstances of this case where WFG failed to attach the Agency Agreement to the Complaint.

WFG has made much of DataQuick's failure to cite to its Agency Agreement with WFG. As it did below, WFG chides DataQuick for not having the agreement, now claiming—for the first time in this proceeding—that DataQuick could have obtained the contract through discovery: "If DataQuick needed additional sources of evidence to make a prima facia [sic] showing of a meritorious defense, it had the right and opportunity to conduct discovery in order to present evidence in support of its motion." (Resp. Init. Br. at 13 (citing *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 299-300, 721 S.E.2d 430, 435 (2012)).) WFG flatly misrepresents South Carolina law. *Graham* is completely inapposite: it does not hold that a defendant in default can obtain discovery but instead holds that a *plaintiff* is entitled to discovery

concerning whether a defendant was properly served when the defendant moves to lift default by challenging the efficacy of service. *Id.* at 299, 721 S.E.2d at 435. (Otherwise, the court reasoned, the plaintiff could have no recourse where the limitations period had passed and where relief from default is granted. *Id.*).

But *Graham* does not support WFG's position that DataQuick, a defendant in default, had the ability to conduct discovery. Rather, the South Carolina Supreme Court has stated unequivocally that a defendant in default has no right to conduct affirmative discovery. *Limehouse v. Hulsey,* 404 S.C. 93, 744 S.E.2d 566 (2013). A defaulting defendant instead is "limited . . . to cross examination and to object to plaintiff's evidence." *Id.* at 116. Of course, because the trial judge failed to conduct the required hearing on damages, DataQuick was deprived even of *that* limited right. (App. Init. Br. 22-23.) DataQuick simply had no ability to conduct discovery, and WFG's assertion to the contrary misstates South Carolina law.[6]

Moreover, DataQuick's meritorious defenses were not limited only to those raising questions of fact but also to those raising questions of law implicated by the allegations of the Complaint. Thus, in addition to the defenses noted above, DataQuick "raise[d] a question of law deserving of some investigation and discussion." *Williams,* 384 S.C. at 326, 681 S.E.2d at 918. These meritorious defenses included the following legal issues:

> (5) a violation of the South Carolina Unfair Trade Practices Act (SCUTPA) cannot be premised upon a breach of contract as a matter of law, *Ardis v. Cox*, 314 S.C. 512, 519, 431 S.E.2d 267, 271 (Ct. App. 1993), yet the Complaint unequivocally relies upon a breach of contract in order to establish violation of the SCUTPA; (6) there was no finding of a willful or knowing violation of the SCUTPA, which is required in order to treble damages, S.C. Code Ann. § 39-5-140(a); and (7) it is improper as a matter of law to treble attorneys' fees as part of a trebling of damages, *Mull v. Ridgeland Realty, LLC*, 387 S.C.

[6] WFG's argument also is disingenuous, as WFG refused multiple requests prior to the hearing to produce the document voluntarily.

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).

(Def. Mem. Supp. at 10.)[7]

Finally, in addition to the meritorious defenses actually raised in DataQuick's Rule 60(b) motion, additional meritorious defenses may be gleaned from the record that this Court may consider on appeal. *See McClurg*, 395 S.C. at 94, 716 S.E.2d at 892 ("[O]n several occasions, our courts have reversed the denial of a Rule 60(b) motion by finding the existence of a meritorious defense in the record.") (Toal, C.J., dissenting); *Thompson v. Hammond,* 299 S.C. 116, 120, 382 S.E.2d 900, 903 (1989) (reversing the denial of a Rule 60(b) motion after finding testimony in the record that presented a meritorious defense "worthy of a hearing or judicial inquiry" (internal quotations omitted)); *Williams,* 384 S.C. at 326-27, 681 S.E.2d at 917-18 (reversing the denial of a Rule 60(b) motion after finding that "the record contains evidence Watkins made a prima facie showing of a meritorious defense"); *Mictronics,* 345 S.C at 511, 548 S.E.2d at 226 (prehearing statement provided record evidence of meritorious defense by party, which was "not required to show an absolute defense").

Here, the record supports two defenses not specifically denominated as "meritorious defenses" in DataQuick's arguments to the trial court below but nonetheless are evident from the record. First, the record reveals that DataQuick has a statute of limitations defense "worthy of a hearing or judicial inquiry." DataQuick had been doing business with WFG since 1994, but ceased all operations under the agreement as of March 26, 2014 (Compl. ¶ 6)—yet WFG waited

[7] The trial court's failures to faithfully apply the SCUTPA in this respect are subject to independent review by this Court. "'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 (S.C. Ct. App. 2018) (alteration in original; quoting *Lambries v. Saluda Cty. Council,* 409 S.C. 1, 7, 860 S.E.2d 785, 788 (S.C. 2014)).

to file suit until August 5, 2016. As WFG's lawsuit was filed some 2.5 years after DataQuick stopped operating as an agent for WFG, it is a reasonable inference that the limitations period had run on some (or all) of the 47 "files" sued upon. S.C. Code Ann. § 15-3-530(1). WFG made no allegation that its claims were brought within three years; in fact, it did not describe the particulars of any of the 47 internal claim files for which it asserted a right to payment. On appeal, WFG attempts to shift *its* burden to prove timeliness to DataQuick: "The record is devoid of any material evidence that DataQuick presented [to] Judge Manning that the claims at issue in the Complaint were time-barred." (Resp. Init. Br. at 14). But "[t]o establish a meritorious defense, a party is not required to show an absolute defense." *Mictronics,* 345 S.C. at 511, 548 S.E.2d at 226. It was not DataQuick's burden to try this action in the procedural straitjacket of default and gather all the evidence that would fully exonerate it, because DataQuick was legally barred from doing so; rather, DataQuick was merely required to raise "a real controversy as to real facts arising from conflicting or doubtful evidence." *Id.* (internal quotations omitted). The record before the trial judge—indeed, the Complaint itself—raised obvious timeliness defenses that qualify as "worthy of a hearing or judicial inquiry." *Thompson,* 299 S.C. at 120, 382 S.E.2d at 903.

Second, the record reveals that DataQuick has a meritorious defense as to the amount of damages. DataQuick's motion to lift the default judgment and corresponding memorandum both expressly challenged the amount of damages awarded by the trial court. Specifically, DataQuick argued below that the damages were unliquidated and that its default "could not reasonably be construed as conceding that the amount of damages was $1,299,888.99 [prior to trebling] because there was no way for this amount to be computed." (Mem. Supp. Mot. Relief Default at 13; see also Mem. at 12-16 and Mot. at 2-4.) Thus, DataQuick asserted a right to a damages

hearing where it could challenge damages, (*id.*), which necessarily constitutes a challenge to the amount of damages awarded. Raising a challenge to the amount of damages is a sufficient showing of a meritorious defense. *McClurg v. Deaton*, 380 S.C. at 580-82, 671 S.E.2d at 96-97 ("Although not previously recognized in South Carolina, courts in other jurisdictions have held that in the context of a Rule 60(b) motion, an allegation that the amount of damages could be different from what was awarded under the default judgment, is sufficient to satisfy the meritorious defense requirement." (Hearn, C.J., concurring in part and dissenting in part)).

Despite all of these meritorious defenses being presented to the court below, the Order only addressed a couple of them. The Order asserted that "[t]he records do not support the suggestion of any assignment of an Agency Agreement" and that "the suggestion that such an assignment could be done unilaterally by DataQuick when it admits that it is not familiar with the contents of the Agency Agreement creates more conjecture." (Order at 7.) The Order also asserted that any potential indemnity was not a defense. But the Order failed to assess the other meritorious defenses raised by DataQuick. Moreover, the court's assertions concerning the assignment of the Agency Agreement were inaccurate. The record did "support the suggestion of any assignment" of the agreement, as the Fliss Affidavit specifically averred that the agreement was assigned to Stewart Title who assumed the agreement and its liability with WFG's awareness and acquiescence. (Fliss Aff. ¶¶ 6-7, 10.) There was no evidence rebutting this sworn statement put into the record by WFG. And the court's assertion that Mr. Fliss could not have knowledge of the assignment of the agreement without knowledge of the contents of the agreement is a *non sequitur*. Mr. Fliss need not be familiar with the contents of the Agency Agreement in order to aver that it was assigned.

The Order below failed to address all of the meritorious defenses raised and further relied upon inaccurate factual statements concerning the ones it did address. Thus, its conclusion of no meritorious defense was based upon a lack of evidentiary support and an abuse of discretion. WFG's assertion on appeal that DataQuick failed to make a prima facie showing of a defense is equally wrong.

D. Prejudice.

The final *Mictronics* factor is whether prejudice would result were the default set aside. DataQuick showed that WFG would suffer no cognizable prejudice were the default set aside, and that a delay in collecting on its windfall could not support this factor (App. Init. Br. 20-22). WFG has offered no argument in response. "If an appellee fails to respond to an issue in its brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct.") *First Union Nat. Bank of S.C. v. FCVS Comms.*, 321 S.C. 496, 504, 469 S.E.2d 613, 618 (Ct. App. 1996 (internal quotations and alterations omitted), *rev'd on other grounds,* 328 S.C. 290, 494 S.E.2d 429 (1997).

The trial judge uncritically adopted the order drafted by WFG, which erroneously stated that DataQuick had not satisfied any of the *Mictronics* factors, when in fact DataQuick had presented substantial proof as to all four. The trial judge abused his discretion by refusing to exercise 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." *State v. Smith,* 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). The default should be set aside so that DataQuick may defend the action.

II. The Trial Court Abused Its Discretion in Failing to Conduct a Damages Hearing and Instead Awarding Unliquidated Damages of Nearly $4 Million

The trial judge awarded nearly $4 million in damages without holding a damages hearing of any sort, or even waiting for the required 10-day notice period to lapse. He did so because WFG told him, falsely, that the damages were liquidated: "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.) This statement was a startling admission by the trial judge that he failed to carry out his judicial duties, thereby demonstrating a per se abuse of discretion requiring reversal on appeal.

WFG does not even try to justify this abdication of the trial court's judicial role. Instead, it seeks to rationalize its own false representation that the damages were liquidated—yet on this crucial issue, it devotes less than a page of its brief in a throwaway section at the end (Resp. Init. Br. at 17-18). As DataQuick showed (App. Init. Br. 22-25), damages are "liquidated" only 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; *see also* App. Init. Br. at 23 (collecting cases); SCRCP 55(b)(1). The claimed damages in this case were not liquidated, and so reversal is required as a matter of law. *Beckmann Concrete Contractors, Inc. v. United Fire & Cas. Co.*, 360 S.C. 127, 600 S.E.2d 76 (Ct. App. 2004) (vacating a judgment of default and remanding for a damages hearing when the court did not hold a damages hearing on unliquidated damages). Further, when a damages hearing is required but is not held, the resulting default judgment is void, and the defendant is entitled to have the default judgment lifted under Rule 60(b). *Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 511-12, 602 S.E.2d 99, 104 (Ct. App. 2004) ("Because no notice was given and no hearing was held, the default judgment was

void. The circuit court erred in refusing to relieve Appellants from the void judgment" (citing *Dymon, Inc. v. Hyman*, 305 S.C. 170, 171-72, 406 S.E.2d 388, 389 (Ct. App. 1991)).

WFG's sole evidence in support of its contention that its damages were liquidated is the declaration of its National Claims Counsel, Jeffrey Dondanville. His affidavit can be fairly summarized as reciting three conclusions, each unsupported by any factual predicate or evidence: (1) the (unidentified) materials he reviewed were business records[8]; (2) WFG's damages were liquidated; and (3) WFG's damages were in excess of $1.3 million. (Dondanville Aff.)[9] The trial judge never should have relied on this inadmissible testimony. WFG's position on appeal appears to be that the applicable rule calls for an "affidavit of amount due," such that any affidavit so titled will do. (Resp. Init. Br. at 18, citing SCRCP 55(b)(1).) That is not the law.

WFG misrepresents DataQuick's position on appeal. (Resp. Init. Br. at 17 (contending that "DataQuick suggests that Mr. Dondanville, [as] a lawyer, is incompetent to provide the affidavit testimony")). WFG relies upon *BB&T v. Fleming*, 360 S.C. 341, 345, 601 S.E.2d 540, 542 (2004), which held that an attorney's declaration was satisfactory evidence to rely upon in entering default judgment. But DataQuick does not argue that Mr. Dondanville *could never be* capable of providing admissible evidence merely because he is a lawyer. Critically, unlike the attorney in *Fleming,* Mr. Dondanville did not assert, let alone show, that he was the custodian of the records he relied upon. *Id.* His affidavit thus contains no admissible evidence. Had Mr.

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[8] The affidavit itself identifies (and defines) those records relied upon as merely "the business records (the 'Records') relating to the Agreement as defined in Paragraph 17 of the Complaint . . . ." (Dondanville Aff. ¶ 2.)

[9] Here, too, WFG misrepresents the record. On appeal, WFG contends that Mr. Dondanville's affidavit "stat[ed] the sums certain paid to date by WFG" (Resp. Init. Br. at 17), but his affidavit below merely recited the conclusion that these were "due and owing" to WFG (Dondanville Aff. ¶¶ 3, 4.)

Dondanville taken the stand and attempted to testify as he did in his short affidavit, his testimony could not be admitted. He provides a conclusory statement that he reviewed "business records," (Dondanville Aff. ¶ 2), but does not provide evidence that he is competent to say so: his affidavit fails to identify what those records were, what specific information they contained, how or when that information was prepared, or anything else that would have allowed the trial judge to evaluate the accuracy of the conclusion that the unidentified documents were "business records" rather than inadmissible hearsay. (App. Init. Br. at 24.) Similarly, Mr. Dondanville asserts the naked conclusion that the damages were liquidated, (Dondanville Aff.), but he does not provide any support for that conclusion. WFG's damages claim was aggregated from 47 distinct "internal claim files," yet Mr. Dondanville does not provide a single fact to support that conclusion as to any of the 47 files. (Compl.; Dondanville Aff.)

Moreover, even were the affidavit admissible, Mr. Dondanville's conclusional description shows on its face that the damages in fact were *not* liquidated. Part of WFG's claimed damages asserted in his affidavit were attorneys' fees[10] and "allocated loss adjustment expenses." (Compl.; Dondanville Aff.) As shown, neither of these categories fits the definition of liquidated damages (App. Init. Br. At 24-25). Moreover, as Mr. Dondanville provided absolutely no details regarding what else comprised the damages claimed, there was no basis for the trial judge to conclude that any of the damages claimed were liquidated. And, as noted, the

[10] These attorneys' fees are distinct from the fees claimed by WFG's counsel in connection with the default proceeding. They represent amounts allegedly incurred by WFG in handling the 47 claims "under the Agreement" (Dondanville Aff. ¶ 2) referenced but not explained by WFG. Mr. Dondanville does not provide any information regarding these fees, including their amount, whether they were paid to outside counsel or whether they represent an amount being claimed for work done by WFG in-house counsel, etc. Attorneys' fees are regarded as unliquidated unless the rate is set by contract. No such allegation appears here. *NationsBank v. Scott Farm*, 320 S.C. 299, 305, 465 S.E.2d 98, 101 (Ct. App. 1995) ("reasonable attorney's fees" claim is unliquidated unless rate specified in contract).

court below made no effort to do so. He simply accepted WFG's assertion: "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 [WFG] order said." (Tr. p. 13 ll. 11-13 (emphasis added).)[11]

Thus, even if the default were not set aside, it is clear that DataQuick was entitled to a hearing on damages because the damages claimed were unliquidated; the trial court independently erred when it failed to conduct such a hearing. Such error entitles DataQuick to relief under Rules 5(a), 55(b), and 60(b)(4). *Beckmann,* 360 S.C. at 133, 600 S.E.2d at 79 (error to fail to hold damages hearing on unliquidated damages under Rules 5(a), 55(b), 60(b), SCRCP); *Stark Truss*, 360 at 511-12, 602 S.E.2d at 104 (requiring relief under Rule 60(b)(4) when a required damages hearing was not held); *Dymon,* 305 S.C. at 172, 406 S.E.2d at 389 (without notice and hearing, order entering judgment was void); *see also* App. Init. Br. 23-26. In addition, the requisite relief mandated under Rule 60(b)(4) does not require any showing of the four factors required by Rule 60(b)(1). *BB&T v. Taylor*, 369 S.C. 548, 553, 633 S.E.2d 501, 503 (2006) ("These factors do not apply to a motion made pursuant to Rule 60(b)(4), SCRCP."). This Court should reverse on these grounds and, at a minimum, remand the case for a damages hearing.

III. The Trial Court Abused Its Discretion in Awarding Relief Under the SCUTPA

WFG refuses to acknowledge that its claim under the SCUTPA does not lie and that it was improper for the trial judge to enter judgment for treble damages under that Act.

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[11] WFG argues that DataQuick was obligated to submit evidence "to rebut Mr. Dondanville's affidavit" (Resp. Init. Br. at 18.). That is wrong. The rule cited by WFG applies when the affiant has established by competent, admissible evidence that a "sum certain" is due. As the affidavit was incompetent, he established nothing. But even if the affidavit had been properly admissible, what he described, as noted, was the opposite of a sum certain (i.e., a liquidated amount).

First, WFG did not allege facts that would establish a SCUTPA claim. No matter how WFG characterizes its Complaint today, it is in essence an action for breach of contract; an allegation that the breach was willful changes nothing. *Key Co., Inc. v. Fameco Distributors, Inc.*, 292 S.C. 524, 526, 357 S.E.2d 476, 478 (Ct. App. 1987) ("deliberate or intentional" breach of contract, "without more, does not constitute a violation of the UTPA"). When properly entered, a default establishes only facts, not conclusions. *Gillian v. Gillian,* 65 S.C. 129, 43 S.E. 386, 387 (1903). WFG's SCUTPA allegations are pure conclusions.

Second, WFG neither cited below nor on appeal any case holding the Act applicable to a private contractual dispute between sophisticated commercial parties. The best WFG could do was speculate (without *any* evidence) that the alleged breach could increase the cost to procure title insurance. But that very theory has been rejected repeatedly as too remote. *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 974 F.2d 502, 507 (4th Cir. 1992) (rejecting argument without evidence that defendant's practice "inflates costs" because "South Carolina courts have consistently rejected speculative claims of adverse public impact and required evidentiary proof of such effects"); *Power Tools & Supply v. Cooper Power Tools,* No. 05-73615, 2007 WL 1840063, at *5 (E.D. Mich. June 26, 2007) (market-price argument deemed "too remote of a consequence to satisfy the public interest requirement"); *Wilson Grp. v. Quorum Health Res., Inc.*, 880 F. Supp. 416, 427 (D.S.C. 1995) ("potential public ramifications" in the form of "higher prices, etc." deemed "too remote to satisfy the public impact requirement"). WFG fails to address these decisions and instead resorts to bromides about the general importance of "the insurance industry" in South Carolina[12] (Resp. Init. Br. at 16). But those

[12] Never mind the fact that WFG affirmatively alleged that, under its agreement with DataQuick, it provided title insurance "on real estate located in various states throughout the United States of

generic statements cannot substitute for the specific factual showing needed to establish "an adverse effect on the public interest" required to state a claim under the SCUTPA. *Wright v. Craft*, 372 S.C. 1, 30, 640 S.E.2d 486, 502 (Ct. App. 2006).

Third, WFG attempts to show an adverse effect on the public interest by alleging conclusionally that "Defendant's acts and omissions are capable of repetition, they are being repeated, and they are ongoing" (Compl. ¶ 39), even though WFG knew that DataQuick had ceased operations 2.5 years before WFG filed suit. The Court of Appeals of South Carolina ruled only months ago that when an alleged violator of the SCUTPA has gone out of business, it renders any past practices "incapable of repetition." *Turner v. Kellett,* 426 S.C. 42, 49, 824 S.E.2d 466, 469 (Ct. App. 2019). It is undisputed that DataQuick stopped underwriting title policies in 2014 when it ceased doing business. Yet WFG does not even discuss *Turner.* Instead, WFG resorts to misdirection:

> WFG plead [sic] that DataQuick's ongoing misconduct . . . 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.

(Resp. Init. Br. at 16 (emphasis in original).)

But as tacitly acknowledged in its brief, WFG would have had the burden of proving at trial "facts that demonstrate the potential for repetition." (Resp. Init. Br. at 16, citing *Wright.*) It thus bore the burden of pleading those *facts* to establish them on default—but instead WFG pleaded pure conclusions. Thus, even had there been a good faith basis for WFG to allege that DataQuick was continuing to do business (there was not), WFG failed to allege any facts

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America" (Compl. ¶ 9), and provided no evidence or allegation regarding the impact of DataQuick's alleged breach *within South Carolina.*

supporting that conclusion; so the default did not establish that DataQuick's alleged conduct was "capable of repetition." *E.g., Gillian,* 65 S.C. 129, 43 S.E. at 387. Moreover, even if the burden had shifted to DataQuick "to present material evidence to disprove those allegations to establish a meritorious defense" as asserted by WFG (Resp. Init. Br. at 16), DataQuick plainly did so. WFG knew DataQuick had stopped doing business (and stopped underwriting policies for WFG) two and half years before WFG filed suit. (Fliss Aff. ¶ 7). Sworn, admissible evidence was before the trial court establishing that "[a]t the time the present lawsuit was filed on August 5, 2016, DataQuick had no business operations and had not operated for over two years." (*Id.* ¶ 4). That evidence was unrebutted, so for WFG to argue that DataQuick "failed to present any such evidence to Judge Manning" strays beyond zealous advocacy.

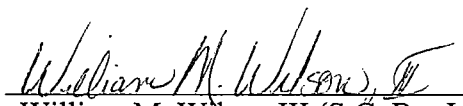
Finally, DataQuick showed that the trial court erred in trebling the improper damage award under the SCUTPA because WFG did not allege that DataQuick's conduct under the SCUTPA was a "willful or knowing" violation as required by the statute (S.C. Code Ann. § 39-5-140). (App. Init. Br. at 31.) WFG responds by citing several paragraphs of its Complaint which it contends suffice. (Resp. Init. Br. at 17, citing Compl. ¶¶ 12, 15, 16, 19, 23, 35, 37.) But, only one of these allegations even includes the words "willful" or "knowing" (Compl. ¶ 23); that paragraph alleged that "when it breached its [contractual] duties," WFG acted with a kitchen sink of intent ("negligent, grossly negligent, wanton, willful, and careless"). But these are classic legal conclusions. No factual basis for any of those conclusions was alleged. As shown above, a willful breach of contract cannot establish a violation of the SCUTPA. *Key Co.,* 292 S.C. at 526, 357 S.E.2d at 478. *A fortiori,* a willful breach of contract cannot serve as a predicate for treble damages under the same law.

The trial judge erred as a matter of law in accepting WFG's argument that the SCUTPA applied and in trebling damages.

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. To the extent the Court declines to grant the above requested relief, DataQuick alternatively 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. DataQuick further requests that such a remand be with instructions that damages (including treble damages) are unavailable under the SCUTPA on the facts alleged.

Respectfully submitted,



William M. Wilson III (S.C. Bar Id. No. 15808)
Wyche P.A.
P.O. Box 728
Greenville, SC 29602
Telephone: 864-242-8200
Facsimile: 864-235-8900
E-Mail: bwilson@wyche.com

Date: June 5, 2019

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

Lower Case No. 2016-CP-40-04718

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 REPLY BRIEF OF APPELLANTS** was served upon counsel of record for Respondents by causing a copy of the same to be deposited in the United States mail, postage prepaid, addressed as follows:

Andrew Bryant Walker, Esq. (SC BAR No. 78271)
Shaun C. Blake, Esq.
Rogers Lewis Jackson Mann & Quinn, LLC
PO Box 11803
Columbia, SC 29211
(803) 978-2836
Attorneys for WFG National Title Insurance Company

This 5th day of June, 2019.

William M. Wilson III