

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2020-000218

RECEIVED

Oct 20 2020

SC Court of Appeals

PTA-FLA, Inc.,

Appellant-Respondent,

v.

TW Telecom Holdings, Inc., a
Delaware corporation; and
DOES 1-10, inclusive,

Respondent-Appellant.

RECORD ON APPEAL

PTA-FLA, Inc.

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4001394

PTA FLA Inc.

TW Telecom Holding Inc.

PLAINTIFF(S)

DOES 1-10

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: No show by either parties

INFORMATION FOR THE PUBLIC INDEX

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

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

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

Circuit Court Judge

Judge Code 2161

Date 4-22-15

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 27 day of April, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Jamie Nicole Smith

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter Debbie McCurdy

Clerk of Court

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4001394

PTA FLA Inc

TW Telecom Holdings Inc

DOES 1-10

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

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

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

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

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

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 16 July 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Jamie Nicole Smith

Joshua Evan Austin

Harry Cooper Wilson III

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

PTA-FLA, Inc.,

Plaintiff,

vs.

TW Telecom Holdings Inc., a Delaware,
corporation; and DOES 1-10, inclusive,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No. 2015-CP-4001394

ORDER

RICHLAND COUNTY
FILED
2015 JUL 16 PM 3:41
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter came before the Court on June 24, 2015, at a motions hearing between the plaintiff PTA-FLA, Inc. d/b/a ClearTalk ("ClearTalk") and the defendant TW Telecom Holdings, Inc. ("TWTC"). ClearTalk moved for an entry of default, which was entered by this court on May 6, 2015. TWTC, on May 12, 2015, filed its Motion to Set Aside Entry of Default and For Late Answer pursuant to 6(b) and 55(c) SCRPC. For the reasons set forth below, TWTC's motion is **DENIED**.

BACKGROUND

ClearTalk filed this case against TWTC after TWTC purportedly failed to uphold its obligations under a contract entered into between the parties under which TWTC would provide ClearTalk wholesale internet and transport services under a fixed payment schedule. After TWTC's alleged failure to provide the promised services and bill according to the fixed schedule, ClearTalk filed the current action alleging as causes of action breach of contract, breach of contract accompanied by fraudulent act, fraud in the inducement, and promissory estoppel.

SCANNED
JUL 16 2015

ClearTalk properly effected service by serving the Summons and Complaint on TWTC's registered agent on March 16, 2015. According to an affidavit filed on behalf of TWTC, and as grounds for its motion, TWTC indicates that its single gatekeeper of lawsuits, Ryan McManis of Level 3 Communications, LLC (TWTC's parent company) was thereafter properly served with the Summons and Complaint, but neglected to realize such. McManis asserts that on March 18, 2015, the day that ClearTalk's Summons and Complaint reached his inbox, McManis was in meetings all day organizing an HR project. McManis further asserts that, on the following day, he presented at this HR meeting for most of the day, was part of an executive meeting at work, and then left the office to pick up his four children from various activities. McManis' affidavit fails to account for any activity on Friday, March 20, 2015, two days following his receipt of the Summons and Complaint, that might have prevented him from checking his email for any service against TWTC or Level 3.

McManis further asserts that "during most of the next week," which would presumably be March 23-27, 2015, McManis was out of the office at offsite meetings, and his contact with the office was limited. Though McManis does indicate that he had little contact with the office during this time, he does not indicate whether his access to email was in any way restricted. The fact that email may be accessed remotely on personal PCs, laptops, tablets, or mobile devices is a commonly recognized principle. The same consideration applies to McManis' statement that he was away for the "next week" (presumably March 31-April 3, 2015) when McManis went on family vacation and had "limited contact" with the office. McManis asserts that "during this incredibly hectic couple of days and weeks, [he] did not see the Summons and Complaint and did not send it to outside counsel for handling." Again, McManis does not account for any reason why he would not have seen the Summons and Complaint during the weeks of April 6-10

GL-2

Page 2 of 6
SCANNED

or April 13-17, 2015, when TWTC still might file a timely answer, nor does he account for the weeks of April 20-24 and April 27-May 1. In other words, McManis allowed the Summons and Complaint to sit on his desk or in his email for seven (7) weeks before assigning it to outside counsel and most of that time he attributes only to "exceptional circumstances," which he fails to identify. In short, McManis simply states in his affidavit that though he is an attorney and though he is responsible for reviewing and delegating time-sensitive legal matters, and though he receives notifications of service via email, he neglected to read his email because he was busy. On the days that are unaccounted for in the affidavit, one may infer from his silence that McManis did not exercise due diligence by checking for mail that he might have missed during his hectic days and weeks. Moreover, this affidavit indicates neither TWTC nor McManis took precautions to implement a system that would allow another individual within the company to handle incoming legal matters in McManis' absence.

LEGAL STANDARD

Rule 55(c), SCRCP, provides that "[f]or good cause shown the court may set aside an entry of default[.]" The good cause standard "requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." *Sundown Operating Co. v. Intedger Indus.*, 383 S.C. 601, 604, 681 S.E.2d 885, 886 (2009). If a movant puts forth a satisfactory explanation for the default, the trial court should then consider three factors: "(1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Id.* In this analysis, our appellate courts have routinely looked to what reason, if any, the defendant has offered as the reason for default. *See Bage, LLC v. Southeastern Roofing Co. of Spartanburg, Inc.*, 373 S.C. 457, 474, 646 S.E.2d 153,

3

SCANNED

162 (Ct. App. 2007); *Stark Truss Co. v. Superior Const. Corp.*, 360 S.C. 503, 510, 602 S.E.2d 99, 102 (Ct. App. 2004) (defendant “had no good reason . . . for failing to act”); *Williams v. Vanvolkenburg*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994) (court examining insufficient reason for failing to answer complaint). Notably, “the trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for finding that of the lack of good cause.” *Sundown*, 383 S.C. at 604, 681 S.E.2d at 886.

Discussion

Rule 55(c), SCRCP, states that an entry of default may be set aside for “good cause” and squarely puts the burden of showing good cause on the moving party, in this case TWTC. TWTC asserts that McManis’ failure to review the Summons and Complaint in his email inbox due to being busy on various days constitutes good cause to set aside the entry of default. There is no showing that McManis, on the days unaccounted for in his affidavit, took any measures to review the Summons and Complaint. Though McManis’ affidavit indicates that he was primarily out of the office on days following the service of the Summons and Complaint, the affidavit does not allege that this would impair McManis’ ability to check his email remotely. As such, McManis’ affidavit fails to prove that he, an attorney who is expected to understand the time-sensitive nature of legal proceedings, was anything but reckless in failing to check his email where McManis 1) receives notifications of legal matters by email; and 2) is the sole gate-keeper of lawsuits for TWTC.

South Carolina courts have recognized that the mishandling of service of process and losing track of a summons and complaint within a corporation is not good cause to set aside default. *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 212, 456 S.E.2d 897, 900 (1995) (upholding trial courts entry of default where “[l]osing a summons and complaint within the



corporation” offered as reason to set default aside); *Bage, LLC*, 373 S.C. at 473, 646 S.E.2d at 162 (finding defendant “mishandled the service of process of this lawsuit”); *Stark Truss Co.*, 360 S.C. at 506, 602 S.E.2d at 102 (finding corporate defendant failed to send summons and complaint to its attorneys until after 30 days from service). The case at hand falls squarely into this line of cases. McManis’ affidavit demonstrates that TWTC’s faulty system of filtering and delegating legal tasks leads to the mishandling of summons and complaints. The Summons and Complaint essentially became lost within McManis’ inbox, causing TWTC to fail to answer in a timely manner.

To set aside an entry of default in this case would be inappropriate because TWTC has failed meet its burden of showing good cause for its failure to timely answer the Summons and Complaint. As a matter of law, failing to answer a Summons and Complaint because the papers were lost within a corporation is not good cause.

Moreover, as explained in the *Sundown Operating* case, because TWTC has failed to set forth a reason for its failure to respond which amounts to “good cause” under Rule 55(c), this Court need not consider TWTC’s arguments relating to factors of the timeliness of a response to the entry of default, meritorious defenses, or prejudice to the Plaintiff. Thus, TWTC’s Motion is denied.

IT IS THEREFORE ORDERED that Defendant TW Telecom Holdings, Inc. is adjudged to be in default in an amount to be set at a hearing at a later date; and

GR 25

IT IS FURTHER ORDERED that the Motion to Allow Defendant TW Telecom Holdings, Inc. to File a Late Answer is denied.

AND IT IS SO ORDERED.

Dated: July 26, 2015
Columbia, South Carolina


The Honorable G. Thomas Cooper, Jr.
Presiding Judge, Fifth Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

PTA-FLA, Inc.,

Case No. 2015-CP-40-1394

Plaintiff,

vs.

ORDER DENYING DEFENDANT'S
MOTION TO RECONSIDER

TW Telecom Holdings Inc., a Delaware
Corporation; and DOES 1-10, inclusive

Defendants.

RECEIVED

FEB 20 2020

SC Court of Appeals

RICHLAND COUNTY
FILED
2015 AUG 26 AM 11:28
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter comes before the Court by way of Defendant's Motion to Alter or Amend the Judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Specifically, Defendant asks this Court to reconsider its Order Denying Defendant's Motion to Set Aside Entry of Default and For Late Answer filed July 16, 2015.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered.¹ Accordingly, this Court hereby **DENIES** Defendant's Motion under Rule 59(e) of the South Carolina Rules of Civil Procedure, to reconsider this Court's Order Denying Defendant's Motion to Set Aside Entry of Default

¹ Despite the appropriate and timely response to Plaintiff's Motion for Entry of Default and Defendant's counsel's reasoned argument on Defendant's Motion to Set Aside Default, this Court is still of the opinion that "good cause" for the default has not been established by a reasonable and specific explanation. Thus, reference to the *Wham* factors (*Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989)) is unnecessary because the predicate, "good cause," has not been established. According to the reasons propounded by Defendant's "gatekeeper for lawsuits" for default, almost any default could be excused. The Defendant's apparent policy of allowing itself to be noticed of lawsuits only by email from its agent for service of process, CT Corporation System, presumably with no hard copy to follow, invites the type of situation confronted by Defendant in this case.

filed July 16, 2015. Furthermore, pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Columbia, South Carolina
August 25, 2015


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

SCANNED

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2015CP4001394**

PTA FLA Inc

TW Telecom Holdings Inc

PLAINTIFF(S)

DOES 1-10

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: Consent Stipulation of dismissal attached pursuant to 40 J

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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Circuit Court Judge

*W. R. Lee*Judge Code 2118

Date

4/4/2016

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 8 day of April, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Joshua Evan Austin

Harry Cooper Wilson III

Robert Holmes Hood Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

PLA-FLA, INC.,

Plaintiff,

vs.

LA FLEET HOLDINGS, INC., A
DELAWARE CORPORATION, AND
DOES 1-10 INCLUSIVE

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-40-01394

**STIPULATION OF DISMISSAL
PURSUANT TO RULE 40(j), SCRPC**

The Plaintiff wishes to strike this case from the trial docket pursuant to Rule 40(j), SCRPC, and the Defendant consents to the Plaintiff's request. Now, therefore, the parties stipulate to the following:

1. This matter shall be, and the same hereby is, stricken from the trial docket.

2. The Plaintiff or Defendant shall have the right to move to restore this case to the trial docket at any time within one calendar year of the date of the filing of this stipulation.

WE STIPULATE:

PLA-FLA, INC.

By: Joshua E. Austin

Joshua E. Austin, Esquire
Attorney for Plaintiff

Date: 4/1/2016

WE CONSENT:

THE HOOD LAW FIRM, LLC

By: H. Cooper Wilson, III

H. Cooper Wilson, III, Esquire
Attorney for Defendant

Date: 4/1/2016

STATE OF SOUTH CAROLINA
COUNTY OF RICHMOND

PLATEAU, INC.,

Plaintiff,

vs.

LAUREL COM HOLDINGS, INC. A
DELAWARE CORPORATION, AND
DOES ET AL INCLUSIVE

Defendant(s)

IN THE COURT OF COMMON PLEAS
FOR THE JUDICIAL CIRCUIT

CA NO. 2015-CP-10-01394

CERTIFICATE OF SERVICE

I, Joshua E. Austin, Esq., Attorney for PLAINTIFF, certify that on this date I caused a copy of
Stipulation of Dismissal Pursuant to Rule 40(g), S.C.R.P. to be placed in a postage-paid envelope and
deposited said envelope in the United States mail to the following address:

H. Cooper Wilson, III
1111 HOOVER LAW FIRM, LLC
P.O. Box 1508
Charleston, SC 29402-1508

Dated this 1st day of April, 2016.

Joshua E. Austin, Esq.

ANNE HENLEY

From: Cooper Wilson <cooper.wilson@hoodlaw.com>
Sent: Friday, April 01, 2016 4:29 PM
To: ANNE HENLEY
Cc: joshuaaustin
Subject: FW: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394
Attachments: PTA-FLA v. TW Telecom Holdings CA No. 2015-cp-40-01394 Filed Copy 40j Stipulation.PDF

Ms. Henley:

Please see the email below re: this case.

Thanks,
Cooper

From: joshuaaustin [mailto:joshuaaustin@cleartalk.net]
Sent: Friday, April 01, 2016 4:28 PM
To: hinleya@rcgov.us
Cc: Cooper Wilson <cooper.wilson@hoodlaw.com>
Subject: Fwd: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394

Good Afternoon Ms. Hinley,

Opposing counsel Mr. Wilson and I hadn't heard back on the email below and we just wanted to make sure that we will be pulled off of the Monday roster. We just wanted to make sure our email was received.

Thanks and have a great weekend.

Best regards,

Joshua

--
Joshua E. Austin, Esq.
In-House Counsel
PTA-FLA, Inc. dba Clear Talk
2101 Main Street, Suite J
P.O. Box 8339 (29202)
Columbia, South Carolina 29201
joshuaaustin@cleartalk.net
(c) 803.466.6488

This electronic mail may be attorney/client privileged and may contain confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify me by telephone (803) 466-6488 and delete the message immediately. Thank you.

----- Original Message -----

Subject: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394

Date: 2016-04-01 13:56

From: joshuaaustin <joshuaaustin@cleartalk.net>

To: ALeeLC@sccourts.org

Cc: Cooper Wilson <cooper.wilson@hoodlaw.com>

Good Afternoon:

I am writing you regarding **Case No. 2015-CP-40-01394**, PTA-FLA, Inc. v. TW Telecom Holdings Inc., et al. This case is number 18 of 27 in priority for the April 4, 2016 Jury Trial Roster.

The Defendant is in default and so all that would be left is a damages hearing. Both parties agree believe that with more time we will be able to come to a mutually beneficial outcome that will not tax the court's time and resources. As such, we have filed a stipulation for dismissal pursuant to 40(j), SCRPC. I have attached a clocked copy here for your convenience. We apologize for the late notice, but it was necessary that we come up with a structured plan of how we were going to proceed in the time after the 40(j) dismissal which took some back and forth before we could file.

Please confirm that the Court will not need our attendance Monday morning as Mr. Wilson, Defendant's attorney CCed here, would need to come in from Charleston.

Should you have any questions or concerns my number is (803) 466-6488. Thank you and have a great weekend.

Best regards,

Joshua Austin

--

Joshua E. Austin, Esq.
In-House Counsel
PTA-FLA, Inc. dba Clear Talk
2101 Main Street, Suite J
P.O. Box 8339 (29202)
Columbia, South Carolina 29201
joshuaaustin@cleartalk.net
(c) 803.466.6488

This electronic mail may be attorney/client privileged and may contain confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please immediately notify me by telephone (803) 466-6488 and delete the message immediately. Thank you.

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2015CP4001394**

PTA FLA Inc

TW Telecom Holdings Inc

PLAINTIFF(S)

DOES 1-10

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

Circuit Court Judge _____ Judge Code 2126 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 5 day of Oct, 20 17 and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 _____ to attorneys of record or to parties (when appearing pro se) as follows:

Joshua Evan Austin

Harry Cooper Wilson III
Robert H. Hood

Robert Holmes Hood Jr.
John O'Connor Radeck Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
PTA-FLA, Inc.	)	C/A No. 2015-CP-40-01394
	)	
<i>Plaintiff,</i>	)	ORDER DENYING DEFENDANT'S
	)	MOTION FOR SUMMARY JUDGMENT
TW Telecom Holdings, Inc., a Delaware	)	
Corporation; and DOES 1-10, inclusive,	)	
	)	
<u><i>Defendants.</i></u>	)	

2016 OCT -5 AM 8:52
 J. METTE M. HOBBS
 C.D.P. & G.S.

This matter is before the Court pursuant to Defendant TW Telecom Holdings, Inc.'s (hereinafter "Defendant") Motion for Summary Judgment. For the reasons set forth below, this Court Denies Defendant's Motion for Summary Judgment.

FACTS AND PROCEDURAL HISTORY

Plaintiff PTA-FLA, Inc. (hereinafter "Plaintiff") filed its Summons and Complaint on March 3, 2015, and served TW Telecom on March 16, 2015 via certified mail to CT Corporation System in Columbia, SC. On May 6, 2015, upon motion of Plaintiff, the clerk filed an entry of default against Defendant. Defendant filed a Motion to Set Aside Entry of Default, an Affidavit from Ryan McManis, and an Answer to Plaintiff's Complaint. By order dated July 16, 2015 this Court denied Defendant's Motion to Set Aside Entry of Default and by order dated August 25, 2015, this Court denied Defendant's Motion to Reconsider. Defendant is in default.

In early March 2016, the parties were notified that the case was placed on the Richland County jury trial roster for the damages hearing. There was a roster meeting scheduled for April 4, 2016. On April 1, 2016, counsel for the parties entered into a stipulation striking the case from

the docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure (hereinafter the "Stipulation"). The Stipulation states:

The Plaintiff wishes to strike this case from the trial docket pursuant to Rule 40(j), SCRCF, and the Defendant consents to the Plaintiff's request. Now, therefore, the parties stipulate to the following:

1. This matter shall be, and the same hereby is, stricken from the trial docket.
2. The Plaintiff or Defendant shall have the right to move to restore this case to the trial docket at any time within one calendar year of the date of the filing of this stipulation.

(Def.'s Mot. Summ. J., Ex. 1).

The Stipulation was dated and filed with the Court on April 1, 2016. That same day, counsel for the Plaintiff emailed the Honorable Alison Renee Lee's law clerk, Chadwick Devlin, advising of the filing of the 40(j) stipulation and seeking confirmation that counsel's presence would not be required at the roster meeting on April 4, 2016. (Def.'s Mot. Summ. J., Ex. 2). Counsel for the parties also emailed Ms. Anne R. Henley, the Civil Non-Jury Court Scheduler for Richland County, to advise that a Rule 40(j) stipulation was entered. (Def.'s Mot. Summ. J., Ex. 3). Ms. Henley responded by saying "thank you." *Id.* On April 4, 2016, Mr. Devlin responded to Plaintiff's counsel's prior email stating that "if this matter was 40(j)'d, there will be no need to attend the roster meeting." (Def.'s Mot. Summ. J., Ex. 2). Further, Mr. Devlin responded again on April 4, 2016 advising counsel that the case did not appear on the trial roster. (Def.'s Mot. Summ. J., Ex. 4). On April 4, 2016, the Honorable Alison Renee Lee executed a Form 4 Order simply stating: "Consent Stipulation of dismissal attached pursuant to 40 J." (Def.'s Mot. Summ. J., Ex. 5). The Form 4 Order was filed on April 7, 2016. *Id.* Plaintiff filed its Motion to Restore on April 6, 2017. On or about April 12, 2017, Defendant simultaneously filed an Opposition to

2

Plaintiff's Motion to Restore and a Motion for Summary Judgment. Plaintiff subsequently filed an Opposition to Defendant's Motion for Summary Judgment and Defendant filed a brief Reply.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), S.C.R.C.P. The moving party has the initial responsibility of demonstrating the absence of a genuine issue of material fact. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537 (1991). However, the moving party may demonstrate this "with or without supporting affidavits," and may point out that there is a lack of evidence to support the nonmoving party's case. Rule 56(b), S.C.R.C.P. "In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." *Id.*

DISCUSSION

I. Defendant Does Not have Standing to File a Motion for Summary Judgment.

"It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability." *Roche v. Young Bros.*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) (internal citations omitted). "Though a defaulting party may be entitled to notice of the damages hearing, that party is limited to cross-examining witnesses and objecting to evidence." *Id.* at 82, 504 S.E.2d at 314. Additionally, a defaulting party may file a motion to set aside the entry of default. *See Limehouse v. Hulsey*, 404 S.C. 93, 111, 744 S.E.2d



566, 576 (2013). There is no further South Carolina authority on additional rights a party in default could possibly have, and Defendant was unable to provide any support for the notion that a defaulted party should be able to subsequently file a motion for summary judgment. This dearth of authority is because it is axiomatic that a defaulted party has forfeited its rights to participate in the case. Defendant filed a motion to set aside the entry of default and that was denied. Its subsequent motion for reconsideration was denied. Defendant has no other legal rights as a party in default. It does not have the right to file a motion for summary judgment and therefore has no standing to file this motion. As such, Defendant's Motion for Summary Judgment is DENIED.

II. Plaintiff's Motion to Restore was Filed within One Year of the Date it Was Stricken.

(j) Case Stricken From Docket by Agreement. A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made **within 1 year of the date stricken**, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.

Rule 40(j), S.C.R.C.P. (emphasis added).

The Stipulation was filed April 1, 2016. On April 4, 2016, the Honorable Alison Renee Lee executed a Form 4 Order simply stating: "Consent Stipulation of dismissal attached pursuant to 40 J." However, the Form 4 Order was not filed until April 7, 2016. Plaintiff filed its Motion to Restore April 6, 2017 within one year of the filing of the Form 4 Order, the date that complaint was stricken pursuant to 40(j).

The Stipulation states:



1. The Plaintiff or Defendant shall have the right to move to restore this case to the trial docket at any time within one calendar year of the date of the filing of this stipulation.

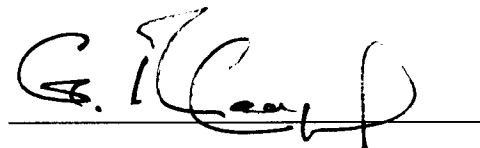
However, the Stipulation also states that “[t]he Plaintiff wishes to strike this case from the trial docket **pursuant to Rule 40(j), SCRPC**, and the Defendant consents to the Plaintiff’s request.”

There becomes an ambiguity as to whether the Stipulation meant to give Plaintiff a year from the date the case was stricken or a year from the date of the filing of this stipulation. Resolving the issue of material fact in the light most favorable to the non-moving party, the Stipulation allowed the Plaintiff to file its Motion to Restore within one year of the date the case was stricken from the docket by Order filed April 7, 2016. Plaintiff filed its Motion to Restore on April 6, 2017, within the one-year time frame.

CONCLUSION

For the reasons set forth above, Defendant’s Motion for Summary Judgment is DENIED. Defendant does not have standing to bring such a motion as a defaulted party, Plaintiff timely filed its Motion to Restore pursuant to 40(j) SCRP, and Plaintiff’s claims are not barred by statute of limitations. Plaintiff is instructed to set a damages hearing with the Richland County Clerk of Court.

IT IS SO ORDERED.



Judge G. Thomas Cooper, Jr.

October 4, 2017

Richland County, South Carolina

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: **2015CP4001394**

PTA FLA Inc

TW Telecom Holdings Inc

PLAINTIFF(S)

DOES 1-10

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

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

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

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

Circuit Court Judge _____ Judge Code 2126 Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 5 day of Oct, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 _____ to attorneys of record or to parties (when appearing pro se) as follows:

Joshua Evan Austin

Harry Cooper Wilson III
Robert H. Hood

Robert Holmes Hood Jr.
John O'Connor Radeck Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
PTA-FLA, Inc.	)	C/A No. 2015-CP-40-01394
	)	
<i>Plaintiff,</i>	)	ORDER GRANTING PLAINTIFF'S
	)	MOTION TO RESTORE
TW Telecom Holdings, Inc., a Delaware	)	
Corporation; and DOES 1-10, inclusive,	)	
	)	
<u><i>Defendants.</i></u>	)	

2011 OCT -5 PM 3:54
 RICHLAND COUNTY
 JEFFREY C. ...
 CLERK OF COURT

This matter is before the Court pursuant to Plaintiff PTA-FLA, Inc.'s (hereinafter "Plaintiff") Motion to Restore. For the reasons set forth below, this Court Grants Plaintiff's Motion to Restore.

FACTS AND PROCEDURAL HISTORY

Plaintiff filed its Summons and Complaint on March 3, 2015, and served TW Telecom on March 16, 2015 via certified mail to CT Corporation System in Columbia, SC. On May 6, 2015, upon motion of PTA-FLA, the clerk filed an entry of default against TW Telecom Holdings, Inc. (hereinafter "Defendant"). Defendant filed a Motion to Set Aside Entry of Default, an Affidavit from Ryan McManis, and an Answer to Plaintiff's Complaint. By order dated July 16, 2015 this Court denied Defendant's Motion to Set Aside Entry of Default and by order dated August 25, 2015, this Court denied Defendant's Motion to Reconsider. Defendant is in default.

In early March 2016, the parties were notified that the case was placed on the Richland County jury trial roster for the damages hearing. There was a roster meeting scheduled for April 4, 2016. On April 1, 2016, counsel for the parties entered into a stipulation striking the case from the docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure

GT

(hereinafter the "Stipulation"). The Stipulation was dated and filed with the Court on April 1, 2016. The Form 4 Order was filed on April 7, 2016. Plaintiff filed its Motion to Restore on April 6, 2017. On or about April 12, 2017, Defendant filed an Opposition to Plaintiff's Motion to Restore.

LAW/ANALYSIS

I. South Carolina Rule of Civil Procedure 40(j) Does not Bar Restoration.

"Rule 40(j) does not require that a party move to restore the case to the docket within one year after it was stricken. Instead, the unambiguous language provides that, if the claim is restored within one year after it is stricken, the statute of limitations is tolled for that period." *Maxwell v. Genez*, 356 S.C. 617, 620-21, 591 S.E.2d 26, 28 (2003). "A party may move to restore the case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j); the party simply cannot take advantage of the one year tolling period provided by the rule." *Id.* at 621, 591 S.E.2d at 28.

While there may be some question as to whether or not Plaintiff may have an issue with the statute of limitations, the law is clear that Plaintiff may restore its case more than a year after it is stricken notwithstanding South Carolina Rule of Civil Procedure 40(j).

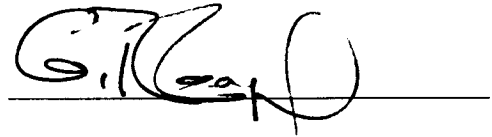
CONCLUSION

South Carolina Rule of Civil Procedure 40(j) does not bar the restoration of a case to the trial docket more than a year after it is stricken as Defendant contends.



IT IS THEREFORE ORDERED that the Plaintiff's Motion to Restore is GRANTED.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "G. Thomas Cooper, Jr.", is written over a horizontal line.

Judge G. Thomas Cooper, Jr.

ORDER 4, 2017

Richland County, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
PTA-FLA, Inc.,	)	C/A No. 2017-CP-40-06433
	)	
Plaintiff,	)	
	)	ORDER
Versus	)	
	)	
TW Telecom Holdings, Inc., a Delaware	)	
corporation; and DOES 1-10, inclusive,	)	
	)	
Defendants.	)	

This matter comes before the Court of Plaintiff's Motion for Default Judgment and Damages. This Court held two separate hearings on this matter on January 31, 2019 and December 3, 2019. Plaintiff PTA-FLA, Inc. (hereinafter "Plaintiff") was represented by Joshua E. Austin, Esquire and Geoffrey Kelly Chambers, Esquire. Defendant TW Telecom Holdings, Inc. (hereinafter "Defendant") was represented by Robert H. Hood, Jr., Esquire. After hearing the testimony and evidence at the hearings, this Court hereby grants Plaintiff direct damages only as detailed below.

Relevant Facts and Procedural Background

In 2010, Plaintiff entered into a contract with Defendant to provide certain telecommunication services to Plaintiff. Plaintiff filed a Summons and Complaint on March 3, 2015 and served the Defendant on March 16, 2015 via certified mail. Plaintiff's asserted causes of action against the Defendant for (1) Breach of Contract; (2) Breach of Contract Accompanied by Fraudulent Act; (3) Fraud in the Inducement; and (4) Promissory Estoppel.

On May 6, 2015, upon motion of Plaintiff, the clerk filed an entry of default against the Defendant. Upon learning of the existence of the Summons and Complaint and the entry of default, this Defendant filed a Motion to Set Aside Entry of Default, an Affidavit from Ryan McManis, and an Answer to Plaintiff's Complaint, all of which were filed with this Court. By orders dated

July 16, 2015 and August 25, 2015, this Court denied this Defendant's Motion to Set Aside Entry of Default and Motion to Reconsider, respectively.

After being notified that the case was placed on the jury trial roster, on April 1, 2016, counsel for the parties entered into a stipulation striking the case from the docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure (hereinafter the "Stipulation"). Plaintiff filed its Motion to Restore on April 6, 2017. On April 12, 2017, Defendant simultaneously filed an Opposition to the Motion to Restore and a Motion for Summary Judgment, arguing that Plaintiff failed to timely restore the action and, therefore, all claims were barred by the statute of limitations. A hearing was held on these motions on September 6, 2017. By Orders dated December 4, 2017, Judge G. Thomas Cooper, Jr. denied Defendant's Motion for Summary Judgment and granted Plaintiff's Motion to Restore. Plaintiff subsequently filed the present Motion along with a Memorandum and Supplemental Memorandum in Support.

In their Motion, Plaintiff elected to seek a default judgment only as to its cause of action for Breach of Contract Accompanied by Fraudulent Act. Because the Defendant is in default, the allegations of the Complaint are deemed admitted. Therefore, the only question before this Court is whether Plaintiff is entitled to damages. Plaintiff seeks (1) direct damages and (2) delay damages.¹ A hearing was held on this matter on January 31, 2019. After the hearing, this Court issued a Form 4 Order on February 4, 2019 that read as follows:

A hearing for this matter was held on January 31, 2019. At issue was Plaintiff PTA FLA, Inc.'s Motion for Default Judgment and Damages. During witness testimony, it became apparent that informative documentation needed to be produced by

¹ Plaintiff's originally also sought lost profits as an element of damages, however, by concession of Counsel for Plaintiff at the hearing on January 31st, 2019, Plaintiff withdrew any of claim for damages including lost profits. (Hr'g Tr. 4:5-14). Additionally, while plead in its Complaint, Plaintiff has not requested punitive damages in this Motion and did not set forth evidence related to punitive damages at the hearing. Therefore, this Order considers only the request for direct damages and delay damages.

Plaintiff for Defendant TW Telecom Holdings, Inc.'s review. Prior to ruling on the motion, Plaintiff shall produce such documentation within 30 days of this order. Upon receipt of the documentation, Defendant TW Telecom Holdings, Inc. has 30 days to review the documentation. After such review, Defendant TW Telecom Holdings will contact the Court to notify of its need for another hearing or if another hearing is not needed. If a hearing is not required by Defendant TW Telecom Holdings, the Court will create a schedule for the submissions of proposed orders from both parties.

Pursuant to the Form 4 Order, Defendant advised the Court that a second hearing concerning the newly produced documents was required. After working through scheduling conflicts, the second hearing was ultimately held on December 3, 2019.

Law

The trial judge has considerable discretion regarding the amount of actual damages it chooses to award. *See Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 310-311, 594 S.E.2d 867, 873 (Ct. App. 2004). An award of actual damages will be reviewed only for whether there are any errors of law in making the actual damages award. *See Mazloom v. Mazloom*, 382 S.C. 307, 320, 675 S.E.2d 746, 753 (Ct. App. 2009).

While a defaulting defendant has conceded liability, a defaulting defendant does not concede the [a]mount of liability. *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 203, 723 S.E.2d 597, 603 (Ct. App. 2012) (citing *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241-42, 246 S.E.2d 880, 882 (1978)). 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. *Jackson v. Midlands Human Resources Center*, 296 S.C. 526, 529, 374 S.E.2d 505, 506-507 (Ct. App. 1988) (internal citations omitted). While the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted. *Id.* In other words, a judgment for money damages must be warranted by the proof of the party in whose favor it is rendered. *Id.* (citing *Wingard v. Lee*, 287 S.C. 57, 336 S.E. (2d) 498 (Ct.

App. 1985). When there is a breach of contract, the amount of damages should put the non-breaching party in the position he would be in had the contract been performed. *Stiles v. American Gen. Life Ins. Co.*, 335 S.C. 222, 227, 516 S.E.2d 449, 451 (1999).

In contesting the default judgment, it is well-settled in South Carolina that defense counsel's participation in the damages hearing is limited to cross-examination and objection to plaintiff's evidence. *Limehouse v. Hulsey*, 404 S.C. 93, 744 S.E.2d 566 (2013).

Findings

A. Direct Damages

Plaintiff seeks \$396,082.42 in direct damages. Plaintiff's direct damages claim is based upon the allegation that Defendant overcharged Plaintiff in violation of the contract. Plaintiff set forth testimony from Eric Steinmann, a part-owner of the Plaintiff who also served as its development manager, who testified this figure represents the total amount Plaintiff claims to have paid the Defendant during the 28-month contract period. There were no documents admitted into evidence to support the claim for direct damages. However, testimony was elicited on both direct and cross-examination concerning a schedule of payments to have been made from the Plaintiff to Defendant.

The schedule of payments was reflected on a letter of intent from April 2010 ("Letter of Intent") and a separate payment schedule dated June 2010 ("Payment Schedule"). Mr. Steinmann testified he believed the only valid portion of his agreement with Defendant was the Letter of Intent. (Jan 31, 2019 Hr'g Tr. 23:5-24:2). The Letter of Intent includes monthly payments totaling \$342,000.00. The monthly payments were later adjusted upwards by \$1,588 per month, by agreement, and reflected in the Payment Schedule. The monthly payments in the Payment

Schedule totaled \$386,864.00. Importantly, Mr. Steinmann admitted he agreed to pay the Defendant \$386,864.00. (Jan 31, 2019 Hr'g Tr. 22:23-26:10).

Therefore, when comparing the agreed upon amount of \$386,864.00 to the amount paid by Plaintiff of \$396,082.42., Plaintiff overpaid by \$9,218.42. (Hr'g Tr. 30:16-22). Therefore, this Court awards Plaintiff \$9,218.42 in direct damages. This amount is sufficient to place Plaintiff in the position it would have been in had the overcharges not occurred.

B. Delay Damages

In addition to its direct damages due to overpayment, Plaintiff also claims in its motion delay damages for a 6-month period from January 2011 to June 2011 (hereinafter "delay period"). In order to establish the numerical basis for the delay damages, Plaintiff relies upon their own internally generated profit and loss summary ("P&L Summary") for the relevant time period. The delay damages are totaled by compiling the alleged losses in various categories as contained on the P&L Summary.

During the first hearing, and upon a timely objection pursuant to the Rule 1006 of the South Carolina Rules of Evidence², Counsel for Defendant requested the supporting documentation used by Plaintiff to create the P&L Summary. This request was granted by the Court to allow the Defendant the opportunity to test the reliability of the figures on the P&L Summary. Counsel for Defendant had an opportunity to inspect and copy the supporting documentation and the parties reconvened for the second hearing on December 3, 2019. Upon further cross-examination of Eric

² "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation, provided the underlying data are admissible into evidence. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court."

Steinmann concerning the supporting documentation, it was evident inconsistencies exist between the numerical figures on the P&L Summary and those in the supporting documentation.

During the second hearing, Mr. Steinmann even conceded that the best source of information for their alleged delay damages is the supporting documentation behind the P&L Summary and not the P&L Summary itself. There were two major categories discussed at the hearing in support of the delay damages: delay period/implementation of the business plan and consulting fees.

i. Delay Period and Plan Implementation

As an initial matter, the Court finds that Plaintiff's allegation in support of the delay damage (the inability to implement an unlimited data plan) was not plead in the Complaint nor coherently supported through evidence or testimony forth during the damages hearings. Because the basis for the alleged delay falls outside the allegations deemed admitted, the Court will not consider it as a basis to support its damages. Yet, even if the basis for the delay damages should be considered, this Court finds that the Plaintiff has not sufficiently proven this element of damages through competent evidence.

There was confusion as to the length of the delay period and the overall impact on the business plan. Mr. Steinmann testified that Defendant's act of switching networks led to a delay in implementing their unlimited data business plan and resulted in damages in the amount of \$1,246,498. On cross-examination, Mr. Steinmann was questioned about paragraph 30 of Plaintiff's Complaint which states the delay was noticed "in or prior to April 2011" (Hr'g Tr. 49:12-50:22). Mr. Steinmann testified that he "assumed" that he noticed the delay prior to April 2011. (Hr'g Tr. 50:3-12).

In addition to the testimony of Mr. Steinmann, Plaintiff also called as a witness a former consultant of the Plaintiff during the delay period named Mr. John Goocher.³ Mr. Goocher testified he was hired to help Plaintiff implement an unlimited talk, text, and data network. (Hr’g Tr. 53:11-54:10). Mr. Goocher testified “[t]he delay by [] [Defendant], from my recollection, ran about seven to eight months from sort of start to finish.” (Hr’g Tr. 56:19-23).

Moreover, while the Plaintiff claims a delay in implementing an *unlimited* data plan, Plaintiff admitted that the business plan concerning data with the Defendant *did* include a limit. (Hr’g Tr. 55:9-10) (emphasis added). Counsel for Defendant also objected that the alleged failure to implement an unlimited data plan was not plead in the Complaint (Hr’g Tr. 54:14-17). To counter the objection, Plaintiff’s counsel cited to Paragraph 9 of the Complaint which says the agreement provided for unlimited data *up to certain bandwidth limits*. (Hr’g Tr. 54:22-55:1) (emphasis added). Mr. Steinmann also testified in the hearing that he was *never* able to implement his business plan, thereby contradicting the claim for delay entirely. (34:16-19) (emphasis added).

This Court finds that the Plaintiff’s arguments regarding the alleged inability to implement its unlimited data business plan falls outside the parameters of what has been deemed admitted by Defendant in the Complaint. Moreover, there is confusing and conflicting testimony as to when the alleged service problems causing the delay started. The Plaintiff’s Complaint vaguely claims service problems started in or prior to April 2011, while Mr. Steinmman testified he assumed it was before then. Apparently using that assumption, he has subsequently chosen January 2011 to June 2011 as the alleged delay period. Yet, Plaintiff’s consultant Mr. Goocher testified the delay ran about seven to eight months. The confusion and inconsistencies concerning the alleged delay period and basis for the delay undermines the reliability of the alleged delay damages as a whole.

³ Mr. Goocher was not proffered as an expert.

ii. Consulting Fees

The Plaintiff claims consulting fees comprise \$459,399 of its delay damages. They claimed that the bulk of the fees were paid to two individuals named John Goocher and Kevin Corrigan. During the first hearing, Plaintiff testified that it paid John Goocher \$45,000 dollars per month in consulting fees which were included as a lost expense for the delay period. Since the production of the supporting documents, which included detailed general ledger, we know that Mr. Goocher was paid only \$22,500 per month for a total of \$90,000 during the delay period. The ledger also shows that Mr. Corrigan was only paid a total of \$50,000. This is another inconsistency that undermines the reliability of the P&L Summary.

Other inconsistencies between the Plaintiff's P&L Summary and their actual invoices and ledgers were revealed on cross-examination of Mr. Steinman. When viewed as a whole, this Court finds the testimony and evidence used in support of the delay damages contain inconsistencies that undermine the reliability of the claimed damages. The Plaintiff uses the P&L Summary in support of damages, but the reliability of that document has been undermined by its supporting documentation and conflicting testimony. Plaintiff concedes the supporting documentation is the best source of evidence, but Plaintiff has not proven through competent evidence or testimony clearly how the delay damages are justified or reasonably calculated. It is the Plaintiff's burden of proof to prove their damages by the preponderance of the evidence by competent testimony. By relying on an unreliable P&L Summary rather than actual documentation of their alleged damages, the Plaintiff has failed to meet their burden of proof as to their claim for delayed damages.

Conclusion

Therefore, the Court hereby **GRANTS** Plaintiff's Motion for Default Judgment and **AWARDS** damages in the total amount of \$9,218.42 in direct damages. The Court awards no money for the alleged delay damages.

AND IT IS SO ORDERED.

The Honorable Robert E. Hood, Presiding
Judge for the Fifth Judicial Circuit

January ____, 2020
_____, South Carolina



Richland Common Pleas

Case Caption: PTA FLA Inc vs TW Telecom Holdings Inc , defendant, et al

Case Number: 2017CP4006433

Type: Order/Other

So Ordered

s/ R.E. Hood #2164

Electronically signed on 2020-01-13 12:08:34 page 10 of 10

The South Carolina Court of Appeals

PTA-FLA, Inc., Appellant,

v.

TW Telecom Holdings, Inc., a Delaware corporation; and
DOES 1-10, inclusive, Defendants,

of which TW Telecom Holdings, Inc. is the Respondent.

Appellate Case No. 2020-000218

ORDER

This appeal arises out of an order of the circuit court granting PTA-FLA Inc.'s motion for default judgment. Because a defaulting party may not appeal from a default judgment, we dismiss the notice of appeal filed by TW Telecom Holdings, Inc. *See Winesett v. Winesett*, 287 S.C. 332, 334, 338 S.E.2d 340, 341 (1985) (explaining a direct appeal does not lie from a default judgment; instead, the proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCPP). A partial remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules. The notice of appeal filed by PTA-FLA, Inc. will be allowed to proceed. All future filings should utilize the above caption.

_____, J.
FOR THE COURT

Columbia, South Carolina

cc:

FILED

February 25, 2020

Joshua Evan Austin, Esquire
Robert Holmes Hood, Jr., Esquire
John O'Connor Radeck, Jr., Esquire

The South Carolina Court of Appeals

PTA-FLA, Inc., Appellant,

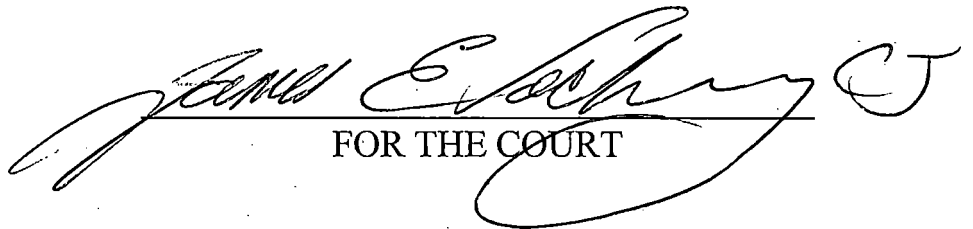
v.

TW Telecom Holdings, Inc., a Delaware corporation; and
DOES 1-10, inclusive, Respondents.

Appellate Case No. 2020-000218

ORDER

After careful consideration, TW Telecom Holdings, Inc.'s motion to reinstate its cross-appeal is granted. Nothing in this order prevents the parties from arguing the issue of appealability in their briefs.


FOR THE COURT

Columbia, South Carolina

cc:

Joshua Evan Austin, Esquire
Robert Holmes Hood, Jr., Esquire
John O'Connor Radeck, Jr., Esquire

FILED
May 22 2020

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
PTA-FLA, Inc.,)
)
Plaintiff,)
vs.)
)
)
TW Telecom Holdings Inc., a Delaware,)
corporation; and DOES 1-10, inclusive,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2015-CP-4001394

ENTRY OF DEFAULT

2015 MAY -6 AM 8:48
RICHLAND COUNTY
JANETTE H. BRIDE
CLERK OF COURT

Plaintiff PTA-FLA, Inc. requests that the clerk of court enter default against defendant TW Telecom Holdings Inc. pursuant to South Carolina Rule of Civil Procedure 55(a). It appearing from the record that Defendant has failed to appear, plead or otherwise defend the default of Defendant is hereby entered pursuant to the South Carolina Rule of Civil Procedure 55(a).

Dated this 1st day of May, 2015.


Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

PTA-FLA, INC.

Plaintiff(s)

vs.

TW TELECOM HOLDINGS, INC., A
DELAWARE CORPORATION; AND DOES 1-10
INCLUSIVE

Defendant(s)

Submitted By: Jamie N. Smith
Address: P.O. Box 8839
Columbia, SC 29202

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

-CP -

2015CP400 1394

SC Bar #: 19367
Telephone #: 101361
Fax #: (803) 363-1323
Other: (866) 333-1984
E-mail: jamies@cleartalk.net

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts	Torts - Professional Malpractice	Torts - Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☒ Breach of Contract (140)	20__-CP-____-	☐ Products Liability (340)	☐ Partition (440)
☐ Other (199)	☐ Notice/ File Med Mal (230)	☐ Personal Injury (350)	☐ Possession (450)
	☐ Other (299)	☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)
Inmate Petitions	Administrative Law/Relief	Judgments/Settlements	Appeals
☐ PCR (500)	☐ Reinstate Drv. License (800)	☐ Death Settlement (700)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Judicial Review (810)	☐ Foreign Judgment (710)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Relief (820)	☐ Magistrate's Judgment (720)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Permanent Injunction (830)	☐ Minor Settlement (730)	☐ Municipal (930)
	☐ Forfeiture-Petition (840)	☐ Transcript Judgment (740)	☐ Probate Court (940)
	☐ Forfeiture-Consent Order (850)	☐ Lis Pendens (750)	☐ SCDOT (950)
	☐ Other (899)	☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Worker's Comp (960)
Special/Complex /Other		☐ Confession of Judgment (770)	☐ Zoning Board (970)
☐ Environmental (600)	☐ Pharmaceuticals (630)	☐ Petition for Workers Compensation Settlement Approval (780)	☐ Public Service Comm. (990)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)	☐ Other (799)	☐ Employment Security Comm (991)
☐ Medical (620)	☐ Out-of-State Depositions (650)		
☐ Other (699)	☐ Motion to Quash Subpoena in an Out-of-County Action (660)		
	☐ Sexual Predator (510)		

Submitting Party Signature: _____

Date: March 3, 2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA,)
)
COUNTY OF RICHLAND)
)
PTA-FLA, Inc.)
Plaintiff,)
)
vs.)
)
TW Telecom Holdings, Inc., a Delaware)
corporation; and DOES 1-10 inclusive,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS

SUMMONS

FILE NO.

2015 FEB -3 PM 1:04
CLERK OF COURT
CLERK OF COURT

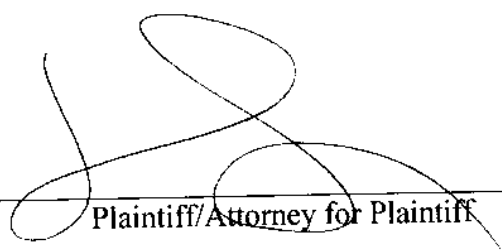
TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Columbia, South Carolina

Dated: February 27, 2015

Address: PTA-FLA, Inc.
P.O. Box 8839
Columbia, SC 29202
(803) 363-1323
jamies@cleartalk.net



Plaintiff/Attorney for Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
PTA-FLA, Inc.,)
Plaintiff,)
vs.)
TW Telecom Holdings Inc., a Delaware)
corporation; and DOES 1-10, inclusive,)
Defendants.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: ____-CP-____-____

COMPLAINT
(Jury Trial Demanded)

2015 MAR -3 PM 1:04
CLERK OF COURT
JANUARY 15, 2015

Plaintiff PTA-FLA, Inc. ("Plaintiff" or "ClearTalk"), a Florida corporation, by and through its counsel alleges:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff is a Florida corporation authorized to do business in the State of South Carolina and maintains its principal place of business in Columbia, South Carolina. Plaintiff provides wireless communication services in South Carolina and elsewhere under the brand "ClearTalk." There are other affiliated companies in other parts of the United States that also provide service under this tradename.

2. Defendant TW Telecom Holdings Inc. (stylized as "tw telecom holdings Inc." and referred to herein as "TWTC") is a Delaware corporation authorized to do business in the State of South Carolina. At all times relevant to this action, Defendant provided fiber optic transport services and sold wholesale internet access in Columbia, South Carolina.

3. Plaintiff is unaware of the true names and capacities of defendants named as DOES 1 through 10 and therefore sues these defendants by such fictitious names. Plaintiff will

amend this complaint to allege their true names and capacities when the same have been ascertained.

4. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the injuries and damages alleged herein and that such defendants were the proximate cause thereof.

5. Plaintiff is further informed and believes and thereon alleges the defendants, and each of them, were acting in concert with, at the behest of, or as agent and/or employee of each of the other defendants in doing the acts complained of herein and each defendant has ratified and approved the acts of his agents and co-defendants.

6. This Court has personal jurisdiction over Defendants because Defendants transact business in the State of South Carolina.

7. Venue is proper in Richland County because all or most of the actions or omissions alleged herein occurred within the County.

FACTUAL ALLEGATIONS

The Agreement

8. In 2010, after a series of negotiations between representatives of ClearTalk and Defendants, the parties entered into an agreement under which [REDACTED]

[REDACTED]

9. Pursuant to the Agreement, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

10. The parties also agreed [REDACTED]

[REDACTED]

[REDACTED]

11. The rates to be charged for the services provided by Defendants were the subject of much discussion and negotiation. A predictable payment structure was important to ClearTalk as it allowed the company to plan for and facilitate business growth without having to negotiate and execute changes in service and rates.

12. [REDACTED]

[REDACTED]

TWTC's Attempt to Unilaterally Modify Payment Schedule

13. After the Agreement was entered into, Defendants requested a meeting with ClearTalk to discuss the details of the service and execute certain documents they claimed were necessary to allow Defendants to initiate service.

14. This meeting occurred in or around June 2010, between ClearTalk representative Kevin Corrigan, who had not participated in the discussions and negotiations between the parties which led to their agreement, and various representatives of Defendants.

15. Prior to the meeting, ClearTalk had authorized Corrigan to execute the documents needed to effect the agreement which the parties had previously entered into.

16. Instead of presenting documents which documented the agreement between the parties, Defendants presented Corrigan with documents that changed some of the material terms of the Agreement.

17. Corrigan executed these documents on behalf of ClearTalk with the understanding and belief that these documents effected the previous agreement.

18. Corrigan did not have authority to modify the Agreement previously reached between ClearTalk and Defendants.

19. Corrigan executed the documents presented to him based on the understanding, created by Defendants' words and actions, that the documents were consistent with and necessary to implement the Agreement.

Defendants Implement Service and Confirms Agreement Terms

20. In or around October 2010, Defendants began providing services pursuant to the Agreement.

21. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

22. While the amount invoiced was lower than the amount upon which the parties had agreed, ClearTalk was concerned [REDACTED]
[REDACTED]
[REDACTED]

23. ClearTalk was also concerned because, around the time the invoice was sent, ClearTalk received reports from Defendants' employees that Defendants did not intend to honor the Agreement and that Defendants desired to implement another type of arrangement t [REDACTED]

[REDACTED]

24. [REDACTED]

[REDACTED]

25. ClearTalk arranged a meeting with a representative of Defendants, Christian Knierim, to discuss these concerns.

26. During the meeting, Knierim informed ClearTalk that the invoice reflected

[REDACTED]

27. [REDACTED]

[REDACTED]

28. [REDACTED]

[REDACTED]

29. [REDACTED]

[REDACTED]

[REDACTED]

Service Problems

30. In or prior to April 2011, ClearTalk began noticing erratic behavior in its network switching, including “blocking” at the 1401 Main location at certain times, even for the small amount of data that was being transmitted at that time. The amount of data transmitted was less than 40 Mb when the 1401 Main location should have allowed for 140 Mb of data throughput.

31. After weeks of investigation and testing, ClearTalk was able to isolate the erratic service problem as a “MAC flapping” issue and identify it as stemming from Defendants’ configuration.

32. “MAC flapping” meant, essentially, that at intermittent and unpredictable times, all of the internet services being provided by Defendants would shut down.

33. This issue affected the customers of ClearTalk as its customers experienced interruption in the data services they purchased from ClearTalk.

34. ClearTalk notified Defendants of this recurring problem.

35. To address this problem, in or around September of 2011, Defendants told ClearTalk it required additional circuits to address this problem within its network.

36. [REDACTED]

[REDACTED]

[REDACTED]

Overcharges

37. In order to implement the changes necessary to remedy the service problems caused by Defendants' network, Defendants claimed that ClearTalk needed to sign a revised service agreement.

38. ClearTalk initially refused to sign such a revised agreement as some of the terms were inconsistent with the original Agreement.

39. Defendants, however, refused to remedy the network problem (although it was able to do so) until ClearTalk signed the revised service agreement.

40. Defendants' refusal to remedy the network problem continued to cause significant business problems for ClearTalk as it prevented ClearTalk from delivering one of its core products to its customers and caused damage to ClearTalk's reputation at the critical start up time of its network.

41. Accordingly, ClearTalk signed the revised agreement "under protest."

42. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

43. [REDACTED]
[REDACTED]
[REDACTED]

44. [REDACTED]
[REDACTED]

45. [REDACTED]

46. Defendants' refusal to adhere to the terms of the Agreement caused ClearTalk to incur charges for more than the amount which it had agreed to pay and also impaired its ability to successfully implement its data service to customers as ClearTalk had the opposite of the peace of mind and simplicity that the agreement, as negotiated, would have allowed. As such, ClearTalk was not afforded time to focus on its marketing, and instead was required to maintain focus on recurring service and billing problems.

Bandwidth Problems

47. In addition to the network and payment problems discussed above, Defendants also breached the Agreement with respect to the amount of bandwidth it agreed to make available to ClearTalk.

48. [REDACTED]

49. Defendants did not provide ClearTalk with the bandwidth for which it was paying which, in turn, led to customer complaints for data access being denied.

50. Customers who purchase data plans expected to be able to access the internet on every attempt, and ClearTalk's inability to provide this data access was damaging to its business.

51. ClearTalk notified Defendants of this breach and Defendants promised to correct the problem but failed to do so.

52. Defendants also exacerbated this problem by informing ClearTalk's customer service employees on multiple occasions that the agreement was other than had been negotiated and set forth on the Payment Schedule.

Refusal to Engage in Goodfaith Negotiations and Continued Overcharges

53. [REDACTED]

54. [REDACTED]

55. [REDACTED]

56. [REDACTED]

57. [REDACTED]

The New Agreement

58. [REDACTED]

[REDACTED] the parties ultimately agreed to the terms of a new agreement ("New Agreement")

59. Although lower cost alternatives were available to ClearTalk at this point, ClearTalk opted to continue its relationship with Defendant in order to avoid the difficulties and expenses involved with switching to another carrier.

60. After entering into the New Agreement, Defendants, without explanation, refused to honor the terms of the newly negotiated agreement, and gave notice to ClearTalk that ClearTalk must discontinue its use of Defendants' network in an unreasonably short time frame.

The Unreasonable and Abrupt Termination

61. In late January 2013, Defendants advised ClearTalk that it intended to terminate its services to ClearTalk, thereby requiring ClearTalk to find another provider.

62. This notice came was unexpected as Defendants had not given any prior notice that it was going to terminate its services [REDACTED]

63. Given the nature of the services Defendants were providing, ClearTalk needed significant lead time to procure bids from other providers in order to obtain a competitive rate.

64. Defendants' abrupt notice resulted in ClearTalk being unable to negotiate from a position of strength and it was forced to urgently find an affordable alternative.

65. Although ClearTalk immediately used its best efforts to transfer its usage to another provider, which ClearTalk ultimately did, the process took several months.

66. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

67. Plaintiff incorporates by reference paragraphs 1 through 66, inclusive, as if fully set forth herein.

68. Plaintiff and Defendants entered into a binding Agreement, as set forth above.

69. Plaintiff has performed all obligations required of it under the Agreement, or has had the performance of any obligation excused.

70. Defendants breached the Agreement by refusing to provide the agreed upon services, overcharging ClearTalk for the services, and refusing to engage in good faith negotiations.

71. Defendants also breached the covenant of good faith and fair dealing implied in the contracts between ClearTalk and Defendants.

72. As a result of the breaches by Defendants, ClearTalk has been damaged in an amount to be determined at trial.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

73. Plaintiff incorporates by reference paragraphs 1 through 72, inclusive, as if fully set forth herein.

74. In addition to breaching its contract with ClearTalk as set forth above, Defendants acted fraudulently in making misrepresentations to ClearTalk [REDACTED]

[REDACTED]

75. Defendants, through their representatives, made such representations with knowledge of their falsity and with fraudulent intent, or with reckless disregard to the truth of such representations.

76. Defendants thereafter reneged on these representations with knowledge that ClearTalk's business was dependent upon the services provided to it by Defendants.

77. As a result of Defendants' breach of contract accompanied by fraudulent misrepresentations by Defendants' representatives, ClearTalk's business plan was disrupted, resulting in damages in an amount to be determined at trial.

78. Due to the fraudulent nature of Defendants' actions, Plaintiff is also entitled to punitive damages in an amount to be determined at trial.

FOR A THIRD CAUSE OF ACTION
(Fraud in the Inducement)

79. Plaintiff incorporates by reference paragraphs 1 through 78, inclusive, as if fully set forth herein.

80. Defendants falsely represented to Plaintiff, by and through its agent Christian Knierim, [REDACTED].

81. Defendants intentionally misrepresented [REDACTED]
[REDACTED].

82. These representations by Defendants to Plaintiff were both material and false.

83. Defendants made such representations to Plaintiff with knowledge of the falsity of the representations, or with reckless disregard to their truth, and made the representations with the intent that Plaintiff act upon them.

84. Plaintiff did not know of the falsity of the representations by Defendants, and rightfully relied on said representations to Plaintiff's detriment, resulting in consequent and proximate injury.

85. Plaintiff did not learn of the nature of Defendants' fraudulent misrepresentations until in or around January of 2012, [REDACTED]

86. As a natural and proximate result of the fraud by Defendants, Plaintiff has lost money in the nature of expectation damages, in an amount to be determined at trial.

87. Due to the fraudulent nature of Defendants' actions, Plaintiff is also entitled to punitive damages in an amount to be determined at trial.

FOR A FOURTH CAUSE OF ACTION
(Promissory Estoppel)

88. Plaintiff incorporates by reference paragraphs 1 through 88, inclusive, as if fully set forth herein.

89. Pleading in the alternative, Defendants promised [REDACTED]

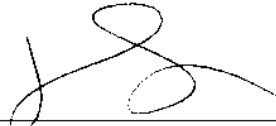
90. Defendants later promised that [REDACTED]

91. Plaintiff reasonably relied, to its detriment, on these promises in its decision to forego alternative service arrangements and its decision to offer data plans to its consumers.

92. Defendants' failure to fulfill the promises described above worked an injustice on Plaintiff and caused Plaintiff damages.

WHEREFORE, Plaintiff prays for judgment against Defendants for compensatory damages, general damages, special damages, consequential damages, punitive damages and any other and further relief that this court considers proper.

Respectfully submitted,

BY: 

Jamie N. Smith, Esq. (101367)
2101 Main Street
Columbia, South Carolina 29201
Telephone: (803) 3631323
jamies@cleartalk.net

Attorney for Plaintiff

March __, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-40-01394
	)	
	)	
Plaintiff,	)	ANSWER TO PLAINTIFF'S
	)	COMPLAINT
Versus	)	(Jury Trial Requested)
	)	
TW Telecom Holdings, Inc., a Delaware	)	
corporation; and DOES 1-10, inclusive,	)	
	)	
Defendants.	)	

RICHLAND COUNTY
 FILED
 2015 MAY 11 AM 11:56
 JESSIE L. HARRIS
 CLERK OF COURT
 C.P. 2015-CP-40-01394

Comes now, the Defendant, TW Telecom Holdings, Inc., a Delaware corporation (hereinafter "this Defendant"), hereby answers the allegations of the Plaintiff's Complaint, subject to any and all affirmative defenses, motions, or other qualifications, as follows:

1. Each and every allegation not specially admitted herein is denied.

AS TO PARTIES, JURISDICTION AND VENUE

2. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 1 of the Plaintiff's Complaint and therefore denies the same.

3. In response to the allegations contained in Paragraph 2 of the Plaintiff's Complaint, this Defendant admits that it is a corporation organized and existing under the laws of a state other than South Carolina. Further, through a series of mergers and acquisitions, Level 3 Communications is the parent company of tw telecom Holdings, LLC, which is the successor by operation of merger to tw telecom Holdings, Inc. All remaining and inconsistent allegations contained in Paragraph 2 of the Plaintiff's Complaint are denied.

4. The allegations contained in Paragraph 3 of the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent a response is required, this Defendant denies, as written, the allegations contained in Paragraph 3 of the Plaintiff's Complaint.

5. This Defendant denies the allegations contained in Paragraphs 4 and 5 of the Plaintiff's Complaint.

6. The allegations contained in Paragraphs 6 and 7 of the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent a response is required, this Defendant denies the allegations contained in Paragraphs 6 and 7 of the Plaintiff's Complaint.

AS TO FACTUAL ALLEGATIONS

7. This Defendant denies the allegations contained in Paragraphs 8, 9, 10, 11 and 12 of the Plaintiff's Complaint as written and craves reference to the agreement between the parties for a complete explanation of the relationship between the Plaintiff and this Defendant.

8. This Defendant denies, as written, the allegations contained in Paragraphs 13 and 14 of the Plaintiff's Complaint.

9. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 15 of the Plaintiff's Complaint and therefore denies the same.

10. This Defendant denies the allegations contained in Paragraphs 16 and 17 of the Plaintiff's Complaint.

11. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraphs 18 and 19 of the Plaintiff's Complaint and therefore denies the same.

12. This Defendant denies, as written, the allegations contained in Paragraphs 20 and 21 of the Plaintiff's Complaint.

13. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 22 of the Plaintiff's Complaint and therefore denies the same.

14. This Defendant denies the allegations contained in Paragraphs 23 and 24 of the Plaintiff's Complaint.

15. This Defendant denies, as written, the allegations contained in Paragraph 25 of the Plaintiff's Complaint.

16. This Defendant denies the allegations contained in Paragraphs 26, 27, 28 and 29 of the Plaintiff's Complaint.

17. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 30 of the Plaintiff's Complaint and therefore denies the same.

18. This Defendant denies the allegations contained in Paragraph 31 of the Plaintiff's Complaint.

19. This Defendant denies, as written, the allegations contained in Paragraph 32 of the Plaintiff's Complaint.

20. This Defendant denies the allegations contained in Paragraph 33 of the Plaintiff's Complaint.

21. This Defendant denies, as written, the allegations contained in Paragraph 34 of the Plaintiff's Complaint.

22. This Defendant denies the allegations contained in Paragraph 35 of the Plaintiff's Complaint.

23. This Defendant denies, as written, the allegations contained in Paragraphs 36 and 37 of the Plaintiff's Complaint.

24. This Defendant denies the allegations contained in Paragraphs 38, 39 and 40 of the Plaintiff's Complaint.

25. This Defendant denies, as written, the allegations contained in Paragraph 41 of the Plaintiff's Complaint.

26. This Defendant denies the allegations contained in Paragraphs 42 and 43 of the Plaintiff's Complaint.

27. This Defendant denies, as written, the allegations contained in Paragraphs 44 and 45 of the Plaintiff's Complaint.

28. This Defendant denies the allegations contained in Paragraphs 46 and 47 of the Plaintiff's Complaint.

29. This Defendant denies, as written, the allegations contained in Paragraph 48 of the Plaintiff's Complaint and craves reference to the agreement signed between the parties for true and accurate representation of the agreement between the parties.

30. This Defendant denies the allegations contained in Paragraphs 49, 50, 51 and 52 of the Plaintiff's Complaint.

31. This Defendant denies, as written, the allegations contained in Paragraphs 53, 54, 55, 56 and 57 of the Plaintiff's Complaint.

32. This Defendant denies, as written, the allegations contained in Paragraph 58 of the Plaintiff's Complaint and craves reference to the agreement between the parties for a true and accurate representation of the parties' relationship.

33. This Defendant denies, as written, the allegations contained in Paragraphs 59, 60, 61, 62, 63 of the Plaintiff's Complaint.

34. This Defendant denies the allegations contained in Paragraphs 64, 65 and 66 of the Plaintiff's Complaint.

AS TO THE FIRST CAUSE OF ACTION
(Breach of Contract)

35. In response to the allegations contained in Paragraph 67 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

36. This Defendant denies, as written, the allegations contained in Paragraph 68 of the Plaintiff's Complaint.

37. This Defendant denies the allegations contained in Paragraphs 69, 70, 71 and 72 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's First Cause of Action.

AS TO THE SECOND CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

38. In response to the allegations contained in Paragraph 73 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

39. This Defendant denies the allegations contained in Paragraphs 74, 75, 76, 77 and 78 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's Second Cause of Action.

AS TO THE THIRD CAUSE OF ACTION
(Fraud in the Inducement)

40. In response to the allegations contained in Paragraph 79 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

41. This Defendant denies the allegations contained in Paragraphs 80, 81, 82, 83, 84, 85, 86 and 87 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's Third Cause of Action.

AS TO THE FOURTH CAUSE OF ACTION
(Promissory Estoppel)

42. In response to the allegations contained in Paragraph 88 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

43. This Defendant denies, as written, the allegations contained in Paragraphs 89, 90 and 91 of the Plaintiff's Complaint.

44. This Defendant denies the allegations contained in Paragraph 92 of the Plaintiff's Complaint, including the WHEREFORE paragraph, those being the remaining allegations of Plaintiff's Fourth Cause of Action and of the Plaintiff's Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Proximate Cause)

45. That, even if this Defendant was negligent, as alleged in the Complaint, which is specifically denied, the negligence of this Defendant is not the direct or proximate cause of any injury alleged by the Plaintiff and therefore this Defendant is not liable for any damages allegedly sustained by the Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Duty Owed)

46. This Defendant is informed, believes, and thereon alleges, that the Complaint, and each cause of action therein, is barred because this Defendant did not owe any duty to Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Comparative Negligence)

47. That, upon information and belief, even if this Defendant was negligent as described in the Complaint, which is specifically denied, the Plaintiff's alleged injuries and damages, if any, resulted from, or were due to the negligence of the Plaintiff, which combined and concurred with any negligence on the part of this Defendant, which is specifically denied, to bring about the said damages, if any, as a proximate cause thereof and without which the same would not have occurred.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reasonableness and Good Faith)

48. This Defendant alleges that it and its agents and employees acted reasonably and in good faith at all times material herein, based on all relevant facts

and circumstances known by them at the time they so acted. Accordingly, Plaintiff is not entitled to recovery any damages whatsoever.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Sole Negligence)

49. That, upon information and belief, whatever injuries and damages, if any, which may have been sustained by the Plaintiff, as described in the Complaint, were due solely to, cause wholly by, and were the direct and proximate result of the negligence, carelessness and recklessness of the Plaintiff, so far as to bar the Plaintiff from recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Limitation of Recovery Based on the Agreement)

50. That the Plaintiff is barred from recovering indirect, consequential, special, incidental, or punitive damages based on the language contained in the agreement.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)

51. That any award or assessment of punitive damages as prayed for by the Plaintiffs would violate this Defendant's Constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reservation and Non-Waiver)

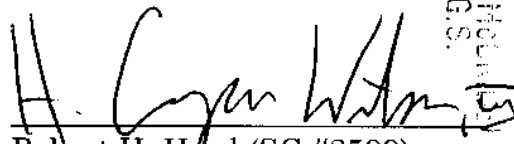
52. This Defendant reserves any additional and affirmative defenses as may be revealed or become available to it during the course of their investigation

and/or discovery in the case and is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Plaintiff's Complaint, and having asserted these affirmative defenses, the Defendant, TW Telecom Holdings, Inc., a Delaware corporation, prays that the Plaintiff's Complaint be dismissed with prejudice and that they be awarded the costs and reasonable fees associated with this matter, and such other relief as the Court may deem just and proper.

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RICHLAND COUNTY
FILED
2015 MAY 11 AM 11:55
JEANETTE M. HOLLAND
C.C.P. & G.S.

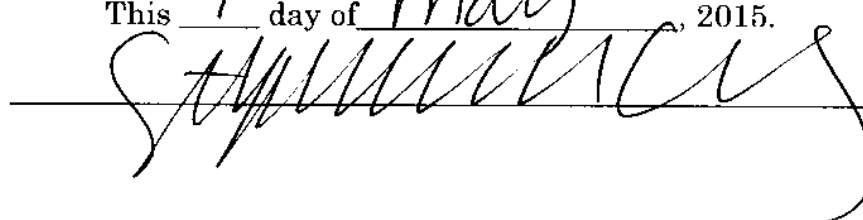

Robert H. Hood (SC #2599)
Robert H. Hood, Jr. (SC #13491)
H. Cooper Wilson, III (SC #74939)

Attorneys for the Defendant
TW Telecom Holdings, Inc., a Delaware corporation

5/7, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 7 day of May, 2015.


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Certificate of Reporter

22

E X H I B I T S

NO EXHIBITS WERE INTRODUCED

1 (Whereupon, the following proceedings were held on
2 June 24, 2015, beginning at approximately 3:30 PM.)

3 BAILIFF: All rise.

4 THE COURT: Thank you.

5 PTA versus Telecom?

6 MS. SMITH: Yes, Your Honor.

7 MR. WILSON: Yes, sir.

8 THE COURT: All right. Who's --

9 MR. WILSON: Your Honor, I'm Cooper Wilson.

10 THE COURT: You're Cooper Wilson?

11 MR. WILSON: Yes, sir.

12 We have filed a motion to set aside entry of
13 default filed on the plaintiff's motion for entry of
14 default. I'm not sure which order you want to go in,
15 but they both address the same thing.

16 THE COURT: Did you ever make a motion? Who has
17 the motion?

18 MS. SMITH: Your Honor, I did move for entry --

19 THE COURT: And you are?

20 MS. SMITH: I apologize. My name is Jamie Smith
21 and I'm with the plaintiff, PTA-FLA, Incorporated.

22 I did move for entry of default on May 1st of this
23 year and entry was -- or the default was entered by
24 Ms. McBride on May 6th. I don't believe at this time
25 that there would be need for an oral argument regarding

1 the entry of default, but we'll --

2 THE COURT: You filed an affidavit?

3 MS. SMITH: Yes, sir.

4 THE COURT: You made the motion for entry?

5 MS. SMITH: Yes, Your Honor.

6 THE COURT: Ms. McBride entered on May the 6th an
7 entry of default?

8 MS. SMITH: Yes, Your Honor.

9 THE COURT: Does that satisfy you, Mr. Wilson?

10 MR. WILSON: Yes, sir, it does.

11 THE COURT: All right. You may proceed.

12 And you have with you Mr. Hood?

13 MR. WILSON: Yes, Your Honor.

14 THE COURT: And?

15 MR. WILSON: Ryan McManis.

16 THE COURT: Mr. McManis, are you an attorney?

17 MR. McMANIS: Yes, Your Honor.

18 THE COURT: Who do you -- who do you represent?

19 MR. McMANIS: I'm the in-house counsel for Level 3
20 Communications and TW Telecom.

21 THE COURT: Okay. You're in-house?

22 MR. McMANIS: Yes, sir.

23 THE COURT: I always thought that would be a pretty
24 good job.

25 MR. McMANIS: At times it is. This isn't one of

1 them.

2 THE COURT: All right.

3 All right, Mr. Wilson.

4 MR. WILSON: May it please the Court? Your Honor,
5 I'm Cooper Wilson. I'm here today to present our case
6 to set aside the plaintiff's motion for default and, of
7 course, entry of default.

8 You just had an opportunity to meet my law partner,
9 Bobby Hood, and also Ryan McManis, who is in-house
10 counsel for the defendant. Mr. McManis is intimately
11 involved in this case. He signed an affidavit regarding
12 the receipt of the summons and complaint and why we're
13 here today.

14 Your Honor, he lives in Denver, Colorado. He flew
15 in last night for this hearing. His -- his presence
16 should show his -- his commitment to the case and how
17 serious he takes this, Your Honor.

18 We're here today to set aside entry of default
19 under Rule 55(c), Your Honor.

20 THE COURT: Tell me about the case. What's the
21 case about?

22 MR. WILSON: Yes, sir.

23 The defendant, TW Telecom, was purchased by
24 Mr. McManis' company called Level 3. TW provides
25 basically a -- a street or a highway of information

1 along the Internet and things like this to companies
2 like the plaintiff, who then take that ability to
3 provide information on the -- on the net, on the
4 highway, to customers.

5 The allegations from the plaintiff are there was
6 a back and forth negotiation between the plaintiff and
7 the defendant, TW Telecom, about how much they were
8 gonna pay each month and what type of services they
9 were gonna receive. The allegations are that they
10 wanted some sort of flat fee and they thought they were
11 being promised that. They signed a contract which does
12 not indicate that and it does indicate the payment
13 schedule that goes with it that was approved by the
14 plaintiff.

15 So we are providing them the ability to provide a
16 network to their clients basically. They don't believe
17 that they got what they bargained for. We believe that
18 they did. We also believe that the contract -- we've
19 read the complaint, the contract and the terms and
20 conditions containing the same reflects a limitational
21 damages as well, so we have a meritorious defense as to
22 both liability and to claim damages which are limited in
23 the contract.

24 The reason we're here today, respectfully, is we
25 didn't answer the complaint on time, Your Honor, and --

1 THE COURT: Give me some -- give me some dates.

2 MR. WILSON: Yes, sir.

3 The -- as I said, the defendant is an out-of-state
4 corporation. The plaintiff served CT Corp, I believe,
5 on March 16th of 2015. That correspondence was sent
6 from CT Corp to the defendant around March 18th. It
7 was not answered for reasons I'll come back to. The
8 plaintiff filed a motion for default on May 1st. The
9 defendant was made aware of the default sometime around
10 May 4th or May 5th. We were hired on May 6th. We filed
11 our motion to set aside the default, an affidavit from
12 Mr. McManis, and a proposed answer to the plaintiff's
13 complaint the next day, Your Honor, immediately. Prior
14 to doing that, we called --

15 THE COURT: So you filed on May 7th?

16 MR. WILSON: Yes, sir.

17 Prior to that -- prior to filing, we called the
18 attorneys for the plaintiff and explained the situation
19 and requested that we be let out of the default and
20 were denied.

21 THE COURT: When? The entry of default is
22 May 1st?

23 MR. WILSON: It may not have been actually entered
24 until the 6th.

25 THE COURT: It was filed on the 6th?

1 MR. WILSON: Yes, sir. And so we were retained --

2 THE COURT: Hold on a minute. It says she signed
3 it on the 1st. Go ahead.

4 MR. WILSON: Yes, sir.

5 And so my law firm was retained on the afternoon
6 of the 6th and by the 7th we had submitted to the Court
7 the paperwork explaining the situation of why we're
8 here.

9 As Your Honor is -- is familiar with default,
10 we are moving to set it aside under Rule 55(c). We
11 believe we have good cause, Your Honor.

12 Mr. McManis has been upfront since the first
13 time he called us, he's been upfront in his affidavit
14 regarding just what happened.

15 THE COURT: Well, let me find his affidavit.

16 MR. WILSON: In the motion, Your Honor, it should
17 be Exhibit Number 2.

18 THE COURT: All right. He says he didn't realize
19 the summons and complaint was e-mailed to him on the
20 18th because he was busy doing something else, an HR
21 project, and then on the 19th he was a presenter at a
22 meeting.

23 Okay.

24 MR. WILSON: Yes, sir. And we're not here to
25 stand in front of this Court and say that Mr. McManis

1 didn't get the e-mail or anything like that. We're
2 here to say that certainly Level 3 is a large
3 corporation. Certainly Mr. McManis has a lot of
4 responsibilities and this is one and I believe --

5 THE COURT: He said he's the gatekeeper for
6 lawsuits.

7 MR. WILSON: He is. Yes, sir. And --

8 THE COURT: Does he get a lot of lawsuits?

9 MR. WILSON: More than one.

10 THE COURT: Okay. You don't have to answer that.

11 MR. WILSON: But in talking to him, this is the
12 only time this has ever happened in a case that he's
13 been involved in, Your Honor. And to add to the -- the
14 elements of what was going on at work, Mr. McManis is
15 also a father of four. His wife runs an eighty-employee
16 Boys and Girls Club in Denver, and during that time was
17 staying late at work. Mr. McManis was rushing to get
18 the kids picked up, home, put to bed and to school the
19 next day and --

20 THE COURT: Well, do you got any caselaw that
21 would support a relief from default for those reasons?

22 MR. WILSON: We -- we believe that those reasons
23 tie into good cause and excusable neglect, Your Honor,
24 and that they also tie in -- the substance of the case
25 ties in on point with the Wham factors. We have a

1 meritorious defense to the case.

2 In our memorandum we have -- in our motion we
3 talked about it and Mr. McManis' affidavit talked about
4 it. We have provided a copy of the contract, which is
5 Exhibit 5 to our memo. Respectfully, that the --
6 there's confidential language in there, but, you know,
7 rather than waiting on a confidentiality order, I
8 submitted it today because I wanted the Court to have
9 it, the detailed contract, both -- which touches on
10 liability and damages. The timing of this was the next
11 day. When Mr. McManis learned after receiving a motion
12 for default that something was wrong, he obviously said
13 oh, my goodness, this is terrible, and called us.

14 THE COURT: I'm sure those were his exact words.

15 MR. WILSON: No, sir. I'm omitting a four-letter
16 word in there. In Sumter, where I'm from, I'd pick a
17 new four-letter word. But took it very seriously, got
18 us immediately and submitted to this Court immediately.

19 On a third factor of the Wham test, the prejudice
20 to the plaintiff, Your Honor, there is none. There's
21 been no discovery done in the case. The only thing
22 that's been done is we invited the plaintiff to Denver,
23 Colorado, a couple of weeks and had a meeting with them,
24 also with their attorneys on the telephone, about the
25 case, about everything.

1 We're willing to participate in discovery, we
2 want to participate, we have defenses to their claims,
3 and under Rule 55(c) not only good cause, but in the
4 interest of justice, Your Honor. This is a case where
5 they've alleged not only breach of contract, but breach
6 of contract with a fraudulent act. So potentially if
7 there's a fraud being committed by the defendant or
8 anybody else, that may affect the public. That's
9 something that a factfinder should have the opportunity
10 to hear; both the allegations, which they would hear,
11 but also our defenses because we have them.

12 And -- you know, so we have good cause and we
13 believe it's in the interest of justice to move forward,
14 but the caselaw in the state courts and the Federal
15 courts is clear, and South Carolina wants cases to be
16 heard on the merits.

17 And this is not a case where you have an injured
18 person that is -- you know, a bodily injury-type of
19 claim, Your Honor. This is two sophisticated businesses
20 that had a bad interaction with each other. The
21 plaintiff company is sophisticated, their owner has a
22 law degree as well, so this is a case that should be
23 heard on the merits in front of a jury.

24 Mr. McManis is -- is here today. He is upset that
25 this happened. He believes that there is excusable

1 neglect which you can use under Rule 60(b) even though
2 that standard is more stringent in 55(c). The Sundown
3 case allows you to say if one of the elements of
4 Rule 60(b) is met, which includes excusable neglect,
5 then that is good cause.

6 As you can see, this -- during this time, this is
7 the end of May, as the children's spring break ran up
8 on him, if nothing else, and we say all these things
9 because they're the truth. That's what happened, that's
10 why we're here. Unfortunately, that's why the complaint
11 wasn't sent to counsel to be answered, but I don't think
12 the rules require perfection. I think there's some good
13 cause. There's a reason why this happened. We believe
14 there's --

15 THE COURT: You know, there's always a reason why
16 it happened --

17 MR. WILSON: Yes, sir.

18 THE COURT: -- and the rules are pretty strict on
19 this -- on this issue. It's not as flexible as you
20 might report to the Court.

21 But anyway, let me hear from Ms. Smith.

22 MS. SMITH: May it please the Court, Your Honor,
23 but as I introduced myself previously, my name is Jamie
24 Smith, and I actually am also in-house counsel for
25 PTA-FLA, Incorporated, and I also represent them in

1 this matter.

2 THE COURT: Where are they out of?

3 MS. SMITH: They're based -- or they're
4 headquartered in -- here in Columbia, South Carolina.
5 They're incorporated in Florida.

6 THE COURT: Okay.

7 MS. SMITH: Your Honor, I would like to begin --

8 THE COURT: I thought this was a school case when
9 I first saw it.

10 Go ahead.

11 MS. SMITH: I would like to begin by addressing
12 Mr. Wilson's characterization of the Wham factors as
13 the legal standard used in deciding whether to set
14 aside an entry of default under Rule 55(c). I'm glad
15 that Mr. Cooper brought up the Sundown Operating Company
16 case as it somewhat restructured the way South Carolina
17 courts view the analysis of whether or not an entry of
18 default should be set aside rather than as under the
19 Wham case considering the three factors that Mr. Cooper
20 mentioned, the meritorious defense --

21 THE COURT: Mr. Wilson.

22 MS. SMITH: Mr. Wilson. I am so sorry.

23 THE COURT: I'm Cooper. No relation.

24 MS. SMITH: -- that Mr. Wilson stated, the
25 meritorious defense, the timeliness and the prejudice

1 to plaintiff. The -- the Sundown Operating case
2 clearly states that the trial court only need to
3 consider these factors if there is a show of good
4 cause for failing to answer in a timely manner.

5 I believe that in this case there is no showing
6 of good cause. You have the affidavit from Mr. McManis,
7 who essentially states that he did not, as the sole
8 gatekeeper for legal matters in a multi-national
9 company, didn't check his e-mail. He was very busy
10 on the 18th and the 19th according to his affidavit,
11 but I -- this begs the question, Your Honor, of why
12 he didn't check his e-mail on March the 20th, the
13 Friday following those two very hectic days. I -- I
14 believe --

15 THE COURT: Or the 21st. Or the 21st or 22nd
16 or 23rd.

17 MS. SMITH: Or the 23rd, yes. And I -- I give
18 him the benefit of the doubt that those were weekend
19 days. Mr. McManis tells us that the following week he
20 was out of the office, had very limited communication
21 with the office. Nowhere in his affidavit do we see
22 that, you know, as the vice president and assistant
23 general counsel of a company that provides wireless he
24 didn't have remote access to his e-mail during this
25 week. The same with the following week when he was

1 very busy on vacation with his family.

2 Your Honor, if I've done the math correctly,
3 Mr. McManis' affidavit accounts for the time period up
4 until April 3rd; whereas, he had until -- he had the
5 weeks of April 6th through 10th and the weeks of April
6 13th to 17th to go back and check his e-mail to see if
7 he missed anything while he was very busy during these
8 two weeks of doing his job.

9 Your Honor, I think that our courts have recognized
10 that the mishandling of service of process within the
11 corporation is not good cause to set aside default,
12 and that authority comes from Roche v. Young Brothers,
13 Incorporated, of Florence, and in that case the service
14 of process and the -- or the summons and complaint was
15 essentially misplaced within a corporation and it was
16 decided that that mishandling was not grounds to set
17 aside the entry of default. Granted, this is an e-mail
18 rather than a physical summons and complaint. I would
19 -- I would make the correlation that this e-mail was
20 lost within Mr. McManis' inbox to an extent if he
21 failed to --

22 THE COURT: There was no hard copy that was sent
23 following the e-mail?

24 MS. SMITH: From my -- from my understanding of
25 the complaint -- or of the affidavit, no, Your Honor.

1 I think that that was --

2 THE COURT: Is that correct, Mr. Wilson?

3 MR. WILSON: That was my understanding.

4 THE COURT: No -- no hard copy?

5 MR. WILSON: As I stand here, I know about the
6 e-mail. I'm not aware of a hard copy.

7 THE COURT: I think CT would have a little more
8 responsibility than that, than just sending an e-mail.
9 But that's not here nor there.

10 Go ahead, Ms. Smith.

11 MS. SMITH: Yes, Your Honor.

12 And along those lines, there have been holdings
13 that losing -- or leaving the complaint and summons
14 in the trunk of your car is not reason to set aside
15 default. Essentially misplacing the summons and
16 complaint, especially in a corporate setting, is no
17 reason to set aside an entry of default.

18 And in this case, I would like to point out
19 that Mr. McManis is an attorney. He understands that
20 receiving a complaint is a very time-sensitive issue.
21 He is the sole gatekeeper of lawsuits coming in and
22 out of Level 3 Corporation. That is a very large
23 company. If he is going to be very, very busy for two
24 and a half weeks, you would think that there might be a
25 system in place for these things to go to an assistant,

1 to another attorney, for there to be due diligence in
2 making sure that these matters are handled in a timely
3 manner.

4 Attorneys are held to a standard of -- and they're
5 held to an expectation of taking the court system very
6 seriously and I feel like here there was just no
7 diligence in making sure that -- that these duties were
8 exercised properly.

9 THE COURT: Tell me this. What is Level 3?

10 MS. SMITH: It -- from my understanding, Your
11 Honor, Level --

12 THE COURT: The defendant is not Level 3?

13 MS. SMITH: The defendant is not Level 3. Time
14 Warner Telecom was acquired by Level 3 in October of
15 last year and Level 3 -- Time Warner Telecom is --

16 THE COURT: A holding company?

17 MS. SMITH: Time Warner Telecom Holdings, Inc.?

18 THE COURT: No, I was saying is Level 3 a holding
19 company?

20 MS. SMITH: I don't believe so, Your Honor. From
21 my understanding, it's a very large multi-national
22 wireless company.

23 THE COURT: Well, you didn't sue Level 3, did you?
24 Explain -- tell me --

25 MS. SMITH: Your Honor, we sued --

1 THE COURT: See, I'm not -- I don't have the
2 benefit of having read your contract or read the
3 complaint. I am factually deficient right now.

4 MS. SMITH: Well, allow me to clarify, please.

5 THE COURT: Please. Thank you.

6 MS. SMITH: Our -- our contract was entered into
7 with Time Warner Telecom Holdings, Incorporated. That
8 is the name that was on the contract we signed. We've
9 also included Does 1 through 10 inclusive because there
10 were vari -- various Time Warner Telecom entities within
11 the State of South Carolina and we wanted to be certain
12 that the proper entities were brought forth in this
13 matter.

14 And to that regard, Time Warner Telecom Holdings
15 was acquired by Level 3. The contract, however, was
16 with Time Warner Telecom Holdings and Time Warner
17 Telecom Holdings remains a separate entity. It is just
18 a subsidiary now, I believe, of Level 3 Communications.
19 Level 3 is the parent company and from my understanding
20 Level 3 now receives notice of legal matters.

21 THE COURT: Well -- okay.

22 Anything else?

23 MS. SMITH: Not at this time, Your Honor.

24 THE COURT: All right.

25 MS. SMITH: Thank you.

1 THE COURT: Mr. Wilson?

2 MR. WILSON: Very briefly, Your Honor.

3 The Sundown case certainly talks about good cause
4 first and the Wham factors and I actually referenced
5 that when I said that one of the things that it does
6 was it clears up some of the misunderstanding of 55(c)
7 versus 60(b), but it does say only -- Rule 60(b) factors
8 are, indeed, relevant to a Rule 55(c) analysis, but only
9 in so much as proof of any one of these factors is
10 sufficient to show good cause, to include, excusable
11 neglect.

12 And I -- I will tie in a question that the Court
13 asked about the defendant TW Tele -- TW Telecom. They
14 were purchased by Level 3 and that was in October of
15 2014.

16 THE COURT: What date?

17 MR. WILSON: I believe it was October of --

18 MR. McMANIS: 31st.

19 MR. WILSON: -- October 31st of 2014. So they
20 had been owned by this company for, you know, less than
21 six months. And Mr. McManis, the idea that he doesn't
22 respect the Court and take it seriously is absurd. He's
23 here. He knows -- he understands the issue. He --

24 THE COURT: He understands the issue now.

25 MR. WILSON: Well -- and prior to that, Your Honor,

1 as far as whether there should have been a system in
2 place, the system that -- that had been in place for
3 him had worked for him and that he -- this had never
4 happened to him before. So this is not a situation
5 where you have --

6 THE COURT: That's an echo.

7 MR. WILSON: Yes, sir. But it's not a situation
8 -- what I was trying to relay is that you have a
9 company, Level 3, that's just blowing off complaints,
10 you know, for the heck of it.

11 THE COURT: Well --

12 MR. WILSON: We think when taken in totality with
13 the issues in the case, the Wham factors, the good
14 cause and excusable neglect --

15 THE COURT: No problem with service; is that
16 correct?

17 MR. WILSON: I haven't seen any, Your Honor;
18 although as you mentioned, it was -- you know, Level 3
19 is not technically a defendant they have, we're here,
20 but when taken in totality and in the interest of
21 justice and --

22 THE COURT: And you represent TW Telecom?

23 MR. WILSON: Through Level 3, yes, sir, Your
24 Honor.

25 That in the interest of --

1 THE COURT: Are they a wholly-owned subsidiary?

2 MR. WILSON: Yes, they are. Level 3 is -- is
3 the parent company. But having cases heard on merits,
4 which is what this -- this case needs to be heard.
5 This is a complicated business transaction between
6 two sophisticated companies and we are prepared to
7 participate and would certainly like the opportunity
8 to defend the allegations, and for those reasons,
9 Your Honor, and for the caselaw and based on our
10 meritorious defense, the timing that we acted with,
11 no prejudice to the plaintiff and for good cause, we'd
12 ask that their entry of default be set aside and allow
13 us to proceed.

14 THE COURT: All right.

15 MR. WILSON: Thank you.

16 THE COURT: Anything further?

17 MS. SMITH: No, Your Honor. Thank you.

18 THE COURT: All right. Let me have proposed
19 orders within ten days.

20 Thank you very much.

21 MS. SMITH: Thank you, Your Honor.

22 MR. WILLSON: Yes, sir. Thank you, Your Honor.

23 MR. McMANIS: Thank you, Your Honor.

24 (Whereupon, the proceedings were concluded at
25 4:30 PM.)

C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter
for the Eleventh Judicial Circuit of the State of
South Carolina, do hereby certify that I transcribed
the proceeding in the captioned case that was reported
by Cheri L. Young, Circuit Court Reporter (Retired),
in the Court of Common Pleas, in and for the State of
South Carolina, on the 24th day of July, 2015, to the
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I do further certify that I am neither of kin,
counsel, nor have an interest to any party hereto.

April 7, 2020

/s/ Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Richland	)	2017CP4006433
	)	
PTA-FLA, INC.	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
TW TELECOM HOLDINGS,	)	
	)	
Defendant ,	)	

September 6, 2017
Columbia, South Carolina

BEFORE:

THE HONORABLE G. THOMAS COOPER, JR., JUDGE.

APPEARANCES:

JOSHUA AUSTIN, ESQ.
Attorney for the Plaintiff

ROBERT H. HOOD, ESQ.
Attorney for the Defendant

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 THE COURT: Mr. Hood, this is your motion.

2 MR. HOOD: So procedurally, actually, Your Honor, the
3 first motion that got added to your roster was Plaintiff's
4 Motion to Restore.

5 THE COURT: All right.

6 MR. HOOD: Which we had a memo and opposition to and
7 summary judgment depending on how that went.

8 THE COURT: All right. Go ahead, Mr. Austin. Tell
9 me about your motion.

10 MR. AUSTIN: Yes, sir. We filed a motion to restore
11 on April 6th, 2017. There was stipulated 40(J) dismissal.
12 The stipulation was signed April 1st, 2016. It was not
13 filed with the Form 4 order until April 7th, 2016. We
14 believe that we filed it within the year's timeframe that
15 we're required pursuant to 40(J).

16 If that's not the case, the Supreme Court in Maxwell
17 in 2003 clearly states that you're not required to restore
18 an action within the year, so we believe that our request
19 for a motion to restore should be granted. And then that
20 just leaves us with a motion for summary judgment issue
21 about whether or not we're barred by their claimed statute
22 of limitations.

23 THE COURT: All right, Mr. Hood.

24 MR. HOOD: Thank you, Your Honor. The parties
25 stipulated to a dismissal 40(J).

1 Just procedurally, that is a case that's been before
2 you in the past on a default that you held us in default.

3 THE COURT: That's correct.

4 MR. HOOD: And we moved to reconsider and that was
5 denied. So just before the default judgment hearing, the
6 case was 40(J)'d.

7 The stipulation, which we've attached as our Exhibit
8 1, specifically states the case was stricken from the
9 trial docket. The plaintiff and the defendant shall have
10 the right to move to restore the case to the trial docket
11 any time within one calendar year from the date of filing
12 the stipulation, that's what the parties agreed to, signed
13 and dated April 30th -- I mean, April 1st, 2016, and filed
14 on April 1st, 2016. So they had until March 31st to move
15 to restore it.

16 The actual order itself was signed by Judge Lee on
17 the fourth, and that's attached as our Exhibit 5. So we
18 believe that they missed the one-year tolling that is
19 granted by 40(J).

20 They then moved to restore it, but --

21 THE COURT: Wait a minute, you didn't finish the
22 sequence of events.

23 MR. HOOD: It was filed by the Clerk of Court on --

24 THE COURT: On the seventh.

25 MR. HOOD: On the seventh, correct.

1 THE COURT: She signed it on the fourth. It was
2 filed on the seventh.

3 MR. HOOD: Correct. So we believe that by the
4 parties' agreement and by their own stipulation, the
5 deadline was one year from the date of filing of the
6 stipulation, which was one year from April 1st, 2016.
7 They clearly missed that date. If you wanted to go,
8 again, based on the date the judge signed the order, that
9 is April 3rd.

10 THE COURT: Fourth.

11 MR. HOOD: April 4th, but if you give them a year,
12 it's April 3rd, 2016. They missed that date, and so their
13 only hope is to go based on the Clerk of Court filing of
14 the Form 4. And we don't believe that's sufficient.

15 We don't believe -- therefore, they're entitled to
16 the protection of the 40(J) for the tolling of the statute
17 of limitations. When they moved to restore, they're
18 outside the statute of limitations because it ran way
19 before the parties even moved to 40(J).

20 THE COURT: That's the basis for your summary
21 judgment motion.

22 MR. HOOD: Yes, sir. And so we filed both --

23 THE COURT: Well, let me ask you this. Seriously, I
24 don't mean this flippant, what gives you standing since
25 you're already in default to make these arguments?

1 MR. HOOD: Well, first, because they -- if they
2 missed the statute of limitations, I mean, and the filing,
3 they've got to refile the suit. They can't just --

4 THE COURT: Well, that's at the end of the process if
5 all your arguments are correct.

6 I don't know that that answers my question.

7 MR. HOOD: We couldn't find any direct case.

8 THE COURT: I can't either.

9 MR. HOOD: And I tried. And I'm sure that they tried
10 and I'm sure Your Honor has looked. But it doesn't make
11 any sense that they would be able to refile at any point,
12 you know, that they -- once they 40(J) it, that they could
13 refile ten years down the road and it wouldn't matter
14 because I was in default.

15 That just defies logic as far as what the Court
16 governs and the way they approach the 40(J). The idea of
17 the 40(J) is that it tolls the statute of limitations for
18 one year. You know, so the parties can refile and go
19 forward. They choose not to during that timeframe, so now
20 it's really a brand new case starting all over in which
21 case, I believe I'm entitled to raise a statute of
22 limitations as a defense and move for summary judgment.

23 THE COURT: Okay.

24 MR. HOOD: I mean, my motion for summary judgment is
25 along the exact same lines.

1 THE COURT: Let's go ahead and argue that because I'm
2 going to ask for proposed orders anyway. So let's get it
3 on the record now.

4 MR. HOOD: Your Honor, just --

5 THE COURT: Assuming -- you might just assume that
6 it's restored. I mean, for the purposes of this argument.

7 MR. HOOD: Okay. So assuming the case is restored,
8 Your Honor, we had also filed a memo in support of our
9 motion for summary judgment. The plaintiff filed a memo
10 in opposition on Friday. I did a reply I have sent to
11 him.

12 THE COURT: I've not seen the reply.

13 MR. HOOD: I just filed it today.

14 THE COURT: I've read both memorandums. All right,
15 thank you.

16 MR. HOOD: And, essentially, our motion for summary
17 judgment is that if it's restored, we still believe they
18 missed -- they're outside of the statute of limitations
19 because they missed the tolling period and that they are
20 starting -- the case by the time it was 40(J)'d, the
21 statute of limitations had already run, so in order to be
22 within the tolling statute, they'd have to file it within
23 the one calender year that it was stayed by 40(J). We
24 believe they missed, so they're refiling it outside of
25 that and because of that, we believe we're entitled to

1 sum.

2 THE COURT: Okay. Mr. Austin.

3 MR. AUSTIN: Your Honor, as a first point before
4 going to the substance of their motion, as you sort of
5 brought up already, as a party in default, I'm not sure
6 that they have any standing to bring a motion for summary
7 judgment.

8 All my research I found, they have basically three
9 options as a defaulted party. They can file a motion to
10 set aside a default judgment, which they did, and that was
11 denied.

12 They can file a motion for reconsideration, which
13 they did, and that was denied. And then they have two
14 other rights. They have a right to a notice of the
15 damages hearing and they have a right to come to the
16 damages hearing and have some sort of cross-examination of
17 our witnesses, but they're not allowed to bring forth any
18 evidence of their own.

19 As far as I can find the South Carolina law, that's
20 the only rights they have. So just as an initial matter,
21 this motion for summary judgment should be dismissed
22 because they don't have the right to bring one.

23 There's no case law about this because I feel like
24 it's axiomatic that a default party has very small rights
25 that they're allowed to -- rights and obligations that

1 they have in the case.

2 THE COURT: Well, address the restoration issue that
3 Mr. Hood raises about the failure to move to restore
4 within one year of the date of the agreement, the
5 stipulation.

6 MR. AUSTIN: Well, Your Honor, we'd also point that
7 in that stipulation, it says the plaintiff wishes to
8 strike this case from the trial docket pursuant to 40(J).
9 The defendant consents to that request.

10 Under the rule of 40(J), it's one calender year from
11 the date the case is stricken. We would argue that the
12 case was not stricken from the record until April 7th when
13 the actual order was filed.

14 And then going towards the merits of the motions for
15 summary judgment, even if you agree with them that the
16 statute of limitations has run and so we're outside of
17 that. At least, one of our --

18 THE COURT: Stop right there. If I agree -- I mean,
19 if I do find that, what do you have?

20 MR. AUSTIN: Well, that's what I was going to, Your
21 Honor. We would, at least, still have a right to have a
22 damages hearing on our promissory estoppel claim. That's
23 a claim in equity. That's not a claim under the law, so
24 the statute of limitations doesn't apply. Laches applies.
25 They mention that in their reply, but they did not bring

1 forth any evidence that they meet the requirements to
2 prove Laches.

3 Towards their statute of limitations argument as an
4 affirmative defense, they have the requirement and a
5 motion for summary judgment to explain how each and every
6 cause of action does not meet the statute of limitations.
7 We believe they haven't met that burden.

8 They make a statement of specific dates for the
9 breach of contract claim, but not for the other causes of
10 action. So even if that were possible, we don't believe
11 they properly argued or pled a statute of limitations
12 affirmative defense to the standard they're required to
13 under the summary judgment.

14 THE COURT: All right.

15 MR. HOOD: And just briefly, Your Honor, as far as
16 the argument that it's one year from the date it was
17 stricken. The matter was on the court roster for
18 April 4th for a damages hearing.

19 There is a -- our Exhibit No. 2 is an email from the
20 clerk of court saying I apologize for being nonresponsive,
21 but I was out of the office. But if the matter was
22 40(J)'d, there's no reason to attend the roster meeting on
23 Monday. That's the fourth.

24 So by the fourth, Judge Lee's clerk has already
25 stricken it from the record, and we submit and we believe

1 that, therefore, at the latest, it's April 4th is the date
2 that it was stricken. And, therefore, they missed that
3 date.

4 As far as the summary judgment and raising it now, by
5 being in default, everything in the complaint is deemed
6 admitted. At the time, there was no statute of
7 limitations issue. It wasn't until they missed the 40(J)
8 deadline that that became an issue that we then raised.

9 So we couldn't have raised it in the default. We
10 couldn't have raised it previously, and so the default
11 order and everything is dealing with before the statute of
12 limitations. So we believe that the creation of the
13 statute of limitations situation is now outside of the
14 default aspect. And, therefore, we believe we are
15 entitled to raise it.

16 THE COURT: The following be restored, the case shall
17 be placed on the general docket and proceed from that date
18 as provided in this rule. Right?

19 MR. HOOD: Correct.

20 THE COURT: You say it shall be -- proceed as a newly
21 filed case. Where do you get that?

22 MR. HOOD: I believe because they failed to restore
23 it, I think by improperly -- I think that we can raise the
24 statute of limitations now that they're doing it outside
25 of the case. It doesn't revert back. They've argued that

1 because they filed the case within the statute of
2 limitations that --

3 THE COURT: You don't contest that?

4 MR. HOOD: The original one was, certainly, filed in
5 the statute of limitations, I don't contest that. But the
6 case they say talking about because it was filed within
7 the original statute of limitations, there is no statute
8 of limitations defense.

9 The case that they cited is a bankruptcy case where
10 it was -- the case was stayed because the bankruptcy. And
11 then once the stay was lifted, there was an issue of
12 whether or not restoring the case back to the trial roster
13 outside the statute of limitations should apply. But that
14 was a bankruptcy case, that was not a 40(J) case and I
15 don't think that applies here.

16 I think that here, once they restore it, if they
17 restore it that we can raise a statute of limitations
18 defense because they have missed the one-year tort.
19 Otherwise, it --

20 THE COURT: So you think even if it is restored, you
21 can raise the statute of limitations?

22 MR. HOOD: I do.

23 THE COURT: Okay. Interesting. The rule doesn't.

24 MR. HOOD: There is nothing on this -- on default,
25 you know --

1 THE COURT: I know.

2 MR. HOOD: And so I mean, there is -- I've looked and
3 I think we've all looked. You know, I think that it's --
4 the idea of -- that they could restore the case at any
5 point and hold us because we were originally in default
6 and we could never contest it, rather than restoring it
7 two days or four days after the one year, if they waited
8 ten days, you know --

9 THE COURT: Which they didn't.

10 MR. HOOD: Which they didn't. But if they waited ten
11 years, where is the equity for a defendant? I mean, all
12 of a sudden, just because they were in default, you know,
13 they never would know any -- have any guidance that that
14 case is ever going to be over. So I mean, I think because
15 they missed the restoring, I think we can raise this now.

16 THE COURT: Okay.

17 MR. AUSTIN: Your Honor, from a --

18 THE COURT: Just don't leave.

19 SPECTATOR: Sir?

20 THE COURT: Don't leave.

21 MR. AUSTIN: Your Honor, from an equity standpoint,
22 you know, this isn't like we sprung something on in the
23 last minute in the dark of night. We have been working
24 together trying to resolve this issue for that entire year
25 on a 40(J).

1 Both parties have discussed restoring it back to the
2 trial docket. I, actually, would have restored it a week
3 earlier, but I had the flu. So it's not like I, you know,
4 surprised them ten years later. It's not like there's
5 some large --

6 THE COURT: Well, this is called a gotcha case.

7 MR. AUSTIN: Yes, sir.

8 MR. HOOD: Right. They gotcha to us, so when the
9 time came back, we gotcha back.

10 THE COURT: Right.

11 MR. HOOD: If the timing is an issue, and it's proper
12 for them, what's good for the goose is good for the
13 gander.

14 THE COURT: Well, I tend to agree with you, Mr. Hood.

15 All right. Then I'll need two proposed orders. One
16 on the restoration issue and one on the assuming -- just
17 assume.

18 MR. HOOD: For the second one.

19 THE COURT: For the sake of timing, not having to
20 come back here, but you address the summary judgment
21 issue, as well. How much time you need, ten days?

22 MR. HOOD: Well, can we have a little more because of
23 the hurricane?

24 THE COURT: Yes, let's say, at least, 20 days.

25 MR. HOOD: Thank you.

1 THE COURT: You may not be able to do it in 20 days
2 if it does what it's predicted to do.

3 MR. HOOD: Sure.

4 THE COURT: Let's say 20 days.

5 MR. HOOD: Thank you.

6

7 (Whereupon, the proceedings were concluded.)

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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Richland County, South Carolina, on the 6th day of
September, 2017.

April 20, 2020

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Richland	)	2017-CP-40-06433
	)	
PTA-FLA,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
TW TELECOM HOLDINGS, INC.,	)	
DOES 1-10,	)	
	)	
DEFENDANTS,	)	

January 31, 2019
Columbia, South Carolina

BEFORE:

THE HONORABLE ROBERT E. HOOD, JUDGE.

APPEARANCES:

JOSHUA AUSTIN, ESQ.
Attorney for the Plaintiff

ROBERT H. HOOD, ESQ.
GEOFFREY CHAMBERS, ESQ.
Attorneys for the Defendant

KAREN AMBROZIAK
Official Court Reporter

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CERTIFICATE OF REPORTER 60

PLAINTIFF'S EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1	depiction	8	8
2	profit & loss statement	20	20

1 THE COURT: All right. We're on the record in
2 2017-CP-40-6433, PTA FLA, Incorporated against TW Telecom
3 Holdings and somebody else.

4 Let's see. Mr. Hood, who do you have?

5 MR. HOOD: I've got the defendant, Your Honor.

6 THE COURT: The defendant?

7 MR. HOOD: Yes.

8 THE COURT: And Mr. Chambers?

9 MR. AUSTIN: Mr. Austin for the plaintiff.

10 THE COURT: Austin, okay. Are you going to be doing
11 all the talking?

12 MR. CHAMBERS: Mr. Austin is.

13 THE COURT: All right.

14 MR. CHAMBERS: I was here to make sure we were
15 straight on the timing. I had called your office
16 yesterday about that.

17 THE COURT: We used to schedule these things all
18 throughout the morning and everything would fall off, and
19 we were all just sitting around waiting for the next
20 thing. So many of them fall off, that's why we started
21 scheduling them all at 9:30 and at 2:00.

22 MR. CHAMBERS: We saw that 15 minutes that it was
23 listed for and we were like oh, no, that's trouble.
24 Because we can get our stuff down close to that, but not
25 quite that and the other side needs a chance to talk, too.

1 THE COURT: No problem. No problem.

2 So we're on the record. Everybody ready to go?

3 MR. AUSTIN: Yes, Your Honor.

4 THE COURT: All right. Let's do it.

5 MR. AUSTIN: Your Honor, Josh Austin for the
6 plaintiff, PTA-FLA. We're here requesting a default
7 judgment and damages. We are specifically asking for
8 \$396,082.42 for direct damages as well as \$1,346,498 in
9 damages related to delays from the defendant's misconduct,
10 which totals \$1,742,580.42.

11 We did brief more than that, but having looked at
12 everything more closely, these were the numbers we thought
13 were the most reasonable and directly related to the cause
14 of action.

15 THE COURT: All right.

16 MR. AUSTIN: We'd like to call our first witness,
17 Your Honor.

18 THE COURT: Okay.

19 MR. AUSTIN: Mr. Eric Steinmann.

20 THE COURT: What's your last name?

21 THE WITNESS: Steinmann, S-T-E-I-N-M-A-N-N.

22 ERIC STEINMANN, after being duly
23 sworn, testified as follows:

24 THE CLERK: Please have a seat in the witness stand.

25 DIRECT EXAMINATION:

1 BY MR. AUSTIN:

2 Q Good morning, Mr. Steinmann.

3 A Good morning.

4 Q What is your relationship with PTA-FLA?

5 A I'm the development manager for PTA-FLA and its
6 related company.

7 THE COURT: You're going to have to scoot closer to
8 that mic and speak up a lot.

9 THE WITNESS: I'm sorry.

10 THE COURT: Thank you.

11 THE WITNESS: I'm -- just a second. Let me get this
12 arranged.

13 THE COURT: Just talk normal. Talk normal.

14 THE WITNESS: I'm the development manager for PTA-FLA
15 and its related companies.

16 BY MR. AUSTIN:

17 Q Okay. I understand that you're here asking for
18 damages. Could you please explain what types of damages
19 you're looking for?

20 A We're seeking damages for the -- for our costs for
21 the circuits and internet access that we paid to TWT
22 Telecom, then became Level 3, now, I believe it's ComCast.

23 And we're also seeking damages for an approximate
24 six-month delay period that they caused us in the launch
25 of our network here in the upstate and mid-state areas of

1 South Carolina.

2 Q Okay. And what were your duties as development
3 manager for PTA-FLA?

4 A To take the market from acquiring a spectrum from the
5 federal government to put up a cell phone network in all
6 the related stores and what have you, to sell that network
7 in the customer care facilities, to service our customers
8 on that network, to take that from nothing to the point in
9 time where it was operational and ready to put paying
10 customers on it. It had been fully tested. The people
11 were hired. The facilities were acquired, and it was
12 ready to turn over to an operations manager to operate it.

13 Q Okay. And how did the relationship with the
14 defendant, Time Warner Telecom, begin?

15 A The -- it would be helpful at this point, I think, to
16 put an exhibit up of kind of the physical infrastructure
17 that we need to put in place to operate a cell phone
18 system.

19 And again, this is like a small Verizon or AT&T
20 operation that would serve not as they do, the whole
21 country, but it would serve the Columbia area and the
22 Greenville, Spartanburg and parts of Anderson area. So
23 the more densely populated areas of mid-state and upstate
24 in South Carolina.

25 Q All right.

1 MR. AUSTIN: May I approach, Your Honor?

2 THE COURT: Of course.

3 BY MR. AUSTIN:

4 Q Mr. Steinmann, have you seen this document before?

5 A I have.

6 Q And what does this depict?

7 A This is a computer thing, it's something I scratched
8 out so I can explain the part -- the part of my job in
9 setting up the back hall, if you will, or the fiberoptic
10 trunk and the internet drain used to get the -- as part of
11 setting up our network.

12 I think everyone understands the cell phone sends a
13 signal to a nearby tower, if you will. Sometimes those
14 towers are antennas on a rooftop. But it's probably not
15 clear to everybody what happens then.

16 Those signals that are sent to a tower need to find
17 their way back to the central switch. And if they're
18 voice -- if it's a voice session, they find their way
19 either to the public switch telephone network, land lines,
20 if you will, or they find their way to -- and the switch
21 is what directs them. They find their way to other cell
22 phone carriers to be completed.

23 Q Mr. Steinmann, does this, to the best of your
24 knowledge, depict that simple system that you're
25 discussing?

1 A Yes.

2 MR. AUSTIN: Your Honor, if there's no objection, I'd
3 like to enter this as Exhibit No. 1?

4 MR. HOOD: No objection.

5 THE COURT: No. 1 without objection.

6 MR. AUSTIN: May I approach?

7 (WHEREUPON, Plaintiff's Exhibit No. 1 was marked for
8 identification and received into evidence.)

9 BY MR. AUSTIN:

10 Q Okay. Mr. Steinmann, could you explain to us from
11 this depiction the system that you were trying to create
12 with PTA-FLA?

13 A In this year, we had about 60 or so sites up in the
14 upstate, Greenville, Spartanburg, Anderson area, and about
15 56 cites down in -- and that's a rough number, in the
16 Columbia area. So this is not showing all the sites that
17 we have.

18 It's showing, you know, the way that we got those
19 sites that we did have back, and the squiggly line or
20 light-looking line would show a microwave connection. Two
21 dishes from two physical places going about three to
22 four miles, I would say, on average, taking the signal
23 that goes to that tower and sending it on to another tower
24 or, in certain cases, sending it on to a rooftop. And
25 then it may be sent on to another tower from there, but

1 eventually ending up where the straight line here depicts
2 the fiberoptic facilities from our provider, which was TWT
3 Telecom that we ended up doing business with.

4 This is where they would have fiberoptic facilities
5 that ended at a tower or ended at a building and that we
6 could take all that traffic, if you will, and put it on
7 the fiber and bring it all the way back on the switch
8 securely on the fiber.

9 This also shows that at our switch -- and this is
10 related to the data that we were doing business with, TWT
11 Telecom, that at our switch location, they would provide
12 us access to the worldwide web or the cloud, that people
13 call it.

14 So when somebody is on their phone getting on the
15 internet, they're requesting data from the internet, it
16 goes through to our switch. Our switch directs that
17 session to the worldwide web, the worldwide web finds the
18 resource and it sends back here's the information.

19 This also network or back-on network works to get the
20 information someone has requested all the way back to
21 them. First, through our switch, then through the
22 fiberoptic facilities to individual sites or buildings or
23 shops, then a narrow-line microwave that we put in to
24 other sites and then to people's cell phones and give them
25 the information back they want.

1 Q So you eventually entered into an agreement with --
2 or negotiations with Time Warner Telecom to provide you
3 these services?

4 A We started by negotiating with several different
5 companies with the idea that we would come to an agreement
6 with a company that would best fit our needs in terms of
7 price and that had some of these trunks in place. You
8 know, other companies --

9 MR. HOOD: Objection, Your Honor. This is going
10 beyond the allegations in the complaint.

11 THE COURT: All right. Mr. Austin.

12 MR. AUSTIN: Yes, Your Honor.

13 THE WITNESS: I'm sorry? In what manner?

14 THE COURT: All right. You just --

15 Ask the next question. Let's move on.

16 MR. AUSTIN: Yes, Your Honor.

17 BY MR. AUSTIN:

18 Q Mr. Steinmann, have you seen this document before?

19 A Yes.

20 Q And what is your understanding of what this document
21 is?

22 A This is the agreement we entered into with TWT
23 Telecom.

24 MR. AUSTIN: Your Honor, if there's no objection, I
25 would enter this as Exhibit 2.

1 MR. HOOD: Your Honor, under the rule of
2 completeness, we'd like the entire document.

3 THE COURT: What about it, Mr. Austin?

4 BY MR. AUSTIN:

5 Q Mr. Steinmann, is this the actual contract or is this
6 your understanding of what the agreement was prior to the
7 contract?

8 MR. HOOD: Objection, Your Honor, that's beyond the
9 allegations in the complaint. There's --

10 THE COURT: I thought we were doing a default
11 hearing.

12 MR. AUSTIN: We are.

13 THE COURT: Is the defendant in default?

14 MR. HOOD: Yes, sir.

15 THE COURT: Okay. Y'all agree you're in default?

16 MR. HOOD: Well, we had -- there has previously been
17 a motion to set aside the default.

18 THE COURT: Okay.

19 MR. HOOD: The company was in default by a couple of
20 days. We moved to set aside and to answer. Judge Cooper
21 denied it. We move to reconsider it. He denied it. The
22 plaintiff 40(J)ed the case. The order for 40(J) said they
23 had to refile within one year of the order. They refiled
24 a year and three days -- three days outside of that order.

25 We moved to dismiss or to fail to restore or for

1 summary judgment because they then missed the statute of
2 limitations. Judge Cooper denied that motion, so we're
3 here on a default judgment damages hearing.

4 THE COURT: We're just hearing on the damages
5 hearing?

6 MR. HOOD: Yes, Your Honor.

7 THE COURT: What are the allegations in the complaint
8 that give rise to damages?

9 MR. AUSTIN: There are allegations in the complaint
10 for breach of contract accompanied by fraudulent act.

11 THE COURT: Okay.

12 MR. HOOD: There is nothing in the complaint --
13 there's -- not a single paragraph in the complaint alleges
14 anything as to this document, April 21st, 2010.

15 Therefore, this cannot be used as default judgment
16 because it's beyond the allegations that are deemed
17 admitted because we're in default. That's my objection to
18 this stuff.

19 MR. AUSTIN: Your Honor, part of the complaint is
20 that the documents that Mr. Steinmann agreed to with the
21 defendant prior to the actual execution of the documents
22 were one agreement. It's our understanding this was
23 supposed to be what the agreement was.

24 Part of the allegations are that then Time Warner
25 Telecom brought in different documents or additional

1 documents for another person to sign that only had
2 authority to sign the agreement as Mr. Steinmann had
3 understood it to be agreed to with the defendant's
4 representative, Christian Yale (phonetic). I'm trying to
5 show what his understanding of the contract was at that
6 time.

7 THE COURT: And what does this document have to do
8 with that?

9 MR. AUSTIN: It's the schedule of payments. It's the
10 requirements they were going to have do. It's what we
11 were supposed to pay.

12 THE COURT: But is this document part of the
13 complaint?

14 MR. AUSTIN: No, Your Honor.

15 THE COURT: Okay. Well, then it's out. This is a
16 default hearing.

17 MR. AUSTIN: Okay.

18 THE COURT: If y'all would like me to remove the
19 defendant from default, if y'all want to talk about going
20 into all that if that's admissible at trial, we can go
21 down that road.

22 MR. AUSTIN: No, Your Honor.

23 THE COURT: I mean, Mr. Hood is limited on what he
24 can object to because he's in default. But one of the
25 things he can object to is whether or not something is

1 contained in the complaint.

2 MR. HOOD: Thank you, Your Honor.

3 THE COURT: All right.

4 BY MR. AUSTIN:

5 Q Mr. Steinmann, you're seeking direct damages of
6 \$396,082.42. How did you compute that number?

7 A That's the amount that we have physical checks for or
8 other forms of payment to TWT Telecom over the time we did
9 business with them.

10 Q And you're asking that that be repaid?

11 A I am asking that be repaid.

12 Q Okay. And then in the complaint, there are
13 allegations of delays caused by Time Warner Telecom's
14 actions, correct?

15 A That's correct.

16 Q And you're seeking damages for those delays?

17 A Yes.

18 Q And I believe that number is 1,300 --

19 MR. HOOD: Object to the leading, Your Honor.

20 THE COURT: Sustained.

21 BY MR. AUSTIN:

22 Q How did you calculate your damages for your delay
23 damages?

24 A Initially -- initially, we looked at the -- our
25 accounting records for all our costs for the period from

1 January 2011 through June of 2011. The six-month period
2 that we were prevented from going from a soft launch phase
3 where we have nonpaying customers to a regular launch
4 where we put paying customers on the system because we
5 were waiting for them to put circuits in. Over that
6 period of time, we looked at our accounting records. That
7 amounted to a net loss over that period of time of some --

8 THE COURT: Hold on. Hold on. Time out.

9 (Pause.)

10 Sorry, go ahead.

11 BY MR. AUSTIN:

12 Q I'm sorry, you were explaining how you came up with
13 your calculation for your six months of damages. Could
14 you elaborate?

15 A We have accounting records that reflect all our
16 payments for that period of time and any income that came
17 in. I looked at that.

18 I originally looked at the net loss for that period
19 of time and then went back and looked at it again to take
20 out anything that may not be fair to charge TWT for the
21 delay, items like contributions that we made, charitable
22 contributions, stuff like that, or if we have some people
23 in that were building some future sites or something. I
24 tried to remove all those costs by eliminating certain
25 line items. I eliminated over \$400,000 over that period.

1 I think the resulting net number that we're seeking is
2 approximately 1.3 million dollars.

3 Q Mr. Steinmann, have you seen this document before?

4 A I have.

5 Q What is this document?

6 A This is the accounting records through that period of
7 time, and then over, there's an adjustment column that
8 shows the elimination of items that may or may not be fair
9 to charge them.

10 So anything that was questionable, we tried to take
11 out and just asked for, you know, our damages, what was
12 certainly the result of the delay contributed by TWT
13 Telecom.

14 MR. AUSTIN: Your Honor, if there's no objections,
15 I'd like to enter this as Exhibit 2.

16 MR. HOOD: Objection on the rule of completeness.
17 This is just a partial statement of operations for a small
18 period of time without the supporting documents behind it.

19 MR. AUSTIN: Your Honor, I think clearly we're
20 allowed to have a summary of something. This is something
21 that's kept in the regular course of business. It's an
22 excerpt of the overall P&Ls.

23 THE COURT: Where is the rest of the documentations?

24 MR. AUSTIN: We can provide that, Your Honor.

25 MR. HOOD: Yeah, I would like to see. Under Rule

1 1006, they can put in a summary, but I'm entitled to the
2 backup docs, so I'd like to see those.

3 MR. AUSTIN: I do not have those at this time.

4 MR. HOOD: Then we object to the use of this
5 document.

6 MR. CHAMBERS: Can we recess to get that?

7 THE WITNESS: We have that electronically.

8 THE COURT: You have it electronically?

9 THE WITNESS: Yeah.

10 THE COURT: Can you pull it up now?

11 THE WITNESS: Do you have your computer, Josh?

12 MR. AUSTIN: I have a full copy of the P&L. I don't
13 have the backup documents that created it.

14 THE WITNESS: Meaning the checks and general ledger?
15 We may have that electronically, but that would be lengthy
16 to find.

17 THE COURT: It would be what?

18 THE WITNESS: Lengthy to find that with everybody
19 waiting, so...

20 THE COURT: Okay. What do you want me to do? I
21 mean, the rules are what the rules are. It says you can
22 do a summary -- I'm not objecting to -- there's no
23 objection to your summary, but under the rules, the backup
24 documentation is fair game.

25 MR. AUSTIN: Your Honor, we'd like to continue this

1 and have time to provide that to the other side.

2 THE COURT: You want to continue the entire hearing?

3 MR. AUSTIN: Yes, Your Honor.

4 MR. HOOD: Your Honor, I've had my client fly in from
5 Denver with this hearing to help me in the cross. This is
6 their opportunity and their obligation to present
7 admissible evidence at this time. And under the rules,
8 I'm entitled to the backup docs.

9 THE COURT: Have you not provided them to him at all?

10 MR. AUSTIN: Just the P&L, Your Honor, not the
11 lengthy amount of the accounting.

12 THE COURT: I mean, isn't your P&L going directly to
13 the loss issue?

14 MR. AUSTIN: Yes, Your Honor.

15 THE COURT: Okay. Well, then, why wouldn't they be
16 entitled to see the rest of those documents?

17 MR. AUSTIN: I don't know, Your Honor.

18 THE WITNESS: Were they requested?

19 THE COURT: Well, they don't get to request it
20 because they don't have the rights under discovery to ask
21 for that kind of stuff.

22 MR. HOOD: But they were actually requested and
23 plaintiff's counsel said he would provide documents to me.

24 MR. AUSTIN: And we did provide --

25 MR. HOOD: And you did provide some, but you did not

1 provide backup documents to support P&L.

2 THE WITNESS: Well, ultimately, the P&L -- excuse me,
3 can I --

4 THE COURT: Yeah, go ahead and talk. There's no
5 jury.

6 THE WITNESS: Yeah.

7 THE COURT: There's nobody to improperly influence,
8 so go ahead.

9 THE WITNESS: So this is a listing of the expenses
10 for that period of time. The only other thing you're
11 going to get is different listings of expenses over that
12 time or maybe something that includes other periods that
13 the delay was not in. And then eventually you got checks,
14 but the checks for this would be, you know, boxes and
15 boxes of documents.

16 MR. HOOD: The problem is, Your Honor, as I already
17 know from their allegations of the direct losses and the
18 invoice that they're claiming, trying to claim, that they
19 are claiming items that are clearly not covered and not
20 rightful damages.

21 I have the itemization to support those invoices and
22 I know that they're including items that should not be
23 included. So therefore, I can't trust a P&L that is just
24 their summary without the supporting data.

25 THE COURT: All right. Here's what we're going to

1 do. I'm going to admit this exhibit to the extent that
2 it's allowed as a summary. When this whole hearing is
3 over, you're going to turn over all the supporting
4 documentation and Mr. Hood is going to have time, along
5 with his client, to review it. And if they want to come
6 back and cross-examine this gentlemen again, I will allow
7 that to happen.

8 So I'm going to give you time to get it. I'm going
9 to give you time to review it and based upon your review,
10 if you need to go back on the record to cross-examine the
11 witness about issues that you find in those documents,
12 I'll set a special hearing, give you the opportunity to
13 come in and do that's exclusively.

14 MR. HOOD: Okay. Thank you, Your Honor.

15 THE COURT: Okay. All right.

16 Go ahead, Mr. Austin.

17 MR. AUSTIN: May I approach, Your Honor?

18 THE COURT: You can just approach. You're fine. I
19 know some people expect you to do that every time. You
20 can walk about as you need to, you won't bother me at all.

21 (WHEREUPON, Plaintiff's Exhibit No. 2 was marked for
22 identification and received into evidence.)

23 BY MR. AUSTIN:

24 Q Mr. Steinmann, in reviewing this profit and loss
25 statement for the six-month delay, what was the total

1 amount of net losses of the company?

2 A One million 300 hundred -- the total net losses over
3 that period was 1,754,056. The total amount that we're
4 claiming on a net basis for the adjustments we made,
5 1,346,498.

6 MR. AUSTIN: Okay. Thank you, Your Honor. I have no
7 other questions for Mr. Steinmann.

8 THE COURT: Okay.

9 CROSS-EXAMINATION:

10 BY MR. HOOD:

11 Q Mr. Steinmann, you -- I want to start with your claim
12 for direct damages. All right, you claim direct damages
13 of 300 -- I'm trying to write it down. Tell me that
14 number again.

15 A I'm -- it's approximately 396,000. We have that
16 detail on it, schedule if that's able to be provided or
17 not.

18 Q Okay. I can't use it as an exhibit, but that is
19 supposed to be invoices that you paid to TW
20 Telecommunications, correct?

21 A That's invoices we paid.

22 Q Right.

23 A To TWT.

24 Q The agreement you ultimately --

25 A Well, it's not the invoices, it's what we paid TWT

1 given our understanding of the agreement. And for most of
2 the time, it was standard invoices, but at one point, they
3 started invoicing stuff that was entirely unrelated to
4 what our agreement was, so we paid what we felt was due
5 under our agreement. So the amount represents just what
6 we paid.

7 Q Okay. Under the agreement, you were intended to have
8 a set monthly amount that you had to pay to TW
9 Telecommunications for their bandwidth services, correct?

10 A Yes. I'd like to explain that. Our agreement was
11 that we would pay a certain amount every month and that
12 amount would escalate if our business presumably would
13 grow.

14 Q Right.

15 A And there was an amount in excess probably of what we
16 were going to actually use, but it would allow us to not
17 monitor the circuits all the time. It would allow us to
18 not be doing the schedules for additional circuits and
19 that stuff all the time.

20 Q And it was 28-month period?

21 A Our agreement was for a 28-month period, that's
22 correct.

23 Q And the initial one of the contract was for \$5,888,
24 correct?

25 A That's not correct.

1 Q Okay. What was the amount for the initial?

2 A It's reflected right here. Originally, it was \$4,000
3 a month for the first four months, then it started to
4 increase after that.

5 Q All right. Under the letter of intent, that is what
6 you're referring to there, correct? The letter of intent,
7 right, not the contract, correct?

8 A No, this was our agreement. And I can explain that,
9 if you will.

10 Q Well, the document that you're looking at
11 specifically says letter of intent, doesn't it? Letter of
12 intent of proposal?

13 A That's what it says on it.

14 Q Okay. So the letter of intent of proposal says 4,000
15 a month and then ramping up in that month, 28, look how
16 much were you supposed to pay under the letter of intent?

17 A \$18,000 a month.

18 Q And so under the letter of intent, you were obligated
19 to -- you were going to be obligated to pay TW
20 Telecommunications \$442,000, correct?

21 A Well, you're referring to this as letter of intent.
22 This became the agreement when we agreed to it. And we
23 did modify it at one point to allow -- the guy at TWT said
24 that he had missed the charge and pricing it and we
25 allowed it to be modified so that the amount we agreed to

1 pay was not as reflected here. We agreed to pay a greater
2 amount.

3 Q But using that letter of intent, if we add up those
4 28 columns, don't we come one \$342,000?

5 A Which -- I haven't added it, but are you talking
6 about this right here?

7 Q Yes, \$4,000, plus \$4,000, plus \$4,000, plus \$4,000,
8 plus \$5,000, plus \$6,000, plus \$7,000, plus \$8,000, plus
9 \$9,000, plus \$10,000, plus \$11,000, plus \$12,000, plus
10 \$12,000, plus \$12,000, plus \$12,000, plus \$12,000, plus
11 \$12,000, plus --

12 A There are too many 12s.

13 Q There were six, right?

14 A One, two, three, four, five, six, yes.

15 Q All right. And then there are twelve 18s right --
16 no, I'm sorry ten 18s, \$18,000, right?

17 A Looks like 11 to me.

18 Q Okay, eleven. Thank you. So if we add all those
19 numbers up, they are what they are. And I'll represent to
20 the Court that when I added them up, it was \$342,000. Do
21 you believe I added incorrectly?

22 A I don't believe you added correctly or incorrectly.
23 If you represent that, I have no reason not to believe it.

24 Q Okay. There was also -- in June, there was an
25 amended -- there was a different schedule that was

1 submitted, correct? June 10th?

2 A There's a schedule -- says schedule one on top and
3 that reflected a change to the agreement where Christian
4 Yale (phonetic) called me and said he had omitted the cost
5 of some circuit. It would be another \$1,588. Would I
6 agree to -- even though we had agreed on this, would I
7 agree to allow that to be added and I said I would.

8 Q Okay.

9 A So the schedule was changed to add 1588.

10 Q All right. So in June of 2010, you agreed to a
11 change from the letter of intent for proposed fiberoptic
12 services to a new payment schedule that increased each one
13 of those line items by \$1,588, correct?

14 A I agreed to -- that was the only change I agreed to,
15 but what you're referring to is a letter of intent was our
16 agreement.

17 Q Okay. But -- so now those payments we just went
18 through and I said -- went through each one of those. But
19 now, the agreed amount to be paid was 5888, 5888 -- I'm
20 sorry, let me start over. It's 5588, 5588, 5588, 5588,
21 6588, 7588, 8588, 9588, 10,588, 11,588, 12,588, 13,588,
22 13,588, 13,588, 13,588, 13,588, 13,588, 19,588, 19,588,
23 19,588, 19,588, 19,588, 19,588, 19,588, 19,588, 19,588,
24 19,588, and 19,588, correct?

25 A I don't have it in front of me, but if you're reading

1 from that, I would assume that is correct.

2 Q All right. And if we total up that number, we come
3 up with 386,560 -- I'm sorry, 386,464, correct?

4 A It's the same response, I haven't totaled it myself,
5 but if you've totaled it, I do not have a reason to
6 believe or not believe the amount.

7 Q So under the agreement with TW Telecommunications,
8 you agreed to pay 386,464?

9 A If that's the total of the schedule one document,
10 then we agreed to pay that.

11 Q You ultimately paid 396 some add thousand dollars,
12 right?

13 A Correct.

14 Q Okay. And the invoices that you are paying included
15 items that were unrelated to bandwidth, right?

16 A I don't know that to be correct.

17 Q Okay. Your agreement that we went over, the numbers
18 we went over were just for the bandwidth use, correct?

19 That was the agreement of what you would pay TW
20 Telecommunications for their bandwidth use, right?

21 A That was what I agreed to.

22 Q Okay.

23 A And there was --

24 Q It --

25 A It's not just the bandwidth use, it included the

1 access to the internet and it included the use of
2 fiberoptics --

3 MR. AUSTIN: Objection, Your Honor. Defense counsel
4 is trying get in other exhibits that they have no right to
5 get in.

6 THE COURT: He hasn't tried to move anything in yet.

7 BY MR. HOOD:

8 Q So you would agree with me that if you paid an
9 invoice that had a line item for private line long
10 distance access, that is not bandwidth use, correct?

11 A Well, it's not what I would refer to as bandwidth
12 use, but I'm not saying that was excluded from this
13 agreement when it was priced out.

14 Q I'm sorry. Could you say that one more time?

15 A I'm not saying that was excluded from this agreement.

16 Q Well, your agreement was all four -- the bandwidth
17 schedule of accumulation months one through 12 was for 140
18 megabytes, right?

19 A That's correct.

20 Q Months 12 through 17 were up to 750 megabytes,
21 correct? Right?

22 A That's correct.

23 Q And months 18 was up to two gigabytes, correct?

24 A That's correct.

25 Q All right. So the price that you agreed, including

1 the increase was for the use of bandwidth, internet and
2 data, right?

3 A Originally, that was on the original agreement.

4 Q Okay.

5 A That's what it was. When we added the \$1,588 a
6 month, that included other circuits that were part of it
7 and it included some other costs that I believe he said he
8 had found, so that was an agreed change. And --

9 Q And the --

10 A -- what we got from TWT was supposed to be billed in
11 accordance with that schedule, 5588 increasing up the
12 19588.

13 Q For the bandwidth?

14 A No, it included everything we got from them. That
15 was what we were going to pay them.

16 Q Do you have any document that shows that was the
17 total and every payment you were supposed to make as
18 opposed to just bandwidth?

19 A That was the -- there's a schedule saying that's what
20 we're going to pay them.

21 Q And the schedule all relates to the amount of
22 bandwidth schedule, doesn't it?

23 A No, the schedule was -- the original payment related
24 just to bandwidth, \$1,588 a month was added to it. It
25 included all the circuits that were being provided to us

1 by TWT.

2 Q So the private line on the invoice in September of
3 2010, if that amount is \$1,000, you're saying that that
4 should be included in your 5588?

5 A Correct. We expected to pay \$5,588 in September
6 of 2010 and instead, they billed us for some \$2,700 during
7 that period.

8 Q And some of your invoices that you claim, at least,
9 on the schedule or allocation of damages had some balance
10 dues, so you were trying to collect them twice?

11 A I'm sorry, what's that?

12 Q Sure. I was provided beforehand a schedule of your
13 losses trying to calculate your invoices versus what was
14 billed and part of that number that came up to your
15 \$396,000 included both September billing, September 2010
16 billings of 210306, as well as the October 10 billing,
17 which has a balance due of 210306 from September that was
18 never paid and it's giving a total of 55 -- I'm sorry,
19 555315. You would agree with me that you can't count the
20 21036, 03.06 twice?

21 A We're not counting it twice. We have no -- we were
22 willing to -- and, in fact, I went and met them after I
23 got those bills for less than the 5588 and said what's
24 going on, we agreed to pay 5588?

25 Q Okay.

1 A And then they -- at some point, they tried to do some
2 catch up on that and billed in one month much more than it
3 was, but we had no problem paying what we agreed to pay.

4 Q Okay. So you have no problem -- wait a minute. I
5 want to make sure we're clear. You have no problem paying
6 what you agreed to pay, which was under the schedule one
7 that started at 5588 per monthly ramping up to 19588 per
8 month in the later months, correct?

9 A Yeah, well, there needs to be a little bit of an
10 explanation about the later months.

11 Q Give me a yes or no. Am I correct, you had no
12 problem paying what you had contracted to pay?

13 A Initially, we had no problem with that.

14 Q Okay.

15 A We were paying what we --

16 Q So under the agreement and the documents that you
17 agreed to, you agreed to pay 386464. You're now claiming
18 instead of 386464, you paid \$396,000?

19 A We did pay \$396,000.

20 Q So you paid roughly \$12,000 more than you contracted
21 for, correct?

22 A Than we originally agreed to in our contract, yes.

23 Q Okay. Thank you. Now, the profits and loss that
24 you're claiming, the delay, during the six months from --
25 well, you started receiving service from TW Communications

1 in October of 2010, correct?

2 A You --

3 Q Or excuse me, September?

4 A September or October. It was one or the other.

5 Q Okay.

6 A It might have been September.

7 Q Okay. And so what you're saying is after service had
8 been going on for a couple of months, that all of a sudden
9 January -- from January 2011 to June 2011 that you were
10 able to get no services?

11 A No. We were unable -- so during that time period,
12 they took the circuits that were installed pursuant to
13 everybody's engineering plan and it was agreed by their
14 technical people and our technical people that were
15 operating for the first four months with -- where we had
16 what -- friendly customers, if you will, that were not
17 paying for this service to test those circuits so that we
18 could then use them for our paying customers.

19 In January or before January, they had a situation
20 where those circuits started blocking, something they told
21 us would never happen to us and they said that they needed
22 to double the circuits up at that time.

23 They didn't need to double the circuits up at that
24 time. They did that so they could increase billing. They
25 also said that they would do it within a

1 two-to-three-month period.

2 So while they did, we could not move forward and
3 offer service on a commercial basis. We had to wait for
4 the circuits to be changed while we had all this expense
5 going on, and after they were changed, we had to retest.
6 But they didn't get what they said they would get done in
7 two months done in two months.

8 It took them more like six months to do that. And
9 then we completed our testing and went about launching our
10 commercial service. So they created a six-month period
11 where we could not move forward to gain any revenue from
12 our network.

13 Q The profit and loss statement that you provided,
14 Exhibit 2, is that for just South Carolina operations?

15 A That is.

16 Q All right.

17 A You'll see in the line item for Florida payroll and I
18 kicked that out of there. Even though the person in
19 Florida at that time was working on South Carolina.

20 Q How many people did you employ for sales and
21 marketing at this time frame?

22 A To the best of my knowledge, we had a kiosk in every
23 Bi-Lo supermarket, that was about 20 people. We had
24 probably -- the stores that we had set up, probably about
25 --

1 Q Who were you paying --

2 A -- another 15 or so. Probably about 40 or more
3 people at that time.

4 Q Who were you paying outside consulting fees to?

5 A We were paying outside consulting, for instance, to
6 Johnny Goocher, who is very experienced in managing and
7 launching a network similar. Although we had our own
8 experience, he had a very successful one. We brought him
9 on as a consultant. We brought this Kevin Corrigan on as
10 a consultant, who worked with one of the local tower
11 companies.

12 Q Well, Kevin was already your marketing developer
13 because he's the one who signed the contract, right?

14 A I went down with the paperwork. Kevin gave him
15 authority to execute the documents they said they needed
16 to enact this contract.

17 Q All right. But my question is, using your profit and
18 loss, during the six-month period, who did you pay the
19 \$459,000 to?

20 A Primarily -- I'd say the bulk of that went to Kevin,
21 who's expensive, and Johnny Goocher, who's expensive.

22 Q How much did you pay John Goocher?

23 A And there were other consultants we brought in, for
24 instance, to look at some of the technical aspects of the
25 system.

1 Q How much did you pay John Goocher?

2 A John was \$45,000 a month or thereabout, I believe.

3 Q Okay. And that is just for his work in South
4 Carolina?

5 A Absolutely.

6 Q And even after the six months, you used his business
7 consulting information, didn't you? The consulting -- let
8 me make sure I'm clear. The consulting services that he
9 provided during those six months, you continued to use
10 after the six-month period, correct?

11 A Well, he prepared business plans and whatnot and
12 helped us get our network ready to go and so that may have
13 benefited somewhat after that, but we were unable to
14 execute those business plans because TWT did not give us
15 the unlimited bandwidth that we contracted with.

16 Q Were you ever able to execute those business plans?

17 A No.

18 Q Never?

19 A No.

20 Q Okay.

21 A We had a business plan that -- well, I don't want to
22 say anything unless you asked.

23 Q What rent -- you have a line value item for rent
24 expense retail stores. How many stores did you have?

25 A Approximately -- to the best of my memory, about 10

1 and that doesn't count the kiosks. As I mentioned, we had
2 the kiosks in the Bi-Lo supermarket.

3 Q And you continued to use those after the six-month
4 period?

5 A Well, we did, but we paid rent on a monthly basis and
6 that line item would be for the monthly expenses.

7 Q During the six-month period, you're claiming you had
8 no service revenue?

9 A No, we only -- there's a very small amount. I really
10 don't know what that would be for. It seems significant,
11 but we were only during that period providing free phones
12 to help test the system.

13 Q Free phones being the 15,000 free handsets?

14 A Uh-huh.

15 Q I mean, there's \$15,000 worth of handsets?

16 A Handsets and Wi-Fi devices, which are wireless, a
17 little device that allows you to access the internet, high
18 speed internet anywhere on a wireless device about the
19 size of a deck of cards.

20 We provided those to the police department here in
21 Columbia during that time period as an example of what we
22 were doing in that time period, getting stuff out to
23 people we weren't charging so that we could test the
24 system. And we had done that by the first four months and
25 then we had to push the collection, so to speak, and wait

1 another six months for those circuits.

2 Q Did you ever file any type of audit or request for a
3 dispute, any of the charges that were provided to you from
4 TW Telecommunications?

5 A Did we file an audit or dispute? We certainly
6 disputed the charges. We didn't file an audit as I would
7 understand an audit.

8 Q Did you ever submit a written dispute within 120
9 calender days of any invoice?

10 A I submitted written disputes and, certainly, they
11 were within 120 calender days. I did them with some of
12 the invoices.

13 Q Did you do that by log -- doing it on the company's
14 customer portal website?

15 A What company are you talking about?

16 Q TW Communications, Telecommunications?

17 A Did I personally?

18 Q Do you know if your company did?

19 A I don't know if they did, no.

20 Q All right. The agreement that Kevin ultimately
21 signed also contains a limitations of liability clause,
22 didn't it?

23 A The agreement that Kevin signed wasn't consistent
24 with this, he wasn't authorized to do, so I don't know
25 what it matters, but I don't know what exactly he signed

1 as I sit here either. I haven't read it. I haven't
2 looked at it.

3 Q To prepare for today, you haven't look at the
4 contract between your company and TW Telecommunications?

5 A No, I have absolutely looked at the contract. This
6 is it.

7 Q That is a letter of intent for proposed fiberoptic
8 services, correct?

9 A No, that's the contract.

10 Q Is that what it states? On the top of it, tell me
11 what it says. Read to it me?

12 A It says, PTA-FLA, Inc. slash TW Telecom letter of
13 intent for proposed fiberoptic services.

14 Q And that was in April of 2010, correct?

15 A Yeah.

16 Q And then in June of 2010, Kevin, who was your general
17 manager or manager of development, signed a contract with
18 TW Telecommunications, correct?

19 A Well, if you'd give me -- I can explain it to you.

20 Q So, if you can answer my question. In June, he
21 signed a contract with TW Telecommunications, correct?

22 A I just said that I don't know what he signed or
23 didn't sign at that point in time. I'm aware of what we
24 agreed to, and what we agreed to is, as I explained, this
25 contract here or this schedule of responsibilities. We

1 were going to pay this amount. They were going to do that
2 amount, and then we agreed to modify the cost and --

3 Q Kevin was your development manager, correct?

4 A No, Kevin was a consultant that worked for us. He
5 used that title to sign some documents for us, but,
6 specifically, I took Kevin down to TWT with myself -- and
7 the reason for doing this agreement more on the circuits
8 we got is because we didn't have unlimited bandwidth that
9 was going on, and sat down and made sure that he
10 understood the agreement with TWT in their presence and
11 told them that they needed to get documents executed to
12 enact this agreement, which is all he had authority to do,
13 that they could work on that.

14 Q And the documents that Kevin executed indicates that
15 neither party is liable to the other for indirect,
16 consequential, special, incidental, or punitive damages of
17 any kind or nature whatsoever, including but not limited
18 to loss profits, lost revenues, lost savings, lost
19 opportunity or harm to business, right?

20 MR. AUSTIN: Objection, Your Honor.

21 THE WITNESS: I have no idea what he executed.

22 THE COURT: When your attorney says objection, please
23 stop talking.

24 Go ahead.

25 MR. AUSTIN: Your Honor, the defendant is in default.

1 There are fraud allegations. South Carolina law is clear
2 that fraud limits saying sort of applicability of these --
3 limitations on liability. I would say this is not a
4 proper course of testimony.

5 THE COURT: Overruled.

6 Go ahead.

7 BY MR. HOOD:

8 Q Mr. Steinmann, you're an attorney, aren't you, by
9 education?

10 A I went to law school and I passed the bar and I never
11 practiced as an attorney.

12 Q Okay. I mean, you were, at least, admitted to the
13 California bar in 1982, right?

14 A That's correct.

15 Q And are you the sole owner of PTA-FLA?

16 A Absolutely not.

17 Q All right. What percentage of the company do you
18 own?

19 A I believe under 30 percent, something of that nature.

20 Q In 2010, what percentage of the company did you own?

21 A It was probably in that ballpark then.

22 Q And do your family members own any percentage of the
23 company?

24 A Not directly.

25 Q I want total ownership of your family interest in

1 PTA-Florida, what percentage of the company do you own,
2 your whole family?

3 A My whole family is over 140 people just that show up
4 for Christmas, so that would define where you cut that
5 off.

6 Q Do the grandkids all own shares?

7 A No, no.

8 Q Okay.

9 A None of them own anything directly is what I said.

10 Q Okay. So directly or indirectly, what percentage of
11 the company is owned by your family?

12 A So if they own a company that owns something that
13 owns part of this, is that you're asking?

14 Q I'm trying to understand what percentage of this
15 company is owned by your family?

16 A I really don't know and I really don't know at that
17 point in time. You know, aunts, uncles, that type of
18 thing?

19 Q Let's go with your immediate family, your wife, your
20 kids, your siblings?

21 A That's reflected in the approximate 30 percent that I
22 said.

23 Q Okay.

24 A So I don't know what my siblings may -- I have one
25 sibling that would own probably about five percent more

1 than.

2 Q All right. So what you're telling us is as an
3 attorney, as a 30 percent owner of this company, you never
4 sat down and read the contract that you authorized Kevin
5 to sign. Is that what you're saying?

6 A Yes.

7 Q Okay.

8 A Nor did I agree to probably hundreds of other
9 contracts. It's just too much work for somebody to go
10 down to that level.

11 Q And there were also service invoices that had to be
12 signed by a representative of your company for each month,
13 right?

14 A I don't know that to be true.

15 Q All right. Did you ever see any service order forms
16 or any invoices for any of the services provided by TW
17 Telecommunications?

18 A I can't recall any specifics, but I do recall that I
19 saw we were being billed for \$2,700 for something
20 thereabout initially when we had agreed to pay 5588 and
21 that prompted my first visit down to TWT to see what was
22 going on, why they weren't doing what we agreed to do. It
23 seemed to be in their interest.

24 Q All right. Also, in the delay aspect of it, you were
25 having problems with other vendors during this same

1 timeframe, weren't you?

2 A Not that affected that delay.

3 Q Well, I mean, you filed -- in South Carolina alone,
4 you filed a lawsuit against ZTE-USA, right?

5 A That's correct.

6 Q All right. And you allege that because of their
7 delay in getting you equipment that it cost you a delay in
8 setting up your installation in Columbia and Greenville,
9 right?

10 A Well, I agree that -- yes, that's correct and I can
11 explain.

12 Q So you said that there was, at least, a two-month
13 delay because of TWT, right, in your complaint?

14 A I don't know if that's true.

15 Q All right. But you do acknowledge that you were, at
16 least, blaming other companies besides TW
17 Telecommunications for the delays you were having in
18 setting up your Columbia, Greenville, Spartanburg
19 business, right?

20 A Nope, that's not true.

21 Q Okay.

22 A During the time period that we're asking for the
23 delay from TWT, we had already taken all ZTE out of our
24 network and replaced that with equipment from another
25 vendor. And they certainly, you know, screwed us around

1 before that, but at that point in time, they were out of
2 our network and weren't causing a delay.

3 Q You also had difficulty setting up, getting approval
4 for a tower on Main Street, right?

5 A We didn't put any tower on Main Street --

6 Q You tried to?

7 A -- in Columbia.

8 Q In Columbia. You tried to?

9 A To put a tower -- I don't know how far Main Street
10 goes.

11 Q You tried to put a tower up and claim it was flagpole
12 and the zoning board refused to give you authorization to
13 do that. Do you remember that?

14 A I don't remember that.

15 Q Okay.

16 A But I wouldn't deny it. I mean, we put towers up
17 that look like trees and clock towers, you name it. We
18 did put a tower up that is a flagpole very close to here.

19 MR. HOOD: Thank you. That's all I have at this
20 time.

21 THE COURT: All right.

22 MR. HOOD: Subject to your ruling on getting the
23 additional documents to support their Exhibit 2.

24 THE COURT: Redirect?

25 MR. AUSTIN: A few quick questions. Thank you.

1 REDIRECT EXAMINATION:

2 BY MR. AUSTIN:

3 Q Mr. Steinmann, you agreed to make payments based on a
4 schedule; is that correct?

5 A That's correct.

6 Q Did you get the services that you were agreeing to
7 pay for that scheduled amount?

8 A Absolutely not.

9 Q Okay. How was that different?

10 A They agreed to pay us -- and as Mr. Hood
11 particularly, we have this bandwidth limitation. When the
12 internet or data sessions come through, those fiber parts
13 start to switch.

14 They have to end up being put on the internet or they
15 have to stop coming from the internet going back over
16 those people's cell phones. Our agreement was -- and the
17 products that they have are very big pipes, big -- you
18 know, they may be using less than one percent of the
19 capacity on, so this was not talking about any additional
20 money, so they agreed that they would give us whatever
21 bandwidth we needed on those fiberoptic pipes.

22 MR. HOOD: Objection, Your Honor, that's beyond the
23 scope of the complaint. They never agreed to unlimited.
24 It's specifically in the schedule.

25 MR. AUSTIN: Your Honor, he opened the door.

1 THE COURT: He just asked him about the invoice.

2 THE WITNESS: It's -- this is.

3 THE COURT: Overruled.

4 THE WITNESS: I said this is what we agreed to and
5 this is what they didn't give us. We agreed that the
6 amount of capacity on those pipes would be limited only by
7 this amount that was designated in the agreement for the
8 internet access.

9 So if there was 140 megabits at the internet access
10 point, that would be allocated amongst these fiberoptic
11 pipes, and instead of that, they only gave us like 10
12 megahertz -- or 10 megabits pipes and 10 megabits of
13 capacity in the drain and that's what caused blocking of
14 our sessions and that was the failure when we were in the
15 testing period that they said that needed to be worked out
16 by putting in duplicate sessions.

17 And then they never after that said that they would
18 honor their agreement to give us use of those transports
19 that was bound only by the amount that we had at the
20 internet access point.

21 Q Okay.

22 A So that prevented us from two or three years ahead of
23 anybody else talking about unlimited data plans and
24 wireless. We were installing and designing for unlimited
25 data plan two or three years ahead of everybody else, but

1 we couldn't execute that business plan at that point.

2 Q Mr. Steinmann, would one tower in a network affect
3 the network greatly?

4 A Excuse me?

5 Q Would one tower in a network affect the operation of
6 the whole network greatly?

7 A One tower in the network typically won't at the
8 beginning of the network, but as you get further along and
9 more use on the network, each of them -- the size of the
10 footprint that the tower covers shrinks because it's
11 covering more people in a denser area.

12 So one tower could be very harmful later in your life
13 of the company, so to speak, when you have a lot of
14 customers on there because the size of the footprint
15 shrinks. But when you're initially launching, you
16 generally have some overlap where surrounding towers would
17 take over any tower you had missing.

18 Q Did Mr. Goocher -- I'm sorry, the defense asked you
19 about Mr. Goocher's consulting fees. Did Mr. Goocher
20 continue with PTA-FLA after this delay period?

21 A Right about that time, he didn't. We couldn't
22 execute our plan and we couldn't really make use of
23 Mr. Goocher's services at that point, so we went our
24 separate ways.

25 Q All right. What was the limiting factor of using his

1 business plan?

2 A Mr. Goocher's?

3 Q Yes.

4 MR. HOOD: Your Honor, this is beyond the scope of
5 the complaint.

6 THE COURT: You asked about Goocher and how much it
7 cost and whether it kept going or not, so I'm going to
8 allow it.

9 Go ahead.

10 THE WITNESS: You said the limiting --

11 BY MR. AUSTIN:

12 Q What was the limiting factor of Mr. Goocher
13 continuing on with the --

14 A He was there to -- he had just got done with San
15 Antonio, being the chief officer of a -- which was a
16 market a little bit bigger, but comparable to the market
17 we were reviewing in South Carolina and he had taken that
18 company to the point where it was making 20, 30 million
19 dollars a year and had just completed a sale of that
20 company for what I had heard was approximately a couple
21 hundred million dollars, and we had brought him to do the
22 same thing with our market here, but in order to do that,
23 we had to give him the tools to do that. And, you know,
24 we were limited after this episode with TWT and being able
25 to provide him the plan we set out to do, which was

1 unlimited data.

2 That's what Mr. Goocher came with some excitement and
3 had thought that we could really grow this market and
4 duplicate that experience he had in San Antonio. So when
5 we couldn't provide him with the data, it didn't make
6 sense to keep paying him to try to do that.

7 If it was just doing voice -- we had done voice in
8 other areas, and we had continued on with that on our own.

9 Q Mr. Steinmann, one last question, by the time the
10 delay occurred from Time Warner Telecom, were all your
11 equipment problems with ZTE either sorted out or fixed
12 with someone else?

13 A Well, before that, we had terminated going forward at
14 all with ZTE, taken all their equipment down from any
15 sites and they were replaced with the other equipment they
16 were using and that wasn't a problem.

17 And our network, our radio access network, everything
18 that got to these TWT sites was sort of being generally
19 very good and we actually posted our statistics for that
20 up on billboards at that time and put it on the internet.
21 I think we had probably the best call blocking, call
22 dropping statistics that I had seen from any carrier in
23 the company at that time.

24 MR. AUSTIN: Thank you, Mr. Steinmann.

25 No more questions, Your Honor.

RECROSS-EXAMINATION:

BY MR. HOOD:

Q Did you ever file any type of dispute that you were not getting enough usage with TW Telecommunications?

A Absolutely. I took it up all the way to contacting their chief executive officer before he finally put somebody on that to come meet with me. That was the part, the later part of the contract where this guy tried to work with us to extend the contract and they pulled the rug out from under us where we had no time to get off the network and put the screws in royally, you know, so.

Q And from your complaint, it says in or about April 2011 is when you began noticing erratic behavior on your network switch, right? That's in your complaint, paragraph 30, okay.

That's what we have deemed to admit that in April 2011 is when you began to notice erratic behavior in your network, not January 2011, but April. That's what your complaint says, in April -- in or prior to April, correct?

A You're reading the complaint. I haven't read it.

MR. HOOD: May I show him the complaint since it is deemed admitted, Your Honor?

THE WITNESS: How do I know that we haven't alleged other things in the complaint for time periods before

1 that, so...

2 BY MR. HOOD:

3 Q Paragraph 30.

4 A Paragraph 30?

5 Q In or prior to April 2011?

6 A Uh-huh.

7 Q Is when you noticed erratic behavior in your network,
8 right?

9 A That's what it says, in or prior to April of 2011.

10 Q Okay.

11 A I assume that was prior to April 2011 that we noticed
12 that.

13 Q So you'll agree with me at a minimum that by
14 June 2011, you had known about a problem with the network
15 based on the work being or the services being provided to
16 you by TW Telecommunications, correct? By 2011, you knew
17 that?

18 A We knew there was problem. We also knew they said
19 they would fix it.

20 Q Okay. But as of June 2011, you knew there was a
21 problem, right?

22 A We certainly knew there was a problem.

23 Q All right. Your filed your complaint March 2015,
24 right?

25 A We didn't know that that was the only problem. We

1 knew that they said they would fix it and we certainly
2 gave them some time to do that. And they gave further
3 promises at that time on how they were going to fix it.

4 Q Well, they fixed the problem that was related to the
5 six month after June 2011, right?

6 A And then continued on to create other problems.

7 Q Let's answer my question. They fixed the problem of
8 the delay that you're claiming as delayed damages as of
9 June 2011; is that correct?

10 A The problem that created the delay was just in
11 reconfiguring the circuits. The reconfigured circuits
12 never actually gave us what we agreed to in the agreement.

13 Q But what you're asking this --

14 A The problem was never fixed.

15 Q What you're asking this Court to do is award you
16 damages for delay damages from January 2011 to June 2011,
17 right? That's what you've calculated and you're asking
18 for, correct?

19 A We're asking the Court to award us damages for TWT
20 not honoring their agreement with us over the course of
21 that agreement.

22 Q No. You told us when we started that your
23 calculation of the delay damages was based on the delay of
24 work from January 2011 to June 2011, correct? And that
25 was the 1.3 million dollar figure that you calculated,

1 right?

2 A That's part of the damages we're asking for.

3 Q Exclusive of the contract stuff. We're talking about
4 delay damages. Your delay damages go from January 2011 to
5 June 2011, correct?

6 A That's correct.

7 Q All right. You filed this complaint in March
8 of 2015, right?

9 A I don't know when it was filed.

10 MR. HOOD: May I approach and show him the complaint,
11 Your Honor?

12 THE COURT: Yeah, I thought he had it. I'm sorry.

13 BY MR. HOOD:

14 Q The cover sheet for the summons, what's the date of
15 that?

16 A Can you point me where the date is? March 3rd, 2015.

17 Q And the summons by your attorney, what's the date on
18 that one?

19 A February 27th, 2015.

20 Q Thank you.

21 MR. HOOD: That's all I have, Your Honor.

22 THE COURT: Thank you, sir. You can step down.

23 Any other witnesses?

24 MR. AUSTIN: Just one more, Your Honor.

25 THE COURT: Is he here?

1 MR. AUSTIN: Yes, sir.

2 THE COURT: All right.

3 JOHN GOOCHER, after being duly sworn,
4 testified as follows:

5 THE CLERK: Have a seat in the witness stand.

6 THE COURT: Spell your last name for us.

7 THE WITNESS: Sure. My last name is Goocher,
8 G-O-O-C-H-E-R. And my full name is John Arnet Goocher.

9 DIRECT EXAMINATION:

10 BY MR. AUSTIN:

11 Q Good morning, Mr. Goocher, would you briefly give us
12 a quick background of your employment experience?

13 A Sure, brief background, degree in finance, 10 years
14 at BellSouth Mobility back when it was the phone company
15 for your car.

16 I actually came to Columbia when we were all laying
17 out service here in the late 80s. Also, three years with
18 Sprint PCS, had startup days there. Spent four years
19 running marketing for a publically traded
20 telecommunications company. All that prior to becoming
21 CEO -- I was technically a consultant, but had the title
22 of CEO running a wireless company in Texas called Pocket.

23 Q Okay. And what was your experience with PTA-FLA?

24 A Eric -- after I successfully sold that company in
25 Texas, Eric and I had a conversation. He said hey, what

1 do you think about South Carolina? I said, I know from my
2 days at BellSouth, it's a great market. I'd love to see
3 if there's something we can do with that market in a flat
4 rate operator environment, which was my experience and
5 which was the way to build a wireless subscriber base at
6 that point in time.

7 And with unlimited talk, text and data at that point
8 in time back in 2010, 2011, it sounded like a great plan
9 and a great thing to do and draw on those experiences that
10 I had running a company from scratch in Texas.

11 Q And were you able to implement that plan?

12 A I was not.

13 Q And why was that?

14 MR. HOOD: Your Honor, object. This is beyond --
15 there's nothing about failure to be able to implement his
16 plan in the complaint. So it's beyond the scope of the
17 complaint.

18 MR. AUSTIN: Your Honor, the complaint talks about
19 how we were unable to achieve unlimited internet, which we
20 were bargaining for in our contract.

21 MR. HOOD: Which paragraph?

22 MR. AUSTIN: Paragraph number nine talks how we
23 exchanged for certain payments to be made where defendants
24 agreed to provide unlimited internet service up to certain
25 bandwidth limits as measured by the amount of traffic at a

1 drain at 1401 Main Street, Your Honor.

2 MR. HOOD: Up to -- yeah, up to certain measured
3 limits, not unlimited. That's what the complaint says.

4 MR. AUSTIN: The complaint also talks, even on the
5 next page, unlimited internet use in all facilities so
6 long as it did not exceed -- get into the technical
7 aspects of the agreement, Your Honor. For all intents and
8 purposes, it's limited only by a drain.

9 THE COURT: So there is a limit?

10 MR. AUSTIN: Yes, sir, Your Honor.

11 THE COURT: So what's the purpose of this witness's
12 testimony?

13 MR. AUSTIN: May I ask him a question, Your Honor?

14 THE COURT: I would rather you answer my question
15 first.

16 MR. AUSTIN: So he -- this sort of limit, for all
17 intents and purposes, from a customer standpoint, you can
18 still provide unlimited internet to that person. The
19 drain is the point in the system where you're going back
20 outside of the cellular network to the internet itself.
21 So like as long as you're calling other calls in the
22 network, you're sending other texts through the network,
23 you're staying within it, it doesn't touch that drain, so
24 you have unlimited transport all throughout that network
25 until you leave that network. So for all intents and

1 purposes, you can provide unlimited data to your
2 customers.

3 THE COURT: My question is what's the purpose of this
4 witness?

5 MR. AUSTIN: To establish that the damages are
6 reasonable.

7 THE COURT: What damages?

8 MR. AUSTIN: The delay damages.

9 THE COURT: How can he establish that?

10 MR. AUSTIN: He was there during the delay.

11 THE COURT: He worked for the company during the
12 delay?

13 MR. AUSTIN: As a consultant, yes, sir.

14 THE COURT: All right. I'll give -- you can go down
15 this road a little bit.

16 BY MR. AUSTIN:

17 Q Mr. Goocher, did we get unlimited internet?

18 A No, we did not.

19 Q How long was the delay in the implementation of
20 changes by Time Warner Telecom?

21 A The delay by Time Warner Telecom, from my
22 recollection at the time, ran about seven to eight months
23 from sort of start to finish.

24 Q And how did that damage PTA-FLA?

25 A We had to delay launching commercial service.

1 Q Are the numbers that you heard Mr. Steinmann say out
2 of the ordinary?

3 MR. HOOD: Your Honor, I object. This is asking an
4 expert opinion of someone not qualified to render
5 expert -- he hasn't been tendered as such.

6 MR. AUSTIN: No further questions, Your Honor.

7 THE COURT: Okay. Cross?

8 MR. HOOD: I have no questions, Your Honor.

9 THE COURT: All right. Welcome back.

10 Next witness.

11 MR. AUSTIN: No other witnesses, Your Honor.

12 THE COURT: Okay. All right. So how long is it
13 going to take you to produce these backup documents?

14 MR. AUSTIN: Backup documents for who now?

15 MR. CHAMBERS: To be clear, does he want ledgers,
16 does he want checks --

17 MR. HOOD: I want everything. I want every document
18 that supports a number that's on that P&L.

19 MR. CHAMBERS: Okay. So it's thick. I think we can
20 count on doing that within 10 days.

21 THE COURT: Okay.

22 MR. CHAMBERS: There's a lot of stuff.

23 THE COURT: Why don't we stretch it out a little bit
24 longer than that.

25 MR. HOOD: I'm not trying to push you on the time.

1 Take as much time as you need.

2 THE COURT: 30 days?

3 MR. CHAMBERS: Sure.

4 THE COURT: All right. So here's what we're going to
5 do. So the plaintiff has 30 days to turn the supporting
6 documentation, everybody knows what I'm talking about,
7 right, over to the defense.

8 Mr. Hood, I don't know your court schedule. Tell me
9 how long after that you want to review it.

10 MR. HOOD: I'm actually pretty good. I'm here next
11 week, so by the time this comes in, I'm good. So if I can
12 have 30 days to get you a memo --

13 THE COURT: Excellent. So from the point of
14 defense's receipt, they have 30 days to review it. Then
15 at that point in time, y'all do a group e-mail to me and
16 say we need go back on the record.

17 We don't need to go back on the record, and let me
18 know where we are. If we need to get a hearing scheduled,
19 I'll take it out of the normal turn of events. We're not
20 going to sit around and wait for me to have another turn,
21 we'll just do it. And then after that, we can talk about
22 putting -- kind of putting everything together in proposed
23 orders and all that stuff.

24 MR. AUSTIN: Perfect. Thank you, Your Honor.

25 THE COURT: Thank you very much.

1 (Whereupon, the proceedings were concluded.)
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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Richland County, South Carolina, on the 31st day of
January, 2019.

February 10, 2019

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

State of South Carolina	)	
	)	In the Court of Common Pleas
County of Richland	)	
	)	
PTA-FLA, Inc.,	)	
	)	
Plaintiff,	)	2017-CP-40-06433
	)	
versus	)	December 3, 2019
	)	
TW Telecom Holdings, Inc.,	)	Columbia, South Carolina
et al.,	)	
	)	
Defendants.	)	
	)	

TRANSCRIPT OF RECORD

B E F O R E:

The Honorable Robert E. Hood

A P P E A R A N C E S:

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Stephen Cook, Esq.
Attorneys for the Plaintiff

Robert H. Hood, Jr., Esq.
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THIS TRANSCRIPT WAS PREPARED FOR ROBERT H. HOOD, JR., ESQ.

I N D E X

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Certificate 28

E X H I B I T S

FOR THE PLAINTIFF:

(WHEREUPON, no exhibits were introduced during
this proceeding.)

FOR THE DEFENDANTS:

(WHEREUPON, no exhibits were introduced during
this proceeding.)

THIS TRANSCRIPT WAS PREPARED FOR ROBERT H. HOOD, JR., ESQ.

P R O C E E D I N G S

(Continuation of proceedings from January 2019.)

THE COURT: We're on the record in 2017-CP-40-06433.
This is PTA-FLA, Inc. versus TW Telecom Holdings.

Mr. Austin, good morning, ---

MR. AUSTIN: Yes. Good morning, Your Honor.

THE COURT: --- is here representing the Plaintiff and
Mr. Hood -- no relation ---

MR. HOOD: Good morning.

THE COURT: --- is here representing the Defendants.

So we started this hearing in January, I'm very
embarrassed to say, and then we needed some records, which
I understand were turned over. And then we've, kind of,
played a scheduling nightmare trying to get this scheduled
between everybody's trial schedule and my court schedule;
and then we had it scheduled and then we didn't get a court
reporter and then -- so I sincerely apologize for the
delay. I don't think I've ever had this much time in
between hearings, so I want you all to know individually
and I want to make sure your clients know that I sincerely
apologize for the delay in the time frame and the confusion
of all of that.

So to the best of my memory, we were in Mr. Goocher's
testimony; is that right?

MR. HOOD: No, Your Honor.

THIS TRANSCRIPT WAS PREPARED FOR ROBERT H. HOOD, JR., ESQ.

1 THE COURT: Okay.

2 MR. HOOD: The only thing that was -- remained open
3 was the cross-examination of Mr. Steinmann ---

4 THE COURT: Mr. Steinmann. Okay.

5 MR. HOOD: --- as to the summary that was allowed in.

6 THE COURT: Okay. Right. Okay. And is Mr. Steinmann
7 here?

8 MR. AUSTIN: Yes, Your Honor, he is.

9 THE COURT: Okay. Do we need to take up anything
10 before we get into that from either side?

11 MR. AUSTIN: No, Your Honor.

12 THE COURT: And I'll give everybody time at the end to
13 kind of put your thoughts together and say whatever you
14 want to, so we'll do that.

15 Mr. Steinmann, thank you for coming in, and come
16 on up, sir. And if you would, place your left hand on the
17 Bible and raise your right hand.

18 THE WITNESS: Yes.

19 THE COURT: Do you swear or affirm the information
20 you're about to give this Court to be the truth, the whole
21 truth, nothing but the truth, so help you, God?

22 THE WITNESS: Yes, sir.

23 THE COURT: All right. Thank you very much. Just
24 grab a seat right there.

25 (WHEREUPON, the witness takes the stand.)

THIS TRANSCRIPT WAS PREPARED FOR ROBERT H. HOOD, JR., ESQ.

1 THE COURT: Whenever you're ready, Mr. Hood.

2 MR. HOOD: Thank you, Your Honor.

3 ERIC STEINMANN, after having been duly
4 sworn, testified as follows:

5 CROSS-EXAMINATION

6 BY MR. HOOD:

7 Q. Mr. Steinmann, the last time we were together we were
8 talking about Exhibit 2, which was a summary of the
9 damages that you're claiming in this case, correct?

10 A. I don't have it in front of me, but I'll assume that's
11 correct.

12 MR. HOOD: May I hand it up to him?

13 THE COURT: Of course, yes.

14 (WHEREUPON, a document is presented to the
15 witness.)

16 Q. Here's a copy of what was put into evidence by your
17 attorney. Okay. And so the questions I had for you
18 last time was related to the documentation that
19 supported those -- those numbers, right? And that's
20 where we, kind of, broke off? I'm just trying to
21 recap.

22 A. Yes. And when I say this is the damages, it's part of
23 the damages.

24 Q. Okay. And part of the damages that you're claiming is
25 \$459,000 for consulting fees, correct? Outside

1 consulting fees.

2 A. Wait a minute. (Witness reviews document.)

3 It's approximately that amount.

4 Q. Okay. And I asked you at your prior -- you know, who
5 that money was paid to and you told us that it
6 primarily went to Kevin -- and that's Kevin Corrigan,
7 right? -- and to Johnny Goocher.

8 A. I would think there would be other -- other people in
9 there besides them.

10 Q. Let me hand you your testimony and ask if I read your
11 testimony correctly.

12 A. Again, do you want me to read my testimony?

13 Q. Did I read it correctly? That primarily the money was
14 paid to Kevin and to Johnny Goocher.

15 A. I said the bulk of it.

16 Q. Okay. And you told us that you paid Johnny Goocher
17 approximately \$45,000 a month, right?

18 A. I said that I believed it was approximately that
19 amount.

20 Q. All right. We have now looked at your records
21 supporting your outside consultants and you paid Mr.
22 Corrigan \$10,752.36 per month, correct?

23 A. I -- I don't have the record in front of me, but that
24 doesn't sound unreasonable to me.

25 Q. And you paid -- Mr. Corrigan was with Anchor

1 Investments, LLC, right?

2 A. He was -- he wasn't with any company. It was really
3 himself, so if that's what he called himself, he
4 probably incorporated or something in that name. I
5 don't know.

6 THE COURT: You may hand him the invoices to refresh
7 his recollection.

8 MR. HOOD: Yes, sir.

9 THE COURT: And y'all feel free to move about the
10 courtroom as you need to.

11 (WHEREUPON, documents are presented to the
12 witness.)

13 BY MR. HOOD: (Resuming)

14 Q. For Mr. Corrigan, the invoices that we were able to
15 locate are from January -- I'm sorry -- from February
16 4, 2011, in the amount of \$10,752.36, correct? It's
17 the first one.

18 A. The one in front of me is for that amount.

19 Q. All right. And the March 11, 2011 is for the same
20 figure?

21 A. That's correct.

22 Q. And the April is for the -- April 13, 2011 is for the
23 same figure?

24 A. That's correct.

25 Q. And the May 6, 2011 is for the same figure?

1 A. That is correct.

2 Q. And the June 9, 2011 is for the same figure?

3 A. I -- the invoice gave that for that amount, yes.

4 Q. And so from February until -- through June, you paid
5 Mr. Corrigan \$53,000, approximately.

6 A. This is -- let's see. That's approximately correct.

7 Q. Okay. And then you had told us that you paid Mr.
8 Goocher \$45,000 a month, but the invoices that we were
9 able to locate showed you paid him \$22,500 for
10 February and March; no payment in April; and then
11 \$45,000 in May is what the check amount at the top is
12 and there's an invoice for 22,5, correct?

13 A. Right. This is for 22,5.

14 Q. Okay. And that's for February, March, and May, but on
15 top of the May there's a notation from -- that says
16 \$45,000 paid on May 21, 2011, right?

17 A. There is a notation.

18 Q. Okay. So from those invoices you paid Mr. Goocher
19 \$45,000 -- I'm sorry -- \$90,000 total from February
20 through June, correct?

21 A. I -- from February? This is February and the last one
22 is -- if these are in sequence, the last one is for
23 May, not June.

24 Q. And there's no ledger entry or any other notation of
25 any other payments to Mr. Goocher after the May that

1 you're aware of, are there?

2 A. Not that I'm aware of right now.

3 Q. Okay.

4 A. But I don't know what ...

5 Q. So those from totals, the amount that you paid Mr.
6 Goocher and Mr. Corrigan, who you said was the bulk of
7 the consultants making up the \$459,000, is roughly
8 \$140,000, not \$459,000, correct?

9 A. From what you've showed me that would be correct.

10 Q. Okay. On that damages sheet you also claim damages
11 for Hub Back Haul, correct?

12 A. There's an amount for Hub Back Haul and then I've
13 adjusted it out in the column next to it, so I don't
14 think it's fair to say that we claimed that. We've
15 adjusted that amount out.

16 Q. You took out the entire amount?

17 A. Yes.

18 Q. Okay. I'm sorry. I missed that.

19 A. Right here. (INDICATING)

20 Q. Okay. So you took out -- of the \$49,000 ---

21 A. Well, it's netted out to 43,939. There's a credit
22 here in this column. (INDICATING)

23 Q. Okay. All right. So from your damage calculations --
24 so you took this credit, you've subtracted that, and
25 this is what's being claimed, the \$43,000? Or is that

1 being adjusted outward?

2 A. Adjusted out.

3 Q. Okay.

4 A. There's no amount being claimed for Hub Back Haul
5 because that's in a separate category ---

6 Q. Okay.

7 A. --- of damages that were claimed for what we paid.

8 Q. All right. There is a claim for Intercompany Support
9 for \$59,943 from February until May of 2011.

10 A. I see that.

11 Q. All right. We found that going through the records
12 that you provided, we found no invoices to support
13 that amount. It was a carryover from your billing in
14 the ledger. How did you come up with the \$59,943?

15 A. It -- could you explain that carryover from my billing
16 in the ledger?

17 Q. Sure. If you look at your -- let me find it for you.
18 So we were provided documentation that was a General
19 Ledger for -- as of May 31, 2011; and then we were
20 also provided with a ledger detail for February 1,
21 2011 until January 31, 2012. And in there, it's my
22 understanding, you all switched your billing records
23 as of the middle -- your accounting software in June
24 2011; is that correct?

25 A. I think that we -- I'm not sure about those dates that

1 you gave, but I do remember that we apparently
2 switched our -- not our billing, but our ---

3 Q. Accounting software.

4 A. --- accounting software ---

5 Q. Yes.

6 A. --- during that period of time, so there would have
7 been two separate ledgers that were put together to
8 compile this.

9 Q. Okay. And that's what the letter from your counsel to
10 me says, that we changed the accounting software in
11 June 2011 and this ledger if -- I think it should have
12 been "is" -- for the first part of the year. It's
13 number three. (INDICATING)

14 A. Okay.

15 Q. All right. And so when we look at the General Ledger
16 from Quickbooks, February 1, 2011, until May -- I'm
17 sorry -- the big General Ledger, when you look for
18 Interoffice Services -- let's see if I can find that
19 page. I'm sorry. I'll find it in just a second and
20 come back to it.

21 You also claim Marketing Promotion or Promo
22 damages of \$44,150 for February to June of 2011,
23 correct?

24 A. That is correct.

25 Q. All right. And looking at your General Ledger as of

1 May 31, 2011, what's listed there shows a total
2 Marketing Promo of \$361.33, correct?

3 A. That's -- that's not correct. You see, all of these
4 sub-accounts below that, okay, they total up -- this
5 is -- the amount that's on this listing is an expense
6 for Marketing Promotion. This -- I'm not sure that
7 this isn't in the income category, so ...

8 Q. All right. The ledger entry says, "Marketing Promo",
9 correct?

10 A. Yeah, but I don't know where this has come from. This
11 is a single expense account listed next to an income
12 account, so this -- you know, whatever the General
13 Ledger would be for that period would have all the
14 accounts here, so I don't know where ...

15 Q. All right. Do you have documentation to show the
16 \$44,150 you claim in Marketing Promotion?

17 A. I'm sure we do, but ---

18 Q. All right.

19 A. --- I don't have it in front of me and I think if I
20 had known you were asking about these, we -- I would
21 have come prepared with all the backup for them.

22 Q. Well, you knew I was going to be asking you about the
23 backup for that spreadsheet. I mean that's why we
24 adjourned, didn't you?

25 A. Yeah, well, I -- we provided y'all with backup. I

1 would assume if there was a problem, you would have
2 let us know and we would straighten it out then.

3 Q. That's why we're here, so that I can ask you about the
4 documentation to support your \$44,150 and the other
5 figures. Can you support those figures based on what
6 you have?

7 A. We have -- we provided y'all the documentation for
8 backup on that and I think we asked if we wanted us to
9 bring it here and we haven't, but we can. We can and,
10 you know, it would take me some time to go through it,
11 but I'm happy to do that.

12 Q. All right. And you also claim Customer Care of \$5059
13 on your damages sheet, correct?

14 A. Is that a highlighted item or not a highlighted item?

15 Q. I don't believe it's highlighted.

16 A. Okay then. Do you know where?

17 Q. Here. I'll find it for you.

18 A. There. Okay. I see it.

19 Q. All right. You claim \$5059 from February through May
20 of 2011, correct?

21 A. Correct.

22 Q. All right. From your General Ledger as of May 31,
23 2011, your ledger entry says Customer Care/Call Center
24 total was \$1712.80, correct?

25 A. This says that. This is also printed in 2/20 of '19,

1 so I don't know how these can be the original ledgers
2 from May of 2011, but ...

3 Q. All right. Well, let's make sure -- what we're
4 looking at says PTA-FLA, Inc., d/b/a Cleartalk,
5 General Ledger as of May 31, 2011, and it's 1:09 PM,
6 2/20/19 print date, right? Isn't that what that's
7 indicating? I mean this is the document I got from
8 your attorney.

9 A. Yeah, but is this the same ledger that supported all
10 the other numbers? Are these the anomalies you found
11 in the ledger that supported all these numbers? All
12 these numbers are supported by ledger and backup, I
13 believe, that we've provided. I'm not sure this is
14 it.

15 Q. Okay. I got two ledgers. One ledger is for the
16 February to March -- I mean -- sorry -- February to
17 May of 2011 and one is a General Ledger for the entire
18 year. And what I'm looking at here is the General
19 Ledger as of May 31, 2011, before you switched
20 accounting systems, that said the total Customer Care
21 cost was \$1712.80, not the \$5059 you're claiming on
22 your damage summary. Are you aware of any other entry
23 on that General Ledger to support a Customer Care
24 figure of \$5059?

25 A. My understanding is we provided you access to 22 boxes

1 of documents, and I believe what you have here is not
2 the General Ledger for this period that supports this,
3 but it is something that was reported. It says
4 General Ledger on it, but it's not the document that's
5 been provided to support these numbers. So ---

6 Q. Okay. But ---

7 A. -- there's a number -- there's a number of zeros in
8 here and I don't -- you know, there is a document that
9 says that, but I don't think it's the document that's
10 been provided to you and I would have thought that if
11 we had a problem, you would brought -- bring it up and
12 we could have clarified that for you. But I'm happy
13 to do so if you want me to go back through the
14 information in support of these numbers.

15 MR. HOOD: Thank you. Those are all the questions I
16 have at this time.

17 THE COURT: All right. Redirect?

18 REDIRECT EXAMINATION

19 BY MR. AUSTIN:

20 Q. Mr. Steinmann, do you have any accounting background?

21 A. I have an extensive accounting background.

22 Q. Okay. Could you elaborate a little bit?

23 A. I have a -- I got my CPA at the same time I was in my
24 first year of law school; I took the test for that.

25 And then I actually -- when I came out of law school,

1 I went to work for a CPA firm and got -- and four
2 years after that I started my own CPA firm and I have
3 had over 200 clients for about 20 years, ranging from
4 very large to very small.

5 Q. Okay. And this document that we're talking about,
6 that Mr. Hood has been talking about with the
7 adjustments out, is that a profit and loss statement?

8 A. It's in a profit and loss format where you have income
9 over expenses, but it's -- so you could call it a
10 profit and loss statement, but it's really for the
11 purpose of consolidating our operations for a period
12 that is not reflected on an annual report. So we've
13 taken the one column for one month and attached it to
14 the other column for five months.

15 Q. And so, while you may have testified earlier that Mr.
16 Goocher and Mr. Corrigan seemed to be the bulk of the
17 consulting fees, and Mr. Hood has given us some
18 numbers for approximately \$140,000, when this profit
19 and loss statement was put together, did you just
20 throw \$45,000 a month in there, or was it based on the
21 evidence or the payments that were made to various
22 vendors?

23 A. No. I believe every number here is supported by the
24 ledger and I think that there's been a question raised
25 if I'm certain of these numbers, but I believe all the

1 support is there for those numbers that are on this
2 statement. I don't think that these papers given to
3 me printed on that date are reflective of that, and I
4 think that would be explained if we were asked ahead
5 of this time.

6 Q. And do you know if there were any other consultants
7 that could have been paid out of that -- that bulk
8 amount? Were these the only two consultants that you
9 hired?

10 A. No, there were certainly a lot of consultants. And
11 maybe when I said bulk, maybe that was the two that
12 would have the biggest amount, but there may have been
13 several other ones in there. And I could probably
14 stretch my memory for a couple of them, but it's --
15 the best thing would be to look at the detail backing
16 up that number to see who they were and I could
17 explain anyone that's in that number and what they did
18 and why they're properly in that number.

19 Q. And which consultants did you personally work with the
20 most often?

21 A. It would -- Well, I worked with both Goocher and Kevin
22 Corrigan, but I also worked with others; and I think
23 we had technical consultants involved and they may be
24 in that number as well.

25 Q. Okay. And could you turn to that General Ledger form

1 for the Marketing Promo that Mr. Hood gave you?

2 A. Okay.

3 Q. I think you pointed this number as something that was,
4 sort of, out of place with the numbers that were in
5 the profit and loss statement. If you look a little
6 more closely at this General Ledger, is this income or
7 is this an expense?

8 A. It's -- I mean the part above it is income. It's one
9 income item lifted for an amount that doesn't tie into
10 this at all, and then it's one expense category. It
11 could be income, but I would think they're expenses.
12 It's referring to some, probably, small amounts from,
13 you know, \$3 to \$40 or so that probably come through
14 on a daily report.

15 Q. Well, here it says Broad River Cash Sales, Marketing
16 Promo, Broad River Cash Sales. Would cash sale be an
17 income or an expense?

18 A. It would be a -- it would be an item off of income,
19 but I'm trying to think what would be marketing promo
20 on the income side. It may be that this is showing a
21 deduction from the receipts for the day for some
22 equipment that was given away and written off to
23 promotional expense; it was such small amounts. It
24 doesn't have anything to do with the category from
25 Market Promotion. I think you'll see advertising

1 expenses, billboards, and that type of thing in that
2 Market Promotion category.

3 Q. Okay. Does this profit and loss summary statement
4 that you put together adjusting out, does this fairly
5 and accurately represent and show the contents of
6 those 22 boxes of documents -- of supporting
7 documents?

8 A. Yeah. This is the same numbers we used to make our
9 decisions on and operate the market, so to our
10 ability, these are the numbers as reflected in the
11 categories that are important to us; and, you know, if
12 asked, with the stuff in front of me, we could
13 provide support for all these numbers.

14 Q. Okay. And one last question, between the amounts that
15 you claim that you've paid TW Telecom that you're
16 seeking back as direct damages along with the adjusted
17 amounts from those, you're seeking \$1000 -- I'm sorry
18 -- \$1,742,580.42; is that correct?

19 A. That's not correct. On all of these amounts, I went
20 through and adjusted out anything that there was, in
21 my mind, any question of whether it could have
22 benefited a future period. The intention of this
23 ledger was to show the expenses that were truly lost
24 expenses for that initial six-month period where we
25 were held up in doing our commercial launch of our

1 network while they -- the TW Telecom circuits were
2 corrected and retested and made functional. So I
3 adjusted out in this other column approximately over
4 \$400,000 of expenses that may not have been fair to
5 charge TW Telecom for, for that period, because either
6 they were related to something else or they benefited
7 a future period. And those are all detailed in the
8 third column here. (INDICATING)

9 Q. Okay. But today ---

10 A. For instance, charitable contributions, certain
11 expenses for automobile, fuel, and maintenance,
12 because that probably related to some construction
13 activities and not to the money that was just burned
14 during that period.

15 Q. Okay. Thank you, Mr. Steinmann. But today you are
16 asking the Court to award PTA-FLA \$1,742,580.42; is
17 that correct?

18 A. Well, then that would -- I'm sorry -- then that would
19 be a combination of, for this delayed period, of one
20 million -- approximately one million, three hundred --
21 -

22 Q. Right. In addition to the direct damages that you've
23 already testified to.

24 A. And then there's the amount that we paid TW Telecom
25 for these circuits that were not what we purchased,

1 which was about \$396,000; so the total, then, yes, is
2 approximately \$1,700,000. And we've left off asking
3 and have not asked for all the damages to us for
4 periods after that, that were, in my mind, too hard to
5 separate out from other damages and to prove, but we
6 certainly were damaged throughout our effort to
7 operate a business here in the mid-state and upstate
8 regions of South Carolina by the actions of TW Telecom
9 and not just initially, but after the arrangement was
10 in place and we were -- had our system going. They
11 never provided us the unlimited circuits we asked and
12 then went back and -- went back on their agreements
13 and caused us to, you know, scamper around and make --
14 try to get people to replace these circuits after they
15 said that they would extend the contract. So we had -
16 - we have a lot of other damages as a result of this
17 that we're not claiming.

18 MR. AUSTIN: All right. Thank you, Mr. Steinmann.

19 No more questions, Your Honor.

20 MR. HOOD: Briefly.

21 RECROSS-EXAMINATION

22 BY MR. HOOD:

23 Q. The direct damages that he just asked you about, the
24 \$386,000, we went over that in length at the last
25 hearing and -- I'm sorry. You're seeking \$396,000,

1 but we went over it at length and went through --
2 under the contract you had agreed that you would pay
3 \$386,864, correct?

4 A. In return for what was promised us ---

5 Q. Okay.

6 A. --- under the agreement, we agreed to pay that amount.

7 Q. Okay. And so you overpaid -- on the direct damages,
8 you overpaid by \$9,218.42 based on the contract.

9 A. No. I don't believe that's correct. We overpaid
10 pretty much the whole thing. If you agreed to pay,
11 you know, \$50,000 for a car and -- a new car, and you
12 got something entirely different, then I think it's
13 fair to say you overpaid the entire \$50,000.

14 Q. All right. You also -- you said that perhaps I was --
15 the figure that I should have used for the Advertising
16 and Marketing Promotion would have been found under
17 Advertising and Promotion, and so I want to hand you
18 another entry from the General Ledger as of May 31,
19 2011, and the total Advertising and Promotion amount
20 at that time was \$6657.16, not \$44,150, correct?

21 A. This is just for a one-month period.

22 Q. That's the General Ledger as of May 31, 2011.

23 A. I would think you would have a great deal of problems
24 in all of these numbers if, you know, you're -- this
25 is something different. This is something printed in

1 2/20/19 and I don't think you're handing me the
2 General Ledger. But if you want to look at, for
3 instance, Auto and Truck Allowance that's right below
4 that, that doesn't tie into this either.

5 Q. Okay. But out of ---

6 A. I really don't know what you're handing me. I believe
7 we handled -- handed you all the support for the
8 numbers that are here.

9 Q. Well, let's look at Auto and Truck Allowance since
10 you've said that this is just for the one month.
11 Under the General Ledger that you have there, for
12 Truck and Auto it has a check for February 10, 2011;
13 February 24, 2011; March 10, 2011; March 24, 2011;
14 April 7, 2011; April 21, 2011; May 5, 2011; May 19.
15 Doesn't that show you that this ledger is for the
16 first -- from February through March of 2011 and not
17 just for one month?

18 THE COURT: You mean May.

19 MR. HOOD: May. Excuse me. Thank you.

20 A. In the Advertising and Promotion amount that you asked
21 me about, there was only expenses in there for one
22 month that I can see.

23 Q. And the total Advertising and Promotion expenses as of
24 May 31, 2011, was \$6657.16, correct? By that ledger.

25 A. Of this that you've handed me, yes.

1 Q. Okay. Thank you.

2 MR. HOOD: That's all I have.

3 THE COURT: All right. Thank you, Mr. Steinmann. You
4 can step down.

5 (WHEREUPON, the witness exits the stand.)

6 THE COURT: All right. Anything further from the
7 Plaintiff?

8 MR. AUSTIN: No, Your Honor.

9 THE COURT: All right. Anything, Mr. Hood?

10 MR. HOOD: No, Your Honor.

11 THE COURT: Okay. All right. Do y'all want to put
12 your thoughts together and then let me hear what you're
13 thinking?

14 Yes, sir, Mr. Austin.

15 MR. AUSTIN: Yes, sir.

16 Your Honor, the Defendants are in default. I
17 think that we've proven through adequate testimony and
18 supporting documentation that the numbers we're requesting
19 are both reasonable and accurate. And we just would ask
20 that you award the amount that we've proven, which is
21 \$1,742,000 approximately.

22 THE COURT: All right.

23 Mr. Hood?

24 MR. HOOD: Thank you, Your Honor.

25 First, we are in default and you've heard the

1 procedural background for that, but that doesn't mean that
2 whatever numbers they say have to believe -- be believed by
3 the Court. They submitted a summary rather than the
4 details, and as their own witness said, the best -- the
5 best thing would be to look at the details backing up the
6 numbers; that's why we asked for the backups so we could
7 look at them. We found inconsistencies in their Exhibit 2.
8 The inconsistencies, we believe, make Exhibit 2
9 inadmissible because that summary is not accurate. They
10 claim promotional damages -- or they claim promotional
11 damages in \$44,000; there's no ledger to support that.
12 They claimed in testimony that the consulting was over
13 \$459,000; there is no supporting detail for anything over
14 \$140,000. So we think that the Plaintiff has failed to
15 meet their burden of showing admissible damage evidence.
16 The only thing that they have shown was direct damages that
17 they claim was \$396,000 -- I'm sorry -- \$396,082.42, which
18 we've shown through cross-examination that they contracted
19 and agreed to pay \$386,864, making their overpayment for
20 direct damages of \$9,218.42. And if anything, that is what
21 they're entitled to.

22 THE COURT: All right. Thank you.

23 MR. AUSTIN: Your Honor, may I add one thing?

24 THE COURT: Yes, sure.

25 MR. AUSTIN: We offered to bring the 22 boxes of stuff

1 today as backup support. Mr. Hood said he didn't need it.
2 And that's all I'd like to say.

3 THE COURT: Okay. All right. I will want proposed
4 orders from both sides, so tell me how long you guys want
5 to do that. I don't know what your court schedules are.

6 MR. AUSTIN: Two weeks, Judge?

7 MR. HOOD: Ten to fourteen days. Two weeks is fine,
8 Judge.

9 THE COURT: Let's do two weeks to submit those, and
10 send them in Word format to my law clerk and then that way
11 we can look through them and process through them and then
12 we'll make a decision before the end of the year.

13 MR. COOK: And provide copies to opposing counsel?

14 THE COURT: Yes, sir. I'm sorry if I didn't say that;
15 I meant to say that.

16 Thank you, gentlemen.

17 MR. HOOD: Thank you, Your Honor.

18 MR. AUSTIN: Thank you, Judge.

19 THE COURT: Again, I sincerely apologize for the
20 delay.

21 (WHEREUPON, the hearing in the above-
22 entitled matter was concluded.)
23
24
25

S/DeeAnne Varnadoe
DeeAnne Varnadoe
Official Court Reporter
Notary Public for South Carolina
My commission expires 3/14/2026.

194

PTA-FLA, Inc. dba C
Statement of Oper

import from QB

Adj

Jan-May Jun-11

Service Revenue

Monthly Service Plan Fees	1,224	1,118
Features Revenue	0	0
Data Plan Fees	0	150
Usage Based Fees	0	-20
Discounts - Services	-361	-406
Reactivation & Other Fees	0	14
Handset Insurance & Shipping Fees	0	0
Payment Fees Revenue	0	0

Service Revenue	863	856	

Equipment Revenue

Handsets	959	14,756
Handset Sales-Discounts	0	-127
Handsets Sales-Dealers	0	0
Modems	-99	398
Modems Sales-Discounts	0	0
Modems Sales-Dealers	0	0
Tablets	0	0
Tablet Sales-Discounts	0	0
Tablets Sales-Dealers	0	0
Accessory Revenue	4,637	1,056
Other Equipment Revenue	0	0
Discounts - Equipment	0	0

Equipment Revenue	5,497	16,083	-21,580

Other Carrier Revenue

Service Revenue - SPRINT	0	0
Service Revenue - SPRINT-RSP	0	0
Service Revenue-SPRINT DATA	0	0
Service Revenue - Dealers	0	0
Page Plus Revenue	12,707	5
Simple Mobile Revenue	16,196	1,292
PreCash Commission Revenue	14,142	2,955

Other Carrier Revenue	43,045	4,252	

Tower Services and Rental Income

Rental Income	6,000	1,500	
Tower Services Revenue	0	0	
Tower Services and Rental Income	6,000	1,500	
Other Revenue			
Other Revenues	923	0	
Other Revenue	923	0	
Total Revenue	56,328	22,691	
Cost of Equipment			
Handsets	15,820	19,444	
Modems	0	550	
Tablets	0	0	
Accessories	2,350	358	
Other Cost of Goods Sold	15,690	-167	
Cost of Equipment	33,860	20,185	54,045
Cost of Tower/ Cell Site			
Site Acquisition & Inspection	0	0	
Site Preparation Expense	0	0	
Cell Site Maintenance	10,005	690	
Cell Site Lease	21,061	14,434	
Cell Site Utilities	17,380	6,845	
Cell Site Equip/Misc	1,448	14,494	15,942
Landscape Expense	0	125	
Cost of Tower/Cell Sites	49,894	36,588	
Cost of Switch			
Switch Site Lease	17,800	1,200	
Switch Site Maintenance	0	0	
Switch Site Utilities	0	200	
Switch Equipment	0	140	
Cost of Switch	17,800	1,540	
Cost of Tower Services			
Cost of Tower Services	0	0	
Total Cost of Tower Services	0	0	
Network Operations			
Intercompany Support (NTCH)	59,943	0	

Network transportation	41,454	36,559	
Hub Back Haul	49,456	-5,517	43,939
Switch Services MRC	0	0	
SS7 Bundled Services	0	0	
Other Misc Transport Network	0	0	
Data Service - ClearSky	0	0	
Spectrum License Lease	0	0	
Software Licenses & Support	9,090	1,648	
Network Equipment Lease Exp	0	1,205	
Network Storage Rental Expense	5,865	0	
Network Support Agreements	0	0	
Network Management	0	5,040	
Tools & Test Equipment	0	0	
CapEx Engineering Costs	0	0	
Network Codes	1,062	338	
Miscellaneous Telecom Fees	0	0	
E911 Costs	0	0	
CALEA Costs	0	0	
Voice Mail Service	30,000	5,000	
IVR Expense	1,556	50	
Domestic Long Distance Expense	5,000	0	
International Long Distance Expense	0	0	
Roaming Expense	0	0	
SMS/MMS Expense	0	0	
Directory Assistance	2	278	
Content Expense	0	0	
Wireless Flashing Expense	100	0	
Network Operations	203,528	44,601	
Cost of MVNO/Sprint			
Sprint Plan Charges	0	0	
Total Cost of MVNO/Sprint	0	0	
Total Cost of Goods Sold	305,082	102,914	
Gross Profit	-248,754	-80,223	
Salaries, Wages and Related			
Salaries and Wages			
Salaries & Wages-General Administrative	37,452	5,308	
Salaries & Wages - Human Resources	0	1,292	
Salaries & Wages - Inventory	8,542	3,809	

Salaries & Wages - Accounting & Finance	9,211	6,073	
Salaries & Wages - Sales & Marketing	133,538	47,273	
Salaries & Wages - Commissions	0	0	
Salaries & Wages - Network	5,558	2,514	
Salaries & Wages - Construction	31,249	8,532	39,781
Salaries & Wages-Site Acquisition/Leases	0	1,292	
Salaries & Wages - IT & Database	4,786	7,230	
Salaries & Wages - Product Development	0	1,923	
Salaries & Wages - Call Center	23,153	10,340	
Salaries & Wages - Florida	9,415	2,354	11,769
Salaries & Wages - Executive	0	2	
Severance Pay	0	0	
Salaries and Wages	262,904	97,942	
Benefits			
Benefits	19,170	3,684	
Per Diem Expense	27,563	7,254	27,563
Training & Education	311	1,035	
Payroll Taxes	26,886	11,401	
Employee Expense	24,359	9,989	
Benefits	98,289	33,363	
Salaries Wages and Related	361,193	131,305	
General and Administrative Expenses			
Automobile Fuel & Maintenance	17,482	9,784	27,266
Bank Expenses	809	64	
Charitable Contributions	2,000	2,000	4,000
Dues & Subscriptions	0	0	
Legal Expense & Professional Services	45,542	12,221	57,763
Permits, Filing & License Fees	10,166	494	
Meals & Entertainment	7,823	5,679	13,502
Miscellaneous Expenses	2,720	1,506	
Office Expense	12,046	6,213	
Reimbursable G&A Payroll Exp	0	0	
Outside Consulting	358,009	101,390	
Property Taxes Expense	0	0	
Rent Expense-Office & Storage	8,800	7,749	
Recruiting	15,492	294	15,786
Regulatory Expenses	0	0	
Repair & Maintenance Exp	1,748	390	
Security Expense	1,169	499	
Travel Expense	45,394	22,110	67,504
Utilities Expense	6,696	1,119	
General and Administrative Expenses	535,896	171,512	

Bad Debt Expense

Bad Debt Expense	396	178
Bad Debt Expense	396	178

Marketing

Rent Expense-Retail Stores	48,031	13,835	
Dealer/Reseller Expenses	0	547	
General Marketing Supplies/Maintenance	10,623	4,323	
Utilities Expense-Retail Stores	5,123	3,644	
Print Media	0	0	
Creative Print Advertising	0	224	
Billboard Advertising	0	10,125	10,125
Digital Billboard Advertising	0	10,770	10,770
Radio Advertising	0	0	
TV Advertising	0	0	
Website Advertising	0	0	
Website Expense	384	0	
Market Promotion	44,150	1,515	
Public Relations	0	0	
Uniform Expense	2,303	1,993	4,296
Other Sales & Marketing	7,331	17,756	25,087
Marketing	117,945	64,732	

Customer Care

Customer Care Expenses	5,059	2,842
Customer Care	5,059	2,842

Insurance

Insurance Expense	748	41,001
Insurance	748	41,001

Depreciation and Amortization

Depreciation & Amortization	0	0
Depreciation and Amortization	0	0

Total Expenses	1,021,237	411,570

Ordinary Income	-1,269,991	-491,793

Other Income/Expenses

Gain (Loss) on Disposition of Asset	0	0
Income Taxes	16	-15
Interest Income	0	2,530

Interest Expense	0	0		
Other Income (Expense)	5,197	0		
Other Income/Expenses	5,213	2,515		
Net Income (Loss)	-1,264,778	-489,278	TOTAL:	407558
			Adjusted	
Net Income ck	-1,264,778	-1,754,056	Loss	-1,346,498

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Richland County Fifth Judicial Circuit Public Index



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Switch View

PTA FLA Inc vs TW Telecom Holdings Inc , defendant, et al

Case Number:	2015CP4001394	Court Agency:	Richland County Common Pleas	Filed Date:	03/03/2015
Case Type:	Common Pleas	Case Sub Type:	Breach of Cont 140	File Type:	Jury
Status:	Dismissed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Dismissed per Rule 40J	Disposition Date:	04/06/2016	Disposition Judge:	Lee, Alison Renee
Original Source Doc:		Original Case #:		Restore Reason:	Reopen Case Rule 40J - Original Case
Judgment Number:		Court Roster:			

Case Parties

Click the  icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
☒ Austin, Joshua Evan	PTA-FLA, Inc. PO Box 8839 Columbia SC 29202				Plaintiff Attorney		03/03/2016
☒ DOES 1-10					Defendant		03/03/2015
☒ Hood, Robert Holmes Jr.	PO Box 1508 Charleston SC 294021508				Defendant Attorney		03/28/2016
☒ Hood, Robert H.	172 Meeting Street Charleston SC 29401				Defendant Attorney		04/14/2017
☒ PTA FLA Inc					Plaintiff		10/20/2017
☒ Radeck, John O'Connor Jr.	172 Meeting Street Charleston SC 29401				Defendant Attorney		04/14/2017
☒ Smith, Jamie Nicole(Inactive)	500 Taylor St. PO Box 8113 Columbia SC 29202				Plaintiff Attorney		10/01/2015
☒ TW Telecom Holdings Inc					Defendant		04/20/2017
☒ Wilson, Harry Cooper III	3 Morris Street Suite A Charleston SC 29403				Defendant Attorney		08/11/2017

Associated Cases

Agency	Case #	External	Relationship	Description	Case Filed Date	Disposition Date	Case Status	Disposition
Richland County Common Pleas	2017CP4006433	N	RSCS	Associated by Rule 40J	10/20/2017	01/13/2020	Appeal	Judgment

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
TW Telecom Holdings Inc	NEF(06-15-2018 09:49:16 AM) Order/Signed Order/Protectio...	Filing		06/15/2018-11:27		
TW Telecom Holdings Inc	Order/Signed Order/Protection from Court Appearance	Filing		06/15/2018-09:49		
PTA FLA Inc	Order granting plaintiff's motion to restore	Order		10/05/2017-15:58	04/06/2016-15:58	
PTA FLA Inc	Order denying defendant's motion for summary judgment	Order		10/05/2017-15:51	04/06/2016-15:51	
PTA FLA Inc	Form 4 Order PTA FLA inc's motion to restore is under	Order		09/07/2017-16:15	04/06/2016-16:15	
TW Telecom Holdings Inc	Defendant's Reply To Plaintiff's Opposition To Defendants Mo	Filing		09/06/2017-15:47	04/06/2016-15:47	
Hood, Robert H.	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		09/01/2017-11:21	04/06/2016-11:21	
Radeck, John O'Connor Jr.	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		09/01/2017-11:21	04/06/2016-11:21	
Wilson, Harry Cooper III	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		09/01/2017-11:21	04/06/2016-11:21	
Hood, Robert Holmes Jr.	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		09/01/2017-11:21	04/06/2016-11:21	
Austin, Joshua Evan	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		09/01/2017-11:21	04/06/2016-11:21	
Hood, Robert Holmes Jr.	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		08/11/2017-11:34	04/06/2016-11:34	
Hood, Robert H.	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		08/11/2017-11:34	04/06/2016-11:34	
Austin, Joshua Evan	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		08/11/2017-11:34	04/06/2016-11:34	

Wilson, Harry Cooper III	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		08/11/2017-11:34	04/06/2016-11:34	
Radeck, John O'Connor Jr.	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		08/11/2017-11:34	04/06/2016-11:34	
Austin, Joshua Evan	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		08/11/2017-11:15	04/06/2016-11:15	
Hood, Robert Holmes Jr.	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		08/11/2017-11:15	04/06/2016-11:15	
Radeck, John O'Connor Jr.	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		08/11/2017-11:15	04/06/2016-11:15	
Hood, Robert H.	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		08/11/2017-11:15	04/06/2016-11:15	
Wilson, Harry Cooper III	9/6/2017_MOTION_Roster/Notice of Motions Roster Publication	Action		08/11/2017-11:15	04/06/2016-11:15	
TW Telecom Holdings Inc	Defendants Opposition To Plaintiffs Motion To Restore	Motion		04/18/2017-14:12	04/18/2017-14:12	
TW Telecom Holdings Inc	Motion for Summary Judgment	Motion		04/14/2017-15:47	09/06/2017-15:47	
PTA FLA Inc	Motion/Motion Filing Fee	Filing		04/14/2017-12:10	04/06/2016-12:10	
TW Telecom Holdings Inc	Memo in Support of Motion for Summary Judgment	Filing		04/14/2017-10:50	04/06/2016-10:50	
PTA FLA Inc	Motion to Restore Case	Motion		04/06/2017-10:01	09/07/2017-10:01	
PTA FLA Inc	Motion/Motion Filing Fee	Filing		04/06/2017-09:53	04/06/2016-09:53	
PTA FLA Inc	Order for a consent stipulation of dismissal to 40 J	Order		04/07/2016-10:47	04/07/2016-10:47	
PTA FLA Inc	Stipulation Of Dismissal	Filing		04/01/2016-11:11	04/06/2016-11:11	
Austin, Joshua Evan	Roster/Notice of Case Roster Publication Sent	Action		03/03/2016-14:42	04/07/2016-14:42	
Wilson, Harry Cooper III	Roster/Notice of Case Roster Publication Sent	Action		03/03/2016-14:42	04/07/2016-14:42	
PTA FLA Inc	Order to Withdraw Counsel	Order		10/01/2015-13:48	04/07/2016-13:48	
PTA FLA Inc	Motion to Withdraw Counsel	Filing		10/01/2015-13:47	04/07/2016-13:47	
PTA FLA Inc	Order/Order Filing Fee	Filing		09/30/2015-15:47	04/07/2016-15:47	
PTA FLA Inc	Order denying defendant's motion to reconsider	Order		08/26/2015-11:33	04/07/2016-11:33	
PTA FLA Inc	Memorandum in Opposition to Defendant TW Telecom Holdings In	Filing		08/18/2015-13:46	04/07/2016-13:46	
TW Telecom Holdings Inc	Memorandum in Support of Motion to Reconsider	Filing		08/04/2015-14:52	04/07/2016-14:52	 
TW Telecom Holdings Inc	Motion to Reconsider	Motion		08/04/2015-14:51	08/26/2015-14:51	
PTA FLA Inc	Motion/Motion Filing Fee	Filing		08/04/2015-11:01	04/07/2016-11:01	
PTA FLA Inc	Order that defendant TW Telecom Holdings, Inc is adjudged to	Order		07/16/2015-15:51	04/07/2016-15:51	
PTA FLA Inc	Form 4 Order plaintiff's motion for entry of default and def	Order		06/26/2015-14:42	06/26/2015-14:42	
TW Telecom Holdings Inc	Memorandum in Support of Motion to Set Aside Entry of Defaul	Filing		06/24/2015-16:31	04/07/2016-16:31	
TW Telecom Holdings Inc	Affidavit of H. Cooper Wilson III Esquire	Filing		06/24/2015-16:30	04/07/2016-16:30	
Smith, Jamie Nicole	Roster/Notice of Motions Roster Publication Sent	Action		05/21/2015-15:48	04/07/2016-15:48	
Smith, Jamie Nicole	Roster/Notice of Motions Roster Publication Sent	Action		05/21/2015-15:48	04/07/2016-15:48	
Austin, Joshua Evan	Roster/Notice of Motions Roster Publication Sent	Action		05/21/2015-15:48	04/07/2016-15:48	
Austin, Joshua Evan	Roster/Notice of Motions Roster Publication Sent	Action		05/21/2015-15:48	04/07/2016-15:48	
Wilson, Harry Cooper III	Roster/Notice of Motions Roster Publication Sent	Action		05/21/2015-15:48	04/07/2016-15:48	
Wilson, Harry Cooper III	Roster/Notice of Motions Roster Publication Sent	Action		05/21/2015-15:48	04/07/2016-15:48	
TW Telecom Holdings Inc	Motion to Set Aside Entry of Default and For Late Answer	Motion		05/12/2015-11:19	04/07/2016-11:19	 
PTA FLA Inc	Motion/Motion Filing Fee	Filing		05/12/2015-09:06	04/07/2016-09:06	
PTA FLA Inc	Motion/Motion Filing Fee	Filing		05/12/2015-09:06	04/07/2016-09:06	
TW Telecom Holdings Inc	Affidavit of Ryan McManis	Filing		05/11/2015-14:24	04/07/2016-14:24	 
TW Telecom Holdings Inc	Answer of TW Telecom Holdings Inc	Filing		05/11/2015-11:20	04/07/2016-11:20	
PTA FLA Inc	Entry of Default/Jeanette W. McBride	Filing		05/06/2015-14:19	04/07/2016-14:19	

PTA FLA Inc	Affidavit of Default	Filing		05/01/2015-14:20	04/07/2016-14:20	
PTA FLA Inc	Motion For Entry of Default	Motion		05/01/2015-14:19	04/07/2016-14:19	
PTA FLA Inc	Notice of Appearance	Filing		05/01/2015-13:28	04/07/2016-13:28	
PTA FLA Inc	Motion/Motion Filing Fee	Filing		05/01/2015-11:09	04/07/2016-11:09	
PTA FLA Inc	Form 4 order no show by either party.	Order		04/22/2015-16:30	04/07/2016-16:30	
Smith, Jamie Nicole	Roster/Notice of Motions Roster Publication Sent	Action		04/07/2015-14:45	04/07/2016-14:45	
PTA FLA Inc	Certificate Of Service by Certified Mail	Filing		03/20/2015-13:50	04/07/2016-13:50	
PTA FLA Inc	Verification/Verified	Filing		03/18/2015-11:51	04/07/2016-11:51	
PTA FLA Inc	Summons & Complaint	Filing		03/03/2015-13:05	04/07/2016-13:05	
PTA FLA Inc	Motion to Seal Complaint	Motion		03/03/2015-09:09	04/07/2016-09:09	

Financials

Summary					
Fine/Costs:	\$350.00	Total Paid for fine/costs:	\$325.00	Balance Due:	\$25.00

Costs				
Description	Cost Code	Amount	Charge Action	Disbursed Amount
Civil Filing Fee County 44%/100%	CVFFCN	\$44.00		\$44.00
Civil Filing Fee State 56%	CVFFST	\$56.00		\$56.00
SCJD Filing Fee Proviso \$50 / \$25	SCJDPV	\$50.00		\$50.00
Motion/Order Filing Fee \$25	MOTION	\$25.00		\$25.00
Motion/Order Filing Fee \$25	MOTION	\$25.00		\$25.00
Motion/Order Filing Fee \$25	MOTION	\$25.00		\$25.00
Motion/Order Filing Fee \$25	MOTION	\$25.00		\$25.00
Motion/Order Filing Fee \$25	MOTION	\$25.00		\$25.00
Motion/Order Filing Fee \$25	MOTION	\$25.00		\$25.00
Motion/Order Filing Fee \$25	MOTION	\$25.00		\$25.00
Motion/Order Filing Fee \$25	MOTION	\$25.00		\$25.00
Motion/Order Filing Fee \$25	MOTION	\$25.00		\$0.00

Payments				
Payment Date	Receipt Number	Entered By	Transaction Type Code	Payment Amount
04/14/2017	221558	C40BMETTS	PY	\$25.00
04/06/2017	221221	C40BMETTS	PY	\$25.00
09/30/2015	199214	C40BMETTS	PY	\$25.00
08/04/2015	196847	C40BMETTS	PY	\$25.00
05/12/2015	193426	C40BMETTS	PY	\$50.00
05/01/2015	193038	C40BMETTS	PY	\$25.00
03/03/2015	190533	C40BMETTS	PY	\$150.00

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

PTA-FLA, Inc.

vs.

TW Telecom Holdings Inc, a Delaware
corporation, and DOES 1-10, inclusive,

Plaintiff,

Defendant.

IN THE COURT OF COMMON PLEAS

Fifth JUDICIAL CIRCUIT

CASE NO.: 2015CP400

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

2015CP400 1394

Plaintiff's Attorney:

Jamie N. Smith, Bar No. 101367

Address:

PTA-FLA, Inc.

P.O. Box 8839, Columbia, SC 29202

Phone: 803.363.1323 Fax _____

E-mail: jamies@cleartalk.net Other: _____

Defendant's Attorney:

CT Corporation, Bar No. _____

Address:

2 Office Park Court, Suite 103

Columbia, SC 29223

Phone: _____ Fax _____

E-mail: _____ Other: _____

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Seal

Estimated Time Needed: 15 minutes

Court Reporter Needed: ☐ YES ☒ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

March 3, 2015

Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$** _____

☒ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: filed w/ new action

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ **MOTION FEE COLLECTED: \$** _____

☐ **CONTESTED - AMOUNT DUE: \$** _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
PTA-FLA, Inc.,)
)
Plaintiff,)
vs.)
)
)
TW Telecom Holdings Inc., a Delaware,)
corporation; and DOES 1-10, inclusive,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2015-CP-____ - _____

MOTION TO SEAL COMPLAINT

2015 MAR -3 PM 1:04
CLERK OF COURT
COMMON PLEAS
COURT

YOU WILL PLEASE TAKE NOTICE that, pursuant to Rule 41.1 of the South Carolina Rules of Civil Procedure, PTA-FLA, Inc. by and through its undersigned attorney, moves before the Court of Common Pleas for our Court on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an Order sealing Plaintiff's Complaint based upon the following.

1. The Complaint which Plaintiff moves to file under seal is based, in part, on a contract entered into by Plaintiff and Defendant.
2. The contract at issue contains a confidentiality provision.
3. Plaintiff's Complaint refers to this contract in several instances.
4. Under the confidentiality provision of the contract, Plaintiff agreed not to publicly disclose information relating to the contract, related service orders, or service level agreements.
5. As required by 41.1(b), a copy of the Complaint is being provided to the Court for *in camera* review.
6. Rule 41.1 provides the Court with guidelines for addressing requests to seal documents filed with the Court and for balancing the interests of private litigants in maintaining the confidentiality of information with the public's access to the courts. The rule provides for seven factors for the Court's consideration as it entertains a request to seal documents. A review

of those factors shows that they weigh heavily in favor of protecting the confidentiality of the subject document through and order sealing same from public access.

a. **The need to ensure a fair trial.** The ability to have a fair trial is not impeded by this request to seal.

b. **The need for witness cooperation.** Sealing the Complaint will have no impact on witness cooperation.

c. **The reliance of the parties upon expectations of confidentiality.** As set forth above, portions of the Complaint refer directly to provisions of a contract protected by a confidentiality clause, which states that “[c]onfidential information includes this Agreement, Service Orders, Service Level Agreements, all pricing information and any other information that is marked confidential . . . Confidential information may not be disclosed except to those employees or affiliates of the receiving Party who have a need to know, or to consultants or subcontractors of the receiving Party who agree to be bound by this section.” Under this clause both parties have agreed to and expect the terms of the contract to remain confidential.

d. **The public or professional significance of the lawsuit.** The lawsuit has no public or professional significance. This is not an action addressing the use of public property or funds or which involves any state agencies or government officials. The matters at issue concern a private contractual agreement entered into by the parties. But for the lawsuit, the public would have been unaware of any of the events the parties will address in this litigation.

e. **The perceived harm to the parties from disclosure.** The Complaint that PTA-FLA, Inc. asks the Court to seal reflects sensitive business information.

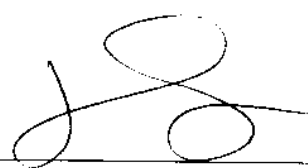
f. **Why alternatives other than sealing the documents are not available to protect legitimate private interest as identified by this Rule.** Less drastic alternatives to sealing are not available in this situation.

g. **Why the public interest, including, but not limited to, the public health and safety, is best served by sealing the documents.** As set forth above, the parties agreed that the terms of the contract at issue in this case are confidential. Honoring this

provision will instill confidence in the public that similar agreements will be upheld by this Court, and will thus encourage commerce.

7. Taking all of the above considerations into account, the balance of public and private interests under these circumstances favors sealing the Complaint. Accordingly, the requirements of Rule 41.1 have been satisfied, and the Court should issue the requested order sealing the document.

Respectfully submitted,

By: 

Jamie N. Smith
S.C. Bar No. 101367
Email: jamies@cleartalk.net
2101 Main Street, Suite J
Post Office Box 8839 (29202)
Columbia, SC 29201
(803) 363-1323

Columbia, South Carolina

February 20, 2015

DOCUMENT TO BE
FILED UNDER SEAL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	CIVIL ACTION NO.: 2014-CP-____-____
	)	
PTA-FLA, Inc.,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
	)	COMPLAINT
	)	(Jury Trial Demanded)
	)	
TW Telecom Holdings Inc., a Delaware,	)	
corporation; and DOES 1-10, inclusive,	)	
	)	
Defendants.	)	
_____	)	

Plaintiff PTA-FLA, Inc. ("Plaintiff" or "ClearTalk"), a Florida corporation, by and through its counsel alleges:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff is a Florida corporation authorized to do business in the State of South Carolina and maintains its principal place of business in Columbia, South Carolina. Plaintiff provides wireless communication services in South Carolina and elsewhere under the brand "ClearTalk." There are other affiliated companies in other parts of the United States that also provide service under this tradename.

2. Defendant TW Telecom Holdings Inc. (stylized as "tw telecom holdings Inc." and referred to herein as "TWTC") is a Delaware corporation authorized to do business in the State of South Carolina. At all times relevant to this action, Defendant provided fiber optic transport services and sold wholesale internet access in Columbia, South Carolina.

3. Plaintiff is unaware of the true names and capacities of defendants named as DOES 1 through 10 and therefore sues these defendants by such fictitious names. Plaintiff will

amend this complaint to allege their true names and capacities when the same have been ascertained.

4. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the injuries and damages alleged herein and that such defendants were the proximate cause thereof.

5. Plaintiff is further informed and believes and thereon alleges the defendants, and each of them, were acting in concert with, at the behest of, or as agent and/or employee of each of the other defendants in doing the acts complained of herein and each defendant has ratified and approved the acts of his agents and co-defendants.

6. This Court has personal jurisdiction over Defendants because Defendants transact business in the State of South Carolina.

7. Venue is proper in Richland County because all or most of the actions or omissions alleged herein occurred within the County.

FACTUAL ALLEGATIONS

The Agreement

8. In 2010, after a series of negotiations between representatives of ClearTalk and Defendants, the parties entered into an agreement under which Defendants agreed to provide, by no later than October 1, 2010, wholesale internet and transport services to enable ClearTalk to offer data plans to its customers for an initial period of 28 months.

9. Pursuant to the Agreement, in exchange for certain payments to be made by ClearTalk, Defendants agreed to provide unlimited internet service up to certain bandwidth limits as measured by the amount of internet traffic used at a "drain" located at 1401 Main Street. By way of example, during the first twelve months of the contract, ClearTalk was entitled to

unlimited internet use on all facilities, so long as use at the Main Street location did not exceed 140 Mb at any given time.

10. The parties also agreed that they would negotiate in good faith for an extension of the term during which services were to be provided after 22 months of the 28 month agreement had elapsed.

11. The rates to be charged for the services provided by Defendants were the subject of much discussion and negotiation. A predictable payment structure was important to ClearTalk as it allowed the company to plan for and facilitate business growth without having to negotiate and execute changes in service and rates.

12. Although the terms of the Agreement were not Defendants' standard offering, Defendants assured ClearTalk they could perform as agreed.

TWTC's Attempt to Unilaterally Modify Payment Schedule

13. After the Agreement was entered into, Defendants requested a meeting with ClearTalk to discuss the details of the service and execute certain documents they claimed were necessary to allow Defendants to initiate service.

14. This meeting occurred in or around June 2010, between ClearTalk representative Kevin Corrigan, who had not participated in the discussions and negotiations between the parties which led to their agreement, and various representatives of Defendants.

15. Prior to the meeting, ClearTalk had authorized Corrigan to execute the documents needed to effect the agreement which the parties had previously entered into.

16. Instead of presenting documents which documented the agreement between the parties, Defendants presented Corrigan with documents that changed some of the material terms of the Agreement.

17. Corrigan executed these documents on behalf of ClearTalk with the understanding and belief that these documents effected the previous agreement.

18. Corrigan did not have authority to modify the Agreement previously reached between ClearTalk and Defendants.

19. Corrigan executed the documents presented to him based on the understanding, created by Defendants' words and actions, that the documents were consistent with and necessary to implement the Agreement.

Defendants Implement Service and Confirms Agreement Terms

20. In or around October 2010, Defendants began providing services pursuant to the Agreement.

21. The initial invoices sent by Defendants did not correspond with the payment terms upon which the parties had previously agreed, as evidenced by the Payment Schedule attached to the executed documents (which had not been changed by Defendants prior to its execution by Corrigan). For example, the first invoice Defendants sent was for the amount of \$3,450.09. According to the Payment Schedule, the initial invoice amount should have been \$5,588.00, plus taxes and associated fees.

22. While the amount invoiced was lower than the amount upon which the parties had agreed, ClearTalk was concerned because the payment terms were intended to provide predictability in the charges ClearTalk would be paying as necessary to launch its data service and thereafter when usage increased.

23. ClearTalk was also concerned because, around the time the invoice was sent, ClearTalk received reports from Defendants' employees that Defendants did not intend to honor the Agreement and that Defendants desired to implement another type of arrangement that would

involve a different structure and only a small amount (less than 30 Mb) of internet bandwidth available at the 1401 Main location.

24. This uncertainty introduced by Defendants hampered ClearTalk's efforts to launch its data service as ClearTalk could not effectively market the service without knowing what its costs were going to be. The fixed cost element of the Payment Schedule was a material term to ClearTalk because, in reliance on this element, ClearTalk would be able to sell unlimited service to its customers.

25. ClearTalk arranged a meeting with a representative of Defendants, Christian Knierim, to discuss these concerns.

26. During the meeting, Knierim informed ClearTalk that the invoice reflected ClearTalk's actual usage (albeit at an unnegotiated rate that Defendants unilaterally chose to apply) as opposed to the flat rate of \$5,588.00 monthly. Knierim further indicated that this invoice was meant to save ClearTalk money.

27. ClearTalk reminded Knierim that Defendants had agreed to deviate from its normal payment structure and the Agreement was for unlimited usage bounded only by the amount of internet used at the drain location at 1401 Main Street – not actual usage.

28. The meeting concluded with Knierim assuring ClearTalk that under no circumstances would it be charged a higher amount than what was set forth in the Payment Schedule, that Knierim and Defendants would monitor the usage to make sure there was no blocking of service and that, in effect, Defendants would likely save ClearTalk money. ClearTalk was assured that in no event would it not be provided with unlimited use on the point to point circuits and internet access at the 1401 Main location, limited only by the stated bandwidth parameters.

29. Knierim also represented that he and Defendants would do whatever was necessary to honor its commitment and make the Agreement work within Defendants' system without further action by ClearTalk.

Service Problems

30. In or prior to April 2011, ClearTalk began noticing erratic behavior in its network switching, including "blocking" at the 1401 Main location at certain times, even for the small amount of data that was being transmitted at that time. The amount of data transmitted was less than 40 Mb when the 1401 Main location should have allowed for 140 Mb of data throughput.

31. After weeks of investigation and testing, ClearTalk was able to isolate the erratic service problem as a "MAC flapping" issue and identify it as stemming from Defendants' configuration.

32. "MAC flapping" meant, essentially, that at intermittent and unpredictable times, all of the internet services being provided by Defendants would shut down.

33. This issue affected the customers of ClearTalk as its customers experienced interruption in the data services they purchased from ClearTalk.

34. ClearTalk notified Defendants of this recurring problem.

35. To address this problem, in or around September of 2011, Defendants told ClearTalk it required additional circuits to address this problem within its network.

36. This remedy also required a change from an "ENLAN service" to a "switched SNLAN/ENLAN service" even though the initial configuration was approved in advance by Defendants' engineers.

Overcharges

37. In order to implement the changes necessary to remedy the service problems caused by Defendants' network, Defendants claimed that ClearTalk needed to sign a revised service agreement.

38. ClearTalk initially refused to sign such a revised agreement as some of the terms were inconsistent with the original Agreement.

39. Defendants, however, refused to remedy the network problem (although it was able to do so) until ClearTalk signed the revised service agreement.

40. Defendants' refusal to remedy the network problem continued to cause significant business problems for ClearTalk as it prevented ClearTalk from delivering one of its core products to its customers and caused damage to ClearTalk's reputation at the critical start up time of its network.

41. Accordingly, ClearTalk signed the revised agreement "under protest."

42. At that time, Knierim of TWTC assured ClearTalk that the changes would not impact the Payment Schedule in any way, and as long as ClearTalk stayed within the bandwidth limits at the 1401 Main Street drain location, the charges would not exceed the monthly payments set forth in the Payment Schedule.

43. Despite Defendants' assurances, immediately after it remedied the defects in its network, it began invoicing ClearTalk for charges in excess of the terms set forth in Payment Schedule.

44. For example, in January 2012, Defendants charged ClearTalk \$15,614.83, despite the Payment Schedule calling for a \$13,588 payment for that month.

45. In February of 2012, Defendants charged ClearTalk \$24,715.04 despite the Payment Schedule calling for a \$13,588 payment for that month.

46. Defendants' refusal to adhere to the terms of the Agreement caused ClearTalk to incur charges for more than the amount which it had agreed to pay and also impaired its ability to successfully implement its data service to customers as ClearTalk had the opposite of the peace of mind and simplicity that the agreement, as negotiated, would have allowed. As such, ClearTalk was not afforded time to focus on its marketing, and instead was required to maintain focus on recurring service and billing problems.

Bandwidth Problems

47. In addition to the network and payment problems discussed above, Defendants also breached the Agreement with respect to the amount of bandwidth it agreed to make available to ClearTalk.

48. Specifically, in months 1-12 of the Agreement, Defendants were to provide 140Mb of bandwidth; in months 12-17, Defendants were to provide up to 750Mb of bandwidth; and in months 18 and after, Defendants were to provide up to 2GB of bandwidth.

49. Defendants did not provide ClearTalk with the bandwidth for which it was paying which, in turn, led to customer complaints for data access being denied.

50. Customers who purchase data plans expected to be able to access the internet on every attempt, and ClearTalk's inability to provide this data access was damaging to its business.

51. ClearTalk notified Defendants of this breach and Defendants promised to correct the problem but failed to do so.

52. Defendants also exacerbated this problem by informing ClearTalk's customer service employees on multiple occasions that the agreement was other than had been negotiated and set forth on the Payment Schedule.

Refusal to Engage in Goodfaith Negotiations and Continued Overcharges

53. After 22 months of service, the parties had agreed to "negotiate in good faith to reach a mutually agreeable extension" to the Agreement based on the usage that has developed over the initial period.

54. As such, in or around July of 2012, ClearTalk attempted to initiate the renewal negotiation process with Defendants.

55. Defendants refused to engage in the negotiation process.

56. Accordingly, in the months that followed, since no extension of the agreement had been reached, ClearTalk began paying only for the amount of internet it actually used.

57. Defendants, however, invoiced ClearTalk for amounts that were not consistent with either the parties' agreement or ClearTalk's actual usage, while continuing to refuse to engage in good faith negotiations to extend the agreement as required.

The New Agreement

58. After Defendants initially refused to participate in good faith negotiations as required, the parties ultimately agreed to the terms of a new agreement ("New Agreement") whereby ClearTalk would pay a monthly rate of \$8,731 for the period from September 2012 to January 2013 in exchange for Defendants' services.

59. Although lower cost alternatives were available to ClearTalk at this point, ClearTalk opted to continue its relationship with Defendant in order to avoid the difficulties and expenses involved with switching to another carrier.

60. After entering into the New Agreement, Defendants, without explanation, refused to honor the terms of the newly negotiated agreement, and gave notice to ClearTalk that ClearTalk must discontinue its use of Defendants' network in an unreasonably short time frame.

The Unreasonable and Abrupt Termination

61. In late January 2013, Defendants advised ClearTalk that it intended to terminate its services to ClearTalk, thereby requiring ClearTalk to find another provider.

62. This notice came as unexpected as Defendants had not given any prior notice that it was going to terminate its services and had, in fact, entered into an extension of the original agreement.

63. Given the nature of the services Defendants were providing, ClearTalk needed significant lead time to procure bids from other providers in order to obtain a competitive rate.

64. Defendants' abrupt notice resulted in ClearTalk being unable to negotiate from a position of strength and it was forced to urgently find an affordable alternative.

65. Although ClearTalk immediately used its best efforts to transfer its usage to another provider, which ClearTalk ultimately did, the process took several months.

66. During this transition period, Defendants refused to honor the \$8,731 per month as agreed, or to charge for actual usage amounts which were less than that amount, and instead charged ClearTalk exorbitant rates which Defendants calculated without a basis in cost or

agreement, under threat of immediately disconnecting ClearTalk's customers from their mobile data services.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

67. Plaintiff incorporates by reference paragraphs 1 through 66, inclusive, as if fully set forth herein.

68. Plaintiff and Defendants entered into a binding Agreement, as set forth above.

69. Plaintiff has performed all obligations required of it under the Agreement, or has had the performance of any obligation excused.

70. Defendants breached the Agreement by refusing to provide the agreed upon services, overcharging ClearTalk for the services, and refusing to engage in good faith negotiations.

71. Defendants also breached the covenant of good faith and fair dealing implied in the contracts between ClearTalk and Defendants.

72. As a result of the breaches by Defendants, ClearTalk has been damaged in an amount to be determined at trial.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

73. Plaintiff incorporates by reference paragraphs 1 through 72, inclusive, as if fully set forth herein.

74. In addition to breaching its contract with ClearTalk as set forth above, Defendants acted fraudulently in making misrepresentations to ClearTalk that, despite the changes in service, ClearTalk's rates would remain within the parameters of the Payment Schedule.

75. Defendants, through their representatives, made such representations with knowledge of their falsity and with fraudulent intent, or with reckless disregard to the truth of such representations.

76. Defendants thereafter reneged on these representations with knowledge that ClearTalk's business was dependent upon the services provided to it by Defendants.

77. As a result of Defendants' breach of contract accompanied by fraudulent misrepresentations by Defendants' representatives, ClearTalk's business plan was disrupted, resulting in damages in an amount to be determined at trial.

78. Due to the fraudulent nature of Defendants' actions, Plaintiff is also entitled to punitive damages in an amount to be determined at trial.

FOR A THIRD CAUSE OF ACTION
(Fraud in the Inducement)

79. Plaintiff incorporates by reference paragraphs 1 through 78, inclusive, as if fully set forth herein.

80. Defendants falsely represented to Plaintiff, by and through its agent Christian Knierim, that they would bill Plaintiff in accordance with the negotiated payment schedule.

81. Defendants intentionally misrepresented that they could provide services within the parameters of the agreed upon Payment Schedule.

82. These representations by Defendants to Plaintiff were both material and false.

83. Defendants made such representations to Plaintiff with knowledge of the falsity of the representations, or with reckless disregard to their truth, and made the representations with the intent that Plaintiff act upon them.

84. Plaintiff did not know of the falsity of the representations by Defendants, and rightfully relied on said representations to Plaintiff's detriment, resulting in consequent and proximate injury.

85. Plaintiff did not learn of the nature of Defendants' fraudulent misrepresentations until in or around January of 2012, when Defendants began charging Plaintiff exorbitant amounts which exceeded the agreed upon Payment Schedule.

86. As a natural and proximate result of the fraud by Defendants, Plaintiff has lost money in the nature of expectation damages, in an amount to be determined at trial.

87. Due to the fraudulent nature of Defendants' actions, Plaintiff is also entitled to punitive damages in an amount to be determined at trial.

FOR A FOURTH CAUSE OF ACTION
(Promissory Estoppel)

88. Plaintiff incorporates by reference paragraphs 1 through 88, inclusive, as if fully set forth herein.

89. Pleading in the alternative, Defendants promised that that they would provide Plaintiff with bandwidth services within the rates set forth in the Payment Schedule.

90. Defendants later promised that they would continue to provide Plaintiff with the above-described bandwidth services at the monthly rate of \$8,731 for the period commencing with the expiration of the initial contract.

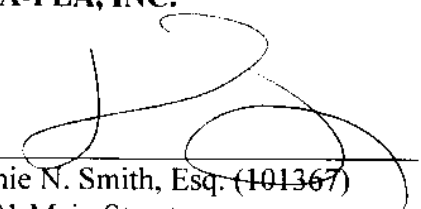
91. Plaintiff reasonably relied, to its detriment, on these promises in its decision to forego alternative service arrangements and its decision to offer data plans to its consumers.

92. Defendants' failure to fulfill the promises described above worked an injustice on Plaintiff and caused Plaintiff damages.

WHEREFORE, Plaintiff prays for judgment against Defendants for compensatory damages, general damages, special damages, consequential damages, punitive damages and any other and further relief that this court considers proper.

Respectfully submitted,

PTA-FLA, INC.

BY: 

Jamie N. Smith, Esq. (101367)
2101 Main Street
Columbia, South Carolina 29201
Telephone: (803) 3631323
jarnies@cleartalk.net

Attorney for Plaintiff

February 20, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

PTA-FLA, Inc.

Plaintiff,

vs.

TW TELECOM HOLDINGS, INC., A DELAWARE
CORPORATION; AND DOES 1-10 INCLUSIVE

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CERTIFICATE OF SERVICE

Case No.: 2015-CP-4001394

2015 MAR 20 AM 11:30
JEANNETTE W. HUBBARD
C.C.P. & G.S.

I certify that on this date, I served a copy of Plaintiff's Summons and Complaint, and Plaintiff's Motion
to Seal Complaint in this action, dated

March 3, 2015, On March 13, 2015 by

☐ Delivering it to him/her personally;

☐ Mailing it to him/her, at his/her last known address, by depositing it in the U.S.

Mail, in an envelope with sufficient postage affixed, addressed as follows:

☐ Delivering it by commercial delivery service in accordance with Rule 4(d)(9),
SCRCP, addressed as follows: ; or,

☒ Other: Mailing it to the registered resident agent on file with the Secretary of State by certified mail,
restricted delivery, in an envelope with sufficient postage attached, which was received on March 16, 2015 pursuant to Rule
4(d)(8), SCRCP, addressed as follows:

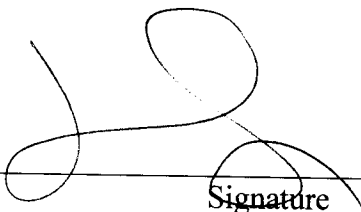
CT Corporations System

2 Office Park Court

Suite 103

Columbia, SC 29223

3/20/15
Date


Signature

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature ☒ Pam Johnson ☐ Agent ☐ Addressee	
1. Article Addressed to: CT Corporations System 2 office Park Court Suite 103 Columbia, SC 29223		B. Received by (Printed Name) <i>Pam Johnson</i>	C. Date of Delivery <i>3-16-15</i>
		D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☐ No	
		3. Service Type ☒ Certified Mail ☐ Express Mail ☐ Registered ☐ Return Receipt for Merchandise ☐ Insured Mail ☐ C.O.D.	
2. Article Number (Transfer from service label)		4. Restricted Delivery? (Extra Fee) ☒ Yes	
PS Form 3811, February 2004		Domestic Return Receipt	
		102595-02-M-1540	

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
 (Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com

COLUMBIA, SC 29223 OFFICE

Postage	\$	\$2.24
Certified Fee		\$3.00
Return Receipt Fee (Endorsement Required)		\$2.70
Restricted Delivery Fee (Endorsement Required)		\$9.05
Total Postage & Fees	\$	\$17.99

MAR 13 REC'D
 Postmark Here

03/13/2015

Sent To _____
 Street, Apt. No., or PO Box No. _____
 City, State, ZIP+4 _____

PS Form 3800, August 2006 See Reverse for Instructions

2015 MAR 20 AM 11:30
 JEANETTE W. MORRIS
 C.O.D. U.S.
 RICHARD G. MORRIS
 FILED

**Service of Process
Transmittal**

05/05/2015

CT Log Number 527067714

TO: Kim Bartlett
Level 3 Communications, Inc.
1025 Eldorado Blvd
Broomfield, CO 80021-8869

RE: **Process Served in South Carolina**

FOR: tw telecom holdings inc. (Domestic State: DE)

ENCLOSED ARE COPIES OF LEGAL PROCESS RECEIVED BY THE STATUTORY AGENT OF THE ABOVE COMPANY AS FOLLOWS:

TITLE OF ACTION: PTA-FLA, Inc., Pltf. vs. TW Telecom Holdings Inc., etc., et al., Dfts.

DOCUMENT(S) SERVED: Motion(s), Affidavit, Entry, Certificate

COURT/AGENCY: Richland County Court of Common Pleas, SC
Case # 2015CP4001394

NATURE OF ACTION: Motion for entry of default

ON WHOM PROCESS WAS SERVED: CT Corporation System, Columbia, SC

DATE AND HOUR OF SERVICE: By Regular Mail on 05/05/2015 postmarked on 05/01/2015

JURISDICTION SERVED : South Carolina

APPEARANCE OR ANSWER DUE: None Specified

ATTORNEY(S) / SENDER(S): Jamie N. Smith
PTA-FLA, Inc.
2101 Main Street
P.O. Box 8839
Columbia, SC 29202
803-363-1323

ACTION ITEMS: CT has retained the current log, Retain Date: 05/06/2015, Expected Purge Date:
05/11/2015
Image SOP
Email Notification, Kim Bartlett KIM.BARTLETT@LEVEL3.COM
Email Notification, Jen Lomeli jen.lomeli@level3.com

SIGNED: CT Corporation System

ADDRESS: 2 Office Park Court
Suite 103
Columbia, SC 29223

TELEPHONE: 404-965-3840

**Service of Process
Transmittal**

05/05/2015

CT Log Number 527067714

TO: Kim Bartlett
Level 3 Communications, Inc.
1025 Eldorado Blvd
Broomfield, CO 80021-8869

RE: Process Served in South Carolina

FOR: tw telecom holdings inc. (Domestic State: DE)

DOCKET HISTORY:

DOCUMENT(S) SERVED:	DATE AND HOUR OF SERVICE:	TO:	CT LOG NUMBER:
Notice, Certificate	By Regular Mail on 05/04/2015 postmarked on 05/01/2015	Kim Bartlett Level 3 Communications, Inc.	527054276
Coversheet, Attachment(s), Summons, Complaint(s), Motion(s) and Order, Motion	By Certified Mail on 03/16/2015 postmarked: "Illegible"	Kim Bartlett Level 3 Communications, Inc.	526764286

PTA-FLA, Inc.
P.O. Box 8839
Columbia, SC 29202

COLUMBIA SC 290

01 MAY 2015 PM 4:11



CT Corporations System
2 Office Park Court
Suite 103
Columbia, SC 29223

29223594828

229

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

PTA-FLA, Inc.)

Plaintiff,)

vs.)

TW Telecom holdings, Inc., a Delaware)
corporation; and DOES 1-10, inclusive,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-400-1394

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

Jamie N. Smith, Bar No. 101367

Address:

PTA-FLA, Inc.

P.O. Box 8839, Columbia, SC 29202

Phone: (803) 363-1323 Fax _____

E-mail: jamies@cleartalk.net Other: _____

Defendant's Attorney:

n/a, Bar No. _____

Address:

Phone: _____ Fax _____

E-mail: _____ Other: _____

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

May 1, 2015

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ _____

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

PTA-FLA, Inc.,

Plaintiff,

vs.

TW Telecom Holdings Inc., a Delaware,
corporation; and DOES 1-10, inclusive,

Defendants.

IN THE COURT OF COMMON PLEAS

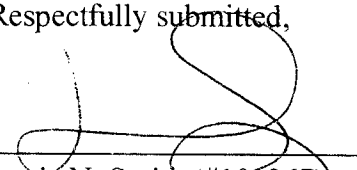
CIVIL ACTION NO.: 2015-CP-4001394

MOTION FOR ENTRY OF DEFAULT

Plaintiff PTA-FLA, Inc. requests that the clerk of court enter default against defendant TW Telecom Holdings Inc. pursuant to South Carolina Rule of Civil Procedure 55(a). In support of this request Plaintiff relies upon the record in this case and the affidavit submitted herein.

Dated this 1st day of May, 2015.

Respectfully submitted,



Jamie N. Smith (#101367)

PTA-FLA, INC.

2101 Main Street (29201)

P.O. Box 8839

Columbia, South Carolina 29202

(803) 363-1323

jamies@cleartalk.net

Attorney for Plaintiff

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

PTA-FLA, INC.)

Plaintiff(s))

vs.)

TW TELECOM HOLDINGS, INC., A)
DELAWARE CORPORATION; AND DOES)
1-10 INCLUSIVE)

Defendant(s))

IN THE COURT OF COMMON PLEAS

CASE NO. 2015 CP4001394

AFFIDAVIT OF DEFAULT

PERSONALLY appeared before me Jamie N. Smith who, being duly sworn, states that she is the Attorney for the Plaintiff(s) and that more than thirty (30) days have elapsed since the service of the Summons and Complaint, exclusive of the date of service, upon the Defendant(s) TW Telecom Holdings, Inc, Does 1-10, : and that no Answer, Demurrer or Notice of Appearance has been served upon her as required by the Summons in this action; and that the Defendant(s) are not a member of the military service; and the Defendant(s) are in default.

Sworn to and Subscribed before me)

28th day of April, 2015.)

Notary Public for South Carolina)

My Commission expires)

09/24/2023)

Attorney(s) for Plaintiff

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
PTA-FLA, Inc.,)
)
Plaintiff,)
vs.)
)
)
)
TW Telecom Holdings Inc., a Delaware,)
corporation; and DOES 1-10, inclusive,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2015-CP-4001394

ENTRY OF DEFAULT

Plaintiff PTA-FLA, Inc. requests that the clerk of court enter default against defendant TW Telecom Holdings Inc. pursuant to South Carolina Rule of Civil Procedure 55(a). It appearing from the record that Defendant has failed to appear, plead or otherwise defend the default of Defendant is hereby entered pursuant to the South Carolina Rule of Civil Procedure 55(a).

Dated this 1st day of May, 2015.

Clerk of Court

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
PTA-FLA, Inc.,)
)
Plaintiff,)
vs.)
)
)
TW Telecom Holdings Inc., a Delaware,)
corporation; and DOES 1-10, inclusive,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS

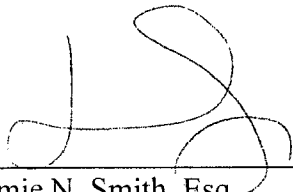
CIVIL ACTION NO.: 2015-CP-4001394

CERTIFICATE OF SERVICE

I, Jamie N. Smith, Esquire, attorney for PTA-FLA, Inc., certify that on this date I caused a copy of the Motion for Entry of Default, Affidavit in Support of Motion for Entry of Default, and proposed Entry of Default to be placed in a postage-paid envelope addressed to the Defendant; at the addresses state below, which are 1) the address for the registered agent for service of said Defendant in South Carolina and 2) the last known address of Defendant's corporate headquarters, and deposited said envelop in the United States mail.

- 1) CT Corporations System
2 Office Park Court
Suite 103
Columbia, SC 29223
- 2) tw telecom holdings, inc.
ATTN: General Counsel
10475 Park Meadows Dr. Ste. 400
Littleton, CO 80124

Dated this 1st day of May, 2015.



Jamie N. Smith, Esq.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
PTA-FLA, INC.)
Plaintiff(s))
vs.)
TW TELECOM HOLDINGS, INC., A)
DELAWARE CORPORATION; AND DOES)
1-10 INCLUSIVE)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CASE NO. 2015 CP4001394

AFFIDAVIT OF DEFAULT

PERSONALLY appeared before me Jamie N. Smith who, being duly sworn, states that she is the Attorney for the Plaintiff(s) and that more than thirty (30) days have elapsed since the service of the Summons and Complaint, exclusive of the date of service, upon the Defendant(s) TW Telecom Holdings, Inc, Does 1-10, and that no Answer, Demurrer or Notice of Appearance has been served upon her as required by the Summons in this action and that the Defendant(s) are not a member of the military service; and the Defendant(s) are in default.

2015 MAY 11 PM 11:11
JEANETTE L. BRIDGES
C.C.P. & G.S.

Sworn to and Subscribed before me)
28th day of April, 2015.)

Notary Public for South Carolina)

My Commission expires)

09/24/2023)

Attorney(s) for Plaintiff

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

PTA-FLA, Inc.

CASE NO. 2015-CP-40-01394

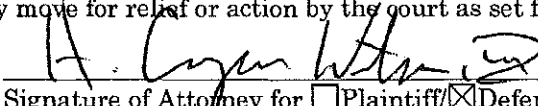
☐ Plaintiff(s),

NOTICE OF MOTION AND MOTION TO SET
ASIDE ENTRY OF DEFAULT AND FOR LATE
ANSWER

Versus

TW Telecom Holdings, Inc., a Delaware
corporation; and DOES 1-10, inclusive,
☒ Defendant(s).

check box above indicating submitting party

Plaintiff's attorney: Jamie N. Smith (#101367) PTA-FLA, Inc. 2101 Main Street/P.O. Box 8839 Columbia, SC 29202 P: 803-363-1323		Defendant's attorney: H. Cooper Wilson, III (SC #74939) HOOD LAW FIRM, LLC 172 Meeting Street/P.O. Box 1508 Charleston, SC 29402 P: 843-577-4435/F: 843-722-1630	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTION I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II AND III)			
SECTION I: Hearing Information Nature of Motion: Motion to Set Aside Entry of Default and for Late Answer Estimated Time Needed: 15 Minutes Court Reporter Needed: YES ☒ / NO ☐			
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order – I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for ☐ Plaintiff/ ☒ Defendant  5/7/15 Date submitted			
SECTION III: Motion Fee ☒ PAID – AMOUNT: \$50 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE _____ CODE: _____ DATE: _____	
CLERK'S VERIFICATION Collected by: _____ (print name) ☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED-AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-40-01394
	)	
Plaintiff,	)	NOTICE OF MOTION AND MOTION
	)	TO SET ASIDE ENTRY OF
Versus	)	DEFAULT AND FOR LATE ANSWER
	)	
TW Telecom Holdings, Inc., a Delaware	)	
corporation; and DOES 1-10, inclusive,	)	
	)	
Defendants.	)	

TO: JAMIE N. SMITH, ATTORNEY FOR THE PLAINTIFF:

The Defendant, TW Telecom Holdings, Inc., a Delaware corporation (hereinafter "this Defendant"), by and through its counsel, and pursuant to Rules 6(b) and 55(c) of the South Carolina Rules of Civil Procedure, hereby moves before the Presiding Judge of the Richland County Court of Common Pleas for an Order to Set Aside the Entry of Default and to Enlarge the Time for this Defendant to Answer the Plaintiff's Summons and Complaint and allow this Defendant to responsively plead to Plaintiff's Complaint. In support of this Motion, this Defendant would state as follows:

1. This Defendant has acted with reasonable promptness to have this motion filed. This Defendant retained the Hood Law Firm, LLC immediately upon receiving the Notice of Motion and Motion for Entry of Default and began taking reasonable steps to address the issue. This Defendant also drafted an Answer to the Plaintiff's Complaint which is being filed separately. See Ex. 1.

2. This Defendant's failure to answer Plaintiff's Complaint in a timely manner was based on the fact that this Defendant did not have notice of the existence of a lawsuit until very recently. On March 18, 2015, upon information

RICHLAND COUNTY
 FILED
 2015 MAY 12 AM 9:00
 JEANNETTE W. MORRIS
 C.C.P. & G.S.

and belief, notice of the service of Summons and Complaint were emailed to Ryan McManis, the Vice President and Assistant General Counsel for Level 3 Communication. Mr. McManis is the gatekeeper of lawsuits and is tasked to review them and assign to counsel for handling. On March 18, 2015, Mr. McManis was involved in a massive Human Resources (HR) project that kept him in meetings that lasted throughout the day and into the night. *See Ex. 2, Affidavit of Ryan McManis.* The following day, Mr. McManis was part of the HR meeting and then was summoned to an emergency conference for a matter involving a State Attorney General. *See Id.* Mr. McManis participated in offsite meetings for most of the next week with limited contact to his office. *See Id.*

3. During these hectic days, Mr. McManis was unaware of the existence of the email informing him of the Summons and Complaint. *See Id.* Because Mr. McManis was unaware of the existence of the Summons and Complaint, he was unable to promptly forward it to outside counsel to begin processing. *See Id.* Mr. McManis did not become aware of the Summons and Complaint until this Defendant was served with a Motion for Default. The Defendant would have answered the Plaintiff's Summons and Complaint in a timely fashion except for the exceptional circumstances which reasonably provide good cause for the Defendant's failure to timely answer the Summons and Complaint. *See Id.* Since learning of the motion for default, the Defendant has diligently with counsel to draft his Answer and Motion to Set Aside Default. *See Id.*

4. This Defendant has a meritorious defense to Plaintiff's claims based on the fact that the contract [which is the subject of the litigation] was an agreement that was freely and voluntarily entered into. Ex. 3, Confidential Agreement

between Plaintiff and this Defendant¹. This Defendant maintains that there was no fraudulent inducement of the Plaintiff to enter the contract, and furthermore, this Defendant maintains that there has been no breach of contract on behalf of this Defendant. Lastly, the contract, signed and initialed on each page by Plaintiff, includes a limitation of liability clause which states that neither party is liable to the other for indirect, consequential, special, incidental, or punitive damages arising from the contract.

5. No prejudice will result to Plaintiff as a result of the Court enlarging the time for this Defendant to Answer the Plaintiff's Complaint since doing so will not impede the ability of Plaintiff to present its claims, and delay alone is insufficient to establish prejudice.

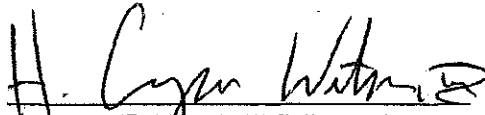
This Motion is supported by the applicable laws, statutes and South Carolina Rules of Civil Procedure. This Motion will be supported by a memorandum of law and affidavits.

The undersigned hereby certifies and affirms, in accordance with Rule 11 of the South Carolina Rules of Civil Procedure, as amended, that he has attempted consultation with opposing counsel in good faith in order to resolve the subject Motion. However, at the time of this filing the undersigned has not been able to reach opposing counsel.

WHEREFORE, this Defendant moves that the Court allow this Defendant to responsively plead to Plaintiff's Complaint.

¹ The agreement between the parties is Confidential. However, the Defendant will produce a copy of the Agreement after a Confidentiality Order is entered.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com



Robert H. Hood (SC #2599)
Robert H. Hood, Jr. (SC #13491)
H. Cooper Wilson, III (SC #74939)

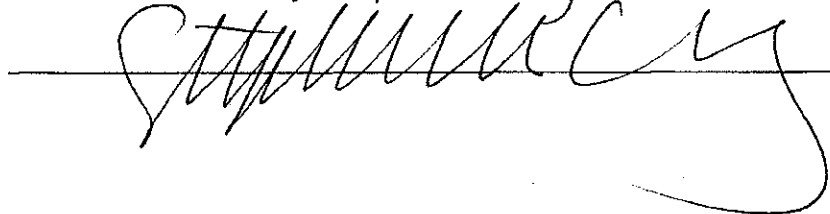
Attorneys for the Defendant
TW Telecom Holdings, Inc., a Delaware
corporation

5/7, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing
was served on each party or counsel of record by ☒ ~~mailing~~, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in
the manner prescribed by the applicable Rule of Civil
Procedure.

This 7 day of May, 2015.



JEANETTE W. MORRIS
C.C.P.

2015 MAY 12 AM 9:08

RICHLAND COUNTY
FILED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-40-01394
	)	
Plaintiff,	)	ANSWER TO PLAINTIFF'S
	)	COMPLAINT
Versus	)	(Jury Trial Requested)
	)	
TW Telecom Holdings, Inc., a Delaware	)	
corporation; and DOES 1-10, inclusive,	)	
	)	
Defendants.	)	

Comes now, the Defendant, TW Telecom Holdings, Inc., a Delaware corporation (hereinafter "this Defendant"), hereby answers the allegations of the Plaintiff's Complaint, subject to any and all affirmative defenses, motions, or other qualifications, as follows:

1. Each and every allegation not specially admitted herein is denied.

AS TO PARTIES, JURISDICTION AND VENUE

2. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 1 of the Plaintiff's Complaint and therefore denies the same.

3. In response to the allegations contained in Paragraph 2 of the Plaintiff's Complaint, this Defendant admits that it is a corporation organized and existing under the laws of a state other than South Carolina. Further, through a series of mergers and acquisitions, Level 3 Communications is the parent company of tw telecom Holdings, LLC, which is the successor by operation of merger to tw telecom Holdings, Inc. All remaining and inconsistent allegations contained in Paragraph 2 of the Plaintiff's Complaint are denied.



4. The allegations contained in Paragraph 3 of the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent a response is required, this Defendant denies, as written, the allegations contained in Paragraph 3 of the Plaintiff's Complaint.

5. This Defendant denies the allegations contained in Paragraphs 4 and 5 of the Plaintiff's Complaint.

6. The allegations contained in Paragraphs 6 and 7 of the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent a response is required, this Defendant denies the allegations contained in Paragraphs 6 and 7 of the Plaintiff's Complaint.

AS TO FACTUAL ALLEGATIONS

7. This Defendant denies the allegations contained in Paragraphs 8, 9, 10, 11 and 12 of the Plaintiff's Complaint as written and craves reference to the agreement between the parties for a complete explanation of the relationship between the Plaintiff and this Defendant.

8. This Defendant denies, as written, the allegations contained in Paragraphs 13 and 14 of the Plaintiff's Complaint.

9. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 15 of the Plaintiff's Complaint and therefore denies the same.

10. This Defendant denies the allegations contained in Paragraphs 16 and 17 of the Plaintiff's Complaint.

11. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraphs 18 and 19 of the Plaintiff's Complaint and therefore denies the same.

12. This Defendant denies, as written, the allegations contained in Paragraphs 20 and 21 of the Plaintiff's Complaint.

13. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 22 of the Plaintiff's Complaint and therefore denies the same.

14. This Defendant denies the allegations contained in Paragraphs 23 and 24 of the Plaintiff's Complaint.

15. This Defendant denies, as written, the allegations contained in Paragraph 25 of the Plaintiff's Complaint.

16. This Defendant denies the allegations contained in Paragraphs 26, 27, 28 and 29 of the Plaintiff's Complaint.

17. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 30 of the Plaintiff's Complaint and therefore denies the same.

18. This Defendant denies the allegations contained in Paragraph 31 of the Plaintiff's Complaint.

19. This Defendant denies, as written, the allegations contained in Paragraph 32 of the Plaintiff's Complaint.

20. This Defendant denies the allegations contained in Paragraph 33 of the Plaintiff's Complaint.

21. This Defendant denies, as written, the allegations contained in Paragraph 34 of the Plaintiff's Complaint.

22. This Defendant denies the allegations contained in Paragraph 35 of the Plaintiff's Complaint.

23. This Defendant denies, as written, the allegations contained in Paragraphs 36 and 37 of the Plaintiff's Complaint.

24. This Defendant denies the allegations contained in Paragraphs 38, 39 and 40 of the Plaintiff's Complaint.

25. This Defendant denies, as written, the allegations contained in Paragraph 41 of the Plaintiff's Complaint.

26. This Defendant denies the allegations contained in Paragraphs 42 and 43 of the Plaintiff's Complaint.

27. This Defendant denies, as written, the allegations contained in Paragraphs 44 and 45 of the Plaintiff's Complaint.

28. This Defendant denies the allegations contained in Paragraphs 46 and 47 of the Plaintiff's Complaint.

29. This Defendant denies, as written, the allegations contained in Paragraph 48 of the Plaintiff's Complaint and craves reference to the agreement signed between the parties for true and accurate representation of the agreement between the parties.

30. This Defendant denies the allegations contained in Paragraphs 49, 50, 51 and 52 of the Plaintiff's Complaint.

31. This Defendant denies, as written, the allegations contained in Paragraphs 53, 54, 55, 56 and 57 of the Plaintiff's Complaint.

32. This Defendant denies, as written, the allegations contained in Paragraph 58 of the Plaintiff's Complaint and craves reference to the agreement between the parties for a true and accurate representation of the parties' relationship.

33. This Defendant denies, as written, the allegations contained in Paragraphs 59, 60, 61, 62, 63 of the Plaintiff's Complaint.

34. This Defendant denies the allegations contained in Paragraphs 64, 65 and 66 of the Plaintiff's Complaint.

AS TO THE FIRST CAUSE OF ACTION
(Breach of Contract)

35. In response to the allegations contained in Paragraph 67 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

36. This Defendant denies, as written, the allegations contained in Paragraph 68 of the Plaintiff's Complaint.

37. This Defendant denies the allegations contained in Paragraphs 69, 70, 71 and 72 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's First Cause of Action.

AS TO THE SECOND CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

38. In response to the allegations contained in Paragraph 73 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

39. This Defendant denies the allegations contained in Paragraphs 74, 75, 76, 77 and 78 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's Second Cause of Action.

AS TO THE THIRD CAUSE OF ACTION
(Fraud in the Inducement)

40. In response to the allegations contained in Paragraph 79 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

41. This Defendant denies the allegations contained in Paragraphs 80, 81, 82, 83, 84, 85, 86 and 87 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's Third Cause of Action.

AS TO THE FOURTH CAUSE OF ACTION
(Promissory Estoppel)

42. In response to the allegations contained in Paragraph 88 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

43. This Defendant denies, as written, the allegations contained in Paragraphs 89, 90 and 91 of the Plaintiff's Complaint.

44. This Defendant denies the allegations contained in Paragraph 92 of the Plaintiff's Complaint, including the WHEREFORE paragraph, those being the remaining allegations of Plaintiff's Fourth Cause of Action and of the Plaintiff's Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Proximate Cause)

45. That, even if this Defendant was negligent, as alleged in the Complaint, which is specifically denied, the negligence of this Defendant is not the direct or proximate cause of any injury alleged by the Plaintiff and therefore this Defendant is not liable for any damages allegedly sustained by the Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Duty Owed)

46. This Defendant is informed, believes, and thereon alleges, that the Complaint, and each cause of action therein, is barred because this Defendant did not owe any duty to Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Comparative Negligence)

47. That, upon information and belief, even if this Defendant was negligent as described in the Complaint, which is specifically denied, the Plaintiff's alleged injuries and damages, if any, resulted from, or were due to the negligence of the Plaintiff, which combined and concurred with any negligence on the part of this Defendant, which is specifically denied, to bring about the said damages, if any, as a proximate cause thereof and without which the same would not have occurred.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reasonableness and Good Faith)

48. This Defendant alleges that it and its agents and employees acted reasonably and in good faith at all times material herein, based on all relevant facts

and circumstances known by them at the time they so acted. Accordingly, Plaintiff is not entitled to recovery any damages whatsoever.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Sole Negligence)

49. That, upon information and belief, whatever injuries and damages, if any, which may have been sustained by the Plaintiff, as described in the Complaint, were due solely to, cause wholly by, and were the direct and proximate result of the negligence, carelessness and recklessness of the Plaintiff, so far as to bar the Plaintiff from recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Limitation of Recovery Based on the Agreement)

50. That the Plaintiff is barred from recovering indirect, consequential, special, incidental, or punitive damages based on the language contained in the agreement.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)

51. That any award or assessment of punitive damages as prayed for by the Plaintiffs would violate this Defendant's Constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

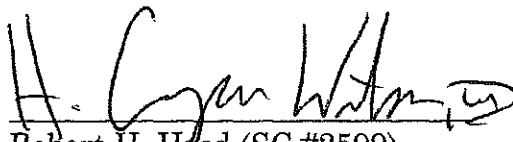
FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reservation and Non-Waiver)

52. This Defendant reserves any additional and affirmative defenses as may be revealed or become available to it during the course of their investigation

and/or discovery in the case and is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Plaintiff's Complaint, and having asserted these affirmative defenses, the Defendant, TW Telecom Holdings, Inc., a Delaware corporation, prays that the Plaintiff's Complaint be dismissed with prejudice and that they be awarded the costs and reasonable fees associated with this matter, and such other relief as the Court may deem just and proper.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com



Robert H. Hood (SC #2599)
Robert H. Hood, Jr. (SC #13491)
H. Cooper Wilson, III (SC #74939)

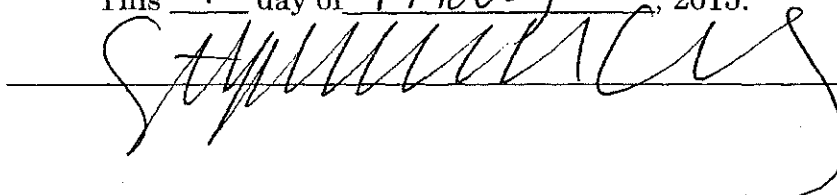
Attorneys for the Defendant
TW Telecom Holdings, Inc., a Delaware corporation

5/7, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 7 day of May, 2015.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-4001394
	)	
Plaintiff,	)	AFFIDAVIT OF RYAN MCMANIS
	)	
Versus	)	
	)	
TW Telecom Holdings Inc., a Delaware,	)	
corporation; and DOES 1-10, inclusive	)	
	)	
Defendants.	)	

PERSONALLY APPEARED BEFORE ME, RYAN MCMANIS, who after being
duly sworn, deposes and says as follows:

1. My name is Ryan McManis.
2. I am over the age of 18.
3. I am a resident of Denver, CO.
4. That I am the Vice President and Assistant General Counsel of Level 3 Communications, LLC a limited liability company organized and existing in the State of Delaware.
5. That through a series of corporate mergers and transactions, Level 3 Communications is the parent company of tw telecom Holdings, LLC, which is the successor by operation of merger to tw telecom Holdings, Inc. as of October 31, 2014.
6. I have personal knowledge of the facts and circumstances in this case.
7. That I have been recently informed that the Plaintiff filed a lawsuit against TW Telecom Holdings Inc., a Delaware, corporation; and DOES 1-10. I was not aware of the lawsuit until recently. That since learning of the lawsuit, we have since worked diligently with our attorneys to respond to the same.



8. That I have reviewed the Plaintiff's Motion for Entry of Default dated May 1, 2015 which indicated that the Plaintiff served CT Corporation System on March 16, 2015 and that the CT Corporation System emailed the Summons and Complaint to my company on March 18, 2015.

9. I now know that the Summons and Complaint was emailed to me around March 18, 2015 as I am the gatekeeper for lawsuits for my company. I review the lawsuits and assign them to defense counsel for handling.

10. That I did not realize that the Summons and Complaint was emailed to me because on the 18th I was organizing a massive HR project for the next day and was in meetings the entire day of the 18th and into the night.

11. That on the 19th, I was a presenter at the meeting which took most of the day. Directly following the meeting, I was part of an executive meeting at work to engage in a telephone conference with respect to a matter involving a State Attorney General. That I left the office in a hurry on the 19th as my wife works full-time at the Boys and Girls Club and was not able to pick up our four (4) children, ages six (6) months, four (4) years old, six (6) years old, and seven (7) years old from their activities and take them home for dinner.

12. That during most of the next week, I was out of the office at offsite meetings, during which my contact with the office was extremely limited. Following these off-site meetings, I was away for the next week with my family for my children's spring break, during which time I had limited contact with my office.

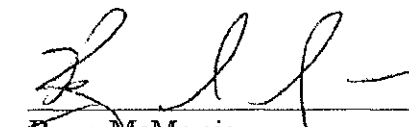
13. That during this incredibly hectic couple of days and weeks, I did not see the Summons and Complaint and did not send it to outside counsel for handling.

14. The contract at issue is between the Plaintiff and TW Telecom Holdings Inc., a business my company purchased. That we have a meritorious defense to the Plaintiff's allegations to include that the Plaintiff freely entered into a contract with TW Telecom Holdings Inc. and that TW Telecom Holdings Inc. did not fraudulently induce the Plaintiff to enter into the agreement. Further, TW Telecom Holdings Inc. did not breach its obligations to the Plaintiff and plans to defend this case if afforded that opportunity.

15. I attest that this Defendant is properly insured and would have answered the Plaintiff's Summons and Complaint in a timely fashion except for the exceptional circumstances at work which reasonably provides good cause for this Defendant's failure to timely answer the Summons and Complaint.

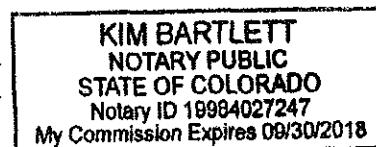
16. Hood Law Firm, LLC has filed an Answer on our behalf. I attest that we have a meritorious defense to the Plaintiff's claims, and I approve of the Answer filed and the affirmative defenses asserted. See Exhibit A.

FURTHER THE AFFIANT SAYETH NOT!


Ryan McManis

SWORN TO AND SUBSCRIBED before me
this 1st day of May 2015.


NOTARY PUBLIC FOR Colorado
MY COMMISSION EXPIRES: 9.30.2018



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-40-01394
	)	
Plaintiff,	)	ANSWER TO PLAINTIFF'S
	)	COMPLAINT
Versus	)	(Jury Trial Requested)
	)	
TW Telecom Holdings, Inc., a Delaware	)	
corporation; and DOES 1-10, inclusive,	)	
	)	
Defendants.	)	

Comes now, the Defendant, TW Telecom Holdings, Inc., a Delaware corporation (hereinafter "this Defendant"), hereby answers the allegations of the Plaintiff's Complaint, subject to any and all affirmative defenses, motions, or other qualifications, as follows:

1. Each and every allegation not specially admitted herein is denied.

AS TO PARTIES, JURISDICTION AND VENUE

2. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 1 of the Plaintiff's Complaint and therefore denies the same.

3. In response to the allegations contained in Paragraph 2 of the Plaintiff's Complaint, this Defendant admits that it is a corporation organized and existing under the laws of a state other than South Carolina. Further, through a series of mergers and acquisitions, Level 3 Communications is the parent company of tw telecom Holdings, LLC, which is the successor by operation of merger to tw telecom Holdings, Inc. All remaining and inconsistent allegations contained in Paragraph 2 of the Plaintiff's Complaint are denied.



4. The allegations contained in Paragraph 3 of the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent a response is required, this Defendant denies, as written, the allegations contained in Paragraph 3 of the Plaintiff's Complaint.

5. This Defendant denies the allegations contained in Paragraphs 4 and 5 of the Plaintiff's Complaint.

6. The allegations contained in Paragraphs 6 and 7 of the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent a response is required, this Defendant denies the allegations contained in Paragraphs 6 and 7 of the Plaintiff's Complaint.

AS TO FACTUAL ALLEGATIONS

7. This Defendant denies the allegations contained in Paragraphs 8, 9, 10, 11 and 12 of the Plaintiff's Complaint as written and craves reference to the agreement between the parties for a complete explanation of the relationship between the Plaintiff and this Defendant.

8. This Defendant denies, as written, the allegations contained in Paragraphs 13 and 14 of the Plaintiff's Complaint.

9. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 15 of the Plaintiff's Complaint and therefore denies the same.

10. This Defendant denies the allegations contained in Paragraphs 16 and 17 of the Plaintiff's Complaint.

11. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraphs 18 and 19 of the Plaintiff's Complaint and therefore denies the same.

12. This Defendant denies, as written, the allegations contained in Paragraphs 20 and 21 of the Plaintiff's Complaint.

13. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 22 of the Plaintiff's Complaint and therefore denies the same.

14. This Defendant denies the allegations contained in Paragraphs 23 and 24 of the Plaintiff's Complaint.

15. This Defendant denies, as written, the allegations contained in Paragraph 25 of the Plaintiff's Complaint.

16. This Defendant denies the allegations contained in Paragraphs 26, 27, 28 and 29 of the Plaintiff's Complaint.

17. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 30 of the Plaintiff's Complaint and therefore denies the same.

18. This Defendant denies the allegations contained in Paragraph 31 of the Plaintiff's Complaint.

19. This Defendant denies, as written, the allegations contained in Paragraph 32 of the Plaintiff's Complaint.

20. This Defendant denies the allegations contained in Paragraph 33 of the Plaintiff's Complaint.

21. This Defendant denies, as written, the allegations contained in Paragraph 34 of the Plaintiff's Complaint.

22. This Defendant denies the allegations contained in Paragraph 35 of the Plaintiff's Complaint.

23. This Defendant denies, as written, the allegations contained in Paragraphs 36 and 37 of the Plaintiff's Complaint.

24. This Defendant denies the allegations contained in Paragraphs 38, 39 and 40 of the Plaintiff's Complaint.

25. This Defendant denies, as written, the allegations contained in Paragraph 41 of the Plaintiff's Complaint.

26. This Defendant denies the allegations contained in Paragraphs 42 and 43 of the Plaintiff's Complaint.

27. This Defendant denies, as written, the allegations contained in Paragraphs 44 and 45 of the Plaintiff's Complaint.

28. This Defendant denies the allegations contained in Paragraphs 46 and 47 of the Plaintiff's Complaint.

29. This Defendant denies, as written, the allegations contained in Paragraph 48 of the Plaintiff's Complaint and craves reference to the agreement signed between the parties for true and accurate representation of the agreement between the parties.

30. This Defendant denies the allegations contained in Paragraphs 49, 50, 51 and 52 of the Plaintiff's Complaint.

31. This Defendant denies, as written, the allegations contained in Paragraphs 53, 54, 55, 56 and 57 of the Plaintiff's Complaint.

32. This Defendant denies, as written, the allegations contained in Paragraph 58 of the Plaintiff's Complaint and craves reference to the agreement between the parties for a true and accurate representation of the parties' relationship.

33. This Defendant denies, as written, the allegations contained in Paragraphs 59, 60, 61, 62, 63 of the Plaintiff's Complaint.

34. This Defendant denies the allegations contained in Paragraphs 64, 65 and 66 of the Plaintiff's Complaint.

AS TO THE FIRST CAUSE OF ACTION
(Breach of Contract)

35. In response to the allegations contained in Paragraph 67 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

36. This Defendant denies, as written, the allegations contained in Paragraph 68 of the Plaintiff's Complaint.

37. This Defendant denies the allegations contained in Paragraphs 69, 70, 71 and 72 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's First Cause of Action.

AS TO THE SECOND CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

38. In response to the allegations contained in Paragraph 73 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

39. This Defendant denies the allegations contained in Paragraphs 74, 75, 76, 77 and 78 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's Second Cause of Action.

AS TO THE THIRD CAUSE OF ACTION
(Fraud in the Inducement)

40. In response to the allegations contained in Paragraph 79 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

41. This Defendant denies the allegations contained in Paragraphs 80, 81, 82, 83, 84, 85, 86 and 87 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's Third Cause of Action.

AS TO THE FOURTH CAUSE OF ACTION
(Promissory Estoppel)

42. In response to the allegations contained in Paragraph 88 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

43. This Defendant denies, as written, the allegations contained in Paragraphs 89, 90 and 91 of the Plaintiff's Complaint.

44. This Defendant denies the allegations contained in Paragraph 92 of the Plaintiff's Complaint, including the WHEREFORE paragraph, those being the remaining allegations of Plaintiff's Fourth Cause of Action and of the Plaintiff's Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Proximate Cause)

45. That, even if this Defendant was negligent, as alleged in the Complaint, which is specifically denied, the negligence of this Defendant is not the direct or proximate cause of any injury alleged by the Plaintiff and therefore this Defendant is not liable for any damages allegedly sustained by the Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Duty Owed)

46. This Defendant is informed, believes, and thereon alleges, that the Complaint, and each cause of action therein, is barred because this Defendant did not owe any duty to Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Comparative Negligence)

47. That, upon information and belief, even if this Defendant was negligent as described in the Complaint, which is specifically denied, the Plaintiff's alleged injuries and damages, if any, resulted from, or were due to the negligence of the Plaintiff, which combined and concurred with any negligence on the part of this Defendant, which is specifically denied, to bring about the said damages, if any, as a proximate cause thereof and without which the same would not have occurred.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reasonableness and Good Faith)

48. This Defendant alleges that it and its agents and employees acted reasonably and in good faith at all times material herein, based on all relevant facts

and circumstances known by them at the time they so acted. Accordingly, Plaintiff is not entitled to recovery any damages whatsoever.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Sole Negligence)

49. That, upon information and belief, whatever injuries and damages, if any, which may have been sustained by the Plaintiff, as described in the Complaint, were due solely to, cause wholly by, and were the direct and proximate result of the negligence, carelessness and recklessness of the Plaintiff, so far as to bar the Plaintiff from recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Limitation of Recovery Based on the Agreement)

50. That the Plaintiff is barred from recovering indirect, consequential, special, incidental, or punitive damages based on the language contained in the agreement.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)

51. That any award or assessment of punitive damages as prayed for by the Plaintiffs would violate this Defendant's Constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

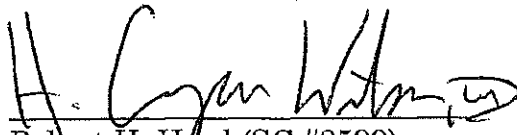
FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reservation and Non-Waiver)

52. This Defendant reserves any additional and affirmative defenses as may be revealed or become available to it during the course of their investigation

and/or discovery in the case and is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Plaintiff's Complaint, and having asserted these affirmative defenses, the Defendant, TW Telecom Holdings, Inc., a Delaware corporation, prays that the Plaintiff's Complaint be dismissed with prejudice and that they be awarded the costs and reasonable fees associated with this matter, and such other relief as the Court may deem just and proper.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com



Robert H. Hood (SC #2599)
Robert H. Hood, Jr. (SC #13491)
H. Cooper Wilson, III (SC #74939)

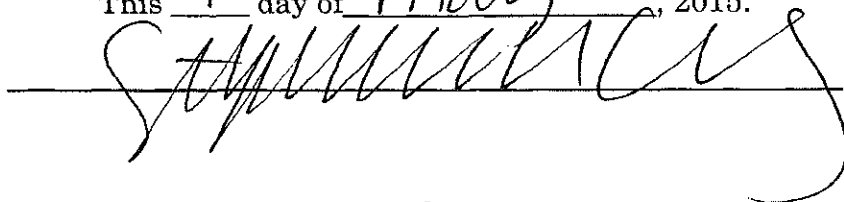
Attorneys for the Defendant
TW Telecom Holdings, Inc., a Delaware corporation

5/7, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 7 day of May, 2015.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-40-01394
	)	
Plaintiff,	)	ANSWER TO PLAINTIFF'S
	)	COMPLAINT
Versus	)	(Jury Trial Requested)
	)	
TW Telecom Holdings, Inc., a Delaware	)	
corporation; and DOES 1-10, inclusive,	)	
	)	
Defendants.	)	

RICHLAND COUNTY
 FILED
 2015 MAY 11 AM 11:56
 JESSIE M. MOSENFELDER
 C.P. & C.S.

Comes now, the Defendant, TW Telecom Holdings, Inc., a Delaware corporation (hereinafter "this Defendant"), hereby answers the allegations of the Plaintiff's Complaint, subject to any and all affirmative defenses, motions, or other qualifications, as follows:

1. Each and every allegation not specially admitted herein is denied.

AS TO PARTIES, JURISDICTION AND VENUE

2. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 1 of the Plaintiff's Complaint and therefore denies the same.

3. In response to the allegations contained in Paragraph 2 of the Plaintiff's Complaint, this Defendant admits that it is a corporation organized and existing under the laws of a state other than South Carolina. Further, through a series of mergers and acquisitions, Level 3 Communications is the parent company of tw telecom Holdings, LLC, which is the successor by operation of merger to tw telecom Holdings, Inc. All remaining and inconsistent allegations contained in Paragraph 2 of the Plaintiff's Complaint are denied.

4. The allegations contained in Paragraph 3 of the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent a response is required, this Defendant denies, as written, the allegations contained in Paragraph 3 of the Plaintiff's Complaint.

5. This Defendant denies the allegations contained in Paragraphs 4 and 5 of the Plaintiff's Complaint.

6. The allegations contained in Paragraphs 6 and 7 of the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent a response is required, this Defendant denies the allegations contained in Paragraphs 6 and 7 of the Plaintiff's Complaint.

AS TO FACTUAL ALLEGATIONS

7. This Defendant denies the allegations contained in Paragraphs 8, 9, 10, 11 and 12 of the Plaintiff's Complaint as written and craves reference to the agreement between the parties for a complete explanation of the relationship between the Plaintiff and this Defendant.

8. This Defendant denies, as written, the allegations contained in Paragraphs 13 and 14 of the Plaintiff's Complaint.

9. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 15 of the Plaintiff's Complaint and therefore denies the same.

10. This Defendant denies the allegations contained in Paragraphs 16 and 17 of the Plaintiff's Complaint.

11. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraphs 18 and 19 of the Plaintiff's Complaint and therefore denies the same.

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13. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 22 of the Plaintiff's Complaint and therefore denies the same.

14. This Defendant denies the allegations contained in Paragraphs 23 and 24 of the Plaintiff's Complaint.

15. This Defendant denies, as written, the allegations contained in Paragraph 25 of the Plaintiff's Complaint.

16. This Defendant denies the allegations contained in Paragraphs 26, 27, 28 and 29 of the Plaintiff's Complaint.

17. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 30 of the Plaintiff's Complaint and therefore denies the same.

18. This Defendant denies the allegations contained in Paragraph 31 of the Plaintiff's Complaint.

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29. This Defendant denies, as written, the allegations contained in Paragraph 48 of the Plaintiff's Complaint and craves reference to the agreement signed between the parties for true and accurate representation of the agreement between the parties.

30. This Defendant denies the allegations contained in Paragraphs 49, 50, 51 and 52 of the Plaintiff's Complaint.

31. This Defendant denies, as written, the allegations contained in Paragraphs 53, 54, 55, 56 and 57 of the Plaintiff's Complaint.

32. This Defendant denies, as written, the allegations contained in Paragraph 58 of the Plaintiff's Complaint and craves reference to the agreement between the parties for a true and accurate representation of the parties' relationship.

33. This Defendant denies, as written, the allegations contained in Paragraphs 59, 60, 61, 62, 63 of the Plaintiff's Complaint.

34. This Defendant denies the allegations contained in Paragraphs 64, 65 and 66 of the Plaintiff's Complaint.

AS TO THE FIRST CAUSE OF ACTION
(Breach of Contract)

35. In response to the allegations contained in Paragraph 67 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

36. This Defendant denies, as written, the allegations contained in Paragraph 68 of the Plaintiff's Complaint.

37. This Defendant denies the allegations contained in Paragraphs 69, 70, 71 and 72 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's First Cause of Action.

AS TO THE SECOND CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

38. In response to the allegations contained in Paragraph 73 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

39. This Defendant denies the allegations contained in Paragraphs 74, 75, 76, 77 and 78 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's Second Cause of Action.

AS TO THE THIRD CAUSE OF ACTION
(Fraud in the Inducement)

40. In response to the allegations contained in Paragraph 79 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

41. This Defendant denies the allegations contained in Paragraphs 80, 81, 82, 83, 84, 85, 86 and 87 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's Third Cause of Action.

AS TO THE FOURTH CAUSE OF ACTION
(Promissory Estoppel)

42. In response to the allegations contained in Paragraph 88 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

43. This Defendant denies, as written, the allegations contained in Paragraphs 89, 90 and 91 of the Plaintiff's Complaint.

44. This Defendant denies the allegations contained in Paragraph 92 of the Plaintiff's Complaint, including the WHEREFORE paragraph, those being the remaining allegations of Plaintiff's Fourth Cause of Action and of the Plaintiff's Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Proximate Cause)

45. That, even if this Defendant was negligent, as alleged in the Complaint, which is specifically denied, the negligence of this Defendant is not the direct or proximate cause of any injury alleged by the Plaintiff and therefore this Defendant is not liable for any damages allegedly sustained by the Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Duty Owed)

46. This Defendant is informed, believes, and thereon alleges, that the Complaint, and each cause of action therein, is barred because this Defendant did not owe any duty to Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Comparative Negligence)

47. That, upon information and belief, even if this Defendant was negligent as described in the Complaint, which is specifically denied, the Plaintiff's alleged injuries and damages, if any, resulted from, or were due to the negligence of the Plaintiff, which combined and concurred with any negligence on the part of this Defendant, which is specifically denied, to bring about the said damages, if any, as a proximate cause thereof and without which the same would not have occurred.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reasonableness and Good Faith)

48. This Defendant alleges that it and its agents and employees acted reasonably and in good faith at all times material herein, based on all relevant facts

and circumstances known by them at the time they so acted. Accordingly, Plaintiff is not entitled to recovery any damages whatsoever.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Sole Negligence)

49. That, upon information and belief, whatever injuries and damages, if any, which may have been sustained by the Plaintiff, as described in the Complaint, were due solely to, cause wholly by, and were the direct and proximate result of the negligence, carelessness and recklessness of the Plaintiff, so far as to bar the Plaintiff from recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Limitation of Recovery Based on the Agreement)

50. That the Plaintiff is barred from recovering indirect, consequential, special, incidental, or punitive damages based on the language contained in the agreement.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)

51. That any award or assessment of punitive damages as prayed for by the Plaintiffs would violate this Defendant's Constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

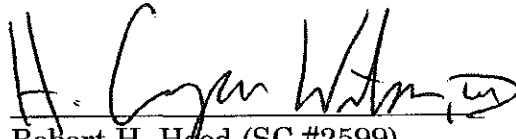
FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reservation and Non-Waiver)

52. This Defendant reserves any additional and affirmative defenses as may be revealed or become available to it during the course of their investigation

and/or discovery in the case and is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Plaintiff's Complaint, and having asserted these affirmative defenses, the Defendant, TW Telecom Holdings, Inc., a Delaware corporation, prays that the Plaintiff's Complaint be dismissed with prejudice and that they be awarded the costs and reasonable fees associated with this matter, and such other relief as the Court may deem just and proper.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com


Robert H. Hood (SC #2599)
Robert H. Hood, Jr. (SC #13491)
H. Cooper Wilson, III (SC #74939)

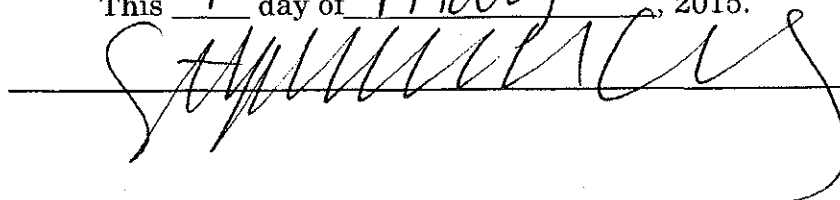
Attorneys for the Defendant
TW Telecom Holdings, Inc., a Delaware corporation

5/7, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 7 day of May, 2015.



JEANNETTE W. MOBRIDGE
S.C. BAR #10060

2015 MAY 11 AM 11:56

RICHLAND COUNTY
FILED

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-4001394
	)	
Plaintiff,	)	AFFIDAVIT OF RYAN MCMANIS
	)	
Versus	)	
	)	
TW Telecom Holdings Inc., a Delaware,	)	
corporation; and DOES 1-10, inclusive	)	
	)	
Defendants.	)	

PERSONALLY APPEARED BEFORE ME, RYAN MCMANIS, who after being
duly sworn, deposes and says as follows:

1. My name is Ryan McManis.
2. I am over the age of 18.
3. I am a resident of Denver, CO.
4. That I am the Vice President and Assistant General Counsel of Level 3

Communications, LLC a limited liability company organized and existing in the State of Delaware.

5. That through a series of corporate mergers and transactions, Level 3 Communications is the parent company of tw telecom Holdings, LLC, which is the successor by operation of merger to tw telecom Holdings, Inc. as of October 31, 2014.

6. I have personal knowledge of the facts and circumstances in this case.

7. That I have been recently informed that the Plaintiff filed a lawsuit against TW Telecom Holdings Inc., a Delaware, corporation; and DOES 1-10. I was not aware of the lawsuit until recently. That since learning of the lawsuit, we have worked diligently with our attorneys to respond to the same.

RICHLAND COUNTY
 FILED
 2015 MAY 11 AM 11:03
 JENNIFER W. JACOBSON
 C.C.P. & C.S.

8. That I have reviewed the Plaintiff's Motion for Entry of Default dated May 1, 2015 which indicated that the Plaintiff served CT Corporation System on March 16, 2015 and that the CT Corporation System emailed the Summons and Complaint to my company on March 18, 2015.

9. I now know that the Summons and Complaint was emailed to me around March 18, 2015 as I am the gatekeeper for lawsuits for my company. I review the lawsuits and assign them to defense counsel for handling.

10. That I did not realize that the Summons and Complaint was emailed to me because on the 18th I was organizing a massive HR project for the next day and was in meetings the entire day of the 18th and into the night.

11. That on the 19th, I was a presenter at the meeting which took most of the day. Directly following the meeting, I was part of an executive meeting at work to engage in a telephone conference with respect to a matter involving a State Attorney General. That I left the office in a hurry on the 19th as my wife works full-time at the Boys and Girls Club and was not able to pick up our four (4) children, ages six (6) months, four (4) years old, six (6) years old, and seven (7) years old from their activities and take them home for dinner.

12. That during most of the next week, I was out of the office at offsite meetings, during which my contact with the office was extremely limited. Following these off-site meetings, I was away for the next week with my family for my children's spring break, during which time I had limited contact with my office.

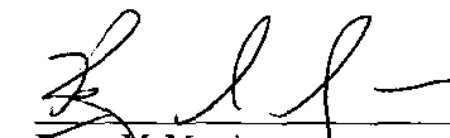
13. That during this incredibly hectic couple of days and weeks, I did not see the Summons and Complaint and did not send it to outside counsel for handling.

14. The contract at issue is between the Plaintiff and TW Telecom Holdings Inc., a business my company purchased. That we have a meritorious defense to the Plaintiff's allegations to include that the Plaintiff freely entered into a contract with TW Telecom Holdings Inc. and that TW Telecom Holdings Inc. did not fraudulently induce the Plaintiff to enter into the agreement. Further, TW Telecom Holdings Inc. did not breach its obligations to the Plaintiff and plans to defend this case if afforded that opportunity.

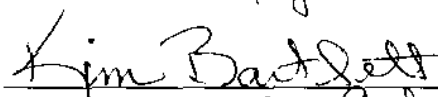
15. I attest that this Defendant is properly insured and would have answered the Plaintiff's Summons and Complaint in a timely fashion except for the exceptional circumstances at work which reasonably provides good cause for this Defendant's failure to timely answer the Summons and Complaint.

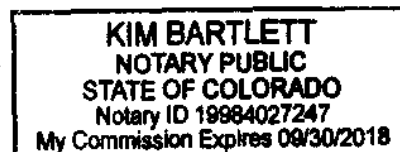
16. Hood Law Firm, LLC has filed an Answer on our behalf. I attest that we have a meritorious defense to the Plaintiff's claims, and I approve of the Answer filed and the affirmative defenses asserted. See Exhibit A.

FURTHER THE AFFIANT SAYETH NOT!


Ryan McManis

SWORN TO AND SUBSCRIBED before me
this 1st day of May 2015.


NOTARY PUBLIC FOR Colorado
MY COMMISSION EXPIRES: 9.30.2018



STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

PTA-FLA, Inc.,

Plaintiff,

Versus

TW Telecom Holdings, Inc., a Delaware
corporation; and DOES 1-10, inclusive,

Defendants.

) IN THE COURT OF COMMON PLEAS

)

)

) C/A No. 2015-CP-40-01394

)

) **AFFIDAVIT OF H. COOPER**
) **WILSON, III, ESQUIRE**

)

)

)

)

)

)

)

)

PERSONALLY APPEARED BEFORE ME, Harry C. Wilson, III, who after
being duly sworn, deposes and says as follows:

1. My name is Harry C. Wilson, III.
2. I am an attorney with the Hood Law Firm who has been retained to
represent the Defendant
3. I am over the age of 18.
4. I am a resident of Charleston, SC.
5. Hood Law Firm received notice of the Plaintiff's Motion for Default
around May 6, 2015 and worked expeditiously since that time to address the issue.
6. We drafted an Answer to the Plaintiff's Complaint, a Motion to Set Aside
the Plaintiff's Motion for Default, and an Affidavit for Ryan McManis after speaking
with him about this case and his role in the same.
7. On May 7, 2015, the Hood Law Firm filed the Motion to Set Aside the
Entry of Default, the proposed Answer to the Plaintiff's Complaint, and the Affidavit
for Ryan McManis. The immediate attention given to this case and the timely filings
reflect the timeliness in which relief from default was sought.

2015 JUN 24 PM 2:45
JEANETTE M. COOPER
C.C.P. & C.S.
RICHLAND COUNTY
FILED



FURTHER THE AFFIANT SAYETH NOT!


Harry C. Wilson, III

SWORN TO AND SUBSCRIBED before me
this 24 day of June 2015.


NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 12/4/22

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-40-01394
	)	
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
	)	MOTION TO SET ASIDE ENTRY OF
Versus	)	DEFAULT
	)	
TW Telecom Holdings, Inc., a Delaware	)	
corporation; and DOES 1-10, inclusive,	)	
	)	
Defendants.	)	

The Defendant, TW Telecom Holdings, Inc., (hereinafter "this Defendant"), submits this Memorandum in in Support of Defendant TW Telecom Holdings, Inc.'s Motion to Set Aside Entry of Default and Allow Defendant TW Holdings, Inc. to Responsively Plead.

FACTS

This matter comes before the Court as a result of a contract between two wireless communication entities. In 2010, Plaintiff PTA-FLA (hereinafter "ClearTalk") entered into a contract with this Defendant to provide wholesale internet and transport services to ClearTalk. ClearTalk alleges that the terms of the agreement were modified by this Defendant, and that the individual who signed the agreement on behalf of ClearTalk was unaware of the material changes. Furthermore, ClearTalk alleges that throughout the term of the contract, there arose issues with, inter alia, payments and service quality. ClearTalk further alleges that a second agreement was entered into by the parties, and that this Defendant unreasonably terminated the agreement¹.

¹ The Defendants deny the allegations in the Plaintiff's Complaint and assert that they have a meritorious defense to the Plaintiff's alleged claims and damages.

ClearTalk filed its Summons and Complaint on March 3, 2015, and served this Defendant on March 16, 2015 via certified mail to CT Corporation System in Columbia, SC. See attached Exhibit 1, Summons and Complaint. However, due to extenuating circumstances, Ryan McManis, an attorney for this Defendant who works at this Defendant's office in Colorado and serves as the gatekeeper for new lawsuits, was not made aware of the service of process upon this Defendant. See Exhibit 2, Affidavit of Ryan McManis. Upon learning of the existence of the Summons and Complaint, this Defendant immediately forwarded the Summons and Complaint to the undersigned counsel. Since this Defendant has become aware of the existence of the Summons and Complaint, they have worked diligently with their attorneys at the Hood Law Firm, LLC in preparing a Motion to Set Aside Entry of Default, an Affidavit from Ryan McManis, and an Answer to ClearTalk's Complaint, all of which have been filed with this Court.

LAW/ANALYSIS

I. The Entry of Default Should be Set Aside Pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure.

A. This Defendant has Made a Showing of Good Cause to Set Aside the Entry of Default.

South Carolina Rules of Civil Procedure (SCRCP), Rule 55(c) provides that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." A judgment by default has not been entered in this case. "Rule 55(c) should be liberally construed to promote justice and dispose of cases on the merits." Melton v. Olenik, 379 S.C. 45, 664 S.E.2d 487, 492 (2008). "Any doubts about whether relief should be granted should be resolved in favor of setting aside the default so that the case may be heard on the merits." Tolson v. Hodge, 411 F.2d

123, 130 (4th Cir.1969). It is within the trial court's discretion whether to grant relief from an entry of default. Melton v. Olenik, 379 S.C. 45, 664 S.E.2d 487, 492 (2008). In addition, "the extreme sanction of judgment by default is reserved only for cases where the party's noncompliance represents bad faith or a complete disregard for the mandates of procedure and the authority of the trial court." Mobil Oil Co. De Venez. v. Parada Jimenez, 989 F.2d 494, 1993 WL 61863, at *3 (4th Cir.1993) (unpublished table decision). The standard for granting relief from an entry of default is "good cause," and is "less stringent than the excusable neglect standard for setting aside a final judgment on the basis of mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud." Limehouse v. Hulsey, 397 S.C. 49, 707 S.E.2d 211, 221 (Ct.App. 2011). The "good cause" standard requires only that the party seeking relief from default to "provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 719 S.E.2d 703, 706 (2011) (citing Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885, 888 (2009)).

Good cause exists for this court to set aside the entry of default in this case. See attached Exhibit 2, Affidavit of Ryan McManis. The Plaintiff served the Summons and Complaint upon CT Corporation, a Columbia, SC based registered agent service for out-of-state corporations. CT Corporation then forwarded the Summons and Complaint via email to Level 3 Communications, Inc., the parent company of this Defendant. When the email was sent to Ryan McManis of this Defendant, he was intimately involved in a series of meetings and presentations which required him to be out of his office. Further, during this time his wife was

working a full time job at the Boys and Girls Club and was not able to pick up their four (4) young children from their activities and take them home. Mr. McManis was forced to handle these familial responsibilities which demanded his full attention and which kept him from his office.

Unfortunately, during this hectic time, Mr. McManis did not become aware of the existence of the Summons and Complaint. See attached Exhibit 2, Affidavit of Ryan McManis. However, as soon as Mr. McManis realized that this Defendant had not filed a responded to the Summons and Complaint, he began working diligently with the attorneys at the Hood Law Firm to file a responsive pleading and rectify this situation. Therefore, from a fairness standpoint, this Defendant should be allowed to responsively plead and his Answer should stand as filed. Further, the interests of justice would be served by allowing this Defendant to responsively plead because it would provide both parties the ability to assert their claims and defenses to the allegations in the Complaint. More specifically, allowing this Defendant to Answer the Plaintiff's Complaint would allow the case to be heard on the merits as intended by South Carolina law.

In deciding whether good cause exists and whether to set aside an entry of default, the trial court should consider the following factors: (1) the timing of the defendant's motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." Melton v. Olenik, 379 S.C. 45, 664 S.E.2d 487, 492 (2008) (citing Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct.App. 1989)). "A trial court is not required to make specific findings of fact for each factor if there is sufficient evidence in the record to support the trial court's decision." Wilder at 706.

1. This Defendant's Motion for Relief Was Timely.

On May 6, 2015, the undersigned became aware of the existence of a Summons and Complaint against this Defendant. The undersigned took immediate action and since that time has reviewed all of the pleadings, motions, and other documents related to this case, spoken with Mr. McManis, drafted an affidavit based on the information given regarding the case, drafted and filed an Answer to the Plaintiff's Complaint. See Exhibit 3, Answer to Complaint. Further, the undersigned again acted with haste and reasonable diligence by filing a Motion to Set Aside the Entry of Default. See Exhibit 4, Affidavit of Harry C. Wilson, III. This Defendant's aforementioned actions reveal that he has acted with promptness and due diligence in seeking relief.

2. This Defendant Has a Meritorious Defense to the Allegations Set Forth in Plaintiff's Complaint.

"To establish that he has a meritorious defense, a complainant need not show that he would prevail on the merits, but only that his defense is meritorious."

McClurg v. Deaton, 380 S.C. 563, 575, 671 S.E.2d 87, 94 (2008) (emphasis added).

[A] meritorious defense need not be perfect nor one which can be guaranteed to prevail at trial. It need only be 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 doubting evidence.

McClurg v. Deaton, 380 S.C. 563, 575, 671 S.E.2d 87, 94 (2008) (quoting Graham v. Town of Loris, 272 S.C. 442, 248 S.E.2d 594 (1978)).

Plaintiff ClearTalk alleges that this Defendant breached its contract with ClearTalk; breached its contract with ClearTalk by making fraudulent representations to ClearTalk, and fraudulently induced ClearTalk into entering into the agreement.

As an initial matter, this Defendant denies that it breached its contract with ClearTalk, and denies that it fraudulently induced or misrepresented material issues to ClearTalk. Further, this Defendant maintains that the agreement with ClearTalk was freely and voluntarily entered into by both parties and represents the terms of the agreement. See attached Exhibit 5, Confidential Agreement between Plaintiff and this Defendant.² Furthermore, the terms and conditions of the agreement, signed and initialed on each page by Plaintiff, includes a limitation of liability clause which states that neither party is liable to the other for indirect, consequential, special, incidental, or punitive damages arising from the contract.

Therefore, this Defendant has a meritorious defense to Plaintiff's claims and alleged damages and a justiciable controversy exists as to the elements of Plaintiff's claims.

3. Plaintiff Would Not Be Prejudiced if the Court Set Aside the Entry of Default.

"Prejudice to a plaintiff from setting aside a default judgment cannot take the form of mere delay or increased costs; rather, the prejudice must be substantial, facilitating fraud or collusion, resulting the in the loss of evidence, or hindering discovery." 49 C.J.S Judgments § 523, Prejudice to Plaintiff, updated 2012. Prejudice to a Plaintiff includes an analysis by the court as to whether evidence essential to the adjudication of the case on the merits will be affected by setting aside the entry of default. Shannon v. McGee, 2007-UP-543, 2007 WL 7273650 (S.C. Ct. App. Nov. 30, 2007). Prejudice can be shown by a non-defaulting party by if the delay resulted in the loss of evidence, made it more difficult for the non-defaulting party to proceed with trial, or impeded the non-defending party's ability

² The agreement between the parties is Confidential. However, this Defendant will produce a copy of the Agreement after a Confidentiality Order is entered.

to complete discovery. Pinpoint It Services, LLC v. Atlas It Export Corp., 812 F.Supp.2d 710, 711 (E.D. Virginia 2011). “[M]ere inconvenience is insufficient to constitute prejudice to the non-moving party” and “delay of only a few months generally does not constitute prejudice to the non-moving party.” Id.

Plaintiff has not demonstrated how it would be prejudiced by an Order setting aside the entry of default and allowing the case to proceed to the merits. The parties have not engaged in any substantive activities in the case that would impact the Plaintiff's position if this Defendant was allowed to responsively plead. This Defendant is ready and willing to immediately participate in discovery, and no substantial discovery has taken place to-date, thus no prejudice to Plaintiff has occurred from the delay. Thus, the Plaintiff cannot show that they would have difficulty presenting evidence or proceeding to trial if the entry of default is set aside.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court set aside the entry of default, and allow this Defendant to responsively plead in the above-captioned matter.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com



Robert H. Hood (SC #2599)
Robert H. Hood, Jr. (SC #13491)
H. Cooper Wilson, III (SC #74939)

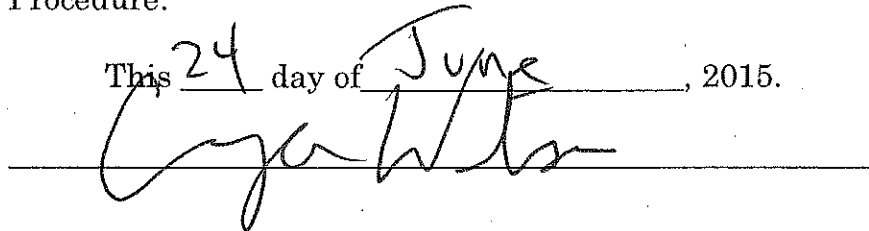
*Attorneys for the Defendant
TW Telecom Holdings, Inc., a Delaware
corporation*

6/24, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing
was served on each party or counsel of record by ☐
mailing, ☐ e-mailing, ☐ facsimile, or ☒ hand delivery in
the manner prescribed by the applicable Rule of Civil
Procedure.

This 24 day of June, 2015.



NOTED AND RECORDED
FILED
2015 JUN 24 PM 2:47
CLERK OF COURT
SOUTH CAROLINA

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

PTA-FLA, INC.

Plaintiff(s)

vs.

TW TELECOM HOLDINGS, INC., A
DELAWARE CORPORATION; AND DOES 1-10
INCLUSIVE

Defendant(s)

Submitted By: Jamie N. Smith
Address: P.O. Box 8839
Columbia, SC 29202

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

-CP-

2015CP4001394

SC Bar #: 101361
Telephone #: (803) 363-1323
Fax #: (866) 333-1984
Other:
E-mail: jamies@cleartalk.net

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

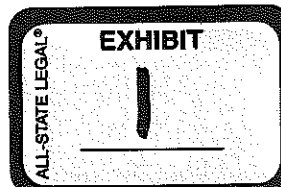
NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☒ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 -CP- ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Sexual Predator (519)		

Submitting Party Signature: _____

Date: March 3, 2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.



FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA,

COUNTY OF RICHLAND

PTA-FLA, Inc.

Plaintiff,

vs.

TW Telecom Holdings, Inc., a Delaware
corporation; and DOES 1-10 inclusive,

Defendant.

IN THE COURT OF COMMON PLEAS

SUMMONS

FILE NO.

RICHLAND COUNTY
FILED
2015 MAR -3 PM 1:04
JEANNETTE W. BEND
C.C.P. 205

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Columbia, South Carolina

Dated: February 27, 2015

Plaintiff/Attorney for Plaintiff

Address: PTA-FLA, Inc.
P.O. Box 8839
Columbia, SC 29202
(803) 363-1323
jamies@cleartalk.net

SCCA 401 (5/02)

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
PTA-FLA, Inc.,)
Plaintiff,)
vs.)
TW Telecom Holdings Inc., a Delaware)
corporation; and DOES 1-10, inclusive,)
Defendants.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: ____-CP-____

COMPLAINT
(Jury Trial Demanded)

RICHLAND COUNTY
FILED
2015 MAR -3 PM 1:04
JEANNETTE M. MORRIS
C.C.P. & C.S.

Plaintiff PTA-FLA, Inc. ("Plaintiff" or "ClearTalk"), a Florida corporation, by and through its counsel alleges:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff is a Florida corporation authorized to do business in the State of South Carolina and maintains its principal place of business in Columbia, South Carolina. Plaintiff provides wireless communication services in South Carolina and elsewhere under the brand "ClearTalk." There are other affiliated companies in other parts of the United States that also provide service under this tradename.
2. Defendant TW Telecom Holdings Inc. (stylized as "tw telecom holdings Inc." and referred to herein as "TWTC") is a Delaware corporation authorized to do business in the State of South Carolina. At all times relevant to this action, Defendant provided fiber optic transport services and sold wholesale internet access in Columbia, South Carolina.
3. Plaintiff is unaware of the true names and capacities of defendants named as DOES 1 through 10 and therefore sues these defendants by such fictitious names. Plaintiff will

amend this complaint to allege their true names and capacities when the same have been ascertained.

4. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the injuries and damages alleged herein and that such defendants were the proximate cause thereof.

5. Plaintiff is further informed and believes and thereon alleges the defendants, and each of them, were acting in concert with, at the behest of, or as agent and/or employee of each of the other defendants in doing the acts complained of herein and each defendant has ratified and approved the acts of his agents and co-defendants.

6. This Court has personal jurisdiction over Defendants because Defendants transact business in the State of South Carolina.

7. Venue is proper in Richland County because all or most of the actions or omissions alleged herein occurred within the County.

FACTUAL ALLEGATIONS

The Agreement

8. In 2010, after a series of negotiations between representatives of ClearTalk and Defendants, the parties entered into an agreement under which [REDACTED]

[REDACTED]

9. Pursuant to the Agreement, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

10. The parties also agreed [REDACTED]

[REDACTED]

11. The rates to be charged for the services provided by Defendants were the subject of much discussion and negotiation. A predictable payment structure was important to ClearTalk as it allowed the company to plan for and facilitate business growth without having to negotiate and execute changes in service and rates.

12. [REDACTED]

[REDACTED]

TWTC's Attempt to Unilaterally Modify Payment Schedule

13. After the Agreement was entered into, Defendants requested a meeting with ClearTalk to discuss the details of the service and execute certain documents they claimed were necessary to allow Defendants to initiate service.

14. This meeting occurred in or around June 2010, between ClearTalk representative Kevin Corrigan, who had not participated in the discussions and negotiations between the parties which led to their agreement, and various representatives of Defendants.

15. Prior to the meeting, ClearTalk had authorized Corrigan to execute the documents needed to effect the agreement which the parties had previously entered into.

16. Instead of presenting documents which documented the agreement between the parties, Defendants presented Corrigan with documents that changed some of the material terms of the Agreement.

17. Corrigan executed these documents on behalf of ClearTalk with the understanding and belief that these documents effected the previous agreement.

18. Corrigan did not have authority to modify the Agreement previously reached between ClearTalk and Defendants.

19. Corrigan executed the documents presented to him based on the understanding, created by Defendants' words and actions, that the documents were consistent with and necessary to implement the Agreement.

Defendants Implement Service and Confirms Agreement Terms

20. In or around October 2010, Defendants began providing services pursuant to the Agreement.

21. [REDACTED]

[REDACTED]

22. While the amount invoiced was lower than the amount upon which the parties had agreed, ClearTalk was concerned [REDACTED]

[REDACTED]

23. ClearTalk was also concerned because, around the time the invoice was sent, ClearTalk received reports from Defendants' employees that Defendants did not intend to honor the Agreement and that Defendants desired to implement another type of arrangement t [REDACTED]

[REDACTED]

[REDACTED]

24. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

25. ClearTalk arranged a meeting with a representative of Defendants, Christian Knierim, to discuss these concerns.

26. During the meeting, Knierim informed ClearTalk that the invoice reflected

[REDACTED]

[REDACTED]

[REDACTED]

27. [REDACTED]

[REDACTED]

[REDACTED]

28. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

29. [REDACTED]

[REDACTED]

[REDACTED]

Service Problems

30. In or prior to April 2011, ClearTalk began noticing erratic behavior in its network switching, including "blocking" at the 1401 Main location at certain times, even for the small amount of data that was being transmitted at that time. The amount of data transmitted was less than 40 Mb when the 1401 Main location should have allowed for 140 Mb of data throughput.

31. After weeks of investigation and testing, ClearTalk was able to isolate the erratic service problem as a "MAC flapping" issue and identify it as stemming from Defendants' configuration.

32. "MAC flapping" meant, essentially, that at intermittent and unpredictable times, all of the internet services being provided by Defendants would shut down.

33. This issue affected the customers of ClearTalk as its customers experienced interruption in the data services they purchased from ClearTalk.

34. ClearTalk notified Defendants of this recurring problem.

35. To address this problem, in or around September of 2011, Defendants told ClearTalk it required additional circuits to address this problem within its network.

36. [REDACTED]

[REDACTED]

[REDACTED]

Overcharges

37. In order to implement the changes necessary to remedy the service problems caused by Defendants' network, Defendants claimed that ClearTalk needed to sign a revised service agreement.

38. ClearTalk initially refused to sign such a revised agreement as some of the terms were inconsistent with the original Agreement.

39. Defendants, however, refused to remedy the network problem (although it was able to do so) until ClearTalk signed the revised service agreement.

40. Defendants' refusal to remedy the network problem continued to cause significant business problems for ClearTalk as it prevented ClearTalk from delivering one of its core products to its customers and caused damage to ClearTalk's reputation at the critical start up time of its network.

41. Accordingly, ClearTalk signed the revised agreement "under protest."

42. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

43. [REDACTED]
[REDACTED]
[REDACTED]

44. [REDACTED]
[REDACTED]

45. [REDACTED]

46. Defendants' refusal to adhere to the terms of the Agreement caused ClearTalk to incur charges for more than the amount which it had agreed to pay and also impaired its ability to successfully implement its data service to customers as ClearTalk had the opposite of the peace of mind and simplicity that the agreement, as negotiated, would have allowed. As such, ClearTalk was not afforded time to focus on its marketing, and instead was required to maintain focus on recurring service and billing problems.

Bandwidth Problems

47. In addition to the network and payment problems discussed above, Defendants also breached the Agreement with respect to the amount of bandwidth it agreed to make available to ClearTalk.

48. [REDACTED]

49. Defendants did not provide ClearTalk with the bandwidth for which it was paying which, in turn, led to customer complaints for data access being denied.

50. Customers who purchase data plans expected to be able to access the internet on every attempt, and ClearTalk's inability to provide this data access was damaging to its business.

51. ClearTalk notified Defendants of this breach and Defendants promised to correct the problem but failed to do so.

52. Defendants also exacerbated this problem by informing ClearTalk's customer service employees on multiple occasions that the agreement was other than had been negotiated and set forth on the Payment Schedule.

Refusal to Engage in Goodfaith Negotiations and Continued Overcharges

53. [REDACTED]
[REDACTED]
[REDACTED]

54. [REDACTED]
[REDACTED]

55. [REDACTED]

56. [REDACTED]
[REDACTED]

57. [REDACTED]
[REDACTED]
[REDACTED]

The New Agreement

58. [REDACTED]

[REDACTED] the parties ultimately agreed to the terms of a new agreement ("New Agreement")

[REDACTED]
[REDACTED]

59. Although lower cost alternatives were available to ClearTalk at this point, ClearTalk opted to continue its relationship with Defendant in order to avoid the difficulties and expenses involved with switching to another carrier.

60. After entering into the New Agreement, Defendants, without explanation, refused to honor the terms of the newly negotiated agreement, and gave notice to ClearTalk that ClearTalk must discontinue its use of Defendants' network in an unreasonably short time frame.

The Unreasonable and Abrupt Termination

61. In late January 2013, Defendants advised ClearTalk that it intended to terminate its services to ClearTalk, thereby requiring ClearTalk to find another provider.

62. This notice came as unexpected as Defendants had not given any prior notice that it was going to terminate its services [REDACTED]
[REDACTED]

63. Given the nature of the services Defendants were providing, ClearTalk needed significant lead time to procure bids from other providers in order to obtain a competitive rate.

64. Defendants' abrupt notice resulted in ClearTalk being unable to negotiate from a position of strength and it was forced to urgently find an affordable alternative.

65. Although ClearTalk immediately used its best efforts to transfer its usage to another provider, which ClearTalk ultimately did, the process took several months.

66. [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

67. Plaintiff incorporates by reference paragraphs 1 through 66, inclusive, as if fully set forth herein.

68. Plaintiff and Defendants entered into a binding Agreement, as set forth above.

69. Plaintiff has performed all obligations required of it under the Agreement, or has had the performance of any obligation excused.

70. Defendants breached the Agreement by refusing to provide the agreed upon services, overcharging ClearTalk for the services, and refusing to engage in good faith negotiations.

71. Defendants also breached the covenant of good faith and fair dealing implied in the contracts between ClearTalk and Defendants.

72. As a result of the breaches by Defendants, ClearTalk has been damaged in an amount to be determined at trial.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

73. Plaintiff incorporates by reference paragraphs 1 through 72, inclusive, as if fully set forth herein.

74. In addition to breaching its contract with ClearTalk as set forth above, Defendants acted fraudulently in making misrepresentations to ClearTalk [REDACTED]

[REDACTED]

75. Defendants, through their representatives, made such representations with knowledge of their falsity and with fraudulent intent, or with reckless disregard to the truth of such representations.

76. Defendants thereafter reneged on these representations with knowledge that ClearTalk's business was dependent upon the services provided to it by Defendants.

77. As a result of Defendants' breach of contract accompanied by fraudulent misrepresentations by Defendants' representatives, ClearTalk's business plan was disrupted, resulting in damages in an amount to be determined at trial.

78. Due to the fraudulent nature of Defendants' actions, Plaintiff is also entitled to punitive damages in an amount to be determined at trial.

FOR A THIRD CAUSE OF ACTION
(Fraud in the Inducement)

79. Plaintiff incorporates by reference paragraphs 1 through 78, inclusive, as if fully set forth herein.

80. Defendants falsely represented to Plaintiff, by and through its agent Christian Knierim, [REDACTED].

81. Defendants intentionally misrepresented [REDACTED]
[REDACTED].

82. These representations by Defendants to Plaintiff were both material and false.

83. Defendants made such representations to Plaintiff with knowledge of the falsity of the representations, or with reckless disregard to their truth, and made the representations with the intent that Plaintiff act upon them.

84. Plaintiff did not know of the falsity of the representations by Defendants, and rightfully relied on said representations to Plaintiff's detriment, resulting in consequent and proximate injury.

85. Plaintiff did not learn of the nature of Defendants' fraudulent misrepresentations until in or around January of 2012, [REDACTED]
[REDACTED]

86. As a natural and proximate result of the fraud by Defendants, Plaintiff has lost money in the nature of expectation damages, in an amount to be determined at trial.

87. Due to the fraudulent nature of Defendants' actions, Plaintiff is also entitled to punitive damages in an amount to be determined at trial.

FOR A FOURTH CAUSE OF ACTION
(Promissory Estoppel)

88. Plaintiff incorporates by reference paragraphs 1 through 88, inclusive, as if fully set forth herein.

89. Pleading in the alternative, Defendants promised [REDACTED]
[REDACTED]

90. Defendants later promised that [REDACTED]
[REDACTED]
[REDACTED]

91. Plaintiff reasonably relied, to its detriment, on these promises in its decision to forego alternative service arrangements and its decision to offer data plans to its consumers.

92. Defendants' failure to fulfill the promises described above worked an injustice on Plaintiff and caused Plaintiff damages.

WHEREFORE, Plaintiff prays for judgment against Defendants for compensatory damages, general damages, special damages, consequential damages, punitive damages and any other and further relief that this court considers proper.

Respectfully submitted,

BY:

Jamie N. Smith, Esq. (101367)
2101 Main Street
Columbia, South Carolina 29201
Telephone: (803) 363 1323
jamies@cleartalk.net

Attorney for Plaintiff

March __, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-4001394
	)	
Plaintiff,	)	AFFIDAVIT OF RYAN MCMANIS
	)	
Versus	)	
	)	
TW Telecom Holdings Inc., a Delaware,	)	
corporation; and DOES 1-10, inclusive	)	
	)	
<u>Defendants.</u>	)	

PERSONALLY APPEARED BEFORE ME, RYAN MCMANIS, who after being
duly sworn, deposes and says as follows:

1. My name is Ryan McManis.
2. I am over the age of 18.
3. I am a resident of Denver, CO.
4. That I am the Vice President and Assistant General Counsel of Level 3 Communications, LLC a limited liability company organized and existing in the State of Delaware.

5. That through a series of corporate mergers and transactions, Level 3 Communications is the parent company of tw telecom Holdings, LLC, which is the successor by operation of merger to tw telecom Holdings, Inc. as of October 31, 2014.

6. I have personal knowledge of the facts and circumstances in this case.

7. That I have been recently informed that the Plaintiff filed a lawsuit against TW Telecom Holdings Inc., a Delaware, corporation; and DOES 1-10. I was not aware of the lawsuit until recently. That since learning of the lawsuit, we have worked diligently with our attorneys to respond to the same.

RICHLAND COUNTY
 FILED
 2015 MAY 11 AM 11:03
 JEANNE E. W. McBRIDE
 C.P. & C.S.



8. That I have reviewed the Plaintiff's Motion for Entry of Default dated May 1, 2015 which indicated that the Plaintiff served CT Corporation System on March 16, 2015 and that the CT Corporation System emailed the Summons and Complaint to my company on March 18, 2015.

9. I now know that the Summons and Complaint was emailed to me around March 18, 2015 as I am the gatekeeper for lawsuits for my company. I review the lawsuits and assign them to defense counsel for handling.

10. That I did not realize that the Summons and Complaint was emailed to me because on the 18th I was organizing a massive HR project for the next day and was in meetings the entire day of the 18th and into the night.

11. That on the 19th, I was a presenter at the meeting which took most of the day. Directly following the meeting, I was part of an executive meeting at work to engage in a telephone conference with respect to a matter involving a State Attorney General. That I left the office in a hurry on the 19th as my wife works full-time at the Boys and Girls Club and was not able to pick up our four (4) children, ages six (6) months, four (4) years old, six (6) years old, and seven (7) years old from their activities and take them home for dinner.

12. That during most of the next week, I was out of the office at offsite meetings, during which my contact with the office was extremely limited. Following these off-site meetings, I was away for the next week with my family for my children's spring break, during which time I had limited contact with my office.

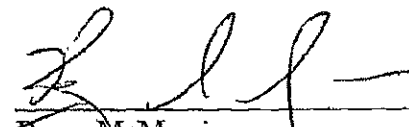
13. That during this incredibly hectic couple of days and weeks, I did not see the Summons and Complaint and did not send it to outside counsel for handling.

14. The contract at issue is between the Plaintiff and TW Telecom Holdings Inc., a business my company purchased. That we have a meritorious defense to the Plaintiff's allegations to include that the Plaintiff freely entered into a contract with TW Telecom Holdings Inc. and that TW Telecom Holdings Inc. did not fraudulently induce the Plaintiff to enter into the agreement. Further, TW Telecom Holdings Inc. did not breach its obligations to the Plaintiff and plans to defend this case if afforded that opportunity.

15. I attest that this Defendant is properly insured and would have answered the Plaintiff's Summons and Complaint in a timely fashion except for the exceptional circumstances at work which reasonably provides good cause for this Defendant's failure to timely answer the Summons and Complaint.

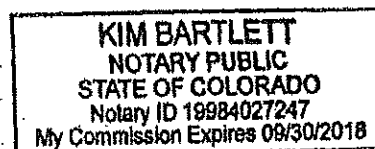
16. Hood Law Firm, LLC has filed an Answer on our behalf. I attest that we have a meritorious defense to the Plaintiff's claims, and I approve of the Answer filed and the affirmative defenses asserted. See Exhibit A.

FURTHER THE AFFIANT SAYETH NOT!


Ryan McManis

SWORN TO AND SUBSCRIBED before me
this 7th day of May 2015.


NOTARY PUBLIC FOR Colorado
MY COMMISSION EXPIRES: 9/30/2018



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-40-01394
	)	
Plaintiff,	)	ANSWER TO PLAINTIFF'S
	)	COMPLAINT
Versus	)	(Jury Trial Requested)
	)	
TW Telecom Holdings, Inc., a Delaware	)	
corporation; and DOES 1-10, inclusive,	)	
	)	
Defendants.	)	

Comes now, the Defendant, TW Telecom Holdings, Inc., a Delaware corporation (hereinafter "this Defendant"), hereby answers the allegations of the Plaintiff's Complaint, subject to any and all affirmative defenses, motions, or other qualifications, as follows:

1. Each and every allegation not specially admitted herein is denied.

AS TO PARTIES, JURISDICTION AND VENUE

2. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 1 of the Plaintiff's Complaint and therefore denies the same.

3. In response to the allegations contained in Paragraph 2 of the Plaintiff's Complaint, this Defendant admits that it is a corporation organized and existing under the laws of a state other than South Carolina. Further, through a series of mergers and acquisitions, Level 3 Communications is the parent company of tw telecom Holdings, LLC, which is the successor by operation of merger to tw telecom Holdings, Inc. All remaining and inconsistent allegations contained in Paragraph 2 of the Plaintiff's Complaint are denied.



4. The allegations contained in Paragraph 3 of the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent a response is required, this Defendant denies, as written, the allegations contained in Paragraph 3 of the Plaintiff's Complaint.

5. This Defendant denies the allegations contained in Paragraphs 4 and 5 of the Plaintiff's Complaint.

6. The allegations contained in Paragraphs 6 and 7 of the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent a response is required, this Defendant denies the allegations contained in Paragraphs 6 and 7 of the Plaintiff's Complaint.

AS TO FACTUAL ALLEGATIONS

7. This Defendant denies the allegations contained in Paragraphs 8, 9, 10, 11 and 12 of the Plaintiff's Complaint as written and craves reference to the agreement between the parties for a complete explanation of the relationship between the Plaintiff and this Defendant.

8. This Defendant denies, as written, the allegations contained in Paragraphs 13 and 14 of the Plaintiff's Complaint.

9. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 15 of the Plaintiff's Complaint and therefore denies the same.

10. This Defendant denies the allegations contained in Paragraphs 16 and 17 of the Plaintiff's Complaint.

11. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraphs 18 and 19 of the Plaintiff's Complaint and therefore denies the same.

12. This Defendant denies, as written, the allegations contained in Paragraphs 20 and 21 of the Plaintiff's Complaint.

13. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 22 of the Plaintiff's Complaint and therefore denies the same.

14. This Defendant denies the allegations contained in Paragraphs 23 and 24 of the Plaintiff's Complaint.

15. This Defendant denies, as written, the allegations contained in Paragraph 25 of the Plaintiff's Complaint.

16. This Defendant denies the allegations contained in Paragraphs 26, 27, 28 and 29 of the Plaintiff's Complaint.

17. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 30 of the Plaintiff's Complaint and therefore denies the same.

18. This Defendant denies the allegations contained in Paragraph 31 of the Plaintiff's Complaint.

19. This Defendant denies, as written, the allegations contained in Paragraph 32 of the Plaintiff's Complaint.

20. This Defendant denies the allegations contained in Paragraph 33 of the Plaintiff's Complaint.

21. This Defendant denies, as written, the allegations contained in Paragraph 34 of the Plaintiff's Complaint.

22. This Defendant denies the allegations contained in Paragraph 35 of the Plaintiff's Complaint.

23. This Defendant denies, as written, the allegations contained in Paragraphs 36 and 37 of the Plaintiff's Complaint.

24. This Defendant denies the allegations contained in Paragraphs 38, 39 and 40 of the Plaintiff's Complaint.

25. This Defendant denies, as written, the allegations contained in Paragraph 41 of the Plaintiff's Complaint.

26. This Defendant denies the allegations contained in Paragraphs 42 and 43 of the Plaintiff's Complaint.

27. This Defendant denies, as written, the allegations contained in Paragraphs 44 and 45 of the Plaintiff's Complaint.

28. This Defendant denies the allegations contained in Paragraphs 46 and 47 of the Plaintiff's Complaint.

29. This Defendant denies, as written, the allegations contained in Paragraph 48 of the Plaintiff's Complaint and craves reference to the agreement signed between the parties for true and accurate representation of the agreement between the parties.

30. This Defendant denies the allegations contained in Paragraphs 49, 50, 51 and 52 of the Plaintiff's Complaint.

31. This Defendant denies, as written, the allegations contained in Paragraphs 53, 54, 55, 56 and 57 of the Plaintiff's Complaint.

32. This Defendant denies, as written, the allegations contained in Paragraph 58 of the Plaintiff's Complaint and craves reference to the agreement between the parties for a true and accurate representation of the parties' relationship.

33. This Defendant denies, as written, the allegations contained in Paragraphs 59, 60, 61, 62, 63 of the Plaintiff's Complaint.

34. This Defendant denies the allegations contained in Paragraphs 64, 65 and 66 of the Plaintiff's Complaint.

AS TO THE FIRST CAUSE OF ACTION
(Breach of Contract)

35. In response to the allegations contained in Paragraph 67 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

36. This Defendant denies, as written, the allegations contained in Paragraph 68 of the Plaintiff's Complaint.

37. This Defendant denies the allegations contained in Paragraphs 69, 70, 71 and 72 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's First Cause of Action.

AS TO THE SECOND CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

38. In response to the allegations contained in Paragraph 73 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

39. This Defendant denies the allegations contained in Paragraphs 74, 75, 76, 77 and 78 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's Second Cause of Action.

AS TO THE THIRD CAUSE OF ACTION
(Fraud in the Inducement)

40. In response to the allegations contained in Paragraph 79 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

41. This Defendant denies the allegations contained in Paragraphs 80, 81, 82, 83, 84, 85, 86 and 87 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's Third Cause of Action.

AS TO THE FOURTH CAUSE OF ACTION
(Promissory Estoppel)

42. In response to the allegations contained in Paragraph 88 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

43. This Defendant denies, as written, the allegations contained in Paragraphs 89, 90 and 91 of the Plaintiff's Complaint.

44. This Defendant denies the allegations contained in Paragraph 92 of the Plaintiff's Complaint, including the WHEREFORE paragraph, those being the remaining allegations of Plaintiff's Fourth Cause of Action and of the Plaintiff's Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Proximate Cause)

45. That, even if this Defendant was negligent, as alleged in the Complaint, which is specifically denied, the negligence of this Defendant is not the direct or proximate cause of any injury alleged by the Plaintiff and therefore this Defendant is not liable for any damages allegedly sustained by the Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Duty Owed)

46. This Defendant is informed, believes, and thereon alleges, that the Complaint, and each cause of action therein, is barred because this Defendant did not owe any duty to Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Comparative Negligence)

47. That, upon information and belief, even if this Defendant was negligent as described in the Complaint, which is specifically denied, the Plaintiff's alleged injuries and damages, if any, resulted from, or were due to the negligence of the Plaintiff, which combined and concurred with any negligence on the part of this Defendant, which is specifically denied, to bring about the said damages, if any, as a proximate cause thereof and without which the same would not have occurred.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reasonableness and Good Faith)

48. This Defendant alleges that it and its agents and employees acted reasonably and in good faith at all times material herein, based on all relevant facts

and circumstances known by them at the time they so acted. Accordingly, Plaintiff is not entitled to recovery any damages whatsoever.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
THIS DEFENDANT ALLEGES:
(Sole Negligence)

49. That, upon information and belief, whatever injuries and damages, if any, which may have been sustained by the Plaintiff, as described in the Complaint, were due solely to, cause wholly by, and were the direct and proximate result of the negligence, carelessness and recklessness of the Plaintiff, so far as to bar the Plaintiff from recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
THIS DEFENDANT ALLEGES:
(Limitation of Recovery Based on the Agreement)

50. That the Plaintiff is barred from recovering indirect, consequential, special, incidental, or punitive damages based on the language contained in the agreement.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
THIS DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)

51. That any award or assessment of punitive damages as prayed for by the Plaintiffs would violate this Defendant's Constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

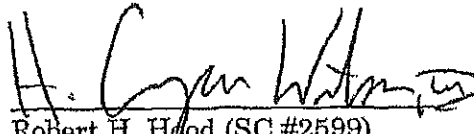
FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE.
THIS DEFENDANT ALLEGES:
(Reservation and Non-Waiver)

52. This Defendant reserves any additional and affirmative defenses as may be revealed or become available to it during the course of their investigation

and/or discovery in the case and is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Plaintiff's Complaint, and having asserted these affirmative defenses, the Defendant, TW Telecom Holdings, Inc., a Delaware corporation, prays that the Plaintiff's Complaint be dismissed with prejudice and that they be awarded the costs and reasonable fees associated with this matter, and such other relief as the Court may deem just and proper.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com


Robert H. Hood (SC #2599)
Robert H. Hood, Jr. (SC #13491)
H. Cooper Wilson, III (SC #74939)

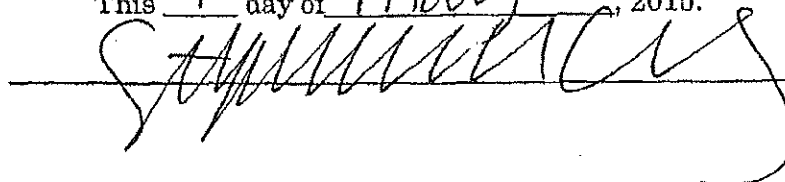
Attorneys for the Defendant
TW Telecom Holdings, Inc., a Delaware corporation

5/7 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 7 day of May, 2015.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-40-01394
	)	
Plaintiff,	)	ANSWER TO PLAINTIFF'S
	)	COMPLAINT
Versus	)	(Jury Trial Requested)
	)	
TW Telecom Holdings, Inc., a Delaware	)	
corporation; and DOES 1-10, inclusive,	)	
	)	
Defendants.	)	

RICHLAND COUNTY
 FILED
 2015 MAY 11 AM 11:56
 JEANETTE M. MOSENFELDER
 CLERK OF COURT
 CP No. 63

Comes now, the Defendant, TW Telecom Holdings, Inc., a Delaware corporation (hereinafter "this Defendant"), hereby answers the allegations of the Plaintiff's Complaint, subject to any and all affirmative defenses, motions, or other qualifications, as follows:

1. Each and every allegation not specially admitted herein is denied.

AS TO PARTIES, JURISDICTION AND VENUE

2. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 1 of the Plaintiff's Complaint and therefore denies the same.

3. In response to the allegations contained in Paragraph 2 of the Plaintiff's Complaint, this Defendant admits that it is a corporation organized and existing under the laws of a state other than South Carolina. Further, through a series of mergers and acquisitions, Level 3 Communications is the parent company of tw telecom Holdings, LLC, which is the successor by operation of merger to tw telecom Holdings, Inc. All remaining and inconsistent allegations contained in Paragraph 2 of the Plaintiff's Complaint are denied.



4. The allegations contained in Paragraph 3 of the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent a response is required, this Defendant denies, as written, the allegations contained in Paragraph 3 of the Plaintiff's Complaint.

5. This Defendant denies the allegations contained in Paragraphs 4 and 5 of the Plaintiff's Complaint.

6. The allegations contained in Paragraphs 6 and 7 of the Plaintiff's Complaint contain conclusions of law to which no response is required. To the extent a response is required, this Defendant denies the allegations contained in Paragraphs 6 and 7 of the Plaintiff's Complaint.

AS TO FACTUAL ALLEGATIONS

7. This Defendant denies the allegations contained in Paragraphs 8, 9, 10, 11 and 12 of the Plaintiff's Complaint as written and craves reference to the agreement between the parties for a complete explanation of the relationship between the Plaintiff and this Defendant.

8. This Defendant denies, as written, the allegations contained in Paragraphs 13 and 14 of the Plaintiff's Complaint.

9. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 15 of the Plaintiff's Complaint and therefore denies the same.

10. This Defendant denies the allegations contained in Paragraphs 16 and 17 of the Plaintiff's Complaint.

11. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraphs 18 and 19 of the Plaintiff's Complaint and therefore denies the same.

12. This Defendant denies, as written, the allegations contained in Paragraphs 20 and 21 of the Plaintiff's Complaint.

13. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 22 of the Plaintiff's Complaint and therefore denies the same.

14. This Defendant denies the allegations contained in Paragraphs 23 and 24 of the Plaintiff's Complaint.

15. This Defendant denies, as written, the allegations contained in Paragraph 25 of the Plaintiff's Complaint.

16. This Defendant denies the allegations contained in Paragraphs 26, 27, 28 and 29 of the Plaintiff's Complaint.

17. This Defendant is without sufficient information upon which to form a belief as to the allegations contained in Paragraph 30 of the Plaintiff's Complaint and therefore denies the same.

18. This Defendant denies the allegations contained in Paragraph 31 of the Plaintiff's Complaint.

19. This Defendant denies, as written, the allegations contained in Paragraph 32 of the Plaintiff's Complaint.

20. This Defendant denies the allegations contained in Paragraph 33 of the Plaintiff's Complaint.

21. This Defendant denies, as written, the allegations contained in Paragraph 34 of the Plaintiff's Complaint.

22. This Defendant denies the allegations contained in Paragraph 35 of the Plaintiff's Complaint.

23. This Defendant denies, as written, the allegations contained in Paragraphs 36 and 37 of the Plaintiff's Complaint.

24. This Defendant denies the allegations contained in Paragraphs 38, 39 and 40 of the Plaintiff's Complaint.

25. This Defendant denies, as written, the allegations contained in Paragraph 41 of the Plaintiff's Complaint.

26. This Defendant denies the allegations contained in Paragraphs 42 and 43 of the Plaintiff's Complaint.

27. This Defendant denies, as written, the allegations contained in Paragraphs 44 and 45 of the Plaintiff's Complaint.

28. This Defendant denies the allegations contained in Paragraphs 46 and 47 of the Plaintiff's Complaint.

29. This Defendant denies, as written, the allegations contained in Paragraph 48 of the Plaintiff's Complaint and craves reference to the agreement signed between the parties for true and accurate representation of the agreement between the parties.

30. This Defendant denies the allegations contained in Paragraphs 49, 50, 51 and 52 of the Plaintiff's Complaint.

31. This Defendant denies, as written, the allegations contained in Paragraphs 53, 54, 55, 56 and 57 of the Plaintiff's Complaint.

32. This Defendant denies, as written, the allegations contained in Paragraph 58 of the Plaintiff's Complaint and craves reference to the agreement between the parties for a true and accurate representation of the parties' relationship.

33. This Defendant denies, as written, the allegations contained in Paragraphs 59, 60, 61, 62, 63 of the Plaintiff's Complaint.

34. This Defendant denies the allegations contained in Paragraphs 64, 65 and 66 of the Plaintiff's Complaint.

AS TO THE FIRST CAUSE OF ACTION
(Breach of Contract)

35. In response to the allegations contained in Paragraph 67 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

36. This Defendant denies, as written, the allegations contained in Paragraph 68 of the Plaintiff's Complaint.

37. This Defendant denies the allegations contained in Paragraphs 69, 70, 71 and 72 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's First Cause of Action.

AS TO THE SECOND CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Act)

38. In response to the allegations contained in Paragraph 73 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

39. This Defendant denies the allegations contained in Paragraphs 74, 75, 76, 77 and 78 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's Second Cause of Action.

AS TO THE THIRD CAUSE OF ACTION
(Fraud in the Inducement)

40. In response to the allegations contained in Paragraph 79 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

41. This Defendant denies the allegations contained in Paragraphs 80, 81, 82, 83, 84, 85, 86 and 87 of the Plaintiff's Complaint, those being the remaining allegations of the Plaintiff's Third Cause of Action.

AS TO THE FOURTH CAUSE OF ACTION
(Promissory Estoppel)

42. In response to the allegations contained in Paragraph 88 of the Plaintiff's Complaint, this Defendant reasserts and realleges the above paragraphs as if fully stated herein verbatim.

43. This Defendant denies, as written, the allegations contained in Paragraphs 89, 90 and 91 of the Plaintiff's Complaint.

44. This Defendant denies the allegations contained in Paragraph 92 of the Plaintiff's Complaint, including the WHEREFORE paragraph, those being the remaining allegations of Plaintiff's Fourth Cause of Action and of the Plaintiff's Complaint.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Proximate Cause)

45. That, even if this Defendant was negligent, as alleged in the Complaint, which is specifically denied, the negligence of this Defendant is not the direct or proximate cause of any injury alleged by the Plaintiff and therefore this Defendant is not liable for any damages allegedly sustained by the Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(No Duty Owed)

46. This Defendant is informed, believes, and thereon alleges, that the Complaint, and each cause of action therein, is barred because this Defendant did not owe any duty to Plaintiff.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Comparative Negligence)

47. That, upon information and belief, even if this Defendant was negligent as described in the Complaint, which is specifically denied, the Plaintiff's alleged injuries and damages, if any, resulted from, or were due to the negligence of the Plaintiff, which combined and concurred with any negligence on the part of this Defendant, which is specifically denied, to bring about the said damages, if any, as a proximate cause thereof and without which the same would not have occurred.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reasonableness and Good Faith)

48. This Defendant alleges that it and its agents and employees acted reasonably and in good faith at all times material herein, based on all relevant facts

and circumstances known by them at the time they so acted. Accordingly, Plaintiff is not entitled to recovery any damages whatsoever.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Sole Negligence)

49. That, upon information and belief, whatever injuries and damages, if any, which may have been sustained by the Plaintiff, as described in the Complaint, were due solely to, cause wholly by, and were the direct and proximate result of the negligence, carelessness and recklessness of the Plaintiff, so far as to bar the Plaintiff from recovery against this Defendant.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Limitation of Recovery Based on the Agreement)

50. That the Plaintiff is barred from recovering indirect, consequential, special, incidental, or punitive damages based on the language contained in the agreement.

FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Punitive Damages Unconstitutional)

51. That any award or assessment of punitive damages as prayed for by the Plaintiffs would violate this Defendant's Constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and comparable provisions of the South Carolina Constitution.

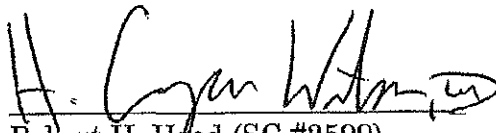
FURTHER ANSWERING AND AS AN AFFIRMATIVE DEFENSE,
THIS DEFENDANT ALLEGES:
(Reservation and Non-Waiver)

52. This Defendant reserves any additional and affirmative defenses as may be revealed or become available to it during the course of their investigation

and/or discovery in the case and is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Plaintiff's Complaint, and having asserted these affirmative defenses, the Defendant, TW Telecom Holdings, Inc., a Delaware corporation, prays that the Plaintiff's Complaint be dismissed with prejudice and that they be awarded the costs and reasonable fees associated with this matter, and such other relief as the Court may deem just and proper.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com


Robert H. Hood (SC #2599)
Robert H. Hood, Jr. (SC #13491)
H. Cooper Wilson, III (SC #74939)

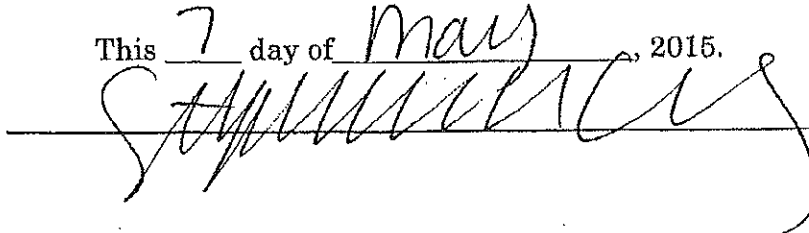
Attorneys for the Defendant
TW Telecom Holdings, Inc., a Delaware corporation

5/7, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 7 day of May, 2015.



2015 MAY 11 AM 11:56
FILED
RICHMOND COUNTY
JENNIFER W. HOSKINS
CLERK OF COURT

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

PTA-FLA, Inc.,

Plaintiff,

Versus

TW Telecom Holdings, Inc., a Delaware
corporation; and DOES 1-10, inclusive,

Defendants.

) IN THE COURT OF COMMON PLEAS

)

)

) C/A No. 2015-CP-40-01394

)

)

**AFFIDAVIT OF H. COOPER
WILSON, III, ESQUIRE**

)

)

)

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)

)

PERSONALLY APPEARED BEFORE ME, Harry C. Wilson, III, who after
being duly sworn, deposes and says as follows:

1. My name is Harry C. Wilson, III.
2. I am an attorney with the Hood Law Firm who has been retained to represent the Defendant
3. I am over the age of 18.
4. I am a resident of Charleston, SC.
5. Hood Law Firm received notice of the Plaintiff's Motion for Default around May 6, 2015 and worked expeditiously since that time to address the issue.
6. We drafted an Answer to the Plaintiff's Complaint, a Motion to Set Aside the Plaintiff's Motion for Default, and an Affidavit for Ryan McManis after speaking with him about this case and his role in the same.
7. On May 7, 2015, the Hood Law Firm filed the Motion to Set Aside the Entry of Default, the proposed Answer to the Plaintiff's Complaint, and the Affidavit for Ryan McManis. The immediate attention given to this case and the timely filings reflect the timeliness in which relief from default was sought.

FILED
2015 JUN 24 PM 2:47
JEANETTE R. HARRIS
CLERK OF COURT
C.P. 666



FURTHER THE AFFIANT SAYETH NOT!



Harry C. Wilson, III

SWORN TO AND SUBSCRIBED before me
this 24 day of June 2015.



NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 12/4/22

Internet Service Order Form



Contract Classification
NEW

☐ Master Services Agreement on File
☐ TWTC Standard Terms and Conditions on File

Date of Original on File:	0/0/00
Date of Original on File:	0/0/00

This Service Order is entered into by tw telecom holdings Inc. by and through its wholly owned subsidiaries that are certified to provide the services being ordered hereunder (collectively "TWTC") and Parties ("Effective Date"). PT A FLA, Inc. ("Customer"). It is effective upon execution by both.

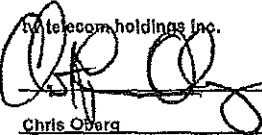
The Internet services described herein are governed by TWTC's Standard Terms and Conditions or Master Service Agreement executed by Customer. This Agreement incorporates by reference the attached Service Level Agreement for Internet Services.

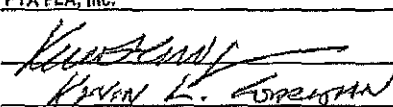
Customer and the individual signing below represent that such individual has the authority to bind Customer to this Agreement.

Customer Name: PT A FLA, Inc.	
Service Address: 1401 Main Street Columbia, SC 29201-5806	Billing Address: 1612 Marion Street, Suite 221 Columbia, SC 29201
Term: Non-Standard	28 Months

Grand Total (Detailed Price Description Below)	Monthly Recurring Charges "MRC"	\$832.80	Non-Recurring Charges "NRC"	\$0.00

Additional charges may be assessed if Customer causes a delay in installation or if wiring is required between the service address and the network demarcation point.

Signature: 
 Print Name: Chris Oberg
 Title: VP & GM of South Carolina
 Date: 6/10/10
 Sales Person: Christen Knierim

Customer: PT A FLA, Inc.
 Signature: 
 Print Name: Kevin L. Overman
 Title: Development Manager
 Date: 9 June 2010

INTERNET SERVICES	Unit Price	Quantity	Monthly Total	Unit Install	Total Install
Internet Transport					
Ethernet 10Mbps	\$ 220.80	1	\$ 220.80	\$ -	0.00
Internet Access					
10 Mbps	\$ 612.00	1	\$ 612.00	\$ -	-
DNS					
Primary DNS (11+)					
Secondary DNS (51+)					
DATA SERVICES TOTAL			\$832.80		\$0.00
TOTAL MONTHLY RECURRING AND NON-RECURRING CHARGES			\$832.80		\$0.00

Internet Services

Usage: Customer shall not transmit or store material in violation of any Federal or state laws or regulations, including, but not limited to, obscenity, indecency, defamation or infringement of trademark or copyright. Customer has read and agrees to adhere to TWTC's IP policy at http://www.twtelecom.com/cust_center/ip_addressing_policy.html and Acceptable Use Policy ("AUP") at http://www.twtelecom.com/cust_center/acceptable_use_policy.html, which may be modified from time to time.

Customer Premises Equipment ("CPE"): Any CPE purchased by Customer hereunder is sold to Customer directly by the third party vendor, and the sale is subject to third party vendor's Terms and Conditions which are attached. TWTC is not the seller or the distributor of any CPE. TWTC MAKES NO WARRANTIES CONCERNING CPE, EXPRESS OR IMPLIED, AND DISCLAIMS ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR OR ORDINARY PURPOSE. The charges for CPE purchased from the third party vendor appear below. For Customer's convenience, unless otherwise directed, Customer shall pay all charges for CPE to TWTC together with all other charges for Service. TWTC will remit payment for CPE to third party vendor. TWTC will provide the initial configuration, installation, and testing for CPE sold to Customer by the third party vendor. Once the CPE is installed and working, Customer assumes full responsibility for the CPE, including maintenance, repair, configuration, and troubleshooting. Customer may apply for a warranty or purchase a maintenance agreement for CPE as made available and managed by the third party vendor.

Included Services for Internet Service

- > Primary DNS (for up to 10 domains)
- > Secondary DNS (for up to 50 domains)
- > Customer premise router and CSU/DSU (CPE) available through TWTC for an additional charge
- > 24 x 7 Internet trouble shooting of Internet Service (excludes CPE)
- > Usenet NNRP/NNTP access and/or feeds (on request)
- > Backup MX (mail exchange) record (on request)
- > Web-based bandwidth usage reports, inbound and outbound traffic (on request and where available)



tw telecom Standard Terms and Conditions

This Agreement is by and between tw telecom holdings inc., a Delaware corporation, by and through its wholly owned subsidiaries that are certified to provide the services being ordered hereunder, (collectively "TWTC") and PTA FLA, Inc. ("Customer"), a FL corporation, and is effective upon execution both by Customer and TWTC ("Effective Date"). Customer and TWTC may be referred to individually as a "Party" or collectively as the "Parties". TWTC will remain responsible for the performance of its subsidiaries under this Agreement, which own and operate the telecommunications facilities.

1. **Service Orders:** Customer may submit service orders to TWTC to purchase telecommunication and related services under this Agreement ("Service Orders"). The Service Orders describe the telecommunication and related services that are available for purchase ("Services"). When fully executed by both Parties, the Service Orders and these Standard Terms and Conditions form the final written agreement between the Parties ("Agreement"). The Agreement can only be amended or modified in a written document that is signed by both Parties. All Services are offered subject to availability, and TWTC has the right not to accept a Service Order submitted by Customer. If a Service Order has been accepted by TWTC, TWTC will provide Services for the term agreed to in such Service Order ("Service Term").

2. **Term:** The term ("Term") of this Agreement is Non-Standard commencing on the Effective Date. The Term will automatically renew for successive one year periods unless terminated by either Party upon written notice given at least thirty days prior to expiration of the then existing Term. Upon expiration of a Service Term for a particular Service, the Service Term will automatically renew for successive one year terms unless terminated by either Party upon written notice delivered in accordance with Section 20 below at least thirty days prior to expiration of the then existing Service Term. When the Term of this Agreement expires, existing Services continue in effect for the remainder of their respective Service Terms and will continue to be governed by this Agreement.

3. **Cancellation, Modification or Expedition of Orders** "Cancellation", "Modification" and "Expedite Charges" referenced hereunder are posted to the TWTC Website (www.twtelecom.com) and are subject to modification by TWTC effective upon posting to the TWTC Website.

(a) **Cancellation.** Customer may cancel a Service Order(s) if the request is received in writing by TWTC prior to the planned installation date, and TWTC shall have the right to assess a Cancellation Charge (a Service Order can only be cancelled one time; the execution of a new Service Order restarts the cancellation process). If the request to cancel is received after installation has begun, Customer must pay full termination liability as set forth in Section 14 below.

(b) **Modification.** Customer may request in writing the modification of any Service Order(s). Such request shall result in a Modification Charge. If TWTC receives a written modification request for delay of installation less than 3 days prior to the planned installation date, Customer must pay, in addition to the Modification Charge, the monthly recurring charge ("MRC") applicable to the delayed Service for the shorter of one billing month or the period from the original due date to the requested installation date. TWTC reserves the right to limit the number of requests to delay the planned installation date.

(c) **Expedite.** Customer may request an expedited installation date. If TWTC accepts the expedited installation date, Customer must pay an Expedite Charge.

(d) **Third Party Charges.** In addition to the charges set forth in (a), (b) and (c) above, TWTC may bill Customer for any third party charges it incurs in order to complete Customer's request to cancel, modify, or expedite the Service Order(s).

4. TWTC Network, Access and Interconnection:

(a) **Responsibilities.** TWTC will own and control the telecommunications equipment, cable and facilities installed and operated by TWTC for provision of the Services to Customer ("TWTC Network"). The TWTC Network will remain TWTC's personal property regardless of where located or attached. TWTC has the right to upgrade, replace or remove the TWTC Network in whole or in part, regardless of where located, so long as the Services continue to perform. TWTC has the right to limit the manner in which any portion of the TWTC Network is used to protect the technical integrity of the Network. Customer may not alter, move or disconnect any parts of the TWTC Network and is responsible for any damage to, or loss of, the TWTC Network caused by Customer's (or its end users') breach of this provision, negligence or willful misconduct. TWTC has no obligation to install, maintain or repair any equipment owned or provided by Customer, unless otherwise agreed to in a writing executed by the Parties. If Customer's equipment is incompatible with the Service, Customer is responsible for any special interface equipment or facilities necessary to achieve compatibility.

(b) **Access.** Customer must provide TWTC with access to its premises to install and maintain Services and TWTC's Network. Customer must provide, at its expense, the following (collectively "Premise Requirements"): (i) appropriate space, power and environmental conditioning; and (ii) reasonable access rights and/or rights of way from third parties, as may be required for the installation and maintenance of the TWTC Network at and into Customer's premises. Customer must pay a Modification Charge if Customer does not provide the Premise Requirements prior to the scheduled installation date. In addition to the Modification Charge, TWTC may charge Customer for the reasonable time and materials incurred and documented by TWTC that are incurred because of Customer's failure to timely provide the Premise Requirements plus any third party charges assessed against TWTC. Customer must provide TWTC with a contact and/or help desk number that can be reached 24 hours per day/7 days per week.

(c) **Demarcation Point and Inside Wiring.** TWTC shall be responsible for provisioning Service up to the Demarcation Point and Customer is responsible for providing and maintaining any necessary wiring and facilities on Customer's side of the Demarcation Point. "Demarcation Point" means the TWTC-designated physical interface between TWTC's Network and Customer's equipment, which point shall be either (i) in the case of a Service terminating at a TWTC owned or controlled premises, TWTC's designated distribution panel or network interface device located within such TWTC premises or (ii) in the case of a Service terminating at Customer's premises, the distribution panel or network interface device located at the common telecommunications ("telco") demarcation at the Customer or end-user premises (e.g., entry point for telco facilities, telco closet or common telco room). If requested by Customer, TWTC may install, co-ordinate or otherwise arrange for installing or obtaining from third parties, facilities on Customer's side of the Demarcation Point ("Inside Wiring"). Customer agrees to pay Time and Materials rates posted at www.twtelecom.com for any Inside Wiring performed by TWTC personnel and agrees that TWTC may bill Customer for any third party charges it incurs to provide such Inside Wiring.

(d) **Letter of Authorization / Carrier Facility Assignment.** If Customer intends to connect the Services to facilities that neither it nor TWTC owns, it must provide TWTC with and maintain (for the Service Term) a current letter of authorization and carrier facility assignment, as applicable.

5. Installation and Maintenance:

(a) **Installation.** TWTC will notify Customer when the Service has been successfully installed and is available for Customer's use ("Service Date"). Unless Customer notifies TWTC by the close of business on the Service Date that the Service is not operational, the Service Term will commence. If Customer so notifies TWTC, the Service Date will occur and the Service Term will commence when the Service is operational. The Service Date will not be delayed or postponed due to problems with Customer's equipment or Customer's lack of readiness to accept or use Service.

(b) Maintenance:

(i) Scheduled Maintenance. TWTC will monitor TWTC's Network 24 hours per day, 7 days per week. Scheduled Maintenance will be performed between the hours of midnight and 6:00 a.m. (local time where the maintenance is being performed) unless another time is agreed to by the Parties for the particular circumstance. TWTC will endeavor to provide Customer with at least five business days notice before performing Scheduled Maintenance unless a shorter notice period is required under the circumstances.

(ii) Emergency Maintenance. If TWTC has to perform maintenance outside of the Scheduled Maintenance window set forth in Section 5(b)(i) above, then TWTC will provide as much prior notice to Customer as is practicable under the circumstances.

6. Charges, Billing, Taxes and Payment:

(a) Services are billed on a monthly basis commencing with the Service Date. Services are invoiced in advance, but usage charges are invoiced in arrears. Any installation or other non-recurring charges, which are non-refundable, will appear on the first monthly invoice.

(b) TWTC may require a deposit prior to the provision of any new Service. TWTC also may require a deposit as a condition to its obligation to continue to provide Service(s) if Customer has failed to timely pay for Service(s) on two occasions during any six month period.

(c) Taxes, as defined below, will be invoiced as a line item charge separate from the MRCs for the Services. Customer will be liable for Taxes which were assessed by or paid to an appropriate taxing authority within the applicable statute of limitations period. If Customer fails to pay any Taxes properly billed, then as between TWTC and Customer, Customer will be solely responsible for payment of the Taxes, and penalty and interest.

"Tax" or "Taxes" mean any federal, state or local excise, gross receipts, value added, sales, use or other similar tax, fee, tax-like fee or surcharge of whatever nature and however designated, imposed, or sought to be imposed, on or with respect to purchases by Customer from TWTC for consideration under this Agreement or for TWTC's use of public streets or rights of way, which TWTC is required or permitted by law or a tariff to collect from Customer; provided, however, that the term "Tax" will not include any tax on TWTC's corporate existence, status, income, corporate property or payroll taxes.

If either Party is audited by a taxing or other governmental authority, the other Party agrees to cooperate reasonably by responding to the audit inquiries in a proper, complete and timely manner. TWTC will cooperate, at Customer's expense, with reasonable requests of Customer in connection with any Tax contest or refund claim. The Customer will ensure that no lien is attached to or allowed to remain on any asset of TWTC as a result of any Tax contest. Customer will indemnify and hold TWTC harmless against any liabilities, damages, losses, costs or expenses arising out of such Tax proceedings, including without limitation any additional Taxes, interest, penalties and attorney's fees.

If Customer claims an exemption for any Taxes, Customer must provide TWTC with a proper tax exemption certificate as authorized by the appropriate taxing authority. Customer must pay the applicable Taxes to TWTC until it provides TWTC with a valid tax exemption certificate. If applicable law exempts a Service under this Agreement from a Tax, but does not also provide an exemption procedure, then TWTC will not collect such Tax. If Customer provides TWTC with a letter signed by one of its officers: (i) claiming a right to the exemption; (ii) identifying the applicable law that allows such exemption and does not require an exemption certificate; and (iii) agreeing to indemnify and hold TWTC harmless from any tax, interest, penalties, loss, cost or expense asserted against TWTC as a result of its not collecting the Taxes from Customer.

(d) Payment for all undisputed amounts must be received by TWTC on or before the due date specified on the bill ("Due Date"). Any payment or portion thereof not received by the Due Date is subject to a late charge on the unpaid amount at the lesser of 1.5% per month or the maximum rate permitted by law.

7. Disputes: Customer may dispute charges invoiced by TWTC by logging onto TWTC's online customer portal at <https://customerportal.twtelecom.com/> and completing a dispute form, or by contacting TWTC's dispute telephone line at 1-800-829-0420. All disputes must be submitted to TWTC in the manner specified above within 120 calendar days of the date of the invoice associated with the disputed charges, or the invoice shall be deemed correct and all rights to dispute such charges are waived. Withheld disputed amounts determined in favor of TWTC must be paid by Customer within five (5) business days following written, electronic or telephonic notice of the resolution, and will bear interest at the lesser of 1.5% per month or the maximum rate allowed by law from the Due Date until the date paid.

8. Service Levels / Service Outage Credits:

(a) Service Level Agreement ("SLA"). The SLA for a particular Service, which specifies the applicable performance metrics and outage credit schedule, is contained in each Service Order. If no SLA is included with a Service Order, then credits for Service Outages (defined below) will be issued at 1/1440 of the applicable MRC per 30 minute outage for up to a 24-hour period, but if a Service Outage lasts greater than 24 hours, at 1/144 of the applicable MRC per 3 hour period. Credits issued during any calendar month will not exceed the MRC associated with the affected Service that experienced the Service Outage(s).

(b) Service Outage Definition. A "Service Outage" is defined as either: (a) material non-compliance with a specific performance metric in a service level agreement and such non-compliance is caused by TWTC's Network; or (b) a complete loss of transmission or reception capability for a Service caused by TWTC's Network.

(c) Reporting and Tracking of Service Outages.

If there is a Service Outage, Customer must contact TWTC's Customer Network Reliability Center ("CNRC") at 800-829-0420, and TWTC will open a trouble ticket and provide Customer with a trouble ticket number for tracking purposes.

(d) Duration of Service Outage and Application of Credits. For the purpose of calculating applicable credits, a Service Outage begins when Customer reports the Service Outage to TWTC's CNRC, and ends when the Service is restored. The duration of the Service Outage only includes outages that are caused by TWTC's Network and does not include outages caused by the equipment, acts or omissions of Customer, third parties, Force Majeure events, or outages occurring during scheduled or emergency maintenance. The duration of a Service Outage also does not include any time during which TWTC is not allowed access to the premises necessary to restore the Service. Credits for Service Outages are only issued if requested by Customer, and such requests must be submitted to TWTC within 120 days from the date Service is restored.

(e) Chronic Trouble Services. If two Service Outages have occurred on a particular Service during a 30-day period, and a third Service Outage occurs within thirty days following the second Service Outage, Customer may terminate the applicable Service without early termination liability provided that Customer supplies TWTC with a written termination notice no later than thirty days following the third Service Outage.

(f) Remedies. Notwithstanding anything to the contrary in this Agreement, the remedies set forth in the service level agreement and Sections 8(a) and 8(e) of this Agreement constitute Customer's sole and exclusive remedy for Service Outages.

(g) Service Outages Not Caused by TWTC's Network. If TWTC responds to a service call initiated by Customer, and TWTC reasonably determines that the cause of the problem is: (i) not due to TWTC's Network; or (ii) on Customer's side of the Demarcation Point, Customer must compensate TWTC for the service call at TWTC's then prevailing Time and Materials rates posted at www.twtelecom.com.

hcr

9. Governmental Regulation - Changes:

- (a) This Agreement is subject to all applicable federal, state and local laws, rules and regulations, and each Party must comply with them in performing its obligations hereunder. To the extent any provision herein conflicts with any applicable law, rule or regulation, such law, rule or regulation will supersede the conflicting provision.
- (b) TWTC may discontinue or impose additional requirements to the provision of Service, upon 15 days written notice, if necessary to meet regulatory requirements or if such requirements have a material, adverse impact on the economic feasibility of TWTC providing the Service. Customer is not responsible for the termination liability set forth in Section 14 below if TWTC discontinues the Service under this subsection.

10. Indemnification: Each Party ("Indemnitor") shall indemnify, defend and hold harmless the other Party ("Indemnitee") from all losses or damages arising from or related to bodily injury or physical damage to tangible property caused by the negligence or willful misconduct of Indemnitor. Customer shall indemnify, defend and hold TWTC harmless from all losses or damages arising from Customer's violation of third party intellectual property rights, all claims of any kind by Customer's end users, or any act or omission of Customer associated with any Service.

 11. Limitation of Liability: Except for the Parties' respective obligations set forth in Section 14 herein, neither Party is liable to the other for indirect, consequential, special, incidental, or punitive damages of any kind or nature whatsoever (including without limitation lost profits, lost revenues, lost savings, lost opportunity or harm to business), whether or not foreseeable, whether or not the Party had or should have had any knowledge, actual or constructive, that such damages might be incurred, and regardless of the form of action, nature of the claim asserted or the frustration of either Party's purpose. Indirect damages include, but are not limited to, damages of the kinds specified in the preceding sentence that are incurred by a third party and are asserted against a Party (including attorneys' fees and expenses). TWTC's liability to Customer for direct damages may not exceed one month's calculation of the applicable MRCs regardless of the form of action, nature of the claim asserted or the frustration of either Party's purpose. TWTC has no liability for the content of information that Customer passes through TWTC's Network, Customer's transmission errors, or any failure to establish connections outside of the TWTC Network.

12. Termination by TWTC:

- (a) Termination With Notice. TWTC may disconnect all Service(s) associated with a delinquent account upon ten (10) days written notice for Customer's failure to pay amounts due under this Agreement which remain uncured at the end of the notice period; or upon thirty (30) days written notice for: (i) Customer's breach of a non-economic, material provision of this Agreement or any law, rule or regulation governing the Services which remains uncured at the end of the notice period; (ii) Customer's insolvency, bankruptcy, assignment for benefit of creditors, appointment of trustee or receiver; and/or (iii) any governmental prohibition or required alteration of the Services.
- (b) Termination Without Notice. TWTC may terminate or suspend Services without notice if: (i) necessary to protect TWTC's Network; (ii) TWTC has reasonable evidence of Customer's illegal, improper or unauthorized use of Services; or (iii) required by legal or regulatory authority.
- (c) Post Termination. Any termination or disconnection shall not relieve Customer of any liability incurred prior to such termination or disconnection, or for payment of unaffected Services. TWTC retains the right to pursue all available legal remedies if it terminates this Agreement or disconnects Service(s) in accordance with this Section. All terms and conditions of this Agreement shall continue to apply to any Services not so terminated, regardless of the termination of this Agreement. If TWTC terminates Service in accordance with this Section, and Customer wants to restore such Service, Customer first must pay all past due charges, a reconnection charge and a deposit equal to 2 months' recurring charges. All requests by Customer for disconnection of On-Net Services will be processed by TWTC in 30 days or less, and for disconnection of long haul Off-Net Services in 45 days or less, following delivery of the written notice. Customer must pay for Services until such disconnection actually occurs. Customer must submit requests to disconnect or terminate Services to TWTC's Order Entry department in accordance with Section 20 below.
13. Termination by Customer. Customer may terminate this Agreement and/or any Service Order hereunder upon thirty (30) days prior written notice, without incurring termination liability, for TWTC's (i) breach of any material provision of this Agreement, or any law, rule or regulation that affects Customer's use of Service(s), which remains uncured at the end of the notice period and/or (ii) insolvency, bankruptcy, assignment for the benefit of creditors, appointment of trustee or receiver or similar event.
14. Termination Liability: If TWTC terminates this Agreement or any Service Order(s) pursuant to Section 12 above (other than subsections a(ii) and/or b(iii)), or if Customer terminates this Agreement or any Service Order(s) for any reason other than as set forth in Section 13 above, all MRCs associated with the terminated Service(s) for the balance of the applicable Service Term shall become immediately due and payable.
15. Assignment: Neither Party may assign this Agreement without the prior written consent of the other Party, not to be unreasonably conditioned, withheld or delayed, except that: (1) TWTC may assign its rights and/or obligations hereunder (a) to its parent, affiliates or subsidiaries, (b) pursuant to any merger, acquisition, reorganization, sale or transfer of all or substantially all its assets, or (c) for purposes of financing; and (2) Customer may assign its rights and/or obligations hereunder (a) to its parent, affiliates or subsidiaries, or (b) pursuant to any merger, acquisition, reorganization, sale or transfer of all or substantially all its assets, provided that any assignment by Customer pursuant to this exception is subject to the following conditions: (i) the proposed assignee satisfies TWTC's credit and deposit standards; (ii) Customer has fully paid for all Services through the date of assignment; and (iii) the proposed assignee agrees in writing to be bound by all provisions of this Agreement.

16. Entire Agreement: This Agreement, together with the Service Order(s) and applicable tariffs set forth the entire agreement with respect to the subject matter hereof, and supersede all prior agreements, promises, representations, and negotiations between the Parties. If there is a conflict, the Service Order shall prevail over this Agreement and any applicable tariff shall prevail over both. Modifications, amendments, supplements to or waivers of this Agreement must be in writing and executed by both Parties.

17. Force Majeure: Either Party shall be excused from performance if inability to perform is due to a cause or causes beyond such Party's reasonable control, including without limitation, acts of God, fire, explosion, vandalism, acts of terrorism, cable cuts caused by a third party, adverse weather conditions, labor strikes and governmental action ("Force Majeure"). If such inability to perform continues for sixty days or longer, the other Party may terminate the affected Services. Customer's invocation of this clause does not relieve Customer of its obligation to pay for Services actually received.

18. Governing Law - Litigation: The interpretation of the rights and duties of the Parties and any claim, controversy or dispute arising under or related to this Agreement shall be governed by and subject to the laws of the State of __SC__, excluding its principles of conflicts of law. If either Party commences litigation under this Agreement, the prevailing Party is entitled to reimbursement of its costs and attorneys' fees from the other Party.

19. Headings: Headings herein are for convenience only and are not intended to have substantive significance in interpreting this Agreement.

20. Notices: Any notice required under this Agreement must be in writing and be delivered to the receiving Party at the addresses listed below (i) in person, (ii) by certified mail with return receipt requested, or (iii) by overnight courier. A notice is deemed given (i) when delivered, if personally delivered, (ii) at the time indicated on the return receipt, if delivered by certified mail, or (iii) at the time the party or its representative executes the delivery receipt, if delivered via courier. TWTC must provide such notice to Customer's billing address, and Customer must provide such notice to TWTC at 1401 Main Street, Suite 102, Columbia, SC 29201, Attn: General Manager, except that if Customer is disconnecting Services for any reason, it must deliver notice to TWTC either by facsimile to 303-803-8638 or by email to "CustomerCare@twtelecom.com". Notice by facsimile or email is deemed given when delivered.

21. No Waiver: Either Party's failure to enforce any provision or term of this Agreement shall not be construed as a future or continuing waiver of such provision or term of this Agreement.

22. Public Releases, Use of Name: Neither Party may issue a news release, public announcement, advertisement or other form of publicity regarding this Agreement or the Services provided hereunder without the prior written consent of the other Party. Customer may not use TWTC's name, logo or service mark without TWTC's prior written consent. TWTC may use Customer's name and logo in materials presented to analysts and investors.

23. Representations and Warranties: Each Party represents and warrants that it, and the person signing on its behalf, is fully authorized to enter into this Agreement. TWTC represents and warrants that the Services will be performed by qualified and trained personnel. TWTC does not guarantee, represent or warrant that the Service(s) will be without interruption. TWTC MAKES NO OTHER REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, EITHER IN FACT OR BY OPERATION OF LAW, AND DISCLAIMS ANY AND ALL WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR OR ORDINARY PURPOSE.

24. Severability: If any provision hereunder is declared or held invalid, illegal or unenforceable, this Agreement will be revised only to the extent necessary to make such provision(s) legal and enforceable, or if impossible, the unaffected portions of this Agreement shall remain in full force and effect so long as the Agreement remains consistent with the Parties' original intent.

25. Survival: The terms and conditions of this Agreement will survive the expiration or termination of this Agreement to the extent necessary for their enforcement and for the realization of the benefit thereof by the Party in whose favor they operate.

26. Relationship of Parties; No Third Party Beneficiaries: The Parties are independent contractors, and nothing herein creates or implies an agency, joint venture or partnership relationship between the Parties. This Agreement shall bind and inure to the benefit of TWTC, Customer, and permitted successors and assigns. The Parties do not intend to create any rights for the benefit of any third parties.

27. Confidentiality: Each Party may disclose confidential information to the other Party in connection with this Agreement. Confidential information includes this Agreement, Service Orders, Service Level Agreements, all pricing information and any other information that is marked confidential or bears a marking of like import, or that the Party disclosing such information states is confidential and then confirms such confidentiality in writing within ten (10) days ("Confidential Information"). Confidential information may only be used in connection with performance under this Agreement. Confidential information may not be disclosed except to those employees or affiliates of the receiving Party who have a need to know, or to consultants or subcontractors of the receiving Party who agree to be bound by this Section. Confidential information does not include information that is generally available to the public through no wrongful act of the receiving Party or is independently developed by the receiving Party. Upon termination or expiration of this Agreement, the receiving Party will return the Confidential Information or destroy it. The obligations of this provision will survive for five years after the termination or expiration of this Agreement.

tw telecom STANDARD TERMS AND CONDITIONS

This Agreement is by and between tw telecom holdings inc., a Delaware corporation, by and through its wholly owned subsidiaries that are certified to provide the services being ordered hereunder, (collectively "TWTC" or "the Company") and PTA FLA, Inc. ("Customer"), a FL corporation and is effective upon execution both by Customer and TWTC ("Effective Date"). Customer and TWTC may be referred to individually as a "Party" or collectively as the "Parties". TWTC will remain responsible for the performance of its subsidiaries under this Agreement, which own and operate the telecommunications facilities.

1. Service Orders: Customer may submit service orders to TWTC to purchase telecommunication and related services under this Agreement ("Service Orders"). The Service Orders describe the telecommunication and related services that are available for purchase ("Services"). When fully executed by both Parties, the Service Orders and these Standard Terms and Conditions form the final written agreement between the Parties ("Agreement"). The Agreement can only be amended or modified in a written document that is signed by both Parties. All Services are offered subject to availability, and TWTC has the right not to accept a Service Order submitted by Customer. If a Service Order has been accepted by TWTC, TWTC will provide Services for the term agreed to in such Service Order and renewal periods ("Service Term").

2. Term: The term ("Term") of this Agreement is 28 months commencing on the Effective Date. The Term will automatically renew for successive one year periods unless terminated by either Party upon written notice given at least thirty days prior to expiration of the then existing Term. Upon expiration of a Service Term for a particular Service, the Service Term will automatically renew for successive one year terms unless terminated by either Party upon written notice delivered in accordance with Section 20 below at least thirty days prior to expiration of the then existing Service Term. When the Term of this Agreement expires, existing Services continue in effect for the remainder of their respective Service Terms and will continue to be governed by this Agreement.

3. Cancellation, Modification or Expedition of Orders: "Cancellation", "Modification" and "Expedite Charges" referenced hereunder are posted to the TWTC Website (www.twtelecom.com) and are subject to modification by TWTC effective upon posting to the TWTC Website.

(a) Cancellation. Customer may cancel a Service Order(s) if the request is received in writing by

TWTC prior to the planned installation date, and TWTC shall have the right to assess a Cancellation Charge (a Service Order can only be cancelled one time; the execution of a new Service Order restarts the cancellation process). If the request to cancel is received after installation has begun, Customer must pay full termination liability as set forth in Section 14 below.

(b) Modification. Customer may request in writing the modification of any Service Order(s). Such request shall result in a Modification Charge. If TWTC receives a written modification request for delay of installation less than 3 days prior to the planned installation date, Customer must pay, in addition to the Modification Charge, the monthly recurring charge ("MRC") applicable to the delayed Service for the shorter of one billing month or the period from the original due date to the requested installation date. TWTC reserves the right to limit the number of requests to delay the planned installation date.

(c) Expedite. Customer may request an expedited installation date. If TWTC accepts the expedited installation date, Customer must pay an Expedite Charge.

(d) Third Party Charges. In addition to the charges set forth in (a), (b) and (c) above, TWTC may bill Customer for any third party charges it incurs in order to complete Customer's request to cancel, modify, or expedite the Service Order(s).

4. TWTC Network, Access and Interconnection:

(a) Responsibilities. TWTC will own and control the telecommunications equipment, cable and facilities installed and operated by TWTC for provision of the Services to Customer ("TWTC Network"). The TWTC Network will remain TWTC's personal property regardless of where located or attached. TWTC has the right to upgrade, replace or remove the TWTC Network in whole or in part, regardless of where located, so long as the Services continue to perform. TWTC has the right to limit the manner in which any portion of the TWTC Network is used to protect the technical integrity of the Network. Customer may not alter, move or disconnect any parts of the TWTC Network and is responsible for any damage to, or loss of, the TWTC Network caused by Customer's (or its end users') breach of this provision, negligence or willful misconduct. TWTC has no obligation to install, maintain or repair any equipment owned or provided by Customer, unless otherwise agreed to in a writing executed by the Parties. If Customer's equipment is

incompatible with the Service, Customer is responsible for any special interface equipment or facilities necessary to achieve compatibility.

(b) Access. Customer must provide TWTC with access to its premises to install and maintain Services and TWTC's Network. Customer must provide, at its expense, the following (collectively "Premise Requirements"): (i) appropriate space, power and environmental conditioning; and (ii) reasonable access rights and/or rights of way from third parties, as may be required for the installation and maintenance of the TWTC Network at and into Customer's premises. Customer must pay a Modification Charge if Customer does not provide the Premise Requirements prior to the scheduled installation date. In addition to the Modification Charge, TWTC may charge Customer for the reasonable time and materials incurred and documented by TWTC that are incurred because of Customer's failure to timely provide the Premise Requirements plus any third party charges assessed against TWTC. Customer must provide TWTC with a contact and/or help desk number that can be reached 24 hours per day/7 days per week.

(c) Demarcation Point and Inside Wiring. TWTC shall be responsible for provisioning Service up to the Demarcation Point and Customer is responsible for providing and maintaining any necessary wiring and facilities on Customer's side of the Demarcation Point. "Demarcation Point" means the TWTC-designated physical interface between TWTC's Network and Customer's equipment, which point shall be either (i) in the case of a Service terminating at a TWTC owned or controlled premises, TWTC's designated distribution panel or network interface device located within such TWTC premises or (ii) in the case of a Service terminating at Customer's premises, the distribution panel or network interface device located at the common telecommunications ("telco") demarcation at the Customer or end-user premises (e.g., entry point for telco facilities, telco closet or common telco room). If requested by Customer, TWTC may install, coordinate or otherwise arrange for installing or obtaining from third parties, facilities on Customer's side of the Demarcation Point ("Inside Wiring"). Customer agrees to pay Time and Materials rates posted at www.twtelecom.com for any Inside Wiring performed by TWTC personnel and agrees that TWTC may bill Customer for any third party charges it incurs to provide such Inside Wiring.

(d) Letter of Authorization / Carrier Facility Assignment. If Customer intends to connect the Services to facilities that neither it nor TWTC owns, it must provide TWTC with and maintain (for the

Service Term) a current letter of authorization and carrier facility assignment, as applicable.

5. Installation and Maintenance:

(a) Installation. TWTC will notify Customer when the Service has been successfully installed and is available for Customer's use ("Service Date"). Unless Customer notifies TWTC by the close of business on the Service Date that the Service is not operational, the Service Term will commence. If Customer so notifies TWTC, the Service Date will occur and the Service Term will commence when the Service is operational. The Service Date will not be delayed or postponed due to problems with Customer's equipment or Customer's lack of readiness to accept or use Service.

(b) Maintenance:

(i) Scheduled Maintenance. TWTC will monitor TWTC's Network 24 hours per day, 7 days per week. Scheduled Maintenance will be performed between the hours of midnight and 6:00 a.m. (local time where the maintenance is being performed) unless another time is agreed to by the Parties for the particular circumstance. TWTC will endeavor to provide Customer with at least five business days notice before performing Scheduled Maintenance unless a shorter notice period is required under the circumstances.

(ii) Emergency Maintenance. If TWTC has to perform maintenance outside of the Scheduled Maintenance window set forth in Section 5(b)(i) above, then TWTC will provide as much prior notice to Customer as is practicable under the circumstances.

6. Charges, Billing, Taxes and Payment:

(a) Services are billed on a monthly basis commencing with the Service Date. Services are invoiced in advance, but usage charges are invoiced in arrears. Any installation or other non-recurring charges, which are non-refundable, will appear on the first monthly invoice.

(b) TWTC may require a deposit prior to the provision of any new Service. TWTC also may require a deposit as a condition to its obligation to continue to provide Service(s) if Customer has failed to timely pay for Service(s) on two occasions during any six month period.

(c) Taxes, as defined below, will be invoiced as a line item charge separate from the MRCs for the Services. Customer will be liable for Taxes which

were assessed by or paid to an appropriate taxing authority within the applicable statute of limitations period. If Customer fails to pay any Taxes properly billed, then as between TWTC and Customer, Customer will be solely responsible for payment of the Taxes, and penalty and interest.

"Tax" or "Taxes" mean any federal, state or local excise, gross receipts, value added, sales, use or other similar tax, fee, tax-like fee or surcharge of whatever nature and however designated, imposed, or sought to be imposed, on or with respect to purchases by Customer from TWTC for consideration under this Agreement or for TWTC's use of public streets or rights of way, which TWTC is required or permitted by law or a tariff to collect from Customer; *provided, however*, that the term "Tax" will not include any tax on TWTC's corporate existence, status, income, corporate property or payroll taxes.

If either Party is audited by a taxing or other governmental authority, the other Party agrees to cooperate reasonably by responding to the audit inquiries in a proper, complete and timely manner. TWTC will cooperate, at Customer's expense, with reasonable requests of Customer in connection with any Tax contest or refund claim. The Customer will ensure that no lien is attached to or allowed to remain on any asset of TWTC as a result of any Tax contest. Customer will indemnify and hold TWTC harmless against any liabilities, damages, losses, costs or expenses arising out of such Tax proceedings, including without limitation any additional Taxes, interest, penalties and attorney's fees.

If Customer claims an exemption for any Taxes, Customer must provide TWTC with a proper tax exemption certificate as authorized by the appropriate taxing authority. Customer must pay the applicable Taxes to TWTC until it provides TWTC with a valid tax exemption certificate. If applicable law exempts a Service under this Agreement from a Tax, but does not also provide an exemption procedure, then TWTC will not collect such Tax if Customer provides TWTC with a letter signed by one of its officers: (i) claiming a right to the exemption; (ii) identifying the applicable law that allows such exemption and does not require an exemption certificate; and (iii) agreeing to indemnify and hold TWTC harmless from any tax, interest, penalties, loss, cost or expense asserted against TWTC as a result of its not collecting the Taxes from Customer.

(d) Payment for all undisputed amounts due under this Agreement must be received by TWTC on or before the due date specified on the bill ("Due

Date"). Any payment or portion thereof not received by the Due Date is subject to a late charge on the unpaid amount at the lesser of 1.5% per month or the maximum rate permitted by law.

7. Disputes: Customer may dispute charges invoiced by TWTC by logging onto TWTC's online customer portal at

<https://customerportal.twtelecom.com/> and completing a dispute form, or by contacting TWTC's dispute telephone line at 1-800-829-0420. All disputes must be submitted to TWTC in the manner specified above within 120 calendar days of the date of the invoice associated with the disputed charges, or the invoice shall be deemed correct and all rights to dispute such charges are waived. Withheld disputed amounts determined in favor of TWTC must be paid by Customer within five (5) business days following written, electronic or telephonic notice of the resolution, and will bear interest at the lesser of 1.5% per month or the maximum rate allowed by law from the Due Date until the date paid.

8. Service Levels / Service Outage Credits:

(a) Service Level Agreement ("SLA"). The SLA for a particular Service, which specifies the applicable performance metrics and outage credit schedule, is contained in each Service Order. If no SLA is included with a Service Order, then credits for Service Outages (defined below) will be issued at 1/1440 of the applicable MRC per 30 minute outage for up to a 24-hour period, but if a Service Outage lasts greater than 24 hours, at 1/144 of the applicable MRC per 3 hour period. Credits issued during any calendar month will not exceed the MRC associated with the affected Service that experienced the Service Outage(s).

(b) Service Outage Definition. A "Service Outage" is defined as either: (a) material non-compliance with a specific performance metric in a service level agreement and such non-compliance is caused by TWTC's Network; or (b) a complete loss of transmission or reception capability for a Service caused by TWTC's Network.

(c) Reporting and Tracking of Service Outages. If there is a Service Outage, Customer must contact TWTC's Customer Network Reliability Center ("CNRC") at 800-829-0420, and TWTC will open a trouble ticket and provide Customer with a trouble ticket number for tracking purposes.

(d) Duration of Service Outage and Application of Credits. For the purpose of calculating applicable credits, a Service Outage begins when Customer

reports the Service Outage to TWTC's CNRC, and ends when the Service is restored. The duration of the Service Outage only includes outages that are caused by TWTC's Network and do not include outages caused by the equipment, acts or omissions of Customer, third parties, Force Majeure events, or outages occurring during scheduled or emergency maintenance. The duration of a Service Outage also does not include any time during which TWTC is not allowed access to the premises necessary to restore the Service. Credits for Service Outages are only issued if requested by Customer, and such requests must be submitted to TWTC within 120 days from the date Service is restored.

(e) Chronic Trouble Services. If two Service Outages have occurred on a particular Service during a 30-day period, and a third Service Outage occurs within thirty days following the second Service Outage, Customer may terminate the applicable Service without early termination liability provided that Customer supplies TWTC with a written termination notice no later than thirty days following the third Service Outage.

(f) Remedies. Notwithstanding anything to the contrary in this Agreement, the remedies set forth in the service level agreement and in Sections 8(a) and 8(e) of this Agreement constitute Customer's sole and exclusive remedy for Service Outages.

(g) Service Outages Not Caused by TWTC's Network. If TWTC responds to a service call initiated by Customer, and TWTC reasonably determines that the cause of the problem is: (i) not due to TWTC's Network; or (ii) on Customer's side of the Demarcation Point, Customer must compensate TWTC for the service call at TWTC's then prevailing Time and Materials rates posted at www.twtelecom.com.

9. Governmental Regulation - Changes:

(a) This Agreement is subject to all applicable federal, state and local laws, rules and regulations, and each Party must comply with them in performing its obligations hereunder. To the extent any provision herein conflicts with any applicable law, rule or regulation, such law, rule or regulation will supersede the conflicting provision.

(b) TWTC may discontinue or impose additional requirements to the provision of Service, upon 15 days written notice, if necessary to meet regulatory requirements or if such requirements have a material, adverse impact on the economic feasibility of TWTC providing the Service. Customer is not responsible for the termination liability set forth in

Section 14 below if TWTC discontinues the Service under this subsection.

10. Indemnification: Each Party ("Indemnitor") shall indemnify, defend and hold harmless the other Party ("Indemnitee") from all losses or damages arising from or related to bodily injury or physical damage to tangible property caused by the negligence or willful misconduct of Indemnitor. Customer shall indemnify, defend and hold TWTC harmless from all losses or damages arising from Customer's violation of third party intellectual property rights, all claims of any kind by Customer's end users, or any act or omission of Customer associated with any Service.

11. Limitation of Liability: Except for the Parties' respective obligations set forth in Section 14 herein, neither Party is liable to the other for indirect, consequential, special, incidental, or punitive damages of any kind or nature whatsoever (including without limitation lost profits, lost revenues, lost savings, lost opportunity or harm to business), whether or not foreseeable, whether or not the Party had or should have had any knowledge, actual or constructive, that such damages might be incurred, and regardless of the form of action, nature of the claim asserted or the frustration of either Party's purpose. Indirect damages include, but are not limited to, damages of the kinds specified in the preceding sentence that are incurred by a third party and are asserted against a Party (including attorneys' fees and expenses). TWTC's liability to Customer for direct damages may not exceed one month's calculation of the applicable MRCs regardless of the form of action, nature of the claim asserted or the frustration of either Party's purpose. TWTC has no liability for the content of information that Customer passes through TWTC's Network, Customer's transmission errors, or any failure to establish connections outside of the TWTC Network.

12. Termination by TWTC:

(a) Termination With Notice. TWTC may disconnect all Service(s) associated with a delinquent account upon ten (10) days written notice for Customer's failure to pay amounts due under this Agreement which remain uncured at the end of the notice period; or upon thirty (30) days written notice for: (i) Customer's breach of a non-economic, material provision of this Agreement or any law, rule or regulation governing the Services which remains uncured at the end of the notice period; (ii) Customer's insolvency, bankruptcy, assignment for benefit of creditors, appointment of

trustee or receiver; and/or (iii) any governmental prohibition or required alteration of the Services.

(b) Termination Without Notice. TWTC may terminate or suspend Services without notice if: (i) necessary to protect TWTC's Network; (ii) TWTC has reasonable evidence of Customer's illegal, improper or unauthorized use of Services; or (iii) required by legal or regulatory authority.

(c) Post Termination. Any termination or disconnection shall not relieve Customer of any liability incurred prior to such termination or disconnection, or for payment of unaffected Services. TWTC retains the right to pursue all available legal remedies if it terminates this Agreement or disconnects Service(s) in accordance with this Section. All terms and conditions of this Agreement shall continue to apply to any Services not so terminated, regardless of the termination of this Agreement. If TWTC terminates Service in accordance with this Section, and Customer wants to restore such Service, Customer first must pay all past due charges, a reconnection charge and a deposit equal to 2 months' recurring charges. All requests by Customer for disconnection of On-Net Services will be processed by TWTC in 30 days or less, and for disconnection of long haul Off-Net Services in 45 days or less, following delivery of the written notice. Customer must pay for Services until such disconnection actually occurs. Customer must submit requests to disconnect or terminate Services to TWTC's Order Entry department in accordance with Section 20 below.

13. Termination by Customer: Customer may terminate this Agreement and/or any Service Order hereunder upon thirty (30) days prior written notice, without incurring termination liability, for TWTC's (i) breach of any material provision of this Agreement, or any law, rule or regulation that affects Customer's use of Service(s), which remains uncured at the end of the notice period, and/or (ii) insolvency, bankruptcy, assignment for the benefit of creditors, appointment of trustee or receiver or similar event.

14. Termination Liability: If TWTC terminates this Agreement or any Service Order(s) pursuant to Section 12 above (other than subsections a(ii) and/or b(iii)), or if Customer terminates this Agreement or any Service Order(s) for any reason other than as set forth in Section 13 above, all MRCs associated with the terminated Service(s) for the balance of the applicable Service Term shall become immediately due and payable.

15. Assignment: Neither Party may assign this Agreement without the prior written consent of the

other Party, not to be unreasonably conditioned, withheld or delayed, except that: (1) TWTC may assign its rights and/or obligations hereunder (a) to its parent, affiliates or subsidiaries, (b) pursuant to any merger, acquisition, reorganization, sale or transfer of all or substantially all its assets, or (c) for purposes of financing; and (2) Customer may assign its rights and/or obligations hereunder (a) to its parent, affiliates or subsidiaries, or (b) pursuant to any merger, acquisition, reorganization, sale or transfer of all or substantially all its assets, provided that any assignment by Customer pursuant to this exception is subject to the following conditions: (i) the proposed assignee satisfies TWTC's credit and deposit standards; (ii) Customer has fully paid for all Services through the date of assignment; and (iii) the proposed assignee agrees in writing to be bound by all provisions of this Agreement.

16. Entire Agreement: This Agreement, together with the Service Order(s) and applicable tariffs set forth the entire agreement with respect to the subject matter hereof, and supersede all prior agreements, promises, representations, and negotiations between the Parties. If there is a conflict, the Service Order shall prevail over this Agreement and any applicable tariff shall prevail over both. Modifications, amendments, supplements to or waivers of this Agreement must be in writing and executed by both Parties.

17. Force Majeure: Either Party shall be excused from performance if inability to perform is due to a cause or causes beyond such Party's reasonable control, including without limitation, acts of God, fire, explosion, vandalism, acts of terrorism, cable cuts caused by a third party, adverse weather conditions, labor strikes and governmental action ("Force Majeure"). If such inability to perform continues for sixty days or longer, the other Party may terminate the affected Services. Customer's invocation of this clause does not relieve Customer of its obligation to pay for Services actually received.

18. Governing Law - Litigation: The interpretation of the rights and duties of the Parties and any claim, controversy or dispute arising under or related to this Agreement shall be governed by and subject to the laws of the State of SC, excluding its principles of conflicts of law. If either Party commences litigation under this Agreement, the prevailing Party is entitled to reimbursement of its costs and attorneys' fees from the other Party.

19. Headings: Headings herein are for convenience only and are not intended to have substantive significance in interpreting this Agreement.

20. Notices: Any notice required under this Agreement must be in writing and be delivered to the receiving Party at the addresses listed below (i) in person, (ii) by certified mail with return receipt requested, or (iii) by overnight courier. A notice is deemed given (i) when delivered, if personally delivered, (ii) at the time indicated on the return receipt, if delivered by certified mail, or (iii) at the time the party or its representative executes the delivery receipt, if delivered via courier. TWTC must provide such notice to Customer's billing address, and Customer must provide such notice to TWTC at 1401 Main Street, Suite 102 Columbia, SC 29201 Attn: General Manager, *except that if Customer is disconnecting Services for any reason, it must deliver notice to TWTC either by facsimile to 303-803-9638 or by email to "CustomerCare@twtelecom.com".* Notice by facsimile or email is deemed given when delivered.

21. No Waiver: Either Party's failure to enforce any provision or term of this Agreement shall not be construed as a future or continuing waiver of such provision or term of this Agreement.

22. Public Releases, Use of Name: Neither Party may issue a news release, public announcement, advertisement or other form of publicity regarding this Agreement or the Services provided hereunder without the prior written consent of the other Party. Customer may not use TWTC's name, logo or service mark without TWTC's prior written consent. TWTC may use Customer's name and logo in materials presented to analysts and investors.

23. Representations and Warranties: Each Party represents and warrants that it, and the person signing on its behalf, is fully authorized to enter into this Agreement. TWTC represents and warrants that the Services will be performed by qualified and trained personnel. TWTC does not guarantee, represent or warrant that the Service(s) will be without interruption. TWTC MAKES NO OTHER REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, EITHER IN FACT OR BY OPERATION OF LAW, AND DISCLAIMS ANY AND ALL WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR OR ORDINARY PURPOSE.

24. Severability: If any provision hereunder is declared or held invalid, illegal or unenforceable, this Agreement will be revised only to the extent necessary to make such provision(s) legal and

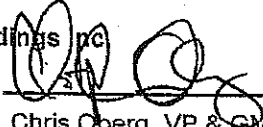
enforceable, or if impossible, the unaffected portions of this Agreement shall remain in full force and effect so long as the Agreement remains consistent with the Parties' original intent.

25. Survival: The terms and conditions of this Agreement will survive the expiration or termination of this Agreement to the extent necessary for their enforcement and for the realization of the benefit thereof by the Party in whose favor they operate.

26. Relationship of Parties; No Third Party Beneficiaries: The Parties are independent contractors, and nothing herein creates or implies an agency, joint venture or partnership relationship between the Parties. This Agreement shall bind and inure to the benefit of TWTC, Customer, and permitted successors and assigns. The Parties do not intend to create any rights for the benefit of any third parties.

27. Confidentiality: Each Party may disclose confidential information to the other Party in connection with this Agreement. Confidential information includes this Agreement, Service Orders, Service Level Agreements, all pricing information and any other information that is marked confidential or bears a marking of like import, or that the Party disclosing such information states is confidential and then confirms such confidentiality in writing within ten (10) days ("Confidential Information"). Confidential Information may only be used in connection with performance under this Agreement. Confidential Information may not be disclosed except to those employees or affiliates of the receiving Party who have a need to know, or to consultants or subcontractors of the receiving Party who agree to be bound by this Section. Confidential Information does not include information that is generally available to the public through no wrongful act of the receiving Party or is independently developed by the receiving Party. Upon termination or expiration of this Agreement, the receiving Party will return the Confidential Information or destroy it. The obligations of this provision will survive for five years after the termination or expiration of this Agreement.

tw telecom holdings inc

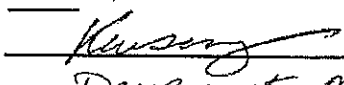
Signature: 

Name and Title: Chris Oberg, VP & GM of South Carolina

Date: 6/10/10

Sales Person: Christian Knierim

Customer: PTA - FLA, INC

Signature: 

Name and Title: Development Manager

Date: June 2010

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF RICHLAND

PTA-FLA, Inc.

CASE NO. 2015-CP-40-01394

☐ Plaintiff(s),

**NOTICE OF MOTION AND MOTION TO
RECONSIDER**

Versus

TW Telecom Holdings, Inc., a Delaware
corporation; and DOES 1-10, inclusive,

☒ Defendant(s).

check box above indicating submitting party

Plaintiff's attorney:

Jamie N. Smith (#101367)
PTA-FLA, Inc.
2101 Main Street/P.O. Box 8839
Columbia, SC 29202
P: 803-363-1323

Defendant's attorney:

H. Cooper Wilson, III (SC #74939)
HOOD LAW FIRM, LLC
172 Meeting Street/P.O. Box 1508
Charleston, SC 29402
P: 843-577-4435/F: 843-722-1630

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTION I and II)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II AND III)

SECTION I: Hearing Information

Nature of Motion: Motion to Reconsider

Estimated Time Needed: 15 Minutes

Court Reporter Needed: YES ☒/ NO ☐

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order –

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff/☒ Defendant

Date submitted

SECTION III: Motion Fee

- ☒ **PAID – AMOUNT:** \$25
☐ **EXEMPT:** (check reason) ☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the
attached order.
☐ Other:

JUDGE

CODE:

DATE:

CLERK'S VERIFICATION

Collected by: metts
(print name)

DATE FILED

8/4/15

- ☐ **MOTION FEE COLLECTED:** _____
☐ **CONTESTED-AMOUNT DUE:** _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-40-01394
	)	
Plaintiff,	)	NOTICE OF MOTION AND MOTION
	)	TO RECONSIDER
Versus	)	
	)	
TW Telecom Holdings, Inc., a Delaware	)	
corporation; and DOES 1-10, inclusive,	)	
	)	
Defendants.	)	

RICHLAND COUNTY
 FILED
 2015 AUG -4 AM 10:59
 JEANNE E. W. JORDAN
 C.C.P. & G.S.

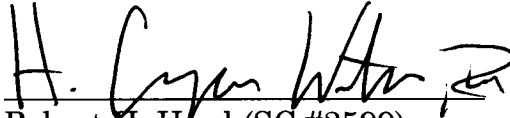
TO: JAMIE N. SMITH, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, TW Telecom Holdings Inc., a Delaware corporation (hereinafter "this Defendant"), will move ten days hence or as soon as may be heard, pursuant to Rules 52 and 59 of the South Carolina Rules of Civil Procedure, for an Order from the Court granting this Defendant's Motion to Reconsider its ruling on this Defendant's Motion for Enlargement of Time to Answer.

This Defendant respectfully submits to this Court that its original ruling should be reconsidered as it was based on legal authority which has been: (1) falsely misrepresented by the Plaintiff; (2) vacated or reversed by a later decision; and/or (3) simply not applicable to the facts of the case at hand.

This motion is supported by the applicable statutory and common law of the State of South Carolina and the attached memorandum.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com



Robert H. Hood (SC #2599)
Robert H. Hood, Jr. (SC #13491)
H. Cooper Wilson, III (SC #74939)

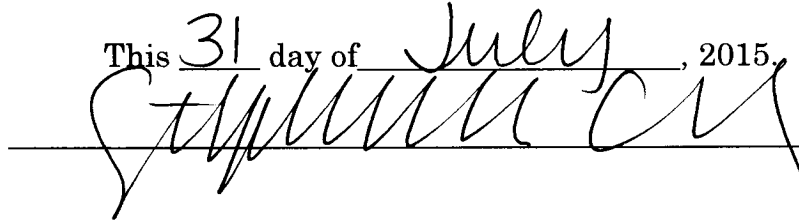
Attorneys for the Defendant
TW Telecom Holdings, Inc., a Delaware
corporation

7/31, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 31 day of July, 2015.



FILED
2015 AUG -4 AM 10:59
JEANETTE M. JORDE
C.C.P. & G.S.
RICHLAND COUNTY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-40-01394
	)	
Plaintiff,	)	MEMORANDUM IN SUPPORT OF
	)	DEFENDANT TW TELECOM
Versus	)	HOLDINGS, INC.'S MOTION TO
	)	RECONSIDER
TW Telecom Holdings, Inc., a Delaware	)	
corporation; and DOES 1-10, inclusive,	)	
	)	
Defendants.	)	

The Defendant, TW Telecom Holdings, Inc., a Delaware corporation (hereinafter "this Defendant"), submits this Memorandum in in Support of this Defendant's Motion to Reconsider the Court's Denial of this Defendant's Motion To Aside Entry of Default and Allow Defendant TW Holdings, Inc. to Responsively Plead.

FACTS

Plaintiff PTA-FLA (hereinafter "ClearTalk") filed a Summons and Complaint on March 3, 2015 and named TW Telecom Holdings, Inc. and DOES 1-10 as Defendants¹. The Plaintiff served the Summons and Complaint on March 16, 2015 via certified mail to CT Corporation System in Columbia, SC. The CT Corporation sent the Summons and Complaint to Level 3 via email on March 18, 2015. Ryan McManis, an attorney for Level 3 who serves as its gatekeeper for new lawsuits, missed the email which included the service of process on this Defendant and therefore never recognized that the Summons and Complaint had been served. See Exhibit 1, Affidavit of Ryan McManis. In fact, Mr. McManis did not become aware

¹ Level 3 Communications, Inc. ("Level 3") purchased TW Telecom Holdings, Inc. making it a wholly owned subsidiary.

of the Summons and Complaint until this Defendant was served with a Motion for Entry of Default in and around May 6, 2015. This Defendant assigned the case to their local counsel on May 6, 2015. This Defendant filed a motion to set aside the default, a proposed Answer to the Plaintiff's Complaint, and an Affidavit from Ryan McManis on May 7, 2015.

On June 24, 2015, this Court heard this Defendant's motion to set aside the entry of default. On July 27, 2015, this Defendant received the Court's Order denying the same based on lack of the "good cause" required to set aside any entry of default². This Defendant respectfully submits this Motion to Reconsider and requests this Court grant this Defendant's Motion to Enlarge the time to Answer because this Defendant presented evidence of good cause and argued the same at the hearing.

ANALYSIS

I. This Defendant's Motion to Set Aside Default Should be Reconsidered Because Plaintiff has Falsely Misrepresented the Law of South Carolina.

In this Court's Order denying this Defendant's Motion to Set Aside Entry of Default, it is stated that "as a matter of law, failing to answer a Summons and Complaint because the papers are lost within a corporation is not good cause." This is an erroneous conclusion based on Plaintiff's incorrect and falsified citations in its Memorandum in Opposition and in the Order Plaintiff submitted to this Court for signing.

² The Court did not rule on whether the Defendant satisfied the factors set forth Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989) regarding setting aside an entry of default. Those factors include: (1) the timing of the defendant's motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." As such, this Defendant relies on its prior memorandums, motions, Affidavits, and arguments from the June 24, 2015 hearing to support its position that it satisfied all three (3) Wham factors.

The Plaintiff cites to Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 212 (1995), *rev'd on other grounds*, 332 S.C. 75 (1998), in support of their proposition that "losing a summons and complaint is not good cause to set aside default." As an initial matter, Plaintiff has incorrectly and falsely paraphrased the excerpt from the Roche case. The actual quote from the Roche Opinion reads: "[l]osing a summons and complaint within the corporation is not a ground to set aside a default judgment." The Plaintiff has inserted the words "good cause" and removed the word "judgment," in order to wholly change the meaning of the excerpt. As this Court is aware, the current motion was to set aside *entry* of default, not to set aside a default judgment, which entails a completely different and more rigorous standard. This Defendant submits that the Roche case, in its entirety, is not applicable to the current case as the Roche case involves a default judgment, not an entry of default.

The standard for granting relief for entry of default is less rigorous than the standard granting relief of a default judgment. Sundown, 383 S.C. at 608. ("We take this opportunity to reassert the basic legal premise that the standard for granting relief under Rule 60(b) is more rigorous than under Rule 55(c), and that an entry of default may be set aside for reasons that would be insufficient to relieve a party from a default judgment.").

However, even if Roche is considered in deciding the current case, the factual differences between the two (2) cases make it distinguishable. The main distinguishing fact is that in Roche, the Vice President of the Defendant accepted service of the Summons and Complaint by signing the return receipt. Roche, 318 S.C at 212. The Summons and Complaint were lost in the corporation *after* they

had been received. In this case, the Summons and Complaint were never actually acknowledged by Mr. McManis as he never noticed or opened the email.

The Plaintiff also cites to Bage, LLC v. Southeastern Roofing Co. of Spartanburg, Inc., 373 S.C. 457 (Ct. App. 2007) in support of their argument. As an initial point, the Bage case has been vacated. See Bage, LLC v. Southeastern Roofing Co. of Spartanburg, 383 S.C. 489, 489 (S.C. 2009) (“Further, we vacate the opinion of the Court of Appeals in this matter.”).

Interestingly, Bage is another case where the Defendant actually signed for the Summons and Complaint. In Bage, a secretary for the Defendant signed for the Summons and Complaint *after* receiving permission to do so from her supervisor. Bage, 373 S.C. at 463 (“the process server arrived... with the intendment of serving [the general manager] with BAGE's summons and complaint. [The general manager] was not in the office at that time, and the server was instead met by Debbie Green, another Southeastern Roofing employee. Green was able to reach [the general manager] by telephone. After being informed someone was in the office with papers to serve, [the general manager] instructed Green to accept the documents.” Id.).

Like Roche, the Bage case is distinguishable from this case. If Mr. McManis had opened the email and reviewed the Summons and Complaint and then failed to act, this would be a different case.

Finally, the Plaintiff cites to Stark Truss Co. v. Superior Constr. Corp., 360 S.C. 503, 506 (Ct. App. 2004) to support their argument. Stark involves two (2) Defendants who were both served with the Summons and Complaint. Stark Truss Co., 370 S.C. at 506. Neither company suggested that they did not receive or

understand they had been served with the Summons and Complaint. Rather, they argued that they filed their Answer after the thirty (30) day time limit, but prior to the entry of default being entered. Id. at 508 ("Appellants argue the circuit court erred in entering default and in refusing to set aside the entry of default because they appeared in the matter by filing their answer and counterclaim prior to the filing of the motion for entry of default. We disagree."). Interestingly, the attorney for the Defendants did not even argue good cause except that one of the Defendants was suffering from depression. Id., at 510. The Stark case is factually distinguishable from the present case in the same way that Roche and Bage were.

Therefore, a thorough review of the Roche, Bage, and Stark Truss opinions demonstrates that the case at hand *does not* fall squarely into this line of cases, which this Court stated in its Order, drafted by the Plaintiff. This Defendant respectfully submits to this Court that basing its ruling on authority which has been: (1) falsely misrepresented by the Plaintiff; (2) vacated or reversed by a later decision; and/or (3) simply not applicable to the facts of the case at hand, would surely be in error.

II. The Entry of Default Should be Set Aside Pursuant to Rule 55(c) of the South Carolina Rules of Civil Procedure because this Defendant Made a Showing of Good Cause to Set Aside the Entry of Default.

Aside from the Plaintiff's flawed support for denial of this Defendant's Motion to Set Aside Entry of Default, this Defendant *has* shown good cause to set aside the entry of default. Rule 55(c) of the South Carolina Rules of Civil Procedure (SCRCP) provides that "[f]or good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)." It is within the trial court's discretion whether to

grant relief from an entry of default. Melton v. Olenik, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (2008). To this end, both the South Carolina State Courts and the United States District Courts of South Carolina have held that Rule 55(c) should be liberally interpreted to promote justice and allow cases to be heard on the merits. See Melton v. Olenik, 379 S.C. 45, 54, 664 S.E.2d 487, 492 (2008) ("Rule 55(c) should be liberally construed to promote justice and dispose of cases on the merits."); See Herlong v. Ludwig, 2010 U.S. Dist. LEXIS 34732 (D.S.C. 2010) ("The clear policy of the Federal Rules of Civil Procedure is to discourage judgment by default and to encourage disposition of claims on their merits." (citing Tolson v. Hodge, 411 F.2d 123, 130 (4th Cir. 1969))).

The United States Court of Appeals for the Fourth Circuit has heard numerous cases involving the entry of default and has "repeatedly expressed a strong preference that, as a general matter, defaults be avoided and that claims and defenses be disposed of on their merits." Colleton Preparatory Acad., Inc. v. Hoover Universal, 616 F.3d 413, 417 (4th Cir. 2010); See, e.g., Tazco, Inc. v. Director, Office of Workers Compensation Program, U.S. Dep't of Labor, 895 F.2d 949, 950 (4th Cir. 1990) ("The law disfavors default judgments as a general matter."); Consolidated Masonry & Fireproofing Inc. v. Wagman Constr. Corp., 383 F.2d 249, 251 (4th Cir. 1967) ("Generally a default should be set aside where the moving party acts with reasonable promptness and alleges a meritorious defense."). The Court even declared this imperative arises in myriad procedural contexts, but its primacy is never doubted. Colleton Preparatory Academy, 616 F.3d at 417.

In addition, the Fourth Circuit held "the extreme sanction of judgment by default is reserved only for cases where the party's noncompliance represents bad

faith or a complete disregard for the mandates of procedure and the authority of the trial court.” Mobil Oil Co. De Venez. v. Parada Jimenez, 1993 U.S. App. LEXIS 4648, *8, 25 Fed. R. Serv. 3d (Callaghan) 728 (4th Cir. 1993).

The standard for granting relief from an entry of default is “good cause,” and is “less stringent than the excusable neglect standard for setting aside a final judgment on the basis of mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud.” Limehouse v. Hulsey, 397 S.C. 49, 70 723 S.E.2d 211, 221 (Ct. App. 2011), *rev’d on other grounds* 404 S.C. 93, 744 S.E.2d 566 (2013). The “good cause” standard requires only that the party seeking relief from default to “provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice.” Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 719 S.E.2d 703, 706 (2011) (citing Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885, 888 (2009)). Courts may consider the totality of the circumstances when determining whether good cause exists. Ricks v. Weinrauch, 293 S.C. 372, 375 (Ct. App. 1987)(“While leaving the suit papers in the trunk of her car would not, alone, meet the requisite showing for good cause, we hold all of the factors considered together are sufficient for such a showing”).

Further, the trial court should consider the following factors in deciding whether to set aside an entry of default: (1) the timing of the defendant’s motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted.” Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989).

Based on the totality of the circumstances, the policy of the State and Federal Courts of this State to have cases heard on the merits, the factors related to good

cause set forth in Wham, the motions, memorandums, Affidavits and exhibits presented by counsel, and the arguments provided by this Defendant's local counsel and their in-house counsel Ryan McManis, good cause exists to set aside the entry of default in this case.

The Plaintiff made a lengthy argument regarding why the email was not recognized by Mr. McManis since he has access to his email through various sources like cell phones and laptops. Further, the Plaintiff argued that Level 3 is a large sophisticated company that should have had someone else reviewing the intake of pleadings in addition to Mr. McManis. This Defendant asserts that the email was originally missed during the days mentioned in Mr. McManis' Affidavit. Following those days, which add up to be almost two (2) weeks, there was never a reason to scour back through the emails to look for the one (1) email that served the Summons and Complaint. The email in essence got missed when it came in and was buried for the emails that arrived after it that day and in the days that follow. Because of this, the Summons and Complaint was never acknowledged or accepted by Mr. McManis.

This Defendant should not be punished for accidentally overlooking one (1) email that served a Summons and Complaint against a newly acquired subsidiary. As we know, this Defendant will certainly be punished as its participation at a damage hearing will be limited to objecting to evidence and cross-examining witnesses. See Limehouse v. Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013). This does not seem to serve the interests of justice.

If the law of this state is for cases to be heard on the merits, then this Defendant should be allowed to Answer the Complaint and defend the case. There is

absolutely no prejudice to the Plaintiff for allowing this Defendant to answer. The Fourth Circuit addressed perceived prejudice to a Plaintiff and explained, “moreover, as obvious as it may be, it bears mention that no cognizable prejudice inheres in requiring a plaintiff *to prove* a defendant's liability, a burden every plaintiff assumes in every civil action filed in every federal court.” Colleton Preparatory Acad., 616 F.3d at 419.

This case does not involve a personal injury where the Plaintiff has been physically injured or is on the verge of death because of this Defendant's actions. This is a complicated dispute between sophisticated parties regarding an alleged breach of contract. This Defendant is ready and anxious to defend the case as it believes it fully complied with the terms of the agreement. Further, this Defendant believes the Plaintiff's alleged damages are not supported by the facts, to include that the agreement between the parties specifically prohibits some of the damages the Plaintiff seeks. To allow the case to proceed with this Defendant in default would allow the Plaintiff to argue for damages it knows it is not entitled to without allowing this Defendant to respond to the same. This is the true prejudice.

Further, the interests of justice would be served by allowing this Defendant to responsively plead because it would provide both parties – who are both sophisticated companies – the ability to have their claims and defenses heard by a Richland County jury. More specifically, allowing this Defendant to Answer the Plaintiff's Complaint would allow the case to be heard on the merits as intended by South Carolina law.

It also seems instructive to review additional factors which are routinely considered by the Fourth Circuit. While the Fourth Circuit generally considers

factors similar to the ones from Wham, it also considers additional factors like whether there is a history of dilatory action and the availability of sanctions less drastic. Payne ex rel. Estate of Calzada v. Brake, 439 F.3d 198, 203 (4th Cir. 2006). If Mr. McManis or Level 3 had a history of routinely failing to timely file responsive pleadings, or if he had a history of losing correspondence serving pleadings, this would be a different case. However, there is no evidence that either of these is true. What is true is that when Mr. McManis first realized pleadings had not been responded to, he acted immediately to address the situation. Further, he was forthright in what happened and laid out the facts in an Affidavit for the Court to consider. He also flew over two thousand (2,000) miles to the hearing in an effort to let both the Plaintiff and this Court know what happened and that he takes the matter very seriously.

This case does not present a large corporation who makes a practice of blowing off opposing parties or failing to timely respond to complaints. This is a case where an in-house lawyer went through a terribly busy time at work and at home and failed to recognize an email that had been sent.

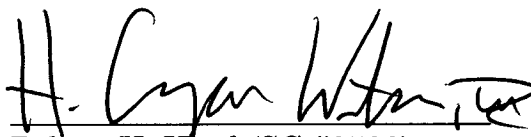
Some have said that if an excuse was good it would be a reason. That may be true. However, in this case, it seems that holding this Defendant in default based on the facts of this case – to include the immediate action taken after realizing the pleading was missed – and the policy of this State to have cases heard on the merits, would be a miscarriage of justice.

CONCLUSION

As the South Carolina Court of Appeals stated, lawsuits should be decided on the merits. See In re Estate of Weeks, 329 S.C. 251, 495 S.E.2d 454 (Ct.App.1997) (Stating that Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits (citing Dixon v. Besco Eng'g, 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995))). This case is no different. While a jury may eventually determine that this Defendant breached its contract with the Plaintiff and be responsible for a portion of the Plaintiff's damages, justice requires that this Defendant be allowed to present their case and provide evidence on the issue.

Therefore, this Defendant respectfully requests that the Court grant its motion to reconsider and allow this Defendant to answer the Complaint.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com



Robert H. Hood (SC #2599)
Robert H. Hood, Jr. (SC #13491)
H. Cooper Wilson, III (SC #74939)

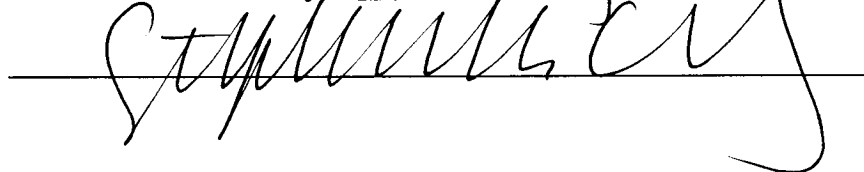
Attorneys for the Defendant
TW Telecom Holdings, Inc., a Delaware
corporation

7/31, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing
was served on each party or counsel of record by ☒ ~~mailing~~,
☒ e-mailing, ☐ facsimile, or ☐ hand delivery in
the manner prescribed by the applicable Rule of Civil
Procedure.

This 31 day of July, 2015



NICKLAUD COUNTY
FILED
2015 AUG -4 AM 11:00
JENNIFER M. HOSKINS
C.C.P. & G.S.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

PTA-FLA, INC.,

Plaintiff,

vs.

TW TELECOM HOLDINGS, INC., A
DELAWARE CORPORATION; AND
DOES 1-10 INCLUSIVE

Defendant(s).

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT
)

) C.A. No: 2015-CP-40-01394
)

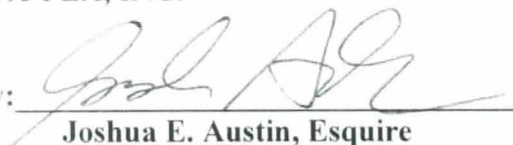
) **STIPULATION OF DISMISSAL**
) **PURSUANT TO RULE 40(j), SCRPC**
)
)
)
)
)
)

The Plaintiff wishes to strike this case from the trial docket pursuant to Rule 40(j), SCRPC, and the Defendant consents to the Plaintiff's request. Now, therefore, the parties stipulate to the following:

1. This matter shall be, and the same hereby is, stricken from the trial docket.
2. The Plaintiff or Defendant shall have the right to move to restore this case to the trial docket at any time within one calendar year of the date of the filing of this stipulation.

WE STIPULATE:

PTA-FLA, INC.

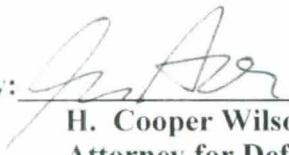
By: 

Joshua E. Austin, Esquire
Attorney for Plaintiff

Date: 4/1/2016

WE CONSENT:

THE HOOD LAW FIRM, LLC

By:  with express permission

H. Cooper Wilson, III, Esquire
Attorney for Defendant

Date: 4/1/2016

RICHLAND COUNTY
FILED
2016 APR - 1 PM 1:29
JANETTE W. HARRIS
C.C.P. & G.S.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

PTA-FLA, Inc.)

Plaintiff,)

vs.)

TW Telecom Holdings, Inc., a Delaware
Corporation; and DOES 1-10, inclusive)

Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-40-01394

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

Joshua E. Austin, Bar No. 101664

Address:

P.O. Box 8839 Columbia, SC 29202

Phone: 803-466-6488 Fax 866-498-3090

E-mail: joshuaaustin@cleartalk.net Other: _____

Defendant's Attorney:

Robert H. Hood Jr., Bar No. _____

Address:

P.O. Box 1508, Charleston, SC 29402

Phone: 843-577-4435 Fax _____

E-mail: bobbyjr.hood@hoodlaw.com Other: _____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**

☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: To Restore Action to Docket

Estimated Time Needed: 1 minute

Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

April 6, 2017
Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ _____

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: metts Date Filed: 4-10-17

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
)
PTA-FLA, Inc.,)
Plaintiff,)
)
vs.)
)
TW Telecom Holdings, Inc., a Delaware)
Corporation; and DOES 1-10, inclusive,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C/A No.: 2015-CP-40-01394

**NOTICE OF MOTION AND
MOTION TO RESTORE**

RICHLAND COUNTY
FILED
2017 APR -6 AM 9:52
JEANNETTE W. McBRIDE
C.C.P. & G.S.

TO: ROBERT H. HOOD, JR., ATTORNEY FOR THE DEFENDANT:

PLEASE TAKE NOTICE that the Plaintiff will move before the presiding Judge of the Court of Common Pleas on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an order to restore this case to the active trial roster.

The Plaintiff hereby moves to restore his case to the trial docket. The Plaintiff's case was stricken from the active trial docket pursuant to Consent Order To Strike from Docket Pursuant to S.C.R.Civ.P.40(j) signed by the Honorable Alison Renee Lee and filed with the Richland County Clerk of Court on April 7, 2016. Plaintiff is moving to restore this case within one (1) year from the filing of the consent order.

Pursuant to Rule 11, SCRCP, Plaintiff's counsel asserts that he consulted with opposing counsel Robert H. Hood, Jr. Mr. Hood is consulting with his client about the possibility of signing the consent order.

Plaintiff hereby requests that the court restore this case to the active roster.

PTA-FLA, Inc.

By:



Joshua E. Austin
P.O. Box 8839
Columbia, SC 29202
(803) 466-6488
Attorney for the Plaintiff

Columbia, SC

April 6, 2017

CERTIFICATE OF SERVICE

As an employee of PTA-FLA, Inc., I hereby certify that a copy of this Notice of Motion and Motion to Restore were served on the Defendant by mailing a copy by first class mail, postage affixed to serving a copy on April 6, 2017 to all counsel of record as follows:

Bobby Hood Jr.
Hood Law Firm
P.O. Box 1508
Charleston, SC 29402-1508



Joshua E. Austin

April 6, 2017

2017 APR -6 AM 9:52
JENNIFER W. MORRIS
CLERK
RICHMOND COUNTY
FILED

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

PTA-FLA, Inc.,

Plaintiff,

Versus

TW Telecom Holdings, Inc., a Delaware
corporation; and DOES 1-10, inclusive,

Defendants.

) IN THE COURT OF COMMON PLEAS

)

)

) C/A No. 2015-CP-40-01394

)

) **DEFENDANT'S OPPOSITION TO**
) **PLAINTIFF'S MOTION TO**
) **RESTORE**

)

)

)

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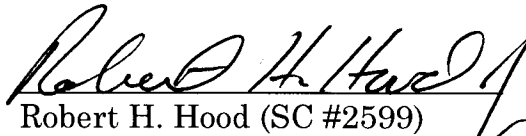
2017 APR 18 AM 10:38
JANETTE W. HODNICK
C.C.P. & G.S.

The Defendant TW Telecom Holdings, Inc., a Delaware corporation (hereinafter "this Defendant"), submits this Opposition to Plaintiff's Motion to Restore. This Defendant, contemporaneously with the filing of this motion, filed a Motion for Summary Judgment and a corresponding Memorandum in Support. As detailed therein, this matter was previously dismissed by stipulation pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. Plaintiff has now moved to restore this matter over one year from the date the case was stricken and, therefore, cannot benefit from the tolling provision of Rule 40(j). Because the applicable statute of limitations has expired, Plaintiff's action is now time-barred and must be dismissed in its entirety with prejudice.

In support of this Opposition to Plaintiff's Motion to Restore, this Defendant wishes to reference and incorporate herein all of the arguments contained within its Memorandum in Support of its Motion for Summary Judgment. The Plaintiff's failure to comply with Rule 40(j) and the applicable statute of limitations calls for the dismissal of Plaintiff's Complaint and procedurally bars this matter from being restored pursuant to Rule 40(j). In the event the Court nevertheless administratively

restores this matter, it should be immediately dismissed pursuant to this Defendant's Motion for Summary Judgment.

HOOD LAW FIRM, LLC
172 Meeting Street
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Fax: (843) 722-1630
Email: Info@hoodlaw.com


Robert H. Hood (SC #2599)
Robert H. Hood, Jr. (SC #13491)
John O. Radeck, Jr. (SC #77849)

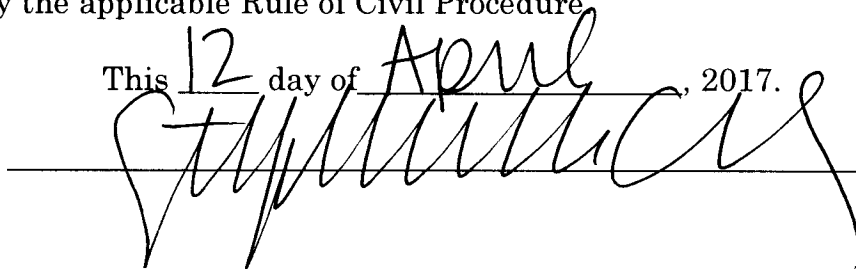
Attorneys for the Defendant
TW Telecom Holdings, Inc., a Delaware corporation

April 12, 2017
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO RESTORE** was served on each party or counsel of record by ☒ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 12 day of April, 2017.



2017 APR 18 AM 10:38
CLARENCE W. NORRIS
C.C.P. & C.
RICHARD P. HILL

April 12, 2017

Jeanette W. McBride
Clerk of Court, Richland County
P.O. Box 2766
Columbia, SC 29202-2766

Re: PTA-FLA, Inc. v. TW Telecom Holdings, Inc., a Delaware corporation; and DOES 1-10,
inclusive
C/A No. 2015-CP-40-01394, Richland CP
HLF File No. 576.000

Dear Ms. McBride:

Enclosed for filing please find an original and one (1) copy of Defendant's Opposition to Plaintiff's Motion to Restore in the above-referenced case. Please file the original and return a clocked-in copy in the enclosed self-addressed stamped envelope.

Kind regards,

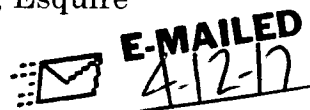
Yours truly,


Robert H. Hood, Jr.

RHHjr/spc
Enclosure(s)

cc's [***Via E-Mail and U.S. Mail:***]

Jamie N. Smith, Esquire/Joshua E. Austin, Esquire



STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
)
)

COUNTY OF RICHLAND

PTA-FLA, Inc.

CASE NO. 2015-CP-40-01394

☐ Plaintiff(s),

**DEFENDANT'S NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT**

Versus

TW Telecom Holdings, Inc., a Delaware
corporation; and DOES 1-10, inclusive,

☒ Defendant(s).

check box above indicating submitting party

Plaintiff's attorney:

Jamie N. Smith (#101367)
PTA-FLA, Inc.
2101 Main Street/P.O. Box 8839
Columbia, SC 29202
P: 803-363-1323

Defendant's attorney:

Robert H. Hood, Jr. (SC #13491)
HOOD LAW FIRM, LLC
172 Meeting Street/P.O. Box 1508
Charleston, SC 29402
P: 843-577-4435/F: 843-722-1630

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTION I and III)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II AND III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment

Estimated Time Needed: 15 Minutes

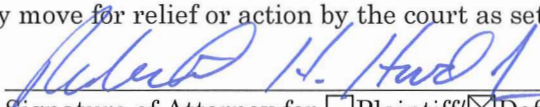
Court Reporter Needed: YES ☒/ NO ☐

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order –

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff/☒ Defendant

4/12/2017
Date submitted

SECTION III: Motion Fee

☒ **PAID – AMOUNT:** \$25

☐ **EXEMPT:** ☐ Rule to Show Cause in Child or Spousal Support

(check reason) ☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the
attached order.

☐ Other: _____

JUDGE

CODE: _____

DATE: _____

CLERK'S VERIFICATION

DATE FILED

Collected by: _____
(print name)

☐ **MOTION FEE COLLECTED:** _____

☐ **CONTESTED-AMOUNT DUE:** _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-40-01394
	)	
<i>Plaintiff,</i>	)	DEFENDANT'S NOTICE OF
	)	MOTION AND MOTION FOR
Versus	)	SUMMARY JUDGMENT
	)	
TW Telecom Holdings, Inc., a Delaware	)	
corporation; and DOES 1-10, inclusive,	)	
	)	
<u><i>Defendants.</i></u>	)	

TO: JAMIE N. SMITH AND JOSHUA E. AUSTIN, ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant TW Telecom Holdings, Inc., a Delaware corporation (hereinafter "this Defendant"), will move as soon as may be heard, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an Order from the Court granting Summary Judgment to this Defendant on all claims. The basis for this Motion is that Plaintiff's Complaint is barred by the statute of limitations.

This motion is supported by the applicable statutory and common law of the State of South Carolina and is also supplemented by this Defendant's Memorandum in Support of its Motion for Summary Judgment.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Fax: (843) 722-1630
Email: Info@hoodlaw.com



Robert H. Hood (SC #2599)
Robert H. Hood, Jr. (SC #13491)
John O. Radeck, Jr. (SC #77849)

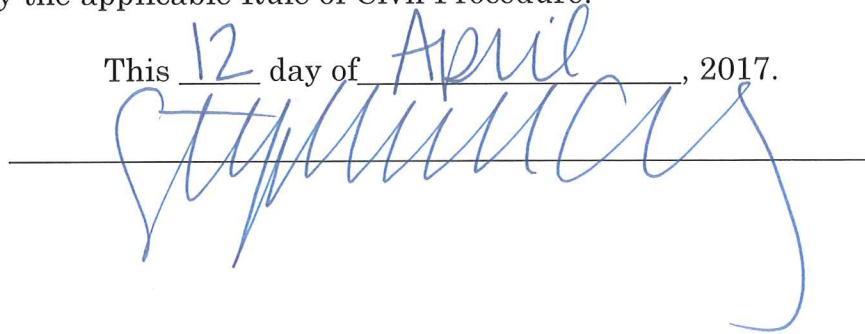
*Attorneys for the Defendant
TW Telecom Holdings, Inc., a Delaware
corporation*

April 12, 2017
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of **DEFENDANT'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT** was served on each party or counsel of record by ☒ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 12 day of April, 2017.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
PTA-FLA, Inc.,	)	C/A No. 2015-CP-40-01394
	)	
<i>Plaintiff,</i>	)	DEFENDANT'S MEMORANDUM IN
	)	SUPPORT OF MOTION FOR
Versus	)	SUMMARY JUDGMENT
	)	
TW Telecom Holdings, Inc., a Delaware	)	
corporation; and DOES 1-10, inclusive,	)	
	)	
<i>Defendants.</i>	)	

The Defendant TW Telecom Holdings, Inc. (hereinafter "this Defendant"), submits this Memorandum in Support of its Motion for Summary Judgment. This Defendant seeks a judgment as a matter of law due to the Plaintiff's action being barred by the applicable statute of limitations. This matter was previously dismissed by stipulation pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. Plaintiff has moved to restore this matter over one year from the date the case was stricken and, therefore, cannot benefit from the tolling provision of Rule 40(j). Because the applicable statute of limitations has expired, Plaintiff's action is now time-barred and must be dismissed in its entirety with prejudice.

FACTS AND PROCEDURAL HISTORY

In 2010, Plaintiff PTA-FLA (hereinafter "ClearTalk" or "Plaintiff") entered into a contract with this Defendant to provide wholesale internet and transport services to ClearTalk. ClearTalk alleges that the terms of the agreement were modified by this Defendant, and that the individual who signed the agreement on behalf of ClearTalk was unaware of the material changes. ClearTalk alleges that throughout the term of the contract issues arose regarding payments and service quality. ClearTalk further alleges that a second agreement was entered into by the parties,

and that this Defendant unreasonably and abruptly terminated the agreement in late January 2013. (Pl's Compl. ¶ 61).

ClearTalk filed its Summons and Complaint on March 3, 2015, and served this Defendant on March 16, 2015 via certified mail to CT Corporation System in Columbia, SC. On May 6, 2015, upon motion of Plaintiff, the clerk filed an entry of default against this Defendant. Upon learning of the existence of the Summons and Complaint and the entry of default, this Defendant filed a Motion to Set Aside Entry of Default, an Affidavit from Ryan McManis, and an Answer to ClearTalk's Complaint, all of which were filed with this Court. By orders dated July 16, 2015 and August 25, 2015, this Court denied this Defendant's Motion to Set Aside Entry of Default and Motion to Reconsider, respectively.

In early March 2016, the parties were notified that this case was placed on the Richland County jury trial roster. The trial roster meeting was scheduled for April 4, 2016. On April 1, 2016, counsel for the parties entered into a stipulation striking the case from the docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure (hereinafter the "Stipulation") (Exhibit 1 – Rule 40(j) Stipulation). The Stipulation states:

The Plaintiff wishes to strike this case from the trial docket pursuant to Rule 40(j), SCRCP, and the Defendant consents to the Plaintiff's request. Now, therefore, the parties stipulate to the following:

1. This matter shall be, and the same **hereby is, stricken from the trial docket.**
2. The Plaintiff or Defendant shall have the right to move to restore this case to the trial docket at any time **within one calendar year of the date of the filing of this stipulation.**

(Exhibit 1) (emphasis added).

The Stipulation was dated and filed with the Court on April 1, 2016. That same day, counsel for the Plaintiff emailed the Honorable Alison Renee Lee's law clerk, Chadwick Devlin, advising of the filing of the 40(j) stipulation and seeking confirmation that counsel's presence would not be required at the roster meeting on April 4, 2016. (Exhibit 2 – Email to Mr. Devlin). Having not yet heard back from Mr. Devlin, counsel for the parties also emailed Ms. Anne R. Henley, the Civil Non-Jury Court Scheduler for Richland County, to advise that a Rule 40(j) stipulation was entered. (Exhibit 3 – Emails to Ms. Henley). Ms. Henley responded by saying “thank you.” *Id.* On April 4, 2016, Mr. Devlin responded to Plaintiff's counsel's prior email stating that “if this matter was 40(j)'d, there will be no need to attend the roster meeting.” (Exhibit 2). Further, Mr. Devlin responded again on April 4, 2016 advising counsel that the case did not appear on the trial roster. (Exhibit 4). On April 4, 2016, the Honorable Alison Renee Lee executed a Form 4 Order simply stating: “Consent Stipulation of dismissal attached pursuant to 40 J.” (Exhibit 5). The Form 4 Order was filed on April 7, 2016. *Id.* Plaintiff filed its Motion to Restore on April 6, 2017.

LAW/ANALYSIS

I. Plaintiff Failed to Restore This Case Within One Calendar Year From the Date it Was Stricken and Cannot Take Advantage of the Tolling Provision of Rule (40)(j), SCRCP.

The Plaintiff failed to restore this case within one calendar year of the filing of the Stipulation. Therefore, the Plaintiff is not entitled to take advantage of the one-year tolling period as provided in Rule 40(j). Rule 40(j) reads as follows:

(j) Case Stricken From Docket by Agreement. A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during

the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.

While Rule 40(j) does not require that a party move to restore the case to the docket within one year after it is stricken, the rule provides that if the claim is restored within one year after it is stricken, the statute of limitations is tolled for that period. *Maxwell v. Genez*, 356 S.C. 617, 620-621, 591 S.E.2d 26, 28, (2003). A party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j), however, the party simply cannot take advantage of the one year tolling period provided by the rule. *Id.* South Carolina considers cases stricken pursuant to Rule 40(j) as the equivalent of being dismissed. *See Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 631, 779 S.E.2d 826, 831 (Ct. App. 2015) (providing a detailed discussion and historical basis for treating a case stricken pursuant to Rule 40(j) as a dismissal). A party moving to restore a case must give 10 days' notice of the motion, and upon being restored the case is placed on the General Docket where it proceeds as a newly filed action on the General Docket. Rule 40(j), SCRCP (Note to 1994 Amendment).

Here, this case was stricken from the docket by the Stipulation: "This matter shall be, and the same hereby is, stricken from the trial docket." (Exhibit 1). The Stipulation was entered into by the consent of the parties and provided that either party could restore the case within one calendar year "of the date of the filing of this stipulation." *Id.* The Stipulation was dated and filed on April 1, 2016. *Id.* Therefore, according to the plain language of the Stipulation entered pursuant to Rule 40(j), Plaintiff was required to file its Motion to Restore on or before April 1, 2017 to benefit

from the tolling provision. Because April 1, 2017 was a Saturday, Plaintiff had until the following Monday, April 3, 2017 to file its Motion to Restore and benefit from the tolling provision. Plaintiff did not file its Motion to Restore until April 6, 2017. Therefore, Plaintiff is now barred from restoring this case and Plaintiff cannot proceed as a newly filed action on the General Docket because the statute of limitations, as discussed below in Section II, has long since expired.

Despite the clear language of the Stipulation, Plaintiff's Motion to Restore creates the impression that it timely filed its Motion to Restore by doing so prior to April 7, 2017. This is incorrect. First, Plaintiff confusingly states that the case was "stricken from the active trial docket pursuant to Consent Order To Strike from Docket Pursuant to S.C.R.Civ.P.40(j) signed by the Honorable Alison Renee Lee ..." (Pl.'s Mot. Restore ¶ 2). Neither the parties nor the Court has executed a document entitled "Consent Order to Strike from Docket Pursuant to S.C.R.Civ.P.40(j)." Rather, the parties executed the Stipulation which struck the case from the docket effective April 1, 2016. The express language of the Stipulation supports the fact that the parties agreed the one-year tolling provision ran from the date the Stipulation was filed on April 1, 2016, i.e. the date the case was stricken. Subsequent to the filing of the Stipulation, Judge Lee executed a Form 4 Order on April 4, 2016 that merely cited to, and attached, the filed Stipulation.

Second, Plaintiff's Motion to Restore states that Plaintiff is "moving to restore this case within one (1) year **from the filing of this stipulation.**" (Pl.'s Mot. Restore ¶ 2) (emphasis added). By using this language, Plaintiff inaccurately seeks to refer to the Form 4 Order as the "stipulation." This would be a convenient but incorrect interpretation by the Plaintiff. It would allow Plaintiff to argue the date of the filing

of the Form 4 order is the operative date for the purposes of the Rule 40(j) tolling provision. This interpretation is completely contrary to the terms of the Stipulation and the fact that the Stipulation was filed on April 1, 2016. Again, the one-year tolling provision was tethered to the date the Stipulation was executed and filed on April 1, 2016, not the date the Form 4 Order was filed on April 7, 2016.

Even if the Court were to determine that the Stipulation filed April 1, 2016 did not strike the case from the docket, at the very latest, the case was stricken from the docket on April 4, 2016 when Judge Lee signed the Form 4 Order and the clerk's office removed the case from the roster. The judge's law clerk even relieved counsel from having to attend the roster meeting. The fact that the Form 4 Order was not filed until April 7, 2016 is inapposite.

II. Because Plaintiff's Lawsuit Was Dismissed and the Statute of Limitations Was Never Tolloed, Plaintiff's Complaint is Now Time-Barred and Must Fail as a Matter of Law.

The Plaintiff's Complaint is time-barred because the applicable statute of limitations was never tolled and has long since expired. Plaintiff's Complaint asserts claims sounding in breach of contract and fraud. Breach of contract claims are governed by a three-year statute of limitations pursuant to S.C. Code Section 15-3-530. A three-year statute of limitations applies to "an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520." *State v. McClinton*, 369 S.C. 167, 173, 631 S.E.2d 895, 898 (2006). The Plaintiff's fraud based claims are also governed by a three-year statute of limitations. S.C. Code Ann. § 15-3-530(7).

The discovery rule applies to all of Plaintiff's causes of action. *See Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 144-145, 697 S.E.2d 644, 654 (Ct. App. 2010) (citing *Maher v. Tietex Corp.*, 331 S.C. 371, 376-77, 500 S.E.2d

204, 207 (Ct. App. 1998) (applying to breach of contract claims). *See also Burgess v. American Cancer Soc., South Carolina Div., Inc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799-800 (Ct. App. 1989) (applying to fraud claims). According to the discovery rule, the statute of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence that a cause of action might exist. *Manios*, 389 S.C. 126 (citing *Abba Equip., Inc. v. Thomason*, 335 S.C. 477, 485, 517 S.E.2d 235, 239 (Ct. App. 1999)).

Statutes of limitations are not mere technicalities. *Stokes-Craven Holding Corp. v. McKenzie*, 416 S.C. 517, 526, 787 S.E.2d 485, 490 (2016) (citing *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct. App. 2009)). They are fundamental to a well-ordered judicial system and embody important public policy concerns, such as stimulating activity and giving security and stability to human affairs. *Id.* Statute of limitations relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights and protect potential defendants from protracted fear of litigation. *Id.*

Here, Plaintiff's Complaint rests on the allegation that this Defendant unreasonably and abruptly breached a contract in late January 2013. (Pl's Compl. ¶ 61). Pursuant to the discovery rule, Plaintiff knew or should have known that it had potential causes of action against this Defendant in late January 2013. Therefore, the three-year statute of limitations commenced in late January 2013 and expired in late January 2016. Plaintiff's Motion to Restore was filed on April 1, 2017 which is over one year past the statute of limitations deadline. Absent the benefit of the Rule 40(j) tolling provision, which Plaintiff does not have, Plaintiff cannot restore its action

because the applicable statute of limitations has long since expired. This result furthers the interests of maintaining an orderly and stable judicial system.

CONCLUSION

In sum, the Plaintiff failed to restore this case within one calendar year from the date it was stricken pursuant to Rule 40(j). Therefore, Plaintiff cannot take advantage of the one-year tolling provision. Because the applicable three-year statute of limitations began to accrue on or about late January 2013 and has long since expired, Plaintiff is time-barred from restoring its case. For these reasons, the above captioned lawsuit should remain forever dismissed and Plaintiff is barred from restoring its case as a new action. Ruling in this Defendant's favor further the goal of creating stability in our judicial systems and relieves the Court of trying Plaintiff's claims when it has slept on its rights. This Defendant requests that the Court deny Plaintiff's Motion to Restore and enter Judgment in this Defendant's favor as to all of Plaintiff's claims.

HOOD LAW FIRM, LLC
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Fax: (843) 722-1630
Email: Info@hoodlaw.com



Robert H. Hood (SC #2599)
Robert H. Hood, Jr. (SC #13491)
John O. Radeck, Jr. (SC #77849)

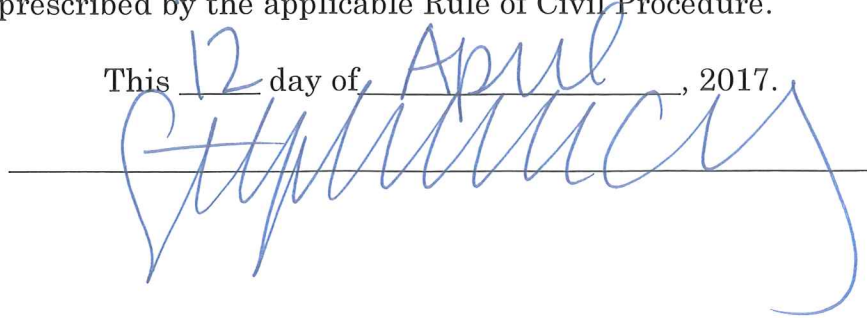
*Attorneys for the Defendant
TW Telecom Holdings, Inc., a Delaware
corporation*

April 12, 2017
Charleston, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of ***DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT*** was served on each party or counsel of record by ☒ mailing, ☒ e-mailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 12 day of April, 2017.

A large, stylized handwritten signature in blue ink is written over a horizontal line. The signature appears to be 'Stephen J. [unclear]'.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

PTA-FLA, INC.,

Plaintiff,

vs.

IW TELECOM HOLDINGS, INC., A
DELAWARE CORPORATION; AND
DOES 1-10 INCLUSIVE

Defendant(s).

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT
)

C.A. No: 2015-CP-40-01394

) **STIPULATION OF DISMISSAL**
) **PURSUANT TO RULE 40(j), SCRPC**
)
)
)

The Plaintiff wishes to strike this case from the trial docket pursuant to Rule 40(j), SCRPC, and the Defendant consents to the Plaintiff's request. Now, therefore, the parties stipulate to the following:

1. This matter shall be, and the same hereby is, stricken from the trial docket.
2. The Plaintiff or Defendant shall have the right to move to restore this case to the trial docket at any time within one calendar year of the date of the filing of this stipulation.

WE STIPULATE:

PTA-FLA, INC.

By: [Signature]
Joshua E. Austin, Esquire
Attorney for Plaintiff

Date: 4/1/2016

WE CONSENT:

THE HOOD LAW FIRM, LLC

By: [Signature] with express permission
H. Cooper Wilson, III, Esquire
Attorney for Defendant

Date: 4/1/2016

SCANNED



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

PTA-FLA. INC.

Plaintiff.

vs.

TW TELECOM HOLDINGS, INC. A
DELAWARE CORPORATION; AND
DOLS 1-10 INCLUSIVE

Defendant(s).

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A NO: 2015-CP-40-01394

CERTIFICATE OF SERVICE

I, Joshua E. Austin, Esq., Attorney for PTA-FLA. Inc., certify that on this date I caused a copy of this Stipulation of Dismissal Pursuant to Rule 40(j), SCRCP to be placed in a postage-paid envelope and deposited said envelope in the United States mail to the following address:

H. Cooper Wilson, III
THE HOOD LAW FIRM, LLC
P.O. Box 1508
Charleston, SC 29402-1508

Dated this 1st day of April, 2016.


Joshua E. Austin, Esq.

FILED
2016 APR -1 PM 1:29
JOSHUA E. AUSTIN
SCRCP 2016

SCANNED

ANNE HENLEY

From: Cooper Wilson <cooper.wilson@hoodlaw.com>
Sent: Friday, April 01, 2016 4:29 PM
To: ANNE HENLEY
Cc: joshuaaustin
Subject: FW: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394
Attachments: PTA-FLA v. TW Telecom Holdings CA No. 2015-cp-40-01394 Filed Copy 40j Stipulation.PDF

Ms. Henley:

Please see the email below re: this case.

Thanks,
Cooper

From: joshuaaustin [mailto:joshuaaustin@cleartalk.net]
Sent: Friday, April 01, 2016 4:28 PM
To: hinleya@rcgov.us
Cc: Cooper Wilson <cooper.wilson@hoodlaw.com>
Subject: Fwd: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394

Good Afternoon Ms. Hinley,

Opposing counsel Mr. Wilson and I hadn't heard back on the email below and we just wanted to make sure that we will be pulled off of the Monday roster. We just wanted to make sure our email was received.

Thanks and have a great weekend.

Best regards,

Joshua

--
Joshua E. Austin, Esq.
In-House Counsel
PTA-FLA, Inc. dba Clear Talk
2101 Main Street, Suite J
P.O. Box 8339 (29202)
Columbia, South Carolina 29201
joshuaaustin@cleartalk.net
(c) 803.466.6488

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SCANNED 1

----- Original Message -----

Subject: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394

Date: 2016-04-01 13:56

From: joshuaaustin <joshuaaustin@cleartalk.net>

To: ALeeLC@sccourts.org

Cc: Cooper Wilson <cooper.wilson@hoodlaw.com>

Good Afternoon:

I am writing you regarding **Case No. 2015-CP-40-01394**, PTA-FLA, Inc. v. TW Telecom Holdings Inc., et al. This case is number 18 of 27 in priority for the April 4, 2016 Jury Trial Roster.

The Defendant is in default and so all that would be left is a damages hearing. Both parties agree believe that with more time we will be able to come to a mutually beneficial outcome that will not tax the court's time and resources. As such, we have filed a stipulation for dismissal pursuant to 40(j), SCRCP. I have attached a clocked copy here for your convenience. We apologize for the late notice, but it was necessary that we come up with a structured plan of how we were going to proceed in the time after the 40(j) dismissal which took some back and forth before we could file.

Please confirm that the Court will not need our attendance Monday morning as Mr. Wilson, Defendant's attorney CCed here, would need to come in from Charleston.

Should you have any questions or concerns my number is (803) 466-6488. Thank you and have a great weekend.

Best regards,

Joshua Austin

--

Joshua E. Austin, Esq.
In-House Counsel
PTA-FLA, Inc. dba Clear Talk
2101 Main Street, Suite J
P.O. Box 8339 (29202)
Columbia, South Carolina 29201
joshuaaustin@cleartalk.net
(c) 803.466.6488

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SCANNED
2

Stephanie Chickey

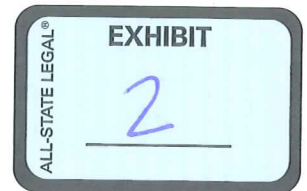
From: Lee, Alison Renee Law Clerk (Chadwick Devlin) <ALeeLC@sccourts.org>
Sent: Monday, April 04, 2016 7:33 AM
To: joshuaaustin
Cc: Cooper Wilson
Subject: RE: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394

Counsel:

Good morning. I apologize for not responding earlier; I was out of the Office Friday afternoon; but, if this matter was 40(j)'d, there will be no need to attend the roster meeting.

Thank you,

Chadwick S. Devlin
Law Clerk to The Honorable Alison Renee Lee
Fifth Judicial Circuit
Richland County Judicial Center
1701 Main Street
Columbia, South Carolina 29201
(803) 576-1767 (Direct Dial)
(803) 576-1765 (Office)



From: joshuaaustin [mailto:joshuaaustin@cleartalk.net]
Sent: Friday, April 01, 2016 1:57 PM
To: Lee, Alison Renee Law Clerk (Chadwick Devlin)
Cc: Cooper Wilson
Subject: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394

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The Defendant is in default and so all that would be left is a damages hearing. Both parties agree believe that with more time we will be able to come to a mutually beneficial outcome that will not tax the court's time and resources. As such, we have filed a stipulation for dismissal pursuant to 40(j), SCRCP. I have attached a clocked copy here for your convenience. We apologize for the late notice, but it was necessary that we come up with a structured plan of how we were going to proceed in the time after the 40(j) dismissal which took some back and forth before we could file.

Please confirm that the Court will not need our attendance Monday morning as Mr. Wilson, Defendant's attorney CCed here, would need to come in from Charleston.

Should you have any questions or concerns my number is (803) 466-6488. Thank you and have a great weekend.

Best regards,

Joshua Austin

--

Joshua E. Austin, Esq.
In-House Counsel
PTA-FLA, Inc. dba Clear Talk
2101 Main Street, Suite J
P.O. Box 8339 (29202)
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joshuaaustin@cleartalk.net
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~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

## Stephanie Chickey

---

**From:** ANNE HENLEY <HENLEYA@rcgov.us>  
**Sent:** Friday, April 01, 2016 4:32 PM  
**To:** Cooper Wilson  
**Subject:** RE: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394

Thank you

Anne R. Henley  
Civil Non-Jury Court Scheduler  
Richland County Judicial Center  
1701 Main Street  
Columbia, SC 29202

803-576-1943

---

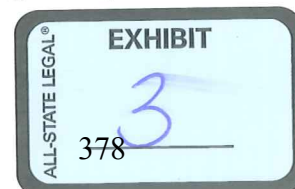
**From:** Cooper Wilson [mailto:cooper.wilson@hoodlaw.com]  
**Sent:** Friday, April 01, 2016 4:29 PM  
**To:** ANNE HENLEY  
**Cc:** joshuaaustin  
**Subject:** FW: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394

Ms. Henley:

Please see the email below re: this case.

Thanks,  
Cooper

**From:** joshuaaustin [mailto:joshuaaustin@cleartalk.net]  
**Sent:** Friday, April 01, 2016 4:28 PM  
**To:** hinleya@rcgov.us  
**Cc:** Cooper Wilson <cooper.wilson@hoodlaw.com>  
**Subject:** Fwd: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394



Good Afternoon Ms. Hinley,

Opposing counsel Mr. Wilson and I hadn't heard back on the email below and we just wanted to make sure that we will be pulled off of the Monday roster. We just wanted to make sure our email was received.

Thanks and have a great weekend.

Best regards,

Joshua

--

Joshua E. Austin, Esq.  
In-House Counsel  
PTA-FLA, Inc. dba Clear Talk  
2101 Main Street, Suite J  
P.O. Box 8339 (29202)  
Columbia, South Carolina 29201  
[joshuaaustin@cleartalk.net](mailto:joshuaaustin@cleartalk.net)  
(c) 803.466.6488

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----- Original Message -----

**Subject:**ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394

**Date:**2016-04-01 13:56

**From:**joshuaaustin <[joshuaaustin@cleartalk.net](mailto:joshuaaustin@cleartalk.net)>

**To:**[ALeeLC@sccourts.org](mailto:ALeeLC@sccourts.org)

**Cc:**Cooper Wilson <[cooper.wilson@hoodlaw.com](mailto:cooper.wilson@hoodlaw.com)>

Good Afternoon:

I am writing you regarding **Case No. 2015-CP-40-01394**, PTA-FLA, Inc. v. TW Telecom Holdings Inc., et al. This case is number 18 of 27 in priority for the April 4, 2016 Jury Trial Roster.

The Defendant is in default and so all that would be left is a damages hearing. Both parties agree believe that with more time we will be able to come to a mutually beneficial outcome that will not tax the court's time and resources. As such, we have filed a stipulation for dismissal pursuant to 40(j), SCRCP. I have attached a clocked copy here for your convenience. We apologize for the late notice, but it was necessary that we come up with a structured plan of how we were going to proceed in the time after the 40(j) dismissal which took some back and forth before we could file.

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Best regards,

Joshua Austin

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Joshua E. Austin, Esq.  
In-House Counsel  
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Columbia, South Carolina 29201  
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## Stephanie Chickey

---

**From:** Lee, Alison Renee Law Clerk (Chadwick Devlin) <ALeeLC@sccourts.org>  
**Sent:** Monday, April 04, 2016 8:49 AM  
**To:** Cooper Wilson  
**Subject:** RE: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394

Okay; I see. Thank you.

-Chad

---

**From:** Cooper Wilson [mailto:cooper.wilson@hoodlaw.com]  
**Sent:** Monday, April 04, 2016 8:47 AM  
**To:** Lee, Alison Renee Law Clerk (Chadwick Devlin); joshuaaustin  
**Subject:** RE: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394

Chad:

I think the Clerk removed it. We sent the Rule 40(j) paperwork to the Court as well.

Thanks,  
Cooper

---

**From:** Lee, Alison Renee Law Clerk (Chadwick Devlin) [mailto:ALeeLC@sccourts.org]  
**Sent:** Monday, April 04, 2016 7:35 AM  
**To:** joshuaaustin <joshuaaustin@cleartalk.net>  
**Cc:** Cooper Wilson <cooper.wilson@hoodlaw.com>  
**Subject:** RE: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394

Also, counsel, I do not see this matter on today's roster.

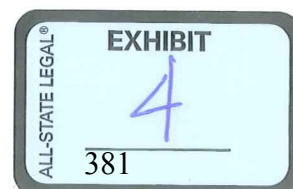
Thanks,  
Chad

---

**From:** joshuaaustin [mailto:joshuaaustin@cleartalk.net]  
**Sent:** Friday, April 01, 2016 1:57 PM  
**To:** Lee, Alison Renee Law Clerk (Chadwick Devlin)  
**Cc:** Cooper Wilson  
**Subject:** ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394

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Should you have any questions or concerns my number is (803) 466-6488. Thank you and have a great weekend.

Best regards,

Joshua Austin

--

Joshua E. Austin, Esq.  
In-House Counsel  
PTA-FLA, Inc. dba Clear Talk  
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P.O. Box 8339 (29202)  
Columbia, South Carolina 29201  
[joshuaaustin@cleartalk.net](mailto:joshuaaustin@cleartalk.net)  
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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4001394

PTA FLA Inc

TW Telecom Holdings Inc

DOES 1-10

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____

Attorney for: ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: Consent Stipulation of dismissal attached pursuant to 40 J

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge Al. Sher Lee Judge Code 2118 Date 4/4/2016

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 8 day of April, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Joshua Evan Austin

Harry Cooper Wilson III

Robert Holmes Hood Jr.

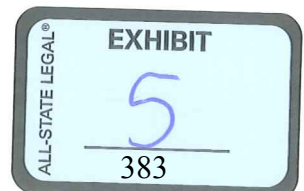
ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCANNED



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

PTA-FLA, INC.,

Plaintiff,

vs.

IW TELECOM HOLDINGS, INC., A
DELAWARE CORPORATION; AND
DOES 1-10 INCLUSIVE

Defendant(s).

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT
)

) C.A. No: 2015-CP-40-01394
)

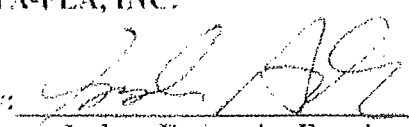
) **STIPULATION OF DISMISSAL**
) **PURSUANT TO RULE 40(j), SCRPC**
)
)
)

The Plaintiff wishes to strike this case from the trial docket pursuant to Rule 40(j), SCRPC, and the Defendant consents to the Plaintiff's request. Now, therefore, the parties stipulate to the following:

1. This matter shall be, and the same hereby is, stricken from the trial docket.
2. The Plaintiff or Defendant shall have the right to move to restore this case to the trial docket at any time within one calendar year of the date of the filing of this stipulation.

WE STIPULATE:

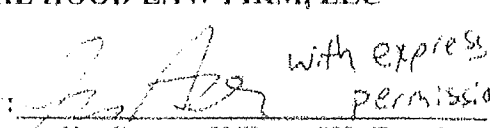
PTA-FLA, INC.

By: 
Joshua E. Austin, Esquire
Attorney for Plaintiff

Date: 4/1/2016

WE CONSENT:

THE HOOD LAW FIRM, LLC

By:  with express permission
H. Cooper Wilson, III, Esquire
Attorney for Defendant

Date: 4/1/2016

SCANNED

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

PTA-FLA. INC;

Plaintiff,

vs.

TW TELECOM HOLDINGS, INC. A
DELAWARE CORPORATION; AND
DOLS 1-10 INCLUSIVE

Defendant(s).

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

C/A NO: 2015-CP-40-01394

CERTIFICATE OF SERVICE

I, Joshua E. Austin, Esq., Attorney for PTA-FLA. Inc., certify that on this date I caused a copy of this Stipulation of Dismissal Pursuant to Rule 40(j), SCRPC to be placed in a postage-paid envelope and deposited said envelope in the United States mail to the following address:

H. Cooper Wilson, III
THE HOOD LAW FIRM, LLC
P.O. Box 1508
Charleston, SC 29402-1508

Dated this 1st day of April, 2016.


Joshua E. Austin, Esq.

SCANNED

ANNE HENLEY

From: Cooper Wilson <cooper.wilson@hoodlaw.com>
Sent: Friday, April 01, 2016 4:29 PM
To: ANNE HENLEY
Cc: joshuaaustin
Subject: FW: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394
Attachments: PTA-FLA v. TW Telecom Holdings CA No. 2015-cp-40-01394 Filed Copy 40j Stipulation.PDF

Ms. Henley:

Please see the email below re: this case.

Thanks,
Cooper

From: joshuaaustin [mailto:joshuaaustin@cleartalk.net]
Sent: Friday, April 01, 2016 4:28 PM
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Best regards,

Joshua

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Joshua E. Austin, Esq.
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SCANNED 1

----- Original Message -----

Subject: ROSTER ID 496 JURY TRIAL ROSTER APRIL 4, 2016 for PTA-FLA, Inc. v. TW Telecom Holdings Inc. C/A No. 2015CP4001394

Date: 2016-04-01 13:56

From: joshuaaustin <joshuaaustin@cleartalk.net>

To: ALeeLC@sccourts.org

Cc: Cooper Wilson <cooper.wilson@hoodlaw.com>

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SCANNED
2

April 12, 2017

Jeanette W. McBride
Clerk of Court, Richland County
P.O. Box 2766
Columbia, SC 29202-2766

Re: PTA-FLA, Inc. v. TW Telecom Holdings, Inc., a Delaware corporation; and DOES 1-10,
inclusive
C/A No. 2015-CP-40-01394, Richland CP
HLF File No. 576.000

Dear Ms. McBride:

Enclosed for filing please find an original and one (1) copy of Defendant TW Telecom Holdings, Inc.'s Notice of Motion and Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment in the above-referenced case. Please file the originals and return a clocked-in copy of each in the enclosed self-addressed stamped envelope.

Kind regards,

Yours truly,



Robert H. Hood, Jr.

RHHjr/spc
Enclosure(s)

cc's [***Via E-Mail and U.S. Mail***]:

Jamie N. Smith, Esquire/Joshua E. Austin, Esquire

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
PTA-FLA, Inc.	)	C/A No. 2017-CP-40-06433
	)	
<i>Plaintiff,</i>	)	PLAINTIFF’S MEMORANDUM IN
	)	SUPPORT OF PLAINTIFF’S MOTION
TW Telecom Holdings, Inc., a Delaware	)	FOR DEFAULT JUDGMENT AND
Corporation; and DOES 1-10, inclusive,	)	DAMAGES
	)	
<i>Defendants.</i>	)	

Plaintiff PTA-FLA, Inc. (hereinafter “PTA-FLA”) submits this Memorandum in Support of Plaintiff’s Motion for Default Judgment and Damages which was filed on October 20, 2017 and is scheduled for hearing on January 31, 2019. For the reasons set forth below, PTA-FLA asks this Court to enter judgment against Defendant TW Telecom Holdings, Inc. (hereinafter “TW Telecom”) in an amount to be determined at trial.

FACTS AND PROCEDURAL HISTORY

PTA-FLA filed its Summons and Complaint on March 3, 2015, and served TW Telecom on March 16, 2015 via certified mail to CT Corporation System in Columbia, SC. On May 6, 2015, upon motion of PTA-FLA, the clerk filed an entry of default against TW Telecom. TW Telecom filed a Motion to Set Aside Entry of Default, an Affidavit from Ryan McManis, and an Answer to PTA-FLA’s Complaint. By order dated July 16, 2015 this Court denied TW Telecom’s Motion to Set Aside Entry of Default and by order dated August 25, 2015, this Court denied TW Telecom’s Motion to Reconsider. TW Telecom is in default.

The Case was struck from the docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure in April 2016. In April 2017 a motion to restore was filed and on October 5, 2017

this court granted PTA-FLA's Motion to Restore. PTA-FLA filed its motion for Default Judgment and Damages on October 20, 2017.

LAW/ANALYSIS

I. Default Judgment

A. Governing Law

In 2013, the Supreme Court of South Carolina reaffirmed its reasoning decisions in *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978). *Limehouse v. Hulsey*, 404 S.C. 93, 114, 744 S.E.2d 566, 578 (2013). The court rearticulated that a defense counsel's participation in default proceeding is limited to cross-examination and objection to plaintiff's evidence. *Id.* (citing *Howard*, 271 S.C. at 241, 246 S.E.2d at 882). The Supreme Court reasoned to "to allow a defaulting defendant to fully participate in a post-default hearing, we believe there would be no consequence for default." *Limehouse*, 404 S.C. at 116, 744 S.E.2d at 578-79.

"It is well settled that by suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and to have conceded liability. *Roche v. Young Bros.*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998). "In *Howard v. Holiday Inns, Inc.*, *supra*, we held that where a defendant has made an appearance but is in default, liability is admitted but the amount of damages is not; the amount must be proved." *Lewis v. Congress of Racial Equality and/or C.O.R.E., Inc.*, 275 S.C. 556, 561, 274 S.E.2d 287, 289 (1981).

Because TW Telecom is in default liability has been conceded. All that is left for the court is to determine in what amount PTA-FLA has been damaged based on the claims of the Complaint.

PTA-FLA's Complaint laid out causes of action for Breach of Contract, Breach of Contract Accompanied by Fraudulent Act, Fraud in the Inducement, and Promissory Estoppel. Each of

those causes of action is an alternative of the others. Plaintiff has elected to proceed under the Breach of Contract Accompanied by Fraudulent Act cause of action.

B. Breach of Contract Accompanied by Fraudulent Act

To recover damages, including punitive damages, for Breach of Contract Accompanied by Fraudulent Act, the Plaintiff must show:

- (1) **A breach of contract.** *Bailey v. North Carolina Mut. Life Ins. Co.*, 173 S.C. 131, 175 S.E. 73 (1934). In the absence of a breach of contract, the plaintiff's proper cause of action will generally be for fraud in the inducement. *See Smyth v. Fleischmann*, 214 S.C. 263, 52 S.E.2d 199 (1949).
- (2) **Fraudulent intent relating to the breaching of the contract and not merely to its making.** (Internal citation omitted). Fraudulent intent is normally proved by circumstances surrounding the breach. *See Sutton v. Continental Casualty Co.*, 168 S.C. 372, 167 S.E. 647 (1933).
- (3) **A fraudulent act accompanying the breach.** (Internal citation omitted). The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character. (Internal citations omitted).

Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-04 (emphasis added).

In cases involving breach of contract accompanied by a fraudulent act “it is clear that the fraudulent act alleged must be an act done with the intent to deceive.” *Save Charleston Foundation v. Murray*, 286 S.C. 170, 181, 333 S.E.2d 60, 67 (Ct. App. 1985). This makes breach of contract accompanied by a fraudulent act fall within actual fraud as it requires the intent to deceive. *See Maybank v. BB&T Corp.*, 416 S.C. 541, 577, 787 S.E.2d 498, 517 (2016) (stating that constructive fraud differentiates from actual fraud because it “constructive fraud does not require the element of intent to deceive” and therefore limitations on liability could apply to the cause of action for constructive fraud). The Supreme Court has recognized that other jurisdictions have refused to enforce limitations on liability where actual fraud is involved. *Maybank*, 416 S.C. at 577 n. 16, 787 S.E.2d at 517 n. 16. “In general, we refuse to enforce contracts based on fraudulent conduct

because a party should not retain the benefits of an agreement that he knowingly and *intentionally* entered into through deceptive means.” *Maybank*, 416 S.C. at 577, 787 S.E.2d at 517. “Moreover, beyond the patent unfairness inherent in enforcing a contract induced through intentional fraud, giving legal effect to such a contract violates a fundamental principle of contract law: there must be a meeting of the minds. By its very nature, there can be no union of purpose where one party is intentionally deceiving the other through fraud.” *Maybank*, 416 S.C. at 577-78, 787 S.E.2d at 517.

Plaintiff’s complaint adequately pleads a cause of action for breach of contract accompanied by a fraudulent act and as TW Telecom has defaulted liability has been conceded.

First, TW Telecom breached the contract. Billing by TW Telecom was not pursuant to the rate schedule. Compl. ¶¶ 21, 43-46. Service provided by TW Telecom was not what was promised because of “flapping” issues. Compl. ¶¶ 30-34. Service provided by TW Telecom was for less than the specified bandwidth. Compl. ¶ 47-50.

Second, there was fraudulent intent relating to the breaching of the contract and not merely its making. After TW Telecom started to bill in deviation of the payment schedule (at a lower amount than planned), PTA-FLA reminded TW Telecom that everyone agreed to deviate from normal payment structure for unlimited usage bounded only by the amount of internet used at the drain location and not for actual usage. Compl.¶ 27. TW Telecom assured again assured PTA-FLA that it would not be charged any amount higher than the payment schedule, which was knowingly false. Compl. ¶ 28. TW Telecom told PTA-FLA knowingly false information on multiple occasions with the intent to charge in excess of the payment schedule in violation of the contract. TW Telecom told PTA-FLA it would need additional circuits and a change to the initial configuration that was approved in advance by TW Telecom’s engineers. Compl. ¶¶ 35-36. TW

Telecom intended to charge PTA-FLA additional sums and knew it could not provide the network service it had promised. Compl. ¶¶ 35-36,

Finally, there were numerous fraudulent acts accompanying the breach. TW Telecom assured that changes to the network would not disrupt the payment schedule in any way but immediately after the changes were made to fix network problems, TW Telecom began charging fees in excess of the Payment Schedule. Compl. ¶ 42. TW Telecom provided documents that were different than those previously negotiated but assured Mr. Corrigan that they were consistent with the agreement that had been made, as Mr. Corrigan knew he had no authority to modify any agreements for PTA-FLA. Compl. ¶¶ 18-19. After TW Telecom started to bill in deviation of the payment schedule (at a lower amount than planned), PTA-FLA reminded TW Telecom that everyone agreed to deviate from normal payment structure for unlimited usage bounded only by the amount of internet used at the drain location and not for actual usage. Compl. ¶ 27. TW Telecom assured again assured PTA-FLA that it would not be charged any amount higher than the payment schedule, which was knowingly false. Compl. ¶ 28.

II. PTA-FLA's Damages

A. Direct Damages

PTA-FLA paid TW Telecom a total of \$396,082.42 over the relationship. However, the value of the services was at most worth \$124,871.32. As such PTA-FLA should receive the amount it paid minus the value of the services it was given which totals at least \$271,211.10.

B. Delay Damages

Delay damages exist. The exact number is being precisely calculated. By agreement with opposing counsel this information will be provided to them on Monday along with supporting documentation. We will update this information with the court with the exact value at that time.

C. Lost Profits

Lost profits damages exist. The exact number is being precisely calculated. By agreement with opposing counsel this information will be provided to them on Monday along with supporting documentation. We will update this information with the court with the exact value at that time.

CONCLUSION

PTA-FLA's Motion for Default Judgment and Damages should be granted and Judgment should be entered against TW Telecom in an amount to be determined at trial.

Respectfully Submitted,

PTA-FLA, Inc.

s/Joshua E Austin

Joshua E. Austin (SC #101664)

P.O. Box 8839

Columbia, SC 29202

(803) 466-6488

joshuaaustin@cleartalk.net

Attorney for Plaintiff

January 24, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of **PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AND DAMAGES** was served on each party or counsel of record by mailing and emailing in the manner prescribed by the applicable Rule of Civil Procedure.

This 24th Day of January, 2019.

s/Joshua E. Austin

Joshua E. Austin

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	
	)	
PTA-FLA, Inc.	)	C/A No. 2017-CP-40-06433
	)	
<i>Plaintiff,</i>	)	PLAINTIFF’S SUPPLEMENTAL
	)	MEMORANDUM IN
	)	SUPPORT OF PLAINTIFF’S MOTION
TW Telecom Holdings, Inc., a Delaware	)	FOR DEFAULT JUDGMENT AND
Corporation; and DOES 1-10, inclusive,	)	DAMAGES
	)	
<u><i>Defendants.</i></u>	)	

Plaintiff PTA-FLA, Inc. (hereinafter “PTA-FLA”) submits this Supplemental Memorandum in Support of Plaintiff’s Motion for Default Judgment and Damages which was filed on October 20, 2017 and is scheduled for hearing on January 31, 2019. For the reasons set forth below, PTA-FLA asks this Court to enter judgment against Defendant TW Telecom Holdings, Inc. (hereinafter “TW Telecom”) in an amount to be determined at trial.

PTA-FLA’s Damages

A. Direct Damages

This is determined by comparing the value of the circuits actually provided for the initial agreed configuration if paid for at TWT’s normal unnegotiated rates to the amounts actually paid by PTA-FLA. A month by month breakdown of the amount that PTA-FLA paid TW Telecom for service and the value of usage for those months is provided below. The circuits for the original agreed configuration were initially billed at \$2,799.94 or less, these circuits were only increased by TW Teleom to generate billing in subsequent months and not pursuant to any agreement or need, this billing included actual connections to all points contracted for and an internet drain

facility and accordingly this amount would be a high estimate of the value of the actual circuits used by PTA FLA. After the 28 month period contracted for a contract these circuits were changed to another provider at a monthly cost of \$5,512.00 and accordingly this higher amount is used during months extending past 28 when the contract terminated but we were unable to move to the new carrier due to lack of notice from TW Telecom.

The total for usage over that time computed in the above manner is **\$116,928.32**, however PTA-FLA during that same period was being billed at higher rates, in variance of the scheduled agreement, and PTA FLA often paid under duress paying a total of **\$396,082.42** over that time period and therefore overpaid at least **\$279,154.10** above what someone would pay if they actually ordered the circuits and facilities PTA-FLA used. PTA-FLA however did not actually order these circuits and value of the usage was not useful to PTA-FLA as it kept PTA-FLA from implementing its business plan which was relying on unlimited data with the drain restriction in the contract and not just paying for certain 10mb circuits as provided and for this reason asks the court to award the full \$396,082.42 be refunded in lieu of the \$279,154 overpayment.

Date	Usage Value	Amount Paid
Initial Deposit	\$0.00	\$8,834.40
Sept. 2010	\$0.00	\$2,103.06
Oct. 2010	\$2,799.94	\$3,450.09
Nov. 2010	\$2,799.94	\$2,759.52
Dec. 2010	\$2,799.94	\$2,798.61
Jan. 2011	\$2,799.94	\$2,799.94
Feb. 2011	\$2,799.94	\$0.00

Mar. 2011	\$2,799.94	\$21,687.11
Apr. 2011	\$2,799.94	\$7,109.21
May 2011	\$2,799.94	\$8,307.82
June 2011	\$2,799.94	\$9,962.75
July 2011	\$2,799.94	\$9,178.59
Aug. 2011	\$2,799.94	\$9,171.51
Sept. 2011	\$2,799.94	\$9,171.41
Oct. 2011	\$2,799.94	\$9,166.87
Nov. 2011	\$2,799.94	\$9,031.19
Dec. 2011	\$2,799.94	\$24,715.04
Jan. 2012	\$2,799.94	\$15,614.83
Feb. 2012	\$2,799.94	\$22,282.66
Mar. 2012	\$2,799.94	\$17,461.96
Apr. 2012	\$2,799.94	\$22,065.95
May 2012	\$2,799.94	\$16,576.69
June 2012	\$2,799.94	\$17,629.41
July 2012	\$2,799.94	\$18,000.00
Aug. 2012	\$2,799.94	\$17,125.60
Sept. 2012	\$2,799.94	\$6,639.80
Oct. 2012	\$2,799.94	\$6,639.80
Nov. 2012	\$2,799.94	\$8,731.60
Dec. 2012	\$2,799.94	\$12,657.00
Jan. 2013	\$2,799.94	\$0.00

Feb. 2013	\$5,512.00	\$0.00
Mar. 2013	\$5,512.00	\$22,000.00
Apr. 2013	\$5,512.00	\$20,000.00
May 2013	\$5,512.00	\$22,500.00
June 2013	\$5,512.00	\$10,000.00
July 2013	\$5,512.00	\$0.00
Aug. 2013	\$5,512.00	\$0.00
Sept. 2013	\$5,512.00	\$0.00
TOTALS	\$116,928.32	\$396,082.42

B. Delay Damages

After PTA-FLA launched its network with the network configuration agreed by the parties, but without the bandwidth agreed to allowed by TW Telecom, TW Telecom informed PTA-FLA that there would be required changes to the system to make the original plan of unlimited data with a cap on bandwidth at the drain work when this was actually not needed. Compl. ¶¶ 30-36. Making these changes caused approximately a six-month delay in PTA-FLA's execution of its business plan however all the planned expenses for this period of the network launch continued during this period to no or minimal benefit while the circuits were reconfigured and retested and prior to their use by paying customers. These delays caused by TW Telecom caused significant damages. Compl. ¶¶ 36, 75-78. Those damages include the following:

- \$1,754,056.00—for the amounts expended in the months of January through June of 2011 per the company's accounting records which show the network—even though there was a four month soft launch period prior to that—generated no material subscriber income as

the network was not tested and could not be tested sound for paying customers on the reconfigured circuits.

- \$878,513.00—the amount of lost earnings at a 6% interest rate on the capital PTA-FLA invested and the value of the licensed radio spectrum actually used for these markets. This was money that was idled by TW Telecom’s actions and prevented from other earning uses or earning interest.
- \$511,076.00—the amount of depreciation on the network equipment with an approximate four year time to obsolescence in the industry.
- **TOTAL=\$3,143,645.00**

This results in an approximate amount of \$3,143,645.00 in damages for the six-month delay that TW Telecom caused.

C. Lost Profits

“Ordinarily, when prospective profits are prevented by the tortious conduct of the defendant, the plaintiff may recover such profits when he can prove that (1) it is reasonably certain that such profits would have been recognized except the tort; and (2) such lost profits can be ascertained and measured from the evidence produced with reasonable certainty. By certainty it is meant that the damages may not be left to mere speculation or conjecture.” *Petty v. Weyerhaeuser Co.*, 288 S.C. 349, 355, 342 S.E.2d 611, 615 (Ct. App. 1986) (internal citations omitted). “The law does not require absolute certainty of data upon which lost profits are to be estimated, but all that is required is such reasonable certainty that damages may not be based wholly upon speculation and conjecture, and that it is sufficient if there is a certain standard or fixed method by which profits sought to be recovered may be estimated and determined with a fair degree of accuracy.”

Id. (quoting *South Carolina Finance Corp. v. West side Finance Co.*, 236 S.C. 109, 122-23 113 S.E.2d 329, 336 (1960) (emphasis in original)).

“[W]here a plaintiff seeks damages to his business and reputation it is not error for the court to utilize gross revenues to estimate damages, where as here, there is evidence that the operating costs can not reasonably be reduced by the plaintiff following the defendant’s wrongful act.” *Petty*, 288 S.C. at 357, 342 S.E.2d at 616 (internal citations omitted). There are a variety of methods to calculate lost profits, which includes the following: “(1) ‘yardstick’ method of comparison with profit performance of business similar in size, nature and locations; (2) comparison with profit history of plaintiff’s successor, where applicable; (3) comparison of similar businesses owned by plaintiff himself, and (4) use of economic and financial data and expert testimony.” *Drews Co v. Ledwith-Wolfe Associates, Inc.* 296 S.C. 207, 214, 371 S.E.2d 532, 536 (1988).

Plaintiff intends to provide testimony of the (1) yardstick method, (3) comparison of similar businesses owned by plaintiff himself and (4) use of economic and financial data and expert testimony. Plaintiff will provide testimony to compare its market to another similarly sized wireless market targeting the same sort of customer demographics. Plaintiff will provide testimony comparing Plaintiff’s market to an affiliate’s business in Western Tennessee that had some of the same people involved with both companies and there will be expert testimony based on trends in wireless network development and penetration based on previous launches and business models.

This testimony will provide a reasonable range of lost profit damages of approximately \$4,000,000 to \$10,000,000 over a three period of time using a couple methods of calculations. A couple witnesses will provide testimony and information on these numbers.

In addition, the testimony will show that the Plaintiff was denied through TW Telecom's actions the prospect of an exit transaction which in year three if the business was doing well which is customary in the industry.

CONCLUSION

PTA-FLA's Motion for Default Judgment and Damages should be granted and Judgment should be entered against TW Telecom in an amount to be determined at trial.

Respectfully Submitted,

PTA-FLA, Inc.

s/Joshua E Austin

Joshua E. Austin (SC #101664)

P.O. Box 8839

Columbia, SC 29202

(803) 466-6488

joshuaaustin@cleartalk.net

Attorney for Plaintiff

January 28, 2019
Columbia, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of **PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AND DAMAGES** was served on each party or counsel of record by emailing in the manner prescribed by the applicable Rule of Civil Procedure.

This 28th Day of January, 2019.

s/Joshua E. Austin

Joshua E. Austin

92137

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2017-CP-40-06433

PTA-FLA, Inc.,

Appellant,

v.

TW Telecom Holdings, Inc., a
Delaware corporation; and
DOES 1-10, inclusive,

Respondent.

RECEIVED
FEB 11 2020
SC Court of Appeals

NOTICE OF APPEAL

PTA-FLA, Inc. appeals the order of the Honorable Robert E. Hood dated January 13, 2020. Appellant received written notice of entry of this order on January 13, 2020.

February 11, 2020


Joshua E. Austin, Esq
Post Office Box 8839
Columbia, South Carolina 29202
(803) 466-6488
Attorney for Appellant

Other Counsel of Record:
Robert H. Hood Jr.
John O'Conner Radeck, Jr.
Post Office Box 1508
Charleston, South Carolina 29402-1508
Attorneys for Respondent
(843) 577-4435

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2017-CP-40-06433

PTA-FLA, Inc.,

Appellant,

v.

TW Telecom Holdings, Inc., a
Delaware corporation; and
DOES 1-10, inclusive,

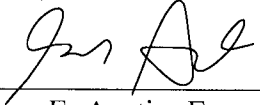
Respondent.

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SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on TW Telecom Holdings, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on February 11, 2020, addressed to its attorneys of record, Robert H. Hood, Jr. and John O'Conner Radeck, Jr., Post Office Box 1508, Charleston, South Carolina 29402-1508.

February 11, 2020


Joshua E. Austin, Esq
Post Office Box 8839
Columbia, South Carolina 29202
(803) 466-6488
Attorney for Appellant

PTA-FLA, Inc.

P.O. Box 8839
Columbia, SC 29202
(803) 466-6488

February 11, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
VIA HAND DELIVERY

RE: PTA-FLA, Inc., Appellant, v. TW Telecom Holdings, Inc., a Delaware corporation, and DOES 1-10, inclusive, Respondent, Case No. 2017-CP-40-06433

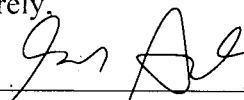
Dear Ms. Kitchings:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on the respondent.
- (2) A copy of the order which is to be challenged on appeal.
- (3) A filing fee of \$250.

Additionally, a copy of the notice of appeal has been filed with Richland County Clerk of Court through the electronic filing system on February 11, 2020.

Sincerely,



Joshua E. Austin, Esq
Post Office Box 8839
Columbia, South Carolina 29202
(803) 466-6488
Attorney for Appellant

cc: Robert H. Hood Jr.
John O'Conner Radeck, Jr.
Post Office Box 1508
Charleston, South Carolina 29402-1508
Attorneys for Respondent
(843) 577-4435

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FEB 11 2020

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas
Robert E. Hood, Circuit Judge
and G. Thomas Cooper, Jr., Circuit Judge

Case No. 2017-CP-40-06433
Appeal No. 2020-000218

RECEIVED

FEB 20 2020

SC Court of Appeals

PTA-FLA, Inc,

Appellant- Respondent,

v.

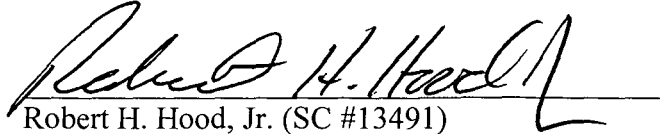
TW Telecom Holdings, Inc., a Delaware
corporation; and DOES 1-10, inclusive,

Respondent- Appellant.

CROSS NOTICE OF APPEAL

TW Telecom Holdings, Inc. files this cross appeal from the following additional Orders of the Honorable G. Thomas Cooper, Jr. in the above matter; filed October 5, 2017 (granting Motion to Restore); filed October 5, 2017 (denying Motion for Summary Judgment); August 26, 2015 (denying motion to reconsider); and July 16, 2015 (denying motion to set aside default). The undersigned received the Notice of Appeal from Appellant on February 11, 2020.

HOOD LAW FIRM, LLC

A handwritten signature in black ink, appearing to read "Robert H. Hood, Jr.", is written over a horizontal line.

Robert H. Hood, Jr. (SC #13491)

Deborah H. Sheffield, *Of Counsel* (SC #2757)

John O. Radeck, Jr. (SC #77849)

172 Meeting Street ~ P.O. Box 1508

Charleston, South Carolina 29402

Phone: (843) 577-4435

Facsimile: (843) 722-1630

**Attorneys for the Respondent-Appellant
TW Telecom Holdings, Inc.**

February 17, 2020

Other Counsel of Record:

Joshua E. Austin, Esquire
2101 Main Street (29201)
P.O. Box 8839
Columbia, SC 29202
Ph (803) 363-1323 / Fax (866) 333-1984
E: joshuaaustin@cleartalk.com
Attorneys for the Appellant-Respondent

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FEB 20 2020
SC Court of Appeals

Certificate of Service

I, secretary to Robert H. Hood, Jr., attorney for the Respondent-Appellant do hereby certify that on February ~~17~~ 19, 2020, I served a copy of the Cross Notice of Appeal on Counsel for Appellant-Respondent, via U.S. Mail, first class, postage prepaid to the following address:

Joshua E. Austin, Esquire
2101 Main Street (29201)
P.O. Box 8839
Columbia, SC 29202

Melanie D. Eason

February 17, 2020

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FEB 20 2020
SC Court of Appeals

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

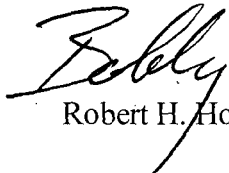
Re: PTA-FLA, Inc. v. TW Telecom Holdings, Inc., a Delaware corporation; and DOES 1-10, inclusive
C/A No. 2017-CP-40-06433, Richland CP
Appellate Case No. 2020-000218
HLF File No. 576.000

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Cross Notice of Appeal for Respondent/Appellant TW Telecom Holdings, Inc. with Orders referenced and a Certificate of Service. By copy of this letter, we are notifying all counsel and we have e-filed a copy with Richland County Court of Common Pleas. Please return a clocked-in copy in the envelope provided.

Kind regards,

Yours truly,


Robert H. Hood, Jr.

RHHjr/jad
Enclosure

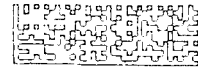
cc: Joshua E. Austin, Esquire

Master

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FEB 20 2020
SC Court of Appeals

HOOD LAW FIRM, LLC
172 MEETING STREET
P.O. BOX 1508
CHARLESTON, SC 29401

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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SC Court of Appeals

92292

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Richland County
Court of Common Pleas
Robert E. Hood, Circuit Judge
G. Thomas Cooper, Jr., Circuit Judge

Case No. 2017-CP-40-06433
Appeal No. 2020-000218

RECEIVED
MAR 02 2020
SC Court of Appeals

PTA-FLA, Inc,

Appellant- Respondent,

v.

TW Telecom Holdings, Inc., a Delaware
corporation; and DOES 1-10, inclusive,

Defendants,

Of which TW Telecom Holdings is

Respondent-Appellant.

**PETITION FOR REHEARING
OF DISMISSAL OF CROSS APPEAL**

Pursuant to Rule 240(j), SCACR, the Respondent-Appellant TW Telecom Holdings petitions for rehearing of the order dismissing its cross appeal as issued by the Honorable John D. Geathers, acting for the Court, of date February 25, 2020. Telecom respectfully submits that in dismissing the cross appeal, the Court has overlooked or misapprehended the procedural history of this case and the nature of the orders under appeal, and thereby has misapplied the ruling in Winesett v. Winesett 383 S.C. 601, 681 S.E.2d 885 (2009).

The Plaintiff/Appellant PTA-FLA has appealed from the final judgment entered on the trial judge's award of damages after a default damages hearing. The Defendant/Respondent Telecom

has served and filed a cross appeal from interlocutory orders, including the order denying its Rule 55(c), SCRCP, motion to set aside entry of default and the order granting the Plaintiff's untimely motion to restore the case under Rule 40(j), SCRCP. Contrary to the Court's order of dismissal, settled precedent does not require that Telecom make a Rule 60(b), SCRCP, motion for relief from the final judgment awarding damages to preserve its right to cross appeal for review of the interlocutory order refusing to set aside entry of default or the order restoring the case to the roster.

Clarification of the Pertinent Procedural History

Although the Record on Appeal has not been filed with this Court, the procedural history as recited in the trial court's orders submitted with the notices of appeal set forth the necessary facts to consider the appellate jurisdiction question posed by the Court's order of dismissal.

The Defendant was served with a summons and complaint on March 16, 2015. On filing of an Affidavit of Default and a Motion for Entry of Default, the Clerk of Court made an entry of default on May 6, 2015. The Defendant appeared and filed an answer together with a motion to set aside entry of default and for a late answer on May 12, 2015. The Trial Court (Judge G. Thomas Cooper, Jr.) denied the motion by order of July 16, 2015. A timely motion for reconsideration was denied by Judge Cooper in an order filed August 26, 2015.

The case was dismissed under Rule 40(j) pursuant to a consent stipulation of dismissal filed on April 1, 2016. On April 6, 2017 the Plaintiff PTA-FLA moved to restore the case and the Defendant Telecom opposed the restoration and moved for summary judgment on statute of limitations because the untimely restoration negated the tolling allowed by Rule 40(j). By orders filed on October 5, 2017, Judge Cooper granted the motion to restore and denied the motion for summary judgment.

The case came before the Trial Court (Judge Robert E. Hood) for a trial of damages held on January 31, 2019 and December 3, 2019. Judge Hood's order awarding damages in the amount of \$9,218.42 was filed on January 13, 2020. The **PLAINTIFF** served a notice of appeal seeking review of that award. Only after receipt of the notice of appeal, did the Defendant file a cross appeal seeking review of Judge Cooper's orders of July 16, 2015 and August 26, 2015 on the Rule 55(c) motion and the orders of October 5, 2019 regarding the Rule 40(j) order restoring the case untimely.

Discussion -- Appellate Review of Default Matters

Since the parties have not yet filed initial briefs, the issues to be raised on appeal have not been stated or argued. However, based on Judge Hood's final order presented with the notice of appeal, it would be fair to reason that Appellant/Respondent PTA-FLA seeks to challenge the amount of the judgment. While reserving the right to further refine the presentation of issues and argument in its future briefing, Respondent/Appellant Telecom proffers that by the cross appeal, it seeks to challenge (1) the trial court's refusal to set aside the entry of default under the mere good cause standard of Rule 55(c), and (2) entry of judgment on a claim barred by the statute of limitations due to the Plaintiff's failure to timely restore the case within one year after the filing of the stipulation of dismissal.

The Court *sua sponte* dismissed the cross appeal based on the ground that the Respondent/Appellant Telecom did not file a Rule 60(b) motion, stating:

This appeal arises out of an order of the circuit court granting PTA-FLA Inc.'s motion for default judgment. Because a defaulting party may not appeal from a default judgment, we dismiss the notice of appeal filed by TW Telecom Holdings, Inc. See *Winesett v. Winesett*, 287 S.C. 332, 334, 338 S.E.2d 340, 341 (1985) (explaining a direct appeal does not lie from a default judgment; instead, the proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRPC). A partial remittitur will be sent as provided by Rule 221 (b) of the South Carolina Appellate Court Rules. The notice

of appeal filed by PTA-FLA, Inc. will be allowed to proceed. All future filings should utilize the above caption.

Telecom respectfully submits that the order of dismissal should be vacated and the cross appeal should be reinstated on the grounds that: (1) appellate preservation rules did not require Telecom to make an unnecessary Rule 60(b) motion after having already made a Rule 55(c) motion, and (2) the interlocutory orders are reviewable on appeal from the final judgment pursuant to S.C. Code Ann. § 14-3-330(1) and applicable case law.

1. Interlocutory orders are subject to review on appeal from final judgment.

Telecom could not file an immediate appeal from the Rule 55(c) order (or the associated order denying the motion for reconsideration) because the law is well settled that an order on a Rule 55(c) motion is not appealable until after final judgment. Ateyeh v. United of Omaha Life Ins. Co., 293 S.C. 436, 361 S.E.2d 340 (Ct. App. 1987); Thynes v. Lloyd, 294 S.C. 152, 154, 363 S.E.2d 122, 123 (Ct. App. 1987); Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC, 428 S.C. 261, 266, 834 S.E.2d 204, 206 (Ct. App. 2019). Likewise, Telecom could not file an immediate appeal from the order granting the motion to restore. Shields v. Martin Marietta Corp., 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) (“The decision on a motion to restore the case to the active docket is not a final judgment and is interlocutory and, therefore, not immediately appealable.”). However, the law is equally clear that those intermediate orders are reviewable on appeal from final judgment:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, *that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;*... (emphasis added).

S.C. Code Ann. § 14-3-330; 15 S.C. Jur. *Appeal and Error* § 15 (“After final judgment has been entered, however, a party may seek review of all decisions by the trial court that are material to the judgment.”)

Although Telecom chose not to appeal from the final judgment entered on the trial court’s damages award, Telecom still is entitled to seek review of the interlocutory orders by cross appeal in response to PTA-FLA’s appeal from the final judgment. See Morgan v. Smith, 59 S.C. 49, 37 S.E. 43, 44 (1900) (an intermediate order of one judge could be reviewed on appeal from a final decree of another judgment); Link v. Sch. Dist. of Pickens Cty., 302 S.C. 1, 7, 393 S.E.2d 176, 179 (1990) (party does not have to challenge final judgment to appeal interlocutory orders).

2. Appellate preservation rules did not require Telecom to make an unnecessary or ill-reasoned Rule 60(b) motion after the final judgment was entered.

As a ground for dismissal, the Court cites to a decision in Winesett v. Winesett, 287 S.C. 332, 333, 338 S.E.2d 340, 341 (1985), for the proposition that a direct appeal does not lie from a default judgment and that the proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRPC. Telecom maintains that this proposition is inapposite because Telecom first made a Rule 55(c) motion to set aside entry of default and final judgment was entered on the trial judge’s damage award after a default damages hearing.

One of the more recent seminal cases on default is Sundown Operating Co. v. Intedger Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009), which had a procedural history comparable to this case. In Sundown, the defendant made a Rule 55(c) motion to set aside entry of default which was denied, and then after a damages hearing was held and judgment entered, both parties appealed. In that opinion, the Supreme Court purposefully sought to clarify confusion in the case law regarding the application of the differing standards for relief set forth in Rule 55(c) and Rule

60(b). There was no holding or discussion in that opinion regarding any jurisdictional issue about the defendant not having made a Rule 60(b) motion after final judgment was entered.

As the Sundown Court explained the distinction between Rule 55(c) and Rule 60(b), it is clear that the timing of the defaulting defendant's awareness of the default is the pertinent factor to whether Rule 55(c) or Rule 60(b) is the proper process to seek relief. If default has been entered, but judgment has not yet been entered, the defendant's option is a motion under Rule 55(c) to move to set aside the entry of default. In contrast, if a default judgment already has been entered, the defendant must move for relief from that judgment under Rule 60(b), SCRCP. Neither Winesett nor Sundown hold that the defaulting defendant must make a Rule 60(b) after a Rule 55(c) has denied. Nothing in the Rules or legal logic support any requirement that a Rule 60(b) motion must be made in circumstances such as here where a Rule 55(c) motion has been made and ruled upon.

The appropriate limitation/qualification on the holding referenced from Winesett is explained in the context of basic appellate principles by the Court in Balloon Plantation, Inc. v. Head Balloons, Inc., 303 S.C. 152, 157–58, 399 S.E.2d 439, 442 (Ct. App. 1990):

In support of its argument, The Balloon Plantation relies on Winesett v. Winesett, 287 S.C. 332, 338 S.E.2d 340 (1985). There, the Supreme Court held that “a default judgment may not be appealed to this Court. The proper procedure for challenging a default judgment is to move the trial court to set aside the judgment pursuant to Rule 60(b), SCRCP.” Id. at 334, 338 S.E.2d at 341. The Court gave three reasons for requiring this procedure: (1) “a defendant who does not appear and answer ‘has no status in court which will enable him to appeal from the judgment rendered’”; (2) “a party appealing a default judgment will ordinarily be precluded from raising any issues on appeal because they were not first presented below”; and (3) “the appellant will often not be able to meet his burden of providing this Court with a record sufficient to permit an adequate review.” Id. at 333, 338 S.E.2d at 341.

The procedure required by the Court in Winesett is not required in the instant case. Here, unlike there, the defendants did appear and answer. They are not in default because of their failure to do so. Rather, they are in default because the circuit judge decided they should be in default. Here, unlike there, the trial court explicitly ruled

on the question of whether the defendants should be in default. This Court is not being asked to rule on an issue not first presented below. There is no point in requiring the defendants to ask the circuit judge to rule on the same question twice. Here, unlike there, the appellants are able to provide this Court with a sufficient record on appeal. Rule 60(b) provides that a court may relieve a party from a final judgment, order or proceeding for "Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc." The defendants do not seek relief based on any of these grounds. Therefore, a motion pursuant to Rule 60(b) would not make any sense. *Nam ratio legis est anima legis; cessante ratione legis cessat et ipsa lex* (or, so they say). (Footnote omitted)

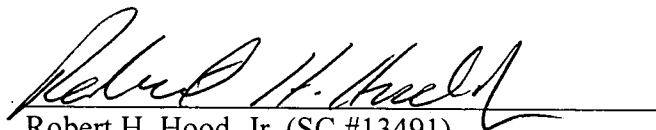
Under a comparable analysis, the Defendant Telecom did appear by making a Rule 55(c) motion to set aside entry of default in which the mere good cause standard was raised and ruled upon. After the damages hearings, the trial court entered a final judgment setting the damages from which an appeal was timely taken by the Plaintiff PTA-FLA who is dissatisfied with the amount of the award. A Rule 60(b) motion on specified grounds with a higher standard (per Sundown) was not required and would have served no logical or jurisprudential purpose, particularly in this case, where the Defendant Telecom chose not to appeal the final judgment entered on the damage award. However, Telecom is entitled to cross appeal to seek review of the interlocutory orders forming a foundation for the final judgment brought to this Court for review by operation of PTA-FLA's appeal.

CONCLUSION

WHEREFORE, based on the foregoing, the Respondent/Appellant Telecom respectfully submits that the order dismissing its cross appeal should be vacated and the cross appeal should be reinstated because Telecom was not required to make a Rule 60(b) motion after having already made a Rule 55(c) motion and the interlocutory orders are reviewable in conjunction with PTA-FLA's appeal from the final judgment.

Respectfully submitted,

HOOD LAW FIRM, LLC

A handwritten signature in black ink, appearing to read "Robert H. Hood, Jr.", written over a horizontal line.

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John O. Radeck, Jr. (SC #77849)

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February 28, 2020

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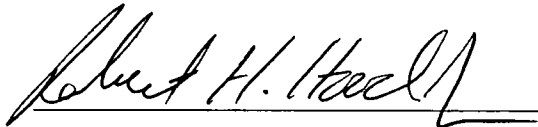
Attorneys for the Appellant-Respondent

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Certificate of Service

I, secretary to Robert H. Hood, Jr., attorney for the Respondent-Appellant do hereby certify that on **February 28, 2020**, I served a copy of the Petition for Rehearing of Dismissal of Cross Appeal on Counsel for Appellant-Respondent, via U.S. Mail, first class, postage prepaid to the following address:

Joshua E. Austin, Esquire
2101 Main Street (29201)
P.O. Box 8839
Columbia, SC 29202



February 28, 2020

Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: PTA-FLA, Inc. v. TW Telecom Holdings, Inc., a Delaware corporation; and DOES 1-10, inclusive
C/A No. 2017-CP-40-06433, Richland CP
Appellate Case No. 2020-000218
HLF File No. 576.000

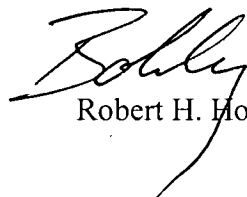
Dear Ms. Kitchings:

Enclosed please find the original and seven copies of the Petition for Rehearing of Dismissal of Cross Notice of Appeal for Respondent/Appellant TW Telecom Holdings, Inc. and a Certificate of Service in the above-referenced matter. Please return a clocked-in copy in the envelope provided.

By copy of this letter, we are serving all counsel with a copy of the Petition. Should you have any questions, please do not hesitate to contact me or my paralegal, Melinda Accardo.

Kind regards,

Yours truly,


Robert H. Hood, Jr.

RHHjr./mde
Enclosure

cc: Joshua E. Austin, Esquire

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

September 30, 2020

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