

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

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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.

FINAL APPELLANT'S BRIEF OF APPELLANT-RESPONDENT
PTA-FLA, INC.

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN APPLYING THE LAW OF DAMAGES FOR BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT?
2. DID THE TRIAL COURT ERR IN FINDING THAT PLAINTIFF HAD NOT MET ITS BURDEN OF PROOF FOR DELAY DAMAGES?

STATEMENT OF THE CASE

Appellant, PTA-FLA, Inc. (“PTA-FLA”) filed a Summons and Complaint on March 3, 2015. (R. p. 29). The Respondent, TW Telecom Holdings, Inc. (“TWT”) was served on March 16, 2015. (R. p. 29). An entry of default was entered on May 6, 2015. PTA-FLA’s complaint asserted causes of action against TWT for (1) Breach of Contract; (2) Breach of Contract Accompanied by Fraudulent Act; (3) Fraud in the Inducement; and (4) Promissory Estoppel. (R. p. 29). TWT appeared and filed an answer together with a motion to set aside entry of judgment and for a late answer on May 12, 2015. (R. p. 29). Judge G. Thomas Cooper, Jr. denied the motion by order of July 16, 2016. (R. pp. 29-30). A motion for reconsideration was denied by Judge Cooper in an order filed August 26, 2015. (R. pp. 29-30).

The case came before Judge Robert E. Hood for a trial of damages held on January 31, 2019 and December 3, 2019. (R. p. 29). Judge Hood’s order awarded damages in the amount of \$9,218.42 and was filed on January 13, 2020. (R. pp. 33, 38). Appellant then timely filed a notice of appeal thereafter on February 11, 2020. (R. p. 404).

STANDARD OF REVIEW

“The trial judge has considerable discretion regarding the amount of damages, both actual and punitive.” Austin v. Specialty Transp. Servs., 358 S.C. 298, 311, 594 S.E.2d 867, (Ct. App. 2004) (internal citations omitted). The Court of Appeals’ review is limited to correction of clear

errors of law. Id. (citing Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 611, 538 S.E.2d 15, 32 (Ct. App. 2000); Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000)). An “appellate court will not disturb the judge’s findings of fact as long as they are reasonably supported by the evidence.” Epworth Children’s Home v. Beasley, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005) (citing Townes Assocs., Ltd. V. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976)).

STATEMENT OF FACTS

I. Background

PTA-FLA offered wireless communications services in South Carolina specifically in the Greenville and Columbia areas. (R. p.112 lines 19-24). In 2010 and 2011, PTA-FLA’s business plan anticipated providing unlimited data usage to its customers at a low cost which would be very attractive to customers in the market. (R. p. 151 line 22- p.152 line 1). To do this, PTA-FLA needed to enter into an arrangement with a wholesale provider that would allow unlimited traffic on its network with the only constraint being bandwidth usage at the internet “drain” which would be increased over time as payments grew and PTA-FLA’s customer base grew. (R. 47-48, ¶¶ 8-12). That arrangement was what PTA-FLA bargained for with TWT but that is not what was delivered, and PTA-FLA was unable to execute its business plan. (R. p. 140 lines 11-15). Instead, PTA-FLA was provided limited use of circuits that TWT provided initially and increased as TWT saw fit. (R. pp. 49-51, ¶¶ 23, 24, 26-29). This prevented PTA-FLA from offering unlimited data usage to its customers, in fact, PTA-FLA’s wholesale data usage never exceeded the usage rate that TWT initially billed at \$2,700 a month. (R. pp. 49-50 ¶¶ 23-25, Pl. R. pp. 396-97).

As a result of TWT’s breaches of contract accompanied by fraudulent acts, PTA-FLA

was not able to make its unlimited data offering and the bargain it made with TWT for a flat rate payment schedule for unlimited data usage on TWT's network limited only by the bandwidth at the internet drain was useless. (R. pp. 47-50, 56-57 (¶¶ 8-12, 23-25, 73-78), R. p. 140 lines 11-15).

II. The Complaint

PTA-FLA provided wireless communications services in South Carolina and elsewhere under the brand "ClearTalk." (R. p. 46, ¶ 1). In 2010, after a series of negotiations between representatives of PTA-FLA and TWT, the parties entered into an agreement under which TWT agreed to provide, by no later than October 1, 2010, wholesale internet and transport services to enable PTA-FLA to offer data plans to its customers. (R. p. 47, ¶ 8). This original agreement had an initial period of 28 months. (R. p. 47, ¶ 8). Pursuant to the agreement, in exchange for certain payments to be made by PTA-FLA, TWT agreed to provide unlimited internet service up to certain bandwidth limits measured by the amount of internet traffic used at a "drain" located at 1401 Main Street in Columbia, SC¹. (R. pp. 47-48, ¶ 9). During the first twelve months of the contract, as long as PTA-FLA did not exceed 140 megabytes of bandwidth at any given time at the drain, then PTA-FLA was entitled to unlimited internet use on TWT's facilities. (R. pp. 47-48, ¶ 9). That bandwidth cap at the drain would raise to 750 megabytes of bandwidth at the drain in months 13-17 and raise again to 2 gigabytes of bandwidth starting in month 18. (R. p. 8, ¶ 48).

The parties agreed they would negotiate in good faith for an extension of the agreement's 28 month term after 22 months of the agreement had elapsed. (R. p. 48, ¶ 10). The rates to be

¹ A drain is the location on a company's network where the traffic within the company's network leaves the company's network and goes out to the wider Internet. So as explained here, any traffic that went over PTA-FLA's equipment or stayed on TWT's network but never went to the wider network would not add to the drain bandwidth usage.

charged for TWT's services were subject to much discussion and negotiation and a predictable payment structure was important to PTA-FLA because it would allow the company to plan for and facilitate business growth without having to negotiate and execute changes in service and rates. (R. p. 48, ¶ 11). In fact, there was an amount in excess of what PTA-FLA would likely use if it paid the normal rate, but the set payments would allow PTA-FLA avoid monitoring the circuits all the time or fill out schedules for additional circuits or require additional planning all the time. (R. p. 128, lines 7-19). Even though the terms of the agreement were not TWT's standard offering, TWT assured PTA-FLA that it could perform as agreed. (R. p. 48, ¶ 12).

In or around October 2010, Defendants began providing services pursuant to the agreement, but the initial invoices sent out by TWT did not correspond with the previously agreed payment schedule. (R. p. 49, ¶¶ 20, 21). The first invoice was sent for \$3,450.09 while the payment schedule had an initial invoice amount that should have been \$5,588.00, plus taxes and associated fees. (R. p. 49, ¶ 21). Though the invoice was lower than the amount that the parties had agreed to, PTA-FLA was concerned because the payment terms were intended to provide predictability in the charge PTA-FLA would be paying as necessary to launch its data services and later when usage increased. (R. p. 49, ¶ 22). PTA-FLA was also concerned because, about the same time the invoice was sent, PTA-FLA received reports from TWT's employees that TWT did not intend to honor the agreement and TWT desired to implement another type of arrangement that would involve a different structure and only a small amount (less than 30 megabytes) of internet bandwidth available at the drain at the 1401 Main location. (R. pp. 49-50 ¶ 23).

This uncertainty introduced by TWT hampered PTA-FLA's efforts to launch its data service because PTA-FLA could not effectively market the service without knowing what its

costs were going to be. (R. p. 50, ¶ 24). The fixed cost element of the payment schedule was a material term to PTA-FLA because, in reliance on this element, PTA-FLA would be able to sell unlimited service to its customers. (R. p. 50, ¶ 24).

As a result of these issues, PTA-FLA had a meeting with TWT's representative Mr. Knierim to discuss the differences in billing. (R. p. 50, ¶¶ 26, 27). Mr. Knierim informed PTA-FLA that the invoice reflected PTA-FLA's actual usage (at an unnegotiated rate that TWT unilaterally chose to apply) as opposed to the flat rate of \$5,588.00 and Mr. Knierim indicated that the invoice was meant to save PTA-FLA money. (R. p. 50, ¶¶ 26, 27). The meeting concluded with Mr. Knierim assuring PTA-FLA that under no circumstances would it be charged a higher amount than what was set forth in the payment schedule, that TWT would monitor the usage and make sure there was no blocking of service because of limitations on traffic and that in effect, TWT would likely save PTA-FLA money. (R. p. 50, ¶ 28). TWT assured PTA-FLA 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 at the drain, where the TWT traffic reaches the greater internet. (R. p. 50, ¶ 28). Mr. Knierim also represented that he and TWT would do whatever was necessary to honor its commitment and make the agreement work within TWT's system without further action from PTA-FLA. (R. p. 51, ¶ 29).

In or prior to April 2011, PTA-FLA 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. (R. p. 51, ¶ 30). At that time, the data transmitted was less than 40 Megabytes when the 1401 Main location drain should have allowed for 140 Megabytes of data throughout. (R. p. 51, ¶ 30). After weeks of investigation, PTA-FLA

was able to isolate the erratic service problem as “MAC flapping” stemming from TWT’s configuration. (R. p. 51, ¶ 31). MAC flapping meant, essentially, that at intermittent and unpredictable times, all of the internet services being provided by TWT would shut down. (R. p. 51, ¶ 32). This issue affected the PTA-FLA’s customers because its customers experienced interruption in the data service they purchased and PTA-FLA notified TWT of this recurring problem. (R. p. 51, ¶¶ 33, 34). TWT told PTA-FLA it would need to purchase additional equipment to address the problems within its network. (R. p. 51, ¶ 35).

In order to implement the changes necessary to remedy the service problems caused by TWT’s network, TWT claimed that PTA-FLA needed to sign a revised service agreement which PTA-FLA initially refused as some of the terms were inconsistent with the original agreement. (R. p. 52, ¶¶ 38, 39). However, TWT refused to remedy the network problem until PTA-FLA signed the revised service agreement. (R. p. 52, ¶ 39). TWT’s refusal to remedy the network problem continued to cause significant business problems for PTA-FLA as it prevented PTA-FLA from delivering one of its core products to its customers and caused damage to PTA-FLA’s reputation at the critical start up time of its network, so PTA-FLA signed the revised agreement under protest. (R. p. 52, ¶ 41).

At that time, Mr. Knierim assured PTA-FLA that the changes would not impact the payment schedule in any way and as long as PTA-FLA stayed within the bandwidth limits at 1401 Main Street drain location, the charges would not exceed the monthly payments set forth in the payment schedule. (R. p. 52, ¶42). Despite these assurances, immediately after TWT remedied the defects in its network, it began invoicing PTA-FLA for charges in excess of the terms set forth in the payment schedule. (R. p. 52, ¶ 43). For example, in January 2012, TWT charged PTA-FLA \$15,614.83, despite the payment schedule calling for a \$13,588.00 payment

for that month. (R. p. 52, ¶ 44). In February 2012, TWT charged PTA-FLA \$24,715.04, despite the payment schedule calling for a \$13,588 for that month. (R. p. 53, ¶ 45). TWT refused to adhere to the terms of the agreement and caused PTA-FLA 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 because PTA-FLA never got the service limited only at the 1401 main street location, which would have allowed PTA-FLA to sell unlimited internet service to its customers. (R. p. 53, ¶ 46).

The agreement also called for an increase in bandwidth as the payment schedule prices increased. (R. p. 53, ¶¶ 47, 48). Specifically, in months 1-12 of the agreement, TWT was supposed to provide 140 Megabytes of bandwidth at the drain; in months 13-17, TWT was supposed to provide up to 750 Megabytes of bandwidth at the drain; and in month 18 and after, TWT was supposed to provide up to 2 Gigabytes of bandwidth. (R. p. 53, ¶ 48). TWT did not provide PTA-FLA with the bandwidth for which it was paying and in turn, this led to PTA-FLA's customers' complaints that data access was being denied. (R. p. 53, ¶ 49). PTA-FLA's customers who purchased data plans expected to be able to access the internet on every attempt, and PTA-FLA's inability to provide this data access damaged its business. (R. p. 53, ¶ 50).

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 had developed over the initial period, as such, PTA-FLA attempted to initiate the renewal negotiation in or around July 2012. (R. p. 54, ¶¶ 53, 54). TWT refused to engage in the negotiation process. (R. p. 54, ¶ 56). The net result, was TWT invoiced PTA-FLA for amounts that were not consistent with either the parties' agreements or PTA-FLA's actual usage, while continuing to refuse to engage in good faith negotiation to extend the agreement. (R. p. 54, ¶ 57). Finally, a new agreement was

reached where PTA-FLA would pay \$8,731 for the period from September 2012 to January 2013 for TWT's services. (R. p. 54, ¶ 58). Although lower cost alternatives were available at this point, PTA-FLA opted to continue its relationship with TWT in order to avoid the difficulties and expenses involved with switching to another carrier which is an expensive and time intensive effort that takes at least six months and ideally twelve months to change. (R. p. 55, ¶ 59).

In late January 2013, TWT abruptly advised PTA-FLA that it intended to terminate its services with PTA-FLA and PTA-FLA would need to find another provider. (R. p. 55, ¶¶ 61-62). Given the nature of the services, PTA-FLA needed significant lead time to procure bids from other providers in order to obtain a competitive rate, and TWT's abrupt notice resulted in PTA-FLA being unable to negotiate from a position of strength and forced PTA-FLA to urgently find an affordable solution. (R. p. 55, ¶¶ 63-64). Despite using best efforts to transfer the usage to another provider, the process still took several months. (R. p. 55, ¶ 65). During this transition period, TWT refused to honor the \$8,731 per month as agreed or charge for actual usage which would have been less than that amount, and instead charged PTA-FLA exorbitant rates calculated without a basis in cost or agreement, under threat of immediately disconnecting PTA-FLA's customers from their mobile data service. (R. pp. 55-56, ¶ 66).

In addition to breaching the agreement, TWT acted fraudulently by making misrepresentations to PTA-FLA that, despite the changes in service, PTA-FLA's rates would remain within the parameters of the payment schedule. (R. p. 56, ¶ 74). TWT continuously assured PTA-FLA that it would provide unlimited usage capped only by the bandwidth at the drain which would also increase as the payment schedule prices increased, but TWT never provided services in that manner and only provided service on a circuit by circuit basis. (R. pp. 47-55, ¶¶ 9-12, 20-29, 37-52, 58-60). TWT made such representations with knowledge of their

falsity and with fraudulent intent, or with reckless disregard to the trust of such representations. (R. p. 57, ¶ 75). TWT thereafter reneged on these representations with the knowledge that PTA-FLA's business was dependent upon the services provided by TWT. (R. p. 57, ¶76). As a result of TWT's breach of contract accompanied by fraudulent misrepresentations by TWT's representatives, PTA-FLA's business plan was disrupted, resulting in damages, and PTA-FLA making payments for a service it never received. (R. pp. 47-55, ¶¶ 9-12, 20-29, 37-52, 58-60, 77).

III. Damages Hearing

Judge Robert E. Hood held two hearings on default judgment damages on January 31, 2019 and December 3, 2019. (R. p. 29). At the January 31, 2019 hearing, PTA-FLA informed the court that it was seeking direct damages and delay damages related to the cause of action for breach of contract accompanied by fraudulent act. (R. p. 110, lines 5-14). PTA-FLA requested \$396,082.42 in direct damages and \$1,346,498 in damages related to delays associated with TWT's misconduct. (R. p. 110, lines 7-10).

At the January 31, 2019 hearing, PTA-FLA called Mr. Eric Steinmann ("Mr. Steinmann") who is the development manager for PTA-FLA and its related companies as a witness. (R. p. 111, lines 4-6). Mr. Steinmann also is a CPA and graduate of law school who went to work for a CPA firm and after about four years started his own CPA firm where he had over 200 clients for about 20 years, ranging from very large clients to very small clients. (R. p. 182 line 20-p. 183 line 4).

PTA-FLA also called Mr. John Goocher as a witness who was a consulting to PTA-FLA to help with technical aspects of the unlimited system. (R. p. 139, lines 5-9). At the hearing, Mr. Steinmann testified to the direct damages and delay damages including using a profit and

loss statement for the delay damages and Judge Hood required PTA-FLA to provide additional documents that backed up the profit and loss statement, upon request of TWT's counsel. (R. p. 125, line 25-p. 126, line 13).

PTA-FLA provided TWT with access to more than twenty bankers boxes of documents that served as the basis for the profit and loss statement. (R. p. 186, lines 3-13). And on December 3, 2019, Judge Hood held a second damages hearing for TWT to ask additional questions about PTA-FLA's financial information. (R. p. 29).

IV. Damages

PTA-FLA requested \$396,082.42 in direct damages which reflected the amount of money that PTA-FLA paid TWT for an unlimited service restricted only by the bandwidth at the drain that PTA-FLA never received. (R. p. 110, lines 7-8, p. 120, lines 5-9, R. pp. 47-55, 57, ¶¶ 9-12, 20-29, 37-52, 58-60, 77). Additionally, PTA-FLA requested \$1,346,498 in damages for the costs attributable to the approximate delay PTA-FLA had in going from testing the network to a launch of the services. (R. p. 110, lines 7-8, p.120 line 22-p. 122, line 2). Mr. Steinmann explained that he identified the six-month period of the delays related to TWT's issues in getting the network going and using the profit and loss statement he looked at the net loss for that period of them and then went back and looked at it again "to take out anything that may not be fair to charge TWT for the delay, items like contributions that we made, charitable contributions, stuff like that, or if we have some people in that were building some future sites or something. I tried to remove all those costs by eliminating certain line items." (R. p. 121, lines 18-25). Mr. Steinmann eliminated over \$400,000 from that period of time that resulted in the net delay damage number that PTA-FLA is seeking. (R. p. 121, line 25-p. 122 ,line 2).

At the December 3, 2019 hearing, attorneys for TWT asked Mr. Steinmann a number of

questions about specific line items and potential discrepancies, but Mr. Steinmann made it clear that, “every number here is supported by the ledger and I think that there’s been a question raised if I’m certain of these numbers, but I believe all the support is there for those numbers that are on this statement.” (R. p. 183 line 23-p. 184, line 5).

ARGUMENT

I. THE TRIAL COURT ERRED IN APPLYING THE LAW WHEN AWARDED DAMAGES FOR BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT

To recover 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 (Ct. App. 1985) (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 “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 TWT has defaulted, liability has been conceded.

First, TWT breached the contract. Billing by TWT was not pursuant to the rate schedule. (R. pp. 49, 52-53, ¶¶ 21, 43-46). Service provided by TWT was not what was promised because of “flapping” issues. (R. p. 51, ¶¶ 30-34). Service provided by TWT was for less than the specified bandwidth. (R. p. 53, ¶ 47-50).

Second, there was fraudulent intent relating to the breaching of the contract and not merely its making. After TWT started to bill in deviation of the payment schedule (at a lower amount than planned), PTA-FLA reminded TWT 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. (R. p. 50, ¶ 27). TWT again assured PTA-FLA that it would

not be charged any amount higher than the payment schedule, which was knowingly false. (R. p. 50, ¶ 28). TWT 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. TWT told PTA-FLA it would need additional circuits and a change to the initial configuration that was approved in advance by TWT's engineers. (R. p. 51, ¶¶ 35-36). TWT intended to charge PTA-FLA additional sums and knew it could not provide the network service it had promised. (R. p. 51, ¶¶ 35-36).

Finally, there were numerous fraudulent acts accompanying the breach. TWT 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, TWT began charging fees in excess of the payment schedule. (R. p. 52, ¶ 42). TWT 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. (R. p. 49, ¶¶ 18-19). After TWT started to bill in deviation of the payment schedule (at a lower amount than planned), PTA-FLA reminded TWT that everyone agreed to deviate from normal payment structure for unlimited usage bound only by the amount of internet used at the drain location and not for actual usage. (R. p. 50, ¶ 27). TWT again assured PTA-FLA that it would not be charged any amount higher than the payment schedule, which was knowingly false. (R. p. 50, ¶ 28).

PTA-FLA paid TWT a total of \$396,082.42 over this relationship for the services. (R. p. 110 lines 7-8, p. 120, lines 5-9). However, because of TWT's breach of contract accompanied by fraudulent act, PTA-FLA never received any real value for the service, because even what service PTA-FLA had was not the bargained for service and kept PTA-FLA from implementing

its business plan of selling unlimited data plans to its customers. (R. pp. 47-50, 56-57, ¶¶ 8-12, 23-25, 73-78, R. p. 140, lines 11-15).

The trial court in its Order awarded only \$9,218.42 to PTA-FLA for direct damages. (R. p. 33). The trial court reasoned that PTA-FLA agreed to pay \$386,864.00 under the agreement, but paid \$396,082.42 and so PTA-FLA overpaid a total of \$9,218.42. (R. p. 33). However, the trial court erred in apply the law related to breach of contract accompanied by fraudulent act. If this were simply a breach of contract, it may be reasonable to determine that PTA-FLA should be reimbursed what it overpaid, but the allegations, accepted as true, were that TWT's fraudulent acts prevented PTA-FLA from getting the benefit of what it had bargained. PTA-FLA agreed to pay \$386,864.00 for service that was unlimited across the network and limited only at the drain by starting at 140 Megabytes and going up to 2 Gigabytes as the payments schedule increased. (R. p. 53, ¶ 48, R. p. 136, lines 6-22, p. 140, lines 11-15). TWT never provided that service, and in fact knew that it could not and would not, and instead continued to lie to PTA-FLA in an effort to keep PTA-FLA's contract. (R. pp. 47-50, 56-57, ¶¶ 8-12, 23-25, 73-78, R. p. 140, lines 11-15).

As PTA-FLA explained in its Memorandum in Support of Plaintiff's Motion for Default Judgment and Damages and Plaintiff's Supplemental Memorandum in Support of Plaintiff's Motion for Default Judgment and Damages, both filed with the court before the first damages hearing, even assuming that TWT's service had value, the original configuration was initially billed at \$2,799.94 a month or less and would have been a high estimate of actual usage and value of what PTA-FLA received if it did not require unlimited usage. (R. pp. 396-97). After the initial 28-month period ended, the circuits would have been priced at \$5,512.00, which corresponds to the rate for the same service per circuit PTA-FLA was able to get from a

competitor to TWT at that time. (R. p. 397). Therefore, ignoring the fact that regular service was not what PTA-FLA bargained for with TWT, and just assuming fair market value of the service, PTA-FLA could have received a value of at most \$116,928.32 from the services TWT provided, but PTA-FLA paid \$396,082.42 for the same service, because it was making payments under an agreement it understood included unlimited data usage capped only by bandwidth usage at the drain at 1401 Main Street. At the very least, the trial court should have awarded \$279,154.10 but PTA-FLA still believes that the accurate direct damages is the total amount of money paid because, “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.

As a result, the trial court erred in its application of the law in making its determination that PTA-FLA was entitled only to the amount it paid over what it agreed to pay under the agreement. The trial court’s decision should be reversed and the full amount of direct damages should be awarded.

II. THE TRIAL JUDGE ERRED BECAUSE THE DENIAL OF DELAY DAMAGES IS NOT REASONABLY SUPPORTED BY THE EVIDENCE

“When calculating damages for breach of contract, damages should place the nonbreaching party in the position he would have enjoyed had the contract been performed.” Madren v. Bradford, 378 S.C. 187, 195, 661 S.E.2d 390, 395 (Ct. App. 2008) (citing Collins Entm’t., Inc. v. White, 363 S.C. 546, 559, 611 S.E.2d 262, 268-69 (Ct. App. 2005)). “Generally, damages consist of ‘(1 out-of-pocket costs actually incurred as a result of the contract; and (2)

the gain above costs that would have been realized had the contract been performed.” Id. (quoting Collins, 363 S.C. at 559, 611 S.E.2d at 269). “Though the party need not prove damages with mathematical certainty, the evidence should allow a court to reasonably determine an appropriate amount.” Id. (Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 646, 529 S.E.2d 764, 767 (Ct. App. 2000)). The amount of damages cannot be left to conjecture, guess, or speculation. Id. (citing Collins, 363 S.C. at 559, 611 S.E.2d at 269).

Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible. See Clark v. Cantrell, 339 S.C. 369, 378, 529 S.E.2d 528, 533 (2000). Actual damages are awarded to a litigant in compensation for his actual loss or injury. Laird v. Nationwide Ins. Co., 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964). Actual damages are such as will compensate the party for injuries suffered or losses sustained. Id. They are such damages as will simply make good or replace the loss caused by the wrong or injury. Actual damages are damages in satisfaction of, or in recompense for, loss or injury sustained. Barnwell v. Barber-Colman Co., 301 S.C. 534, 537, 393 S.E.2d 162, 163 (1989). The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. Clark, 339 S.C. at 378, 529 S.E.2d at 533.

Mellen v. Lane, 377 S.C. 261, 287, 659 S.E.2d 236, 250 (Ct. App. 2008).

The trial court finding that PTA-FLA’s allegation in support of the delay damages—the inability to implement an unlimited data plan—was not pled in the Complaint is inaccurate. (R. p. 34).

In the Complaint, PTA-FLA pled “in exchange for certain payments to be made by [PTA-FLA], 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.” (R. p. 47, ¶9). “The predictable payment structure was important to [PTA-FLA] as it allowed the company to plan for and facilitate business growth without having to negotiate and execute changes in service and rates.” (R. p. 48, ¶ 11). “Although the terms of the Agreement

were not Defendants' standard offering, Defendants assured [PTA-FLA] they could perform as agreed." (R. p. 48, ¶ 12). "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" (R. p. 49, ¶ 21).

"While the amount invoiced was lower than the amount upon which the parties had agreed, [PTA-FLA] was concerned because the payment terms were intended to provide predictability in the charges [PTA-FLA] would be paying as necessary to launch its data services and thereafter when usage increased." (R. p. 49, ¶ 22). "[PTA-FLA] was also concerned because, around the time the invoice was sent, [PTA-FLA] 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." (R. pp. 49-50, ¶ 23). "This uncertainty introduced by Defendants hampered [PTA-FLA]'s efforts to launch its data service as [PTA-FLA] could not effectively market the service without know what costs were going to be. The fixed cost element of the Payment Schedule was a material term to [PTA-FLA] because, in reliance on this element, [PTA-FLA] **would be able to sell unlimited service to its customers.**" (R. p. 50, ¶ 24) (emphasis added).

"[PTA-FLA] 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." (R. p. 50, ¶ 27). This was combined with "in or prior to April 2011, [PTA-FLA] began noticing erratic behavior on 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." (R. p. 51, ¶ 30). "After weeks of

investigation and testing, [PTA-FLA] was able to isolate the erratic service problem as a ‘MAC flapping’ issue and identify it as stemming from Defendants’ configuration.” (R. p. 51, ¶31). “‘MAC flapping’ meant, essentially, that at intermittent and unpredictable times, all of the internet services being provided by Defendants would shut down” (R. p. 51, ¶ 32). “This issue affected the customer’s of [PTA-FLA] as its customers experienced interruption in the data services they purchased from [PTA-FLA]. (R. p. 51, ¶ 33).

“In order to implement the changes necessary to remedy the service problems caused by Defendants’ network, Defendants claimed that [PTA-FLA] needed to sign a revised service agreement. (R. p. 52, ¶ 37). Defendants, however, refused to remedy the network problem (although it was able to do so) until [PTA-FLA] signed the revised service agreement.” (R. p. 52, ¶ 39).

The complaint alleged that PTA-FLA intended to implement an unlimited data plan for its customers which could have been done if TWT provided unlimited data service bounded only by the bandwidth at the drain at 1401 Main Street. The trial court may have misunderstand the technological nuisance between the ability to provide an unlimited data plan to a customer and buying wholesale data service that allows unlimited transport on TWT’s network and is only limited by a bandwidth amount at the drain. The complaint notes that the system was having problems and the amount of data being transmitted at the drain was less than 40 Megabytes of the 140 Megabytes amount allowed, so PTA-FLA was not even close to reach its bandwidth restriction. (R. p. 51, ¶ 30). Furthermore, after 12 months the bandwidth amount would raise from 140 megabytes to 750 megabytes of bandwidth at the drain as the payment schedule increased, eventually raising to 2 gigabytes of bandwidth in month 18. (R. p. 53, ¶ 48).

Moreover, the trial court stated that, “Plaintiff admitted that the business plan concerning

data with the Defendant *did* include a limit.” (R. p. 35). However, that discussion and citation to the transcript is an excerpt from a colloquy with PTA-FLA’s attorney and wholly ignores the explanation right after that:

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
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.

(R. p. 161 line 16-p. 162, line 2).

The trial court refers to discrepancies in testimony about PTA-FLA’s consulting fees as a major part of why PTA-FLA has failed to meet its burden in proving delay damages. (R. p. 36). In the initial hearing on January 31, 2019, Mr. Steinmann was asked who PTA-FLA paid the \$459,000 to in the six-month period and Mr. Steinmann said primarily the bulk was Kevin Corrigan and John Goocher who were expensive. (R. p. 139, lines 17-21). The trial court stated that it was ultimately shown that Mr. Goocher was paid \$22,500 a month for a total of \$90,000 during the delay period and Mr. Corrigan was only paid a total of \$50,000. (R. p. 36). The trial court stated that this was another inconsistency that undermines the reliability of the P&L Summary. (R. p. 36). However, this additional question was asked almost a year later with the benefit of review of more than twenty bankers’ boxes full of supporting documentation. Furthermore, Mr. Steinmann, a CPA, stated “I believe every number here is supported by the ledger and I think that there’s been a question raised if I’m certain of these numbers, but I believe all the support is there in those numbers that are on this statement.” (R. p. 183 line 23-p.

184, line 5). Additionally, Mr. Steinmann was asked if there were other consultants that could have been paid out of the \$459,000 or whether there were only two consultants hired, to which Mr. Steinmann responded, “no, there were certainly a lot of consultants. And maybe when I said bulk, maybe that was the two that would have the biggest amount, but there may have been several other ones in there. And I could probably stretch my memory for a couple of them, but it’s—the best thing would be to look at the detail backing up that number to see who they were and I could explain anyone that’s in that number and what they did and why they’re properly in that number.” (R. p. 184, lines 6-18).

Mr. Steinmann was being asked about things that happened in 2011 and stated that the documents themselves would be the best resource to use to recollect and answer and he was sure that all the numbers matched up with support. While TWT’s counsel was able to find a few discrepancies in a year’s worth of accounting records that should not make the ability to ascertain the delay damages completely unreasonable. Additionally, PTA-FLA had offered to bring the support boxes to court, but TWT’s counsel said they did not need them. (R. p. 192, line- p. 193, line 2).

PTA-FLA provided evidence that should allow a court to reasonably determine an appropriate amount of delay damages. By the trial court’s failure to award any delay damages at all is not reasonably supported by the evidence and should therefore be reversed.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the circuit court and award additional damages.

Respectfully submitted,

October 20, 2020

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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR

October 20, 2020

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