

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-1814

Lauren Proctor and Trans-Union National
Title Insurance Company f/k/a Atlantic
Title Insurance Company,

Respondents,

v.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man, Forrest
Whitlark, Paul Whitlark, Charlie E. Bishop,
and Brett Blanks,

Appellants.

RECORD ON APPEAL
VOLUME I

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RECEIVED
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SC Court of Appeals

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2006CP4001814

Lauren Proctor

vs.

Whitlark & Whitlark Inc

Plaintiff

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;☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of _____, 2009.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2009, and a copy mailed first class this _____ day of _____, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

Mario A Pacella
 Louis H Lang

ATTORNEY(S) FOR THE PLAINTIFF(S)

SCRPC APP-24/FORM 4

James Marcus Whitlark
 James Mixon Griffin
 E. Hood Temple
 Michael Charles Abbott

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W. McBride
 Clerk of Court

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Lauren Proctor and TransUnion National Title
Insurance Company f/k/a Atlantic Title
Insurance Company,

Plaintiffs,

vs.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man, Forrest Whitlark,
Paul Whitlark, Charlic E. Bishop, and Brett
Blanks,

Defendants.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C/A # 06-CP-40-1814

ORDER ON SUMMARY JUDGMENT

2011 SEP -9 PM 3:30
RICHLAND COUNTY
FILED
JANETTE W. McBRIDE
C.C.P. & G.S.

Before the Court are a number of motions for summary judgment. Plaintiff Lauren Proctor ("Plaintiff" or "Proctor") has filed a Motion for Partial Summary Judgment contending no genuine issue of material fact exists other than the amount of damages. Plaintiff TransUnion National Title Insurance Company ("TNTIC") joins in Plaintiff Proctor's motion. Defendants Whitlark & Whitlark, Inc., Forest Whitlark, and Paul Whitlark (collectively referred to as "Whitlark Defendants") filed a Motion for Summary Judgment contending that they are entitled to summary judgment because of the common law affirmative defense of *in pari delicto*. The Honorable William P. Keesley, in an Order dated August 20, 2008, previously addressed these summary judgment motions, resolving them without prejudice to the parties to re-file the motion on certain issues. Defendants Charlie E. Bishop and Brett Blanks (collectively "Bishop and Blanks") also filed a Motion for Summary Judgment alleging that Plaintiffs cannot recover because the causes of action are barred by the statute of limitations, unclean hands, and the affirmative defense of *in pari delicto*.

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FACTUAL BACKGROUND

In 1988, Attorney Walter Smith had a real estate practice in which he employed a company named State Title to provide real estate closing services. Stella Kelly owned State Title. Her daughter is the Plaintiff Lauren Proctor. Atlantic Title (now known as TNTIC) was the principal, if not the exclusive, title insurance company that Smith and State Title used. *In Re Smith*, 370 S.C. 343, 345-346, 635 S.E.2d 87, 88-89 (2006).

Smith had no meaningful involvement in handling the proceeds from the real estate closings after the clients left his law office, and did not reconcile or thoroughly inspect the records of his trust accounts until severe shortages appeared in 2005. This was true despite what the Supreme Court described as the dramatic and glaring red flags showing that the proceeds from the real estate closing were not being safely kept. These red flags began in 2000 and lasted at least until June 2005. *In re Smith*, 370 S.C. at 347-349, 635 S.E.2d at 89-90.

Proctor began stealing funds from Smith's trust account. To embezzle the funds, she would write herself checks made out to cash, forge her mother's signature on checks, or launder the funds through a friend's checking account. She knew that all of this was wrong and illegal when she did it.

On June 16, 2005, Smith, having discovered the problem, self-reported and notified Atlantic Title of the shortages and problems with the trust account. *Id.* at 352, 635 S.E.2d at 92. He was ultimately suspended indefinitely. *Id.*

Proctor claims that she used the funds that she admittedly stole to gamble at various establishments, including Rockaway's Athletic Club and Pizza Man run by the Whitlark defendants. Bishop and Blanks formerly co-owned a limited liability company, named Zodiac Distributing, LLC, before it dissolved on May 3, 2007. Zodiac placed one coin operated touch screen amusement game at the Pizza Man restaurant. Zodiac's machine was only one of the five or six machines available at Rockaway's and Pizza Man. Zodiac's machine had attached to it the required operator's license which identified it as the owner.

Proctor pled guilty in federal court and was ordered to pay \$755,000 in restitution for the illegal diversion of the money. She now seeks to recover from all the Defendants the gambling losses she allegedly incurred up to June 2005. TNTIC seeks to recover the losses which it traces through Proctor, Smith, and the Whitlarks before reaching Bishop and Blanks. TNTIC has also brought a separate action against Proctor, its co-plaintiff in this action. See Docket No. 2005-



CP-40-05411. In that action, TNTIC seeks to recover from Proctor the same losses that it seeks in this action. Proctor entered a Confession of Judgment in the amount of \$461,495.32 on January 23, 2008.

In late October or early November 2007, Plaintiff and her counsel received discovery documents from Whitlark & Whitlark, Inc., including one page of an indemnification agreement between Zodiac Distributing, LLC, Brett Blanks, Charlie Bishop, and Defendants Forrest and Paul Whitlark. Prior to receipt of that document, Plaintiff Proctor contends that neither Plaintiff nor her attorney knew of the relationship between Zodiac Distributing LLC, Brett Blanks, Charlie Bishop, and the Whitlarks. On November 7, 2007, Forrest Whitlark waived his Fifth Amendment privilege and testified for the first time that one of the machines at Pizza Man was owned by Zodiac Distributing, Charlie Bishop, and Brett Blanks. Previous attempts to acquire this information from Forrest Whitlark were delayed by the assertion of his Fifth Amendment privilege. During that deposition, Plaintiff learned for the first time that Defendants Bishop and Blanks shared in the profits with Forrest Whitlark and others generated from that machine at Pizza Man.

On November 19, 2007, Plaintiff's counsel contacted Heath Taylor, attorney for Defendants Charlie Bishop and Brett Blanks, and notified him that, given the new information, Plaintiffs would be filing a motion to amend the complaint to include the two new defendants. Ms. Proctor's attorney filed a Motion to Amend the Complaint two days later on November 21, 2007, along with an accompanying proposed Second Amended Complaint that included Charlie Bishop and Brett Blanks as defendants.

Plaintiffs' Motion to Amend was heard in January, 2008 and taken under advisement. A written order was issued on August 20, 2008 granting Plaintiffs' Motion to Amend the complaint to add Charlie Bishop and Brett Blanks as defendants in the case. Following that ruling, Plaintiff filed her Second Amended Complaint on August 29, 2008. The Second Amended Complaint alleges causes of action for declaratory judgment, unjust enrichment, civil conspiracy, violations of the Unfair Trade Practices Act, and negligence.

STANDARD OF REVIEW

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Hamiter v. Retirement Division of South Carolina, 326 S.C. 93, 96, 484 S.E 2d 586, 587 (1997); Café Assocs., Ltd. v. Gerngross,

305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). The Court may grant summary judgment to a party when, after a reasonable time for discovery, the evidence demonstrates that the non-movant has failed to establish an essential element of his case. The party moving for summary judgment bears the initial burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970). In determining whether any triable issue of fact exists which will preclude summary judgment, the evidence, and all inferences that can be reasonably drawn, must be viewed in the light most favorable to the non-moving party. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000).

Once the moving party has met this initial burden, the burden shifts to the opposing party to show that a genuine issue of material fact exists. Celotex Corp. v. Catrell, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). The opposing party may not simply rest upon mere allegations or denials of the pleadings. Rather, the nonmoving party must make a sufficient showing of facts to establish the existence of an essential element to his case on which he will bear the burden of proof at trial. Id. Summary judgment is also inappropriate where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co., 420 F.2d 1211, 1213 (5th Cir. 1969).

I. STANDING OF BOTH PLAINTIFFS

All Defendants challenge both Plaintiffs' standing to bring the claims. In the Order dated August 20, 2008, Judge Keesley ruled that Proctor had standing to bring the action. That ruling is not law of the case. No additional evidence has been presented to reconsider that ruling.

The party seeking to establish standing has the burden of proving it. Powell v. Bank of America, 379 S.C. 437, 665 S.E.2d 237, 241 (Ct.App. 2008). In this case, TNTIC's theory of standing is much too attenuated for it to establish that it is a proper party. Bishop's and Blanks' alleged wrongdoing is several steps removed from TNTIC's alleged losses, including others' criminal and sanctionable acts. In Powell, *supra*, for example, the court was called on to determine if a bank had standing to question the allocation of interpled funds that the bank held on deposit. The Bank argued on appeal that it had an interest in the allocation in that a certain allocation would reduce the Bank's potential liability. The Court held that this practical concern was too tangential and peripheral to confer standing. Powell, 665 S.E.2d at 241.

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Powell relied heavily on *Ex parte Government Employee's Ins. Co.*, 373 S.C. 132, 644 S.E.2d 699 (2007), for its analysis. In that case, a UIM carrier wanted to intervene in a family court action brought to determine if a common law marriage existed. The family court held that the UIM carrier lacked standing. The Supreme Court affirmed. In affirming, the Court noted that a UIM carrier had an interest in whether or not a common law marriage existed, in that it would affect its burden of proof in resolving a related claim for insurance benefits, yet held that this financial interest was too peripheral and tangential to confer standing.

The Court in *Wogan v. Kunze*, 366 S.C. 583, 623 S.E.2d 107 (Ct.App. 2007), addressed a similar issue in the context of an Unfair Trade Practices Act claim. There, a wife tried to bring a UTPA claim against a doctor for allegedly improperly billing medical services to her husband. The Court held that she did not state a claim because she did not suffer an ascertainable loss "as a result of" the acts allegedly directed toward her husband.

This case is even more removed than was *Powell*, *Ex parte Government Employee's*, and *Wogan*. Atlantic Title was the title insurance company that insured certain lenders and purchasers whose loans were closed by Attorney Smith and the title company employing Plaintiff Proctor. TNTIC's insured was the lender and the purchaser on these real estate transactions not the attorney or the title company employing Proctor. As part of the title insurance, the insurance company also insured against loss from theft conducted by its authorized title agent. TNTIC is subrogated to the rights of its insured not Walter Smith or the title company employing Proctor. It may seek to recover the money it paid from the person who caused the loss. It has done that by bringing an action against Lauren Proctor and Walter Smith. A judgment was obtained against both of them. To the extent that Proctor may be successful in this action and recover money from the defendants, TNTIC may seek to have its judgment paid by those funds. However, TNTIC has no direct cause of action against Defendants, not even a claim for indemnification. At best TNTIC may have a lien it could enforce in the event Proctor prevails in this action. TNTIC lacks standing to assert any claim against the Defendant. Furthermore, TNTIC can sue and is suing Proctor for its losses. This alternative forum shows that it can protect its interests by other means. See *Ex Parte Government Employee's*, 373 S.C. at 137, 644 S.E.2d at 702 (noting that UIM carrier lacked standing in part because it could protect its interests in the related litigation).

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II. STATUTE OF LIMITATIONS

Defendants Bishop and Blanks argue that, because the causes of action accrued in June 2005, and Blanks and Bishop were not served until September 2008 and November 2008, respectively, the three-year statute of limitations has run out on both Plaintiff's Unfair Trade Practices Act (UTPA) and civil conspiracy claims. Plaintiffs dispute the accrual date based upon the discovery rule. Because Plaintiffs are within the statute of limitations for the reasons that follow, the Court declines to address the date of accrual.

In the motion filed by Defendants Bishop and Blanks, they cite a number of cases where Plaintiffs attempted to add party Defendants *after* the statute of limitations had already expired. These cases are distinguishable based upon the fact that Plaintiff did not attempt to add the parties until the limitations period had expired. The statute of limitations does not dictate when service is effected, but merely when an action must be *brought*. See S.C. Code Ann. § 39-5-150 (1976) ("No action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit."). Most importantly, Plaintiff filed her motion to amend to add Bishop and Blanks *before* the statute of limitations had expired. Under Rule 15(a), the complaint could not be amended without the consent of the adverse parties or a court order.

Suit was brought against all Defendants within the three-year statutory period. Defendants Bishop and Blanks were given notice of the claims against them in November 2007, well within the statutory period, when Plaintiff filed the Motion to Amend seeking to add them as parties and Plaintiff's counsel notified Defendants of the filing. Plaintiff's causes of action accrued in June, 2005 and have a three-year statute of limitations. Plaintiff Proctor argues that filing her Motion to Amend on November 21, 2007 with an accompanying Amended Complaint within the three-year period tolled the statute of limitations until the Court issued its Order granting the motion, giving Plaintiff a reasonable time to amend.

The issue of whether a motion to amend, accompanied by an amended complaint, tolls the statute of limitations is one of first impression in South Carolina. Federal cases addressing this issue indicate that the Motion to Amend and an Order granting such do toll the statute of limitations. See Bradley v. Armstrong Rubber Co., 46 F.Supp.2d 583, 585 (S.D.Miss.,1999) (finding that Plaintiffs' Motion for Leave to Amend and the Order granting leave tolled the statute of limitations for a reasonable time).

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Other federal courts addressing this issue have also held that the filing of a motion to amend a complaint to add additional parties, when accompanied by a copy of the proposed amended complaint, tolls the applicable statute of limitations. See Moore v. State of Indiana, 999 F.2d 1125, 1131 (7th Cir.1993); Mayes v. AT & T Information Systems, Inc., 867 F.2d 1172, 1172 (8th Cir.1989); Longo v. Pennsylvania Elec. Co., 618 F.Supp. 87, 89 (W.D.Pa.1985), *aff'd*, 856 F.2d 183 (3d Cir.1988); Eaton Corp. v. Appliance Valves Co., 634 F.Supp. 974, 982-83 (N.D.Ind.1984), *aff'd on other grounds*, 790 F.2d 874 (Fed.Cir.1986); Gloster v. Pennsylvania R.R. Co., 214 F.Supp. 207, 208 (W.D.Pa.1963).

In their analyses, the primary concern the courts face in determining whether to allow a Plaintiff to amend her complaint to add additional parties is the possibility of prejudice to the added Defendant. See Bradley, 46 F.Supp.2d at 587 (finding that since Defendants had notice of the amendment and were not prejudiced by Plaintiffs' delay in amending their Complaint, the added claims were not barred by the statute of limitations). Here, Plaintiff's counsel personally notified defendant's former lawyer on November 19, 2007, of Plaintiff's intention to file a motion to amend her complaint to include the Defendants based on the newly discovered information provided in Discovery. Plaintiff filed her Motion to Amend the Complaint, along with the Second Amended Complaint, on November 21, 2007. Defendants thus had notice of their inclusion in the suit several months *before* the statute of limitations would expire.

"[O]nce the plaintiff has filed its proposed amended complaint accompanied by a motion for leave to amend within the statutory period, the statute of limitations is tolled even though the court order granting leave to amend and the technical filing of the amended complaint occur after the running of the statute of limitations. This is the only just and proper result since once leave to amend has been requested and a proposed complaint is on file, the plaintiff has taken those steps within his power to toll the statute and must await the appropriate court order."

Frazier v. East Tennessee Baptist Hosp., Inc., 55 S.W.3d 925, 929 (Tenn.,2001)(citing Eaton Corp. v. Appliance Valves Co., 634 F.Supp. 974, 982-83 (N.D.Ind.1984)(holding that when the motion to amend the complaint and a proposed amended complaint are filed prior to the running of the statute of limitations, the motion to amend stands in place of the actual amended complaint while the motion is under review by the court). This Court adopts the federal standard that a properly filed Motion to Amend, along with a proposed amended complaint adding parties, tolls

the statute of limitations during the time the motion is pending and the parties are awaiting a court order. Plaintiff followed this standard by filing her Motion with an accompanying amended complaint. The statute of limitations was tolled for a reasonable period of time. Here, Plaintiff filed her Second Amended Complaint on August 29, 2008, a mere nine days after the Court issued its order granting her leave to amend, and served both Defendants within ninety (90) days of filing, well within the limits imposed by the Rule 3.

III. SUMMARY JUDGMENT AS TO PROCTOR'S EQUITABLE CLAIMS

Proctor's equitable claims must fail due to her unclean hands. Proctor admits that she repeatedly engaged in gambling after it became illegal and stole funds from Walter Smith's trust accounts to do so. She also knew that her conduct was unlawful including the embezzlement and forging her mother's name. There are no allegations that she had any dealings directly with Bishop or Blanks or that they did anything to induce her to engage in these illegal acts. Zodiac Distributing, LLC simply supplied one of several legal coin operated video gaming machines on which Proctor played. Her participation in illegal and wrongful acts giving rise to her alleged injury are complete defenses to the equitable claims.

The doctrine of "unclean hands" precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. First Union Nat. Bank of South Carolina v. Soden, 333 S.C. 554, 511 S.E. 2d 372 (Ct. App. 1998). Here, Plaintiff specifically admitted that when she won proceeds that she would either keep gambling with these proceeds or she would leave with the money. On whole, through Plaintiff asserts that she eventually lost all of the money that she gambled with to the Defendants. Nevertheless, Plaintiff admitted that had she been a net winner, rather than a net loser, Plaintiff Proctor would have not returned the money to the Defendants. In addition, all of the money that Plaintiff claims she lost gambling on video machines owned by the Defendants was stolen from her employer. Plaintiff Proctor's claims are likewise barred by the doctrine of unclean hands.

IV. THE COMMON LAW DOCTRINE OF IN PARI DELICTO

The common law doctrine of *in pari delicto*¹ is a common law doctrine that states that a court should not allow a person to recover money lost in an illegal venture. The South Carolina

¹ Black's Law Dictionary defines the Latin term *in pari delicto* as "in equal fault."

Supreme Court recognized this doctrine in very old gambling cases. However, the South Carolina legislature abrogated this doctrine in passing a number of statutes, including S.C. Code Ann. §§ 32-1-10, 32-1-20, and the South Carolina Unfair Trade Practices Act. In Collins Entertainment, the South Carolina Supreme Court had the opportunity to address the issue of whether the doctrine of *in pari delicto* at common law prohibited a person to recover gambling losses under the South Carolina Unfair Trade Practices Act. The Supreme Court explained that “[s]ections 32-1-10 and 20 promote “a policy which prevents a gambler from allowing his vice to overcome his ability to pay. The legislature adopted a policy to protect a citizen and his family from the gambler’s uncontrollable impulses.”” Collins Entertainment, 349 S.C. at 635, 564 S.E.2d at 664-665.

The Supreme Court further explained that Sections 32-1-10 and 32-1-20 do not have preclusive effect regarding remedies afforded under the South Carolina Unfair Trade Practices Act because S.C. Code Ann. § 39-5-160 provides that powers and remedies under this section are cumulative and supplementary to all powers and remedies provided by existing law. Id. Because the common law doctrine of *in pari delicto* was abrogated by the passage of Sections 32-1-10 and 32-1-20, and Plaintiff is in the class of persons that the statutes were designed to protect, Plaintiff is not barred from recovery under the doctrine of *in pari delicto*. Because Collins Entertainment is on point that the doctrine of *in pari delicto* has been abrogated regarding suits for gambling losses under the South Carolina Unfair Trade Practices Act, Plaintiff is not barred from recovery because she gambled at Rockaways and Pizza Man.

V. PLAINTIFFS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff seeks partial summary judgment on the basis that Whitlark & Whitlark admitted Proctor lost \$130,000 gambling at its establishment. To support its motion, Proctor filed an Affidavit and also refers to the Deposition of Forrest Whitlark taken on November 7, 2007 in the lawsuit filed by Atlantic Title against Proctor, Walter Smith, and others (Docket No. 2005-CP-40-05411). This deposition was taken pursuant to a confidentiality order signed by the parties in the current action and was filed under seal. ent
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Further, Plaintiffs argue that the operation of video gaming machines violates the S.C. Unfair Trade Practices Act because it is a violation of the Racketeer Influenced Corrupt Organizations Act (RICO) as well as other federal statutes relating to illegal gambling, money laundering and racketeering activity. The Defendant opposed the motion based upon the *in pari*

delicto defense. Plaintiff relies on Johnson v. Collins Entertainment Co., Inc., 349 S.C. 613, 564 S.E.2d 653 (2002) to show that Defendant violated these various federal statutes. Analysis of federal statutes is not necessary in determining whether there was a violation of the S.C. Unfair Trade Practices Act ("Act"). The operation of video poker machines became unlawful in 2000. S.C. Code Ann. § 39-5-20 provides in part that "unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." In order to be actionable, an unfair or deceptive act must have an impact upon the public interest. Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006) rehearing denied. An act is "unfair" under the Act when it is offensive to public policy, or when it is immoral, unethical, or oppressive. Id. Clearly the operation of video poker machine in contravention of state law is an unfair act as defined by the Act. Thus, partial summary judgment is granted as to Defendant Whitlark & Whitlark on the issue of liability only.

In private actions under the Act, directors and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of the Act. BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). The evidence presented demonstrates that the individual Whitlark defendants had knowledge and participated in the unlawful conduct; therefore, partial summary judgment is granted as to liability against Paul Whitlark and Forrest Whitlark. The amount of damages is a factual issue to be determined.

Plaintiff did not seek partial summary judgment against Defendants Bishop and Blanks.

ORDER

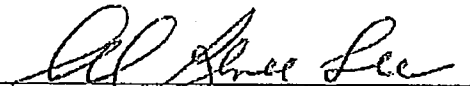
Based upon the foregoing, it is hereby ORDERED:

1. Partial Summary Judgment is granted against Defendant Whitlark & Whitlark, Paul Whitlark, and Forrest Whitlark as to liability only.
2. Defendants' motion for summary judgment based upon standing against TNITIC is granted but denied as to standing of Proctor.
3. Defendants' motion for summary judgment against Proctor based upon unclean hands is granted.

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4. Defendants' motion for summary judgment on the basis of *in pari delicto* is denied.
5. Bishop and Blanks motion for summary judgment as to the statute of limitations is denied. Their motion as to the claim of unjust enrichment is granted.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Circuit Court Judge

Columbia, South Carolina
September 9, 2011.

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2006CP4001814

Lauren Proctor

Whitlark & Whitlark Inc

Trans Union National Title Insurance
Company

Rockaways Athletic Club

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
		\$
		\$
		\$

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 15 November 2011 to attorneys of record or to parties (when appearing pro se) as follows:

Mario A Pacella
Louis H Lang

James Marcus Whitlark
James Mixon Griffin
E. Hood Temple
Michael Charles Abbott

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court _____

Jeanette Whitlark

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

Lauren Proctor and Trans-Union National)
Title Insurance Company f/k/a Atlantic)
Title Insurance Company,)

Plaintiffs,)

v.)

Whitlark & Whitlark, Inc. d/b/a Rockaways)
Athletic Club and Pizza Man, Forrest)
Whitlark, Paul Whitlark, Charlie E. Bishop,)
and Brett Blanks,)

Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Docket No.: 2006-CP-40-1814

ORDER

RICHLAND COUNTY
FILED
2011 NOV 15 AM 11:14
JEANETTE W. McBRIDE
C.C.P. & G.S.

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 either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Applicant's Motion pursuant to Rule 59(e) SCRCP to Alter or Amend Judgment of this Court's Order filed September 9, 2011. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
November 10, 2011

COUNTY OF RICHLAND

LAUREN PROCTOR

Plaintiff(s)

vs.

WHITLARKK & WHITLARK, INC., D/B/A
ROCKAWAYS ATHLETIC CLUB AND
PIZZA MAN

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2006-CP-1011814

(Please Print)

Submitted By: Mario A. Pacella, Esq.

Address: 2110 Bellline Blvd., Suite A, Columbia, SC 29204

SC Bar #: 68488

Telephone #: 803-252-4800

Fax #: 803-252-4800

Other:

E-mail:

mpacella@sironilaw.com

BARBARA C
2006 MAR 23

NOTE: The cover sheet 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 cover sheet 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 Circuit Court Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate 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) ☐ Other (299)	☐ Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Other (399)	☐ Real Property ☐ Claims & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
☐ Inmate Petitions ☐ PCR (500) ☐ Sexual Predator (510) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	☐ Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Other (799)	☐ Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture (840) ☐ Other (899)	☐ Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Administrative Law Judge (980) ☐ Public Service Commission (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)		
- Declaratory Judgment

Submitting Party Signature:

Mario A. Pacella

Date: 03/29/2006

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

SCCA / 234 (10/05)

Page 1 of 2

Florence, Horry, Lexington, Richland, Greenville**, and Anderson**
** Contact Respective County Clerk of Court for modified ADR Program Rules

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 within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Case 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. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. 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 had 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

LAUREN PROCTOR,

Plaintiff,

v.

WHITLARK & WHITLARK, INC.,
D/B/A ROCKAWAY'S ATHLETIC
CLUB and PIZZA MAN,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No. 06-CP-_____

SUMMONS
(JURY TRIAL DEMANDED)

2006 MAR 29 PM 3:28
BARBARA A. SCOTT
C.C.C. & G.S.

RICHLAND COUNTY

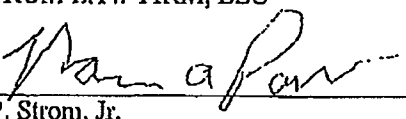
TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the complaint in the above action. A copy of the complaint is attached to this Summons and is herewith served upon you. Your answer must be in writing and signed by you or by your attorney and must state your address or the address of your attorney if signed by your attorney. Your answer must be served upon the undersigned attorneys for the Plaintiff within thirty (30) days after the service hereof, exclusive of the day of service, at 2110 Beltline Boulevard, Suite A, Columbia South Carolina 29204.

YOU ARE HEREBY GIVEN NOTICE FURTHER that, if you fail to appear and defend and fail to answer the complaint as required by this summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the complaint.

March 29, 2006

STROM LAW FIRM, LLC



J.P. Strom, Jr.

Mario A. Pacella

2110 Beltline Blvd., Suite A

Columbia, South Carolina 29204

Telephone: (803) 252-4800

Fax: (803) 252-4801

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA]
COUNTY OF RICHLAND]

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LAUREN PROCTOR,
Plaintiff,

v.

WHITLARK & WHITLARK, INC.,
D/B/A ROCKAWAYS ATHLETIC
CLUB and PIZZA MAN,
Defendant.

Case No. 2006-CP-40-

2006 MAR 29 PM 3:28
BARBARA A. SCOTT
C.C.C. & G.S.

RICHLAND COUNTY

COMPLAINT

Plaintiff Lauren Proctor, complaining of Defendant, alleges as follows:

NATURE OF THE CASE

1. Plaintiff brings this action on behalf of herself to recover gambling losses sustained where Defendant violated S.C. Code Ann. § 32-1-10, the prohibition against video gaming (See 1999 Act No. 124, Part I, § 8, effective July 1, 2000), and the South Carolina Unfair Trade Practices Act.

PARTIES

2. Plaintiff Lauren Proctor is a citizen and resident of Richland County, South Carolina.
3. Defendant Whitlark & Whitlark, Inc., is a corporation organized under the laws of South Carolina with a principal place of business in Columbia, South Carolina. Defendant Whitlark & Whitlark, Inc., does business as Rockaways Athletic Club and Pizza Man.

JURISDICTION AND VENUE

4. Jurisdiction is proper in this court, as the parties reside in South Carolina. Venue is proper in the county where both parties reside and the conduct (acts and omissions), giving rise to Plaintiff's causes of action, County of Richland, State of South Carolina, pursuant to S.C. Code Ann. § 15-7-30.

FACTUAL ALLEGATIONS

5. In or around 1995, Plaintiff began gambling heavily on video gaming machines throughout Columbia, South Carolina.
6. In July 2000, the Video Gaming Machines Act, S.C. Code Ann. §§ 12-21-2770-12-21-2809, was repealed by the legislature, prohibiting retail establishments from operating video games for the purpose of patron gambling.
7. Beginning in 1999, and continuing until June 2005, Plaintiff gambled weekly (and many times multiple times during the week) through video game machines at Defendant's retail establishments, Rockaways Athletic Club and Pizza Man.
8. Plaintiff's gambling losses ranged from \$1000 to \$2000 weekly at Defendant's retail establishments.
9. On several occasions, Defendant, through its retail establishments, provided cash advances on Plaintiff's credit card in order to pay Defendant gambling debt. Plaintiff is informed and believes that Defendant would charge her credit card for food purchases in large dollar amounts, sometimes exceeding \$1000 for this purpose.
10. Plaintiff is informed and believes Defendant's Pizza Man establishment has two video gaming machines for gambling and Defendant's Rockaways establishment has three video gaming machines for gambling.

11. Plaintiff is informed and believes that Defendant received in excess of \$500,000 from Plaintiff in gambling losses during Defendant's continuous course of conduct.

12. Because of Defendant's continuous course of conduct in operating video gaming machines illegally and illegally receiving payments for gambling debt as late as June 2005, Plaintiff's cause of action did not accrue until June 2005.

13. Upon information and belief, Defendant continues to operate video gaming machines in violation of South Carolina law.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

14. Plaintiff incorporates and alleges paragraphs 1-13 as if fully restated herein.

15. Through her continuous gambling at Defendant's retail establishments through their video gaming machines (both before and after such machines became illegal), Plaintiff has lost in excess of \$50 and paid and delivered sums of money on the debt within the last three months. The last date of said gambling loss took place on or about June 2005.

16. S.C. Code Ann. § 32-1-10 prohibits individuals retail establishments from collecting more than \$50.00 in gambling losses.

17. Plaintiff is a person interested under agreements constituting unlawful gaming contracts and bring this action pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10 to -140 (Law Co-op. 1976), to determine the validity of and her legal rights arising under those agreements.

18. Because said contracts are unlawful because losses incurred exceed \$50.00 at any one sitting, Plaintiff seeks a declaration that such contracts are void.

FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment)

19. Plaintiff incorporates and alleges paragraphs 1-18 as if fully restated herein.
20. Through her continuous gambling at Defendant's retail establishments through their video gaming machines after such machines became illegal in July, 2000, Defendant collected money from Plaintiff for losses incurred as a result of Defendant operating illegal gaming machines.
21. In July 2000, the Video Gaming Machines Act, S.C. Code Ann. §§ 12-21-2770-12-21-2809, was repealed by the legislature, prohibiting retail establishments from operating video games for the purpose of patron gambling.
22. Plaintiff is a person interested under agreements constituting unlawful gaming contracts and bring this action pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10 to -140 (Law Co-op. 1976), to determine the validity of and her legal rights arising under those agreements.
23. Because said contracts are unlawful after July 2000, Plaintiff seeks a declaration that such contracts are void.

FOR A THIRD CAUSE OF ACTION
(Unjust Enrichment)

24. Plaintiff incorporates and alleges paragraphs 1-23 as if fully restated herein.
25. Through the above-described actions, Defendant obtained gambling proceeds from the Plaintiff in violation of state law and by taking of undue advantage of the Plaintiff.
26. Said conduct and receipt of funds from Plaintiff resulted in the unjust enrichment of the Defendant.

27. As a direct, foreseeable and proximate result thereof, Plaintiff suffered actual damages.

28. Plaintiff is entitled to restitutionary relief and disgorgement of Defendant's unlawful receipt of gambling proceeds.

FOR A FOURTH CAUSE OF ACTION
(Violation of the South Carolina Unfair Trade Practices Act)

29. Plaintiff incorporates and alleges paragraphs 1-16 as if fully restated herein.

30. The actions and practices of operating video gaming machines for the purpose of gambling by the Defendant as described above constitute unfair and/or deceptive methods as defined by the South Carolina Unfair Trade Practices Act (SCUTPA), codified at S. C. Code Ann. §§ 39-5-102-160.

31. Defendant's practice of owning and operating video gaming machines after July 1, 2000, is a violation of South Carolina law and a unfair trade practice.

32. Defendant's practice of collecting more than \$50 in gambling losses is a violation of South Carolina law and an unfair trade practice.

33. Defendant's aforementioned practices are offensive to public policy, immoral, unethical, and/or oppressive. Furthermore, Defendant's actions have a direct impact upon the public interest since said actions and deceptive practices have a history and continued potential for repetition. Said potential is clearly illustrated by Defendant continuing to operate said video gaming machines at its Rockaways Athletic Club and Pizza Man establishments.

34. As a proximate result of the Defendant's deceptive practices, Plaintiff has suffered actual damages in gambling losses.

35. Upon information and belief, Plaintiff is entitled to judgment against the Defendant, for violation of the South Carolina Unfair Trade Practices Act (SCUTPA) for their actual damages, treble damages, costs, and attorneys fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Whittlark & Whittlark, Inc., as follows:

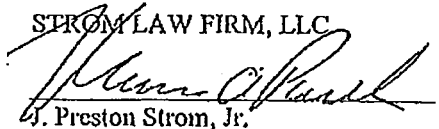
1. For actual and compensatory damages;
2. Treble damages;
3. Punitive damages; and
4. Attorneys' fees and costs.

JURY DEMAND

Plaintiffs pray for a trial by jury.

RESPECTFULLY SUBMITTED, this 29th day of March, 2006.

STROM LAW FIRM, LLC


J. Preston Strom, Jr.

Mario A. Pacella

2110 N. Beltline Boulevard, Suite A

Columbia, South Carolina 29204

Tel: 803-252-4800

Fax: 803-252-4801

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Case No. 2006-CP-40-1814

LAUREN PROCTOR,
Plaintiff,

v.

ANSWER TO COMPLAINT

WHITLARK & WHITLARK, INC.,
D/B/A ROCKAWAYS ATHLETIC
CLUB and PIZZA MAN,
Defendant.

2006 JUN -5 PM 3:59
BARBARA A. SCOTT
C.C.C. & G.S.

TO: MARIO A. PACELLA, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Plaintiff hereby answering allegations in the Complaint in the case listed hereinabove, states as follows:

All allegations of the Complaint referenced above are hereby denied except those specifically admitted hereinbelow:

1. The allegations in Paragraph #1 of the Complaint are denied.
2. The allegations in Paragraph #2 of the Complaint are admitted upon information and belief.
3. The allegations in Paragraph #3 of the Complaint upon information and belief are admitted.
4. The Defendant admits the allegations in Paragraph #4 of the Complaint that jurisdiction is proper however the remaining allegations in Paragraph #4 are denied.
5. The allegations in Paragraph #5 of the Complaint upon information and belief are admitted.
6. The allegations in Paragraph #6 of the Complaint upon information and belief are admitted.

7. The allegations in Paragraph #7 of the Complaint are denied.
8. The allegations in Paragraph #8 of the Complaint are denied.
9. The allegations in Paragraph #9 of the Complaint are denied.
10. The Defendants admit so much of Paragraph #10 of the Complaint that alleges Pizza Man had 2 video game machines and Rockaway Athletic Club had 3 video game machines, however, the remaining allegations of Paragraph # 10 are denied.
11. The allegations in Paragraph #11 of the Complaint are denied and Defendants' demand strict proof thereof.
12. The allegations in Paragraph #12 of the Complaint are denied.
13. The allegations in Paragraph #13 of the Complaint are denied.

As To The First Cause Of Action

14. All allegations in Paragraph #14 of the Complaint are denied.
15. The allegations in Paragraph #15 of the Complaint are denied.
16. The Defendants admit that part of Paragraph #16 of the Complaint which cite S.C. Code of Laws § 32-1-10 as prohibiting businesses from collecting more than \$50.00 in gambling losses.
17. The allegations in Paragraph #17 of the Complaint are denied.
18. The allegations in Paragraph #18 of the Complaint are denied.

As To The Second Cause Of Action

19. All allegations in Paragraph #19 of the Complaint are denied.
20. The allegations in Paragraph #20 of the Complaint are denied.
21. The allegations in Paragraph #21 of the Complaint are admitted upon information and belief.
22. The allegations in Paragraph #22 of the Complaint are denied.
23. The allegations in Paragraph #23 of the Complaint are denied.

As To The Third Cause Of Action

24. The allegations in Paragraph #24 of the Complaint are denied.
25. The allegations in Paragraph #25 of the Complaint are denied.
26. The allegations in Paragraph #26 of the Complaint are denied.
27. The allegations in Paragraph #27 of the Complaint are denied.
28. The allegations in Paragraph #28 of the Complaint are denied.

As To The Fourth Cause Of Action

29. The allegations in Paragraph #29 of the Complaint are denied.
30. The allegations in Paragraph #30 of the Complaint are denied.
31. The allegations in Paragraph #31 of the Complaint are denied.
32. The allegations in Paragraph #32 of the Complaint are denied.
33. The allegations in Paragraph #33 of the Complaint are denied.
34. The allegations in Paragraph #34 of the Complaint are denied and Defendants' demand strict proof thereof.
35. The allegations in Paragraph #35 of the Complaint are denied.
36. All allegations in the Prayer For Relief are hereby denied.

For A Second Defense As To All Causes Of Action
(Lack Of Specificity Required To Bring Suit)

37. That the Plaintiff Lauren Proctor has not specified what dates and time and what amounts she allegedly "lost" in the video game machines of the two (2) Defendants, during all times pertinent hereto.
38. That the Plaintiff Lauren Proctor has not alleged that she was the lawful owner of the money she supposedly spent at the Defendant's businesses.

39. That the Plaintiff has not alleged that she notified the Defendants within 90 days of her demand for the refund of the money allegedly lost to Defendants as required by South Carolina Code § 32-1-10 in order to make a proper claim under the requirements of the law.
40. That the Plaintiff's suit is therefore barred by the Statute of Limitations set forth in South Carolina Code § 32-1-10, and by the strict requirements of specific dates, times and amount lost as set forth in §32-1-10, et. seq.

For A Third Defense As To All Causes Of Action
(Illegalities Engaged In By Plaintiff)

41. That, on information and belief, the Plaintiff Lauren Proctor is currently being investigated by South Carolina Law Enforcement for the theft of more than \$100,000.00 dollars from the Title Business where she was formerly employed, and she has asserted, on information and belief, that she spent this stolen money on gaming machines in and around South Carolina, including the Defendant Rockaway Athletic Club and Pizza Man restaurants.
42. That the "money" that Plaintiff allegedly lost in video gaming machines at the Defendant's two restaurants was, therefore, not the Plaintiff's money, but was stolen by the Plaintiff from other people, and involves another illegality; the expenditure of stolen money on video games by the Plaintiff Lauren Proctor.
43. All causes of action are therefore based upon the use of illegally obtained funds through illegal conduct by the Plaintiff and should therefore be dismissed on the grounds of no capacity or standing to bring suit and/or illegality in the case of Plaintiff's lawsuit.

For A Fourth Defense
(No Capacity To Bring This Suit)

44. That the Plaintiff Lauren Proctor, also alleges that she engaged in an illegality, that is, was gambling on video machines for payoffs, which, according to Plaintiff's assertions, was illegal under South Carolina Law, and as such the complaint should be dismissed on the grounds that the matter involves illegal conduct alleged have been engaged in by the Plaintiff, and therefore may not be redressed or be the proper subject of a civil suit in the Court of Common Pleas in the State of South Carolina.

That based upon the above allegations the Plaintiff Lauren Proctor lac standing and the capacity required to bring and maintain this lawsuit.

For A Fifth Defense As To All Causes Of Action
(Laches)
(Statute Of Limitations)

That the Plaintiff Lauren Proctor, alleged that she "lost" uncertain sums of money in Defendant's video games from 1999 until June 2005, and yet did not bring a lawsuit until March 29, 2006, and this lawsuit is therefore barred by the statute of limitations and/or the doctrine of LACHES, with reference to the S.C. Code of Laws.

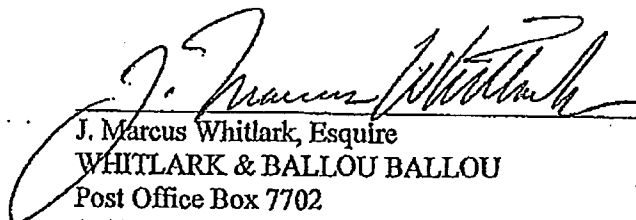
For A Sixth Defense As To All Causes Of Action

The Complaint fails to State facts sufficient to constitute a cause of action for which relief may properly be granted under South Carolina Law.

Set Off

46. That the Plaintiff Lauren Proctor has not alleged that she was reimbursed by the Defendant's for monies she spent in these video games, and therefore Defendant's request a set off for any and all amounts of reimbursement from video games owned by Defendant's and in which Plaintiff is determined to have been given reimbursements from Defendants for her alleged expenditures at Defendant's businesses.

WHEREFORE, the Defendants' request that the entire Complaint be dismissed for the reasons set forth in the Defendant's Answer and that all costs are assessed as the Court deems just and proper.


J. Marcus Whitlark, Esquire
WHITLARK & BALLOU BALLOU
Post Office Box 7702
1708 Main Street (29201)
Columbia, South Carolina 29202

June 5, 2006

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

LAUREN PROCTOR

☐ Plaintiff

v.

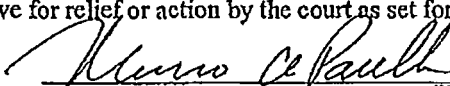
Whitlark & Whitlark, Inc., D/B/A Rockaways
Athletic Club And Pizza Man

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2006-CP-40-1814

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Mario A. Pacella, Bar No. 68488 Address: Strom Law Firm, LLC 2110 Beltline Boulevard, Suite A Columbia, South Carolina 29204 phone: 803-252-4800 fax: 803-252-4801 e-mail: mpacella@stromlaw.com other:	Defendant's Attorney: J. Marcus Whitlark, Bar No. Address: Whitlark & Ballou P. O. Box 7702 Columbia, South Carolina 29202 phone: 803-799-1011 fax: 803-799-1016 e-mail: other:	2007 MAR 29 PM 4:24 BARBARA A. SCOTT C.C.C. & J.S.	CLERK OF COURT
☒ 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 for Partial Summary Judgment Estimated Time Needed: 30 Min. 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 28, 2007 Date submitted			
SECTION III: Motion Fee ☒ PAID - AMOUNT: 25.00 ☐ 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 Collected by: _____ Date Filed: _____			

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA]
COUNTY OF RICHLAND]

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LAUREN PROCTOR,]
Plaintiff,]

Case No. 2006-CP-40-1814

WHITLARK & WHITLARK, INC.,]
D/B/A ROCKAWAYS ATHLETIC]
CLUB and PIZZA MAN,]
Defendant.]

MOTION FOR PARTIAL SUMMARY JUDGMENT

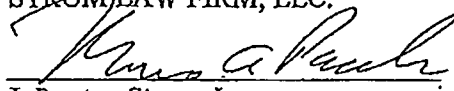
Comes now Plaintiff, by and through her undersigned counsel of record, and moves this Honorable Court for an Order Granting Partial Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, as no genuine issue of material fact exists regarding Plaintiff's causes of action for declaratory judgment and violation of the South Carolina Unfair Trade Practices Act. In support of this motion, Plaintiff relies upon the following:

1. Affidavit of Lauren Proctor. (Exhibit 1)
2. Requests for Admission Served on Defendant that have not been responded to and constitute Admissions pursuant to Rule 36 of the South Carolina Rules of Civil Procedure. (Exhibit 2)
3. The Order requiring Defendant to respond to the admissions. (Exhibit 3)
4. Deposition of Forrest Whitlark. (Exhibit 4A and 4B)
5. Deposition of Paul Whitlark. (Exhibit 5A and 5B)

RESPECTFULLY SUBMITTED, this 21 day of March, 2007.

RICHLAND COUNTY
FILED
2007 MAR 29 PM 5:44
BARBARA A. SCOTT
C.C.C. & G.S.

STROM LAW FIRM, LLC.



J. Preston Strom, Jr.

Mario A. Pacella

2110 Beltline Boulevard, Suite A

Columbia, South Carolina 29204

Tel: 803-252-4800

Fax: 803-252-4801

EXHIBIT 1

STATE OF SOUTH CAROLINA]
COUNTY OF RICHLAND]

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LAUREN PROCTOR,]
Plaintiff,]

Case No. 2006-CP-40-1814

v.]

WHITLARK & WHITLARK, INC.,]
D/B/A ROCKAWAYS ATHLETIC]
CLUB and PIZZA MAN,]

Defendant.]

AFFIDAVIT OF LAUREN PROCTOR

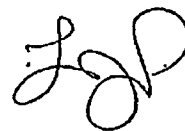
Personally appeared before me, Lauren Proctor, and after being duly sworn,
deposes and testifies as follows:

1. My name is Lauren Proctor and I am over the age of eighteen (18) and competent to testify in this matter.
2. I am the Plaintiff in the above-reference matter and provide this testimony of my own knowledge and recollection.
3. In or around 1995, I began gambling heavily on video gaming machines throughout Columbia, South Carolina.
4. At that time, I became addicted to gambling, particularly gambling on video games at bars and restaurants in South Carolina.
5. Even after July 2000, where operating video gaming machines became illegal, I continued to gamble on video games at bars and restaurants in South Carolina.
6. Beginning in 1999, and continuing until June 2005, I gambled weekly, and many times multiple times during the week, through video game machines at

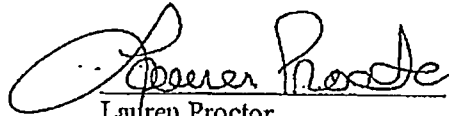


Defendant's retail establishments, Rockaways Athletic Club and Pizza Man.

7. My gambling losses ranged from \$1000 to \$5000 weekly at Defendant's retail establishments.
8. On several occasions, Defendant, through its retail establishments, provided cash advances on my credit card in order to pay Defendant gambling debt.
9. Defendant would charge my credit card for food purchases in large dollar amounts, sometimes exceeding \$1000 for this purpose.
10. Defendant's Pizza Man establishment had two to three video gaming machines for gambling and Defendant's Rockaways establishment had three video gaming machines for gambling prior to those machines being seized by the FBI.
11. I paid \$ 507,279.81 on gambling debt to Defendant. This debt is documented by copies of checks paid to Defendant in the amount of \$387,623.65, credit card transactions directly with Defendant in a total amount of \$28,057.69, and debit card withdrawals from banks and checks cashed at banks where funds were then used to pay gambling debt in the amount of \$ 91,598.47.
12. I have requested additional documentation that I believe will show the figures in paragraph 11 are larger than stated. It appears that additional damages in will amount to \$133,008.85, bringing our total to \$ 640,288.67 I will supplement my affidavit when documents are received.
13. Defendant continued to operate the gaming machines until an FBI sting operation in Fall, 2005.
14. Other individuals who gambled at Defendant's establishments included, but



are not limited to, Hugh Barenow, Hillary Helms, Dennis Constantino, Sam
Bray, and two older women.


Lauren Proctor

SWORN AND SUBSCRIBED to me
On this 28 day of MARCH, 2007.


Notary Public for South Carolina
My Commission Expires: MAY 20 2015

EXHIBIT 2

STATE OF SOUTH CAROLINA]
COUNTY OF RICHLAND]

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LAUREN PROCTOR,]
Plaintiff,]

v.]

Case No. 2006-CP-40-_____

WHITLARK & WHITLARK, INC.,]
D/B/A ROCKAWAYS ATHLETIC]
CLUB and PIZZA MAN,]
Defendant.]

PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS TO DEFENDANT

Pursuant to Rule 36, SCRCF, Plaintiffs hereby serve the following Request for Admissions to be answered within thirty (30) days after service:

INSTRUCTIONS FOR REQUEST FOR ADMISSIONS

1. These request for admissions are admitted for purposes of this case unless a proper answer or objection in writing is served within the time allotted.
2. If you object, you must set forth the specific reasons for the objection.
3. If you do not object, you must answer with "admit" or "deny" or set forth in detail the reasons why you cannot truthfully admit or deny the matter. If you admit or deny the matter but must qualify the response, you shall specify so much of the admission as is true and qualify or deny the remainder.
4. You may not give "lack of information or knowledge" as a reason for failure to admit or deny unless you state you have made a reasonable inquiry and that the information known or readily obtainable is insufficient to enable you to admit or deny the request. Further, you may not object to the request on the basis that it presents a genuine

issue for trial.

5. If you assert privilege as a ground for failing to answer any request, you must respond to that part of each such request that, in your view, does not seek allegedly privileged information or communications. For each request, or portion thereof, for which you claim a privilege, describe the factual basis for the claim of privilege in sufficient detail to permit adjudication of the validity of that claim.

6. Defendant refers to Whitlark & Whitlark, Inc., which includes any and all its organizational units, predecessors-in-business, affiliated entities, successors, joint ventures, subsidiaries, agents, servants and employees, officers, executives, directors, private investigators, attorneys, accountants, auditors, inspectors, representatives or other who are in possession of or who may have obtained information or knowledge for or on behalf of the Whitlark & Whitlark, Inc. Defendant also includes its restaurant businesses of Rockaways Athletic Club and Pizza Man.

7. "You" or "your", unless otherwise specified, means the Whitlark & Whitlark, Inc. Present tense should be construed as also including past tense, and masculine terms encompass the feminine.

REQUEST FOR ADMISSIONS

1. Defendant operated video gaming machines utilized for gambling by its patrons from 1999-2000.

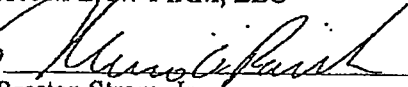
2. Defendant collected gambling proceeds from Plaintiff in amounts that exceed \$50 on at least five occasions in 1999.

3. Defendant collected gambling proceeds from Plaintiff in amounts that exceeded \$50 on at least five occasions in 2000 prior to July 1, 2000.

4. Defendant collected gambling proceeds from Plaintiff after July 1, 2000.
5. Defendant charged Plaintiff's credit card on one or more occasions for gambling debt owed by Plaintiff prior to July 1, 2000.
6. Defendant charged Plaintiff's credit card on one or more occasions for gambling debt owed by Plaintiff on or after July 1, 2000.

RESPECTFULLY SUBMITTED, this 24th day of March 2006.

STROM LAW FIRM, LLC

By 

J. Preston Strom, Jr.

Mario A. Pacella

2110 N. Beltline Boulevard, Suite A

Columbia, South Carolina 29204

(803) 252-4800

ATTORNEYS FOR PLAINTIFF

Columbia, South Carolina

EXHIBIT 3

STATE OF SOUTH CAROLINA]
COUNTY OF RICHLAND]

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LAUREN PROCTOR,
Plaintiff,

Case No. 2006-CP-40-1814

v.

WHITLARK & WHITLARK, INC.,
D/B/A ROCKAWAYS ATHLETIC
CLUB and PIZZA MAN,
Defendant.

2006 NOV 14 AM 10:08
RICHLAND COUNTY
FILED
BARBARA A. SCOTT
C.C.C. & G.S.

ORDER GRANTING MOTION TO COMPEL

Before the Court is Plaintiff's Motion to Compel answers to Interrogatories, Requests for Admission, and Requests for Production of Documents pursuant to Rule 37 of the South Carolina Rules of Civil Procedure. The Court held oral argument on Plaintiff's motion on November 13, 2006. For the following reasons, Plaintiff's Motion to Compel is GRANTED.

In response to Plaintiffs' discovery requests, Defendant asserted a Fifth Amendment privilege against self-incrimination. Plaintiff attempted to secure responses to no avail. The question before the Court is whether a corporation has a Fifth Amendment privilege. After review of pertinent legal authority, the Court finds that the Fifth Amendment privilege against self-incrimination does not extend to corporations. In Bellis v. United States, 417 U.S. 85, 94 S. Ct. 2179, 40 L. Ed. 2d 678 (1974), the United States Supreme Court explained that the Fifth Amendment privilege against self-incrimination protects only individuals from compelled production of personal papers and compelled oral testimony. In quoting United States v. White, 322 U.S. 694, 698, 64 S.Ct. 1248, 1251, 88 L. Ed. 1542 (1944), the Supreme Court explained '[t]he constitutional privilege against self-incrimination . . . is designed to prevent the use of

legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." Bellis, 417 U.S. 88, 94 S. Ct. at 2183. While this privilege extends to the business records of a sole proprietor or sole practitioner, it does not extend to corporations or corporate records in a person's possession in a representative capacity "even if such records might incriminate him personally." Bellis, 417 U.S. 88, 94 S. Ct. at 2183. The Supreme Court further held that "the privilege against compulsory self-incrimination should be limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records." Bellis, 417 U.S. 89-90, 94 S. Ct. at 2184.

In South Carolina Tax Com. v. Reeves, 278 S.C. 658, 300 S.E.2d 916, the South Carolina Supreme Court applied the constitutional reasoning from Bellis to the Fifth Amendment of the South Carolina Constitution. The Court also held that a "party was not allowed to plead the Fifth Amendment when he held the business records in a representative capacity." Id. at 660, 300 S.E.2d at 917.

Because the privilege against self-incrimination does not extend to artificial entities like corporations, Defendant must answer Plaintiff's discovery requests. The Court GRANTS Plaintiff's Motion to Compel Discovery and ORDERS Defendant to respond to Plaintiff's discovery requests within thirty (30) days of this order.

SO ORDERED, this 13 day of November, 2006.

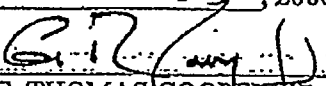

G. THOMAS COOPER, JR.
Presiding Judge, Fifth Judicial Circuit

EXHIBIT 4A



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Date: September 8, 2006

Dear Client:

The original of this transcript has been sent to the deponent for reading and signing. The witness has 30 days to read and sign the transcript. We anticipate this transcript returning to us the week of October 13, 2006.

Upon receipt of the executed signature sheet, we will immediately forward a copy of the signed signature sheet to be inserted in your copy of such deposition. Also, if applicable, we will forward to you the sealed original transcript.

We will be processing this document the week of October 20, 2006 should the witness fail to send us a signature sheet.

Please do not hesitate to contact us if we can be of further assistance to you.

CompuScripts, Inc.

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF RICHLAND FIFTH JUDICIAL CIRCUIT

3

4

5

6 LAUREN PROCTOR,

7

8 Plaintiff(s),

9

10 vs

Case No.: 2006-CP-40-1814

11

12 WHITLARK & WHITLARK, INC.,

13 D/B/A ROCKAWAYS ATHLETIC CLUB

14 and PIZZA MAN,

15

16 Defendant(s).

17

18

COPY

19

D E P O S I T I O N

20 WITNESS:

FORREST WHITLARK

21 DATE:

Wednesday, August 23, 2006

22 TIME:

9:15 a.m.

23 LOCATION:

The Strom Law Firm
2110 Beltline Boulevard
Columbia, South Carolina

24 TAKEN BY:

Attorneys for the Plaintiff(s)

25 REPORTED BY:

SUSAN M. VALSECCHI,
Certified Realtime Reporter

26

27

28

29

30

31

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1 APPEARANCES:

2

ATTORNEYS FOR PLAINTIFF(S)

3

LAUREN PROCTOR:

4

STROM LAW FIRM, L.L.C.

5

BY: MARIO A. PACELLA, ESQUIRE

2110 Beltline Boulevard, Suite A

Columbia, South Carolina 29204

6

7

8 ATTORNEYS FOR DEFENDANT(S)

WHITLARK & WHITLARK, INC.,

9

D/B/A ROCKAWAYS ATHLETIC CLUB

and PIZZA MAN:

10

WHITLARK & BALLOU

11

BY: J. MARCUS WHITLARK, ESQUIRE

1708 Main Street

12

Walker Building, Suite 103-105

Columbia, South Carolina 29201

13

14

15 ALSO PRESENT:

PAUL WHITLARK

16

17

18

(INDEX AT REAR OF TRANSCRIPT)

19

20

21

22

23

24

25

1 STIPULATION: It is stipulated by and
2 between Counsel that this deposition is being taken
3 in accordance with the South Carolina Rules of
4 Civil Procedure, and that the deponent does not
5 waive the right to read and sign the deposition
6 transcript.

7 - - - - -

8 FORREST WHITLARK, being first duly
9 sworn, testified as follows:

10 EXAMINATION

11 BY MR. PACELLA:

12 Q. Mr. Whitlark, my name is Mario Pacella
13 and I'm an attorney here in Columbia at the Strom
14 Law Firm and in this civil matter I represent
15 Lauren Proctor.

16 And you've been -- you're here under --
17 sort of for two reasons, one, under a Notice of
18 Deposition that I served in your name to your
19 attorney and then another reason is I served a
20 notice asking your attorney to identify a person in
21 the corporation, Whitlark & Whitlark, who could
22 answer questions about certain topics, who would be
23 the person who would have the best knowledge or
24 most knowledge of a lot of certain topics. And
25 you've been identified as that person.

1 It's important that you listen to the
2 questions that I ask and that we don't try to talk
3 over one another. If I start talking over you, you
4 tell me to wait a second so you can finish your
5 answer to any question and I will try to do -- you
6 know, I will try to do the same and we can be able
7 to have the court reporter take down questions and
8 answers correctly as opposed to us talking over one
9 another.

10 I'll ask you some questions. If you
11 don't understand the question I'm asking, please
12 ask me to clarify. Under the rules, you can't ask
13 your attorney or the attorney for the company
14 answers to those --

15 For clarification, you actually have to
16 ask me. And if you don't ask me for clarification,
17 there's going to be a presumption that you
18 understood the question and that your answer is
19 accurate.

20 Do you have any questions about those
21 sort of basic rules?

22 A: No.

23 MR. WHITLARK: Excuse me. Let me
24 interject something here.

25 After discussions with counsel,

1 Mr. Pacella -- this is Marcus Whitlark for the
2 defendant.

3 There is currently an investigation
4 going on by the FBI and the United States attorney
5 in a matter involving some allegations of some
6 wrongdoing involved with the corporation and with
7 individuals that work there.

8 Based upon the fact that there is a
9 pending investigation and the threat of criminal
10 prosecution in the case, I have instructed my
11 clients and they will assert their Fifth Amendment
12 rights not to answer any questions which could tend
13 to incriminate them or lead to the -- any type of
14 evidence being discovered to prosecute them with.

15 Now, there are -- the questions being
16 asked right now are non-offensive to us. However,
17 any substantive question regarding any of the
18 activities of the business, the defendant business,
19 Whitlark & Whitlark, Incorporated, or any of the
20 individuals involved that are being deposed by
21 Plaintiff, will not be answered and the Fifth
22 Amendment right of the Constitution will be
23 asserted. Okay?

24 MR. PACELLA: Okay.

25 BY MR. PACELLA:

1 Q. Mr. Whitlark, how do you spell your
2 first name?

3 A. Forrest, F-o-r-r-e-s-t.

4 Q. Two Rs. Okay. And how old are you?

5 A. I'm 51.

6 Q. And where were you born?

7 A. Columbia, South Carolina.

8 Q. Off the record we talked about where you
9 went to college. Do you have a bachelor's degree?

10 A. Yes.

11 Q. And what's the highest degree you have?

12 A. I have a master's.

13 Q. Is your bachelor's of arts or science?

14 A. Science.

15 Q. From Canisius College?

16 A. Yes.

17 Q. And your master's?

18 A. Master's in accounting.

19 Q. And where is that from?

20 A. University of South Carolina.

21 Q. And what year did you graduate from
22 Canisius?

23 A. 1977.

24 Q. And from USC?

25 A. '79.

1 Q. What's your -- since you graduated from
2 USC, what's your employment history?

3 A. I went to work for Finch Hamilton &
4 Company in the fall of 1979.

5 Q. What kind of company is that?

6 A. It's a CPA firm.

7 Q. How long did you work there?

8 A. I worked there until July 1982.

9 Q. And what kind of work did you do?

10 A. I was an auditor and a tax person.

11 Q. Do you have a CPA?

12 A. Yes.

13 Q. Is that active?

14 A. No.

15 Q. Okay. And after you left Finch
16 Hamilton -- is that right?

17 A. Uh-huh. (Affirmative.)

18 Q. After you left Finch Hamilton, where did
19 you go?

20 A. G.R. Rich & Company in Lexington.

21 Q. Another accounting firm?

22 A. Yeah.

23 Q. How long did you work there?

24 A. I worked there until 1986.

25 Q. And did you do similar work?

- 1 A. Yeah, the same.
- 2 Q. Okay. And after that?
- 3 A. I went full time into the restaurant
- 4 business.
- 5 Q. Starting -- is that when you started the
- 6 Rockaways Company or --
- 7 A. No, that company had been started in
- 8 1982.
- 9 Q. Okay. That's Whitlark & Whitlark?
- 10 A. Yes.
- 11 Q. Who are the principals?
- 12 A. Principals? Stockholders?
- 13 Q. Yeah, owners.
- 14 A. I'm a stockholder. Paul Whitlark is a
- 15 stockholder. David Melson is a stockholder.
- 16 Q. David --
- 17 A. -- Melson, M-e-l-s-o-n. Tom Dudek is a
- 18 stockholder.
- 19 Q. Tom Dudek?
- 20 A. Yeah, T-o-m, D-u-d-e-k.
- 21 Q. Those are the present stockholders?
- 22 A. Yes.
- 23 Q. Okay. Who were the stockholders?
- 24 A. That's basically been it, yeah.
- 25 Q. Okay. Is that when you first opened

1 your first restaurant, in 1982?

2 A. Yes.

3 Q. What was that?

4 A. Rockaway Athletic Club.

5 Q. And then how about Pizza Man; when did
6 that open up?

7 A. In 1993.

8 Q. Okay. Do you live in Richland County?

9 A. Yes.

10 Q. Do you have immediate family in Richland
11 County?

12 A. Brothers and sisters.

13 Q. Brothers, sisters, wife, children
14 parents.

15 A. I have a sister, Mary Margaret Ballou.

16 I have a brother, John Whitlark. I have a brother
17 Allan Whitlark.

18 Q. A-l-l-e-n?

19 A. a-n.

20 Q. Okay. Two Ls or one L?

21 A. Two.

22 Q. Okay.

23 A. Paul Whitlark. Mark Whitlark. And
24 that's all.

25 Q. Are you married?

1 A. Yeah.

2 Q. Your wife's name?

3 A. Taryn, T-a-r-y-n, Whitlark.

4 Q. Do you have any children --

5 A. Yes.

6 Q. -- that are over the age of 18?

7 A. No.

8 Q. And parents. Deceased?

9 A. Yes.

10 (PLF. EXH. 1, Notice of Taking
11 Deposition, was marked for identification.)

12 BY MR. PACELLA:

13 Q. Okay. Mr. Whitlark, I know you're here
14 with an attorney for the company, Whitlark &
15 Whitlark, Incorporated.

16 Does he personally represent you or just
17 the company?

18 MR. WHITLARK: Yes, I represent --

19 MR. PACELLA: -- individually and the
20 company.

21 MR. WHITLARK: Yes, I do...

22 MR. PACELLA: Okay... That's fine.. I...
23 just wanted to make sure that was clear for the
24 record.

25 BY MR. PACELLA:

1 Q. Mr. Whitlark, I have handed you a
2 document which I will represent to you is a Notice
3 of a Deposition pursuant to one of the South
4 Carolina rules that allows us to ask your attorney
5 or your company's attorney to identify the person
6 who would have the best knowledge or would be the
7 most appropriate person to testify as to certain
8 topics.

9 And all I'm going to ask you to do
10 is -- well, first I'm going to ask you if you've
11 seen this before.

12 A. I don't think I have.

13 Q. Okay. Well, if you would look at the
14 topics 1 through 5 below where it says deposition
15 subject matter, and all I want to know is if you
16 would be the most appropriate person from the
17 company to answer those questions.

18 I'm not going to ask you substantively
19 the questions yet, but if you're the most
20 appropriate person to answer those questions.

21 MR.. WHITLARK: We'll stipulate on the
22 record that Mr.. Forrest Whitlark, president of the
23 corporation, would be the most appropriate person
24 to discuss topics involving business operations and
25 the details of file keeping and so forth;

1 however --

2 MR. PACELLA: And I understand where
3 you're going --

4 MR. WHITLARK: Is that Plaintiff's
5 Exhibit Number 1?

6 MR. PACELLA: Yeah, that would be
7 Exhibit Number 1.

8 MR. WHITLARK: Yeah. Plaintiff's
9 Exhibit Number 1 is a 30(b)(6) notice by the
10 Plaintiff's attorneys sent over to us as the
11 Defendants in the corporate and individual capacity
12 and has listed out matters that the Plaintiff is
13 interested in inquiring about.

14 1 through 5, I believe, is a designation
15 that the Plaintiff --

16 Again, the Defendant asserts their Fifth
17 Amendment rights not to acknowledge nor answer any
18 questions regarding any of this information or
19 these allegations, and that even the acknowledgment
20 of this would be --

21 MR. PACELLA: He can come in if you
22 want.

23 MR. WHITLARK: Yeah, come on in. Have a
24 seat right here.

25 (Mr. Paul Whitlark enters the deposition

1 room.)

2 MR. WHITLARK: So I'm going to advise my
3 client at this time not to answer any questions
4 even acknowledging -- other than acknowledging that
5 he's the person under Rule 30(b)(6) that would be
6 the most appropriate to discuss any topic involving
7 records and the operation of the corporation and
8 its businesses.

9 MR. PACELLA: Okay. Just for the
10 record, is that Paul Whitlark?

11 MR. WHITLARK: Yeah, Paul Whitlark who
12 just stepped in.

13 MR. PACELLA: Yeah, Paul Whitlark just
14 stepped in. Certainly as a shareholder of the
15 corporation, I think it's appropriate that he can
16 be here.

17 MR. WHITLARK: Yeah, under the rules
18 it's allowed.

19 (PLF. EXH. 2, the Complaint, was marked
20 for identification.)

21 BY MR. PACELLA:

22 Q. I'm handing you a document I've had the
23 court reporter mark as Exhibit Number 2. And I
24 would ask you if you've seen this document before.

25 MR. WHITLARK: Do you recall that, going

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1 over it?

2 BY MR. PACELLA:

3 Q. That's just the question, if you recall
4 seeing that document, not --

5 A. I've never seen these two pages before
6 or the --

7 Q. If you go back to substantively --
8 substantively on the fourth page where it says
9 Complaint, have you seen that document or do you
10 think you've seen it before?

11 MR. WHITLARK: Yeah, that's the
12 Complaint -- I mean, what's represented to be the
13 Complaint in this case, yeah.

14 THE WITNESS: Yeah.

15 BY MR. PACELLA:

16 Q. And in the upper right corner, there's a
17 stamp from Richland County -- is that correct -- on
18 the fourth page?

19 MR. WHITLARK: Yes, there is a stamp
20 there. It's a copy of a filing.

21 BY MR. PACELLA:

22 Q. Okay. And I'd ask you to turn to Page 2
23 of the Complaint which is the fifth page of that
24 document.

25 Okay. First and foremost, prior to

1 2000, were there video gaming machines that patrons
2 can use for gambling at either Rockaways or Pizza
3 Man?

4 MR. WHITLARK: We're not going to answer
5 on the advice of counsel and asserting Fifth
6 Amendment rights --

7 MR. PACELLA: I think he needs to say
8 that.

9 MR. WHITLARK: Go ahead and say it for
10 him. Just say the same thing I just said, that I'm
11 not going to answer on the advice of counsel.

12 THE WITNESS: Yeah. I can't answer on
13 the advice of counsel.

14 BY MR. PACELLA:

15 Q. Okay. On advice of counsel, you're
16 asserting your Fifth Amendment privilege?

17 A. Yes.

18 Q. Okay. I understand that.

19 After July of 2000, were there video
20 games that patrons could use for gambling at Pizza
21 Man and Rockaways?

22 A. Again, I have to -- on advice of
23 counsel, I have to assert my Fifth Amendment.

24 Q. Okay. Are you familiar with Lauren
25 Proctor and her patronizing your establishments,

1 Rockaways and Pizza Man?

2 MR. WHITLARK: Same.

3 We can have a stipulation that you can
4 put the same thing down. Mr. Whitlark can say, you
5 know --

6 MR. PACELLA: He can just say, "same
7 thing," and that will be, I assume, upon advice of
8 counsel you assert your Fifth Amendment privilege.

9 THE WITNESS: Yes.

10 BY MR. PACELLA:

11 Q. Is that the same answer you want for
12 every time you say same?

13 A. Yes.

14 Q. Okay. And I don't have a problem with
15 that. Did Lauren Proctor come to Pizza Man and
16 Rockaways to use the video game machines to gamble?

17 A. The same.

18 Q. Did she lose money gambling?

19 A. Same.

20 Q. Did she lose money in excess of a
21 thousand dollars a week?

22 A. Same.

23 Q. How about in excess of \$2,000 a week?

24 A. Same.

25 Q. Did she gamble from 1999 to June 2005?

1 A. Same.

2 Q. Did she lose money?

3 A. Same.

4 Q. Did she lose money after -- did she lose
5 in excess of a hundred thousand dollars in that
6 time period?

7 A. Same.

8 Q. How about in excess of \$200,000?

9 A. Same.

10 Q. Did she lose in excess of \$300,000?

11 A. Same.

12 Q. Did she lose in excess of \$400,000?

13 A. Same.

14 Q. Did she lose in excess of \$500,000?

15 A. The same.

16 Q. Okay. Did she carry a gambling debt?

17 A. Same.

18 Q. And did she utilize credit cards to pay
19 that gambling debt?

20 A. Same.

21 Q. And --

22 MR. WHITLARK: Excuse me, Counsel. May
23 I interject something here.

24 This Complaint has been answered and the
25 answers are filed with the -- or the Plaintiff has

1 a copy of them.

2 You've got to forgive me. I'm a
3 plaintiff's lawyer; I keep thinking plaintiff, not
4 defendant.

5 But, again, the client's been
6 advised -- I advised my clients not to answer any
7 of these questions except for their backgrounds.
8 And I said the answer speaks for itself in this
9 case.

10 But, again, the clients have been
11 advised on any subjects regarding this, other than
12 their background, not to answer any questions.

13 Okay. Can you mark this Exhibit 3.
14 Since you mentioned the answer, I will show that to
15 you.

16 (PLF. EXH. 3, Answer to Complaint, was
17 marked for identification.)

18 BY MR. PACELLA:

19 Q. All right. Mr. Whitlark, have you seen
20 this document before?

21 A. Yes.

22 Q. And this document says Answer to the
23 Complaint; isn't that correct?

24 A. Yes.

25 Q. Okay. Do you see -- if you'd turn to

1 Page 5 of that document.

2 And Paragraph 46 says, "That the
3 Plaintiff Lauren Proctor has now alleged that she
4 was reimbursed by Defendants for money she spent in
5 these video games and therefore Defendants request
6 a setoff for any and all amounts of reimbursement
7 from video games owned by Defendants and in which
8 Plaintiff is determined to have been given
9 reimbursements from Defendants for alleged
10 expenditures at Defendants' businesses."

11 Can you explain what that means?

12 MR. WHITLARK: That's a legal question.

13 I'm the attorney Marcus Whitlark for the
14 Defendants.

15 That is a requirement of the law and a
16 legal question and research obviously that the
17 Plaintiff must be aware of.

18 BY MR. PACELLA:

19 Q. But is the factual basis for that
20 statement that Ms. Proctor was given complimentary
21 food and beverages?

22 MR. WHITLARK: Same. Assert your right.....
23 Assert your right:

24 THE WITNESS: Yeah, the same.

25 BY MR. PACELLA:

1 Q. Okay. Were those -- in addition
2 to -- was she ever given anything else other than
3 food and beverages?

4 A. I would just say the same.

5 Q. Was she ever given illegal narcotics?

6 A. The same.

7 Q. Did the company collect gambling
8 proceeds from the Plaintiff that exceeded 50
9 dollars?

10 A. The same.

11 Q. Starting in 1999, did the company
12 collect gambling proceeds in excess of 50 dollars?

13 A. That's the same.

14 Q. Okay. Did that happen on multiple
15 occasions?

16 A. The same.

17 Q. Okay. And did the company collect
18 gambling proceeds in excess of 50 dollars in 2000
19 at any one time?

20 A. The same.

21 Q. Did it happen more than one occasion?

22 A. The same.

23 Q. Did it happen more than five occasions?

24 A. The same.

25 Q. Okay. Did the company collect gambling

1 proceeds from Plaintiffs after July 1st, 2000?

2 A. The same.

3 Q. Did the company charge Plaintiff's
4 credit card on more than one occasion for gambling
5 debts prior to July 2000?

6 A. The same.

7 Q. And did the company charge Plaintiff's
8 credit card on more than one occasion for gambling
9 debts after July of 2000?

10 A. The same.

11 Q. Did the company ever cash checks made
12 out from State Title to the business?

13 A. Same.

14 Q. Did it happen on more than one occasion?

15 A. The same.

16 Q. Were those checks in excess of 50
17 dollars?

18 A. The same.

19 Q. Were those checks in excess of 500
20 dollars?

21 A. The same.

22 Q. Did you purchase video game machines to
23 be used for gambling at Rockaways or Pizza Man?

24 A. Same.

25 Q. And did the company purchase video

1 gaming machines for Rockaways and Pizza Man?

2 A. The same.

3 Q. And were those purchases -- were those
4 video games in operation after July of 2000?

5 A. The same.

6 Q. Incidentally, do you have the books and
7 records regarding the video game machines that were
8 purchased?

9 MR. WHITLARK: I'm objecting to that.

10 That's a matter involved with an FBI
11 seizure. And in order to avoid any problem with
12 that, I will simply state the attorney for the
13 corporation states that those records were seized
14 pursuant to a search warrant issued by the federal
15 courts. And that's a matter that's already been
16 explained to the Plaintiffs.

17 MR. PACELLA: Sure. And should those
18 records be returned.--

19 MR. WHITLARK: We'll stipulate that when
20 all of the originals records that were seized by
21 them and all of the records that they have in their
22 possession, if and when they're returned to us,
23 certainly the Plaintiff can seek appropriate
24 discovery under the rules.

25 BY MR. PACELLA:

1 Q. Which employees at Rockaways or Pizza
2 Man or employees of the company collected gambling
3 debts?

4 A. The same.

5 Q. You have an employee named Hillary, is
6 that correct, daughter of a Marlene who is an
7 accountant?

8 MR. WHITLARK: At this point, let me
9 assert this on the -- if the Plaintiff wants
10 substantive information about the business, they're
11 going to have to re-depose these men after we have
12 a resolution of the criminal matter.

13 And all of this information involves
14 highly sensitive subjects that are currently being
15 inquired into by the United States attorney and the
16 FBI.

17 And at this point, despite the fact that
18 the Defendant will, under the rules, cooperate in
19 discovery, we simply cannot get into any more
20 factual questioning by The defendant -- or rather
21 the Plaintiff.

22 If you want to rule us in the court, go
23 ahead.

24 MR. PACELLA: Okay.

25 MR. WHITLARK: But we're just not going

1 to answer anything else. I mean, it's basically a
2 carte blanche assertion of the Fifth Amendment.
3 And this is on advice of counsel. As I said, I'm
4 trying to cooperate with everybody in this matter.

5 MR. PACELLA: Just to make sure I'm
6 clear, you're closing the deposition; is that what
7 you're doing?

8 MR. WHITLARK: No. I have told you that
9 he'll answer background questions and all of that,
10 but it's a waste of time, since he's going to say
11 this.

12 If you want to assert in court that
13 answering the Complaint was waiving his rights or
14 the denial of allegations and him taking the Fifth
15 Amendment is somehow a procedural open door for the
16 Plaintiff, we'll have to have that matter discussed
17 in front of a judge.

18 MR. PACELLA: Okay. Well, I'm prepared
19 to ask all of my questions and he can assert for
20 all of my questions or you can close it and we can
21 talk about it in front of a judge... I'm going to do
22 it either way..

23 MR. WHITLARK: Well, the problem is
24 going to be that you're going to receive answers,
25 even one of which could be subject for you to rule

1 into court and ask the judge about the merits of
2 asserting the Fifth on that subject.

3 I mean, so the problem is going to be
4 there's not going to be a hundred percent
5 satisfaction of the Plaintiff to all of the
6 answers --

7 MR. PACELLA: I understand that.

8 MR. WHITLARK: -- and we're going to
9 have to get in front of a judge on this matter.

10 I mean, you know, I would have to
11 project that both the Plaintiff and Defendant are
12 going to be discussing this matter in front of a
13 judge, regardless of the civil issues, but --

14 BY MR. PACELLA:

15 Q. Okay. So do you have an employee named
16 Hillary or have you had an employee named Hillary?

17 MR. WHITLARK: At this point, as I have
18 said, I've just stated, that the deponent,

19 Mr. Forrest Whitlark, in both of these capacities,
20 is not going to answer any more of the questions,

21 because, you know, as I said --

22 MR. PACELLA: You can assert privilege
23 every time I ask a question.

24 MR. WHITLARK: That's right. But we're
25 not going to sit here and, you know -- I mean, I'll

1 tell you this. We're close to having to have this

2 matter heard in front of the circuit court, okay?

3 All right? I mean, that's it. That's it.

4 MR. PACELLA: So you're ending the
5 deposition, is what you're saying.

6 MR. WHITLARK: Well, that's right.

7 MR. PACELLA: That's fine. That's all I
8 was asking.

9 MR. WHITLARK: That's right.

10 MR. PACELLA: Okay. All right. Well,
11 just for the record --

12 MR. WHITLARK: Let me state something on
13 the record here.

14 The Defendant in this case has tried to
15 engage in good faith in negotiation and talk with
16 the Plaintiff's attorneys about a resolution of
17 this matter short of a court appearance.

18 However, I can see clearly here that
19 there is going to be some sort of loophole
20 procedural matters asserted by the Plaintiff in
21 this very serious, serious matter.

22 And based upon the fact that these
23 men -- I'm not going to risk these men being
24 prosecuted or having facts distorted to be used to
25 prosecute these gentlemen by the U.S. Attorney.

1 And that's why we can't answer any more
2 questions about substantive matters, which was
3 explained to the Plaintiff's attorney long before
4 the deposition. And, of course, he has his right
5 to ask his questions, but it's simply a waste of
6 time for us to go any further with this.

7 Okay? Let's let the judge decide it.

8 MR. PACELLA: Fair. We can go off the
9 record.

10 (The deposition concluded at 9:44 a.m.)

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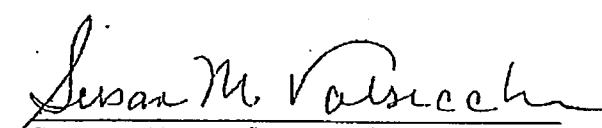
CERTIFICATE OF REPORTER

I, Susan M. Valsecchi, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing deposition was taken before me on the date and at the time and location stated on Page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is a true, accurate and complete record of the testimony of the deponent and of all objections made at the time of the examination to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 29th day of, August 2006, at Columbia, Richland County, South Carolina.


Susan M. Valsecchi,
RPR, Notary Public,
State of South Carolina at
Large.
My Commission expires
January 4, 2015

1

SIGNATURE OF DEPONENT

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3

I, the undersigned, FORREST WHITLARK, do

4 hereby certify that I have read the foregoing

5 deposition and find it to be a true and accurate

6 transcription of my testimony, with the following

7 corrections, if any:

8

9 PAGE/LINE

CHANGE

REASON

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FORREST WHITLARK

25

1 I N D E X

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5	BY MR. PACELLA	3
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STATE OF SOUTH CAROLINA]
COUNTY OF RICHLAND]

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LAUREN PROCTOR,]
Plaintiff,]

Case No. 2006-CP-40-1814

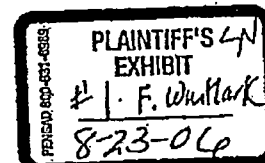
WHITLARK & WHITLARK, INC.,]
D/B/A ROCKAWAYS ATHLETIC]
CLUB and PIZZA MAN,]
Defendant.]

TO COUNSEL FOR THE ABOVE-NAMED DEFENDANT:

PLEASE TAKE NOTICE that pursuant to Rule 26 and 30(b)(6) of the South Carolina Rules of Civil Procedure, Plaintiff by her attorneys, will take the deposition of the designee of Whitlark & Whitlark, Inc. commencing at 2:00 p.m on Wednesday, July 19, 2006, and continuing thereafter until completed, at the Strom Law Firm, LLC, 2110 Beltline Boulevard, Suite A, Columbia, South Carolina, 29204. The deposition will be before a person authorized by law to administer oaths and will continue from day-to-day, excluding Sundays and court-recognized holidays, until the examination is completed. The deposition may be videotaped.

DEPOSITION SUBJECT MATTER

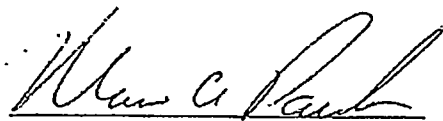
1. Defendant's operation of video gaming machines utilized for gambling by its patrons from 1999-2005.
2. Defendant's collection of gambling proceeds from Plaintiff and other patrons from 1999-2005.
3. Defendant's practice of charging Plaintiff's credit card for gambling debt allegedly owed by Plaintiff from 1999-2005.



4. The purchase and ownership of video gaming machines at Rockaways Athletic Club and Pizza Man from 1999-2005.

5. Employment of service personnel at Rockaways Athletic Club and Pizza Man from 1999-2005.

STROM LAW FIRM, LLC



J. Preston Strom, Jr.

Mario A. Pacella

2110 Beltline Blvd., Suite A

Columbia, South Carolina 29204

(803) 252-4800

June 30, 2006

COUNTY OF RICHLAND

LAUREN PROCTOR

Plaintiff(s)

CIVIL ACTION COVERSHEET

vs.

WHITLARKK & WHITLARK, INC., D/B/A
ROCKAWAYS ATHLETIC CLUB AND
PIZZA MAN

Defendant(s)

(Please Print)
Submitted By: Mario A. Pacella, Esq.
Address: 2110 Bellline Blvd., Suite A, Columbia, SC 29204

SC Bar #: 68488
Telephone #: 803-252-4800
Fax #: 803-252-4801
Other:
E-mail: mpacella@stromlaw.com

NOTE: The cover sheet 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 cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

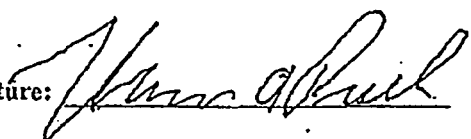
*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate 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) ☐ Other (299)	☐ Torts - Personal Injury ☐ Assault/Slander/Label (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ 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)
☐ Intimate Relations ☐ PCR (500) ☐ Sexual Predator (510) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	☐ Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Other (799)	☐ Administrative Law/Relief ☐ Reinstatement Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture (840) ☐ Other (899)	☐ Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Administrative Law Judge (980) ☐ Public Service Commission (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)		

Declaratory Judgment

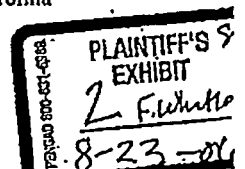
Submitting Party Signature: 

Date: 03/29/2006

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.

SCCA / 234 (10/05)

Page 1 of 2



**** Contact Respective County Clerk of Court for modified ADR Program Rules**

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 within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. 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. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. 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 had 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

LAUREN PROCTOR,

Plaintiff,

v.

WHITLARK & WHITLARK, INC.,
D/B/A ROCKAWAY'S ATHLETIC
CLUB and PIZZA MAN,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No. 06-CP-_____

SUMMONS
(JURY TRIAL DEMANDED)

RICHLAND COUNTY
FILED
2006 MAR 29 PM 3:28
BARBARA A. SCOTT
C.C.C. & G.S.

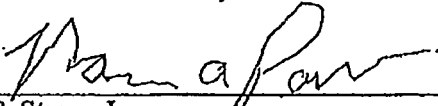
TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the complaint in the above action. A copy of the complaint is attached to this Summons and is herewith served upon you. Your answer must be in writing and signed by you or by your attorney and must state your address or the address of your attorney if signed by your attorney. Your answer must be served upon the undersigned attorneys for the Plaintiff within thirty (30) days after the service hereof, exclusive of the day of service, at 2110 Beltline Boulevard, Suite A, Columbia South Carolina 29204.

YOU ARE HEREBY GIVEN NOTICE FURTHER that, if you fail to appear and defend and fail to answer the complaint as required by this summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the complaint.

March 29, 2006

STROM LAW FIRM, LLC


J.P. Strom, Jr.
Mario A. Pacella
2110 Beltline Blvd., Suite A
Columbia, South Carolina 29204
Telephone: (803) 252-4800
Fax: (803) 252-4801

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

LAUREN PROCTOR,

Plaintiff,

v.

WHITLARK & WHITLARK, INC.,
D/B/A ROCKAWAYS ATHLETIC
CLUB and PIZZA MAN,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2006-CP-40-

BARBARA A. SCOTT
C.C.C. & G.S.

2006 MAR 29 PM 3:28

RICHLAND COUNTY

COMPLAINT

Plaintiff Lauren Proctor, complaining of Defendant, alleges as follows:

NATURE OF THE CASE

1. Plaintiff brings this action on behalf of herself to recover gambling losses sustained where Defendant violated S.C. Code Ann. § 32-1-10, the prohibition against video gaming (See 1999 Act No. 124, Part I, § 8, effective July 1, 2000), and the South Carolina Unfair Trade Practices Act.

PARTIES

2. Plaintiff Lauren Proctor is a citizen and resident of Richland County, South Carolina.

3. Defendant Whitlark & Whitlark, Inc., is a corporation organized under the laws of South Carolina with a principal place of business in Columbia, South Carolina. Defendant Whitlark & Whitlark, Inc., does business as Rockaways Athletic Club and Pizza Man.

JURISDICTION AND VENUE

4. Jurisdiction is proper in this court, as the parties reside in South Carolina. Venue is proper in the county where both parties reside and the conduct (acts and omissions) giving rise to Plaintiff's causes of action, County of Richland, State of South Carolina, pursuant to S.C. Code Ann. § 15-7-30.

FACTUAL ALLEGATIONS

5. In or around 1995, Plaintiff began gambling heavily on video gaming machines throughout Columbia, South Carolina.

6. In July 2000, the Video Gaming Machines Act, S.C. Code Ann. §§ 12-21-2770-12-21-2809, was repealed by the legislature, prohibiting retail establishments from operating video games for the purpose of patron gambling.

7. Beginning in 1999, and continuing until June 2005, Plaintiff gambled weekly (and many times multiple times during the week)-through video game machines at Defendant's retail establishments, Rockaways Athletic Club and Pizza Man.

8. Plaintiff's gambling losses ranged from \$1000 to \$2000 weekly at Defendant's retail establishments.

9. On several occasions, Defendant, through its retail establishments, provided cash advances on Plaintiff's credit card in order to pay Defendant gambling debt. Plaintiff is informed and believes that Defendant would charge her credit card for food purchases in large dollar amounts, sometimes exceeding \$1000 for this purpose.

10. Plaintiff is informed and believes Defendant's Pizza Man establishment has two video gaming machines for gambling and Defendant's Rockaways establishment has three video gaming machines for gambling.

11. Plaintiff is informed and believes that Defendant received in excess of \$500,000 from Plaintiff in gambling losses during Defendant's continuous course of conduct.

12. Because of Defendant's continuous course of conduct in operating video gaming machines illegally and illegally receiving payments for gambling debt as late as June 2005, Plaintiff's cause of action did not accrue until June 2005.

13. Upon information and belief, Defendant continues to operate video gaming machines in violation of South Carolina law.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

14. Plaintiff incorporates and alleges paragraphs 1-13 as if fully restated herein.

15. Through her continuous gambling at Defendant's retail establishments through their video gaming machines (both before and after such machines became illegal), Plaintiff has lost in excess of \$50 and paid and delivered sums of money on the debt within the last three months. The last date of said gambling loss took place on or about June 2005.

16. S.C. Code Ann. § 32-1-10 prohibits individuals retail establishments from collecting more than \$50.00 in gambling losses.

17. Plaintiff is a person interested under agreements constituting unlawful gaming contracts and bring this action pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10 to -140 (Law Co-op. 1976), to determine the validity of and her legal rights arising under those agreements.

18. Because said contracts are unlawful because losses incurred exceed \$50.00 at any one sitting, Plaintiff seeks a declaration that such contracts are void.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Case No. 2006-CP-40-1814

LAUREN PROCTOR,)
Plaintiff,)

v.)

ANSWER TO COMPLAINT

WHITLARK & WHITLARK, INC.,)
D/B/A ROCKAWAYS ATHLETIC)
CLUB and PIZZA MAN,)
Defendant.)

FILED
2006 JUN -5 PM 3:59
BARBARA A. SCOTT
C.C.C. & G.S.

TO: MARIO A. PACELLA, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Plaintiff hereby answering allegations in the Complaint in the case listed hereinabove, states as follows:

All allegations of the Complaint referenced above are hereby denied except those specifically admitted hereinbelow:

1. The allegations in Paragraph #1 of the Complaint are denied.
2. The allegations in Paragraph #2 of the Complaint are admitted upon information and belief.
3. The allegations in Paragraph #3 of the Complaint upon information and belief are admitted.
4. The Defendant admits the allegations in Paragraph #4 of the Complaint that jurisdiction is proper however the remaining allegations in Paragraph #4 are denied.
5. The allegations in Paragraph #5 of the Complaint upon information and belief are admitted.
6. The allegations in Paragraph #6 of the Complaint upon information and belief are admitted.



7. The allegations in Paragraph #7 of the Complaint are denied.
8. The allegations in Paragraph #8 of the Complaint are denied.
9. The allegations in Paragraph #9 of the Complaint are denied.
10. The Defendants admit so much of Paragraph #10 of the Complaint that alleges Pizza Man had 2 video game machines and Rockaway Athletic Club had 3 video game machines, however, the remaining allegations of Paragraph # 10 are denied.
11. The allegations in Paragraph #11 of the Complaint are denied and Defendants' demand strict proof thereof.
12. The allegations in Paragraph #12 of the Complaint are denied.
13. The allegations in Paragraph #13 of the Complaint are denied.

As To The First Cause Of Action

14. All allegations in Paragraph #14 of the Complaint are denied.
15. The allegations in Paragraph #15 of the Complaint are denied.
16. The Defendants admit that part of Paragraph #16 of the Complaint which cite S.C. Code of Laws § 32-1-10 as prohibiting businesses from collecting more than \$50.00 in gambling losses.
17. The allegations in Paragraph #17 of the Complaint are denied.
18. The allegations in Paragraph #18 of the Complaint are denied.

As To The Second Cause Of Action

19. All allegations in Paragraph #19 of the Complaint are denied.
20. The allegations in Paragraph #20 of the Complaint are denied.
21. The allegations in Paragraph #21 of the Complaint are admitted upon information and belief.
22. The allegations in Paragraph #22 of the Complaint are denied.
23. The allegations in Paragraph #23 of the Complaint are denied.

As To The Third Cause Of Action

24. The allegations in Paragraph #24 of the Complaint are denied.
25. The allegations in Paragraph #25 of the Complaint are denied.
26. The allegations in Paragraph #26 of the Complaint are denied.
27. The allegations in Paragraph #27 of the Complaint are denied.
28. The allegations in Paragraph #28 of the Complaint are denied.

As To The Fourth Cause Of Action

29. The allegations in Paragraph #29 of the Complaint are denied.
30. The allegations in Paragraph #30 of the Complaint are denied.
31. The allegations in Paragraph #31 of the Complaint are denied.
32. The allegations in Paragraph #32 of the Complaint are denied.
33. The allegations in Paragraph #33 of the Complaint are denied.
34. The allegations in Paragraph #34 of the Complaint are denied and Defendants' demand strict proof thereof.
35. The allegations in Paragraph #35 of the Complaint are denied.
36. All allegations in the Prayer For Relief are hereby denied.

For A Second Defense As To All Causes Of Action
(Lack Of Specificity Required To Bring Suit)

37. That the Plaintiff Lauren Proctor has not specified what dates and time and what amounts she allegedly "lost" in the video game machines of the two (2) Defendants, during all times pertinent hereto.
38. That the Plaintiff Lauren Proctor has not alleged that she was the lawful owner of the money she supposedly spent at the Defendant's businesses.

39. That the Plaintiff has not alleged that she notified the Defendants within 90 days of her demand for the refund of the money allegedly lost to Defendants as required by South Carolina Code § 32-1-10 in order to make a proper claim under the requirements of the law.
40. That the Plaintiff's suit is therefore barred by the Statute of Limitations set forth in South Carolina Code § 32-1-10, and by the strict requirements of specific dates, times and amount lost as set forth in §32-1-10, et. seq.

For A Third Defense As To All Causes Of Action
(Illegalities Engaged In By Plaintiff)

41. That, on information and belief, the Plaintiff Lauren Proctor is currently being investigated by South Carolina Law Enforcement for the theft of more than \$100,000.00 dollars from the Title Business where she was formerly employed, and she has asserted, on information and belief, that she spent this stolen money on gaming machines in and around South Carolina, including the Defendant Rockaway Athletic Club and Pizza Man restaurants.
42. That the "money" that Plaintiff allegedly lost in video gaming machines at the Defendant's two restaurants was, therefore, not the Plaintiff's money, but was stolen by the Plaintiff from other people, and involves another illegality; the expenditure of stolen money on video games by the Plaintiff Lauren Proctor.
43. All causes of action are therefore based upon the use of illegally obtained funds through illegal conduct by the Plaintiff and should therefore be dismissed on the grounds of no capacity or standing to bring suit and/or illegality in the case of Plaintiff's lawsuit.

For A Fourth Defense
(No Capacity To Bring This Suit)

44. That the Plaintiff Lauren Proctor, also alleges that she engaged in an illegality, that is, was gambling on video machines for payoffs, which, according to Plaintiff's assertions, was illegal under South Carolina Law, and as such the complaint should be dismissed on the grounds that the matter involves illegal conduct alleged have been engaged in by the Plaintiff, and therefore may not be redressed or be the proper subject of a civil suit in the Court of Common Pleas in the State of South Carolina.

That based upon the above allegations the Plaintiff Lauren Proctor has standing and the capacity required to bring and maintain this lawsuit.

For A Fifth Defense As To All Causes Of Action

(Laches)

(Statute Of Limitations)

That the Plaintiff Lauren Proctor, alleged that she "lost" uncertain sums of money in Defendant's video games from 1999 until June 2005, and yet did not bring a lawsuit until March 29, 2006, and this lawsuit is therefore barred by the statute of limitations and/or the doctrine of LACHES, with reference to the S.C. Code of Laws.

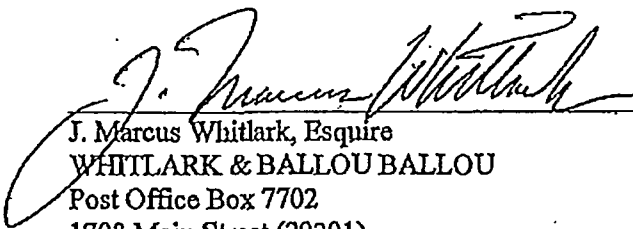
For A Sixth Defense As To All Causes Of Action

The Complaint fails to State facts sufficient to constitute a cause of action for which relief may properly be granted under South Carolina Law.

Set Off

46. That the Plaintiff Lauren Proctor has not alleged that she was reimbursed by the Defendant's for monies she spent in these video games, and therefore Defendant's request a set off for any and all amounts of reimbursement from video games owned by Defendant's and in which Plaintiff is determined to have been given reimbursements from Defendants for her alleged expenditures at Defendant's businesses.

WHEREFORE, the Defendants' request that the entire Complaint be dismissed for the reasons set forth in the Defendant's Answer and that all costs are assessed as the Court deems just and proper.



J. Marcus Whitlark, Esquire
WHITLARK & BALLOU BALLOU
Post Office Box 7702
1708 Main Street (29201)

Columbia, South Carolina 29202

June 5, 2006

Columbia, South Carolina

EXHIBIT 4B



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Date: January 23, 2007

Dear Client:

The original of this transcript has been sent to the deponent for reading and signing. The witness has 30 days to read and sign the transcript. We anticipate this transcript returning to us the week of February 27, 2007.

Upon receipt of the executed signature sheet, we will immediately forward a copy of the signed signature sheet to be inserted in your copy of such deposition. Also, if applicable, we will forward to you the sealed original transcript.

Should the witness fail to send us a signature sheet, we will be processing this document the week of March 6, 2007.

Please do not hesitate to contact us if we can be of further assistance to you.

Compuscripts, Inc.

1 STATE OF SOUTH CAROLINA
2 COUNTY OF RICHLAND
3
4 LAUREN PROCTOR,
5 Plaintiff(s),
6 vs. Case No: 2006-CP-40-1814
7 WHITLARK & WHITLARK, INC.,
8 D/B/A ROCKAWAYS ATHLETIC CLUB
and PIZZA MAN,
9 Defendant(s).

COPY

11 DEPOSITION

12 VOLUME II

13 WITNESS: FORREST WHITLARK
14 DATE: Tuesday, January 9, 2007
15 TIME: 10:30 a.m.
16 LOCATION: Strom Law Firm, LLC
2110 Beltline Boulevard
17 Columbia, South Carolina
18 TAKEN BY: Attorneys for the Plaintiff
19 REPORTED BY: SHERI L. BYERS
Registered Professional Reporter
20

21
22 COMPUSCRIPTS, INC.
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1 APPEARANCES:

2 ATTORNEYS FOR THE PLAINTIFF:

3 THE STROM LAW FIRM
4 BY: MARIO A. PACELLA, ESQUIRE
5 2110 Beltline Boulevard, Suite A
6 Columbia, South Carolina 29204

7 ATTORNEYS FOR THE DEFENDANTS:

8 WHITLARK & BALLOU
9 BY: J. MARCUS WHITLARK, ESQUIRE
10 1708 Main Street
11 Walker Building, Suite 103-105
12 Columbia, South Carolina 29201

13

14

15

16 (INDEX AT REAR OF TRANSCRIPT)

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1 STIPULATION: It is stipulated by and between
2 counsel that this deposition is being taken in
3 accordance with the South Carolina Rules of Civil
4 Procedure, and that the deponent reserves the right to
5 read and sign the deposition transcript.

6 - - - - -

7 FORREST WHITLARK, being first duly
8 sworn, testified as follows:

9 EXAMINATION

10 BY MR. PACELLA:

11 Q. Mr. Whitlark, Mario Pacella again. We met
12 several months ago. I'm here to ask you some more
13 questions. We're reconvening your deposition which
14 originally took place August 23rd, 2006, which was
15 ended by counsel for the corporation and subsequently
16 have got a court order to get it reopened, reconvening.

17 Just because it's reconvening doesn't mean
18 you're waiving any of your privileges that you have,
19 and I make that clear to you. I'm not trying to get
20 anything that's privileged. And if you have a
21 privilege that you plan to assert, that's your right
22 and well within your rights. I'll not get in the way
23 of that.

24 Just to remind you of the rules of a
25 deposition, you're under oath. I'll ask you questions.

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1 Any answers that you give me have to be truthful to the
2 best of your knowledge. And I ask that you answer
3 questions verbally and orally and try not to shake your
4 head, nod your head and say uh-huh, huh-uh, just for
5 the court reporter to be able to take that down. And
6 when we go back and look at it, we know what the words
7 mean as opposed to uh-huh and we're not sure if that
8 means uh-huh or huh-uh.

9 And if I ask you a question you don't
10 understand, feel free to ask me to restate it or
11 clarify it, and I will do so.

12 I'm not real good at this, sometimes I talk
13 over the witnesses and you should just stop me and tell
14 me that you need to finish your answer. And I'll
15 apologize for that in advance, but I have a tendency to
16 do that. And likewise, if you will let me finish my
17 question before you answer, that would be appropriate.

18 Do you have any questions for me as we
19 start -- as we reconvene this deposition?

20 A. No.

21 Q. Okay. Where we last left off is I was asking
22 you about an employee of the company and her name was
23 Hillary, and I was asking you what -- if you would tell
24 me her last name?

25 A. Helms, H-e-l-m-s.

1 Q. Okay. And who is her mother?

2 A. Maureen Helms.

3 Q. And does Maureen Helms do bookkeeping work
4 for the company?

5 A. Yes.

6 Q. And is Hillary at all related to David
7 Melton?

8 A. No.

9 Q. Okay. And David Melton is the one who's a
10 part owner of the corporation; is that correct?

11 A. Yes.

12 Q. But she's not related?

13 A. No.

14 Q. Okay. How long has Hillary been with your
15 business?

16 A. I believe she came to work in 2004.

17 Q. And what does she do?

18 A. She's a bartender.

19 Q. And which business does she work at?

20 A. She works at both restaurants.

21 Q. Okay. How is she paid?

22 A. Hourly.

23 Q. And of course she can earn tips; is that
24 correct?

25 A. Yes.

1 Q. Does she have a particular shift she works,
2 or do people just work 11 to 11 or 11 to close? How
3 does that work?

4 A. Usually there's a morning shift and an
5 evening shift, and she's -- I'd say in the last couple
6 of years she's worked evenings.

7 Q. How long has Maureen Helms worked?

8 A. How many years?

9 Q. Yeah.

10 A. She's been there 16 or 17 years.

11 Q. Where does she live?

12 A. I don't know the exact address, somewhere on ..
13 Wheat Street in Shandon.

14 Q. And so she's worked there -- she's the
15 bookkeeper, is that her title?

16 A. Yes.

17 Q. She worked out of one of the offices, out of
18 one of the buildings?

19 A. Yes.

20 Q. Which one?

21 A. Both.

22 Q. Okay.

23 A. There's an office set up in each one.

24 Q. How is she paid?

25 A. Hourly.

1 Q. Does she work full-time?

2 A. No, I think she averages about 25 -- 20, 25
3 hours a week.

4 Q. Did Hillary ever gamble using these machines
5 that were at Rockaways or Pizza Man?

6 MR. WHITLARK: Go ahead. Assert your --

7 THE WITNESS: I assert my rights there.

8 BY MR. PACELLA:

9 Q. Okay. And just for the record you can say I
10 assert my rights and that will be the same as "Upon
11 advice of counsel, I assert my Fifth Amendment
12 privilege" as we discussed earlier in your deposition.

13 A. Yes.

14 Q. Okay. And did Hillary ever lose money using
15 video gaming machines?

16 A. I have to assert my right.

17 Q. Okay. Where does Hillary live?

18 A. I don't know her physical address.

19 Q. Okay. That's fine. Office records would
20 have that?

21 A. I would think so. I mean, I have a W-4 but
22 it's -- you know, it's four years old. I don't know if
23 it's still her actual address. I think she was living
24 with her sister for a while, but I don't know. I
25 truthfully don't know that.

- 1 Q. Okay. Still employed, though?
- 2 A. Yes.
- 3 Q. Who is Hugh Barrineau?
- 4 A. He's a customer that comes in the restaurant.
- 5 Q. Has he ever used the video gaming machines
- 6 for gambling purposes?
- 7 A. I can't answer upon advice of counsel. I
- 8 assert my rights.
- 9 Q. Did he ever owe you in excess of \$8,000?
- 10 A. I have to assert my rights.
- 11 Q. Do you have an employee named Bennett?
- 12 A. Yes.
- 13 Q. Is that his first name or last name?
- 14 A. That's his first name.
- 15 Q. What's his last name?
- 16 A. Brown.
- 17 Q. Is he still working with you?
- 18 A. Yes.
- 19 Q. How long has he been working there?
- 20 A. I'd say four to five years.
- 21 Q. What's his job duties?
- 22 A. He is a cook in the kitchen.
- 23 Q. Both businesses?
- 24 A. Just the Rockaway.
- 25 Q. Okay. Does he ever use the video gaming

1 machines for gambling purposes?

2 A. I will assert my rights.

3 Q. Okay. Do you know where he lives?

4 A. I know he lives in an apartment complex in
5 Five -- I couldn't tell you the address of it. It's
6 one of those --

7 Q. In Five Points, though?

8 A. Yeah, one of those apartments down there.

9 Q. Okay. Dennis Consentino, do you know who he
10 is?

11 A. Yes.

12 Q. Who is he?

13 A. He owned the Gamecock Country retail store
14 across from the Rockaway.

15 Q. Is he also a customer?

16 A. Yes.

17 Q. Is he currently a customer?

18 A. Yes, I believe he is.

19 Q. Did he ever use the video game machines for
20 gambling purposes?

21 A. I have to assert my rights.

22 Q. Incidentally Hugh Barrineau, does he still
23 come in?

24 A. I haven't seen him in a while. He possibly
25 comes in when I'm not there, I don't know, but I

1 haven't seen him.

2 Q. Okay. Sam Bray, who is he?

3 A. He's a customer.

4 Q. Still a customer?

5 A. I think I've seen him in the last three or

6 four months in there one time. I mean, like I said,

7 these people could come in and I'm not aware of it.

8 Q. Sure. Yeah, and I understand you can only

9 answer as to what you have personal knowledge of.

10 A. I think I've seen him within the last three

11 months in the Rockaway Club.

12 Q. Did he ever use video gaming machines for

13 gambling purposes?

14 A. I'll have to assert my rights.

15 Q. Okay. Do you have an employee named Tom?

16 A. Dudek?

17 Q. Do you have an employee named Tom?

18 A. Yes. Yes.

19 Q. What's Tom's last name?

20 A. Dudek, D-u-d-e-k.

21 Q. I've got that somewhere else. A different

22 set of notes.

23 And what does he do?

24 A. He's night manager -- well, I won't say that.

25 He opens the restaurant and works during the day around

1 there, you know, general maintenance, I'd say.

2 Q. How long has he been working there?

3 A. What year is it, 2006, -7, since about -- for
4 about 20 years, I think.

5 Q. So obviously a trustworthy employee?

6 A. Yeah.

7 Q. I asked you a question about -- I have to go
8 back to Bennett, I apologize. Did Bennett ever run
9 gambling proceeds back and forth between Pizza Man and
10 Rockaways?

11 A. I have to assert my rights there.

12 Q. Same question for Tom?

13 A. I have to assert my rights there.

14 Q. Who is Graeme Mitchell?

15 A. A customer.

16 Q. Okay. Is it Graeme, G-r-a-h-a-m?

17 A. I believe -- I think it's G-r-a-e-m-e. I
18 think. Something spelled like that.

19 Q. Okay. Did he ever work there?

20 A. Yes.

21 Q. When did he work there?

22 A. I believe Graeme worked 2002 to 2004. Don't
23 hold me to that, but I think it's a couple of years or
24 something in there.

25 Q. Did he ever use the video gaming machines for

1 gambling purposes?

2 A. I have to assert my rights.

3 Q. Why did he leave the job?

4 A. He quit.

5 Q. He wasn't fired?

6 A. No.

7 Q. Okay. He didn't take money out of the bag
8 that was used to store gambling proceeds?

9 A. I have to assert my rights there.

10 Q. Do you have an employee ever named Christy
11 who may work at Longhorn now?

12 A. Yeah. Christy Bell, yes.

13 Q. When did she work there?

14 A. She worked for us for ten years until -- I
15 think from like 1994 to 2004, I guess.

16 Q. Do you know why she was terminated?

17 A. Let me see, did she -- she did not want to
18 bartend.

19 Q. Did the bartender have to deal with gambling
20 proceeds?

21 A. I have to assert my rights.

22 I don't know if I would call it termination,

23 she was like -- I presented her with, you know,

24 assuming bartender responsibilities and she wanted to

25 continue waiting tables, so I guess that was our big --

1 she didn't --

2 Q. I understand. I have worked in restaurants
3 before.

4 A. She didn't want to do that, and it became
5 like I'm not doing it and, you know, so when you say to
6 terminate her, I guess it becomes real gray to me
7 because I would like for you to do it, I refuse to do
8 it, so ...

9 Q. Her employment terminated, it's not
10 necessarily that you told her she had to leave?

11 A. I feel like I left that decision in her
12 hands.

13 Q. I understand where you're coming from.

14 A guy named John Gaskins, have you ever heard
15 of him?

16 A. Yes.

17 Q. Okay. Is he --

18 A. He's a customer.

19 Q. Is he still a customer?

20 A. I haven't seen him in a while.

21 Q. Do you know if he ever sold drugs?

22 A. Not to my personal knowledge.

23 Q. The answer would be the same, did he ever
24 sell drugs at one of your establishments?

25 A. I'm not directly aware of that.

1 Q. Who might be directly aware of that?

2 You just have to answer orally. I see you
3 putting your arms up in the air like "I don't know,"
4 but you have to answer orally.

5 A. I don't believe I know anyone that would know
6 that.

7 Q. I understand you can't have your eyes
8 everywhere.

9 A. Yeah.

10 Q. Is it possible that Paul would know?

11 A. I couldn't -- I have no idea.

12 Q. I mean Paul Whitlark.

13 A. I have no idea.

14 Q. Did you ever open either Pizza Man or
15 Rockaways on off hours, hours that would normally be
16 closed to let people in to come use the machines to
17 gamble?

18 A. I have to assert my rights there.

19 Q. Okay. Lauren Proctor, the plaintiff in this
20 case, did she ever have a tab as high as \$18,000?

21 A. I have to assert my rights there.

22 Q. When I say a tab up to \$18,000, I mean for
23 gambling losses.

24 A. I have to assert my rights there.

25 Q. Okay. And did in order for her to continue

1 playing, she would have to pay down that debt?

2 A. I have to assert my rights there.

3 Q. Okay. Did she ever use checks drawn on an
4 account from State Title to pay any of her gambling.
5 debts?

6 A. I have to assert my rights there.

7 Q. Did she ever use any checks drawn on a trust
8 account for Walt Smith, a SouthTrust bank account to
9 pay off gambling debt?

10 A. I would have to assert my rights there.

11 Q. Did she ever pay off her gambling debt with
12 credit cards?

13 A. I have to assert my rights.

14 Q. Did you personally ever run credit card
15 transactions for her in excess of a hundred dollars?

16 A. I have to assert my rights there.

17 Q. Did anyone at either Pizza Man or Rockaways
18 ever make credit card transactions to pay off gambling
19 debt for Lauren Proctor in excess of a hundred dollars?

20 A. I have to assert my rights there.

21 Q. Okay. The gambling proceeds were kept in a
22 bag; is that correct?

23 A. I have to assert my rights.

24 Q. When I say a bag, I mean like a bank bag and
25 that bag had a ledger in it?

1 A. I have to assert my rights.

2 Q. Okay. And the ledgers did that -- and there
3 were a piece of paper for each person who gambled; is
4 that correct?

5 A. I have to assert my rights.

6 Q. Did Ms. Proctor ever use checks out of an
7 account in the name of Debra or Debbie Mitchell?

8 A. I assert my rights.

9 Q. At some point Mr. Smith, Walt Smith's account
10 changed other from SouthTrust to Wachovia. Did
11 Ms. Proctor ever write checks payable to Rockaways,
12 Pizza Man or your company for gambling debt out of a
13 Wachovia bank account drawn on Walt Smith's account?

14 A. I have to assert my rights there.

15 Q. Another person, a Mark Whitburn (sic)?

16 A. Winburn, yes.

17 Q. Winburn?

18 A. Uh-huh.

19 Q. Is he a customer?

20 A. Yes.

21 Q. Friends with John Gaskins or an associate of
22 John Gaskins in some way?

23 A. They could be friends. I don't have any
24 direct knowledge of that.

25 Q. Okay. Do you know if Mark Winburn sold

1 drugs?

2 A. I have no knowledge of that.

3 Q. Okay. If you'd open up your deposition to
4 the Exhibit Number 3, I direct your attention to
5 paragraph 41.

6 That is -- incidentally, I'll tell you that
7 this is a copy of the answer filed by your attorney.
8 You feel free to take a look at the entire document, if
9 you'd like. Take your time. But I am going to ask
10 questions about paragraphs 41 and 46.

11 A. Uh-huh.

12 Q. Okay. Paragraph 41 states that, On
13 information and belief, plaintiff Lauren Proctor is
14 currently being investigated by the South Carolina law
15 enforcement for theft of more than a hundred thousand
16 dollars from the title business where she was formerly
17 employed and she has asserted on information and belief
18 that she spent this money on gambling machines in and
19 around South Carolina, including defendant Rockaways
20 Athletic Club and Pizza Man restaurants.

21 Now what I'm really interested in is the
22 information and belief that plaintiff is being
23 investigated by South Carolina law enforcement. What's
24 the basis for that knowledge?

25 MR. WHITLARK: Go ahead and answer him, if

1 you can.

2 BY MR. PACELLA:

3 Q. Excluding privileged information that may
4 have come from counsel, like any person that you hired
5 as an attorney, have you gotten that information from
6 anybody else?

7 A. No. No.

8 Q. Okay. So you don't know what agency might be
9 investigating the theft?

10 A. No.

11 Q. Okay. Okay. And what's the basis for
12 asserting that it was in excess of a hundred thousand
13 dollars, do you know?

14 MR. WHITLARK: I can answer it.

15 MR. PACELLA: So can I, but I'm asking him
16 the question.

17 MR. WHITLARK: That was from talking with
18 Pete Strom.

19 MR. PACELLA: I'm asking for his knowledge.
20 And I'm not asking for privileged information that you
21 may have communicated to him.

22 MR. WHITLARK: That's fine. I'm just telling
23 you, it's a conversation with Pete.

24 BY MR. PACELLA:

25 Q. Okay. You don't have personal knowledge of

1 that?

2 A. No, not directly.

3 Q. Okay. And other than from counsel, have you
4 learned that information from any source other than
5 your counsel?

6 A. No.

7 Q. Okay. The paragraph 46 asks for a setoff,
8 that plaintiff had been given reimbursements from
9 defendants for alleged expenditures at your businesses.

10 Are you talking about complimentary food and
11 beverages in that paragraph?

12 MR. WHITLARK: No, no, that's for -- the law
13 requires that you ask for that.

14 MR. PACELLA: I'm just asking for the actual
15 basis for that pleading.

16 BY MR. PACELLA:

17 Q. Mr. Whitlark, based on -- both as the
18 corporate representative and based on your knowledge,
19 your personal knowledge and the corporate knowledge,
20 what's the factual basis or the facts that give rise to
21 the claim for a setoff?...

22 MR. WHITLARK: Well, those are all legal
23 matters that are done by the attorney.

24 MR. PACELLA: I'm asking for the facts.

25 MR. WHITLARK: Well, I'm just telling you, he

1 didn't comprise that, the attorney did. An attorney
2 did that.

3 MR. PACELLA: I understand that, and I'm
4 asking for the facts that give rise to the -- that
5 allow the attorney to even be able to make that claim.

6 BY MR. PACELLA:

7 Q. What are the facts, what reimbursements have
8 been given to plaintiff?

9 MR. WHITLARK: Assert your rights on it.

10 THE WITNESS: I assert my rights on it.

11 MR. PACELLA: Thank you. I figured that was
12 going to be the answer, I was just waiting for it to ..
13 get there.

14 BY MR. PACELLA:

15 Q. And would some of those reimbursements be
16 complimentary food and beverages?

17 A. I have to assert my rights there.

18 Q. And could some of those -- was some of those
19 beverages alcoholic beverages?

20 A. I guess I have to assert my rights.

21 Q. Was Lauren Proctor ever given complimentary
22 alcohol? ..

23 A. I have to assert my rights there.

24 Q. Was she ever given shots of Crown and Jack?

25 A. Possibly.

1 Q. Crown Royal and Jack Daniels.

2 Did you ever give her Scotch while she was
3 playing video games?

4 A. I have to assert my rights there.

5 Q. Did you ever advance money to her in order to
6 play video games or gamble on video games?

7 A. I have to assert my rights there.

8 Q. Okay. Did anyone on behalf of the
9 corporation besides you ever advance her money to
10 continue to gamble on these video gaming machines?

11 A. I have to assert my rights there.

12 Q. Incidentally, are the video game machines
13 still there for gambling purposes at either of the
14 businesses?

15 A. I assert my rights.

16 Q. And are any of the -- is any video gaming for
17 gambling purposes going on at any of the businesses
18 currently?

19 A. I have to assert my rights.

20 MR. PACELLA: Okay. Let's take a break for
21 about five minutes, and I'll let you know if I have any
22 other questions.

23 (A recess transpired.)

24 MR. PACELLA: I don't have any other
25 questions, Mr. Whitlark. Thank you for coming today.

1 (The deposition concluded at 11:03 a.m.)

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1 SIGNATURE OF DEPONENT

2

3 I, the undersigned, FORREST WHITLARK, do
4 hereby certify that I have read the foregoing
5 deposition and find it to be a true and accurate
6 transcription of my testimony, with the following
7 corrections, if any:

8 PAGE LINE CHANGE REASON

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FORREST WHITLARK DATE

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25

1 CERTIFICATE OF REPORTER

2 I, Sheri L. Byers, Registered
3 Professional Reporter and Notary Public for the
4 State of South Carolina at Large, do hereby
certify:

5 That the foregoing deposition was
6 taken before me on the date and at the time and
7 location stated on page 1 of this transcript; that
8 the deponent was duly sworn to testify to the
9 truth, the whole truth and nothing but the truth;
10 that the testimony of the deponent and all
11 objections made at the time of the examination were
recorded stenographically by me and were thereafter
transcribed; that the foregoing deposition as typed
is a true, accurate and complete record of the
testimony of the deponent and of all objections
made at the time of the examination to the best of
my ability.

12 I further certify that I am neither
13 related to nor counsel for any party to the cause
pending or interested in the events thereof.

14 Witness my hand, I have hereunto
15 affixed my official seal this 10th day of January,
2007, at Columbia, Richland County, South Carolina.

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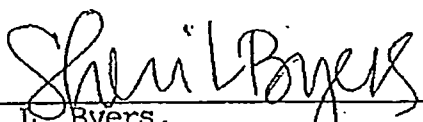
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Sheri L. Byers,
Registered Professional Reporter,
Notary Public
State of South Carolina at Large
My Commission expires:
January 5, 2014

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E X H I B I T S

(None was proffered.)

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EXHIBIT 5A

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
2 COUNTY OF RICHLAND FIFTH JUDICIAL CIRCUIT

3
4
5 LAUREN PROCTOR,
6 Plaintiff(s),

7 vs Case No.: 2006-CP-40-1814

8 WHITLARK & WHITLARK, INC.,
9 D/B/A ROCKAWAYS ATHLETIC CLUB
and PIZZA MAN,

10 Defendant(s).

COPY

11
12 D E P O S I T I O N

13 WITNESS: PAUL WHITLARK

14 DATE: Wednesday, August 23, 2006

15 TIME: 9:48 a.m.

16 LOCATION: The Strom Law Firm
2110 Beltline Boulevard
17 Columbia, South Carolina

18 TAKEN BY: Attorneys for the Plaintiff(s)

19 REPORTED BY: SUSAN M. VALSECCHI,
Certified Realtime Reporter

20

21

22

COMPUSCRIPTS, INC.
A Full-Service Court Reporting Agency
23 Post Office Box 7172
Columbia, SC 29202
24 803-988-0086
25 1-800-988-0086

1 APPEARANCES:

2

ATTORNEYS FOR PLAINTIFF(S)

3

LAUREN PROCTOR:

4

STROM LAW FIRM, L.L.C.

5

BY: MARIO A. PACELLA, ESQUIRE

2110 Beltline Boulevard, Suite A

Columbia, South Carolina 29204

6

7

8 ATTORNEYS FOR DEFENDANT(S)

9

WHITLARK & WHITLARK, INC.,

D/B/A ROCKAWAYS ATHLETIC CLUB

and PIZZA MAN:

10

WHITLARK & BALLOU

11

BY: J. MARCUS WHITLARK, ESQUIRE

1708 Main Street

12

Walker Building, Suite 103-105

Columbia, South Carolina 29201

13

14

15 ALSO PRESENT:

16

FORREST WHITLARK

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2 MR. WHITLARK: This is Marcus Whitlark,
3 the defense attorney, Defendants' attorney,
4 Whitlark & Whitlark, Incorporated, and Rockaways
5 Athletic Club.

6 I believe the date is August 23rd, 2006.

7 Pursuant to a deposition notice for a
8 30(b)(6) witness, Forrest Whitlark, appeared on
9 behalf of the Whitlark & Whitlark Corporation; and
10 because of the crossover between his
11 individual -- himself and his corporate
12 personality, we have answered the questions as far
13 as we could go without crossing over into the
14 violation or the --

15 We assert the privilege of the Fifth
16 Amendment on Paul Whitlark. We will carte blanche
17 Fifth Amendment assertion. He's not going to
18 answer any questions or submit to a deposition
19 based upon obviously the sensitive nature of the
20 questions the Plaintiff's counsel is asking.

21 And we will -- we did submit to a
22 30(b)(6) designation. We explained that the
23 records have been seized by the FBI pursuant to a
24 warrant issued by the federal court and then we
25 shall -- we object and assert the Fifth Amendment

1 to any of the substantive questions asked by
2 Plaintiff's counsel after the designation was
3 complied with. Okay?

4 MR. PACELLA: And just to be clear,
5 counsel is instructing his clients not to answer
6 questions on the basis of their Fifth Amendment
7 privilege.

8 MR. WHITLARK: That's right.

9 MR. PACELLA: Okay. We'll close the
10 depositions.

11 MR. WHITLARK: All right.

12 (The deposition concluded at 9:49 a.m.)

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CERTIFICATE OF REPORTER

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4

I, Susan M. Valsecchi, Registered
Professional Reporter and Notary Public for the
State of South Carolina at Large, do hereby
certify:

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12

That the foregoing deposition was taken
before me on the date and at the time and location
stated on Page 1 of this transcript; that the
deponent was duly sworn to testify to the truth,
the whole truth and nothing but the truth; that the
testimony of the deponent and all objections made
at the time of the examination were recorded
stenographically by me and were thereafter
transcribed; that the foregoing deposition as typed
is a true, accurate and complete record of the
testimony of the deponent and of all objections
made at the time of the examination to the best of
my ability.

13

14

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

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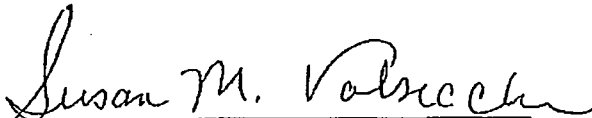
22

23

24

25

Witness my hand, I have hereunto affixed
my official seal this 29th day of August 2006,
at Columbia, Richland County, South Carolina.


Susan M. Valsecchi,
RPR, Notary Public,
State of South Carolina at
Large.
My Commission expires
January 4, 2015.

A ability 5:10 accurate 5:9 affixed 5:14 Agency 1:22 Amendment 3:16,17,25 4:6 answer 3:18 4:5 answered 3:12 APPEARAN... 2:1 appeared 3:8 asked 4:1 asking 3:20 assert 3:15,25 assertion 3:17 Athletic 1:8 2:9 3:5 attorney 3:3,3 Attorneys 1:18 2:2,8 August 1:14 3:6 5:14 a.m 1:15 4:12	1:23 2:5,12 5:15 Commission 5:20 COMMON 1:1 complete 5:9 complied 4:3 COMPUSCR... 1:22 concluded 4:12 corporate 3:11 Corporation 3:9 counsel 3:20 4:2 4:5 5:12 County 1:1 5:15 court 1:1,22 3:24 crossing 3:13 crossover 3:10 CRR 5:19	3:17,25 4:6 Firm 1:16 2:4 foregoing 5:4,8 Forrest 2:15 3:8 Full-Service 1:22 further 5:11	obviously 3:19 Office 1:23 official 5:14 Okay 4:3,9	sensitive 3:19 South 1:1,17 2:5 2:12 5:3,15,19 State 1:1 5:3,19 stated 5:5 stenographica... 5:8 Street 2:11 Strom 1:16 2:4 submit 3:18,21 substantive 4:1 Suite 2:5,12 Susan 1:19 5:2 5:18 sworn 5:6	2 2006 1:14 3:6 5:14 2006-CP-40-1... 1:6 2015 5:21 2110 1:16 2:5 23 1:14 23rd 3:6 29th 5:14 29201 2:12 29202 1:23 29204 2:5
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EXHIBIT 5B



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Date: January 23, 2007

Dear Client:

The original of this transcript has been sent to the deponent for reading and signing. The witness has 30 days to read and sign the transcript. We anticipate this transcript returning to us the week of February 27, 2007.

Upon receipt of the executed signature sheet, we will immediately forward a copy of the signed signature sheet to be inserted in your copy of such deposition. Also, if applicable, we will forward to you the sealed original transcript.

Should the witness fail to send us a signature sheet, we will be processing this document the week of March 6, 2007.

Please do not hesitate to contact us if we can be of further assistance to you.

CompuScripts, Inc.

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS.

2 COUNTY OF RICHLAND

3

4 LAUREN PROCTOR,

5 Plaintiff(s),

6 vs.

Case No: 2006-CP-40-1814

7 WHITLARK & WHITLARK, INC.,
8 D/B/A ROCKAWAYS ATHLETIC CLUB
and PIZZA MAN,

9 Defendant(s).

10

11

DEPOSITION

12

VOLUME II

COPY

13

WITNESS: PAUL WHITLARK

14

DATE: Tuesday, January 9, 2007

15

TIME: 4:01 p.m.

16

LOCATION: Strom Law Firm, LLC
2110 Beltline Boulevard
Columbia, South Carolina

17

18 TAKEN BY: Attorneys for the Plaintiff

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REPORTED BY: SHERI L. BYERS
Registered Professional Reporter

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1 APPEARANCES:

2 ATTORNEYS FOR THE PLAINTIFF:

3 THE STROM LAW FIRM
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5
6 ATTORNEYS FOR THE DEFENDANTS:

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Columbia, South Carolina 29201

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13 (INDEX AT REAR OF TRANSCRIPT)

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1 STIPULATION: It is stipulated by and between
2 counsel that this deposition is being taken in
3 accordance with the South Carolina Rules of Civil
4 Procedure, and that the deponent reserves the right to
5 read and sign the deposition transcript.

6 -----
7 PAUL WHITLARK, being first duly
8 sworn, testified as follows:

9 EXAMINATION

10 BY MR. PACELLA:

11 Q. Paul, Mario Pacella. We met --

12 A. Yes, sir.

13 Q. -- six months or so ago. And I'm one of the
14 lawyers that represents Lauren Proctor in this lawsuit
15 against Whitlark & Whitlark doing business as Rockaways
16 Athletic Club and Pizza Man, as you know. And I
17 understand that you are one of the corporate principals
18 for the corporation. I'll ask you some questions about
19 that in a little bit.

20 As you know, you're under oath so any
21 questions that you answer have to be answered
22 truthfully. If you answer my questions, I'm going to
23 assume you understand the question.

24 A. Right.

25 Q. It's the only way we can operate. Obviously

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1 if you don't understand a question I'm asking, please
2 stop me and ask me to rephrase it or explain my
3 question. I'm not always great at asking questions, so
4 that's possible.

5 And I'll try not to interrupt you and you try
6 not to interrupt me. That happens sometimes, and we'll
7 just stop each other and try to make sure that you get
8 to finish all your answers, I get to finish all my
9 questions, because the court reporter can't take down
10 two people speaking at once.

11 A. Okay.

12 Q. And of course, answer verbally and, you know,
13 you can shake your head, nod your head, do all that,
14 but you also have to answer out loud as well.

15 Okay. What's your full name?

16 A. Paul Daniel Whitlark.

17 Q. What's your date of birth?

18 A. 12-28-58.

19 Q. That makes you 58; is that right?

20 A. 48.

21 Q. Sorry. I was like you're not that old.

22 Okay. You certainly don't look like you're 58. That's

23 why I was like, my math is not working.

24 So who's the oldest?

25 A. Where?

- 1 A. I guess he moved on.
- 2 Q. What did he move on to do?
- 3 A. I think he's a carpenter now.
- 4 Q. Carpenter?
- 5 A. I believe so.
- 6 Q. Okay. And so he quit?
- 7 A. I don't think so. I think he just moved on.
- 8 Q. Meaning he resigned. When I say quit, it was
- 9 his choice to leave?
- 10 A. Yes, sir.
- 11 Q. If he wanted a job back, you would think
- 12 about hiring him?
- 13 A. Yeah, he was trustworthy.
- 14 Q. Okay. Did he ever use those video game
- 15 machines for gambling purposes?
- 16 A. I assert my rights on that.
- 17 Q. Okay. He wasn't fired for taking money out
- 18 of the gambling bag, was he?
- 19 A. I can't -- I assert my rights on that.
- 20 Q. Okay. Do you have a former employee named
- 21 Christy? I think her name is Christy Bell.
- 22 A. Yes, sir.
- 23 Q. And she worked for you for about ten years or
- 24 so, that's what Forrest said.
- 25 A. I'm bad with employees.

1 Q. Yeah, I'm not holding you to dates.

2 She was a former employee?

3 A. She was there for a while, yes, sir.

4 Q. And do you know why she left?

5 A. I'm not sure.

6 Q. Okay. You weren't involved in that decision
7 when she left?

8 A. I think that was on her own free will.

9 Q. Okay. All right. Was she ever asked to
10 collect gaming proceeds?

11 A. I assert my rights on that.

12 Q. Okay. Now, John Gaskins, do you know who he
13 is?

14 A. Yes, sir.

15 Q. Okay. Who is he?

16 A. He's a patron. I haven't seen him in a
17 while.

18 Q. Okay. Patron to both businesses?

19 A. Yes, sir.

20 Q. Okay. Did -- has he ever sold drugs in any
21 of your establishments to your knowledge?

22 A. I assert my rights on that one.

23 Q. Okay. Okay. How about Mark Winburn, do you
24 know who he is?

25 A. Yes, sir.

1 Q. Okay. Who is he?

2 A. He's a patron, too.

3 Q. Okay. And he -- has he ever sold drugs at
4 either Pizza Man or Rockaways?

5 A. I assert my rights on that.

6 Q. Okay. Okay. And to be clear, I think you
7 have answered this question, you asserted your right to
8 this question but just to make clear, have you ever
9 given Lauren Proctor any drugs at either of your
10 establishments?

11 A. I assert my rights on that.

12 Q. Okay. Okay. There's -- apparently there was ...
13 a money bag that the gaming proceeds were kept in; is
14 that correct?

15 MR. WHITLARK: Object to the form question.

16 BY MR. PACELLA:

17 Q. I'll rephrase the question. Was there a
18 money bag like a bank money bag that gambling proceeds
19 were kept in?

20 A. I assert my rights to that.

21 Q. In that gambling bag, was there a ledger that
22 kept track of who owed what?

23 A. I assert my rights to that.

24 Q. Okay. You're aware, you mentioned this at
25 the start, there's an FBI investigation. Do you know

1 the status of that investigation?

2 A. No.

3 Q. Okay. Who's involved -- who is being
4 investigated?

5 A. I assert my rights to that.

6 MR. PACELLA: Okay. Okay. I am going to
7 take a quick break because I have to go get some
8 documents and I'll be right back.

9 MR. WHITLARK: All right.

10 (A recess transpired.)

11 BY MR. PACELLA:

12 Q. Mr. Whitlark, I'm going to give you two
13 documents. We're going to mark one as Exhibit 1, one
14 as Exhibit 2 to your deposition. I'm going to
15 represent to you these are copies of the complaint and
16 the answer filed in this case. I'm going to give you
17 the opportunity to look at it and read through it in
18 its entirety, if you want, but I'm going to ask some
19 pretty sort of direct questions about small parts of
20 these documents. And, you know, so it's up to you

21 about how long you want to take to review the documents.

22 is what I'm saying. I'm not going to get in your way
23 of taking the time you need to read them.

24 I will ask you as far as the first document

25 which is -- which is the complaint that's been filed in

1 this case, I ask you if you've had a chance to look at
2 this before?

3 A. Briefly.

4 Q. Okay. And the next document is the answer
5 filed in this case, and I ask you if you've had a
6 chance to look at that?

7 A. Yeah, but I haven't -- like I said briefly, I
8 haven't compared them or looked back and forth to the
9 answers to the questions.

10 Q. Okay. And you aren't involved in the actual
11 assisting the lawyer to answer the questions or to
12 answer the complaint; is that correct?

13 I'm not asking about the content of those
14 conversations. To be very clear, I'm just asking if
15 you were involved with your lawyer in coming up with
16 the answers and defenses in that -- that are filed in
17 that answer?

18 MR. WHITLARK: Answer him.

19 THE WITNESS: Overall maybe, yes but, you
20 know, not directly.

21 BY MR. PACELLA:

22 Q. Okay. Would it be a fair representation that
23 your lawyer asked you questions and you provided him
24 the answers to the questions and he drafted the
25 documents?

1 A. Yeah.

2 MR. WHITLARK: I object to that on the
3 grounds of attorney/client privilege.

4 MR. PACELLA: Yeah; and I withdraw that
5 question. I'll just withdraw that question.

6 You don't need to ask for a protective order
7 or anything like that, Mark.

8 THE WITNESS: Is this the same thing here?

9 MR. PACELLA: Yeah, just an extra copy.

10 Sorry.

11 BY MR. PACELLA:

12 Q. Okay. I direct your attention to paragraph
13 41 of the answer which is the second document. This
14 will be Exhibit 2 to your deposition.

15 Can you read that paragraph? Just to
16 yourself. Just familiarize yourself with it.

17 A. All right.

18 Q. Okay. And it says that Plaintiff Lauren
19 Proctor is being investigated by South Carolina law
20 enforcement for theft of more than a hundred thousand
21 dollars.

22 Do you have any personal knowledge about her
23 being investigated?

24 A. No.

25 Q. Okay. And there's not -- no one from law

1 enforcement has come to you and said Ms. Proctor's
2 being investigated?

3 A. No.

4 Q. Okay. Good.

5 And do you have any personal knowledge that
6 that amount exceeds a hundred thousand dollars? Other
7 than what you may have learned from your attorneys, and
8 that is privileged and I'm not asking about what you
9 may have learned from your attorneys, but what you may
10 have learned from somebody else?

11 A. I can't answer that. I don't --

12 Q. The answer is you don't know?

13 A. I don't know.

14 Q. Okay. Okay. Turn to page 5 of the answer,
15 paragraph 46. I want you to read that paragraph again
16 to yourself just to familiarize yourself with that.

17 A. All right.

18 Q. Okay. One of the things that it says in the
19 last two lines, sets forth that plaintiff has been

20 given reimbursements from defendants for alleged

21 expenditures at defendants' businesses.

22 What kind of reimbursements, do you know?

23 A. I assert my rights.

24 Q. Okay. Could those reimbursements have been
25 for complimentary food and beverages?

1 A. I assert my rights on that.

2 Q. Could those reimbursements have been for --
3 what were those reimbursements for? I'm sorry, I just
4 changed some of my question.

5 Were the reimbursements that you were
6 referring to, that's being referred to in that
7 paragraph are complimentary food and beverages?

8 A. I assert my rights.

9 Q. Were the reimbursements referred to in
10 paragraph 46 of the answer complimentary alcoholic
11 beverages given to Lauren Proctor?

12 A. I assert my rights on that.

13 Q. Were the reimbursements -- do the
14 reimbursements included in paragraph 46 refer to
15 illegal narcotics provided to Ms. Lauren Proctor?

16 A. I assert my rights on that.

17 Q. Okay. Sorry, I have a number of pads that
18 I'm going through just to make sure I have no other
19 questions.

20 Were there two older women who also came in
21 and used the video gaming machines for gambling
22 purposes?

23 A. I assert my right under that.

24 Q. Okay. Did you ever require Lauren Proctor to
25 pay down a gambling debt before she was allowed to

1 continue to gamble on the machines?

2 A. I assert my rights on that.

3 MR. WHITLARK: And I object to the form of
4 the question.

5 BY MR. PACELLA:

6 Q. Is there a time frame in 2002, 2003 time
7 frame where the video game machines that were used for
8 gambling were removed from Pizza Man?

9 MR. WHITLARK: Object to the form.

10 BY MR. PACELLA:

11 Q. You still have to answer.

12 A. I assert my rights to that.

13 MR. PACELLA: Okay. I believe that that's
14 all the questions I have.

15 THE WITNESS: All right.

16 MR. WHITLARK: No questions.

17 (PLF. EXH. 1, Complaint, was marked for
18 identification.)

19 (PLF. EXH. 2, Answer to Complaint, was marked
20 for identification.)

21 (The deposition concluded at 4:41 p.m.)

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SIGNATURE OF DEPONENT

I, the undersigned, PAUL WHITLARK, do hereby
certify that I have read the foregoing deposition and
find it to be a true and accurate transcription of my
testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

PAUL WHITLARK	DATE

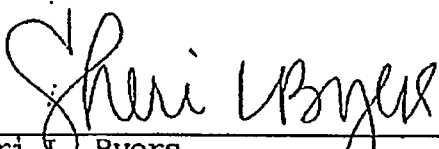
1 CERTIFICATE OF REPORTER

2 I, Sheri L. Byers, Registered
3 Professional Reporter and Notary Public for the
4 State of South Carolina at Large, do hereby
certify:

5 That the foregoing deposition was
6 taken before me on the date and at the time and
7 location stated on page 1 of this transcript; that
8 the deponent was duly sworn to testify to the
9 truth, the whole truth and nothing but the truth;
10 that the testimony of the deponent and all
11 objections made at the time of the examination were
recorded stenographically by me and were thereafter
transcribed; that the foregoing deposition as typed
is a true, accurate and complete record of the
testimony of the deponent and of all objections
made at the time of the examination to the best of
my ability.

12 I further certify that I am neither
13 related to nor counsel for any party to the cause
pending or interested in the events thereof.

14 Witness my hand, I have hereunto
15 affixed my official seal this 10th day of January,
2007, at Columbia, Richland County, South Carolina.

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Sheri L. Byers,
Registered Professional Reporter,
Notary Public
State of South Carolina at Large
My Commission expires:
January 5, 2014

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COUNTY OF RICHLAND

LAUREN PROCTOR

Plaintiff(s)

CIVIL ACTION COVERSHEET

vs.

WHITLARK & WHITLARK, INC., D/B/A
ROCKAWAYS ATHLETIC CLUB AND
PIZZA MAN

Defendant(s)

(Please Print)

Submitted By: Mario A. Pacella, Esq.

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NOTE: The cover sheet 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 cover sheet 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 Circuit Court Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- ☐ Contracts
☐ Construction (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)
☐ Other (299)

- ☐ Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ 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)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

- ☐ Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799)

- ☐ Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)

- ☐ Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (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)

Declaratory Judgment

Submitting Party Signature:

Date: 03/29/2006

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.

SCCA / 234 (10/05)

EXHIBIT 1 P. Whitlark

Page 1 of 2

JAN 09 2007

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CompuScripts Inc.

**** Contact Respective County Clerk of Court for modified ADR Program Rules**

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 within 210 days of filing of this action, and the Plaintiff shall file a "Stipulation of Neutral Selection" on or before the 224th day after the filing of the action. If the parties cannot agree upon the selection of the neutral within 210 days, the Plaintiff shall notify the Court by filing a written "Request for the Appointment of a Neutral" on or before the 224th day after the filing of this action. The Court shall then appoint a neutral from the Court-approved mediator/arbitrator list.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Case 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. Cases which are appellate in nature such as appeals or writs of certiorari;
 - c. Post Conviction relief matters;
 - d. Contempt of Court proceedings;
 - e. Forfeiture proceedings brought by the State;
 - f. Cases involving mortgage foreclosures; and
 - g. Cases that have been submitted to mediation with a certified mediator prior to the filing of this action.
4. 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 had 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
LAUREN PROCTOR,

Plaintiff,

v.

WHITLARK & WHITLARK, INC.,
D/B/A ROCKAWAY'S ATHLETIC
CLUB and PIZZA MAN,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No. 06-CP-_____

SUMMONS
(JURY TRIAL DEMANDED)

RICHLAND COUNTY
FILED
2006 MAR 29 PM 3:28
BARBARA A. SCOTT
C.C.C. & G.S.

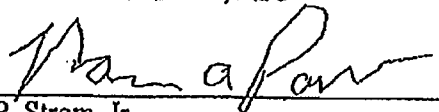
TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the complaint in the above action. A copy of the complaint is attached to this Summons and is herewith served upon you. Your answer must be in writing and signed by you or by your attorney and must state your address or the address of your attorney if signed by your attorney. Your answer must be served upon the undersigned attorneys for the Plaintiff within thirty (30) days after the service hereof, exclusive of the day of service, at 2110 Beltline Boulevard, Suite A, Columbia South Carolina 29204.

YOU ARE HEREBY GIVEN NOTICE FURTHER that, if you fail to appear and defend and fail to answer the complaint as required by this summons within thirty (30) days after the service hereof, judgment by default will be rendered against you for the relief demanded in the complaint.

March 29, 2006

STROM LAW FIRM, LLC


J.P. Strom, Jr.
Mario A. Pacella
2110 Beltline Blvd., Suite A
Columbia, South Carolina 29204
Telephone: (803) 252-4800
Fax: (803) 252-4801

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA]
COUNTY OF RICHLAND]

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LAUREN PROCTOR,]
Plaintiff,]

v.]

Case No. 2006-CP-40-_____

WHITLARK & WHITLARK, INC.,]
D/B/A ROCKAWAYS ATHLETIC]
CLUB and PIZZA MAN,]

Defendant.]

COMPLAINT

RICHLAND COUNTY
2006 MAR 29 PM 3:28
BARBARA A. SCOTT
C.C.C. & G.S.

Plaintiff Lauren Proctor, complaining of Defendant, alleges as follows:

NATURE OF THE CASE

1. Plaintiff brings this action on behalf of herself to recover gambling losses sustained where Defendant violated S.C. Code Ann. § 32-1-10, the prohibition against video gaming (See 1999 Act No. 124, Part I, § 8, effective July 1, 2000), and the South Carolina Unfair Trade Practices Act.

PARTIES

2. Plaintiff Lauren Proctor is a citizen and resident of Richland County, South Carolina.

3. Defendant Whitlark & Whitlark, Inc., is a corporation organized under the laws of South Carolina with a principal place of business in Columbia, South Carolina. Defendant Whitlark & Whitlark, Inc., does business as Rockaways Athletic Club and Pizza Man.

JURISDICTION AND VENUE

4. Jurisdiction is proper in this court, as the parties reside in South Carolina. Venue is proper in the county where both parties reside and the conduct (acts and omissions) giving rise to Plaintiff's causes of action, County of Richland, State of South Carolina, pursuant to S.C. Code Ann. § 15-7-30.

FACTUAL ALLEGATIONS

5. In or around 1995, Plaintiff began gambling heavily on video gaming machines throughout Columbia, South Carolina.

6. In July 2000, the Video Gaming Machines Act, S.C. Code Ann. §§ 12-21-2770-12-21-2809, was repealed by the legislature, prohibiting retail establishments from operating video games for the purpose of patron gambling.

7. Beginning in 1999, and continuing until June 2005, Plaintiff gambled weekly (and many times multiple times during the week) through video game machines at Defendant's retail establishments, Rockaways Athletic Club and Pizza Man.

8. Plaintiff's gambling losses ranged from \$1000 to \$2000 weekly at Defendant's retail establishments.

9. On several occasions, Defendant, through its retail establishments, provided cash advances on Plaintiff's credit card in order to pay Defendant gambling debt. Plaintiff is informed and believes that Defendant would charge her credit card for food purchases in large dollar amounts, sometimes exceeding \$1000 for this purpose.

10. Plaintiff is informed and believes Defendant's Pizza Man establishment has two video gaming machines for gambling and Defendant's Rockaways establishment has three video gaming machines for gambling.

11. Plaintiff is informed and believes that Defendant received in excess of \$500,000 from Plaintiff in gambling losses during Defendant's continuous course of conduct.

12. Because of Defendant's continuous course of conduct in operating video gaming machines illegally and illegally receiving payments for gambling debt as late as June 2005, Plaintiff's cause of action did not accrue until June 2005.

13. Upon information and belief, Defendant continues to operate video gaming machines in violation of South Carolina law.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

14. Plaintiff incorporates and alleges paragraphs 1-13 as if fully restated herein.

15. Through her continuous gambling at Defendant's retail establishments through their video gaming machines (both before and after such machines became illegal), Plaintiff has lost in excess of \$50 and paid and delivered sums of money on the debt within the last three months. The last date of said gambling loss took place on or about June 2005.

16. S.C. Code Ann. § 32-1-10 prohibits individuals retail establishments from collecting more than \$50.00 in gambling losses.

17. Plaintiff is a person interested under agreements constituting unlawful gaming contracts and bring this action pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10 to -140 (Law Co-op. 1976), to determine the validity of and her legal rights arising under those agreements.

18. Because said contracts are unlawful because losses incurred exceed \$50.00 at any one sitting, Plaintiff seeks a declaration that such contracts are void.

FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment)

19. Plaintiff incorporates and alleges paragraphs 1-18 as if fully restated herein.
20. Through her continuous gambling at Defendant's retail establishments through their video gaming machines after such machines became illegal in July, 2000, Defendant collected money from Plaintiff for losses incurred as a result of Defendant operating illegal gaming machines.
21. In July 2000, the Video Gaming Machines Act, S.C. Code Ann. §§ 12-21-2770-12-21-2809, was repealed by the legislature, prohibiting retail establishments from operating video games for the purpose of patron gambling.
22. Plaintiff is a person interested under agreements constituting unlawful gaming contracts and bring this action pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10 to -140 (Law Co-op. 1976), to determine the validity of and her legal rights arising under those agreements.
23. Because said contracts are unlawful after July 2000, Plaintiff seeks a declaration that such contracts are void.

FOR A THIRD CAUSE OF ACTION
(Unjust Enrichment)

24. Plaintiff incorporates and alleges paragraphs 1-23 as if fully restated herein.
25. Through the above-described actions, Defendant obtained gambling proceeds from the Plaintiff in violation of state law and by taking of undue advantage of the Plaintiff.
26. Said conduct and receipt of funds from Plaintiff resulted in the unjust enrichment of the Defendant.

27. As a direct, foreseeable and proximate result thereof, Plaintiff suffered actual damages.

28. Plaintiff is entitled to restitutionary relief and disgorgement of Defendant's unlawful receipt of gambling proceeds.

FOR A FOURTH CAUSE OF ACTION

(Violation of the South Carolina Unfair Trade Practices Act)

29. Plaintiff incorporates and alleges paragraphs 1-16 as if fully restated herein.

30. The actions and practices of operating video gaming machines for the purpose of gambling by the Defendant as described above constitute unfair and/or deceptive methods as defined by the South Carolina Unfair Trade Practices Act (SCUTPA), codified at S. C. Code Ann. §§ 39-5-102-160.

31. Defendant's practice of owning and operating video gaming machines after July 1, 2000, is a violation of South Carolina law and a unfair trade practice.

32. Defendant's practice of collecting more than \$50 in gambling losses is a violation of South Carolina law and an unfair trade practice.

33. Defendant's aforementioned practices are offensive to public policy, immoral, unethical, and/or oppressive. Furthermore, Defendant's actions have a direct impact upon the public interest since said actions and deceptive practices have a history and continued potential for repetition. Said potential is clearly illustrated by Defendant continuing to operate said video gaming machines at its Rockaways Athletic Club and Pizza Man establishments.

34. As a proximate result of the Defendant's deceptive practices, Plaintiff has suffered actual damages in gambling losses.

35. Upon information and belief, Plaintiff is entitled to judgment against the Defendant, for violation of the South Carolina Unfair Trade Practices Act (SCUTPA) for their actual damages, treble damages, costs, and attorneys fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Honorable Court enter judgment against Whitlark & Whitlark, Inc., as follows:

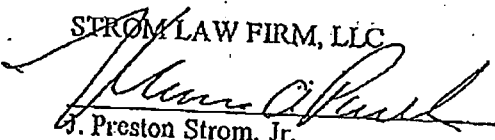
1. For actual and compensatory damages;
2. Treble damages;
3. Punitive damages; and
4. Attorneys' fees and costs.

JURY DEMAND

Plaintiffs pray for a trial by jury.

RESPECTFULLY SUBMITTED, this 29th day of March, 2006.

STROM LAW FIRM, LLC


J. Preston Strom, Jr.

Mario A. Pacella

2110 N. Beltline Boulevard, Suite A
Columbia, South Carolina 29204

Tel: 803-252-4800

Fax: 803-252-4801

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

LAUREN PROCTOR,)

Plaintiff,)

v.)

WHITLARK & WHITLARK, INC.,)
D/B/A ROCKAWAYS ATHLETIC)
CLUB and PIZZA MAN,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Case No. 2006-CP-40-1814

ANSWER TO COMPLAINT

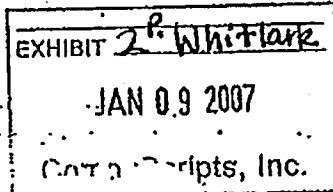
2006 JUN -5 PM 3:59
BARBARA A. SCOTT
C.C.C. & G.S.
RICHLAND COUNTY

TO: MARIO A. PACELLA, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Plaintiff hereby answering allegations in the Complaint in the case-listed hereinabove, states as follows:

All allegations of the Complaint referenced above are hereby denied except those specifically admitted hereinbelow:

1. The allegations in Paragraph #1 of the Complaint are denied.
2. The allegations in Paragraph #2 of the Complaint are admitted upon information and belief.
3. The allegations in Paragraph #3 of the Complaint upon information and belief are admitted.
4. The Defendant admits the allegations in Paragraph #4 of the Complaint that jurisdiction is proper however the remaining allegations in Paragraph #4 are denied.
5. The allegations in Paragraph #5 of the Complaint upon information and belief are admitted.
6. The allegations in Paragraph #6 of the Complaint upon information and belief are admitted.



7. The allegations in Paragraph #7 of the Complaint are denied.
8. The allegations in Paragraph #8 of the Complaint are denied.
9. The allegations in Paragraph #9 of the Complaint are denied.
10. The Defendants admit so much of Paragraph #10 of the Complaint that alleges Pizza Man had 2 video game machines and Rockaway Athletic Club had 3 video game machines, however, the remaining allegations of Paragraph # 10 are denied.
11. The allegations in Paragraph #11 of the Complaint are denied and Defendants' demand strict proof thereof.
12. The allegations in Paragraph #12 of the Complaint are denied.
13. The allegations in Paragraph #13 of the Complaint are denied.

As To The First Cause Of Action

14. All allegations in Paragraph #14 of the Complaint are denied.
15. The allegations in Paragraph #15 of the Complaint are denied.
16. The Defendants admit that part of Paragraph #16 of the Complaint which cite S.C. Code of Laws § 32-1-10 as prohibiting businesses from collecting more than \$50.00 in gambling losses.
17. The allegations in Paragraph #17 of the Complaint are denied.
18. The allegations in Paragraph #18 of the Complaint are denied.

As To The Second Cause Of Action

19. All allegations in Paragraph #19 of the Complaint are denied.
20. The allegations in Paragraph #20 of the Complaint are denied.
21. The allegations in Paragraph #21 of the Complaint are admitted upon information and belief.
22. The allegations in Paragraph #22 of the Complaint are denied.
23. The allegations in Paragraph #23 of the Complaint are denied.

As To The Third Cause Of Action

24. The allegations in Paragraph #24 of the Complaint are denied.
25. The allegations in Paragraph #25 of the Complaint are denied.
26. The allegations in Paragraph #26 of the Complaint are denied.
27. The allegations in Paragraph #27 of the Complaint are denied.
28. The allegations in Paragraph #28 of the Complaint are denied.

As To The Fourth Cause Of Action

29. The allegations in Paragraph #29 of the Complaint are denied.
30. The allegations in Paragraph #30 of the Complaint are denied.
31. The allegations in Paragraph #31 of the Complaint are denied.
32. The allegations in Paragraph #32 of the Complaint are denied.
33. The allegations in Paragraph #33 of the Complaint are denied.
34. The allegations in Paragraph #34 of the Complaint are denied and Defendants' demand strict proof thereof.
35. The allegations in Paragraph #35 of the Complaint are denied.
36. All allegations in the Prayer For Relief are hereby denied.

For A Second Defense. As To All Causes Of Action
(Lack Of Specificity Required To Bring Suit)

37. That the Plaintiff Lauren Proctor has not specified what dates and time and what amounts she allegedly "lost" in the video game machines of the two (2) Defendants, during all times pertinent hereto.
38. That the Plaintiff Lauren Proctor has not alleged that she was the lawful owner of the money she supposedly spent at the Defendant's businesses.

39. That the Plaintiff has not alleged that she notified the Defendants within 90 days of her demand for the refund of the money allegedly lost to Defendants as required by South Carolina Code § 32-1-10 in order to make a proper claim under the requirements of the law.
40. That the Plaintiff's suit is therefore barred by the Statute of Limitations set forth in South Carolina Code § 32-1-10, and by the strict requirements of specific dates, times and amount lost as set forth in §32-1-10, et. seq.

For A Third Defense As To All Causes Of Action
(Illegality Engaged In By Plaintiff)

41. That, on information and belief, the Plaintiff Lauren Proctor is currently being investigated by South Carolina Law Enforcement for the theft of more than \$100,000.00 dollars from the Title Business where she was formerly employed, and she has asserted, on information and belief, that she spent this stolen money on gaming machines in and around South Carolina, including the Defendant Rockaway Athletic Club and Pizza Man restaurants.
42. That the "money" that Plaintiff allegedly lost in video gaming machines at the Defendant's two restaurants was, therefore, not the Plaintiff's money, but was stolen by the Plaintiff from other people, and involves another illegality; the expenditure of stolen money on video games by the Plaintiff Lauren Proctor.
43. All causes of action are therefore based upon the use of illegally obtained funds through illegal conduct by the Plaintiff and should therefore be dismissed on the grounds of no capacity or standing to bring suit and/or illegality in the case of Plaintiff's lawsuit.

For A Fourth Defense
(No Capacity To Bring This Suit)

44. That the Plaintiff Lauren Proctor, also alleges that she engaged in an illegality, that is, was gambling on video machines for payoffs, which, according to Plaintiff's assertions, was illegal under South Carolina Law, and as such the complaint should be dismissed on the grounds that the matter involves illegal conduct alleged have been engaged in by the Plaintiff, and therefore may not be redressed or be the proper subject of a civil suit in the Court of Common Pleas in the State of South Carolina.

That based upon the above allegations the Plaintiff Lauren Proctor has standing and the capacity required to bring and maintain this lawsuit.

For A Fifth Defense As To All Causes Of Action

(Laches)

(Statue Of Limitations)

That the Plaintiff Lauren Proctor, alleged that she "lost" uncertain sums of money in Defendant's video games from 1999 until June 2005, and yet did not bring a lawsuit until March 29, 2006, and this lawsuit is therefore barred by the statute of limitations and/or the doctrine of LACHES, with reference to the S.C. Code of Laws.

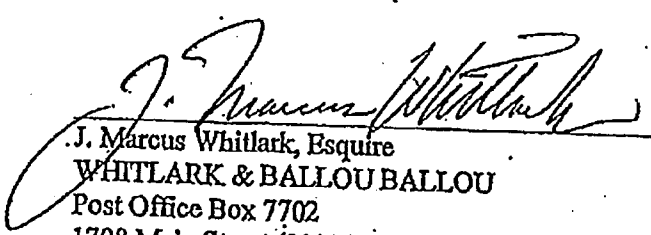
For A Sixth Defense As To All Causes Of Action

The Complaint fails to State facts sufficient to constitute a cause of action for which relief may properly be granted under South Carolina Law.

Set Off

46. That the Plaintiff Lauren Proctor has not alleged that she was reimbursed by the Defendant's for monies she spent in these video games, and therefore Defendant's request a set off for any and all amounts of reimbursement from video games owned by Defendant's and in which Plaintiff is determined to have been given reimbursements from Defendants for her alleged expenditures at Defendant's businesses.

WHEREFORE, the Defendants' request that the entire Complaint be dismissed for the reasons set forth in the Defendant's Answer and that all costs are assessed as the Court deems just and proper.


J. Marcus Whitlark, Esquire
WHITLARK & BALLOU BALLOU
Post Office Box 7702
1708 Main Street (29201)
Columbia, South Carolina 29202

June 5, 2006.

Columbia, South Carolina

STATE OF SOUTH CAROLINA]

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

COUNTY OF RICHLAND]

LAUREN PROCTOR,]

Plaintiff,]

Case No. 2006-CP-40-1814

v.]

WHITLARK & WHITLARK, INC.,]

D/B/A ROCKAWAYS ATHLETIC]

CLUB and PIZZA MAN,]

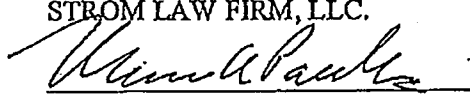
Defendant.]

CERTIFICATION OF COUNSEL

Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, I certify that I have not consulted with Counsel for Defendant prior to filing the Motion for Partial Summary Judgment because such consultation would serve no useful purpose.

RESPECTFULLY SUBMITTED, this 29th day of March, 2007.

STROM LAW FIRM, LLC.


J. Preston Strom, Jr.

Mario A. Pacella

2110 Beltline Boulevard, Suite A

Columbia, South Carolina 29204

Tel: 803-252-4800

Fax: 803-252-4801

STATE OF SOUTH CAROLINA]

COUNTY OF RICHLAND]

LAUREN PROCTOR,]

Plaintiff,]

v.]

WHITLARK & WHITLARK, INC.,]

D/B/A ROCKAWAYS ATHLETIC]

CLUB and PIZZA MAN,]

Defendant.]

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2006-CP-40-1814.

CERTIFICATE OF SERVICE

I, Ryan Alphin, Investigator at the Strom Law Firm, LLC, certify that I served the following documents to Marcus Whittlark, Attorney for Defendant, 1708 Main Street, Columbia, South Carolina, 29201 (P.O. Box 7702, Columbia, SC 29202) via hand delivery on this the 29th day of March, 2007.

Motion to Strike Answer
Motion for Partial Summary Judgment


Ryan Alphin

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT
Civil Action #06-CP-40-1814

LAUREN PROCTOR, and TRANS-)
UNION NATIONAL TITLE INSURANCE)
COMPANY, f/k/a ATLANTIC TITLE)
INSURANCE COMPANY)

Plaintiff,)

v.)

WHITLARK & WHITLARK, INC., D/B/A)
ROCKAWAYS ATHLETIC CLUB and)
PIZZA MAN,)

Defendants,)

RICHLAND COUNTY
2007 NOV 29 AM 9:19
BARBARA A. SCOTT
C.C.C. & G.S.

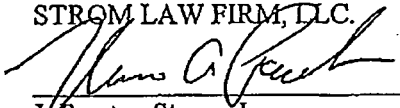
NOTICE OF FILING

Comes now Plaintiff Proctor, by and through her undersigned counsel of record,
and files the following documents in response to Defendant's Motion for Summary
Judgment:

1. Supplemental Affidavit of Lauren Proctor.
2. Expert Report of Frank Quinn, Ph. D.
3. November 7, 2007 Deposition of Forrest Whitlark, filed under seal.

RESPECTFULLY SUBMITTED, this 29th day of November, 2007.

STROM LAW FIRM, LLC.


J. Preston Strom, Jr.

Mario A. Pacella

2110 Beltline Boulevard, Suite A

Columbia, South Carolina 29204

Tel: 803-252-4800

Fax: 803-252-4801

EXHIBIT

1

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Civil Action #06-CP-40-1814

LAUREN PROCTOR, and TRANS-
UNION NATIONAL TITLE INSURANCE)
COMPANY, f/k/a ATLANTIC TITLE)
INSURANCE COMPANY)

Plaintiff,)

v.)

WHITLARK & WHITLARK, INC., D/B/A)
ROCKAWAYS ATHLETIC CLUB and)
PIZZA MAN,)

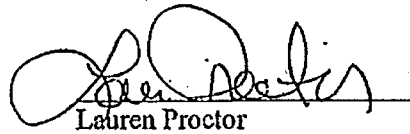
Defendants,)

SUPPLEMENTAL AFFIDAVIT OF LAUREN PROCTOR

Personally appeared before me, Lauren Proctor, and after being duly sworn,
deposes and testifies as follows:

1. My name is Lauren Proctor and I am over the age of eighteen (18) and competent to testify in this matter.
2. I am the Plaintiff in the above-reference matter and provide this testimony of my own knowledge and recollection.
3. Some of the funds used to gamble at Defendant's establishments included personal funds I earned from my employment.
4. I am indebted to Walter Smith and Trans-Union Title Insurance Company f/k/a Atlantic Title Insurance Company, as evidenced by my plea agreement with the United States Attorney's Office. The plea agreement is attached as exhibit A to my supplemental affidavit.




Lauren Proctor

SWORN AND SUBSCRIBED to me
On this 28th day of November, 2007.

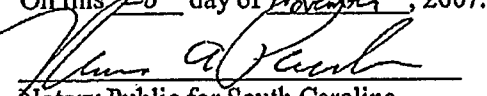

Notary Public for South Carolina
My Commission Expires: 8/21/2010

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

UNITED STATES OF AMERICA)

CRIMINAL NO. 3:07-CR-1160

v.)

LAUREN JOAN PROCTOR)

PLEA AGREEMENT

General Provisions

This PLEA AGREEMENT is made this 10 day of September, 2007, between the United States of America, as represented by United States Attorney Reginald I. Lloyd, Assistant United States Attorney Anne Hunter Young ; the Defendant, LAUREN JOAN PROCTOR, and Defendant's Attorney, J. Preston Strom, Jr., Esquire.

IN CONSIDERATION of the mutual promises made herein, the parties hereto agree as follows:

1. The Defendant, LAUREN JOAN PROCTOR, agrees to waive Indictment and arraignment, and plead guilty to an Information charging that beginning in or about late 1998, and continuing until about June 2005, the Defendant devised, and intended to devise, a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations, and promises, and during such period stated above, did execute such scheme and artifice to defraud, and did attempt to do so, and did deposit, and did cause to be deposited, in authorized depositories for mail matter, mail to be sent and delivered by the

United States Postal Service for the purpose of executing such scheme and artifice to defraud, and attempting to do so, in violation of Title 18, United States Code, § 1341.

In order to sustain its burden of proof as to this offense, the Government is required to prove the following:

One: The Defendant knowingly devised a scheme and artifice to defraud and to obtain money by means of false or fraudulent pretenses, representations, or promises as detailed in Count 1 of the Information.

Two: In advancing, or furthering, or carrying out this scheme and artifice to defraud and to obtain money by means of false or fraudulent pretenses, representations or promises, the Defendant used the mails or caused the mails to be used.

Possible Penalties for 18 U.S.C. § 1341

Fine of \$250,000 (18 U.S.C. § 3571) and/or imprisonment for 20 years and a term of supervised release of 3 years (18 U.S.C. § 3583) plus a special assessment of \$100.00 (18 U.S.C. § 3013).

2. The Defendant agrees to provide detailed financial information to the United States Probation Office prior to sentencing. The Defendant further agrees to enter into the Bureau of Prisons Inmate Financial Responsibility Program if sentenced to a term of incarceration with an unsatisfied monetary penalty. The Defendant further understands and agrees that any monetary penalty imposed is not dischargeable in bankruptcy.

(A) Fines: The Defendant understands and agrees that the Court may impose a fine pursuant to 18 U.S.C. §§ 3571 and 3572,

which fine may be due and payable immediately after sentencing regardless of whether the Defendant has the money to pay the fine. In the event the Defendant does not have the money, the Defendant understands and agrees that the Court may establish a payment schedule, taking into account the Defendant's present and future means of earning money, or of obtaining money to pay the fine.

- (B) Restitution: The Defendant agrees to make full restitution under 18 U.S.C. § 3556 in an amount to be determined by the Court at the time of sentencing, which amount is not limited to the count to which the Defendant pled guilty, but will include restitution to each and every identifiable victim who may have been harmed by her scheme or pattern of criminal activity, pursuant to 18 U.S.C. § 3663. In particular, the Defendant agrees to pay restitution in the amount of \$565,475.25 to Atlantic Title Insurance Company and \$195,000.00 to Walter H. Smith. The Defendant further agrees to cooperate fully with the government in identifying all victims. The Defendant understands and agrees that full payment of restitution is due immediately after sentencing unless the Court provides, in the interest of justice, for payment on a date certain or in installments over the shortest

time in which full payment can be reasonably made. The Defendant further understands and agrees that the government will seek enforcement of any order of restitution, and reserves the right to petition the Court at a later date to increase the amount of any installment payments toward restitution in the interest of justice.

- (C) Special Assessment: Pursuant to 18 U.S.C. §3013, the Defendant must pay a special assessment of \$100.00 for each felony count for which she is convicted. This special assessment must be paid at or before the time of the guilty plea hearing.

3. The Defendant understands that the matter of sentencing is within the sole discretion of the Court and that the sentence applicable to Defendant's case will be imposed after the Court considers as advisory the United States Sentencing Commission Guidelines, Application Notes and Policy Statements, as well as the factors set forth in Title 18, United States Code, Section 3553(a). The Defendant also understands that Defendant's sentence has not yet been determined by the Court, and that any estimate of a probable sentencing range Defendant may have received from Defendant's attorney, the Government or the United States Probation Office is only a prediction, not a promise, and is not binding on the Government, the Probation Office or the Court. The Defendant further understands that the Government retains the right to inform the Court of any relevant facts, to address the

Court with respect to the nature of the offense, to respond to questions raised by the Court, to correct any inaccuracies or inadequacies in the presentence report, to respond to any statements made to the Court by or on behalf of the Defendant and to summarize all evidence which would have been presented at trial to establish a factual basis for the plea.

4. The Defendant agrees that all facts that determine her offense level under the Guidelines and pursuant to any mandatory minimum (including facts that support any specific offense characteristic or other enhancement or adjustment) can be found by the Court at sentencing by a preponderance of the evidence standard and the Court may consider any reliable evidence, including hearsay. By executing this Agreement, the Defendant understands that she waives any argument that facts that determine her offense level under the Guidelines and pursuant to any mandatory minimum should be alleged in an indictment and found by a jury beyond a reasonable doubt.

5. The Defendant understands that the obligations of the Government within the Plea Agreement are expressly contingent upon the Defendant's abiding by federal and state laws and complying with the terms and conditions of any bond executed in this case.

6. In the event that the Defendant fails to comply with any of the provisions of this Agreement, either expressed or implied, it is understood that the Government will have the right, at its sole election, to void all of its obligations under this

Agreement and the Defendant will not have any right to withdraw her plea of guilty to the offense(s) enumerated herein.

Cooperation and Forfeiture

7. The Defendant agrees to be fully truthful and forthright with federal, state and local law enforcement agencies by providing full, complete and truthful information about all criminal activities about which she has knowledge. The Defendant must provide full, complete and truthful debriefings about these unlawful activities and must fully disclose and provide truthful information to the Government including any books, papers, or documents or any other items of evidentiary value to the investigation. The Defendant must also testify fully and truthfully before any grand juries and at any trials or other proceedings if called upon to do so by the Government, subject to prosecution for perjury for not testifying truthfully. The failure of the Defendant to be fully truthful and forthright at any stage will, at the sole election of the Government, cause the obligations of the Government within this Agreement to become null and void. Further, it is expressly agreed that if the obligations of the Government within this Agreement become null and void due to the lack of truthfulness on the part of the Defendant, the Defendant understands that:

- (A) the Defendant will not be permitted to withdraw her plea of guilty to the offenses described above;

- (B) all additional charges known to the Government may be filed in the appropriate district;
- (C) the Government will argue for a maximum sentence for the offense to which the Defendant has pleaded guilty; and
- (D) the Government will use any and all information and testimony provided by the Defendant in the prosecution of the Defendant of all charges.

8. The Defendant agrees to submit to such polygraph examinations as may be requested by the Government and agrees that any such examinations shall be performed by a polygraph examiner selected by the Government. Defendant further agrees that her refusal to take or her failure to pass any such polygraph examination to the Government's satisfaction will result, at the Government's sole discretion, in the obligations of the Government within the Agreement becoming null and void.

9. The Government agrees that any self-incriminating information provided by the Defendant as a result of the cooperation required by the terms of this Agreement, although available to the Court, will not be used against the Defendant in determining the Defendant's applicable guideline range for sentencing pursuant to the U.S. Sentencing Commission Guidelines. The provisions of this paragraph shall not be applied to restrict any such information:

- (A) known to the Government prior to the date of this Agreement;

- (B) concerning the existence of prior convictions and sentences;
- (C) in a prosecution for perjury or giving a false statement; or
- (D) in the event the Defendant breaches any of the terms of the Plea Agreement.

10. Provided the Defendant cooperates pursuant to the provisions of this Plea Agreement, and that cooperation is deemed by the Government as providing substantial assistance in the investigation or prosecution of another person who has committed an offense, the Government agrees to move the Court for a downward departure or reduction of sentence pursuant to United States Sentencing Guidelines §5K1.1, Title 18, United States Code, § 3553(e) or Federal Rule of Criminal Procedure 35(b). The Defendant further understands that any such motion by the Government is not binding upon the Court, and should the Court sentence the Defendant within the Guidelines, to the maximum penalty prescribed by law or refuse to reduce the sentence imposed, the Defendant will have no right to withdraw her plea.

Merger and Other Provisions

11. The parties agree that if the Court determines the Defendant has readily demonstrated acceptance of responsibility for her offenses, that USSG § 3E1.1(a) applies, thereby providing for a decrease of two (2) levels. In addition, if the Defendant qualifies for a decrease under § 3E1.1(a), the Government will move that

she receive the one level decrease set forth in § 3E1.1(b), and requests that this provision be considered as that request.

12. The Defendant represents to the Court that she has met with her attorney on a sufficient number of occasions and for a sufficient period of time to discuss the Defendant's case and receive advice; that the Defendant has been truthful with her attorney and related all information of which the Defendant is aware pertaining to the case; that the Defendant and her attorney have discussed possible defenses, if any, to the charges in the Information including the existence of any exculpatory or favorable evidence or witness, discussed the Defendant's right to a public trial by jury or by the Court, the right to the assistance of counsel throughout the proceedings, the right to confront and cross-examine the government's witnesses, the Defendant's right to testify in her own behalf, or to remain silent and have no adverse inferences drawn from her silence; and that the Defendant, with the advice of counsel, has weighed the relative benefits of a trial by jury or by the Court versus a plea of guilty pursuant to this Agreement, and has entered this Agreement as a matter of the Defendant's free and voluntary choice, and not as a result of pressure or intimidation by any person.

13. The attorneys for the Government and the Defendant stipulate and agree that the amount of loss is \$750,000 for the purpose of calculating a sentence under the advisory U.S. Sentencing Commission Guidelines. The Defendant understands that this stipulation is not binding upon the Court of the United States

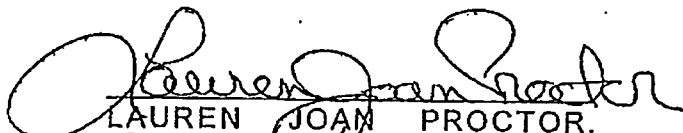
Probation Office, and the Defendant has no right to withdraw her plea should this stipulation not be accepted.

14. The parties hereby agree that this Plea Agreement contains the entire agreement of the parties; that this Agreement supersedes all prior promises, representations and statements of the parties; that this Agreement shall not be binding on any party until the Defendant tenders a plea of guilty to the Court having jurisdiction over this matter; that this Agreement may be modified only in writing signed by all parties; and that any and all other promises, representations and statements, whether made prior to, contemporaneous with or after this Agreement, are null and void.

9/10/07
DATE

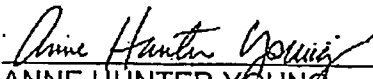
9/10/07
DATE

September 12, 2007
DATE


LAUREN JOAN PROCTOR,
Defendant


J. PRESTON STROM, JR.
Attorney for the Defendant

REGINALD I. LLOYD
UNITED STATES ATTORNEY

BY: 
ANNE HUNTER YOUNG
Assistant U. S. Attorney

U.S. District Court
District of South Carolina (Columbia)
CRIMINAL DOCKET FOR CASE #: 3:07-cr-01160-MBS-1

Case title: USA v. Proctor

Date Filed: 09/19/2007

Assigned to: Honorable Margaret B
Seymour

Defendant (1)

Lauren Joan Proctor

represented by Joseph Preston Strom, Jr
Strom Law Firm
2110 Beltline Boulevard
Suite A
Columbia, SC 29204
803-252-4800
Fax: 803-252-4801
Email: petestrom@stromlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Robert E Hood
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803-252-4800
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Email: rhood@stromlaw.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED
Designation: Retained

Pending Counts

FRAUDS AND SWINDLES/Defendant
devised, and intended to devise, a
scheme and artifice to defraud and
obtain money by means of false and
fraudulent pretenses, representations,
and promises, and executed such
scheme and artifice to defraud, and
attempted to do so, deposited, and did
cause to be deposited, in authorized

Disposition

depositories for mail matter, mail to be sent and delivered by the United States Postal Service for the purpose of executing such scheme and artifice to defraud, and attempting to do so. In violation of 18:1341.

(1)

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

Highest Offense Level (Terminated)

None

Complaints

None

Disposition

Plaintiff

USA

represented by Anne Hunter Young
US Attorneys Office
1441 Main Street
Suite 500
Columbia, SC 29201
803-929-3000
Fax: 803-254-2943
Email: anne.young@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
09/19/2007	1	INFORMATION as to Lauren Joan Proctor (1) count(s) 1. Arraignment set for 10/2/2007 09:45 AM in Columbia # 7, Matthew J. Perry, Court House, 901 Richland St, Columbia before Magistrate Judge Bristow Marchant. (bshr,) (Entered: 09/20/2007)
09/19/2007	4	PLEA AGREEMENT as to Lauren Joan Proctor (bshr,) (Entered: 09/20/2007)
09/20/2007	5	NOTICE OF CANCELLATION OF HEARING: Arraignment 10/2/2007 09:45 AM in Columbia # 7, as to Lauren Joan Proctor (bshr,) (Entered: 09/20/2007)

09/24/2007	6	Case Assigned as to Lauren Joan Proctor to Judge Margaret B Seymour. (ydav,) (Entered: 09/24/2007)
09/26/2007	7	NOTICE OF ATTORNEY APPEARANCE: Robert E Hood appearing for Lauren Joan Proctor (Hood, Robert) (Entered: 09/26/2007)
09/26/2007	8	MOTION for Discovery by Lauren Joan Proctor. Proposed Order sent to Judge Chambers email address? No. (Strom, Joseph) (Entered: 09/26/2007)
09/27/2007	9	NOTICE OF HEARING as to Lauren Joan Proctor Change of Plea Hearing set for 10/11/2007 10:00 AM in Columbia # 5, Matthew J. Perry, Court House, 901 Richland St, Columbia before Honorable Margaret B Seymour. (mdea) (Entered: 09/27/2007)
10/11/2007	10	Minute Entry for proceedings held before Judge Margaret B Seymour : Arraignment as to Lauren Joan Proctor (1) Count 1 held on 10/11/2007, Change of Plea Hearing as to Lauren Joan Proctor held on 10/11/2007 Plea Agreement Accepted Lauren Joan Proctor (1) Count 1; Lauren Joan Proctor (1) Guilty Count 1. Court sets \$50,000 unsecured bond, conditions reviewed. Court Reporter Gary Smith.CJA Time 10:00-10:35. (mdea) (Entered: 10/11/2007)
10/11/2007	11	WAIVER OF INDICTMENT by Lauren Joan Proctor (mdea) (Entered: 10/11/2007)
10/11/2007	12	GUILTY PLEA ENTERED as to Lauren Joan Proctor (mdea) (Entered: 10/11/2007)
10/11/2007	14	Unsecured Bond Entered as to Lauren Joan Proctor in amount of \$ 50,000. (mdea) (Entered: 10/11/2007)
10/11/2007	15	ORDER Setting Conditions of Release as to Lauren Joan Proctor (1) \$50,000 unsecured. Signed by Judge Margaret B Seymour on 10/11/2007.(mdea) (Entered: 10/11/2007)

PACER Service Center			
Transaction Receipt			
11/28/2007 14:59:04			
PACER Login:	sy0038	Client Code:	
Description:	Docket Report	Search Criteria:	3:07-cr-01160-MBS
Billable Pages:	2	Cost:	0.16

EXHIBIT

2

CAROLINA PSYCHIATRIC SERVICES, P.A.
160 MEDICAL CIRCLE
FIRST FLOOR
WEST COLUMBIA, SC 29169
(803) 786-6811

LARRY W. NELSON, M. D.
CARL O. KINARD, M. D.
JOHN H. DEWITT, M. D.
PATRICK T. BUTTERFIELD, M. D.

FRANK L. QUINN, PH.D.
SUSAN W. TAYLOR, M.S.N.
SHANNON T. WILSON, M.S.N.
ASHTON M. CARRIGAN, M.S.W.

EVALUATION

Lauren Proctor
SSN: 251-15-0572
DOB: 05/20/1963
Date of evaluation: 04/04/2007

Identifying information: Ms Proctor is a forty-three year old white female who was referred by her attorney for evaluation.

Reason for referral: Ms Proctor was referred by her attorney, Mario Pacella, to help prepare for her upcoming legal actions. She appears to have a significant gambling problem which may have led to some financial difficulties. Although no charges have been filed as of yet Ms Proctor may be accused of mishandling funds belonging to her previous employer.

Presentation at evaluation: Ms Proctor is a large, well-nourished and friendly woman. She was casually dressed and appeared comfortable. She was alert, oriented times four, congruent in affect and mood, and free of hallucinations or delusions. Her thought processes were clear and concrete and her judgment seemed grossly intact. Throughout the evaluation she was attentive and co-operative.

Social history: Ms Proctor has spent most of her life in Columbia, S.C. She was the second of two children born into an intact family. Her father died when she was five and her mother supported the family by working in real estate. The only significant trauma she remembers during childhood was the deaths of her father and both grandparents.

Although she does not remember much about elementary school, Ms Proctor described herself as an average student. She graduated from Dreher High School and attended Midlands Tech for two years.

For twenty-four years she worked at the State Title Company, but has worked for Transit Services as a dispatcher for the last one and one half years. She left the State Title Company because of her gambling problem.

Ms Proctor dated some boys in High School, but she considers herself gay. She has been in an intimate relationship with another woman for twelve years. She has no children.

Until recently Ms Proctor has never had any legal problems. Although she is yet to be charged she admits to using money from her previous employer to pay her gambling debts. She has been co-operative with the authorities and hopes to make restitution to her employer.

Gambling history: Ms Proctor reports having played video gaming devices for over ten years. However, her gambling was not a problem until after the machines became illegal. She reports playing almost daily at two local bars from 2000 through 2005. She states that the bar owners often gave her free drinks, cocaine and credit to encourage her to keep playing. During this period she reports losing as much as \$5,000 in one sitting and winning as much as \$1,500 at one sitting. Altogether her losses are estimated at \$800,000. Eventually to cover her losses she borrowed money from her employer's bank account. Ms Proctor reports not being interested in any other form of gambling and being abstinent from all gambling since 2005.

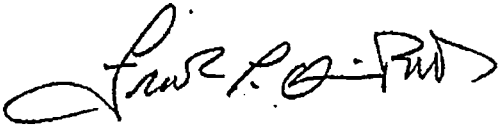
Medical history: Although obese Ms Proctor denies any major medical problems. She does admit to seeing a therapist years ago when struggling with her sexual identity. She reports being abstinent from alcohol and cocaine since 2005, but admits to abusing alcohol since her teen years and using both coke and alcohol excessively during her gambling binge. It should be noted that both alcohol and cocaine were often supplied to her by the bar operators in which she gambled to encourage her to continue gambling. She also reports being currently abstinent from gambling.

Evaluation process: Ms Proctor met with Frank L. Quinn, PhD at the offices of Carolina Psychiatric Services, P.A. on April 4, 2007 for approximately two hours. She completed a Structured Diagnostic Interview (SDI), the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), the Gamblers Anonymous Twenty Questions (GA-20), the South Oaks Gambling Screen (SOGS) and the Video Gaming Device Interest Survey (VGDIS).

Discussion of results: All measures suggest that Ms Proctor meets the criteria for Pathological Gambling. She scored 20 out of 20 on the SOGS (the pathological cutoff is 5) suggesting she is a Level 3 or probable pathological gambler. This was congruent with her score of 20 out of 20 on the GA-20, which has a cutoff score of 7. While the VGDIS is not an assessment instrument Ms Proctor's responses were similar to the sample of Video Poker players in South Carolina who were identified as being addicted to video poker in 1997. Her scores on the MMPI-2 suggested the possibility of Dysthymia, an underlying personality disorder and a Substance Abuse disorder, all of which would be consistent with individuals suffering from gambling problems.

Findings:

1. Ms Proctor is currently abstinent, but she meets the full criteria for Pathological gambling as defined by DSM-IV.
2. Ms Proctor has a history of substance abuse which was encouraged during her gambling career by the bar owners in order to prolong her gambling.
3. Ms Proctor's only significant gambling was on illegal machines. The owners of these machines plied her with drugs, "free" drinks, and extended credit until her gambling was out of control. Ms Proctor must assume responsibility for her actions, but there is little doubt that if the illegal machines and inducements were not available she would have not developed a gambling problem.
4. Ms Proctor's progression from recreational gambler to pathological gambler is consistent with the progression of many women who gamble only on video gaming devices. This progression is often more rapid when combined with inducements such as alcohol, drugs and easy credit.



Frank L. Quinn, PhD

EXHIBIT

3

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Civil Action #06-CP-40-1814

LAUREN PROCTOR, and TRANS-)
UNION NATIONAL TITLE INSURANCE)
COMPANY, f/k/a ATLANTIC TITLE)
INSURANCE COMPANY)

Plaintiff,)

v.)

WHITLARK & WHITLARK, INC., D/B/A)
ROCKAWAYS ATHLETIC CLUB and)
PIZZA MAN,)

Defendants,)
_____)

NOVEMBER 7, 2007 DEPOSITION OF FORREST WHITLARK

FILED UNDER SEAL

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Civil Action #06-CP-40-1814

LAUREN PROCTOR, and TRANS-)
UNION NATIONAL TITLE INSURANCE)
COMPANY, f/k/a ATLANTIC TITLE)
INSURANCE COMPANY)

Plaintiff,)

v.)

WHITLARK & WHITLARK, INC., D/B/A)
ROCKAWAYS ATHLETIC CLUB and)
PIZZA MAN,)

Defendants,)

2007 NOV 29 AM 9:19
BARBARA A. SCOTT
C.C.C. & G.S.
RICHLAND COUNTY
CLERK

CERTIFICATE OF SERVICE

I certify that on this the 29th day of November, 2007 that I served Plaintiff Proctor's Memorandum in Support of Plaintiff's Motion for Summary Judgment and Plaintiff's Notice of Filing on counsel for Defendant hand delivery in open court.

James M. Griffin
Attorney for Defendant
1116 Blanding Street
Columbia, South Carolina 29201


Mario A. Pacella

STATE OF SOUTH CAROLINA]
COUNTY OF RICHLAND]

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

LAUREN PROCTOR,]
Plaintiff,]

Case No. 2006-CP-40-1814

v.]

WHITLARK & WHITLARK, INC.,]
D/B/A ROCKAWAYS ATHLETIC]
CLUB and PIZZA MAN,]

Defendant.]

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT AND MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

2008 JAN 23 PM 3:02
BARBARA A SCOTTE
C.C.C.
RICHLAND COUNTY
FILED

Plaintiff Proctor filed a Motion for Partial Summary Judgment contending that Defendant cannot establish a genuine issue of material fact and Plaintiff Proctor should be granted judgment as a matter of law. Defendant responded by filing a Motion for Summary Judgment. In its Motion, Defendant does not contest any facts regarding whether it operated a gambling business out of its restaurants and bars where Plaintiff Proctor suffered gambling losses. Rather, Defendant contends that Plaintiff Proctor cannot be successful in her causes of action because she lacks standing and because of the common law doctrine of *in pari delicto*. This memorandum establishes that there is no genuine issue of material fact and that Plaintiff Proctor is entitled to partial summary judgment.

Statement of the Facts

The undisputed evidence of record, as documented by Plaintiff's affidavit, Defendant's lack of responses to Plaintiff's Requests for Admission, and the depositions

of Forrest Whitlark and Paul Whitlark conclusively establish the following undisputed facts:

1. In or around 1995, Plaintiff began gambling heavily on video gaming machines throughout Columbia, South Carolina. (Proctor Affidavit ¶ 3.)
2. At that time, Plaintiff became addicted to gambling, particularly gambling on video games at bars and restaurants in South Carolina. (Proctor Affidavit ¶ 4.)
3. Even after July 2000, when operating video gaming machines became illegal, Plaintiff continued to gamble on video games at bars and restaurants in South Carolina. (Proctor Affidavit ¶ 5.)
4. Beginning in 1999, and continuing until June 2005, Plaintiff gambled weekly, and many times multiple times during the week, through video game machines at Defendant's retail establishments, Rockaways Athletic Club and Pizza Man. (Proctor Affidavit ¶ 6.)
5. Plaintiff's gambling losses ranged from \$1000 to \$5000 weekly at Defendant's retail establishments. (Proctor Affidavit ¶ 7.)
6. On several occasions, Defendant, through its retail establishments, provided cash advances on Plaintiff's credit card in order to pay Defendant gambling debt. (Proctor Affidavit ¶ 8.)
7. Defendant would charge Plaintiff's credit card for food purchases in large dollar amounts, sometimes exceeding \$1000 for this purpose. These credit card transactions utilized interstate communication facilities such as telephone lines to complete these credit card transactions. (Proctor Affidavit ¶ 9.)
8. Defendant's Pizza Man establishment had two to three video gaming

machines for gambling and Defendant's Rockaways establishment had three video gaming machines for gambling prior to those machines being seized by the FBI. (Proctor Affidavit ¶ 10.)

9. Plaintiff paid in excess of \$500,000 in gambling debt to Defendant. This debt is documented by copies of checks paid to Defendant in the amount of \$387,623.65, credit card transactions directly with Defendant in a total amount of \$28,057.69, and debit card withdrawals from banks and checks cashed at banks where funds were then used to pay gambling debt in the amount of \$ 91,598.47. (Proctor Affidavit ¶ 11.)
10. Defendant continued to operate the gaming machines until an FBI sting operation in Fall, 2005. (Proctor Affidavit ¶ 13.)
11. Other individuals who gambled at Defendant's establishments included, but are not limited to, Hugh Barenow, Hillary Helms, Dennis Constantino, Sam Bray, and two older women. (Proctor Affidavit ¶ 14.) Paul Whitlark also gambled and sustained losses at Rockaways and Pizza Man. (November 7, 2007 Deposition of Forrest Whitlark.)
12. Defendant is owned and operated by four principals, David Melson, Tom Dudek, Forrest Whitlark, and Paul Whitlark. (August 23, 2006 Deposition of Forrest Whitlark at 8.) Defendant employed Hilary Helms. (August 8, 2006 Deposition of Forrest Whitlark at 23; January 9, 2007 Deposition of Forrest Whitlark at 35.) Defendant also had an employee named Bennett. (January 9, 2007 Deposition of Forrest Whitlark at 38.) An employee named Graeme Mitchell worked for Defendant. (January 9, 2007 Deposition of Forrest

Whitlark.) With respect to the owners, Forrest Whitlark and Paul Whitlark managed the gambling operation, and Tom Dudek, Hillary Helms, Bennett, and Graeme Mitchell assisted Forrest and Paul Whitlark in collecting proceeds from Plaintiff and carrying such proceeds between Defendant's Rosewood area restaurants. (January 9, 2007 Deposition of Forrest Whitlark 127-129.)

13. Defendant collected unlawful debt from Plaintiff in this manner on numerous occasions.
14. To carry out the scheme to obtain money from Plaintiff for unlawful and unfair debt, Defendant utilized interstate communication facilities to charge Plaintiff's credit or debit cards and utilize interstate communication facilities to deposit checks made out to its business from Plaintiff or by Plaintiff to satisfy this unlawful debt as set forth in attachment A to this memorandum.
15. To carry out the scheme to obtain money from Plaintiff for unlawful and unfair debt, Defendant utilized interstate communication facilities to charge Plaintiff's credit or debit cards and utilize interstate communication facilities to deposit checks made out to its business from Plaintiff to satisfy this unlawful debt.
16. Because of the assertion of the Fifth Amendment privilege by Forrest Whitlark and Paul Whitlark, the facts as set forth above are essentially uncontradicted, the issues before the Court are whether Plaintiff is entitled to a declaratory judgment that the payments of debt to Defendant are invalid and unenforceable and whether such conduct constitutes an unfair trade practice in violation of South Carolina law. Forrest Whitlark has since waived his Fifth

Amendment privilege and testified in his deposition. The only fact he contests is that he estimates that Lauren Proctor lost only \$130,000 between 2003 and 2005.

On November 7, 2007, Forrest Whitlark waived his Fifth Amendment privilege. Paul Whitlark, Tom Dudek, Graeme Mitchell, Hilary Helms, Maureen Helms, and video game distributor Charlie Bishop to operate a gambling enterprise out of Rockaways and Pizza Man. As a part of this civil conspiracy, Forrest Whitlark explained that he installed video game machines that doubled as gambling machines where the player can accumulate credits. However, the machines could be set up so that credits would only accumulate 85% of the time, meaning that players who use the machines extensively, particularly those addicted to gambling on those machines, will lose money. Forrest Whitlark confirmed that Plaintiff Lauren Proctor lost at least \$130,000 on the machines. Forrest Whitlark also confirmed that his enterprise would loan Plaintiff Lauren Proctor money for gambling at Rockaways and Pizza Man. Forrest Whitlark explained that Plaintiff Lauren Proctor would re-pay the gambling debt with checks drawn on accounts of Deborah Mitchell and State Title, Inc.

Defendant has raised two affirmative defenses: standing and the common law doctrine of *in pari delicto*. This memorandum will take each of those defenses in turn.

Standard of Determination

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Hamiter v. Retirement Division of South Carolina, 326 S.C. 93, 96, 484 S.E.2d 586, 587 (1997); Café Assocs., Ltd. V. Gerngross, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). The Court may grant

summary judgment to a party when, after a reasonable time for discovery, the evidence demonstrates that the nonmovant has failed to establish an essential element of his case. The party moving for summary judgment bears the initial burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970). In determining whether any triable issue of fact exists which will preclude summary judgment, the evidence, and all inferences that can be reasonably drawn, must be viewed in the light most favorable to the non-moving party. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E 2d 369, 371 (2000).

Once the moving party has met this initial burden, the burden shifts to the opposing party to show that a genuine issue of material fact exists. Celotex Corp. v. Catrell, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). The opposing party may not simply rest upon mere allegations or denials of the pleadings. Rather, the nonmoving party must make a sufficient showing of facts to establish the existence of an essential element to his case on which he will bear the burden of proof at trial. Id.; Barfield v. Brierton, 883 F.2d 923, 933 (11th Cir. 1989). To oppose the motion sufficiently after the movant has met his initial burden, the nonmoving party must point to evidence in the record or present additional evidence in the form of affidavits. Riley v. Newton, 94 F.3d 632, 639 (11th Cir. 1996). If the record presents factual issues, the Court must deny the motion and proceed to trial. Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. Unit A 1981). Summary judgment is also inappropriate where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co., 420 F.2d 1211, 1213 (5th Cir. 1969).

The invocation of the Fifth Amendment privilege is not a substitute for relevant evidence. In In re Adelphia Communications Corp., 317 B.R. 612, 624 (S.D.N.Y. 2004), the bankruptcy court stated, "however—and as is highly relevant to the pending motion for summary judgment—an invocation of the Fifth Amendment 'is not a substitute for relevant evidence,' and a litigant claiming the privilege is not 'freed from adducing proof in support of a burden which would otherwise have been his.'" Adelphia, 317 B.R. at 624 (quoting United States v. Rylander, 460 U.S. 752, 758, 761, 103 S. Ct. 1548, 75 L. Ed. 2d 521 (1983)). If a party presents no evidence to oppose a summary judgment motion and merely invokes his right to silence, summary judgment likely will be entered against him.

Discussion and Citation to Authority

I. **Defendant's Conduct Constitutes an Unfair Trade Practice in Violation of the South Carolina Unfair Trade Practices Act.**

In Johnson v. Collins Entertainment Co., Inc., 349 S.C. 613, 639 E.2d 653, 667 (2002), the South Carolina Supreme Court recognized that the operation of video poker is an unfair trade practice where the operators of the video poker machines engage in a variety of schemes to evade detection of the criminal enterprise. The Court in Collins Entertainment further explained that the degree of repetition and the "public impact" is extraordinary when the record suggests daily deceptive or unfair activities regarding video gaming.

Here, the predicate acts which serve as the basis for a violation of the South Carolina Unfair Trade Practices Act include a racketeering enterprise where Defendant, through its owners and employees, violated several federal criminal statutes, including but not limited to, 18 U.S.C. § 1952 (the Travel Act), 18 U.S.C. § 1955 (prohibition of illegal gambling business), 18 U.S.C. § 1956 (laundering of monetary instruments), and

18 U.S.C. §§ 1961 & 1962 (Racketeer Influenced Corrupt Organizations).

Defendant violated the Travel Act by utilizing an interstate communication facility, such as the telephone line used to charge Plaintiff's credit and debit cards, with the intent to distribute proceeds of unlawful criminal activity and with the intent promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, its Rockaways' Gambling Enterprise. 18 U.S.C. § 1952 specifically enumerates gambling as an unlawful activity that is a predicate act for violations of the Travel Act. Defendant's multiple violations of the travel act, as illustrated by the transactions in attachment A certainly are unfair trade practices and the extraordinary degree of repetition demonstrates adverse public impact required under the South Carolina Unfair Trade Practices Act.

Defendant violated the prohibition of operating an illegal gambling business in violation of 18 U.S.C. § 1955 by conducting, financing, supervising, managing, directing and owning all or part of an illegal gambling business in violation of South Carolina law, which involves five or more persons involved in conducting, supervising, or managing the gambling business or own all or part of such business, and has been in operation continuously for thirty days or has a gross revenue of \$2,000 in any single day. While only four individuals own the business, Forrest Whitlark, Paul Whitlark, Tom Dudek, and David Melson, four employees participated in the supervision of the gambling business including an employee named Bennett, Graeme Mitchell, Maureen Helms, and Hilary Helms. Forrest Whitlark admitted that he violated this statute in his deposition and confirmed that he is in the federal Pretrial Diversion Program as a result of his conduct and an Information filed against him. In addition to having five or more individuals

involved in ownership or supervision of the business, this business, beginning on or after July 1, 2000, was illegal as the Video Game Machine Act was repealed by the legislature. Finally, as evidenced by attachments A and B to this memorandum, Defendant's illegal gambling business operated for more than thirty consecutive days and collected in excess of \$2,000 on more than one single day. Defendant's violation of the federal prohibition on an illegal gambling business, with constant repetition from 2000 until 2005, when its operation was ended by the FBI, constitutes an unfair and deceptive trade practice with such repetition that results in an adverse impact on the public interest.

Defendant also violated 18 U.S.C. § 1956 when it laundered the proceeds it received from its violations of the Travel Act and the federal gambling statute through its restaurant business. Defendant's conduct of receiving the proceeds, either by completing a credit card transaction and depositing the money in its merchant account for its restaurant or depositing cash or checks into its business account to carry on its illegal activity constitutes money laundering in violation of federal law. Again, such conduct is repugnant to public policy, constitutes an unfair and deceptive trade practice, and has an adverse impact on the public interest in violation of the South Carolina Unfair Trade Practice Act.

Moreover, Section 1961(1) of the Racketeer Influenced Corrupt Organizations Act (RICO) provides that "racketeering activity" includes any act indictable by 18 U.S.C. § 1952 (the Travel Act), 18 U.S.C. § 1955 (prohibition of illegal gambling), 18 U.S.C. § 1956 (money laundering), and the collection of an unlawful debt as a racketeering activity. During the ten years preceding the last predicate act in June, 2005, Defendant engaged in a pattern of racketeering activity by violation the above-referenced federal

statutes and by collecting unlawful debt from Plaintiff in its illegal gambling operation. Specifically, Defendant collected unlawful debt from Plaintiff in the manners and dates set forth in attachments A, B, and C to this memorandum. Defendant has engaged in a "pattern of racketeering activity," as defined in 18 U.S.C. § 1961(5), by committing at least two acts of racketeering activity (i.e., indictable violations of 18 U.S.C. §§ 1952, 1955, 1956, and by collecting unlawful debt). Defendant's predicate acts of racketeering activity included violating the Travel Act, 18 U.S.C. § 1952, by using an interstate communication facility to distribute proceeds of an illegal gambling enterprise as set forth above. Defendant's predicate acts of racketeering activity also included violating 18 U.S.C. § 1955, the federal law prohibiting the conducting, financing, managing, supervising, directing or owning a gambling business, as Defendants conducted, financed, managed, supervised, directed, and owed the Rockaways Gambling Enterprise as set forth above. Additionally, Defendant's predicate acts of racketeering activity included violation 18 U.S.C. § 1956, money laundering, as they laundered the illegal gambling proceeds it collected from Plaintiff through its restaurant businesses, Rockaways Athletic Club and Pizza Man. Finally, Defendant's predicate acts of racketeering activity also included collecting unlawful debts from Plaintiff, as state law and federal law prohibited Defendant from operating gaming machines and collecting gambling debts from patrons like Plaintiff. Through Defendant's illegal gambling operation, it collected in excess of \$500,000 from Plaintiff for unlawful gambling debt. Defendant's violation of the Racketeering Influenced Corrupt Organizations Act is repugnant to public policy, an unfair and deceptive trade practice, and has an adverse

impact on the public interest in violation of the South Carolina Unfair Trade Practices Act.

II. Plaintiff Has Standing to Bring an Action for Violation of the South Carolina Unfair Trade Practices Act.

In its Answer to the Original Complaint, Defendant states "[t]hat the 'money' that Plaintiff allegedly lost in video gaming machines at the Defendant's two restaurants was, therefore, not the Plaintiff's money, but was stolen by the Plaintiff from other people, and involves another illegality; the expenditure of stolen money on video games by the Plaintiff Lauren Proctor." Defendant appears to challenge Plaintiff's standing to bring suit. S.C. Code Ann. § 39-5-140 states that "[a]ny person who suffers ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually." Plaintiff has established by affidavit that she used her credit card and her checks for a number of these transactions. That alone satisfies the standing requirement under section 39-5-140. Moreover, any money that may have been acquired from other sources must be repaid in association with related civil and criminal proceedings. Finally, Intervenor-Plaintiff TransUnion National Title Insurance Company, f/k/a Atlantic Title Insurance Company, also has been damaged as a result of Defendant's conduct in that it has reimbursed individuals who lost money to the Rockaways' Gambling Enterprise.

III. The Common Law Doctrine of *In Pari Delicto* Has Been Abrogated by the Statutory Scheme Involving Gambling in South Carolina and Under Federal Law.

The common law doctrine of *in pari delicto*¹ is a common law doctrine that states

¹ Black's Law Dictionary defines the Latin term *in pari delicto* as "in equal fault."

that a court should not allow a person to recover money lost in an illegal venture. The South Carolina Supreme Court recognized this doctrine in very old gambling cases. However, the South Carolina legislature abrogated this doctrine in passing a number of statutes, including S.C. Code Ann. §§ 32-1-10, 32-1-20, and the South Carolina Unfair Trade Practices Act. In Collins Entertainment, the South Carolina Supreme Court had the opportunity to address the issue of whether the doctrine of *in pari delicto* at common law prohibited a person to recover gambling losses under the South Carolina Unfair Trade Practices Act. The Supreme Court explained that “[s]ections 32-1-10 and 20 promote “a policy which prevents a gambler from allowing his vice to overcome his ability to pay. The legislature adopted a policy to protect a citizen and his family from the gambler’s uncontrollable impulses.” Collins Entertainment, 349 S.C. at 635, 564 S.E.2d at 664-665.

The Supreme Court further explained that sections 32-1-10 and 20 do not have preclusive effect regarding remedies afforded under the South Carolina Unfair Trade Practices Act because S.C. Code Ann. § 39-5-160 provides that powers and remedies under this section are cumulative and supplementary to all powers and remedies provided by existing law. Id. Because the common law doctrine of *in pari delicto* was abrogated by the passage of sections 32-1-10 and 32-1-20, and Plaintiff is in the class of persons that the statutes were designed to protect, Plaintiff is not barred from recovery under the doctrine of *in pari delicto*. Moreover, the statutory violations that serve as the basis or predicate for violation of the South Carolina Unfair Trade Practices Act, violations of 18 U.S.C. § 1952 (the Travel Act), 18 U.S.C. § 1955 (prohibition of illegal gambling business), 18 U.S.C. § 1956 (laundering of monetary instruments), and 18 U.S.C. §§

1961 & 1962 (Racketeer Influenced Corrupt Organizations), were designed to protect those gamblers whose vice overcame their ability to pay. Because Collins Entertainment is on point that the doctrine of *in pari delicto* has been abrogated regarding suits for gambling losses under the South Carolina Unfair Trade Practices Act, Plaintiff is not barred from recovery merely because she gambled at Defendant's establishment.

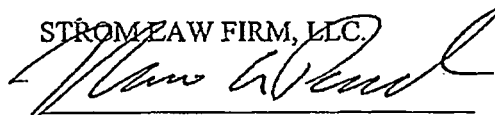
Furthermore, even if the doctrine of *in pari delicto* was somehow applicable with respect to Plaintiff's conduct which arguably violated S.C. Code Ann. § 16-19-40 by playing at a tavern, inn, or store for retailing spirituous liquors, the punishment is imprisonment for a period not to exceed thirty days or a fine of \$100. However, the legislature created an unequal punishment for the tavern keeper, recognizing that the tavern keeper was more at fault, making the maximum punishment to be imprisonment for a period not to exceed twelve months and a fine of two thousand dollars. Even based upon the disparate punishments under S.C. Code Ann. § 16-19-40, the legislature has made it clear that Plaintiff is less at fault than Defendant with respect to their conduct serving as the factual basis for this action.

Conclusion

For the above and foregoing reasons, Plaintiff's Motion for Partial Summary Judgment should be granted, and this case should be scheduled for trial on damages.

RESPECTFULLY SUBMITTED, this 23rd day of January, 2008.

STROMZAW FIRM, LLC.



J. Preston Strom, Jr.

Mario A. Pacella

2110 Beltline Boulevard, Suite A

Columbia, South Carolina 29204

Tel: 803-252-4800

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STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT
) Civil Action #06-CP-40-1814

LAUREN PROCTOR, and TRANS-)
UNION NATIONAL TITLE INSURANCE)
COMPANY, f/k/a ATLANTIC TITLE)
INSURANCE COMPANY)

Plaintiff,)

v.)

SUMMONS

WHITLARK & WHITLARK, INC., D/B/A)
ROCKAWAYS ATHLETIC CLUB and)
PIZZA MAN, FORREST WHITLARK,)
PAUL WHITLARK,)
CHARLIE E. BISHOP, and)
BRETT BLANKS,)

Defendants,)

RICHLAND COUNTY
FILED
2008 AUG 29 PM 3:41
BARBARA A. SCOTT
C.C.C. & G.S.

TO: DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Second Amended
Complaint in this action, a copy of which is hereby served on you, and to serve a copy of your
Answer to the said Complaint upon the Plaintiffs at 1812 Lincoln Street, 2nd Floor, Columbia, South
Carolina, 29201 and 2110 Beltline Boulevard Blvd., Suite A, Columbia, South Carolina 29204,
within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to
answer the Complaint within the time aforesaid, judgment by default will be rendered against you
for the relief demanded in such Complaint.

SIGNATURE ON PAGE TO FOLLOW

CALLISON TIGHE & ROBINSON, LLC

Louis Lang by Michael W. Tighe
Michael W. Tighe, Esq. (SCBAR#5574) *per 4-5-02*

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Attorneys for TransUnion National Title
Insurance Company, f/k/a Atlantic Title
Insurance Company

And

STROM LAW FIRM, LLC

Mario A. Pacella

J. Preston Strom, Jr.

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Attorneys for Lauren Proctor

Columbia, South Carolina

Aug 29, 2008

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT
 COUNTY OF RICHLAND) Civil Action #06-CP-40-1814

LAUREN PROCTOR, and TRANS-)
 UNION NATIONAL TITLE INSURANCE)
 COMPANY, f/k/a ATLANTIC TITLE)
 INSURANCE COMPANY)

Plaintiff,)

v.)

WHITLARK & WHITLARK, INC., D/B/A)
 ROCKAWAYS ATHLETIC CLUB and)
 PIZZA MAN, FORREST WHITLARK,)
 PAUL WHITLARK,)
 CHARLIE E. BISHOP, and)
 BRETT BLANKS,)

Defendants,)

SECOND AMENDED COMPLAINT

RICHLAND COUNTY
 FILED
 2008 AUG 29 PM 3:41
 BARBARA A. SCOTT
 C.C.C. & C.S.

Plaintiffs, Lauren Proctor (Proctor) and TransUnion National Title Insurance Company, f/k/a Atlantic Title Insurance Company (TNTIC), complaining of the Defendants herein, allege as follows:

NATURE OF CASE

1. Plaintiffs bring this action on behalf of themselves to recover gambling losses sustained where Defendants violated S.C. Code Ann. § 32-1-10, the prohibition against video gaming (See 1999 Act No. 124, Part I, § 8 effective July 1, 2000), for unjust enrichment, for violations of the South Carolina Unfair Trade Practices Act, and for civil conspiracy.

PARTIES

2. Proctor is a citizen and resident of Richland County, South Carolina. TNTIC is a corporation organized and existing under the laws of the State of South Carolina, and is a real party in interest in this matter as a result of its payment of certain claims to third parties, those claims being made and paid pursuant to TNTIC's obligations under various documents issued by it including owners and lenders title insurance policies and commitments and closing protection letters, as set forth below.
3. Defendant Whitlark & Whitlark, Inc., is incorporated under the laws of South Carolina and its principle place of business is in Richland County, South Carolina.
4. Defendant Forrest Whitlark is the president and majority shareholder of Whitlark & Whitlark, Inc., and manages the restaurants owned by the corporation. Upon information and belief, Defendant Forrest Whitlark resides in Richland County.
5. Defendant Paul Whitlark is an officer and minority shareholder of Whitlark & Whitlark, Inc., and manages the restaurants owned by the corporation. Upon information and belief, Defendant Paul Whitlark resides in Richland County.
6. Upon information and belief, Charlie E. Bishop is a video gaming distributor and resides in Lexington County.
7. Upon information and belief, Brett Blanks is a video gaming distributor and resides in Lexington County.

JURISDICTION AND VENUE

8. Jurisdiction is proper in this court, as the parties are citizens of South Carolina. Venue is proper in the county wherein the parties reside and/or do business and the conduct (acts

and omissions) giving rise to Plaintiffs' causes of action all occurred in the County of Richland, State of South Carolina, pursuant to S.C. Code Ann. § 15-7-30.

FACTUAL ALLEGATIONS

9. In or around 1995, Proctor began gambling heavily on video gaming machines throughout Columbia, South Carolina.
10. In July 2000, the Video Gaming Machines Act, S.C. Code Ann. §§ 12-21-2770-12-21-2809, was repealed by the legislature, prohibiting retail establishments from operating video games for the purpose of patron gambling.
11. Beginning in 1999, and continuing until June 2005, Plaintiff Proctor gambled weekly (and many times multiple times during the week) through video game machines at retail establishments owned by Defendant Whitlark & Whitlark, Inc., Rockaways Athletic Club and Pizza Man.
12. Defendants Whitlark & Whitlark, Inc., Forrest Whitlark, and Paul Whitlark knew that for Plaintiff Proctor video gaming became an addiction. Defendants Whitlark & Whitlark, Inc., Forrest Whitlark, and Paul Whitlark preyed upon her addiction in allowing her to borrow money from them to gamble.
13. Defendants Whitlark & Whitlark, Inc., Forrest Whitlark, and Paul Whitlark also knew that they could entice her further to gamble at their establishment by preying upon her addiction to cocaine and alcohol. One or more of these defendants provided Plaintiff Proctor free alcohol and cocaine.

14. Defendants Charlie E. Bishop and Brett Blanks placed a video gaming machine at Pizza Man with an agreement with Forrest Whitlark that the proceeds would be divided with 60% to Whitlark & Whitlark, Inc., and 40% to Bishop and Blanks.
15. Upon information and belief, the machine placed at Pizza Man by Bishop and Blanks could be manipulated to earn credits and be used for illegal video gaming. Likewise, the remaining machines owned by Whitlark & Whitlark, Inc. could be manipulated to earn credits and be used for illegal video gaming.
16. Upon information and belief, each of the machines at Rockaways and Pizza Man could be manipulated to allow for the player to win between 65% and 85% of the time. In this regard, the machines were set up so that players would lose when they played. Upon information and belief, Defendants, including Bishop and Blanks, manipulated the winning percentage in the machines at Rockaways and Pizza Man. Plaintiffs only became aware of the involvement of Defendants Bishop and Blanks upon receipt of discovery from Whitlark & Whitlark, Inc., in Fall, 2007. Moreover, it was only at that time did Plaintiffs become aware that Defendants Forest Whitlark and Paul Whitlark conspired with Defendants Bishop and Blanks. This information has previously been concealed by Defendant Whitlark & Whitlark, Inc., by refusing to cooperate in discovery.
17. Plaintiff Proctor's gambling losses ranged from \$1,000.00 to \$5,000.00 weekly at Defendant's retail establishments.
18. Plaintiff Proctor lost at least \$130,000 in the calendar years of 2003 and 2005.
19. On several occasions, Defendants Whitlark & Whitlark, Inc., Forrest Whitlark, and Paul Whitlark, through Rockaways and Pizza Man, provided cash advances on Proctor's credit

card in order to pay Proctor's gambling debt. Proctor is informed and believes that the Whitlark Defendants would charge her credit card for purchases in large dollar amounts, often times exceeding \$1,000.00 for this purpose.

20. Plaintiffs are informed and believe the Whitlark Defendants' Pizza Man establishment had two to three video gaming machines for gambling and Defendant's Rockaways establishment had three video gaming machines for gambling.
21. Plaintiffs are informed and believe that Defendants received in excess of \$500,000.00 from Plaintiff Proctor in gambling losses during Defendants' continuous course of conduct.
22. Because of Defendants' continuous course of conduct in operating video gaming machines illegally and illegally receiving payments for gambling debt as late as June 2005, Plaintiffs cause of action did not accrue until June 2005.
23. Upon information and belief, Defendant continues to operate video gaming machines in violation of South Carolina.
24. TNTIC is informed and believes that a portion of the funds making up the gambling debt of Proctor as set forth above were funds converted by Proctor from the real estate trust account of suspended attorney Walter H. Smith. Former attorney Smith was a former approved attorney for TNTIC. As a consequence of this conversion, TNTIC was called upon to pay substantial sums to third parties pursuant to its obligations under title insurance policies, commitments and closing protection letters it issued in regard to real estate closings conducted by or under the supervision of suspended attorney Walter H. Smith.

FOR A FIRST CAUSE OF ACTION
(Declaratory Judgment)

25. Plaintiffs incorporate and allege paragraphs 1-24 as if fully restated herein.
26. Through Plaintiff Proctor's continuous gambling at Defendant's retail establishments through their video gaming machines after such machines became illegal in July, 2000, Defendants collected money from Plaintiff Proctor for losses incurred as a result of Defendants operating illegal gaming machines.
27. In July 2000, the Video Gaming Machines Act, S.C. Code Ann. §§ 12-21-2770-12-21-2809, was repealed by the legislature, prohibiting retail establishments from operating video games for the purpose of patron gambling.
28. Plaintiff Proctor is a person interested under agreements constituting unlawful gaming contracts and brings this action pursuant to the Uniform Declaratory Judgments Act, S.C. Code Ann. §§ 15-53-10 to -140 (Law Co-op. 1976), to determine the validity of and her legal rights arising under those agreements.
29. Because said contracts are unlawful after July 2000, Plaintiffs seek a declaration that such contracts are void.

FOR A SECOND CAUSE OF ACTION
(Unjust Enrichment)

30. Plaintiffs incorporate and allege paragraphs 1-24 as if fully restated herein.
31. Through the above-described actions, Defendants obtained gambling proceeds from Plaintiff Proctor in violation of state law and by taking of undue advantage of the Plaintiff Proctor.

32. Said conduct and receipt of funds from Plaintiff Proctor resulted in the unjust enrichment of the Defendants.
33. As a direct, foreseeable and proximate result thereof, Plaintiffs Proctor and TNTIC, as its interests may appear, have suffered actual damages.
34. Plaintiffs Proctor and TNTIC are entitled to restitutionary relief and disgorgement of Defendants' unlawful receipt of gambling proceeds.

FOR A THIRD CAUSE OF ACTION
(Violation of the South Carolina Unfair Trade Practices Act)

35. Plaintiffs incorporate and allege paragraphs 1-24 as if fully restated herein.
36. The actions and practices of operating video gaming machines for the purpose of gambling by the Defendants as described above constitute unfair and/or deceptive methods as defined by the South Carolina Unfair Trade Practices Act (SCUTPA), codified at S.C. Code Ann. §§ 39-5-102-160.
37. Defendants' practice of owning and operating video gaming machines after July 1, 2000, is a violation of South Carolina law and an unfair trade practice.
38. Defendants' practice of collecting more than \$50.00 in gambling losses is a violation of South Carolina law and an unfair trade practice.
39. Defendants' aforementioned practices are offensive to public policy, immoral, unethical, and/or oppressive. Furthermore, Defendants' actions have a direct impact upon the public interest since said actions and deceptive practices have a history and continued potential for repetition. Said potential is clearly illustrated by Defendants continuing to operate said video gaming machines at its Rockaways Athletic Club and Pizza Man

establishments until seizure of the video gaming machines by the Federal Bureau of Investigation.

40. As a proximate result of the Defendant's deceptive practices, Proctor and TNTIC have suffered actual damages in gambling losses.
41. Upon information and belief, Proctor and TNTIC are entitled to judgment against the Defendant, for violation of the South Carolina Unfair Trade Practices Act (SCUTPA) for their actual damages, treble damages, costs, and attorneys fees.

0
FOR A FOURTH CAUSE OF ACTION
(Restitution to TNTIC)

42. Plaintiffs incorporate and allege paragraphs 1-24 as if fully restated herein.
43. As set forth above, a portion of the funds making up the gambling debt of Proctor were funds converted by Proctor from the real estate trust account of suspended attorney Walter H. Smith. Former attorney Smith was a former approved attorney for TNTIC. As a consequence of this conversion, the funds, if any, remaining in the real estate trust account of former attorney Smith were insufficient to properly complete many real estate transactions for which the converted funds had been deposited into the trust account of former attorney Smith. As a result, TNTIC was called upon to pay substantial sums to third parties pursuant to its obligations under title insurance policies, commitments and closing protection letters it issued in regard to real estate closings conducted by or under the supervision of former attorney Smith.
44. TNTIC is informed and believes, as a result of its having to substitute its funds for the funds converted by Proctor in order to complete the real estate transactions referred to

above, the converted funds utilized by Proctor in the illegal gambling operation of the Defendants rightfully belong to it and, therefore, TNTIC is informed and believes it is entitled to judgment as against these Defendants for the funds so converted and utilized in the Defendants' illegal gambling operation.

45. TNTIC has no reasonable means of ascertaining the exact amount of the converted funds utilized by the Plaintiff Proctor in the illegal gambling operations of the Defendants. TNTIC is informed and believes that these Defendants have records showing the amount of money gambled and lost by Proctor in their various illegal gambling operations and, therefore, TNTIC is informed and believes it is entitled to an accounting from these Defendants as to those funds.

FOR A FIFTH CAUSE OF ACTION
(Civil Conspiracy)

46. Plaintiffs incorporate and allege paragraphs 1-24 as if fully restated herein.
47. Beginning as early as July 2000, and continuing through 2005, Defendants created a joint enterprise where they combined to conduct illegal video gaming to prey upon the addiction developed by Plaintiff Proctor and other individuals who became addicted to video gaming when such a practice was legal.
48. The purpose of the joint enterprise was to court addicted individuals and cause further addiction, forcing Plaintiff Proctor and other addicted individuals to continue to return to Rockaways and Pizza Man to feed their addiction.

49. Defendants further combined to prey upon Plaintiff Proctor's addiction to alcohol and cocaine while she was playing video poker to impair her judgment and cause her to lose additional money.
50. Defendants exerted control over the joint enterprise to achieve their common purpose to cause and exacerbate addiction so that Plaintiff Proctor and other individuals would continue to lose money to Defendants. This exacerbated addiction constitutes special damage.
51. Plaintiff Proctor suffered from special damage caused by Defendants.
52. The money lost by Plaintiff Proctor also constitutes special damage in that her gambling losses greatly exceeded her ability to pay, causing her to be indebted to Walter Smith and Plaintiff TNTIC.
53. As a result of this civil conspiracy and joint enterprise, Defendants are liable to Plaintiffs for actual and punitive damages.

FOR A SIXTH CAUSE OF ACTION

(Negligence Against the Whitlark Defendants—Pled in the Alternative)

54. Plaintiffs incorporate and allege paragraphs 1-24 as if fully restated herein.
55. In operating restaurants and bars, the Whitlark Defendants had a duty to ensure that any video games on its premises could not be used for gambling and ensure that its employees complied with state gaming laws to prevent customers from sustaining gambling losses.
56. The Whitlark Defendants breached this duty by not ensuring that video games on its premises could not be used for gambling activities by customers like Plaintiff.
57. The Whitlark Defendants' breach was the actual and proximate cause of the gambling

losses sustained by Plaintiff Proctor and the financial losses sustained by Plaintiff TNTIC.

58. As a result of Defendants' negligence, Plaintiffs are entitled to actual compensatory damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Honorable Court enter judgment against Defendants, as follows:

- a. For actual and compensatory damages;
- b. Treble damages;
- c. Punitive damages; and
- d. Attorneys' fees and costs.

JURY DEMAND

Plaintiffs pray for a trial by jury.

RESPECTFULLY SUBMITTED, this 2nd day of August, 2008.

CALLISON TIGHE & ROBINSON, LLC

BY:

Louis Lang w/ permission Michael W. Tighe

Michael W. Tighe, Esq. (SCBAR#5574)

Louis H. Lang, Esq. (SCBAR#003127)

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Columbia SC 29202

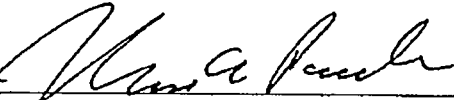
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Attorneys for TransUnion National Title
Insurance Company, f/k/a Atlantic Title
Insurance Company

And

STROM LAW FIRM, LLC

By: 

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Facsimile: (803) 252-4801

Attorneys for Lauren Proctor

Columbia, South Carolina

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Civil Action #06-CP-40-1814

Plaintiff,

Y.

WHITLARK & WHITLARK, INC., D/B/A)
ROCKAWAYS ATHLETIC CLUB and)
PIZZA MAN, FOREST WHITLARK,)
PAUL WHITLARK, CHARLIE E. BISHOP)
AND BRETT BLANKS,)

Defendants,


Ryan Alphin

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

Lauren Proctor and Trans-Union National Title
Insurance Company f/k/a Atlantic Title
Insurance Company,

Plaintiffs,

v.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man, Forrest Whitlark,
Paul Whitlark, Charlie E. Bishop and Brett
Blanks,

Defendant.

Case No.: 06-CP-40-1814

**ANSWER TO SECONDED
AMENDED COMPLAINT**

(Jury Trial Demanded)

Defendants Whitlark & Whitlark, Inc., d/b/a Rockaways Athletic Club and Pizza Man,
Forest Whitlark and Paul Whitlark, by and through their undersigned counsel, answering the
Second Amended Complaint state as follows.

FIRST DEFENSE

1. Defendants deny each and every allegation of the Second Amended Complaint
except as to those allegations that are specifically admitted herein.

2. Defendants admit so much of the allegations of Paragraph 1 as alleges that
Plaintiffs seek to bring an action for unjust enrichment, violation of the South Carolina Unfair
Trade Practices Act and for civil conspiracy but deny that Plaintiffs have any right to recover
against these Defendants or any other party.

3. Defendants admit upon information and belief that Plaintiff Proctor is a citizen
and resident of Richland County, South Carolina but is currently incarcerated in a federal prison
somewhere outside of South Carolina. Defendants further admit upon information and belief
that Plaintiff TNTIC is a corporation organized and existing under the laws of the State of South

Carolina. Defendants deny the remaining allegations of Paragraph 2 that TNTIC is a real party in interest in this matter.

4. Defendants admit the allegations of Paragraphs 3, 4 and 5.

5. Defendants admit upon information and belief only so much of the allegations of Paragraph 6 as allege that Charlie E. Bishop resides in Lexington County.

6. Defendants admit upon information and belief only so much of the allegations of Paragraph 7 that alleges Defendant Brett Blanks resides in Lexington County.

7. Defendants admit the allegations of Paragraph 8.

8. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 9 and therefore deny same.

9. Defendants admit only so much of the allegations of Paragraph 10 as alleges that in July 2000, the Video Games Machines Act was repealed. The remaining allegations of Paragraph 10 are denied.

10. Defendants deny the allegations of Paragraph 11 as stated. Further answering the allegations of Paragraph 11, Defendants state that Plaintiff Proctor played video game machines at Rockaways Athletic Club and Pizza Man during the period between 1999 and June 2005.

11. Defendants deny the allegations of Paragraphs 12 and 13.

12. Defendants admit the allegations of Paragraph 14.

13. Defendants deny the allegations of Paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24.

14. Answering the allegations of Paragraph 25, Defendants incorporate their responses to the allegations of Paragraphs 1 through 24.

15. Defendants deny the allegations of Paragraph 26.

16. Defendants admit only so much of the allegations of Paragraph 27 as alleges that in July 2000, the Video Game Machines Act was repealed. The remaining allegations of Paragraph 27 are denied.

17. Defendants deny the allegations of Paragraphs 28 and 29.

18. Answering the allegations of Paragraph 30, Defendants incorporate their responses to the allegations of Paragraphs 1 through 24.

19. Defendants deny the allegations of Paragraphs 31, 32, 33 and 34.

20. Answering the allegations of Paragraph 35, Defendants incorporate their responses to the allegations of Paragraphs 1 through 24.

21. Defendants deny the allegations of Paragraphs 36, 37, 38, 39, 40 and 41.

22. Answering the allegations of Paragraph 42, Defendants incorporate their responses to the allegations of Paragraphs 1 through 24.

23. Defendants deny the allegations of Paragraphs 43, 44 and 45.

24. Answering the allegations of Paragraph 46, Defendants incorporate their responses to the allegations of Paragraphs 1 through 24.

25. Defendants deny the allegations of Paragraphs 47, 48, 49, 50, 51, 52 and 53.

26. Answering the allegations of Paragraph 54, Defendants incorporate their responses to the allegations of Paragraphs 1 through 24.

27. Defendants deny the allegations of Paragraphs 55, 56, 57 and 58.

SECOND DEFENSE

28. Plaintiffs' claims are barred by the statute of limitations.

THIRD DEFENSE

29. Plaintiffs' claims are barred by the doctrine of unclean hands.

FOURTH DEFENSE

30. Plaintiffs' claims are barred by the doctrine of *in para delicto*.

FIFTH DEFENSE

31. Plaintiffs' claims are barred by the doctrine of laches.

SIXTH DEFENSE

32. Plaintiffs' claims are barred by the doctrine of assumption of risk.

SEVENTH DEFENSE

33. Plaintiffs have failed to state a claim upon which relief can be granted for civil conspiracy in that Plaintiffs have not alleged facts constituting special damages.

EIGHTH DEFENSE

34. Plaintiffs' Complaint, in whole or in part, fails to allege facts to support a claim upon which relief can be granted.

NINTH DEFENSE

34. Plaintiff Proctor lacks standing to recover monies of other persons and companies that Plaintiff Proctor allegedly used to play video games in Rockaways and Pizza Man.

TENTH DEFENSE

35. Plaintiff TNTIC is not a real party in interest and therefore lacks standing.

ELEVENTH DEFENSE

36. Defendants are entitled to a set-off for all debts owed by Plaintiff Proctor for payments made to her on dishonored checks and other monies she received from the play of video machines.

TWELFTH DEFENSE

37. Any alleged injury Plaintiffs sustained was due to and proximately caused by the contributory and comparative negligence, recklessness, willfulness and wantonness of Plaintiff Proctor and Plaintiff TNTIC's insured, which combining and concurring with that of Defendants, if any, which is expressly denied, contributed to the Plaintiffs' alleged damages as the proximate cause thereof, and therefore, Plaintiffs may not recover herein for their Sixth Cause of Action alleging negligence.

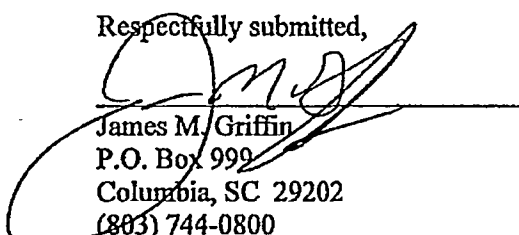
THIRTEENTH DEFENSE

38. Any alleged injury Plaintiffs may have sustained was due to and proximately caused by the sole or intervening negligence, recklessness, willfulness and wantonness of third parties, which occurred subsequent to any acts or omissions by Defendants, if any, which are expressly denied, and therefore the sole or intervening acts of third parties are the real, efficient and proximate causes of any alleged injuries to Plaintiffs, and therefore, Plaintiffs may not recover herein under their Sixth Cause of Action for negligence.

WHEREFORE, having answered the allegations of the Second Amended Complaint, Defendants respectfully request that the Court dismiss the Second Amended Complaint with prejudice, entering judgment in favor of these Defendants and for such other and further relief as the Court deems just and proper.

JURY TRIAL DEMANDED

Respectfully submitted,


James M. Griffin
P.O. Box 999
Columbia, SC 29202
(803) 744-0800
Attorney for Defendants

Columbia, South Carolina
September 19, 2008

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Lauren Proctor,

Case No.: 06-CP-40-1814

Plaintiff,

CERTIFICATE OF SERVICE

v.

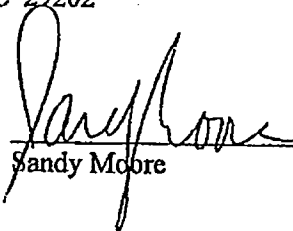
Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man,

Defendant.

I, Sandy Moore, the undersigned employee of the Law Firm of James M. Griffin, attorney for Defendant do hereby certify that I have served a copy of the foregoing Defendant's Answer to Second Amended Complaint, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

Mario Pacella
Strom Law Firm, LLC
2110 Beltline Blvd. Suite A
Columbia, SC 29204

Louis H. Lang
Michael W. Tighe
Callison Tighe & Robinson, LLC
P.O. Box 1390
Columbia, SC 29202


Sandy Moore

Columbia, South Carolina
September 19, 2008

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Lauren Proctor, et al.

☒ Plaintiff

v.

Whitlark & Whitlark, Et Al.

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2006-CP-40-1814

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Marion Pacella, Bar No. Address: 2110 Beltline Blvd., Suite A, Columbia, SC 29204 phone: 252-4800 fax: 252-4801 e-mail: other:		Defendant's Attorney: James M. Griffin, Bar No. 9995 Address: P.O. Box 999, Columbia, SC 29202 phone: 744-0800 fax: 744-0805 e-mail: other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTION I and III)		2006 MAR -3 PM 12:05	
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)		JEANETTE W. McBRIDE	
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)		RICHLAND COUNTY	
SECTION I: Hearing Information			
Nature of Motion: Motion for Summary Judgment			
Estimated Time Needed: 30 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 2, 2009 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: 25.00			
☐ 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.		JUDGE	
☐ Other:		CODE: Date:	
CLERK'S VERIFICATION			
Collected by: _____		Date Filed: _____	
☐ MOTION FEE COLLECTED: _____			
☐ CONTESTED - AMOUNT DUE: _____			

SCCA/233 (11-03)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Lauren Proctor and Trans-Union National Title
Insurance Company f/k/a Atlantic Title
Insurance Company,

Case No.: 06-CP-40-1814

Plaintiffs,

v.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man; Forrest
Whitlark; Paul Whitlark; Charlie E. Bishop;
and Brett Blanks,

Defendant.

DEFENDANTS WHITLARK &
WHITLARK, INC. AND FORREST
WHITLARK'S MOTION FOR
SUMMARY JUDGMENT

RICHLAND COUNTY
FILED
MAR-3 PM 12:05
J. W. HERBIDE
C.P. & G.S.

Defendants Whitlark & Whitlark, Inc. and Forrest Whitlark, by and through their undersigned counsel, hereby move the Court pursuant to Rule 56 for summary judgment on the grounds that there exists no genuine issue of material fact and the Defendants are entitled to judgment as a matter of law.

I. Defense of In Para Delicto

Under the doctrine of *in pari delicto*, Plaintiff may not recover money lost while engaged in illegal gambling. See *Rice v. Gist*, 32 S.C.L. 82 (1846) (unlawful wagers are not to be recovered in courts of justice); *Livingston v. Wootan*, 10 S.C.L. 178 (1818) (at common law, the parties to a gambling transaction stand *in pari delicto* and money lost and paid over cannot be recovered); *Owen v. Davis*, 1 Bail. 315, 1829 W.L. 7401 (1829) (money paid for a gaming debt cannot be recovered back by the loser, unless he brings suit for it within the period limited by the statute of anns); *Hasket v. Wootan* (1 Nott and McC 180, 181 W.L. 850 (1818)) (an illegal wager of \$60, won on a horse raise, cannot be recovered); *Abers v. Elliott*, (2006 W.L. 2053425) (Minn. P. App. 2006) (doctrine of *in pari delicto* barred plaintiff's claim to seek payment of promised

money from unlawful gambling proceeds); *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002) (plaintiff may be barred from bringing RICO claim based upon illegal gambling by doctrine of unclean hands); *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998) (holding that plaintiffs did not have standing to bring a civil RICO claim predicated on illegal gambling because they failed to allege "a compensable injury."); *Kelly v. First Astri Corporation*, 72 Cal. App. 4th 462 (1999) (under the *in pari delicto* doctrine, neither courts of law nor courts of equity will aid or assist a plaintiff to recover money lost in a gambling game that is prohibited by law, regardless of where it is played and even if the loss resulted from cheating, absent a statute authorizing recovery of the gambling losses); *Al-Ibrahim v. Edde*, 897 F.Supp. 620 (D.D.C. 1995) (doctrine of unclean hands barred plaintiff's suit to recovery taxes paid on behalf of the defendant for illegal gaming proceeds); *State v. Hair*, 114 N.C. App. 464, 442 S.E.2d 163 (1994) (one who pays gambling debt owed to another may not subsequently attempt to recover that which he is paid.); *People v. Coates*, 64 A.D. 2d 1 (Sup. Ct. Appellate Division, Second Department N.Y. 1978) (because the parties in an unlawful gambling activity are *in pari delicto*, the unsuccessful gambler has no common law right to recover his losses); *Reynolds v. Reynolds*, 238 Ga. 1, 230 S.E.2d 842 (1976) (the defense of *in pari delicto* prevents recovery based upon claims involving violation of gambling statutes which constitute a crime); *Grim v. Cheatwood*, 208 Okla. 570, 257 P.2d 1059 (1953) (the general rule is that losses sustained in the gambling game may not be recovered by the loser); *Wallace v. Oppenheim*, 73 Cal. App. 2d 25, 165 P.2d 709 (1946) (in the absence of statute authorizing recovery of gambling losses, loser engaging in a game of "21" which was prohibited by statute cannot maintain an action to recover his losses from the winner alleging using a deck of marked cards); *See also* 38 Am. Jur. 2d § 212, at 259 (1968) (independent of statute, the rule is that there is no remedy for the loser where money or

property is delivered in payment of or on account of a gambling contract or transaction, since the law will not lend its aid to a party in either the execution or the rescission of such a contract, the maxim, "*Ex Turpi Causa Non Oritur Actio*" applying, and the loser being regarded as *in pari delicto* with the winner in such cases.)

Plaintiff Lauren Proctor admitted in her deposition and has alleged in the Complaint that she is seeking to recover money that she stole from her employer and allegedly lost to the Defendants while engaged in illegal gambling. Plaintiff Proctor testified that she gambled on video machines being operated at Defendant's restaurants. (*Deposition excerpts attached*) Under South Carolina law a person gambling on a video machine and the operator of the machine are both guilty of a misdemeanor offense. South Carolina law S.C. Code § 16-19-40 makes it unlawful for a person to play

"any game with cards or dice, any gaming table commonly called ABC or E, O or any gaming table known or distinguished by any other letters or by any figures or any machine or device licensed pursuant to § 12-21-2720 and used for gambling purposes. A person convicted of this offense is subject to imprisonment of not more than 30 days and a fine of not more than \$100."¹

II. Defense of Unclean Hands

The doctrine of "unclean hands" precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. First Union Nat. Bank of South Carolina v. Soden, 333 S.C. 554, 511 S.E. 2d 372 (Ct. App. 1998). Many of the cases cited above are also decided upon the doctrine of unclean hands. Here, Plaintiff specifically admitted that when she won proceeds that she would either keep gambling with these proceeds or she would leave with the money. On whole, through Plaintiff asserts that she eventually lost all of the money that she gambled with to the Defendants. Nevertheless,

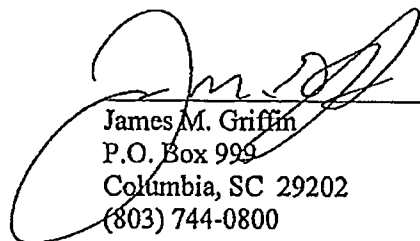
¹ 16-19-40 subjects a person who is operating a "gaming house" to a fine of \$1,000 and prison of up to 1 year.

Plaintiff admitted that had she been a net winner, rather than a net loser, Plaintiff Proctor would have not returned the money to the Defendants. (*Deposition Excerpts Attached*) In addition, all of the money that Plaintiff claims she lost gambling on video machines owned by the Defendants was stolen from her employer.

III. *Atlantic Title Lacks Standing To Assert Direct Claims Against the Defendants*

Atlantic Title was the title insurance company that insured certain lenders and purchasers whose loans were closed by Attorney Walt Smith and the title company employing Plaintiff Proctor. Atlantic Title's insured was not Walt Smith or the title company employing Proctor, but rather was the lender and the purchaser on these sales transactions. As part of the title insurance, the insurance company also insured against loss from theft conducted by its authorized title agent. However, Atlantic Title is subrogated to the rights of its insured, not Walt Smith or the title company employing Proctor. Furthermore, there is no evidence to support any allegation or claim that Atlantic Title's insured may pursue against Defendant Whitlark & Whitlark. Atlantic Title therefore lacks standing to assert any claim against this Defendant.

Respectfully submitted,



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Columbia, SC 29202
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Attorney for Defendant

Columbia, South Carolina
March 2, 2009

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1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
 2 COUNTY OF RICHLAND) C/A #: 06-CP-40-1814
 3 Lauren Proctor and)
 4 Trans-Union National)
 5 Title Insurance Company)
 6 f/k/a Atlantic Title)
 7 Insurance Company,)
 8 Plaintiffs,)
 9 v.)
 10 Whitlark & Whitlark, Inc.)
 11 d/b/a Rockaways Athletic)
 12 Club and Pizza Man,)
 13 Defendant.)

DEPOSITION OF

LAUREN PROCTOR

Tuesday, August 28, 2007
 2:41 p.m. - 6:43 p.m.

The deposition of Lauren Proctor, taken on behalf of the Defendant at the Strom Law Firm, 2110 Beltline Boulevard, Columbia, South Carolina, on the 28th day of August, 2007 before Sonya K. Grice, Court Reporter and Notary Public in and for the State of South Carolina, pursuant to Notice of Deposition and/or agreement of counsel.

Page 2

APPEARANCES:

James M. Griffin, Esquire
 Attorney at Law
 1116 Blanding Street, 2nd Floor
 Columbia, South Carolina 29201
 Attorney for the Defendant
 J. Marcus Whitlark, Esquire
 Whitlark & Balkou
 1708 Main Street, 2nd Floor
 Columbia, South Carolina 29201
 Attorney for the Defendant
 Mario Pacella, Esquire
 Strom Law Firm
 2110 Beltline Boulevard
 Columbia, South Carolina 29204
 Attorney for the Plaintiff

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MS. PROCTOR: PAGE:
 MR. GRIFFIN.....EXAMINATION.....3
 MR. PACELLA.....EXAMINATION.....175
 Signature sheet 177
 Certificate 178

EXHIBITS

(There were no exhibits to this deposition.)

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the South Carolina Rules of Civil Procedure.
 It is stipulated by and between counsel and the witness that the reading and signing of the following deposition be, and the same are, hereby not waived.
 The signature sheet is attached to the deposition at page 177.

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LAUREN PROCTOR, being duly sworn, deposes and testifies as follows:
 MS. PROCTOR - EXAMINATION BY MR. GRIFFIN:
 Q: Will you state your name, please?
 A: Lauren Joan Proctor.
 Q: Ms. Proctor, my name is Jim Griffin. I'm a lawyer, and I represent Whitlark & Whitlark in a lawsuit that you brought against the company. We're here today to take your deposition. Have you ever had your deposition taken before?
 A: No, sir.
 Q: I want to go through the ground rules first about what a deposition is, and there are some things that the law requires me to advise you of conduct for the deposition. But first, this is my opportunity to ask you questions, to discover the information that you have in hopes of, for me and my client to evaluate your claim against them. And I'll be doing that today by asking you a series of questions. Everything that I'm saying right now and your answers are taken down by the court reporter seated here, and she will type up my questions and your answers. Because we need a record of the communications we're having, it's important

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that all communications be spoken. So she can't take down a head nod ...
 A: Sure.
 Q: ... or huh-uh or uh-huh or something like that.
 A: Okay.
 Q: And then it's also very important that your answers to my questions are given only after you understand my question because we don't want to read the deposition transcript at a later date and there be some confusion on your behalf of, "Well, I didn't understand him to ask that, and I answered the wrong question." So if at any point in time during my questioning I phrase a question in a way that's unclear to you, please, before you answer, stop me and ask me to rephrase it. Will you do that?
 A: Yes, sir.
 Q: Okay. A deposition is testimony, and it's sworn testimony, and the oath that you just took is the same oath that you would take if you were testifying in a court. And this case is pending in the Court of Common Pleas in Richland County, as if you were sworn before a judge and a jury. Do you understand that?

1 (Pages 1 to 4)

1230 Richland Street / Columbia, SC 29201
 (803) 252-3445 / (800) 822-0896

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1 Q: I see. So now she's renting the house?
 2 A: Yes, sir.
 3 Q: When you say when all this happened ... let me
 4 see. After June of 2005, did you continue to
 5 gamble anywhere?
 6 A: Only when the FBI asked me to.
 7 Q: Okay. And I think you mentioned you gambled
 8 previously. Where all did you gamble?
 9 A: I would say ...
 10 Q: Stop. I want to talk from '99 to 2005.
 11 A: When it was illegal to gamble?
 12 Q: Well, it didn't become illegal for video poker
 13 purposes until June of 2000, so ...
 14 A: Okay. So you're in ... of course, Rockaway's,
 15 Pizza Man. Edisto Grill, I gambled with for a
 16 little while, a couple months. Now when it was
 17 legal, and I don't know when it went illegal,
 18 but I can tell you that I would go to a little
 19 poker place on Rosewood Drive every once in a
 20 while and gamble there, Oasis or something.
 21 And that's when it was legal. Of course, that
 22 was closed down. And Jim Casey, when he had,
 23 across from his bar he had a little gambling
 24 casino, and I would go there every once in a
 25 while. Didn't gamble as hard as I did, you

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1 know, towards the end, so the last, when it
 2 went from legal to illegal is when it got the
 3 worst for me.
 4 Q: Okay. Well, I'm just going through ...
 5 A: I understand.
 6 Q: ... all the places.
 7 A: Sure.
 8 Q: Okay. We've got Jim Casey, Oasis, you said
 9 Edisto Grill, you said Rockaway's and Pizza
 10 Man.
 11 A: Uh-huh (affirmative response).
 12 Q: Can you think of any other places?
 13 A: Let me think. I mean, if I just walked in and
 14 stuck a dollar in a machine, you want to know
 15 where I went, or you want to know a regular
 16 place?
 17 Q: A regular place.
 18 A: No. I don't think, I can't think of any other
 19 ...
 20 Q: What about the Showboat on Divine Street?
 21 A: I went there a couple times. Yeah, I sure did.
 22 Q: More than a couple times or just a couple
 23 times?
 24 A: I went there a few times, yeah. I mean, it
 25 wasn't like I was there every day, but I did,

Page 39

1 I went by there.
 2 Q: Okay.
 3 A: I'm trying to think if there's anywhere else.
 4 I can't remember all the places.
 5 Q: Fast Freddie's? Did you go there?
 6 A: Yeah, I went to Fast Freddie's a couple times.
 7 That was a little too far over on the other
 8 side of town for me.
 9 Q: How about Gamecock Country?
 10 A: No. He ran one in the back room when it was
 11 illegal, but I went over there and messed
 12 around a couple times, but I never spent any
 13 time over there.
 14 Q: You never gambled at Gamecock Country?
 15 A: Regularly, no, sir. You asked me about
 16 regularly. No, sir. I think I went over there
 17 once or twice and drank with him and played a
 18 couple games, but it wasn't a regular thing.
 19 Q: Okay. So Gamecock Country once or twice?
 20 A: Yeah. It was not a regular thing at all.
 21 Q: Okay. And that was when it was legal or
 22 illegal?
 23 A: Illegal.
 24 Q: Okay. Tell me about the Edisto Grill. How
 25 frequently would you go there?

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1 A: I went there for a couple months when I was
 2 angry with Pizza Man. Forrest had fired Kathy,
 3 a friend of mine, actually a girl I really
 4 liked over there, wasn't really a friend, but
 5 a bartender because she refused to give money
 6 out of the bag because it was illegal, and he
 7 fired her. So I went over to Edisto Grill for
 8 a couple months.
 9 Q: Why did you stop going over there?
 10 A: All my friends were over at Pizza Man, so I
 11 went back over there.
 12 Q: Okay.
 13 A: I wasn't mad anymore, I guess.
 14 Q: And how soon after Kathy getting fired did you
 15 go over to Edisto Grill?
 16 A: Immediately.
 17 Q: Okay. Do you remember sitting here when that
 18 was?
 19 A: No, sir. I couldn't tell you that.
 20 Q: But you would feel comfortable if we got
 21 Kathy's employment records so we could tie the
 22 date down?
 23 A: Sure. Yeah, sure. Yes, sir. I sure would.
 24 Q: And what was Kathy's last name?
 25 A: Bell, I think. I'm not real sure. I think

10 (Pages 37 to 40)

Page 41	Page 43
1 it's Bell. 2 Q: And do you know how much money you gambled at 3 Edisto Grill? 4 A: Not offhand. I think there's some checks in 5 there you could look at that were for Edisto. 6 I think a few thousand dollars. 7 Q: Who was the owner and operator at Edisto Grill? 8 A: I couldn't tell you their name. His wife was 9 there, and I don't even remember her name. 10 Q: Do you owe them any money? 11 A: No, sir. 12 Q: You don't owe them any money from gambling ... 13 A: No, sir, I do not. 14 Q: Did they forgive the money or did you not ... 15 A: Forgive what money? 16 Q: Well, I was going to ask you. Let me ask you 17 a better way. Did you ever run up a debt at 18 ... 19 A: No, sir. 20 Q: ... Edisto Grill? 21 A: I had to pay when I left there. 22 Q: You paid and they never carried a debt there 23 for you? 24 A: No, sir. 25 Q: And so without a doubt, you didn't leave there	1 month? 2 A: Not always every day, not always every week. 3 I can't answer that question. 4 Q: Okay. Where would you buy lottery tickets? 5 Did you have a regular place you'd go to? 6 A: No. Sometimes I'd drop by the BP station. 7 Sometimes I'd drop by the Pantry. I mean, just 8 whenever. 9 Q: The BP station where? 10 A: Rosewood Drive. I'd stop by there some. 11 Q: Rosewood Drive. How far is that from 12 Rockaway's? 13 A: A few blocks. 14 Q: Across the street? 15 A: No, sir. 16 Q: The one across the street or ... 17 A: No. It was down the street. It's at the 18 corner of South Holly and Rosewood. 19 Q: But it's on the other side of Rosewood than ... 20 I just want to be sure I know which one you're 21 talking about. 22 A: It's on the corner of South Holly and Rosewood 23 Drive. 24 Q: And if you're going west on Rosewood, it's on 25 ...
Page 42	Page 44
1 owing any amount of money? 2 A: No, sir, not to my knowledge. No, sir. 3 Q: Okay. 4 A: Not that I know of. 5 Q: Now, what do you consider gambling? 6 MR. PACELLA: I object to the form. Go ahead and 7 answer the question. 8 Q: We talked about places that you gambled, and 9 I'm trying to understand what you consider ... 10 A: Poker, video poker machines. 11 Q: Okay. 12 A: Sorry. 13 Q: Did you ever play the State lottery? 14 A: Yeah, I did. 15 Q: Do you consider that to be gambling? 16 A: A form of, but it's not the same as video 17 poker. You don't sit in front of something and 18 it spins around for hours and you play it and 19 that type of thing, no. Video poker you, it's 20 a different type of gambling. 21 Q: When did you start buying lottery tickets? 22 A: Everybody ... when the lottery started, I would 23 play every once in a while. 24 Q: Okay. What do you mean by once in a while? 25 Every day, once a day, once a week, once a	1 A: I don't know south, west, sir. If you're going 2 down towards Midlands Tech on Rosewood Drive, 3 it's on the right-hand side on the corner of 4 South Holly and Rosewood Drive. 5 Q: And how often would you go in there and play? 6 A: I couldn't tell you how often I'd go play. 7 Q: What's the most amount of money you spent in 8 there, buying lottery tickets? 9 A: I don't know. Maybe \$60. 10 Q: \$60? 11 A: Maybe. And I'm not going to testify to that. 12 I don't know. 13 Q: Okay. It would be no more than \$100? 14 A: I'm not going to say. I don't know. Maybe. 15 Maybe not. I did play the ... 16 Q: Maybe more than \$1,000? 17 A: No, sir. No. 18 Q: Clearly never more than \$1,000? 19 A: Never in my life have I spent \$1,000 in a day 20 on the lottery. No, sir. 21 Q: Okay. What's the most you think you ever spent 22 in a week? 23 A: I couldn't tell you. 24 Q: On lottery tickets? 25 A: I could not tell you.

11 (Pages 41 to 44)

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1 A: Yeah. Yes, I did. The first one I remember
 2 very vividly because I was like, yeah, I won
 3 \$60. It was \$60 I won that day, and that got
 4 me started back.
 5 Q: Okay. That \$60 that you won, what did you do
 6 with it?
 7 A: I put it back in.
 8 Q: And did you lose it?
 9 A: Yeah.
 10 Q: So, that day started you back and you lost it?
 11 A: Well, you lose, and then you want to win, yeah.
 12 Q: Okay. So day one, you cashed out ...
 13 A: I'm telling you it accelerated. It didn't end.
 14 That day I didn't go, "Oh, my God. Oh, my God.
 15 I'm addicted to poker again." I never,
 16 addiction never went away. I think I've had
 17 it, you know, forever, but, you know, even when
 18 it was legal, I'm sure that that addiction was
 19 there, but that some reason, these machines
 20 were not monitored by anyone but Forrest.
 21 Forrest set them. Forrest had everything to do
 22 with them. They weren't monitored by any state
 23 law or by Collins or anybody. He owned them.
 24 So it was just something, you try to beat it,
 25 you try to beat it. It was so hard to beat,

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1 and when you beat it, whatever that thing is
 2 that goes off in you, it just gets worse and
 3 worse. And my times of winning, I could
 4 probably count on two hands. The times of
 5 losing, you've got the evidence on that.
 6 Q: All right. I want to go back to the first
 7 time. You said you won \$60. And did you get
 8 cash for the \$60? I mean, what you remember
 9 the first time?
 10 A: What do you mean get cash?
 11 Q: The Monkey machine. You said you won \$60.
 12 What did that mean?
 13 A: Well, that means that I had points. Graham
 14 went into a little bag that they have and
 15 brought me \$60.
 16 Q: Okay. And then my question is ...
 17 A: I put it back in and played more.
 18 Q: And?
 19 A: And lost.
 20 Q: And lost?
 21 A: Yeah.
 22 Q: And you lost the \$60 that you had won, plus
 23 whatever money you put in?
 24 A: Right.
 25 Q: Okay. How much did you lose the first time?

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1 A: Come on now. I don't know.
 2 Q: No. I just ...
 3 A: I mean, it started out innocent, probably \$5.
 4 I mean, I don't know.
 5 Q: Okay. And so, I mean, I guess that was what I
 6 wanted to clarify. You said you won the first
 7 time, but in all actuality, if you ...
 8 A: There is no ...
 9 Q: At the end of the day you ...
 10 A: There is no ...
 11 Q: ... you lost \$5?
 12 A: ... understanding the concept of this
 13 addiction, believe me.
 14 Q: In this big picture, you've said you could
 15 count the times you won on two hands?
 16 A: Uh-huh (affirmative response).
 17 Q: And what do you mean by won?
 18 A: Well, you don't ever win.
 19 Q: Okay. Well, but let me ask you, when you say
 20 you can count the times you won on two hands,
 21 does that mean you walked out the door with
 22 money?
 23 A: I don't think I walked out the door with money
 24 but maybe three or four times, if I, I mean,
 25 you just don't win on them. It's not a win-win

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1 situation. It's a lose-lose, okay? But I say,
 2 winning I mean in the concept, winning would be
 3 putting in, you know, \$10 and walking out with
 4 \$100 or, you know, but it was a much bigger
 5 picture than that, you know. It was losing
 6 \$10,000 and winning \$1,500. And in the, just
 7 like you could say the same thing with the
 8 lottery. You know, you buy a \$2 ticket and you
 9 win when you get a \$2 winner. You don't win;
 10 you get your money back. You barely ever won
 11 anything. But when I say win, I'm talking
 12 about actually being able to cash in some
 13 points, and I probably already put twice that
 14 in there, if that makes sense to you, if you
 15 understand what I'm trying to tell you. There
 16 wasn't a winning there.
 17 Q: Okay. Well, maybe let's talk about cashing
 18 out.
 19 A: That's the same thing. That's what I'm talking
 20 about.
 21 Q: Okay. Let's talk about cashing out. Did you
 22 ever, ever cash out and walk out the door with
 23 money in your hands?
 24 A: Yeah, sure.
 25 Q: How many times?

16 (Pages 61 to 64)

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1 A: I couldn't tell you. I could probably, like I
2 said, count them on my hand, but I'd go back
3 the next day and spend it.
4 Q: Well, that's ...
5 A: Or most of, really, to walk out with cash in my
6 pocket was very rare. If I won, I was usually
7 putting it back towards the tab that I had run
8 behind the bar.
9 Q: Okay.
10 A: I'll tell you this much. You sit down at this
11 machine and within three minutes you could lose
12 \$100, \$200. That's how fast this thing went,
13 okay? So that you understand what I'm trying
14 to explain, that's how fast it goes. And I
15 didn't have \$200 or \$300, and I'm sure, you
16 know, by what I'm telling you, so about every
17 time I went in there, I was borrowing money.
18 Q: And who were you borrowing money from?
19 A: From Forrest, from his bag.
20 Q: And how would you go about borrowing money?
21 A: I'd say, "Give me \$500," and they'd go back and
22 they'd put, "Lauren owes \$500," in the bag,
23 take \$500 out and give it to me to play.
24 Q: And then you would play with it?
25 A: Right.

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1 Q: Would you play with all the \$500?
2 A: Yeah.
3 Q: Every time?
4 A: You would have to because when he, let's say
5 he's got \$5,000 in this bag, and I borrow
6 \$3,000 that night, and he goes to clean his
7 machine out and he doesn't have \$3,000 in
8 there, he questions you as to why he doesn't.
9 Q: So your testimony is that you never borrowed
10 money from Forrest and ...
11 A: Walked out the door with it?
12 Q: ... walked out ...
13 A: That is my testimony.
14 Q: ... with any portion of it?
15 A: That's my testimony. I might have had \$1.50 to
16 get me a pack of crackers or something or a
17 pack of cigarettes, but if you're talking about
18 any substantial amount, no, sir, I did not.
19 Q: Okay.
20 A: Never.
21 Q: And substantial in your mind is anything over
22 \$1.50?
23 A: No, sir.
24 Q: Okay. Well, I mean, you qualified your answer
25 to any substantial amount, so what is not a

1 substantial amount in your mind?
2 A: Don't back ... I'm not going to be backed in
3 the corner by these questions. I'm doing the
4 best I can. I'm telling you, if you're asking
5 me if I ever cashed a check there and walked
6 out and went somewhere else and played poker or
7 did anything, no, sir, I did not. And that is
8 my testimony. So don't back me in a corner on
9 it.
10 Q: Here's my question. Did you ever borrow money
11 from Forrest and not spend 100 percent of the
12 money in the poker machine?
13 A: Okay. No. Yes. We could say I, yes, I did
14 that.
15 Q: Okay. And what was the most amount of money
16 that you kept and didn't put in the poker
17 machine?
18 A: I remember, I can tell you this. One time I
19 left with \$300, and he approached me on it. So
20 there's your substantial amount.
21 Q: So you recall one time where you borrowed money
22 and kept \$300?
23 A: Oh, I'm just giving you an example. He always
24 checked the bag to what was in the machine.
25 Q: Well, let's go to the time that he confronted

1 you about it.
2 A: He thought somebody was stealing from him
3 because all of the money wasn't in there.
4 Q: Well, the \$300, was he correct about that?
5 A: About what?
6 Q: When he confronted you and said, the \$300 you
7 walked out with? Did he, is that what
8 happened?
9 A: Did I walk out with \$300? I don't think it was
10 \$300, no. He was missing \$300. And he
11 approached me on it.
12 Q: Okay.
13 A: My answer with him was no because if I walked
14 out with anything, I'm telling you it would
15 have been \$10, \$20. I never walked out with
16 any substantial amount of money.
17 Q: Okay. So you answered my earlier question and
18 said you walked out with some money.
19 A: Right.
20 Q: And then you gave us a description of an
21 incident where Forrest accused you of walking
22 out with \$300.
23 A: Because he thought somebody was stealing. I'm
24 trying to give you how he kept up with it.
25 Q: And you're saying that did not happen? That

17 (Pages 65 to 68)

Page 69

1 you didn't walk out with \$300?
 2 A: No, I didn't. No. And he knew that. He
 3 thought that ... and Graham was stealing from
 4 him, and Graham got fired for it.
 5 Q: And the most you've ever walked out after
 6 borrowing money ...
 7 A: You're making me specific, and I won't do it.
 8 Q: Well, can you tell us under oath what the most
 9 amount of money you ever walked out with?
 10 A: No, sir, I cannot.
 11 Q: So is it ... well, let me do ranges again. Can
 12 you say under oath that you never walked out
 13 with more than \$300, after borrowing money from
 14 Forrest?
 15 A: Yeah, I can say that.
 16 Q: Can you say under oath you never walked out
 17 with more than \$150 after borrowing money from
 18 Forrest?
 19 A: Not that I recall, no.
 20 Q: So you don't recall walking out with more than
 21 \$150?
 22 A: Not at all.
 23 Q: Can you ...
 24 A: You're asking me, you're backing me in a corner
 25 again. I don't want to do that. I'm not going

Page 70

1 to do it. I had given you an example, and I've
 2 told you that I've never walked out of there
 3 with a substantial amount. I cannot remember
 4 if it was \$50, \$100, \$150. They would close
 5 down sometimes. I would have to leave. I'd
 6 come back the next day and continue playing.
 7 Ask me ... I mean, I don't know what you're
 8 getting at. The money ... if I walked out with
 9 \$300, let's just use that amount, I came back
 10 the next day and played. So I don't know, I
 11 can't and I won't give you specifics because I
 12 don't recall. Back then I wasn't thinking that
 13 one day I'd be talking to you about this stuff.
 14 Q: Okay. So, I mean, you can't say that you never
 15 walked out with more than \$150; is that fair?
 16 A: I can't say?
 17 Q: Yeah. You are unable to say to me under oath
 18 ...
 19 A: No, no. No, no, no. Let's just say I can say
 20 I pretty much never walked out of there with
 21 more than \$300, if you want to do that. I'm
 22 not going to say ... because you could go up to
 23 anything with that.
 24 Q: Okay. So you feel comfortable capping it at
 25 \$300?

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1 A: I don't feel comfortable doing anything at
 2 this. I told you I don't remember. But I am
 3 telling you that I didn't go out and buy a car,
 4 okay, if that's what you want to know. The
 5 money, if I walked out with any money, they
 6 were closing down. I'd come back the next day.
 7 I'd win \$1,500. Yeah, I'd walk out with it in
 8 my pocket. Sure, I would. I won it. After I
 9 pay my tab, if I was lucky enough not to have
 10 one. I mean, it wasn't all, you know, that I
 11 didn't ever walk out with anything in my
 12 pocket. I just don't know what you're trying
 13 to get at because if you're asking me if I
 14 cashed checks and would leave there with the
 15 money without playing, the answer is no.
 16 Q: What I'm trying to get at is I've been provided
 17 a notebook of checks.
 18 A: Right.
 19 Q: And the question I've got is, every dollar in
 20 this notebook go to Rockaway's?
 21 A: That isn't even all of it.
 22 Q: So you're ...
 23 A: You can't include some of the other money I put
 24 in there. I mean, we're talking about
 25 \$750,000. And it, I'm telling you right now

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1 that 99 percent of it went to Pizza Man.
 2 Q: Okay.
 3 A: So, you know, yeah, you ... actually you're
 4 getting off with that.
 5 Q: Well, here's what I, so the only way I know to
 6 do because you brought this lawsuit, okay?
 7 A: Uh-huh (affirmative response).
 8 Q: And you're making these allegations, and then
 9 I'm asking you these questions, and you're
 10 challenging me for asking you questions that
 11 you don't know the answers to.
 12 A: Okay. If I won, I'd walk out with money in my
 13 pocket. There's an answer.
 14 Q: Okay.
 15 A: Okay? And it could have been up to \$1,500.
 16 That's all you could win in a sitting because
 17 it's all the machine would play [sic]. Would
 18 pay. So there's a figure.
 19 Q: All right. So you're telling us here that you
 20 do recall walking out with \$1,500?
 21 A: When I won, yes, sir. When I cashed out
 22 \$1,500, I'd usually get up and run, unless I
 23 was too drunk, and I'd play it back down. So
 24 if you want to know if on occasion that amount
 25 walked out the door in my pocket when I won,

18 (Pages 69 to 72)

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1 yes, sir, it did.
 2 Q: Okay. So can you say that happened on more
 3 than one occasion?
 4 A: Well, you're talking about, what, four, was it
 5 three, four years? I'm sure it happened on
 6 more than one occasion.
 7 Q: And is it your testimony that you took that,
 8 all that \$1,500 when you would walk out and
 9 then you'd show up the next day and spend that
 10 \$1,500?
 11 A: Yes, sir, pretty much. Yes, sir.
 12 Q: Well, is it pretty much or is it, "Yes, I did
 13 it"?
 14 A: I'm not going to ... I don't know how to answer
 15 your question.
 16 Q: Well, you can answer it three ways, yes, no, or
 17 I don't know.
 18 A: I don't know.
 19 Q: Okay. Now, we started talking about the Monkey
 20 machine.
 21 A: Uh-huh (affirmative response).
 22 Q: And how much do you understand the Monkey
 23 machine would pay out?
 24 A: For payout?
 25 Q: Yes.

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1 A: Like I told you, I don't remember a whole
 2 bunch. It went around in circles, and if you
 3 hit Tarzan, you'd hit big. I mean, I really
 4 don't remember the entire concept of the Monkey
 5 machine.
 6 Q: Okay.
 7 A: I think it was Tarzan and actually not Monkey.
 8 Q: Tarzan?
 9 A: Yeah.
 10 Q: And do you know if, well, was there another
 11 machine that you played after the Tarzan
 12 machine?
 13 A: Yeah. And that was the one that had the, one
 14 that was like pool, and the balls were solid
 15 balls were your low numbers and the striped
 16 were the high. And it was played like a poker
 17 hand, five-card draw.
 18 Q: Okay.
 19 A: And he also had blackjack on the same machine.
 20 And that one you could bet up to \$80 a hand.
 21 Q: You're saying you could bet up to \$80 a hand?
 22 A: On the blackjack. On the pool it was up to
 23 \$7.50 a hand.
 24 Q: Did you say \$80 or \$8?
 25 A: \$80.

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1 Q: And the pool ball was \$7.50?
 2 A: Uh-huh (affirmative response).
 3 Q: Now, in between the Tarzan machine and the pool
 4 ball and blackjack ... well, let's, the pool
 5 ball and blackjack, were they on the same ...
 6 A: Yes, they were.
 7 Q: ... box?
 8 A: Same one. There were three of those machines
 9 in Pizza Man.
 10 Q: And those, and that machine, were there a menu
 11 of games that, some games were ...
 12 A: Yeah.
 13 Q: ... trivia-type games?
 14 A: Yeah. Trivia, stuff like that.
 15 Q: Okay. And the games that you played on were
 16 primarily the pool ball and the blackjack
 17 games?
 18 A: Yes, sir.
 19 Q: And were those ... let me ask you, in your
 20 mind, were you gambling on those machines?
 21 A: Yeah.
 22 Q: Okay. And when you were gambling, you were
 23 hoping to win money?
 24 A: That's usually what it's about, yeah.
 25 Q: And if you had won money, you would have kept

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1 the money?
 2 A: Well, that's a question I can't answer because
 3 I never kept it before.
 4 Q: Well, I mean, if you had won money ...
 5 A: I'm an addict.
 6 Q: At the end of the day ...
 7 A: I'm an addict. You don't keep the money.
 8 Q: Well, if you'd won money and Pizza Man burned
 9 down, would you have given it back, or would
 10 you have kept it?
 11 A: Why would I give it back to them?
 12 Q: Okay. So you were playing for keeps?
 13 A: Yeah. Well, I mean, yeah. Sure you are, but
 14 you never get that. An addict doesn't ever
 15 win.
 16 Q: And here you're suing because you lost,
 17 correct?
 18 A: I am suing because I took money, okay, out of
 19 an escrow account during a time in my life that
 20 I was very sick. And these men, under
 21 Rockaway's or Pizza Man, have the money, and
 22 they got it illegally also. And all I want to
 23 do is get it back to the people who need the
 24 money back. That's why I'm suing. I don't
 25 want to, you know, I'm not standing over here

19 (Pages 73 to 76)

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1 saying that I'm innocent and all this and I'm
2 a horrible victim. I do feel victimized by
3 them. I feel like they were vultures, and they
4 fed into my addiction, and they knew exactly
5 what they were doing. That's what you want to
6 know from me. That's what I'm telling you.
7 But that money isn't for me.
8 Q: But when you were playing, you were playing to
9 win and playing to keep, correct?
10 A: Towards the end, I was winning to try to win,
11 believe it or not, and tried to get some money
12 back. But that doesn't happen with his
13 machines.
14 Q: I understand. I understand that. But when you
15 were playing, you were playing to win and keep
16 money, correct?
17 A: It isn't like that. When you're playing,
18 you're playing for the, whatever high you get
19 off that machine. It isn't like that. And I
20 don't know if you've ever known anyone addicted
21 to poker, and I cannot explain it to you. It
22 is not like anything I've ever felt before in
23 my life.
24 Q: Well, was the high the playing the game or the
25 opportunity to win?

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1 A: It's ... I don't know how to ex- ... talk to
2 the psychiatrist. I can't explain that to you.
3 All I know is, if I was thinking about winning
4 money, I'd have quit a long time ago because it
5 isn't going to happen there.
6 Q: All right.
7 A: Okay? And that was very obvious.
8 Q: But you were playing for money ...
9 A: Because I'm not the only one that lost this
10 amount of money there. Hugh Barrineau lost
11 what I lost, if not twice that much. There
12 were other people that were damaged in the same
13 way. So, you know, I'm not the only one here
14 that went through this experience.
15 Q: After June of 2000, I mean, we know, I think
16 we've established that date, but you knew at
17 some point in time it was illegal to pay off on
18 the machines, right?
19 A: Sure. Uh-huh (affirmative response).
20 Q: And it was illegal for you to play and win on
21 the machines?
22 A: Yes.
23 Q: Correct?
24 A: Uh-huh (affirmative response).
25 Q: And you knew what you were doing was illegal,

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1 correct?
2 A: Yes.
3 Q: Okay. Just like you were doing cocaine, and
4 you knew that was illegal when you were doing
5 it?
6 A: Yes.
7 Q: And you were stealing money from Walt Smith,
8 and you knew that was illegal, correct?
9 A: Yes.
10 Q: And you were forging signatures of your mother
11 ...
12 A: Yes.
13 Q: ... on checks?
14 A: Yes.
15 Q: You knew that was illegal, ...
16 A: Yes.
17 Q: ... correct?
18 A: Yes.
19 Q: Okay.
20 MR. PACELLA: Let him ask the whole question before
21 you answer it.
22 A: I'm just getting tired of the same question
23 over and over.
24 MR. PACELLA: I understand. Just so that we have a
25 good record.

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1 A: I understand. I'm just getting frustrated with
2 the same stuff.
3 Q: Now, you mentioned Hugh Barrineau.
4 A: Uh-huh (affirmative response).
5 Q: You think he lost as much or twice as much as
6 you did?
7 A: Yes, definitely.
8 Q: Twice as much as you did?
9 A: I said as much or twice as much is what you
10 asked me. I said yes.
11 Q: Okay. Well, I'm just ...
12 A: Because when it was legal, I wasn't, you know,
13 giving checks like he was. Back when it was
14 legal, he was still paying credit cards and
15 checks and running tabs, and that carried over
16 to when it was illegal. So he did it longer
17 than I did.
18 Q: So, I mean, he played a lot?
19 A: Oh, yeah. He was there ...
20 Q: And he played beside you?
21 A: Yeah.
22 Q: Okay. And can you name any other players that
23 played frequently?
24 A: Mark Whitburn played.
25 Q: Mark Whitburn?

20 (Pages 77 to 80)

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Lauren Proctor and Trans-Union National Title
Insurance Company f/k/a Atlantic Title
Insurance Company,

Plaintiffs,

v.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man; Forrest
Whitlark; Paul Whitlark; Charlie E. Bishop;
and Brett Blanks,

Defendants.

Case No.: 06-CP-40-1814

CERTIFICATE OF SERVICE

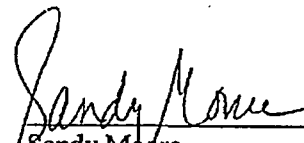
RICHLAND COUNTY
FILED
2009 MAR -3 PM 3:05
JEANETTE W. MURPHY
C.C.P. & G.D.

I, Sandy Moore, the undersigned employee of the Law Firm of James M. Griffin, attorney
for Defendant do hereby certify that I have served a copy of the foregoing Defendant Whitlark
& Whitlark, Inc. and Forrest Whitlark's Motion for Summary Judgment, in connection
with the above-referenced case by mailing a copy of the same by United States Mail, postage
prepaid, to the following address:

E. Hood Temple
The Hyman Law Firm, LLP
170 Courthouse Square
P.O. Box 1770
Florence, SC 29503

Mario Pacella
Strom Law Firm, LLC
2110 Beltline Blvd. Suite A
Columbia, SC 29204

Louis H. Lang
Michael W. Tighe
Callison Tighe & Robinson, LLC
P.O. Box 1390
Columbia, SC 29202


Sandy Moore

Columbia, South Carolina
March 7, 2009

3

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

LAUREN PROCTOR and TRANSUNION
NATIONAL TITLE INSURANCE COMPANY, et
al.

☐ Plaintiff

v.

Whitlark & Whitlark, Inc., Et Al.

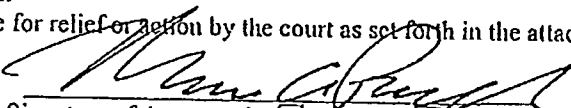
☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2006-CP-40-1814

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Mario A. Pacella, Bar No. 68488 Address: 2110 Bellline Boulevard, Ste. A Columbia, South Carolina 29204 phone: 803-252-4800 fax: 803-252-4801 e-mail: mpacella@stromlav.com other:		Defendant's Attorney: James M. Griffin, Bar No. Address: P. O. Box 999 Columbia, South Carolina 29202 phone: 803-744-0800 fax: 803-744-0805 e-mail: jmg@jimgriffinlaw.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: Renewed Motion for Partial Summary Judgment as to Whitlark & Whitlark, Inc. and Motion for Partial Summary Judgment as to Forrest Whitlark and Paul Whitlark Estimated Time Needed: 30 min. 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 12, 2009 Date submitted			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$25.00 ☐ 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, 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: _____ Date Filed: _____			

SCCA/233 (11-03)

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Civil Action #06-CP-40-1814

LAUREN PROCTOR, and TRANS-)
UNION NATIONAL TITLE INSURANCE)
COMPANY, f/k/a ATLANTIC TITLE)
INSURANCE COMPANY)

Plaintiff,)

v.)

WHITLARK & WHITLARK, INC., D/B/A)
ROCKAWAYS ATHLETIC CLUB and)
PIZZA MAN, FORREST WHITLARK,)
PAUL WHITLARK,)
CHARLIE E. BISHOP, and)
BRETT BLANKS,)

Defendants,)

RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT
AS TO WHITLARK & WHITLARK, INC. AND MOTION
FOR PARTIAL SUMMARY JUDGMENT AS TO FORREST WHITLARK
AND PAUL WHITLARK

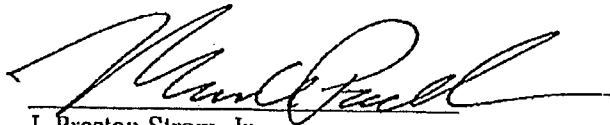
Plaintiff filed a Motion for Partial Summary Judgment as to Whitlark & Whitlark, Inc., contending that no genuine issue of material fact exists as to liability and that Plaintiff Lauren Proctor is entitled to partial summary judgment as a matter of law. Specifically, Defendants Whitlark & Whitlark, Forrest Whitlark, and Paul Whitlark concede that Plaintiff lost at least \$130,000 gambling on video poker machines at Defendant's restaurants, Rockaways Athletic Club and Pizza Man. The issue for the Court was whether Defendants' common law affirmative defense of *in part delicto* was an available affirmative to alleged violations of the South Carolina Unfair Trade Practices

Act. The Court heard oral arguments on Plaintiffs' Motion for Partial Summary Judgment and on a Cross Motion for Summary Judgment. The Court denied both motions without prejudice. Now that discovery is almost complete, Plaintiff re-files her Motion for Partial Summary Judgment as to Whitlark & Whitlark, Inc., and moves for Partial Summary Judgment as to Forrest Whitlark and Paul Whitlark.

Plaintiff hereby incorporates by reference her previous Motion for Partial Summary Judgment, her Memorandum in Support of Motion for Partial Summary Judgment, and the Exhibits in Support of Motion for Partial Summary Judgment.

RESPECTFULLY SUBMITTED, this 12th day of March, 2009.

STROM LAW FIRM, LLC



J. Preston Strom, Jr.
Mario A. Pacella
2110 Beltline Boulevard, Suite A
Columbia, South Carolina 29204
Tel: 803.252.4800
Fax: 803.252.4801

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Civil Action #06-CP-40-1814

LAUREN PROCTOR, and TRANS-)
UNION NATIONAL TITLE INSURANCE)
COMPANY, f/k/a ATLANTIC TITLE)
INSURANCE COMPANY)

Plaintiff,)

v.)

WHITLARK & WHITLARK, INC., D/B/A)
ROCKAWAYS ATHLETIC CLUB and)
PIZZA MAN, FORREST WHITLARK,)
PAUL WHITLARK,)
CHARLIE E. BISHOP, and)
BRETT BLANKS,)

Defendants.)

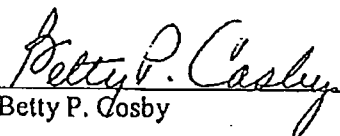
CERTIFICATE OF SERVICE

I, Betty P. Cosby, an employee of the Strom Law Firm, LLC. do hereby certify that I have this 12th day of March, 2009, served a copy of my Renewed Motion for Partial Summary Judgment as to Whitlark & Whitlark, Inc., and Motion for partial summary judgment as to Forrest Whitlark and Paul Whitlark on the following by placing in the U.S. Mail proper postage affixed.

James Mixon Griffin, Esquire
The Law Offices of James Mixon Griffin
P. O. Box 999
Columbia, South Carolina 29202

Michael C. Abbott, Esquire
Hyman Law Firm
P. O. Box 1770
Florence, South Carolina 29503

Louis H. Lang, Esquire
Callison Tighe & Robinson, LLC
P. O. Box 1390
Columbia, South Carolina 29202-1390


Betty P. Cosby

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Lauren Proctor and Trans-Union National
Title Insurance Company f/k/a Atlantic
Title Insurance Company,

Plaintiffs,

v.

Whitlark & Whitlark, Inc. d/b/a
Rockaways Athletic Club and Pizza Man,

Defendant.

Case No.: 06-CP-40-1814

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

2007 DEC -3 PM 2:50
BARBARA A. SCOTT
C.C.C. & G.S.

RICHLAND COUNTY

INTRODUCTION

Defendant, by and through its undersigned counsel, respectfully submits this memorandum of law in support of its Motion for Summary Judgment pursuant to Rule 56, SCRPC on the grounds that there exists no genuine issue of material fact and Defendant is entitled to judgment as a matter of law.

STANDARD OF REVIEW

Summary judgment is appropriate where "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), SCRPC. *All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina*, 358 S.C. 209, 222, 595 S.E.2d 253, 261 (Ct.App. 2004). In determining whether any triable issues of fact exist, the evidence and all inferences which can reasonably be drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Medical Univ. of South*

Carolina v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 355, 559 S.E.2d 327, 336 (Ct.App.2001).

FACTS

Plaintiff Proctor allegedly stole more than \$600,000 from her employer's attorney trust account. Plaintiff has also pled guilty to federal criminal charges relating to the theft. Plaintiff contends that she lost all of the stolen money gambling on video machines located in Defendant's restaurants. Plaintiff Proctor thereafter filed this suit against the Defendant seeking to recover alleged gambling losses.

Plaintiff's employer had a real estate closing practice and he was also had a title insurance agency Atlantic Title. Atlantic Title provided insure closing services to lenders on approximately three sales transactions that closed in May and June, 2005. As a result of Plaintiff's theft, the escrow account was overdrawn and mortgages on the three closings totaling approximately \$600,000 were left unsatisfied. Atlantic Title satisfied these mortgages on behalf of its insured lenders. Atlantic Title has intervened in this action as a party plaintiff.

ARGUMENT

I. **SUMMARY JUDGMENT IS APPROPRIATE BECAUSE PLAINTIFF PROCTOR IS PRECLUDED FROM RECOVERING MONEY LOST WHILE ENGAGED IN ILLEGAL GAMBLING UNDER THE DOCTRINE OF IN PARI DELICTO.**

Under the doctrine of *in pari delicto*, Plaintiff may not recover money lost while engaged in illegal gambling. *See Rice v. Gist*, 32 S.C.L. 82 (1846) (unlawful wagers are not to be recovered in courts of justice); *Livingston v. Wootan*, 10 S.C.L. 178 (1818) (at

common law, the parties to a gambling transaction stand *in pari delicto* and money lost and paid over cannot be recovered); *Owen v. Davis*, 1 Bail. 315, 1829 W.L. 7401 (1829) (money paid for a gaming debt cannot be recovered back by the loser, unless he brings suit for it within the period limited by the statute of anns); *Hasket v. Wootan* (1 Nott and McC 180, 181 W.L. 850 (1818)) (an illegal wager of \$60, won on a horse raise, cannot be recovered; *Abers v. Elliott*, (2006 W.L. 2053425) (Minn. P. App. 2006) (doctrine of *in pari delicto* barred plaintiff's claim to seek payment of promised money from unlawful gambling proceeds); *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002) (plaintiff may be barred from bringing RICO claim based upon illegal gambling by doctrine of unclean hands); *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998) (holding that plaintiffs did not have standing to bring a civil RICO claim predicated on illegal gambling because they failed to allege "a compensable injury."); *Kelly v. First Astri Corporation*, 72 Cal. App. 4th 462 (1999) (under the *in pari delicto* doctrine, neither courts of law nor courts of equity will aid or assist a plaintiff to recover money lost in a gambling game that is prohibited by law, regardless of where it is played and even if the loss resulted from cheating, absent a statute authorizing recovery of the gambling losses); *Al-Ibrahim v. Edde*, 897 F.Supp. 620 (D.D.C. 1995) (doctrine of unclean hands barred plaintiff's suit to recovery taxes paid on behalf of the defendant for illegal gaming proceeds); *State v. Hair*, 114 N.C. App. 464, 442 S.E.2d 163 (1994) (one who pays gambling debt owed to another may not subsequently attempt to recover that which he is paid.); *People v. Coates*, 64 A.D. 2d 1 (Sup. Ct. Appellate Division, Second Department N.Y. 1978) (because the parties in an unlawful gambling activity are *in pari delicto*, the unsuccessful gambler has no common law right to recover his losses); *Reynolds v.*

Reynolds, 238 Ga. 1, 230 S.E.2d 842 (1976) (the defense of *in pari delicto* prevents recovery based upon claims involving violation of gambling statutes which constitute a crime); *Grim v. Cheatwood*, 208 Okla. 570, 257 P.2d 1059 (1953) (the general rule is that losses sustained in the gambling game may not be recovered by the loser); *Wallace v. Oppenheim*, 73 Cal. App. 2d 25, 165 P.2d 709 (1946) (in the absence of statute authorizing recovery of gambling losses, loser engaging in a game of "21" which was prohibited by statute cannot maintain an action to recover his losses from the winner alleging using a deck of marked cards); *See also* 38 Am. Jur. 2d § 212, at 259 (1968) (independent of statute, the rule is that there is no remedy for the loser where money or property is delivered in payment of or on account of a gambling contract or transaction, since the law will not lend its aid to a party in either the execution or the rescission of such a contract, the maxim, "*Ex Turpi Causa Non Oritur Actio*" applying, and the loser being regarded as *in pari delicto* with the winner in such cases.)

Plaintiff Lauren Proctor admitted in her deposition and has alleged in her Complaint that she is seeking to recover money that she stole from her employer and allegedly lost to the Defendant while engaged in illegal gambling. Plaintiff Proctor testified that she gambled on video machines operated at Defendant's restaurants. (*Deposition excerpts attached*). Under South Carolina law, a person gambling on a video machine and the operator of the machine are both guilty of a misdemeanor offense. South Carolina law S.C. Code § 16-19-40 makes it unlawful for a person to play

"any game with cards or dice, any gaming table commonly called ABC or E, O or any gaming table known or distinguished by any other letters or by any figures or any machine or device licensed pursuant to § 12-21-2720 and used for

gambling purposes. A person convicted of this offense is subject to imprisonment of not more than 30 days and a fine of not more than \$100."¹

Therefore, because Plaintiff Proctor admittedly lost money while engaged in illegal gambling, she is barred from recovering those losses under the doctrine of in pari delicto.

Therefore, no genuine issue of material fact exists in this case and the court should grant Defendant's motion for summary judgment.

II. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE PLAINTIFF PROCTOR CANNOT RECOVER MONEY LOST WHILE ENGAGED IN ILLEGAL GAMBLING UNDER THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

Plaintiff's Complaint alleges that Defendant's practice of owning and operating video poker machines and collecting more than \$50.00 in gambling losses from Plaintiff is a violation of South Carolina law and constitutes an unfair trade practice from which Plaintiff is entitled to recover. In *Johnson v. Collins Entertainment Co., Inc.*, 349 S.C. 613, 564 S.E.2d 653 (2002), the U.S. District Court certified questions to the South Carolina Supreme Court to determine if video poker operators conduct in collecting money from plaintiffs constituted an unfair or deceptive act for purposes of the South Carolina Unfair Trade Practices Act (SCUTPA). In *Johnson*, the court determined that the video operators conduct did constitute an unfair and deceptive trade practice and held that plaintiffs were entitled to recover their losses. *Johnson*, 349 S.C. at 639, 564 S.E.2d at 667.

The basis for the unfair trade practice claim in *Johnson* was that the defendants were operating video game machines in violation of the South Carolina Video Game Machine Act, which has subsequently been repealed. One provision of this Act limited

¹ 16-19-40 subjects a person who is operating a "gaming house" to a fine of \$1,000 and prison of up to 1 year.

the amount of winnings a player could receive in a twenty four hour period to no more than \$125.00 The Court described various ways in which the defendants attempted to evade the limitation. One such way attempted to shift blame to the players by requiring the players to sign documents verifying that the player had not netted more than \$125 in winnings. The defendants further suggested that the players unfair trade practice claim should fail because of the *in pari delicto* defense, since the players were falsifying documents. The Supreme Court adopted the reasoning the federal District Court which had certified certain questions, that provided:

On this point the defendants suggest an *in para delicto* defense. The translation ends the inquiry-the phrase means "in equal fault." The operators and machines at issue are licensed to operate in a regulated area of the law. They should, therefore, be held to greater knowledge and understanding of the laws than their customers, particularly where the laws are designed to protect the player from his or her own bad judgment. In any case, what the law prohibits is the *making* of the payouts in excess of the statutory cap. It does not directly address the *receipt* of the funds.

Id. at footnote 13

However, since the time of *Johnson*, it has become illegal for persons to "win" money playing video poker. Therefore, the court's holding and rejection of the *in pari delicto* defense in *Johnson* is inapplicable to this case. Moreover, there is no dispute in this case that Plaintiff Proctor was aware that her conduct was illegal.

Each of Plaintiff Proctor's causes of action is precluded by the defense of *in para delicto*. Plaintiff has failed to present the court any triable issue of material fact and the court should grant Defendant's motion for summary judgment.

III. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE PLAINTIFF PROCTOR LACKS STANDING TO BRING SUIT AGAINST DEFENDANT.

Standing to sue is a fundamental requirement to institute an action. *Mulherin-Howell v. Cobb*, 362 S.C. 588, 597, 608 S.E.2d 587, 592 (Ct.App. 2006) citing *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 528 S.E.2d 647 (1999); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App.2003). To have standing, one must have a personal stake in the subject matter of the lawsuit. *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. South Carolina Dep't of Natural Res.*, 345 S.C. 594, 550 S.E.2d 287 (2001); *Evins v. Richland County Historic Pres. Comm'n*, 341 S.C. 15, 532 S.E.2d 876 (2000); *Newman v. Richland County Historic Pres. Comm'n*, 325 S.C. 79, 480 S.E.2d 72 (1997). One must be a real party in interest to have standing to institute litigation. *Charleston County Sch. Dist. v. Charleston County Election Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999); see also *Henry v. Horry County*, 334 S.C. 461, 463 n. 1, 514 S.E.2d 122, 123 n. 1 (1999) ("To have standing, one must be a real party in interest."). A real party in interest is one who has a real, material, or substantial interest in the subject matter of the action, and not merely a nominal or technical interest in the action. *Charleston County Sch. Dist.*, 336 S.C. at 181, 519 S.E.2d at 571; see also *Anchor Point, Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 428, 418 S.E.2d 546, 549 (1992) (holding a party has standing to sue if the party has "a real, material, or substantial interest in the subject matter of the action, as opposed to ... only a nominal or technical interest in the action"); *Huff v. Jennings*, 319 S.C. 142, 148, 459 S.E.2d 886, 890 (Ct.App.1995) ("A real party in interest is one who has a real, actual, material or substantial interest in the subject matter of the action, as distinguished from one who has only a nominal, formal, or technical

interest in, or connection with, the action."'). To have standing, one must have the three required elements of injury in fact, a causal connection and likelihood that a favorable decision would give relief. *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 632 S.E.2d 864 (S.C. 2006).

In this case, Plaintiff Proctor admittedly stole money from her employer and lost the stolen money playing video machines located in the Defendant's restaurants. Now, Plaintiff Proctor is seeking to recover the alleged gambling losses. However, Plaintiff lacks standing to bring such suit because she does not satisfy the injury in fact element required for standing. Because the money Plaintiff lost was stolen, Proctor never had legal ownership of the money and therefore has suffered no injury in fact. Further, Proctor is not a real party in interest in this litigation because she has no real, material, or substantial interest in the subject of the litigation, but rather just a technical interest in that she lost the money she illegally stole from her employer. Because Plaintiff Proctor has suffered no injury in fact and has no real interest in the subject matter of this litigation, she lacks standing to bring this action and the court should grant Defendant's motion for summary judgment.

Furthermore, under the South Carolina Unfair Trade Practice Act, Plaintiff Proctor must establish that she lost money or property as a result of the complained of actions. Section 39-5-140, S.C. Code provides:

Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages.

By her own admission, Plaintiff Proctor did not lose any of her money or property to the Defendants and may not maintain a claim under the Unfair Trade Practices Act.

IV. SUMMARY JUDGMENT IS APPROPRIATE BECAUSE ATLANTIC TITLE LACKS STANDING TO ASSERT DIRECT CLAIMS AGAINST THE DEFENDANT.

When an insurer pays its insured for a loss resulting from the tortuous conduct of a third party, the insurer is subrogated to the rights of its insured against the third party. *Frank B. Hall & Co., Inc of California v. Vic Bailey Lincoln-Mercury, Inc.*, 298 S.C. 282, 284, 379 S.E.2d 892, 894 (1989) citing *Powers v. Calvert Fire Ins. Co.*, 216 S.C. 309, 57 S.E.2d 638 (1950) (an insurer who has paid a claim for property destroyed through the negligence of a third party may be reimbursed out of the funds received by the insured in satisfaction of his claim against the third person); *Calvert Fire Insurance Co. v. James*, 236 S.C. 431, 435, 114 S.E.2d 832, 834 (1960); *Mobile Ins. Co. v. Columbia & Greenville R. Co.*, 41 S.C. 408, 19 S.E. 858, 860 (1894) ("the doctrine being well settled that an insurer, after payment of a loss incurred by the insured, is subrogated to all the rights of the insured against the person or corporation whose tortuous act has caused the loss). Further, where the insurer has paid to the insured the entire loss, the insurer may bring an action either in its own name or in the name of the insured against the tortfeasor whose wrongful act caused the loss. *Calvert Fire Insurance Co. v. James*, 236 S.C. 431, 114 S.E. 2d 832 (1960).

In this case, Atlantic Title has intervened asserting an interest in the action alleging that "[Atlantic] is informed and believes that a portion of the funds making up the gambling debt of Proctor as set forth above were funds converted by Proctor from the real estate trust account of suspended attorney Walter H. Smith. ...As a consequence of this conversion, [Atlantic] was called upon to pay substantial sums to third parties

pursuant to its obligations under title insurance policies, commitments and closing protection letters it issued in regard to real estate closings conducted by or under the supervision of suspended attorney Walter Smith." Amended Complaint, para. 13.

There is no claim in the Amended Complaint that the funds of these third parties to whom Atlantic insured and paid claims totaling more than \$500,000 was gambled by Plaintiff Proctor. Moreover, discovery in this case has failed to demonstrate that any of the money gambled by Plaintiff Proctor was money advanced by the three mortgage companies for real estate closings in May and June, 2005. Rather, Plaintiff Proctor only claims to have lost less than \$20,000 for the months of May and June, 2005. Atlantic Title however paid claims exceeding \$500,000 for loan closings that were scheduled for May and June 2005.

Furthermore, even if it could be assumed that the money allegedly gambled by Proctor in May and June 2005 came from the diverted loan proceeds, Atlantic Title claims against the Defendant would still fail on the basis of causation. Proctor's criminal actions was the legal and proximate cause of the loss to Atlantic Title's insured. At most, Atlantic Title has a lien on any proceeds that Plaintiff Proctor may recover in this action. Because Atlantic Title lacks standing to pursue this litigation, the Defendant is entitled to judgment as a matter of law and Defendant's motion for summary judgment should be granted.

CONCLUSION

Based upon the foregoing, Defendant respectfully requests that the Court grant Defendant's Motion for Summary Judgment.

Respectfully submitted,

/s/ James M. Griffin

James M. Griffin

P.O. Box 999

Columbia, SC 29202

(803) 744-0800

Attorney for Defendant

Columbia, South Carolina

October 2, 2007

Nov. 29, 2007

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Lauren Proctor and Trans-Union National
Title Insurance Company f/k/a Atlantic Title
Insurance Company

Plaintiff,

vs.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man; Forrest
Whitlark; Paul Whitlark; Charlie E. Bishop;
and Brett Blanks

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2006-CP-40-1814

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

Plaintiff's Attorney: Mario Pacella, Bar No. _____ Address: 2110 Beltline Blvd. Suite A, Columbia, SC 29204 Phone: 803-252-4800 Fax 803-252-4801 E-mail: _____ Other: _____		Defendant's Attorney: James M. Griffin, Bar No. 9995 Address: P.O. Box 999, Columbia, SC 29202 Phone: 803-744-0800 Fax 803-744-0805 E-mail: jmg@jlmgriffinlaw.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: Defendants' Motion for Reconsideration or in the Alternative to Alter or Amend Partial Summary Judgment Order Estimated Time Needed: 30 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		September 26, 2011 Date submitted	
SECTION III: Motion Fee ☒ PAID AMOUNT: \$ 25.00 ☐ 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: \$ _____

SCCA 233 (11/2003)

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

Lauren Proctor and Trans-Union National Title
Insurance Company f/k/a Atlantic Title
Insurance Company,

Plaintiffs,

v.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man; Forrest
Whitlark; Paul Whitlark; Charlie E. Bishop;
and Brett Blanks,

Defendant.

Case No.: 06-CP-40-1814

MOTION FOR RECONSIDERATION
AND/OR TO ALTER OR AMEND ORDER
OF PARTIAL SUMMARY JUDGMENT

FILED
C.C.P. & G.S.

SEP 26 AM 11:07

RICHLAND COUNTY

Defendants Forest Whitlark and Paul Whitlark hereby move the Court to reconsider its Order granting partial summary judgment to the Plaintiff Lauren Proctor alleging violations of the South Carolina Unfair Trade Practices Act entered September 9, 2011 and received by Defendants on September 15, 2011. Defendants move pursuant to South Carolina Rules of Civil Procedure Rule 59(e), Rule 60, and this Court's inherent authority to reconsider its own rulings and request that the Court reconsider its conclusion that the doctrine of *in para delicto* has been abrogated by the passage of S.C.Code §§ 32-1-10 and 32-1-20 and the South Carolina Unfair Trade Practices Act.

ARGUMENT

The ruling that S.C.Code §§ 32-1-10 and 32-1-20 abrogated the common law doctrine of *in pari delicto* is directly contrary to controlling South Carolina Supreme Court authority cited to this Court in Defendants' Motion for Summary Judgment. See Rice v. Gist, 32 S.C.L. 82 (1846) (unlawful wagers are not to be recovered in courts of justice); Livingston v. Wootan, 10 S.C.L.

178 (1818) (at common law, the parties to a gambling transaction stand *in pari delicto* and money lost and paid over cannot be recovered); *Owen v. Davis*, 1 Bail. 315, 1829 W.L. 7401 (1829) (money paid for a gaming debt cannot be recovered back by the loser, unless he brings suit for it within the period limited by the statute of Anne); *Hasket v. Wootan* (1 Nott and McC 180, 181 W.L. 850 (1818)) (an illegal wager of \$60, won on a horse raise, cannot be recovered).

All of the cited cases involve the application of the common law doctrine of *in para delicto* and were decided after the enactment of the Statute of Anne, which is currently codified at S.C.Code § 32-1-10 et. seq. In *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993), the Supreme Court explained, "except for changing the monetary threshold this statute [S.C.Code § 32-1-10 et. seq.] has remained unchanged since 1712, when it was adopted from English law by the "reception statute" passed by the South Carolina colonial assembly." This statute, known as the English Statutes of Anne "was originally titled, "An Act for the Better Preventing of excessive and deceitful Gaming." *Id.* The South Carolina Supreme Court relied upon this legislative history in its ruling that Section 32-1-10 was not limited to illegal gambling, but allowed a person who lost money gambling on video poker machines, which were lawful then, to sue and recover under the Statute for losses exceeding \$50.

This Court's ruling that the enactment of S.C.Code §§ 32-1-10 and 32-1-20 abrogated the doctrine of *in para delicto* directly conflicts with the South Carolina Supreme Court decision in *Owen v. Davis*, 1 Bail. 315, 1829 W.L. 7401 (1829), a case relied upon by the Defendants. In *Owen v. Davis* the Court specifically ruled that money paid for a gaming debt cannot be recovered back by the loser, unless he brings suit for it within the period limited by the statute of Anne. The plaintiff was suing the defendant for his share of \$800 in gambling proceeds that they both won from an individual named Murray. In its ruling upholding the plaintiff's right to

recover from the defendant a portion of gambling proceeds won off of Murray, the Court explains that "Murray would have been protected in refusing to pay; but as he had paid, the plaintiff was certainly entitled [sic] to recover his share of the fund, unless, indeed, Murray might himself recover back the whole. This, however, he could not do, except by the authority of the St. 9 Ann. C. 14, and that statute limited his right to three months, which period had now expired

) Similarly, in both *Rice v. Gist*, 32 S.C.L. 82 (1846) and *Hasket v. Wootan* *Hasket v. Wootan* (1 Nott and McC 180, 181 W.L. 850 (1818) also relied upon by Defendants, the Court ruled that party cannot sue to seek to recover the proceeds of a wager. In both decisions the Court addressed the Statute of Anne. ." See also 38 Am. Jur. 2d § 212, at 259 (1968) (independent of statute, the rule is that there is no remedy for the loser where money or property is delivered in payment of or on account of a gambling contract or transaction, since the law will not lend its aid to a party in either the execution or the rescission of such a contract, the maxim, "*Ex Turpi Causa Non Oritur Actio*" applying, and the loser being regarded as *in pari delicto* with the winner in such cases.)

In addition, this Court's conclusion that the South Carolina Legislature abrogated the doctrine of *in pari delicto* with the passage of the South Carolina Unfair Trade Practices Act is also contrary to South Carolina appellate court rulings. In *Johnson v. Collins Entm't Co., Inc.* 349 S.C. 613, 639, 564 S.E. 2d 653, 667 (2002) the Court did not rule that the common law defense of *in pari delicto* had been abrogated by the passage of the South Carolina Unfair Trade Practices Act. Rather, the Court adopted the federal district court's opinion regarding the application of the Unfair Trade Practices Act to claims by persons who lost money playing video poker alleging that the video poker operators violated the South Carolina Video Games Machines Act. With regard to the *in pari delicto* defense, the Court states:

On this point, defendants suggest an *in pari delicto* defense. The translation ends the inquiry-the phrase means "in equal fault." The operators and machines at issue are licensed to operate in a regulated area of the law. They should, therefore, be held to a greater knowledge and understanding of the laws than their customers, particularly where the laws are designed to protect the player from his or her own bad judgment. *In any case, what the law prohibits is the making of the payouts in excess of the statutory cap. It does not directly address the receipt of the funds.* Thus, while this court is not willing to suggest that the player who receives an excess payment is without fault, the fault or culpability is certainly not "equal."

Johnson v. Collins Entm't Co., Inc., 349 S.C. 613, 639, 564 S.E.2d 653, 667 (2002)(emphasis added)

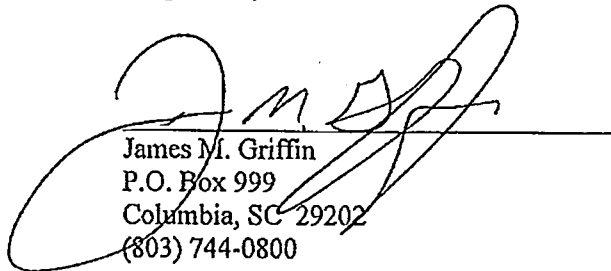
During the time period under consideration in *Johnson v. Collins*, it was not illegal to gamble on video poker machines, nor was it illegal for a player such as Plaintiff Proctor to win money. However, during the period of time that Proctor now seeks to recover gambling losses, her conduct was certainly illegal. Defendants previously presented this Court with deposition excerpts where Plaintiff Lauren Proctor admitted that she is seeking to recover money that she stole from her employer and allegedly lost to the Defendants while engaged in illegal gambling. Plaintiff Proctor testified that she gambled on video machines being operated at Defendant's restaurants and knew that the time she was gambling that her conduct was illegal. Therefore, under the doctrine of *in para delicto* Plaintiff Proctor's claims for recovery of money that she lost while knowingly engaged in illegal gambling are barred by the defense of *in para delicto*.

In addition, the South Carolina Court of Appeals in *Myatt v. RHBT Fin. Corp.*, 370 S.C. 391, 397, 635 S.E.2d 545, 548 (Ct. App. 2006) specifically held that the doctrine of *in pari delicto* to a corporate receiver's claims brought under the South Carolina Unfair Trade Practices Act. Also, in *Jackson v. Bi-Lo Stores, Inc.*, 313 S.C. 272, 276-77, 437 S.E.2d 168, 170 (Ct. App. 1993) the Court applied the similar doctrine of "illegality" to bar claims brought under the South Carolina Unfair Trade Practices Act.

CONCLUSION

Based upon the foregoing, Defendants respectfully request that this Court alter or amend its judgment to either grant Defendants summary judgment or to address the arguments set forth hereinabove which were omitted from this Court's opinion.

Respectfully Submitted.



James M. Griffin
P.O. Box 999
Columbia, SC 29202
(803) 744-0800

Attorney for Defendants

September 25, 2011
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Lauren Proctor and Trans-Union National Title
Insurance Company f/k/a Atlantic Title
Insurance Company,

Case No.: 06-CP-40-1814

Plaintiffs,

v.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man; Forrest
Whitlark; Paul Whitlark; Charlie E. Bishop;
and Brett Blanks,

Defendants.

CERTIFICATE OF SERVICE

JEANIE M. HARMON
C.C.P. & G.S.

2011 SEP 26 AM 11:07

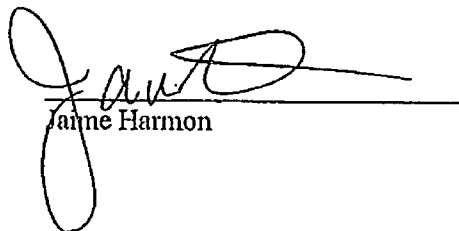
RICHLAND COUNTY
FILED

I, Jaime Harmon, the undersigned employee of Griffin LLC, attorney for Defendants do hereby certify that I have served a copy of the foregoing Defendants' Motion for Reconsideration and/or to Alter or Amend Order of Partial Summary Judgment, in connection with the above-referenced case by hand delivering a copy of the same, to the following address:

Louis H. Lang
Callison Tighe & Robinson, LLC
1812 Lincoln Street, Second Floor
Columbia, SC 29201

Mario Pacella
Strom Law Firm, LLC
2110 Beltline Blvd. Suite A
Columbia, SC 29204

Columbia, South Carolina
September 26, 2011


Jaime Harmon

THE STATE OF SOUTH CAROLINA
In The Court of Appeals --

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

RECEIVED

DEC 13 2011

Case No. 2006-CP-40-1814

SC Court of Appeals

Lauren Proctor and Trans-Union National
Title Insurance Company f/k/a Atlantic
Title Insurance Company,

Respondents,

v.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man, Forrest
Whitlark, Paul Whitlark, Charlie E. Bishop,
and Brett Blanks,

Appellants.

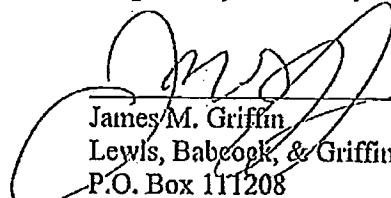
NOTICE OF APPEAL

Whitlark & Whitlark, Inc. d/b/a Rockaways Athletic Club and Pizza Man, Forrest Whitlark, and Paul Whitlark appeal the Judgment entered November 15, 2011 upon the Order of the Honorable Alison Renee Lee dated November 10, 2011 denying the Appellants' Motion For Reconsideration and/or to Alter or Amend the Order of Partial Summary Judgment entered in favor of the Respondents on September 9, 2011 granting the Respondents partial summary

judgment against Defendants Whitlark & Whitlark, Paul Whitlark, and Forrest Whitlark as to liability only.

The Appellants received written notice of entry of the Order and Judgment on November 18, 2011. Copies of the Order and Judgment are attached.

Respectfully submitted,



James M. Griffin
Lewis, Babcock, & Griffin, LLP
P.O. Box 111208
Columbia, South Carolina 29211
(803) 771-8000
Attorney for the Appellants

Columbia, South Carolina

December 12, 2011

Other Counsel of Record:

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Mario Pacella
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2110 Beltline Blvd., Suite A
Columbia, SC 29204

JUDGMENT IN A CIVIL CASE

Lauren Proctor

Whitlark & Whitlark Inc
Rockaways Athletic Club

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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

DISPOSITION TYPE (CHECK ONE)

- 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(n), SCRPC (Vol. Non-suit);
☐ 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;

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk :

ORDER INFORMATION

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.

Clerk of Court Judge _____ Judge Code _____ Dnto _____

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 15 November 2011 to attorneys of record or to parties (when appearing pro se) as follows:

Mario A Pacella
Louis H Lang

James Marcus Whilark
James Milson Griffin
B. Hood Temple
Michael Charles Abbott

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Lauren Proctor and Trans-Union National
Title Insurance Company f/k/a Atlantic
Title Insurance Company,

Plaintiffs,

v.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man, Forrest
Whitlark, Paul Whitlark, Charlie E. Bishop,
and Brett Blanks,

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

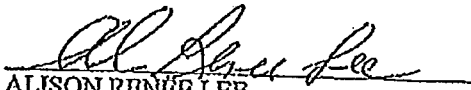
Docket No.: 2006-CP-40-1814

ORDER

RICHLAND COUNTY
FILED
2011 NOV 15 AM 11:14
JEANETTE W. McBRIDE
C.C.P. & G.S.

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 either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby DENIES Applicant's Motion pursuant to Rule 59(e) SCRPC to Alter or Amend Judgment of this Court's Order filed September 9, 2011. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
November 10, 2011

SCANNED

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Lauren Proctor and Trans-Union National
Title Insurance Company f/k/a Atlantic Title
Insurance Company

Plaintiff,

vs.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man; Forrest
Whitlark; Paul Whitlark; Charlie B. Bishop;
and Brett Blanks

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CASE NO.: 2006-CP-40-1814

MOTION AND ORDER INFORMATION

FORM AND COVERSHEET

FILED
2011 SEP 26 AM 11:07
CLERK OF COURT
CCP & CS

Plaintiff's Attorney:
Marlo Pacella, Bar No. _____

Address:
2110 Beltline Blvd. Suite A, Columbia, SC
29204
Phone: 803-252-4800 Fax 803-252-4801
E-mail: _____ Other: _____

Defendant's Attorney:

James M. Griffin, Bar No. 9995
Address:
P.O. Box 999, Columbia, SC 29202
Phone: 803-744-0800 Fax 803-744-0805
E-mail: jmg@jlmgriffinlaw.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: Defendants' Motion for Reconsideration or In the Alternative to Alter or Amend
Partial Summary Judgment Order

Estimated Time Needed: 30 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

September 26, 2011
Date submitted

SECTION III: Motion Fee

☒ PAID AMOUNT: \$ 25.00

☐ 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: _____ Date Filed: _____
☐ MOTION FEE COLLECTED: \$ _____
☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

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

Lauren Proctor and Trans-Union National Title
Insurance Company f/k/a Atlantic Title
Insurance Company,

Plaintiffs,

v.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man; Forrest
Whitlark; Paul Whitlark; Charlie E. Bishop;
and Brett Blanks,

Defendant.

Case No.: 06-CP-40-1814

MOTION FOR RECONSIDERATION
AND/OR TO ALTER OR AMEND ORDER
OF PARTIAL SUMMARY JUDGMENT

FILED
C.C.P. & G.S.

SEP 26 AM 11:07

RICHLAND COUNTY
FILED

Defendants Forest Whitlark and Paul Whitlark hereby move the Court to reconsider its Order granting partial summary judgment to the Plaintiff Lauren Proctor alleging violations of the South Carolina Unfair Trade Practices Act entered September 9, 2011 and received by Defendants on September 15, 2011. Defendants move pursuant to South Carolina Rules of Civil Procedure Rule 59(e), Rule 60, and this Court's inherent authority to reconsider its own rulings and request that the Court reconsider its conclusion that the doctrine of *in pari delicto* has been abrogated by the passage of S.C. Code §§ 32-1-10 and 32-1-20 and the South Carolina Unfair Trade Practices Act.

ARGUMENT

The ruling that S.C. Code §§ 32-1-10 and 32-1-20 abrogated the common law doctrine of *in pari delicto* is directly contrary to controlling South Carolina Supreme Court authority cited to this Court in Defendants' Motion for Summary Judgment. See *Rice v. Gist*, 32 S.C.L. 82 (1846) (unlawful wagers are not to be recovered in courts of justice); *Livingston v. Wootan*, 10 S.C.L.

178 (1818) (at common law, the parties to a gambling transaction stand *in pari delicto* and money lost and paid over cannot be recovered); *Owen v. Davis*, 1 Bail. 315, 1829 W.L. 7401 (1829) (money paid for a gaming debt cannot be recovered back by the loser, unless he brings suit for it within the period limited by the statute of Anne); *Hasket v. Wootan* (1 Nott and McC 180, 181 W.L. 850 (1818)) (an illegal wager of \$60, won on a horse raise, cannot be recovered).

All of the cited cases involve the application of the common law doctrine of *in pari delicto* and were decided after the enactment of the Statute of Anne, which is currently codified at S.C.Code § 32-1-10 et. seq. In *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760 (1993), the Supreme Court explained, "except for changing the monetary threshold this statute [S.C.Code § 32-1-10 et. seq.] has remained unchanged since 1712, when it was adopted from English law by the "reception statute" passed by the South Carolina colonial assembly." This statute, known as the English Statutes of Anne "was originally titled, "An Act for the Better Preventing of excessive and deceitful Gaming." *Id.* The South Carolina Supreme Court relied upon this legislative history in its ruling that Section 32-1-10 was not limited to illegal gambling, but allowed a person who lost money gambling on video poker machines, which were lawful then, to sue and recover under the Statute for losses exceeding \$50.

This Court's ruling that the enactment of S.C.Code §§ 32-1-10 and 32-1-20 abrogated the doctrine of *in pari delicto* directly conflicts with the South Carolina Supreme Court decision in *Owen v. Davis*, 1 Bail. 315, 1829 W.L. 7401 (1829), a case relied upon by the Defendants. In *Owen v. Davis* the Court specifically ruled that money paid for a gaming debt cannot be recovered back by the loser, unless he brings suit for it within the period limited by the statute of Anne. The plaintiff was suing the defendant for his share of \$800 in gambling proceeds that they both won from an individual named Murray. In its ruling upholding the plaintiff's right to

recover from the defendant a portion of gambling proceeds won off of Murray, the Court explains that "Murray would have been protected in refusing to pay; but as he had paid, the plaintiff was certainly entitled [sic] to recover his share of the fund, unless, indeed, Murray might himself recover back the whole. This, however, he could not do, except by the authority of the St. 9 Ann. C. 14, and that statute limited his right to three months, which period had now expired

Similarly, in both *Rice v. Gist*, 32 S.C.L. 82 (1846) and *Hasket v. Wootan* *Hasket v. Wootan* (1 Nott and McC 180, 181 W.L. 850 (1818) also relied upon by Defendants, the Court ruled that party cannot sue to seek to recover the proceeds of a wager. In both decisions the Court addressed the Statute of Anno. ." See also 38 Am. Jur. 2d § 212, at 259 (1968) (independent of statute, the rule is that there is no remedy for the loser where money or property is delivered in payment of or on account of a gambling contract or transaction, since the law will not lend its aid to a party in either the execution or the rescission of such a contract, the maxim, "*Ex Turpi Causa Non Oritur Actio*" applying, and the loser being regarded as *in part delicto* with the winner in such cases.)

In addition, this Court's conclusion that the South Carolina Legislature abrogated the doctrine of *in part delicto* with the passage of the South Carolina Unfair Trade Practices Act is also contrary to South Carolina appellate court rulings. In *Johnson v. Collins Entm't Co., Inc.*, 349 S.C. 613, 639, 564 S.E. 2d 653, 667 (2002) the Court did not rule that the common law defense of *in part delicto* had been abrogated by the passage of the South Carolina Unfair Trade Practices Act. Rather, the Court adopted the federal district court's opinion regarding the application of the Unfair Trade Practices Act to claims by persons who lost money playing video poker alleging that the video poker operators violated the South Carolina Video Games Machines Act. With regard to the *in part delicto* defense, the Court states:

On this point, defendants suggest an *in part delicto* defense. The translation ends the inquiry-the phrase means "in equal fault." The operators and machines at issue are licensed to operate in a regulated area of the law. They should, therefore, be held to a greater knowledge and understanding of the laws than their customers, particularly where the laws are designed to protect the player from his or her own bad judgment. *In any case, what the law prohibits is the making of the payouts in excess of the statutory cap. It does not directly address the receipt of the funds.* Thus, while this court is not willing to suggest that the player who receives an excess payment is without fault, the fault or culpability is certainly not "equal."

Johnson v. Collins Entm't Co., Inc., 349 S.C. 613, 639, 564 S.E.2d 653, 667 (2002)(emphasis added)

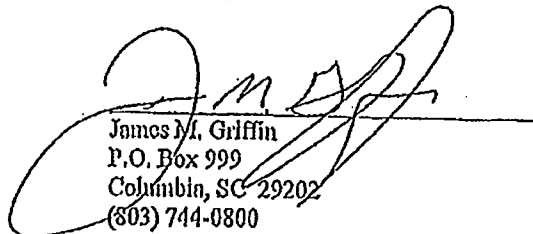
During the time period under consideration in *Johnson v. Collins*, it was not illegal to gamble on video poker machines, nor was it illegal for a player such as Plaintiff Proctor to win money. However, during the period of time that Proctor now seeks to recover gambling losses, her conduct was certainly illegal. Defendants previously presented this Court with deposition excerpts where Plaintiff Lauren Proctor admitted that she is seeking to recover money that she stole from her employer and allegedly lost to the Defendants while engaged in illegal gambling. Plaintiff Proctor testified that she gambled on video machines being operated at Defendant's restaurants and knew that the time she was gambling that her conduct was illegal. Therefore, under the doctrine of *in part delicto* Plaintiff Proctor's claims for recovery of money that she lost while knowingly engaged in illegal gambling are barred by the defense of *in part delicto*.

In addition, the South Carolina Court of Appeals in *Myatt v. RHBT Fin. Corp.*, 370 S.C. 391, 397, 635 S.E.2d 545, 548 (Ct. App. 2006) specifically held that the doctrine of *in part delicto* to a corporate receiver's claims brought under the South Carolina Unfair Trade Practices Act. Also, in *Jackson v. BI-Lo Stores, Inc.*, 313 S.C. 272, 276-77, 437 S.E.2d 168, 170 (Ct. App. 1993) the Court applied the similar doctrine of "illegality" to bar claims brought under the South Carolina Unfair Trade Practices Act.

CONCLUSION

Based upon the foregoing, Defendants respectfully request that this Court alter or amend its judgment to either grant Defendants summary judgment or to address the arguments set forth hereinabove which were omitted from this Court's opinion.

Respectfully Submitted,



James M. Griffin
P.O. Box 999
Columbia, SC 29202
(803) 744-0800

Attorney for Defendants

September 25, 2011
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Lauren Proctor and Trans-Union National Title
Insurance Company f/k/a Atlantic Title
Insurance Company,

Case No.: 06-CP-40-1814

Plaintiffs,

v.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man; Forrest
Whitlark; Paul Whitlark; Charlie B. Bishop;
and Brett Blanks,

Defendants.

CERTIFICATE OF SERVICE

2011 SEP 26 AM 11:07
JENNIFER H. HARRISON
C.C.P. & C.S.

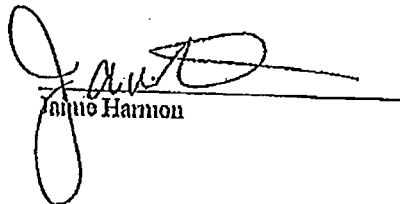
RICHLAND COUNTY
FILED

I, Jaime Harmon, the undersigned employee of Griffin LLC, attorney for Defendants do hereby certify that I have served a copy of the foregoing Defendants' Motion for Reconsideration and/or to Alter or Amend Order of Partial Summary Judgment, in connection with the above-referenced case by hand delivering a copy of the same, to the following address:

Louis H. Lang
Callison Tighe & Robinson, LLC
1812 Lincoln Street, Second Floor
Columbia, SC 29201

Mario Pacella
Strom Law Firm, LLC
2110 Bellline Blvd. Suite A
Columbia, SC 29204

Columbia, South Carolina
September 26, 2011


Jaime Harmon

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2006CP4001814

Lauren Proctor

vs.

Plaintiff

Whitlark & Whitlark Inc
2006 SEP 29 PM 3:30
JENNETTE W. McBRIDE
C.C.P. & G.
RICHLAND COUNTY
FILED
Defendant

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;☐ Statement of Judgment by the Court;

Dated at Columbia, South Carolina, this _____ day of _____, 2009.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2009, and a copy mailed first class this _____ day of _____, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

Marlo A Pacella
Louis H Lang

ATTORNEY(S) FOR THE PLAINTIFF(S)

James Marcus Whitlark
James Milton Griffin
E. Hood Temple
Michael Charles Abbott

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W. McBride
Clerk of Court

SCRPC APP-24/FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

C/A # 06-CP-40-1814

Lauren Proctor and TransUnion National Title
Insurance Company f/k/a Atlantic Title
Insurance Company,

Plaintiffs,

vs.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man, Forrest Whitlark,
Paul Whitlark, Charlie E. Bishop, and Brett
Blanks,

Defendants.

ORDER ON SUMMARY JUDGMENT

2011 SEP -9 PM 3:30
FILED
RICHLAND COUNTY
JANETTE W. MCBRIDE
C.C.P. & G.S.

Before the Court are a number of motions for summary judgment. Plaintiff Lauren Proctor ("Plaintiff" or "Proctor") has filed a Motion for Partial Summary Judgment contending no genuine issue of material fact exists other than the amount of damages. Plaintiff TransUnion National Title Insurance Company ("TNTIC") joins in Plaintiff-Proctor's motion. Defendants Whitlark & Whitlark, Inc., Forest Whitlark, and Paul Whitlark (collectively referred to as "Whitlark Defendants") filed a Motion for Summary Judgment contending that they are entitled to summary judgment because of the common law affirmative defense of *in pari delicto*. The Honorable William P. Keesley, in an Order dated August 20, 2008, previously addressed these summary judgment motions, resolving them without prejudice to the parties to re-file the motion on certain issues. Defendants Charlie E. Bishop and Brett Blanks (collectively "Bishop and Blanks") also filed a Motion for Summary Judgment alleging that Plaintiffs cannot recover because the causes of action are barred by the statute of limitations, unclean hands, and the affirmative defense of *in pari delicto*. 

FACTUAL BACKGROUND

In 1988, Attorney Walter Smith had a real estate practice in which he employed a company named State Title to provide real estate closing services. Stella Kelly owned State Title. Her daughter is the Plaintiff Lauren Proctor. Atlantic Title (now known as TNTIC) was the principal, if not the exclusive, title insurance company that Smith and State Title used. *In Re Smith*, 370 S.C. 343, 345-346, 635 S.E.2d 87, 88-89 (2006).

Smith had no meaningful involvement in handling the proceeds from the real estate closings after the clients left his law office, and did not reconcile or thoroughly inspect the records of his trust accounts until severe shortages appeared in 2005. This was true despite what the Supreme Court described as the dramatic and glaring red flags showing that the proceeds from the real estate closing were not being safely kept. These red flags began in 2000 and lasted at least until June 2005. *In re Smith*, 370 S.C. at 347-349, 635 S.E.2d at 89-90.

Proctor began stealing funds from Smith's trust account. To embezzle the funds, she would write herself checks made out to cash, forge her mother's signature on checks, or launder the funds through a friend's checking account. She knew that all of this was wrong and illegal when she did it.

On June 16, 2005, Smith, having discovered the problem, self-reported and notified Atlantic Title of the shortages and problems with the trust account. *Id.* at 352, 635 S.E.2d at 92. He was ultimately suspended indefinitely. *Id.*

Proctor claims that she used the funds that she admittedly stole to gamble at various establishments, including Rockaway's Athletic Club and Pizza Man run by the Whitlark defendants. Bishop and Blanks formerly co-owned a limited liability company, named Zodiac Distributing, LLC, before it dissolved on May 3, 2007. Zodiac placed one coin operated touch screen amusement game at the Pizza Man restaurant. Zodiac's machine was only one of the five or six machines available at Rockaway's and Pizza Man. Zodiac's machine had attached to it the required operator's license which identified it as the owner.

Proctor pled guilty in federal court and was ordered to pay \$755,000 in restitution for the illegal diversion of the money. She now seeks to recover from all the Defendants the gambling losses she allegedly incurred up to June 2005. TNTIC seeks to recover the losses which it traces through Proctor, Smith, and the Whitlarks before reaching Bishop and Blanks. TNTIC has also brought a separate action against Proctor, its co-plaintiff in this action. See Docket No. 2005-

CP-40-05411. In that action, TNTIC seeks to recover from Proctor the same losses that it seeks in this action. Proctor entered a Confession of Judgment in the amount of \$461,495.32 on January 23, 2008.

In late October or early November 2007, Plaintiff and her counsel received discovery documents from Whitlark & Whitlark, Inc., including one page of an indemnification agreement between Zodiac Distributing, LLC, Brett Blanks, Charlie Bishop, and Defendants Forrest and Paul Whitlark. Prior to receipt of that document, Plaintiff Proctor contends that neither Plaintiff nor her attorney knew of the relationship between Zodiac Distributing LLC, Brett Blanks, Charlie Bishop, and the Whitlarks. On November 7, 2007, Forrest Whitlark waived his Fifth Amendment privilege and testified for the first time that one of the machines at Pizza Man was owned by Zodiac Distributing, Charlie Bishop, and Brett Blanks. Previous attempts to acquire this information from Forrest Whitlark were delayed by the assertion of his Fifth Amendment privilege. During that deposition, Plaintiff learned for the first time that Defendants Bishop and Blanks shared in the profits with Forrest Whitlark and others generated from that machine at Pizza Man.

On November 19, 2007, Plaintiff's counsel contacted Heath Taylor, attorney for Defendants Charlie Bishop and Brett Blanks, and notified him that, given the new information, Plaintiffs would be filing a motion to amend the complaint to include the two new defendants. Ms. Proctor's attorney filed a Motion to Amend the Complaint two days later on November 21, 2007, along with an accompanying proposed Second Amended Complaint that included Charlie Bishop and Brett Blanks as defendants.

Plaintiffs' Motion to Amend was heard in January, 2008 and taken under advisement. A written order was issued on August 20, 2008 granting Plaintiffs' Motion to Amend the complaint to add Charlie Bishop and Brett Blanks as defendants in the case. Following that ruling, Plaintiff filed her Second Amended Complaint on August 29, 2008. The Second Amended Complaint alleges causes of action for declaratory judgment, unjust enrichment, civil conspiracy, violations of the Unfair Trade Practices Act, and negligence.

STANDARD OF REVIEW

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Hamiter v. Retirement Division of South Carolina, 326 S.C. 93, 96, 484 S.E 2d 586, 587 (1997); Café Assocs., Ltd. v. Gerngross,

305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). The Court may grant summary judgment to a party when, after a reasonable time for discovery, the evidence demonstrates that the non-movant has failed to establish an essential element of his case. The party moving for summary judgment bears the initial burden of meeting this exacting standard. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970). In determining whether any triable issue of fact exists which will preclude summary judgment, the evidence, and all inferences that can be reasonably drawn, must be viewed in the light most favorable to the non-moving party. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000).

Once the moving party has met this initial burden, the burden shifts to the opposing party to show that a genuine issue of material fact exists. Celotex Corp. v. Catrell, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). The opposing party may not simply rest upon mere allegations or denials of the pleadings. Rather, the nonmoving party must make a sufficient showing of facts to establish the existence of an essential element to his case on which he will bear the burden of proof at trial. Id. Summary judgment is also inappropriate where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co., 420 F.2d 1211, 1213 (5th Cir. 1969).

I. STANDING OF BOTH PLAINTIFFS

All Defendants challenge both Plaintiffs' standing to bring the claims. In the Order dated August 20, 2008, Judge Keesley ruled that Proctor had standing to bring the action. That ruling is not law of the case. No additional evidence has been presented to reconsider that ruling.

The party seeking to establish standing has the burden of proving it. Powell v. Bank of America, 379 S.C. 437, 665 S.E.2d 237, 241 (Ct.App. 2008). In this case, TNTIC's theory of standing is much too attenuated for it to establish that it is a proper party. Bishop's and Blanks' alleged wrongdoing is several steps removed from TNTIC's alleged losses, including others' criminal and sanctionable acts. In Powell, *supra*, for example, the court was called on to determine if a bank had standing to question the allocation of interpled funds that the bank held on deposit. The Bank argued on appeal that it had an interest in the allocation in that a certain allocation would reduce the Bank's potential liability. The Court held that this practical concern was too tangential and peripheral to confer standing. Powell, 665 S.E.2d at 241.

and
#4

Powell relied heavily on *Ex parte Government Employee's Ins. Co.*, 373 S.C. 132, 644 S.E.2d 699 (2007), for its analysis. In that case, a UIM carrier wanted to intervene in a family court action brought to determine if a common law marriage existed. The family court held that the UIM carrier lacked standing. The Supreme Court affirmed. In affirming, the Court noted that a UIM carrier had an interest in whether or not a common law marriage existed, in that it would affect its burden of proof in resolving a related claim for insurance benefits, yet held that this financial interest was too peripheral and tangential to confer standing.

The Court in *Wogan v. Kunze*, 366 S.C. 583, 623 S.E.2d 107 (Ct.App. 2007), addressed a similar issue in the context of an Unfair Trade Practices Act claim. There, a wife tried to bring a UTPA claim against a doctor for allegedly improperly billing medical services to her husband. The Court held that she did not state a claim because she did not suffer an ascertainable loss "as a result of" the acts allegedly directed toward her husband.

This case is even more removed than was *Powell*, *Ex parte Government Employee's*, and *Wogan*. Atlantic Title was the title insurance company that insured certain lenders and purchasers whose loans were closed by Attorney Smith and the title company employing Plaintiff Proctor. TNTIC's insured was the lender and the purchaser on these real estate transactions not the attorney or the title company employing Proctor. As part of the title insurance, the insurance company also insured against loss from theft conducted by its authorized title agent. TNTIC is subrogated to the rights of its insured not Walter Smith or the title company employing Proctor. It may seek to recover the money it paid from the person who caused the loss. It has done that by bringing an action against Lauren Proctor and Walter Smith. A judgment was obtained against both of them. To the extent that Proctor may be successful in this action and recover money from the defendants, TNTIC may seek to have its judgment paid by those funds. However, TNTIC has no direct cause of action against Defendants, not even a claim for indemnification. At best TNTIC may have a lien it could enforce in the event Proctor prevails in this action. TNTIC lacks standing to assert any claim against the Defendant. Furthermore, TNTIC can sue and is suing Proctor for its losses. This alternative forum shows that it can protect its interests by other means. See *Ex Parte Government Employee's*, 373 S.C. at 137, 644 S.E.2d at 702 (noting that UIM carrier lacked standing in part because it could protect its interests in the related litigation).

and
#5

II. STATUTE OF LIMITATIONS

Defendants Bishop and Blanks argue that, because the causes of action accrued in June 2005, and Blanks and Bishop were not served until September 2008 and November 2008, respectively, the three-year statute of limitations has run out on both Plaintiff's Unfair Trade Practices Act (UTPA) and civil conspiracy claims. Plaintiffs dispute the accrual date based upon the discovery rule. Because Plaintiffs are within the statute of limitations for the reasons that follow, the Court declines to address the date of accrual.

In the motion filed by Defendants Bishop and Blanks, they cite a number of cases where Plaintiffs attempted to add party Defendants *after* the statute of limitations had already expired. These cases are distinguishable based upon the fact that Plaintiff did not attempt to add the parties until the limitations period had expired. The statute of limitations does not dictate when service is effected, but merely when an action must be *brought*. See S.C. Code Ann. § 39-5-150 (1976) ("No action may be brought under this article more than three years after discovery of the unlawful conduct which is the subject of the suit."). Most importantly, Plaintiff filed her motion to amend to add Bishop and Blanks *before* the statute of limitations had expired. Under Rule 15(a), the complaint could not be amended without the consent of the adverse parties or a court order.

Suit was brought against all Defendants within the three-year statutory period. Defendants Bishop and Blanks were given notice of the claims against them in November 2007, well within the statutory period, when Plaintiff filed the Motion to Amend seeking to add them as parties and Plaintiff's counsel notified Defendants of the filing. Plaintiff's causes of action accrued in June, 2005 and have a three-year statute of limitations. Plaintiff Proctor argues that filing her Motion to Amend on November 21, 2007 with an accompanying Amended Complaint within the three-year period tolled the statute of limitations until the Court issued its Order granting the motion, giving Plaintiff a reasonable time to amend.

The issue of whether a motion to amend, accompanied by an amended complaint, tolls the statute of limitations is one of first impression in South Carolina. Federal cases addressing this issue indicate that the Motion to Amend and an Order granting such do toll the statute of limitations. See Bradley v. Armstrong Rubber Co., 46 F.Supp.2d 583, 585 (S.D.Miss.,1999) (finding that Plaintiffs' Motion for Leave to Amend and the Order granting leave tolled the statute of limitations for a reasonable time).

Other federal courts addressing this issue have also held that the filing of a motion to amend a complaint to add additional parties, when accompanied by a copy of the proposed amended complaint, tolls the applicable statute of limitations. See Moore v. State of Indiana, 999 F.2d 1125, 1131 (7th Cir.1993); Maves v. AT & T Information Systems, Inc., 867 F.2d 1172, 1172 (8th Cir.1989); Longo v. Pennsylvania Elec. Co., 618 F.Supp. 87, 89 (W.D.Pa.1985), *aff'd*, 856 F.2d 183 (3d Cir.1988); Eaton Corp. v. Appliance Valves Co., 634 F.Supp. 974, 982-83 (N.D.Ind.1984), *aff'd on other grounds*, 790 F.2d 874 (Fed.Cir.1986); Gloster v. Pennsylvania R.R. Co., 214 F.Supp. 207, 208 (W.D.Pa.1963).

In their analyses, the primary concern the courts face in determining whether to allow a Plaintiff to amend her complaint to add additional parties is the possibility of prejudice to the added Defendant. See Bradley, 46 F.Supp.2d at 587 (finding that since Defendants had notice of the amendment and were not prejudiced by Plaintiffs' delay in amending their Complaint, the added claims were not barred by the statute of limitations). Here, Plaintiff's counsel personally notified defendant's former lawyer on November 19, 2007, of Plaintiff's intention to file a motion to amend her complaint to include the Defendants based on the newly discovered information provided in Discovery. Plaintiff filed her Motion to Amend the Complaint, along with the Second Amended Complaint, on November 21, 2007. Defendants thus had notice of their inclusion in the suit several months *before* the statute of limitations would expire.

"[O]nce the plaintiff has filed its proposed amended complaint accompanied by a motion for leave to amend within the statutory period, the statute of limitations is tolled even though the court order granting leave to amend and the technical filing of the amended complaint occur after the running of the statute of limitations. This is the only just and proper result since once leave to amend has been requested and a proposed complaint is on file, the plaintiff has taken those steps within his power to toll the statute and must await the appropriate court order."

Frazier v. East Tennessee Baptist Hosp., Inc., 55 S.W.3d 925, 929 (Tenn.,2001)(citing Eaton Corp. v. Appliance Valves Co., 634 F.Supp. 974, 982-83 (N.D.Ind.1984)(holding that when the motion to amend the complaint and a proposed amended complaint are filed prior to the running of the statute of limitations, the motion to amend stands in place of the actual amended complaint while the motion is under review by the court). This Court adopts the federal standard that a properly filed Motion to Amend, along with a proposed amended complaint adding parties, tolls

the statute of limitations during the time the motion is pending and the parties are awaiting a court order. Plaintiff followed this standard by filing her Motion with an accompanying amended complaint. The statute of limitations was tolled for a reasonable period of time. Here, Plaintiff filed her Second Amended Complaint on August 29, 2008, a mere nine days after the Court issued its order granting her leave to amend, and served both Defendants within ninety (90) days of filing, well within the limits imposed by the Rule 3.

III. SUMMARY JUDGMENT AS TO PROCTOR'S EQUITABLE CLAIMS

Proctor's equitable claims must fail due to her unclean hands. Proctor admits that she repeatedly engaged in gambling after it became illegal and stole funds from Walter Smith's trust accounts to do so. She also knew that her conduct was unlawful including the embezzlement and forging her mother's name. There are no allegations that she had any dealings directly with Bishop or Blanks or that they did anything to induce her to engage in these illegal acts. Zodiac Distributing, LLC simply supplied one of several legal coin operated video gaming machines on which Proctor played. Her participation in illegal and wrongful acts giving rise to her alleged injury are complete defenses to the equitable claims.

The doctrine of "unclean hands" precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. First Union Nat. Bank of South Carolina v. Soden, 333 S.C. 554, 511 S.E. 2d 372 (Ct. App. 1998). Here, Plaintiff specifically admitted that when she won proceeds that she would either keep gambling with these proceeds or she would leave with the money. On whole, through Plaintiff asserts that she eventually lost all of the money that she gambled with to the Defendants. Nevertheless, Plaintiff admitted that had she been a net winner, rather than a net loser, Plaintiff Proctor would have not returned the money to the Defendants. In addition, all of the money that Plaintiff claims she lost gambling on video machines owned by the Defendants was stolen from her employer. Plaintiff Proctor's claims are likewise barred by the doctrine of unclean hands.

IV. THE COMMON LAW DOCTRINE OF IN PARI DELICTO

The common law doctrine of *in pari delicto*¹ is a common law doctrine that states that a court should not allow a person to recover money lost in an illegal venture. The South Carolina

¹ Black's Law Dictionary defines the Latin term *in pari delicto* as "in equal fault."

Supreme Court recognized this doctrine in very old gambling cases. However, the South Carolina legislature abrogated this doctrine in passing a number of statutes, including S.C. Code Ann. §§ 32-1-10, 32-1-20, and the South Carolina Unfair Trade Practices Act. In Collins Entertainment, the South Carolina Supreme Court had the opportunity to address the issue of whether the doctrine of *in part delicto* at common law prohibited a person to recover gambling losses under the South Carolina Unfair Trade Practices Act. The Supreme Court explained that "[s]ections 32-1-10 and 20 promote 'a policy which prevents a gambler from allowing his vice to overcome his ability to pay. The legislature adopted a policy to protect a citizen and his family from the gambler's uncontrollable impulses.'" Collins Entertainment, 349 S.C. at 635, 564 S.E.2d at 664-665.

The Supreme Court further explained that Sections 32-1-10 and 32-1-20 do not have preclusive effect regarding remedies afforded under the South Carolina Unfair Trade Practices Act because S.C. Code Ann. § 39-5-160 provides that powers and remedies under this section are cumulative and supplementary to all powers and remedies provided by existing law. Id. Because the common law doctrine of *in part delicto* was abrogated by the passage of Sections 32-1-10 and 32-1-20, and Plaintiff is in the class of persons that the statutes were designed to protect, Plaintiff is not barred from recovery under the doctrine of *in part delicto*. Because Collins Entertainment is on point that the doctrine of *in part delicto* has been abrogated regarding suits for gambling losses under the South Carolina Unfair Trade Practices Act, Plaintiff is not barred from recovery because she gambled at Rockaways and Pizza Man.

V. PLAINTIFFS MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff seeks partial summary judgment on the basis that Whitlark & Whitlark admitted Proctor lost \$130,000 gambling at its establishment. To support its motion, Proctor filed an Affidavit and also refers to the Deposition of Forrest Whitlark taken on November 7, 2007 in the lawsuit filed by Atlantic Title against Proctor, Walter Smith, and others (Docket No. 2005-CP-40-05411). This deposition was taken pursuant to a confidentiality order signed by the parties in the current action and was filed under seal. ad
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Further, Plaintiffs argue that the operation of video gaming machines violates the S.C. Unfair Trade Practices Act because it is a violation of the Racketeer Influenced Corrupt Organizations Act (RICO) as well as other federal statutes relating to illegal gambling, money laundering and racketeering activity. The Defendant opposed the motion based upon the *in part*

delicto defense. Plaintiff relies on Johnson v. Collins Entertainment Co., Inc., 349 S.C. 613, 564 S.E.2d 653 (2002) to show that Defendant violated these various federal statutes. Analysis of federal statutes is not necessary in determining whether there was a violation of the S.C. Unfair Trade Practices Act ("Act"). The operation of video poker machines became unlawful in 2000. S.C. Code Ann. § 39-5-20 provides in part that "unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." In order to be actionable, an unfair or deceptive act must have an impact upon the public interest. Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006) rehearing denied. An act is "unfair" under the Act when it is offensive to public policy, or when it is immoral, unethical, or oppressive. Id. Clearly the operation of video poker machine in contravention of state law is an unfair act as defined by the Act. Thus, partial summary judgment is granted as to Defendant Whitlark & Whitlark on the issue of liability only.

In private actions under the Act, directors and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of the Act. BPS, Inc. v. Worthy, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005). The evidence presented demonstrates that the individual Whitlark defendants had knowledge and participated in the unlawful conduct; therefore, partial summary judgment is granted as to liability against Paul Whitlark and Forrest Whitlark. The amount of damages is a factual issue to be determined.

Plaintiff did not seek partial summary judgment against Defendants Bishop and Blanks.

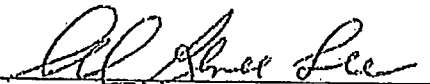
ORDER

Based upon the foregoing, it is hereby ORDERED:

1. Partial Summary Judgment is granted against Defendant Whitlark & Whitlark, Paul Whitlark, and Forrest Whitlark as to liability only.
2. Defendants' motion for summary judgment based upon standing against TNITIC is granted but denied as to standing of Proctor.
3. Defendants' motion for summary judgment against Proctor based upon unclean hands is granted.

*Paul
x10*

4. Defendants' motion for summary judgment on the basis of *in pari delicto* is denied.
 5. Bishop and Blanks motion for summary judgment as to the statute of limitations is denied. Their motion as to the claim of unjust enrichment is granted.
- AND IT IS SO ORDERED.


ALISON RENEE LEE
Circuit Court Judge

Columbia, South Carolina
September 9, 2011.

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#11

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-1814

RECEIVED

DEC 13 2011

SC Court of Appeals

Lauren Proctor and Trans-Union National
Title Insurance Company f/k/a Atlantic
Title Insurance Company,

Respondents,

v.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man, Forrest
Whitlark, Paul Whitlark, Charlie E. Bishop,
and Brett Blanks,

Appellants.

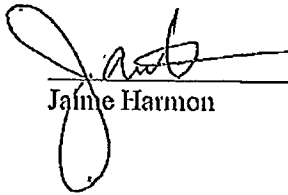
PROOF OF SERVICE

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for Appellant Will D. Wheeler, do hereby certify that I have served a copy of the foregoing Notice of Appeal, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses on December 13, 2011:

Mario Pacella
Strom Law Firm, LLC
2110 Beltline Blvd. Suite A
Columbia, SC 29204

Louis H. Lang
Callison Tighe & Robinson, LLC
1812 Lincoln Street, Second Floor
Columbia, SC 29201

The Honorable Jeanette McBride
Clerk of Court, Richland County
1701 Main Street, Room 205
Columbia, SC 29201



Jaime Harmon

Columbia, South Carolina
December 13, 2011

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
County of Richland	)	06-CP-40-1814
	)	
LAUREN PROCTOR,	)	
	)	
PLAINTIFF ,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
WHITLARK & WHITLARK, INC.,	)	
	)	
DEFENDANT,	)	

April 14, 2009
Columbia, South Carolina

BEFORE:

THE HONORABLE ALISON RENEE LEE, JUDGE.

APPEARANCES:

MARIO PACELLA, ESQ.
Attorney for the Plaintiff

Louis Lang, ESQ.
Attorney for TransUnion

JAMES GRIFFIN, ESQ.
Attorney for the Defendants

MICHAEL ABBOTT, ESQ.
Attorney for Brett Blanks, Charles Bishop

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: Okay. Our last case, I understand it,
2 for day is docket number 2006-CP-40-1814, Lauren Proctor
3 vs. Whitlark and Whitlark, Incorporated, et al. The
4 plaintiff is represented by Mario Pacella, and Louis Lang
5 is also representing TransUnion National Title Insurance
6 Company; is that correct?

7 MR. LANG: That's correct, Your Honor.

8 THE COURT: And for the defendants, I have Jim
9 Griffin who is representing Pizza Man, Rockaways Athletic
10 Club, Forest Whitlark and Paul Whitlark, as well?

11 MR. GRIFFIN: That's correct.

12 THE COURT: And Whitlark and Whitlark; is that
13 correct?

14 MR. GRIFFIN: Correct.

15 THE COURT: And then for the remaining defendants, I
16 have --

17 MR. ABBOTT: Michael Abbott, Your Honor.

18 THE COURT: -- Michael Abbott for Brett Blanks and
19 Charles Bishop.

20 MR. ABBOTT: That's correct.

21 THE COURT: I think that covers everybody.

22 MR. ABBOTT: Your Honor, before you break into that,
23 you had mentioned about the pending motions, and I don't
24 have any issue with the analysis of the clerk in --

25 THE COURT: Okay.

1 MR. ABBOTT: I do --

2 THE COURT: I just want to make -- because when I got
3 this notebook, it appeared that there were motions pending
4 from a long time ago, and I just wanted to make sure --

5 MR. ABBOTT: Your Honor, I do want -- I did file an
6 amended motion for summary judgment. I want to give an
7 explanation of why I did that. It has to do with Judge
8 Keesley's order from August 20 -- 20th, 2008.

9 THE COURT: For --

10 MR. ABBOTT: He did -- he denied Plaintiff's motion
11 for partial summary judgment basically saying they are
12 genuine issues of fact.

13 The argument that we made -- it's going to be the
14 argument we're making here again today in response to
15 Mr. Griffin's motion for summary judgment -- the only
16 argument was the in pari delicto defense, whether it's
17 available or not available, and that was the crux of the
18 summary judgment motion.

19 And in reality, the resolution of Mr. Griffin's
20 summary judgment motion will resolve that issue that we
21 have, as well.

22 So we refiled that motion in -- in sort of an
23 abundance of caution to sort of protect that interest as
24 what -- because the order is really sort of unclear for
25 us.

1 THE COURT: Okay. Okay. And since the first motion
2 I've got is the December 12th, 2008 motion that was filed,
3 I guess, by Mr. Abbott, I guess we ought to take up that
4 particular issue first.

5 The only thing I have on -- I mean, there's a lot of
6 papers in the file, and I've been through the file a
7 couple of times. I just want to make sure that I have
8 everything.

9 (Pause).

10 Okay. Yes, sir. And I have -- Mr. Abbott, you did
11 send me a proposed order, so I just wanted to make sure I
12 had that information, as well.

13 Yes, sir.

14 MR. ABBOTT: That's correct, Your Honor. There
15 should also be a memo in support of the motion with the
16 affidavit that was attached, as well.

17 THE COURT: Attached to the motion?

18 MR. ABBOTT: Attached to the memo in support. I
19 asked the -- I filed the motion. Sometime later I filed
20 the affidavit, and then sometime later I filed in support,
21 and I asked the clerk to attach it to all the motions.

22 THE COURT: The order that I'm referring to is one
23 that was e-mailed to me.

24 MR. ABBOTT: Correct. I did that on Thursday or
25 Friday. March 23rd, I filed an affidavit, and March 16th,

1 I filed a memo in support.

2 THE COURT: I wouldn't count on me having those.
3 When? Give me the dates again.

4 MR. ABBOTT: Your Honor, the memo was filed
5 March 16th.

6 THE COURT: Of 2009?

7 MR. ABBOTT: Yes, ma'am.

8 THE COURT: I haven't seen it, so if you happen to
9 have an extra copy.

10 MR. PACELLA: Your Honor, I also have a memo that I
11 filed last week in opposition with two affidavits
12 attached. I have a copy I'll hand up to your clerk.

13 THE COURT: Well -- and Mr. Pacella, I have a whole
14 notebook from you, so I assume that everything that you
15 have is in that notebook.

16 MR. PACELLA: It is in that notebook before you, Your
17 Honor.

18 THE COURT: Because that's the only way I got it.

19 MR. PACELLA: Okay.

20 THE COURT: Well, actually what I have is --

21 MR. PACELLA: There would be a memo in opposition to.

22 THE COURT: Right, and it did have a file date on it.
23 It's in here, but there's not a copy clocked in.

24 MR. PACELLA: And, Your Honor, I don't have it --

25 MR. ABBOTT: Your Honor, there is the affidavit, the

1 order that I prepared and sent for you on Thursday,
2 everything is in that. Everything that's in that memo is
3 in the order, so if you look at that and have that
4 available, I think it will serve you just as well, and
5 I've got the memo, if you like it. It essentially says
6 the same thing.

7 THE COURT: It says the same as the order says?

8 MR. ABBOTT: Yes, ma'am.

9 THE COURT: And I assumed it would. Sometimes there
10 is an attachment I need to be aware of.

11 MR. ABBOTT: The only attachment would be the
12 affidavit.

13 THE COURT: Okay.

14 Mr. Lang, you have got any documents?

15 MR. LANG: Yes, ma'am.

16 THE COURT: Okay.

17 MR. LANG: Hopefully not to confuse things further, I
18 do have the submissions where I sent out copies, my fax,
19 to everyone last Friday. This is just a motion for the
20 attachments that was filed in a related case that may have
21 some bearing on the issues today.

22 THE COURT: Thank you.

23 Okay. Yes, sir.

24 MR. ABBOTT: Thank you, Your Honor, may it please the
25 Court.

1 Your Honor, without going through the long factual
2 history of this case which was set out in the proposed
3 order that you had for me and several of the other parties
4 here, the -- my motion boils down to a statute of
5 limitations defense.

6 Your Honor, I think the original suit giving rise to
7 all these parties being here today took place in 2006.
8 The plaintiffs in their complaint indicate that the cause
9 of action about which they complained accrued in June of
10 2005. That's from paragraph 22 of the second amended
11 complaint.

12 The second amended complaint added my clients,
13 Charlie Bishop and Brett Blanks, as parties. Your Honor,
14 that second amended -- second amended complaint was filed
15 on August 29th of 2008. Mr. Blanks was served in
16 September of 2008 and Mr. Bishop in November of 2008.

17 Your Honor, it's the position of the defendants,
18 Blank and Bishop, that more than three years has elapsed
19 from the date the plaintiffs admit that the causes of
20 action accrued for which they were added as parties and
21 for which they were served.

22 Your Honor, for both the unfair trade practices act
23 cause of action and the civil conspiracy cause of action,
24 there's a three-year statute of limitations. Again, more
25 than three years has elapsed since my two clients were

1 brought into the case.

2 It's our position that there is no dispute, the fact
3 that that amended cause of action accrued, and they were
4 brought into the case. There is no dispute that more than
5 three years passed since that time.

6 We believe, Your Honor, we are entitled to judgment
7 as a matter of law for the statute of limitations having
8 run.

9 Your Honor, I have some other grounds for summary
10 judgment, as well, in my motion and kind of bootstrapping
11 Mr. Griffin on those. I think I'll refer to him as he
12 gets his argument.

13 My main argument on this is a statute of limitations
14 defense.

15 THE COURT: Mr. Pacella.

16 MR. PACELLA: Your Honor, to give the Court a brief
17 procedural history, this is a suit to recover gambling
18 losses. Ms. Proctor gambled at Rockaways, had some
19 significant losses and she is bringing suit to recover.

20 Defendants Bishop and Blanks apparently were the
21 distributors of one of five machines that were at this
22 restaurant.

23 This case was filed in 2006, and served written
24 discovery, took depositions, actually deposed Forest
25 Whitlark twice and Paul Whitlark one time. They asserted

1 fifth amendment privilege in those depositions, and we're
2 seeking to try to find out if there was a distributor who
3 might have been involved in the -- in this operation.

4 Finally, the Whitlark defendants or at least Whitlark
5 and Whitlark, Incorporated decided that it would waive
6 fifth amendment privilege as to Forest Whitlark and
7 provided us some written discovery in October of 2007.

8 In that written discovery, there was one page of a
9 two-page indemnification agreement whereby defendant
10 Bishop and Blanks paid Whitlark and Whitlark a sum of
11 money for an indemnification agreement evidencing some
12 sort of relationship between defendants Bishop and Blanks
13 and the Whitlark defendants.

14 So in addition, Forest Whitlark also sat for a
15 deposition on November 7th, 2007. At that time, he waived
16 his fifth amendment privilege and actually answered
17 questions.

18 We have that deposition here, but he basically said
19 that he did run a gambling enterprise. And he did -- he
20 was involved with Bishop and Blanks in this gambling
21 enterprise.

22 So November 7th is the first time that Ms. Proctor
23 and -- and her counsel were able to understand that there
24 was not only a distributor but a distributor who had some
25 relationship to the disputed -- to the disputed conduct.

1 Immediately, and I say immediately, we received
2 transcript on November 20th, been able to review the
3 transcript.

4 The very next day, November 21st, on behalf of both
5 Ms. Proctor and TransUnion, we filed a motion to amend the
6 complaint to add a party, and filed attached to that
7 motion to amend, which attached a proposed amended
8 complaint, filed with the court.

9 The hearing was scheduled for some time in December
10 before Judge Kinard. He decided -- he determined that it
11 was appropriate to recuse himself for a potential conflict
12 of interest.

13 The case was reset. That motion was reset for a
14 hearing in front of Judge Keesley in January 2008. Judge
15 Keesley heard motions, took it under advisement, and in
16 August -- on August 20th, 2008 issued a ruling allowing
17 the -- allowing the filing of the amended complaint.

18 Nine days later, on August 29th, we filed the amended
19 complaint, and then within 120 days afterwards had both
20 parties served. Mr. Bishop proved to be very difficult to
21 serve.

22 There's not a lot of South Carolina law that has to
23 do with what happens when you file a motion to amend
24 within the limitations period along with the proposed
25 amended complaint.

1 You file both documents, and you're waiting for the
2 court to rule, particularly in a situation where you
3 really can't file another suit because it would violate
4 rules against claim splitting.

5 So we went, took a look at the federal law. What do
6 the federal rules say and what do the federal courts say
7 about that practice?

8 Uniformly, the federal courts -- we find the federal
9 rules say that if you file a motion to amend with a
10 proposed amended complaint within the statute of
11 limitations timeframe, the time that it takes between the
12 filing of the complaint and the Court ruling on the motion
13 is tolled -- so you would subtract that out from the
14 limitations period. So the time period from
15 November 21st, 2007 until August 20th, 2008 would not
16 count in the statute of limitations period.

17 We believe that the Court should adopt the federal
18 standard. We haven't found a South Carolina case to
19 address that particular issue.

20 I will say all federal courts have uniformly applied
21 that rule. There are a number of states that apply that
22 rule: Rhode Island, Mississippi implicitly applies --
23 applies the rule. There is New York, Florida, Kansas,
24 Colorado, and Tennessee all apply the federal rules. I
25 found two states that did not: Delaware and Nevada.

1 So there is some dispute, but it is a question for
2 the -- for the South Carolina courts as to whether this
3 is -- this is an appropriate method for dealing with the
4 statute of limitations issue.

5 The -- what the defendants are asking the Court to do
6 is say Ms. Proctor and TransUnion should have filed a new
7 case, but that would have violated the rules against claim
8 splitting.

9 I do want to point out that we also think that the
10 civil conspiracy cause of action may not have accrued in
11 June of 2005. I think there's a question as to when that
12 accrued because a civil conspiracy under South Carolina
13 law does not -- cannot form with just employees of one
14 company.

15 An employee and an employer cannot conspire together
16 under civil conspiracy law in South Carolina. That comes
17 from McMillian vs. Oconee Memorial Hospital, a 2006 South
18 Carolina Supreme Court case.

19 And so you need to have some outside party involved
20 in the conspiracy, and the discovery of that did not occur
21 until November of 2007.

22 Alternatively, we would be asking the Court to apply
23 the federal standard for accrual, which is really -- which
24 isn't South Carolina law, but without arguing it today, I
25 can't preserve that for an issue for a change later on.

1 The federal rule is you got to know not only that you
2 are injured, but you have to know the party who injured
3 you, and that comes from Mason vs Warden, which is a
4 fourth circuit case from 1995.

5 Your Honor, as to the statute of limitations, the
6 real question is the case was pending, the motion to amend
7 the complaint with a proposed amended complaint was
8 pending for almost a period of ten -- ten months.

9 We're waiting on a ruling whether the parties, the
10 plaintiff, should be punished or penalized for not -- for
11 waiting on the Court to rule on a motion where the claims
12 must be joined together.

13 The -- the other argument with respect to claim
14 splitting, Your Honor, is we can't file -- plaintiffs
15 cannot file a new complaint alleging the same acts against
16 another defendant. That would violate the rules where --
17 you violate joinder rules and claim splitting rules, and I
18 did not note that case from South Carolina law where --
19 where you can't split your claims, but there are numerous
20 cases, Your Honor.

21 MR. GRIFFIN: Your Honor, if I may just respond.

22 First of all, I'm not aware of any such rule that you
23 cannot -- plaintiff can sue any member the plaintiff
24 wishes to sue, and I don't know why in this case in
25 November of 2007 when they allegedly first learned of

1 Mr. Blanks and Mr. Bishop's existence, why they did not
2 then, at least when the motion to amend was dragging out,
3 they could not have technically filed a lawsuit against
4 them because of that statute of limitations period.

5 Having said that, if you will review the affidavit
6 before you, Your Honor, it's clear that there were five or
7 six machines at which Ms. Proctor alleges that she played
8 video poker at defendant Whitlark's two establishments.

9 Only one of those machines was -- it was not supplied
10 by defendants Bishop and Blanks. Rather, as Mr. Whitlark
11 indicated in his deposition, my client, they were supplied
12 by Zodiac Distributing, LLC, who is not a defendant to
13 this lawsuit.

14 Your Honor, on the machine, as you'll see in the
15 affidavit, on the one machine that Zodiac Distributing,
16 LLC placed at Mr. Whitlark's business, Pizza Man, it had
17 on it throughout the time that Ms. Proctor was playing, a
18 required operating license or owner's license, which
19 identified Zodiac Distributing, LLC as the owner of the
20 machine.

21 And, Your Honor, this gets to the heart of the
22 discovery rule. The Court of Appeals is clear, Your
23 Honor, that -- and I'm reading from the case of Cline vs.
24 Faulkner Homes which I cited in my proposed order. Under
25 South Carolina law, the date when a plaintiff learns of a

1 potential new defendant has absolutely no bearing on the
2 timing of the statute of limitations.

3 Again, Your Honor, when Ms. Proctor was playing, the
4 opportunity for her to learn the identity of the potential
5 tort feisor against her, co-conspirator, whatever you want
6 to call it, was right there in front of her face two feet
7 away.

8 Now, the cause of action accrued, and this gets into
9 some of the facts. I don't think this is disputed,
10 although it wasn't entered in the depositions because I've
11 read them -- the plaintiff in the case -- the causes of
12 action accrued in June of 2005.

13 At some point, the jig was up, so to speak, for
14 Ms. Proctor. Mr. Smith and the title insurance company or
15 somebody found out that she had been embezzling this
16 money, or stealing this money, from Mr. Smith's trust
17 account and using it, purportedly to gamble at some of
18 these machines.

19 As I understand it, she, in consultation with her
20 lawyer, went to the FBI and suggested that there was a
21 large gambling operation going on at the Whitlark's place
22 of business.

23 After June of 2005, she was working with the FBI, and
24 the FBI was asking her to go back in and gamble and use
25 the machines. Certainly, at that point, she knew she had

1 a potential cause of action.

2 Certainly, at that point the machine was right in
3 front of her with my client's corporate name on it -- and
4 she easily, readily, had that information available to her
5 back in June of 2005 or July of 2005 when this -- when
6 this claim accrued.

7 So to suggest that she had no means of finding out
8 who these people were until November of 2007 or some time
9 beyond that is simply not proper factually.

10 Of course, we believe the legal argument, based upon
11 South Carolina law -- and I'm not aware of any South
12 Carolina statute rule or case in which the statute of
13 limitations is tolled based upon the filing of the motion
14 for an amended complaint to add a new party.

15 In fact, the cases cited by counsel, fourth circuit
16 cases, are South Carolina federal court cases to that
17 effect. Your Honor, we believe the statute has run.

18 MR. PACELLA: Your Honor, if I may point out one
19 factual issue, and that is for knowing the identity of the
20 owner of the machine wouldn't be enough in order to file a
21 lawsuit, in order to determine whether Ms. Proctor knew or
22 should have known that the owners of Zodiac were involved
23 in a -- in a gambling conspiracy with Forest Whitlark,
24 Paul Whitlark, and Whitlark and Whitlark. That
25 information was not developed until November of 2007

1 during that deposition.

2 I point that out mainly because I don't think that
3 necessarily has a bearing on the argument about the
4 timeliness of the statute of limitations based on the
5 tolling during the timing of the motion to amend and the
6 proposed amended complaint, but it does create at least a
7 factual issue on the statute of limitations grounds as to
8 when the identity of Zodiac was discovered, not just their
9 identity but when it was discovered as to their
10 involvement in the case and their involvement in the
11 conduct.

12 By the way, it's involvement that they still dispute.
13 They don't -- they don't agree that they knew about the
14 gambling enterprise, that they were a part of it. I
15 wanted to point that out for the Court as a factual issue.

16 But our main argument is that during the time of the
17 motion to amend the complaint, the proposed amended
18 complaint filed, based on South Carolina Rules of Civil
19 Procedure Rule 3 and the filing of a -- which requires the
20 filing of a complaint to initiate an action, that -- the
21 timing is tolled during the statute of limitations. It's
22 actually subtracted out, and the statute of limitations
23 wouldn't have expired until well into 2009.

24 Thank you.

25 THE COURT: Mr. Lang?

1 MR. LANG: Judge, just very briefly, of course, I
2 represent TransUnion, which was added as a plaintiff after
3 this case was filed.

4 My posture is a little bit different, but I wanted to
5 for the record to indicate that I believe -- and I'm going
6 on Mr. Pacella' argument in regard to the limitations
7 period, I would only suggest this, Your Honor: My -- as I
8 indicated, my posture is just a little bit different.

9 I represent a title insurance company who incurred a
10 significant loss as a consequence of, I suppose, shortages
11 in the trust account of Walt Smith, who has been
12 indefinitely suspended by our Supreme Court.

13 The way we got to this June 2005 accrual date is that
14 was when my title insurance company discovered the
15 shortage in Mr. Smith's trust account.

16 Of course, I don't think it's disputed that this
17 shortage was as a result of Ms. Proctor stealing money
18 from that trust account and then using that money to
19 gamble in the defendants' restaurants.

20 So in terms of the actual discovery of Mr. Abbotts'
21 clients being involved, my client, TransUnion, which was
22 subrogated to the rights, in part, of those lenders whose
23 money it had to pay over as a consequence of its
24 obligations and the filing of its amendments, policies,
25 and closing protection letters wasn't discovered until

1 actually the deposition of Forest Whitlark that
2 Mr. Pacella alluded to. That's the only thing I want to
3 point out, Your Honor.

4 MR. ABBOTT: Again, Your Honor, I would just point
5 out the cause of action accrued in June of 2005. When
6 they learned of a potential new defendant under South
7 Carolina law is immaterial. The statute begins to run
8 when the cause of action is accrued.

9 THE COURT: I'll look at that argument further.
10 Then the next motion would be defendant Whitlark's
11 motion for summary judgment.

12 MR. GRIFFIN: Yes. Thank you, Your Honor. Jim
13 Griffin on behalf of the defendants, Whitlark and Whitlark
14 doing business as Rockaways and Pizza Man, as well as
15 Forest Whitlark and Paul Whitlark. I would point out,
16 Your Honor, that the filed motion only references Forest
17 Whitlark and Whitlark and Whitlark.

18 It doesn't include in the caption of the motion Paul
19 Whitlark. I discussed it with -- with plaintiff's
20 counsel. I believe they oppose that oral amendment to the
21 motion. So that we're clear that it also -- it was Paul
22 Whitlark, as well.

23 MR. PACELLA: Plaintiff Proctor doesn't oppose that,
24 Your Honor.

25 MR. LANG: Neither does TransUnion, Your Honor.

1 MR. GRIFFIN: And as Mr. Pacella previously pointed
2 out, this -- this motion was argued before Judge Keesley
3 sometime last year.

4 He took it under advisement for quite some time, and
5 then eventually denied the motion without prejudice with
6 leave to refile it, as he is gathered mostly outside the
7 circuit and caught up in Lexington County duties over
8 there and all over.

9 I'm not sure -- I know you have a lot of files. I
10 e-mailed you a proposed order. There was a previous memo
11 that I had filed back in November that I -- I'll just hand
12 up an extra copy for Your Honor so you'll have it.

13 THE COURT: The one in December -- okay. March?

14 MR. GRIFFIN: No. No, Your Honor. It was when the
15 original motion was filed. It was back in -- the first
16 motion that I just -- in November of 2007 is this memo
17 some time ago. Rather than you having to dig through the
18 file, I'll just hand you a copy, but the arguments are all
19 the same.

20 The -- and there are two plaintiffs, and the defenses
21 to both -- to the two plaintiffs are somewhat different,
22 Your Honor.

23 I would like to address, first, the plaintiff Lauren
24 Proctor. Ms. Proctor was an employee of State Title,
25 which was a title company that had a relationship with an

1 attorney, Walt Smith, in Richland County, and she
2 apparently stole money from Mr. Smith's trust account.

3 In her deposition, she admits to being addicted to
4 alcohol, being a cocaine abuser and -- and being a
5 gambling addict.

6 She claims that she stole money from Mr. Smith's
7 trust account, and that she took those, those stolen
8 proceeds, and she gambled on video machines, really not
9 video poker machines but in the parlance of that -- of
10 what people call them, you know. I'll refer to them as
11 video poker machines, but she -- you know, at a time when
12 video poker was illegal in South Carolina.

13 In her deposition, she readily admitted that she knew
14 that it was illegal. At page 78 of her deposition, which
15 is attached, I asked her after June of 2000, I believe we
16 had established that date, but you knew at some point in
17 time that it was illegal to pay off on the machines.

18 She said sure.

19 I asked her and it was illegal for you to play and
20 win on the machines.

21 She answered yes.

22 And I asked her and you knew what you were doing was
23 illegal, correct?

24 She answered yes.

25 Your Honor, under the doctrine of in pari delicto,

1 which is -- which is the common law rule that is alive and
2 well in South Carolina and was previously last applied, as
3 I can tell, by the South Carolina Court of Appeals in 2006
4 in the case of Myatt v. RHVT Financial Corp.

5 In there, the Court of Appeals described the doctrine
6 of in pari delicto as a principle that the plaintiff who
7 has participated in wrongdoing may not recover damages
8 resulting from the wrongdoing.

9 We have, in South Carolina, a long history of case
10 law applying, essentially, the doctrine of in pari delicto
11 to claims of folks who gambled and lost money. And -- and
12 the law in South Carolina is consistent that there was,
13 and is, no common law right of recovery for gambling
14 losses.

15 Now, in 18 -- excuse me, 1712, Your Honor, the --
16 there was an English law that was passed that was adopted
17 in South Carolina by the reception statute (phonetic)
18 which -- which basically allowed for a recovery of
19 gambling losses by the gambler if he is -- if he or she is
20 sued within 90 days or three months -- as the statute
21 reads, within three months, then next suing, that the
22 person who lost can come back, sue -- it's a statutory
23 right gives explicitly to the -- to the gambler, whether
24 it's legal or illegal as the South Carolina Supreme Court
25 ruled in Burke Aloe v Dutten (phonetic) that -- that

1 someone loses, and the amounts have changed, but -- but as
2 of today, it's \$50 or more at a -- at a sitting that if
3 someone gambles, loses more than \$50 at a sitting, they
4 have more than 90 days in which to sue and recover.

5 If they don't avail themselves of that 90-day period,
6 Your Honor, then a third party can come along sort of in a
7 private Attorney General lawsuit and sue on their behalf
8 to get recovery.

9 There's trebling of the damages and the money split
10 between the -- the plaintiff, the relator as they're
11 called, and the circuit, the solicitor's office.

12 And so there is a statutory remedy by which a gambler
13 can sue and recover money. This lawsuit does not attempt
14 to invoke that statutory remedy whatsoever.

15 Outside that -- the statute, the law, is clear in
16 South Carolina and frankly around the country, that if you
17 don't avail yourselves of the time periods pursuant under
18 that statute, then -- then your claim of -- for seeking to
19 recover monies you lost on a wager are -- are void.

20 The Courts -- starting in 1846, the South Carolina
21 Supreme Court decision of Rice v. Gist (phonetic),
22 G-I-S-T, at the -- and this is cited in my brief, and I
23 have a copy of it I'll hand up, Your Honor.

24 It says all wagers are unlawful on their clear and
25 immoral tendency and cannot be recovered in the Courts.

1 In 1856, in a case of Mordecai, M-O-R-D-E-C-A-I, v.
2 Dawkins -- that's an 1856 decision of the South Carolina
3 Supreme Court, it says money lent to gain with, mean
4 gamble with, cannot be recovered back. You can't loan the
5 money to someone and allow them to gamble it and then want
6 to get it back.

7 In the case of an 1818 decision, Your Honor, Laura B.
8 Lipson v. Daniel Wooten (phonetic), again a South Carolina
9 Supreme Court decision, says that common law, the parties
10 to gambling transactions stand in pari delicto. Money
11 lost and paid over cannot be recovered, and then they
12 explain that the only way to recover is through availing
13 yourselves of the -- of that statutory remedy.

14 The last South Carolina Supreme Court decision is
15 Owen v. Davis, an 1829 case. It says money paid for the
16 gaming debt cannot be recovered back by the loser unless
17 he brings his action forward within the period limited
18 by -- it's called the Statute of Anne.

19 There, the Court says Murray would have been
20 protected in refusing to pay in a gambling transaction,
21 but as since he has paid, the plaintiff certainly is
22 entitled to recover his share of funds back unless Murray
23 may himself recover back the whole; however, he could not
24 do, so except under the authority of the Statute of Anne,
25 and that statute limited his right to three months. This

1 period has now expired.

2 That's exactly where Ms. Proctor finds herself. She
3 has -- suing under various common law theories of
4 recovery: Civil conspiracy, restitution, unjust
5 enrichment.

6 She also has a claim under the South Carolina Unfair
7 Trade Practices Act, and the -- and the plaintiff will
8 argue that that claim somehow creates a greater right that
9 she had under common law, and that claim creates a cause
10 of action in her behalf to recover gambling losses.

11 In that, the authority that's relied upon by the
12 plaintiff, Your Honor, is a -- is the case that is well
13 known in this area. It's called Johnson v. Collins.

14 It is a South Carolina Supreme Court answering a
15 certified question sent over by Judge Joseph Anderson in
16 connection with a lawsuit, a class action lawsuit that was
17 filed in federal court seeking to -- on behalf of folks
18 who had -- gamblers who lost money.

19 The allegations there in the federal lawsuit -- and
20 it's important to understand when it occurred. The
21 federal lawsuit occurred prior to the time South Carolina
22 outlawed video poker. Video poker was legal at the time.

23 The question was did the video poker operators
24 essentially unlawfully entice players to -- to gamble by
25 offering them jackpots in excess of the statutory limits,

1 \$50 or more a day.

2 In the -- in the -- in the -- in the action as
3 referenced in the footnote, the defendants there -- in
4 addition to arguing that the plaintiffs had no statutory
5 right to recover under the South Carolina Unfair Trade
6 Practices Act and that -- and that the exclusive remedy
7 was under the Statute of Anne, the defendants also raised
8 the defense of in pari delicto.

9 There the court, Supreme Court, adopted Judge Joe
10 Anderson's analysis at footnote 13 in the order and
11 basically says on this point the defendants suggest an in
12 pari delicto defense. The translation, hence, the
13 inquiry, phrase means at equal fault.

14 The operators and machines at issue are licensed to
15 operate on a regulated area of the law. They should,
16 therefore, be held to a greater knowledge and
17 understanding of the laws than their customers,
18 particularly when the laws are designed to protect the
19 player from his or her own bad judgments.

20 In any case, what the law prohibits is the making of
21 the payouts in excess of the statutory cap. It does not
22 directly address receipt of the funds.

23 Therefore, the Court is not willing to suggest that a
24 player who receives an excess payment is without fault or
25 culpability but certainly is not equal.

1 Now -- and as that quote establishes, at the time, it
2 was -- A, it was not unlawful for a player to gamble, A;
3 B, it had never been ruled unlawful in South Carolina that
4 it was -- that a person playing could not receive in
5 excess of the statutory cap. The law said you can only --
6 you are limited to paying out in excess of the statutory
7 cap.

8 In -- in here, we have a change in the law. It was
9 -- it had been illegal for Whitlark and Whitlark to pay
10 out. It would be illegal for -- it would be illegal for
11 Ms. Proctor to win, and it had been illegal for
12 Ms. Proctor to pay Whitlark and Whitlark, and it would be
13 illegal for Whitlark and Whitlark to win, which is what
14 she claims is that "I gambled on these machines at
15 Whitlark and Whitlark's places of business. I lost, they
16 won, so therefore, I'm entitled to recover."

17 There is not -- the statute -- I mean, the claims
18 that under the -- under the South Carolina Unfair Trade
19 Practices Act are subject to the same defenses that --
20 common law and otherwise, as any other claim.

21 In here, it's a well-recognized defense of in pari
22 delicto, and we believe it certainly bars her claim. She
23 is at equal fault. She has admitted to that factually in
24 this deposition when she knew good and well that what she
25 was doing was illegal.

1 Furthermore, and this ties in to the in pari delicto,
2 as well as to the defense of unclean hands as to
3 Ms. Proctor. In her deposition, she said that she was
4 playing for keeps; that if she won, she was going to keep
5 the money.

6 Now, she claims she had never won, but -- but on --
7 at page 76, I asked her, I said, "Well, if you had won
8 money at the end of the day" -- she said, "I'm an addict.
9 You don't keep the money."

10 I said, "Well, if you had won money and Pizza Man
11 burned down, would you give it back or would you have kept
12 it?"

13 She asked me, "Well, why would I give it back?"

14 I asked her, "Okay. So you were playing for keeps?"

15 She goes, "Yeah. Well, I'm sure I was." Then she
16 said, "Addicts never win."

17 She agrees that she was playing to try to win, and
18 that she would have kept it. She claims she lost. She
19 said now she is suing because she lost.

20 So we -- we then imposed the defense of in pari
21 delicto and the doctrine of unclean hands, and we think
22 those were barred in Ms. Proctor's claim.

23 I have separate arguments on -- on -- in the claims
24 of TransUnion National. I'll be happy to raise them now
25 or if you want to address this in pari delicto defense

1 first.

2 THE COURT: Let's address this one first.

3 MR. GRIFFIN: Thank you.

4 MR. PACELLA: Your Honor, Mr. Griffin mentioned a
5 bunch of cases, a number of cases from South Carolina.

6 The last case where in pari delicto was recorded -- I
7 believe it was recorded by the South Carolina Supreme
8 Court in a gambling loss.

9 There are a number of other in pari delicto cases
10 after this one, but Francis vs. Mauldin (phonetic), which
11 is a 1941 case, predates the South Carolina Unfair Trade
12 Practices Act by a number of years.

13 I believe that the South Carolina Unfair Trade
14 Practices Act was initially passed in 1971, and for that
15 reason, I think that Johnson vs. Collins Entertainment is
16 the beginning of the inquiry and actually ends the inquiry
17 as to the in pari delicto defense.

18 In Johnson vs. Collins Entertainment, it starts off
19 with the premise -- or it starts off with the case
20 where -- where folks are trying to recover gambling losses
21 from video gaming operators who were potentially violating
22 some of the video gaming laws about how much they could
23 advertise the payouts.

24 One of the questions made by the -- one of the
25 certified questions sent by Judge Anderson to the South

1 Carolina Supreme Court, and accepted in answer by the
2 South Carolina Supreme Court, is on page 632 of the
3 decision.

4 The question says, "While the general operation of
5 the devices at issue was authorized by law during all
6 times at issue, and while South Carolina law generally
7 exempts the operation of the devices at issue from
8 statutory codes under the state's criminal laws relating
9 to gambling" --

10 THE COURT: Will you slow down.

11 MR. PACELLA: I'm sorry.

12 I'll -- I'll start over, Your Honor.

13 THE COURT: You don't have to start over. She got
14 it --

15 MR. PACELLA: Okay.

16 THE COURT: -- but you just need to slow down.

17 MR. PACELLA: Okay. "Would the activity alleged,
18 nonetheless, become" in quotations "a gambling business,
19 which is a violation of the laws of the State" end
20 quotations "of South Carolina if defendants have proven
21 they have routinely offered and made payouts in excess of
22 that allowed by state law or to have created fraudulent
23 records to disguise making such payouts."

24 The Supreme Court said -- says, restates the
25 question, "Plaintiffs argue that although video poker was

1 a legal business in South Carolina. Because defendants
2 routinely violated the Video Gaming Machines Act, they
3 were conducting an illegal gambling business in violation
4 of the law of South Carolina for purposes of 18 USC,
5 section 1955, which is a correct hearing statute.

6 So the South Carolina Supreme Court sets forth that
7 at least -- the backdrop of Johnson vs. Collins
8 Entertainment, the video gaming operators were violating
9 state law.

10 It stands to reason that those playing the machines
11 that were being operated in violation of state law may
12 also have been violating state law in gambling, in making
13 wagers.

14 So when looking at Johnson vs. Collins Entertainment
15 and that footnote that -- as Mr. Griffin pointed out,
16 footnote 13 on page 639, the question of whether the
17 parties are at equal fault, it's -- it's plaintiff's
18 position that -- that at minimum, there is a factual
19 question as to whether the plaintiff is at equal fault
20 with the defendant.

21 First, the state statute that prohibits gambling is
22 16-9-40. The gambler could be punished 30 days or \$100
23 for gambling. The tavern owner who operated a gambling
24 enterprise can be punished 12 months or \$2,000. The
25 disparate punishments reflect the difference in -- in

1 fault.

2 Second, the Statute of Anne, which has been around
3 since -- I believe Mr. Griffin pointed out since 1712,
4 does -- is not the only remedy for a gambler, according to
5 Johnson vs. Collins Entertainment.

6 Johnson vs. Collins Entertainment does state that --
7 states that, "With respect to the plaintiff's claims under
8 the South Carolina Unfair Trade Practices Act, section
9 32-1-10 and 20 do not have a preclusive effect because, in
10 fact, South Carolina code annotated section 39-5-160
11 provides powers of remedies provided by the government
12 shall be cumulative and supplementary to all powers and
13 remedies provided by law."

14 The South Carolina Unfair Trade Practices Act is a
15 vehicle for the recovery of gambling losses, and it can
16 piggyback on the Statute of Anne, but at minimum, Your
17 Honor, there is a question of fact as to whether
18 Mr. Whitlark was at equal fault with the defendants.

19 In -- I should point out some of the facts that
20 indicate why that is the case. First, there is evidence
21 in the record that Ms. Proctor is a gambling addict. We
22 have an expert in the form of -- employed a psychologist
23 who would identify her as a gambling addict.

24 She testified that she received alcohol and drugs
25 from at least one of the defendants. That is not

1 contested in the record. When I say not contested, Paul
2 Whitlark, one of the defendants, actually asserted his
3 fifth amendment privilege as to questions as to whether he
4 gave her alcohol and drugs while she was gambling, but Ms.
5 Proctor has testified that she did receive alcohol and
6 drugs in an inducement to sit down and gamble in that
7 lawsuit.

8 So there are actual factual issues in the record that
9 establish or at least bring up the question of whether she
10 is in equal fault with the Whitlark and Whitlark
11 defendants in addition to that statutory difference
12 between punishments between the gambler and the tavern
13 operator who runs the gambling enterprise.

14 So, Your Honor, just -- just in summary, the Unfair
15 Trade Practices Act is a vehicle to recover gambling
16 losses and piggybacks off of the Statute of Anne,
17 according to Johnson vs. Collins Entertainment.

18 Even if it does not, the question of whether
19 Ms. Proctor is at equal fault is a factual question to be
20 resolved by a jury.

21 MR. GRIFFIN: Just briefly, Your Honor.

22 Mr. Abbott may have some more to add but first, the
23 Collins v. Johnson case certainly recognizes that the
24 defense of in pari delicto applies to claims brought under
25 the Unfair Trade Practices Act.

1 They address -- I didn't bring a copy of the Myatt
2 vs. RHVT Financial Corp. case, 370 SC 391, but Your Honor,
3 that case, as I recall likewise, is -- one of the claims
4 is an Unfair Trade Practices claim.

5 There, the issue is there was a receiver put in place
6 for a company that was then suing one of -- another
7 company that it did business with for Unfair Trade
8 Practice.

9 The Court says the defense of in pari delicto applies
10 to the receiver because it stands in the shoes of the
11 company, and he has no claim.

12 I would also point out that the -- that these old
13 cases that have never been overruled in the late 1800 --
14 late 1800s, when there is illegal gambling, there is no
15 weighing of equities.

16 They say outright you cannot come into the court and
17 recover monies you lost in illegal gambling enterprise,
18 period, end of story.

19 That's all that has to be determined here is was it
20 an illegal gambling enterprise, and did she know it and
21 knowingly engage in it. The answer to that is not
22 disputed.

23 I have these cases I'll hand up after the hearing,
24 but if Mr. Abbott has anything to add.

25 MR. ABBOTT: Your Honor, the only thing I would

1 suggest is, as to my clients, who again are Charlie Bishop
2 and Brett Blanks, there is absolutely no allegation. If
3 the Court does weigh the equities, so to speak, they had
4 no dealings at all with Ms. Proctor. The only thing that
5 they did, and actually it's denied that they did it, but
6 was supply the Whitlark defendants with one of the many
7 machines, and that was it.

8 You know, they simply put their machine in there, and
9 they collected whatever money was earned from the machine.
10 They had no participation, no control over -- no control
11 over what happened with the machine.

12 They didn't have any dealings directly with
13 Ms. Proctor. They have no -- as to Ms. Proctor, they have
14 no -- there is no allegation that they had any dealings
15 with her.

16 They have no -- they have clean hands as to her. She
17 acknowledges the gambling, et cetera, et cetera, et
18 cetera.

19 MR. GRIFFIN: Your Honor, the --

20 THE COURT: Do you have another issue?

21 MR. GRIFFIN: Yes, Your Honor, this deals with the
22 claim brought by TransUnion National Title Insurance, and
23 I know it as Atlantic Title. If it's all right, I'll
24 refer to it as Atlantic Title, but Mr. Lang described the
25 posture of Atlantic Title earlier. There's no

1 disagreement in this.

2 What Atlantic Title is, is a title insurance company,
3 for whom I believe State Title, which was Ms. Proctor's
4 employer was an authorized title agent, authorized to
5 write title insurance, and that -- in about May or June of
6 2005, Your Honor, Ms. -- Mr. Smith's trust account check
7 started bouncing.

8 Ms. Proctor, after speaking with her mother who works
9 there, and Mr. Smith admitted that she had stolen money
10 from the trust account and that it was essentially out of
11 trust.

12 It turns out, it was out of trust, according to
13 Atlantic Title's documentation to the tune of \$551,477.

14 The money that was -- what then Atlantic Title had to
15 come in, was step into -- is to honor their insurance that
16 they had written on real estate closings conducted by
17 State Title and Mr. Smith.

18 The insured under these policies, were they were --
19 they were the finance company, the lender, and the
20 purchaser, the mortgagee and the mortgagor.

21 And so -- and I believe that Mr. Lang had submitted
22 Exhibit F in the materials, but it's a declaration from
23 Stephanie Bland Munsey who was with Atlantic Title.

24 Basically, if you look, there are about six -- well,
25 actually, there appears to be five real estate closings

1 where there are insufficient funds to satisfy, pay off the
2 mortgage. Then there was one on this list that had to do
3 with old taxes that had not been paid.

4 And so -- so what Atlantic Title had to do was -- was
5 pay off these mortgages on these real estate closings, on
6 these five that -- where the money was not there in the
7 trust account to satisfy.

8 What is missing in this record, and the reason we
9 moved for summary judgment, a couple of grounds: One is
10 what's missing is where did that \$500,000 go in May?

11 There is -- and the record is -- established that
12 under Ms. Proctor's -- even accepting everything she says
13 as true, that in May she would have lost \$20,000. That's
14 really a hard thing for us to believe, and we don't
15 believe it, but accepting everything she says as true, she
16 lost 500,000 -- I mean, excuse me. She lost \$20,000 in
17 May.

18 So the question is, where is the other \$530,000? The
19 answer, we believe, is that the monies -- it's like a
20 classic check-kiting scheme is that the monies that were
21 coming up short, they were just borrowing Peter to pay
22 Paul.

23 So the monies that came up short that were owed to
24 the five lenders to pay off those mortgages, that money
25 was not used at Rockaways or Pizza Man.

1 That money was used to pay off the mortgages of
2 Wachovia or Wells Fargo or whoever was up the line. It
3 was not -- so there's been no tracing of the proceed, and
4 that's our complaint is that -- and we pointed that out.
5 We pointed it out in our motion.

6 We pointed it out the last time we filed the motion
7 is they can't -- there's no tracing of the funds. Even if
8 you were to recognize the claim that a -- and I'm arguing
9 that you can't in a second, but that -- there's no
10 evidence that the money that was -- should have gone --
11 that was loaned to the borrower, from these finance
12 companies that went into this trust account -- there's no
13 evidence that Atlantic Title had to insure -- there's no
14 evidence that money ever ended up in Rockaways or Pizza
15 Man. The record is completely devoid of that.

16 The limited authority that Atlantic Title has from
17 other jurisdictions requires some tracing of funds, and
18 there's no tracing of funds. There's no evidence on that.

19 And so that's our -- our -- our first basis is
20 there's lack of proof. Secondly, they do have authority
21 from other jurisdictions but none in South Carolina.

22 Our second argument is that they lack standing
23 because there's no cognizable injury to the -- as to
24 the -- as against our client, the Whitlarks, as to...

25 Just to pick an example on this list, you got --

1 well, it doesn't say who the lender was, I don't believe,
2 but say the lender was Chase Manhattan, it is -- Chase
3 Manhattan doesn't have a lawsuit against the Whitlark
4 people because Ms. Proctor stole money from Walt Smith
5 because she says, "I got it to gamble," but she says also,
6 "I was on drugs, and I was drinking too much."

7 It's a classic foreseeability and proximate cause
8 connection. There's no linkage, because Chase Manhattan
9 would then have a lawsuit against Jack Daniel's Distillery
10 because she is an alcoholic because she stole money
11 because she -- she lost her judgment.

12 They also would have a cause of action against
13 whatever drug dealer that she bought cocaine from on
14 Rosewood or wherever she was buying it from.

15 It's the classic proximate cause foreseeability
16 linkage that is missing in this case, and so first, the
17 failure of proving, even if you were to accept that, but
18 secondly, it's beyond the level of foreseeability that
19 Pizza Man or Rockaways or Forest Whitlark or Paul Whitlark
20 would -- would -- that -- that a Chase Manhattan in New
21 York or wherever these lenders are would have some claim
22 against them because Lauren Proctor is drunk gambling on
23 the corner of Rosewood and Woodrow.

24 Thank you.

25 THE COURT: Mr. Lang.

1 MR. LANG: Very briefly, Your Honor. In regard to
2 the -- well, first off, in terms of the in pari delicto
3 and the unclean hands arguments, we would adopt
4 Mr. Pacella -- his arguments and submissions, although
5 those offenses really don't apply to my client.

6 In regard to -- what I think counsel's first argument
7 in -- as to tracing, I would suggest tracing is irrelevant
8 to this issue.

9 Lauren proctor took all the money. This is not a
10 situation where Ms. Proctor took money to which she was
11 entitled from Walt Smith's trust account and invested it
12 in various legitimate schemes, including Whitlark and
13 Whitlark.

14 She stole all the money. It just so happened at the
15 end of the day when this was discovered, there was a
16 shortage in Walt Smith's trust account. It just so
17 happened that the victims of that, and those victims are
18 those lenders who prior -- who closed transactions
19 involving prior loans that were supposed to be paid off,
20 those lenders who had a first lien on a property -- or
21 thought they had a first lien on a piece of property and
22 ended up with a second lien because those prior loans had
23 not been paid off because Lauren Proctor had stolen the
24 money, those happens to be loans who are listed on Exhibit
25 A to this affidavit.

1 So this is not a situation where I have to go and
2 say, "Okay. Lauren Proctor took \$100,000 legitimately and
3 put it here and then stole \$100,000 and gambled it and put
4 it in Whitlark and Whitlark."

5 She took all the money, so it was all stolen money
6 that she had took. So I am entitled to an attempt to
7 recover that money from Whitlark and Whitlark, assuming
8 I'm entitled to do that. So basically, I would suggest
9 it's not an issue.

10 THE COURT: So -- and that's also assuming that you
11 can prove that she put all of that money into the gambling
12 enterprise.

13 MR. LANG: That's correct, Your Honor. I believe
14 that that is fairly -- for the most part, that is
15 certainly more than sufficient, deposition testimony, as
16 well as affidavits to that effect, that are in front of
17 the Court, I believe.

18 THE COURT: So -- so Mr. Griffin's argument that
19 she -- she could have -- she may have drunk some of it, or
20 she may have used drugs with some of it, that's not an
21 issue?

22 MR. LANG: Not as far as I know, Your Honor. I think
23 she gambled it all.

24 THE COURT: So the allegations that -- and what
25 you're claiming the proof is establishes that all \$551,000

1 was used towards the gambling.

2 MR. LANG: That's correct, Your Honor, and I was
3 unaware that Mr. Griffin was arguing that some of that
4 money went to buy liquor. I mean, I'll spot him a couple
5 of bucks here and there. We're not talking \$100,000 or
6 \$500,000.

7 I don't know of any testimony that Lauren Proctor
8 bought drugs with -- with the stolen money, nor do I know
9 of any testimony that she bought a beer or two during the
10 gambling evolutions.

11 I think that the testimony from Lauren Proctor is she
12 was given all of this to encourage her, in essence, to
13 remain and then gamble that money away in these various
14 video poker machines.

15 The other argument, Your Honor, I would suggest to
16 the court, there isn't a whole lot of law on this. As a
17 matter of fact, there isn't any as far as I know, in South
18 Carolina, but there is an Am. Jur. annotation, 53(A) Am.
19 Jur. 2d, Money, section 23.

20 Ordinarily, the rule, Your Honor, if I steal money
21 from Mr. Pacella and then I go and buy a car with that
22 stolen money, Mr. Pacella doesn't then get the stolen car
23 because money is fungible. And you can't trace money
24 through a thief to somebody else.

25 If I were to, say, steal \$20 from Mr. Pacella and

1 give it to Mr. Griffin, Mr. Pacella could not go to Mr.
2 Griffin and say, "Okay. Give me that 20 bucks that you
3 stole." Again, you can't identify money. It's fungible.

4 The exception to that, though, Your Honor, is when
5 someone steals money and then gambles that money away in
6 an illegal gambling enterprise.

7 In that respect, Your Honor, it says a person -- I'm
8 just quoting from this section in the ALR cited by this
9 Am. Jur. section, a person receiving stolen or embezzled
10 money in a game of chance, that would be Whitlark and
11 Whitlark under our facts, obtains no title to it as
12 against the true owner, even though he or she has no
13 knowledge, actual or constructive, of retaining character
14 in the matter.

15 So in other words, if I steal money and then gamble
16 it away in an illegal gambling operation, even though the
17 illegal gambling operation doesn't know that the money is
18 stolen, Your Honor, I don't think there's is any -- too
19 much dispute that Whitlark and Whitlark didn't know this
20 money was stolen.

21 They still obtain no title to those funds, and as the
22 true owner, that would be myself, from whom the proceeds
23 have been stolen and subrogated to the lender's rights, I
24 have the opportunity, then, to recover those funds from
25 the illegal gambling operation.

1 That's all I have, Your Honor, thank you.

2 MR. GRIFFIN: Your Honor, a couple of points. When
3 he says true owner, he's arguing what I stand here
4 arguing. They can't prove the true owner of this money,
5 whatever it is, and that's the requirement of tracing,
6 okay.

7 Now, he says that Ms. Proctor's testimony is that she
8 gambled it all and gambled it all at Rockaways and didn't
9 spend it on anything else.

10 Your Honor, that's not an accurate reflection of the
11 testimony, but -- but on the other -- on the other end of
12 the question, he has to say Atlantic Title, I guess,
13 insured every real estate transaction that came through
14 Walt Smith's office, and that we're the true owner of
15 every dollar that went through Walt Smith's trust account.

16 So we're the true owner of -- when Ms. Proctor stole
17 \$2,500 in April of 2004 and gambled it at Rockaways, we're
18 the true owner. That's what's totally missing from his
19 proof, and that's what is totally missing at this stage of
20 summary judgment when we point out you haven't shown any
21 linkage to the money going to Rockaways.

22 All you have is this big mob saying in May of 2005
23 he's out of trust \$500,000. Therefore, Rockaways, you owe
24 us. You owe us \$500,000. That -- I mean, that's the link
25 that's missing.

1 As to Ms. Proctor's testimony, I mean, I spent a
2 period of time nailing down this -- all the money that she
3 earned legitimately, she and her girlfriend, partner, that
4 every bit of it was spent to make ends meet, paying --
5 paying the light bill, the grocery bill, the vet bill.
6 They have a lot of animals, and there was no extra cash.

7 But then she admits that she -- she played the State
8 Lottery significantly; that she gambled at Gamecock
9 Country, which is another place where they had a poker
10 machine, and that -- and that she bought cocaine.

11 So there is a -- there's -- it's a -- I don't think
12 it's a factual dispute, because that's her testimony, that
13 she admits to spending money elsewhere.

14 Now, maybe she subsequent -- I don't know if she
15 submitted an affidavit in -- contradicting that or not,
16 but the point is, you know, that there's no evidence
17 showing that any of the \$500,000 that they had to pony up
18 to satisfy these mortgages went to Rockaways. We've been
19 asking for it in these motions saying there's a lack of
20 proof. There's none.

21 MR. PACELLA: Your Honor, may I make a brief point
22 about -- I'm only going to make a point about what was
23 spent at Rockaways and Pizza Man?

24 I think the record actually does demonstrate a few
25 things that the Court needs to understand. First, Lauren

1 Proctor, when she did gamble at Rockaways and Pizza Man
2 used -- used -- did it a couple of different ways. She
3 would bring a check to Forest Whitlark, and he would cash
4 the check. She would bring her credit card and use a
5 credit card and then swipe the credit card, and they would
6 give her cash to put in the machines.

7 She would also use a debit card under the same
8 analysis. We add all those transactions up, and we have
9 all of the bank records.

10 When you add all of those transactions up, it amounts
11 to approximately, I think about \$386,000 that we can
12 document with checks, credit cards, and debit card
13 transactions.

14 Then we get up to another number, which is a little
15 more difficult, more difficult to establish, but we plan
16 to establish this at trial that there is an ATM machine
17 right outside near Pizza Man and Rockaways.

18 If you include that ATM machine, you get a -- you get
19 in the neighborhood of \$600,000 that -- that she testified
20 she had lost there. The actual amount that the accounting
21 established that she had taken from the trust account from
22 Walt Smith was in the neighborhood of \$750,000.

23 So Mr. Griffin could -- can be right saying money was
24 spent elsewhere in other places, but Ms. Proctor has never
25 said, "I spent everything at Rockaways and Pizza Man," but

1 we do have good records of this \$386,000 going into
2 Rockaways and Pizza Man. I just wanted to point those
3 factual issues out to the Court.

4 Thank you.

5 MR. ABBOTT: Your Honor, if I may be heard on that
6 issue briefly. It's our position, at least in terms of
7 defendants Bishop and Blanks, that there are far too many
8 steps that TransUnion has to go through to get to my
9 clients to confer standing on them.

10 They don't have a cause of action until Walt Smith
11 mishandles his trust account, until Lauren Proctor steals
12 the money from the mishandled trust account, until alleged
13 gambling payouts were done on my clients, one out of four
14 or five legal machines that they placed in the Whitlark's
15 entity.

16 As far as my clients are concerned, it's -- their
17 claim against defendants Bishop and Blanks are far too
18 tangential. I mean, they're claim is against Ms. Proctor
19 and Ms. Smith, and they have sued them. They have a forum
20 to do that.

21 They're -- they're a judgment creditor trying to horn
22 in on this lawsuit, is our position; that they have other
23 means that all they're looking to do is help Ms. Proctor
24 win so that they can recover from Ms. Proctor because they
25 are her judgment creditor.

1 They don't have a direct cause of action against, at
2 least my clients, or for that matter, I don't think they
3 have a direct cause of action against the Whitlarks
4 either.

5 THE COURT: And just to ask the question, what is
6 different about the arguments that have been made here and
7 what they were before Judge Keesley?

8 MR. GRIFFIN: Your Honor, Mr. Abbott and his clients
9 were not in the case I'm arguing before the Court.

10 THE COURT: But that doesn't change any of your
11 arguments, does it?

12 MR. GRIFFIN: No, sir -- no, ma'am. I think I was a
13 lot more eloquent today.

14 MR. LANG: He was, Your Honor.

15 MR. GRIFFIN: That's all I've got.

16 THE COURT: So basically, just the statement in Judge
17 Keesley's order that says that you are not prohibited from
18 being able to -- nothing in this order should be deemed to
19 bind a judge presiding over a subsequent motion or for a
20 trial on the issue of whether such a defense applies or
21 whether the plaintiff is barred from asserting their
22 claims.

23 MR. GRIFFIN: That's correct, and how that came up --
24 I mean, I think the Chief Administrative Judge reached out
25 to Judge Keesley and said, "Have you had a chance to

1 rule?" Then we got this order pretty quickly.

2 THE COURT: Okay. If there's nothing further, then
3 I'll consider all of the information. I can tell you,
4 it's probably going to be a while.

5 MR. GRIFFIN: Thank you.

6 MR. LANG: Thank you, Your Honor.

7 MR. PACELLA: Thank you.

8 (Whereupon, the proceedings were concluded.)
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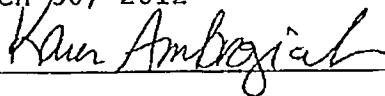
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CERTIFICATE OF REPORTER:

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 14th day of April,
2009.

March 30, 2012



Karen Ambroziak, Court Reporter

My Commission Expires: 04/01/14

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-1814

Lauren Proctor and Trans-Union National
Title Insurance Company f/k/a Atlantic
Title Insurance Company,

Respondents,

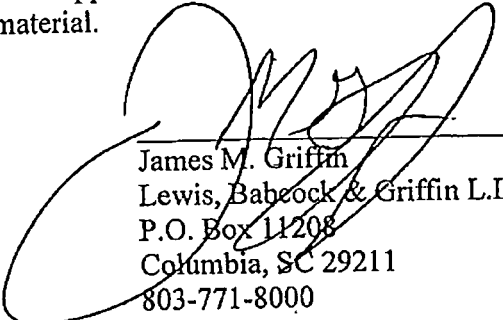
v.

Whitlark & Whitlark, Inc. d/b/a Rockaways
Athletic Club and Pizza Man, Forrest
Whitlark, Paul Whitlark, Charlie E. Bishop,
and Brett Blanks,

Appellants.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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August 30, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2006-CP-40-1814

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Athletic Club and Pizza Man, Forrest
Whitlark, Paul Whitlark, Charlie E. Bishop,
and Brett Blanks,

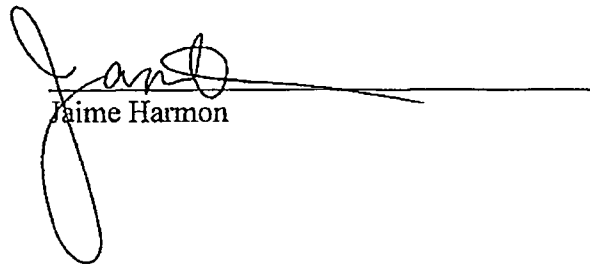
Appellants.

PROOF OF SERVICE

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for Appellant Whitlark & Whitlark, Inc. d/b/a Rockaways Athletic Club and Pizza Man, Forrest Whitlark, Paul Whitlark, do hereby certify that I have served a copy of the foregoing Record on Appeal , in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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Columbia, South Carolina
August 30, 2012