STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)))	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
State of South Carolina on the relation of William Walter Wilkins, III, Solicitor of the Thirteenth Judicial Circuit, Plaintiff, vs. Elephant, Inc. and Frontage Road Associates, Inc., Defendants.	)	C.A. No.: 2015-CP-23-02597 **ORDER GRANTING TEMPORARY INJUNCTION**

The Solicitor of the Thirteenth Circuit ("Solicitor") brought the present civil action pursuant to S.C. Code § 15-43-10 *et seq.* ("Nuisance Statute") on behalf of the State of South Carolina ("State"). The action was filed April 17, 2015. As allowed under the Nuisance Statute, the Solicitor also filed a motion seeking a temporary injunction pursuant to S.C. Code § 15-43-30 ("Motion") seeking to close the sexually oriented business operated in Greenville County by Elephant, Inc ("EI") and known as "Platinum Plus" ("PP"). Frontage Road Associates, Inc. owns the real estate of which EI is a tenant. A hearing was conducted on the Solicitor's Motion on April 24, 2015. All parties appeared and were represented by well prepared and zealous counsel. Understanding the importance of the issues to all parties and the short time frame in which Defendants' counsel had to prepare for the hearing held April 24, 2015, the Court allowed all parties to submit post-motion briefs. The Court has reviewed all pre- and post-motion submissions.

As an initial matter, the Court addresses the challenges to service of process ("Service") raised by Defendant Elephant,. Inc. ("EI").[1] The record evidence reflects the Solicitor first attempted Service upon the registered agent of EI as identified by records on file with the South Carolina Secretary of State. (*See* R. Monroe Aff.; J. Smith Aff., ¶¶3-8.)[2] The Solicitor contends, as stated in the affidavit, that such Service was refused by the individuals encountered at the address of EI's registered agent. (*Id.*)

When Service upon EI's registered agent was not effected, the Solicitor directed the delivery of Service to the manager then in charge of EI's Greenville location at 805 Frontage Road in Greenville ("Subject Property").[3] (*See* Todd Aff., ¶¶3-4.) The Greenville County Sheriff's Office ("GCSO") thereafter served an individual named Robert Zurich ("Zurich"). (*Id.* at 8; 4/29/2015 EI Opp. Brief, p. 3.). Accordingly, the initial issue before the Court is whether service upon Zurich constitutes proper service on EI such that this Court has personal jurisdiction over EI.

Sergeant Claude Todd of GCSO personally served Zurich on April 20, 2015 at the PP location at 805 Frontage Road, Greenville, SC. (Todd Aff., ¶8.)[4] Upon arrival at the Subject Property, Sergeant Todd's affidavit reflects he asked to speak "to whomever was in charge." (*Id.* at 4.) Zurich then "stepped forward and identified himself as the manager in charge" and confirmed he would deliver the paperwork to the people who needed it. (Todd Aff., ¶9.)

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[1] Such arguments only relate to EI. During the April 24, 2015 hearing, Defendant Frontage Road Associates, Inc. ("FRAI") acknowledged the Solicitor properly served FRAI. Counsel for EI appeared but did not waive their client's objection to service and personal jurisdiction.

[2] The registered agent for EI on file with the Secretary of State is Vanseea Mascea at 800 Bush River Road in Columbia, South Carolina.

[3] The Subject Property is the site where the acts and omissions giving rise to this lawsuit allegedly occurred.

[4] The legal paperwork served on EI included: the summons, the verified petition with exhibits, the motion for a temporary injunction, the Curtis Affidavit, and the notice of hearing. (Todd Aff., ¶7.)

Affidavits of Zurich and Kevin Ford, both employees of EI, assert that, while Zurich may have been a "day manager", he was not authorized to accept service on behalf of EI.

The South Carolina Rules of Civil Procedure authorize Service on a corporation's "managing or general agent." Rule 4(d)(3), SCRCP. Based upon the record evidence and the holding of *Schenck v. National Health Care,* 471 S.E.2d 736, 737-38 (Ct. App. 1996), the Court finds under the unique facts of this case that Zurich was held out by EI as, and in fact constituted, a "managing or general agent" of EI within the meaning of Rule 4(d)(3), SCRCP. Accordingly, I find that the Solicitor properly served EI through the person on-site at PP who identified himself as the proper person to accept service. Thus, I find that this Court has jurisdiction over EI.

The Court now addresses the merits of the Solicitor's Motion. As noted *supra*, the Thirteenth Circuit Solicitor's Office, a governmental entity, brought the instant Motion pursuant to South Carolina Code § 15-43-30. The Court must, therefore, look to the Nuisance Statute to determine whether temporary injunctive relief should issue. *See, e.g., Cnty. Of Richland v. Simpkins,* 560 S.E.2d 902, 904 (Ct. App. 2002) (Holding modified in part on other grounds). EI argues that the common law test for issuance of injunctive relief applies since the Nuisance Statute does not outline specific conditions or the analysis the court is to apply. However, I find that ordinary preliminary injunction standards as set forth in common law cases do not apply since the State is proceeding under a specific statute enacted by our legislature. (*Id.*).[5] The analysis thus initially involves: (1) determining whether the Nuisance Statute covers the situation in the present case; and (2) whether the Solicitor has satisfactorily established a violation of the Nuisance Statute (*Id.*; *see also* FN5.).

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[5]*See also City of Columbia v. Pick-a-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 521 (2000); 42 AM. JUR. 2D *Injunctions* §25 (2015) ("A statute may impose upon a court the positive duty to grant injunctive relief under specified conditions. A statutory request for injunctive relief is governed by the requirements of the statute, and express statutory language supersedes common-law requirements.")

The Court finds the Solicitor has satisfied his burden in this regard. First, the statutory definition of nuisance under South Carolina Code § 15-43-10(A) clearly embraces the conduct at issue here.[6] And, South Carolina Code § 15-43-30 requires the Court to enter preliminary injunctive relief if the evidence presented by the Solicitor sufficiently establishes that a nuisance occurred at the Subject Property under S.C. Code § 15-43-10(A). As a result, the Nuisance Statute both embraces the issues herein and affords temporary injunctive relief to the State upon a satisfactory showing.[7] What is required for a "satisfactory" showing is set forth below.

The Court must next determine whether the Solicitor has adequately established a violation of the Nuisance Statute entitling the State to a temporary injunction. (*See* S.C. Code § 15-43-30 ("[T]he court...shall...allow a temporary writ of injunction..."). According to the Solicitor, Defendants violated the Nuisance Statute because acts of prostitution, assignation, and lewdness occurred at the Subject Property. (*See* Memo. in Supp., p. 1; *see also* Verified Petition.) EI denies these allegations. However, and as more fully set forth below, the Court finds the Solicitor has satisfied the burden under S.C. Code § 15-43-30 by introducing evidence demonstrating a repeated and continuous nuisance, as defined by the law set forth below, existed at the Subject Property within the meaning of the Nuisance Statute.

In reaching this conclusion it is critical to note that, as a threshold issue, sexually oriented businesses may lawfully operate in South Carolina and, more specifically, here in Greenville County. Thus, in interpreting and applying the Nuisance Statute, the Court must first analyze what the terms lewdness, assignation, and prostitution ("Prohibited Acts") mean under the

[6] The Court incorporates herein by reference the full text of both S.C. Code §§ 15-43-10(A) & 15-43-30.

[7] The Court would also note that S.C. Code § 15-43-30 has been previously invoked on behalf of the State to close a business--pending a trial on the merits--due to a violation of the Nuisance Statute. (*See, e.g., State ex rel. Hembree v. Sherald*, No. 2010-UP-448, 2010 WL 10085571, at *2 (Ct. App. Oct. 19, 2010) (Unpub.) (Holding a preliminary injunction that shuttered a business for over a year before a trial on the merits under the Nuisance Statute did not moot the action.)

Nuisance Statute. The Court finds the following sources relevant in analyzing the Prohibited Acts: South Carolina Code § 16-15-90[8]; Greenville County Code of Ordinances ("GCCO") §§ 2.5-71, 2.5-72, 2.5-73, 2.5-82, & 2.5-87 (Enacted as Ord. No. 2673);[9] and a prior Consent Order executed by EI on January 24, 2002.[10] (*Compare* FN9 *with* FN10.) It is certainly noteworthy that in this Consent Order it was clearly defined as to what could or could not occur in PP and the Consent Order also sets out the affirmative duties and obligations that PP undertook in its location at 805 Frontage Road. Thus, it is against the legal framework established by these sources that the Court must next determine if the evidence sufficiently establishes that Prohibited Acts occurred.

Taken alone, paragraphs 4 through 10 of the Affidavit of Deputy Sheriff Robert Curtis ("Deputy Curtis"), which EI contends is inadmissible hearsay in its entirety, along with the video evidence (attached as Exhibit D to the Verified Petition),[11] amply establish the Prohibited Acts repeatedly and consistently occurred at the Subject Property in violation of South Carolina Code § 15-43-10(A). GCSO's investigation at Platinum Plus involved over fifteen (15) visits to the Subject Property. (*Id.* at 4.) Paragraph 9 of Deputy Curtis's Affidavit evidences a wide range of

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[8] South Carolina Code § 16-15-90 declares prostitution and acts in furtherance thereof illegal in South Carolina. The Court incorporates South Carolina Code § 16-15-90 herein by reference.

[9] Greenville County Ordinance prohibits the use of the Subject Property as a "sexually oriented business." (GCCO § 2.5-87.) Under the Ordinance, no person in the Subject Property may appear in a "state of nudity" or engage in live performances characterized by the exposure of "specified anatomical areas" or by "specified sexual activities." (GCCO § 2.5-72 ("Adult cabaret").) No person in the Subject Property may display her/his "bare buttock, anus, male genitals, female genitals, or female breast." (*Id.* ("Nudity" or "a state of nudity").) Moreover, no person in the Subject Property may engage in the "(1) ... fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts; (2) Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy; (3) Masturbation, actual or simulated..." (*Id.* ("Specified sexual activities").)

[10] In the January 24, 2002 Consent Order, EI stipulated by judicial decree that EI shall not operate a "sexually oriented business" by allowing any person: to appear in "state of nudity," to engage in "specified sexual activities," or to display "specified anatomical areas" as defined by GCCO #2673 and codified at GCCO §2.5-72.

[11] EI concedes Exhibit D is its own surveillance footage from the Subject Property. The pertinent part of the video evidence begins at approximately the five minute mark of Exhibit D.

Prohibited Acts that he personally observed during GCSO's investigation. (*Id.* at 9.) Thus, the Court finds that the affidavit and the video are admissible for the purposes of the present motion. And, to the extent the Deputy Curtis affidavit may contain some degree of hearsay outside of his personal observations, the Court has disregarded the same. For purposes of the instant motion, the Court is compelled to find that such repeated and consistent acts constitute a nuisance under South Carolina Code § 15-43-10(A).[12]

Despite EI's objections, the Court also finds the many sworn statements of the female "entertainers" submitted as attachments to the Curtis Affidavit are admissible. (*See* Curtis Aff., Attach. C-1 to C-8.)[13] The content of the statements reflect they were based upon the personal knowledge and observations of the individuals who made them. (*Id.*) The statements indicate their content is accurate and correct. (*Id.*) With exception of one statement by an EI employee, the statements were sworn to a notary. (*Id.*) The Court finds such statements are admissible and properly considered by the Court, particularly at the temporary injunction stage. (*Id.*) The Court further finds that these statements both corroborate and expand upon the Prohibited Acts personally observed by Deputy Curtis and captured on the video evidence. (*Id.*) But, as noted above, even if the Court did not consider the statements, the Court would still find, and does find, the State amply satisfied its burden with the Curtis Affidavit and video evidence alone.[14]

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[12]The Court incorporates herein by reference the conduct set forth in Paragraph 9 of the Affidavit of Deputy Curtis. (Curtis Aff., ¶9.) "Of note, most or all of the sexually related acts set forth [in Paragraph 9 of the Curtis Affidavit] were not isolated occurrences." (*Id.* at 10.) The conduct "serially occurred at Platinum Plus over [Curtis's] fifteen (15) or more visits to the Subject Property as witnessed by [him] and other undercover GCSO officers." (*Id.*) And, with respect to such evidence, EI provides scant, if any, evidence rebutting the same.

[13] The Court incorporates the content of the statements attached to the Curtis herein by reference. (Curtis Aff., Attach. C-1 to C-8.)

[14] The Court did not consider the online statements (attached as Exhibit F to the Curtis Affidavit) in connection with this Order.

The Court next finds the evidence submitted thus far, as noted above, fails to establish abatement has occurred within the meaning of the Nuisance Statute. Initially, under the Nuisance Statute, only "the owner of the real estate" has a right to avoid suit by statutory abatement. (S.C. Code § 15-43-110.) The evidence of record confirms FRAI owns the real estate, not EI. (*See* Curtis Aff., ¶8 & Attach. B.) Thus, EI can avoid neither suit nor the instant Motion by *post facto* claims that it implemented measures to cease the unlawful conduct. And, the fact that at the time Solicitor served the March 27, 2015 written notice of the alleged nuisance upon FRAI, he also served EI with the same written notice of the alleged nuisance is not legally relevant under the Nuisance Statue. To accept EI's argument allowing a tenant to abate a nuisance would require the Court to re-write the Nuisance Statute.

However, even if EI as a tenant could abate under the Nuisance Statute, and even if the measures taken by EI somehow established abatement occurred within the meaning of the Nuisance Statute, a statutory construction the Court rejects, the record evidence would still overwhelmingly belie a finding of appropriate abatement occurred in this case. Thus, under the Nuisance Statute and the relevant authorities cited above, the State has established a right, both factually and legally, to close PP. This is especially true where, as here, a Consent Order of this Court already existed under which EI stipulated--by judicial decree--to prevent the exact conduct giving rise to this lawsuit and the Solicitor's Motion. (*See* Jan. 24, 2002 Consent Order.) Even if otherwise proper, the Court would still reject EI's assurances of self-policing when a prior Court Order failed to deter EI's conduct. EI, in that litigated Consent Order, affirmatively agreed to a defined acceptable course of conduct, a defined acceptable behavior in the venue and a defined level of affirmative duties it would undertake. Now, in light of both the degree and the nature of the evidence, EI has clearly crossed the lines it agreed to operate within and the lines that the

applicable law allows. EI may not close its corporate eyes to the activities in its location at 805 Frontage Road and then claim blindness as a defense.

EI also argues the Nuisance Statute, as it is sought to be enforced in this case, violates the *First Amendment*, as an unconstitutional prior restraint on expressive activity. While premature to fully argue the issue, the Court rejects this argument at this point in the proceedings. EI's argument in this regard, by its own admission, appears to lack evidentiary support. (*See, e.g.*, EI's Memo. in Opp., pp. 12-13, FN3 ("While it is too early to discern the motivation of the state....").[15] Moreover, based upon the evidence and record so far, the Court finds the South Carolina Nuisance Statute, as applied here, does not implicate the *First Amendment* since the conduct it aims to penalize garners no *First Amendment* protection. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986).[16]

In granting the relief sought by the Solicitor's Motion, the Court notes the following to avoid any confusion:

- First, the Court's Order constitutes a purely temporary order based solely on the record to date. None of the findings herein constitute permanent or conclusive findings and Defendants retain their full rights to present any and all defenses at the trial on the merits. Similarly, none of the findings herein shall in any way be binding upon any of the parties at the time of the trial on the merits.

- Second, to date, none of the evidence submitted by the Solicitor reflects FRAI participated in the Prohibited Acts prompting the Solicitor to bring this action or file the instant Motion. The record evidence, to date, only reflects FRAI owned the real property where the Prohibited Acts allegedly occurred.

- Third, the trial of this case shall occur on an expedited basis. As soon as practicable, the Parties are directed to consult upon a timetable for completing discovery and, if possible,

[15] If EI later unearths evidence supporting its claims of selective prosecution in violation of its *First Amendment* rights, such arguments remain available to EI for presentation at the trial on the merits.

[16] In *Arcara*, the United States Supreme Court upheld the closure of an adult bookstore used for prostitution under New York's Nuisance Statute because protected activities (*i.e.*, bookselling) did not: "confer First Amendment coverage [so as] to defeat a valid statute aimed at penalizing and terminating illegal uses of premises..." (*Id.* at 707); *see also Dorman v. Aiken Communications, Inc.*, 303 S.C. 63, 66 (1990) (Citing and following the analysis in *Arcara*.)

identify potential trial dates. Once completed, the Parties are directed to contact the presiding Administrative Judge to schedule a trial date consistent with this directive. Counsel for all parties have indicated the case will likely be ready for a trial on the merits within 90 days.

For the reasons set forth above, the Court **GRANTS** the Solicitor's Motion for a Temporary Injunction including the relief prayed for therein, subject only to the following clarifications:

A. Defendants shall have forty-eight (48) hours following the issuance of this Order and its receipt by Defense Counsel to wind-down and cease, pending further Court Order, Platinum Plus's operations, as operated by Elephant, Inc., at 805 Frontage Road in Greenville, South Carolina 29615;

B. After the forty-eight (48) hours set forth above, the Greenville County Sheriff's Office shall post a laminated Notice (size to be 11x14) on all exterior doors of 805 Frontage Road in substantially the same form as Attachment A;

C. This Order shall remain in full, force and effect until: (1) a trial can be conducted on the merits of the above-captioned matter; or (2) the Court modifies this Order;

D. Individuals found guilty of violating this Order shall be subject to the Court's contempt powers as required by S.C. Code §§ 15-43-30 & 15-43-70 and subject to a fine of up to one thousand dollars ($1,000.00) or imprisonment up to six (6) months.

IT IS SO ORDERED.

The Honorable Charles B. Simmons, Jr.
Presiding Judge, 13th Judicial Circuit

Greenville, S.C.

May 6, 2015

ATTACHMENT A

Pursuant to Court Order, this business is closed until further Order. See, 2015-CP-23-02597.

Violation of this Order may result in contempt of court, including monetary fines and/or jail.

A copy of the Court Order may be obtained from the Greenville County Clerk of Court, 305 East North Street, Greenville, SC 29601.