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, Charlie 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

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.

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).

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); 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.

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.

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 NO: 2006CP4001814

Lauren Proctor *vs.* **Whitlark & Whitlark Inc**

Plaintiff 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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ 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)

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

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W. McBride

Clerk of Court