

ENTERED

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L.A.B.
DEPUTY CLERK

IN RE:

BHB ENTERPRISES, LLC, d/b/a Tycoon's
Gallery of Games,

Debtor.

Stanley H. McGuffin, Chapter 11 Trustee, for
the Debtor BHB Enterprises, LLC, d/b/a
Tycoon's Gallery of Games,

Plaintiff,

v.

Harold Barman, Evelyn Barman, Norman
Barman, Michael Baumhaft, Sandra
Baumhaft, and Universal Video, Inc.,

Defendants.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

C/A No. 97-01975-W

Adv. Pro. No. 97-80227-W

JUDGMENT

Chapter 11

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Judgment shall be entered as follows:

On the Trustee's Objection to the Proof of Claim of Michael Baumhaft ("Claim"), Trustee's Objection to the Claim is sustained, and the Claim is reduced to \$266,312.50, after deducting the claim of Dr. Kohlenburg, and is subordinated to the payment of all administrative and unsecured claims. The claim of Norman Barman is disallowed in its entirety.

On the Trustee's First and Second Claim for Relief, against Sandra Baumhaft, the Court rules that the Trustee may disregard the corporate identity of BHB Enterprises, LLC and recover from Sandra Baumhaft the amount necessary to pay all administrative and unsecured claims in full.

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On the Trustee's Third Claim for Relief, against Sandra Baumhaft, the Court finds that Sandra Baumhaft breached her fiduciary duty, and that the Trustee is entitled to judgment against Sandra Baumhaft in the amount necessary to pay all administrative and unsecured claims in full, as an alternative recovery to the Trustee's First and Second Claim for Relief.

On the Trustee's Fourth and Ninth Claims for Relief, the Court rules that the claim of Norman Barman will be subordinated to the claims of all the Debtor's other creditors pursuant to §510(c)(1). The Court further rules that the claim of Michael Baumhaft will be subordinated, pursuant to §510(a) and § 510(c)(1) to the claims of all the Debtor's unsecured creditors

On the Trustee's Sixth Claim for Relief, against Michael Baumhaft for breach of contract, the Court finds that Trustee is entitled to judgment in the amount necessary to pay all administrative and unsecured claims in full, \$303,712.00.

On the Trustee's Seventh Claim for Relief, against Michael Baumhaft for specific performance, the Court finds that Trustee is entitled to judgment against Michael Baumhaft for specific performance as an alternative recovery to the Trustee's Sixth Claim for Relief.

On the Trustee's Tenth Claim for Relief, against Michael Baumhaft, Sandra Baumhaft, Norman Barman and UVI, the Court finds that Trustee is entitled to turnover of the estate assets, including all records of the Debtor, in the possession or control of Michael Baumhaft, Sandra Baumhaft, Norman Barman and UVI, and therefore orders said Defendants to turnover the enumerated assets within ten (10) days of the entry of this Order or, after said ten (10) days, failing the Defendants compliance herewith, judgment in favor of the Plaintiff in the amount of \$85,978.58.

On the Trustee's Eleventh Claim for Relief, against Michael Baumhaft, Sandra Baumhaft, Norman Barman and UVI for conversion of assets of the estate, the Court finds that Trustee is

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entitled to judgment against Michael Baumhaft, Sandra Baumhaft, Norman Barman and UVI in the amount of \$85,978.58.

On the Trustee's Fifteenth and Sixteenth Claim for Relief, against Michael Baumhaft for post petition transfers, the Court finds that the Trustee is entitled to judgment against Michael Baumhaft in the amount of \$12,000.00, as an alternative recovery to a portion of the Trustee's Tenth Claim for Relief.

On the Trustee's Seventeenth, Twentieth, Twenty First, Twenty Second Claims for Relief, against Michael Baumhaft, Norman Barman, Sandra Baumhaft, and UVI, for accounting, the Court finds that Trustee is entitled to the relief requested, and therefore orders:

- a. Michael Baumhaft, Norman Barman, and UVI to account to the Trustee for the Lost Profits;
- b. Michael Baumhaft and Norman Barman to account to the Trustee for the revenues generated by said defendant's additional enterprises, as well as to provide the Trustee with a detailed list of all additional enterprises;
- c. Michael Baumhaft, Norman Barman, Sandra Baumhaft, and UVI, to account to the Trustee for all income and expenses of the Debtor;
- d. Norman Barman, to account to the Trustee for the proceeds of the David Linville loan;
- e. said Defendants to provide all accountings within ten (10) days of the entry of this Order.

On the Trustee's Eighteenth and Twenty Ninth Causes of Action, as to Michael Baumhaft, Norman Barman, and UVI, the Court finds that the Trustee is entitled to turnover of revenues of the Debtor now or formerly in the possession or control of Michael Baumhaft, Norman Barman and UVI, including, but not limited to, the proceeds from the Linville Loan [\$4,000.00], revenues from the Golf Course Route Machines [\$56,000.00], and lease payments for the Golf Course Route Machines

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[\$12,675.00], and therefore orders said Defendants to turnover the enumerated assets within ten (10) days of the entry of this Order.

Columbia, South Carolina,
September 30, 1998.


UNITED STATES BANKRUPTCY JUDGE

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CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

OCT 1 1998

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

LISA BAUGHMAN

Deputy Clerk

Driffic	Naupul/Short
Java	N. Barmon
Strait	E. Barmon
Mathews	H. Barmon
metzger	m. Baumhaft
McCarthy	S. Baumhaft
Keenan	Zortocue

3 to Chambers

ENTERED
OCT 01 1998
L.A.B.
DEPUTY CLERK
IN RE:

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at October 2 1998 min M
SEP 30 1998
BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (4)

BHB ENTERPRISES, LLC, d/b/a Tycoon's
Gallery of Games,

Debtor.

Stanley H. McGuffin, Chapter 11 Trustee, for
the Debtor BHB Enterprises, LLC, d/b/a
Tycoon's Gallery of Games,

Plaintiff,

v.

Harold Barman, Evelyn Barman, Norman
Barman, Michael Baumhaft, Sandra
Baumhaft, and Universal Video, Inc.,

Defendants.

C/A No. 97-01975-W

Adv. Pro. No. 97-80227-W

ORDER

Chapter 11

THIS MATTER comes before the Court for the trial of the above-referenced adversary proceeding as to the defendants Sandra Baumhaft, Michael Baumhaft, Norman Barman, and Universal Video, Inc ("UVI") (collectively "Defendants"), and the hearing on the Trustee's Objection to the Claim of Michael Baumhaft and Norman Barman. Immediately preceding the trial, the Court was advised by the attorney representing all of the Defendants on August 4, 1998, the Defendants Harold Barman and Evelyn Barman filed a voluntary petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Michigan and that as a result, the action was stayed as to those two Defendants.

After reviewing the pleadings in this matter, the Joint Pre-Trial Order entered August 5,

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1998, hearing the testimony of the witnesses, and considering the evidence presented and arguments of counsel for the parties, the Court adopts the parties' Stipulation of Facts and makes its own Additional Findings of Fact and Conclusions of Law.¹

STIPULATION OF FACTS

On or about December 6, 1995, BHB Enterprises, LLC, ("Debtor") was formed for the purpose of "establishing, owning and operating gambling casinos throughout the United States," pursuant to the terms of an operating agreement that set forth the obligations of its members and other related parties ("Agreement").

Members of the Debtor are: (a) Defendant Harold Barman ("H. Barman"); (b) Defendant Sandy Baumhaft ("S. Baumhaft"); and (c) Lynette Horvath. Lynette Horvath is the wife of Robert Horvath, who was a pre-petition attorney and real estate broker for the Debtor, as well as a creditor of the Debtor. Lynette Horvath is not a defendant in this case. Defendants H. Barman and S. Baumhaft each hold a 1/3 interest in the Debtor (collectively "Controlling Members"). Lynette Horvath also holds a 1/3 interest in the Debtor.

On or about April 22, 1996, Debtor began operating its video gaming business in Surfside Beach, South Carolina, under the name "Tycoon's."

On March 5, 1997, creditors of the Debtor ("Petitioning Creditors") filed an involuntary petition against the Debtor. On May 1, 1997, the Order Adjudicating the Involuntary Petition was granted. On May 22, 1997, on motion of the petitioning creditors and the United States

¹The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

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Trustee, the Court entered an Order Appointing a Chapter 11 Trustee. On May 23, 1997, Stanley H. McGuffin, Esq. was appointed as Chapter 11 Trustee ("Trustee"). On July 24, 1997, Trustee filed this adversary proceeding seeking, among others, declaratory judgment within the meaning of 27 U.S.C. § 2201 for the purpose of determining the rights, duties, entitlement, status and other legal relations among the parties.

This Court has jurisdiction over this adversary proceeding, as well as jurisdiction over all Defendants, based upon 28 U.S.C. § 1334(b), because this is a proceeding arising in or related to a case under Title 11, United States Code, that has been referred to the Bankruptcy Court pursuant to 28 U.S.C. § 157(b)(1). Venue is proper, and is based upon 28 U.S.C. § 1409 in that the Debtor's Chapter 11 bankruptcy case is pending in this District.

Defendant Universal Video, Inc. ("UVI"), is a closely-held corporation operating and existing under the laws of the State of Michigan, with its principal place of business in Bloomfield Hills, Michigan. H. Barman is the owner and 100% shareholder of UVI. H. Barman claims to have made loans to the Debtor totaling \$50,000.00 but has not filed a proof of claim with the Court. However, he has asserted an oral claim, and has been listed in the Debtor's Schedules (prepared by the Trustee), as the holder of a disputed claim.

Defendant Norman Barman ("N. Barman") was an employee of the Debtor until he was released by the Trustee in June, 1997. N. Barman also acted as the designated agent for exercising the rights of H. Barman [his father] in the Debtor.

Defendant Michael Baumhaft ("M. Baumhaft") claims to be a creditor of the Debtor. M. Baumhaft also acted as the designated agent for exercising the rights of S. Baumhaft [his wife] in the Debtor. Defendant Evelyn Barman ("E. Barman") claims to be a creditor of the Debtor.

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M. Baumhaft, S. Baumhaft, E. Barman, N. Barman, and H. Barman are insiders of the Debtor, as that term is defined by 11 U.S.C. §101(31)(B).²

There is no “oral lease” between the Debtor and either H. Barman or M. Baumhaft. There are three (3) leases in the name of UVI for the lease of video gaming machines.

ADDITIONAL FINDINGS OF FACT

A. General Findings

The Debtor which was formed “for the purpose of establishing, owning, and operating gambling casinos throughout the United States” is both a direct and a third party beneficiary to the Agreement. While the Agreement provided that the Debtor could engage in other business activities, it also provides that, “[n]o Member shall appropriate any business opportunity to himself which business opportunity shall first have been made available to the Company without the unanimous consent of all other members.” The Agreement provides that Members may engage in other business activities, provided they are, “not in competition with the business of the Company.” Certain creditors of the Debtor relied on the terms of the Agreement when dealing with the Debtor.

The Debtor’s premises or “First Site” [as set forth in the Agreement], were bought on a land sale contract from Bobby’s Bar B-Q, Inc., by N. Barman, on behalf of a corporation to be formed. The Debtor was to be funded by capital contributions as required by Article VI, §6.1 of the Agreement; however, it does not appear that such contributions were made.

The Agreement contains an integration clause and the Court finds that the Agreement

² Further reference to the Bankruptcy Code, 11 U.S.C. §101, *et seq.*, shall be by section number only.



represents the complete agreement of the parties and has not been modified.

Members and their agents failed to maintain adequate corporate records or held real corporate meetings. The Debtor was insolvent and prior to the Trustee's appointment, the Debtor did not make a net profit. The operating assets were sold by the Trustee on October 1, 1997 pursuant to the terms of an Order of this Court. Proceeds from the sale were used to pay Bobby's Bar B-Q and the Petitioning Creditors, as well as creditors whose claims can be classified as claims incurred by the Debtor in starting up its operations. These claims were in the specific category of costs and expenses that the parties intended to pay using loans from E. Barman and M. Baumhaft pursuant to §6.6.1 of the Agreement. After payment of these claims, the Trustee has insufficient funds to pay the remaining allowed claims of creditors. The Defendants S. Baumhaft, M. Baumhaft, and N. Barman did not file an objection to the Debtor's Chapter 11 plan, which was confirmed by this Court.

Barefoot Billiards is a poolroom located in Myrtle Beach, South Carolina. Barefoot Billiards is the trade name of a Michigan corporation "BaumBar," that was formed by M. Baumhaft and H. Barman after the filing of the petition in this case, and is now owned by H. Barman.

Prior to the filing of the petition, Debtor purchased many items used in the operation of Tycoons. Among the Debtor's records was evidence that among the items purchased were 17 20-inch TVs, 2 40-inch TVs, a pool table, jukebox with 50 compact disks ("CDs"), and five (5) Victor 6 video game machine. Of these items, seven (7) TVs, the jukebox, CDs, two (2) Victor 6, and the pool table (collectively "Missing Assets") were not on the Debtor's premises when the Trustee took over operations. The Missing Assets have not been accounted for or turned over by

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any of the Defendants. In addition, the proceeds from the alleged sale of the Missing Assets have not been accounted for. Items that are similar to the Missing Assets are used at Barefoot Billiards.

The Debtor made lease payments on video poker machines that are on a "route" operated by N. Barman on certain golf courses ("Golf Course Route"). The Golf Course Route consisted of five (5) video poker machines that were leased in the name of UVI. Prior to the Trustee's appointment, the Debtor made the lease payments for these machines. The machines on the Golf Course Route generated revenues of approximately \$56,000.00 for the period from the Spring of 1996 through August, 1997 ("Revenues"). Some of the Revenues were deposited into Barefoot Billiards' accounts. Before the Trustee's appointment, some of the Revenues may have been deposited to the Debtor's safe, or other accounts. The Golf Course Route operated until after the Trustee's appointment. The video gaming licenses on the Golf Course Route machines were paid for initially by the Debtor.

The Debtor leased or purchased 75 video gaming machines. Based upon the Trustee's investigation, there is one (1) machine that has not been adequately accounted for.³ The remainder of the machines have been sold or abandoned by the Trustee.

The Debtor was grossly undercapitalized, as evidenced by the failure to maintain sufficient operating reserves or capital accounts to fund Debtor's continuing operations and never made distributions to its members.

³ The unaccounted for machine is a "Pot of Gold" video poker machine, bearing serial number 2004730496 ("Missing Machine"). The Missing Machine was not located on the Golf Course Route, or on the Debtor's premises. The evidence further shows that the Debtor purchased the Missing Machine for \$7,720.58.

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B. Findings as to Defendant Sandra Baumhaft:

S. Baumhaft is experienced in financial matters, having gained this experience as the former owner and operator of a finance company. S. Baumhaft is a signatory to the Agreement, which provides, at Article IX, §9.5 that, “each of the Members acknowledge and accept in his capacity as a member that he is acting as a fiduciary of the company”

S. Baumhaft did not participate in any of the business decisions made by the Debtor or monitor the activities of the Debtor. She did not obtain reports from her agent/ husband as to the Debtor’s activities, nor did she monitor the activities of her agent/ husband. She made no loans to the Debtor and did not receive distributions from the Debtor.

S. Baumhaft had specific duties under the Agreement but failed to fulfill these duties and carried out no functions or responsibilities for the Debtor.

The Agreement provides for the assignment of a Member’s interest to his spouse, provided the spouse, “first agrees in writing to assume and be bound by the . . . Agreement.” There is no evidence that S. Baumhaft assigned her interest in the Debtor to her husband M. Baumhaft or, if she attempted to do so, that M. Baumhaft first agreed in writing to assume and be bound by the Agreement. Therefore, the Court finds that any purported waiver of obligations under the agreement by S. Baumhaft would be invalid, and that S. Baumhaft remained obligated to fulfill her duties under the Agreement.

S. Baumhaft, through her agent M. Baumhaft, had constructive knowledge of the Debtor’s creditors. In addition, S. Baumhaft, through her agent M. Baumhaft, had knowledge of the Golf Course Route and its functioning.

C. Findings as to Defendant Michael Baumhaft:

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M. Baumhaft was S. Baumhaft's agent. M. Baumhaft contracted with the Debtor to provide services to the Debtor, "related to obtaining financing for the opening and operating of additional venues."

Section 6.6.1 of the Agreement required M. Baumhaft to loan funds to the Debtor for fifty (50%) percent of the total amount required for:

All of the acquisition costs for the site located at 1900 North 17th Avenue, Surfside Beach, S.C. ("First Site") including but not limited to the down payment, monthly land contract payments, and related out of pocket expenses [Agreement at § 6.6.1.1];
All costs incurred in connection with making improvements to the First Site [Agreement at §6.6.1.2]; and
All of the acquisition costs incurred in connection with fixturing the First Site, obtaining all required furniture, machinery, and equipment . . . including the acquisition of approximately 75 video devices and the purchase of necessary S.C. machine tags [Agreement at §6.6.1.3].

The Agreement contains no limit on the amount of funds that M. Baumhaft was obligated to loan the Debtor, and provides for subordination of M. Baumhaft's loans to other creditors.

The Agreement further provides that, "Michael Baumhaft [is] executing [the Agreement] solely for the purpose of indicating [his] agreement and undertaking to make . . . loans to the [Debtor] and such undertaking by [him] shall be binding and enforceable under the law." Consequently, the Court finds that that M. Baumhaft knew, at all times, of his obligations to loan money to the Debtor under the Agreement, and that the funds advanced by M. Baumhaft to the Debtor were loans. Despite his knowledge of his obligation to loan money to the Debtor under the Agreement, M. Baumhaft intentionally ceased making loans to the Debtor.

Commencing on or about April 7, 1997 and continuing for at least seven (7) weeks, M. Baumhaft received not less than \$1,500.00 per week, and up to \$3,000.00 per week from the Debtor. M. Baumhaft knew that the Debtor was in bankruptcy when he accepted these payments.



On or around June 23, 1997, M. Baumhaft brokered a loan to BaumBar from Fifth Third Bank in the amount of approximately \$245,000. As part of the transaction, H. Barman and the Debtor were guarantors of the loan to the Bank. This transaction occurred after the Trustee's appointment, and without the consent or authorization of the Trustee or this Court. The proceeds of the loan were used by BaumBar to purchase video gaming machines from a corporation solely owned and operated by M. Baumhaft. Although unclear from the testimony, it appears that M. Baumhaft sold the video gaming machines for an artificially inflated price.

The business opportunity facilitated by the Fifth Third Bank Loan was a business opportunity that the Debtor could have taken and used.

M. Baumhaft had actual knowledge of the Debtor's creditors and knew that Bobby's Bar B-Q was not being paid and was foreclosing on the Debtor's First Site. He also knew that Jim Wood was not being paid.

M. Baumhaft's Proof of Claim dated July 21, 1997 is in the amount of \$598,012.50. M. Baumhaft testified that this claim represents both funds loaned to the Debtor by Mr. Baumhaft personally, and funds loaned to the Debtor, through Mr. Baumhaft, by Dr. James Kohlenburg. However, Dr. James Kohlenburg has filed his own proof of claim in the main case for the sum of \$331,700.00. M. Baumhaft has not filed an amended proof of claim. The loans from Dr. Kohlenburg were not authorized by a super majority of the Members, as required by the Agreement. The Agreement contains a subordination clause by which M. Baumhaft agrees that any loan made by him to the Debtor will be paid out of Net Cash.

M. Baumhaft had actual knowledge of the Golf Course Route that N. Barman operated using machines leased by UVI, and paid for by the Debtor.

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D. Findings as to Defendant Norman Barman.

N. Barman was Harold Barman's agent and was an employee of the Debtor. Before the Trustee's appointment, N. Barman was responsible for the day to day operations of the Debtor. Commencing in or around April 7, 1997, N. Barman paid H. Barman and M. Baumhaft up to \$3,000.00 per week for approximately seven (7) weeks.

The Controlling Members did not require N. Barman to regularly report activities of the Debtor. Assets of the Debtor, food, liquor, and "free play" on the video poker machines, in the form of "comps" to customers, were given away on a regular basis by N. Barman. The Debtor did not maintain records of the comps given to customers.

N. Barman "operated" out of the Debtor's safe, freely using the Debtor's assets as his own. N. Barman asserts that the funds allegedly left by N. Barman in the Debtor's safe were loans from N. Barman to the Debtor. However, N. Barman did not maintain a personal bank account or checking account, or a separate source of revenue outside of the Debtor's safe. Based on the evidence presented regarding N. Barman's free handed dealing with the Debtor's assets, the Court rejects N. Barman's contention that he loaned the Debtor money, or that all or a portion of the cash within the Debtor's safe belonged to N. Barman. The Court finds that any cash or proceeds located in the Debtor's safe at any time were the Debtor's assets.

David Linville was loaned \$4,000.00 in cash. N. Barman failed to maintain records of the Linville Loan. The David Linville loan was repaid in full, but the proceeds have not been accounted for. The proceeds from the Linville Loan are not of inconsequential value to the estate.

N. Barman cannot account for the location of the seven (7) televisions purchased by the

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Debtor, or the proceeds from the alleged disposal of those televisions. N. Barman also cannot account for the pool table, CDs, 2 Victor 6 video poker machine, and juke box purchased by the Debtor.

Derrie Cavens testified that, after Carolina Equities purchased the Debtor's business from the Trustee, she discovered that video poker "tickets" generated from machines believed to be located at Barefoot Billiards were surreptitiously presented for payment at Tycoons. The Trustee verified that, in fact, Barefoot Billiards had in its possession video game machine paper that bore the "Tycoons" logo, and that this paper was once located at the Debtor's premises. The Trustee testified that this paper was taken from the Debtor's premises without the Trustee's knowledge or permission, but were returned to the Trustee after the foregoing factors were brought to his attention and he demanded the return of the logo property.

The evidence shows that N. Barman or his agents took some of the Golf Course Route Revenues to Barefoot Billiards. Furthermore, after the Trustee's appointment, N. Barman took the Revenues for his own personal use. The evidence also shows that N. Barman took an indeterminate amount of money from the Debtor, post petition, for his own personal use, and made other unauthorized withdrawals of cash from the Debtor. Counsel for N. Barman stipulated that N. Barman's claim for \$9,000.00 should be subordinated.

N. Barman caused certain of the Debtor's records to be removed from the Debtor's Off Site Storage facility without the permission or consent of the Trustee.

E. Findings to Defendant UVI:

UVI is a Michigan Corporation solely owned and operated by H. Barman and is in the business of operating, maintaining, and repairing video game machines and routes of machines in

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Michigan. The Debtor utilized UVI as the entity through which it leased twenty three (23) video game machines because, at the time the Debtor was created, the Debtor was not a credit worthy entity that the game lessors would lease machines to. Of the 23 machines, 18 of the machines were on the Debtor's premises, and 5 of the machines were located by the Trustee on the Golf Course Route.

Prior to the filing of the petition, the Debtor made payments on the 23 machines leased by UVI in the total amount of \$58,306.83.



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CONCLUSIONS OF LAW

1. Issues Not Tried or Pursued:

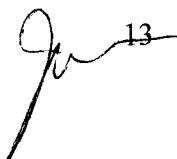
Before trial, Trustee advised the Court that the estate no longer intended to pursue the Twelfth [Fraudulent Transfers – M. Baumhaft], Thirteenth [Fraudulent Transfer –M. Baumhaft], Fourteenth [Recovery of Fraudulent Transfers –M. Baumhaft], or Twenty Third [Resulting Trust – UVI] Causes of Action.

2. Core proceeding

In their Answer to Trustee's First Amended Complaint, Defendants' asserted that the Trustee's Causes of Action for Breach of Fiduciary Duty (3rd), Breach of Contract (6th), Conversion (11th and 30th), and Theft of Corporate Opportunity (19th), were not core proceedings within the meaning of 28 U.S.C. § 157(b)(2)(A), (H), and (O) and, therefore, could not be finally determined by this Court. The Court disagrees.

"Core proceedings" are those matters concerning the administration of the estate or proceedings affecting the adjustment of the debtor/creditor relationship. 28 U.S.C. §§157(b)(2)(A) and (O). A matter cannot be deemed to be non-core merely because its resolution is controlled by state law. 28 U.S.C. §157(b)(3).

The Court finds, as a matter of law, that the issues raised by in the above-referenced causes of action directly relate to the administration of the estate, and are therefore core proceedings. Each cause of action involves a claim by the Debtor, asserted through the Chapter 11 Trustee, against Members and insiders of the Debtor, for damages sustained by the Debtor arising out of the Defendants' actions, or arising as a result of the Defendants' interference with Debtor's rights in assets of the Estate and therefore the outcome of this adversary proceeding will necessarily affect the

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administration of the Estate. *See in re Cuyahoga Equip. Corp.*, 980 F.2d 110 (2nd Cir. 1992); *In re Lemoco Gypsum*, 910 F.2d 784 (11th Cir. 1990); *Pacor v. Higgins*, 743 F.2d 984 (3rd Cir. 1984).

3. Objection to M. Baumhaft's Claim

The Trustee filed an objection to M. Baumhaft's claim. Once an objection to a claim is filed, the burden of proof shifts to the claimant to prove the validity and amount of his claim. The evidence shows that M. Baumhaft's claim is filed for the amount of \$598,012.50, and that the basis of this claim is the loans allegedly made by M. Baumhaft to the Debtor. However, the Trustee has testified, and M. Baumhaft has confirmed, that of this claim, \$331,700.00 represents funds loaned to the Debtor by Dr. James Kohlenburg. The evidence is also clear that, at present, M. Baumhaft and Dr. Kohlenburg are adverse parties to each other. Therefore, the Court sustains a portion of the Trustee's objection to M. Baumhaft's claim, and orders the claim reduced by the face amount of the Kohlenburg claim, to the amount of \$266,312.50. The priority of this claim is addressed later at section 6.

4. First and Second Causes of Action – [Piercing the Corporate Veil – S. Baumhaft]

In his First and Second Causes of Action, Trustee seeks to pierce the Debtor's corporate veil to hold Controlling Member, S. Baumhaft, liable for the difference needed to pay creditors of the Debtor. Unlike most piercing cases, when the veil is pierced primarily because of the direct action of a party, Trustee argues, based on principals of agency, that the actions of S. Baumhaft's agent, M. Baumhaft, combined with the inaction of S. Baumhaft in monitoring the activities of her agent and the Debtor, provide ample grounds to pierce the veil.

The parties stipulated prior to trial that M. Baumhaft was S. Baumhaft's agent. Defendants failed to argue or produce any evidence that, at any time during his tenure as S. Baumhaft's agent,

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M. Baumhaft acted outside the scope of his authority as S. Baumhaft's agent. Therefore, the Court concludes that all of M. Baumhaft's activities were within the scope of the authority given to him by his principal. See *Crystal Ice Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 498 (1979).

Under South Carolina law, knowledge and actions acquired by an agent during the scope of the agency are imputed to the principal. *Crystal Ice Co.*, 273 S.C. at 309, 257 S.E.2d at 497; *Bankers Trust of S.C. v. Bruce*, 283 S.C. 408, 323 S.E.2d 523 (Ct. App. 1984). The fact that a principal and agent are wife and husband does not change the application of this legal principal. An agency relationship between a husband and wife is governed by the same rules that apply to an agency relationship between two non-related parties. *Bankers Trust*, 283 S.C. at 423, 323 S.E.2d at 532.

The controlling case in this district on piercing the corporate veil is *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 683 (4th Cir. 1976). In *DeWitt*, the Fourth Circuit court of Appeals, upholding the District Court order, stated that, "in an appropriate case and in furtherance of the ends of justice, the corporate veil will be pierced and the corporation and its stockholders will be treated as identical". *Id.* at 683. Whether or not to pierce the veil depends upon the facts of each case, which will vary. *Id.* at 684. To justify such drastic relief, the movant, in this case the Trustee, has the burden of establishing, by a preponderance of the evidence, the grounds for piercing the veil, under a two (2) part test.

Under the first prong, the Court must consider whether there is evidence that the corporation was grossly undercapitalized⁴; corporate formalities were not observed; dividends were not paid; the

⁴ Inadequacy of capital can be determined by the capital actually deposited or required, compared with the magnitude of the proposed undertaking. *DeWitt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 683, 686 n.13 (4th Cir. 1976) (*hereinafter* "*DeWitt*") (citing *Anderson v.*

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corporation was insolvent; corporate funds were siphoned off by controlling shareholders; corporate records were not maintained; the corporation was a façade for the operations of the controlling shareholders and whether there are non-functioning or “frozen out” shareholders, or directors. *Id.* at 684 – 87; *Hovis v. Powers Construction Co., Inc., (In re Hoffman Assoc., Inc.)*, Adv. Pro. No. 91-8293-W, at 32 (Bkrtcy. D.S.C. April 25, 1995) (“*Hoffman Associates*”). The foregoing list is not exclusive, nor is it mandatory, as the absence of one of the articulated elements will not, in and of itself, protect the veil. *See DeWitt*, 540 F.2d at 687.

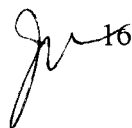
Under the second prong of the *DeWitt* test, the Court must find evidence proving the existence of, “an element of injustice or fundamental unfairness,” to justify the relief requested. *DeWitt* 540 F.2d at 687; *Hoffman Associates* at 32. The Court finds that the Trustee has met his burden, and that the corporate veil should be pierced as to S. Baumhaft.

a. *DeWitt*’s First Prong

i. The Debtor was grossly undercapitalized:

Evidence presented by the Trustee shows that the Debtor was grossly undercapitalized. Under the terms of the Agreement, Debtor was to be funded through capital contributions from members totaling \$60,000.00. Although money was put into the corporation, testimony was conflicting as to whether S. Baumhaft made her required initial capital contribution. When asked in her deposition whether she made a capital contribution, she testified that she was not sure. H. Barman and N. Barman, a Controlling Member and his agent, respectively, testified in their

Abbott, 321 U.S. 349, 362 (1943). This view should also be coupled with a recognition that the obligation to provide capital begins at the corporation’s inception and continues throughout the life of its operation. *DeWitt*, 540 F.2d at 686.

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depositions that no capital contributions were actually contributed by the Members. Robert Horvath, the Debtor's former consultant, also testified that no capital contributions were ever made.

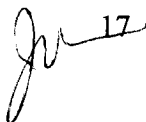
Defendants argued that evidence that the initial capital contribution was made by S. Baumhaft can be seen in the form of a ledger entry dated February 9, 1996 in the amount of \$20,000.00. The Court rejects this interpretation of the evidence. At the outset, the funds in question were paid to the Debtor well after the Debtor's December, 1995 inception. Furthermore, there was no evidence that these funds were earmarked as capital contributions, or placed in a segregated account. The ledger entry in question does not specifically identify these funds as capital contributions.

Even assuming that the February 9, 1996 Ledger entry shows S. Baumhaft's capital contribution, the Court remains unsatisfied as to the sufficiency of this defendant's capital contribution. Considering the size of the business, the nature and amount of the Debtor's indebtedness, and the amount of reserves necessary for the Debtor to have maintained its operations, the Court finds that the Debtor was grossly undercapitalized, and that the Members failed to maintain sufficient capital in the corporation for it to continue its operations.⁵ *See DeWitt*, 540 F.2d at 686. Furthermore, the Court finds that there is no evidence that any calls for capital contributions were made. To the contrary, when the Debtor was ailing, no calls for capital contributions were made and the Debtor's primary lender, S. Baumhaft's husband and agent M. Baumhaft, ceased loaning money to the Debtor.

ii. Members failed to observe corporate formalities.

The evidence presented indicated that corporate formalities were not followed by the

⁵ The Trustee and Josie Robbins, the Debtor's former manager, testified that the Debtor needed to maintain approximately \$15,000.00 to \$20,000.00 on the premises as operating money.

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Members. No corporate minutes or records were on the Debtor's premises or produced by Defendants in the discovery phase of the case. In their deposition, the Controlling Members and their agents were questioned regarding the following of corporate formalities. While some of the parties testified that corporate meetings to discuss business were held, documentation demonstrating these meetings was never located by the Trustee or produced by Defendants. In fact, all of the evidence suggests that no formal meetings were ever conducted, that no formal votes were taken, and other formalities were not observed. Tax returns for the Debtor were not prepared or filed until after the Trustee's appointment in May, 1997, and were only prepared at the Trustee's direction.

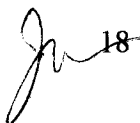
Particularly enlightening as to the freehanded and informal way in which the Debtor's business affairs were conducted is the method by which the loans to the Debtor, contemplated in Article VI, §6.6 of the Agreement were memorialized. The Agreement provides that the loans from M. Baumhaft and E. Barman would be "evidenced by promissory notes." However, the evidence suggests that these notes were never drafted or executed.

Furthermore, the Agreement provides that the Debtor's operations would be run by the Members. S. Baumhaft testified, however, that it was N. Barman, not the Members, who operated the Debtor.

iii. Dividends were not paid.

In their depositions and Rule 2004 examinations, S. Baumhaft and H. Barman, confirmed that that they did not receive dividends from the Debtor. Moreover, M. Baumhaft, confirmed that his wife/principal, received nothing from the Debtor. Inability of a corporation to pay dividends, "is persuasive proof of . . . want of capital." *DeWitt* 540 F.2d at 688.

iv. The Debtor was insolvent.

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The Defendants attempt to assert that based upon the tax returns filed by the Debtor, its assets exceeded its liabilities and therefore was solvent. However, Mr. Ouzts, the accountant for the Trustee, testified that the claims against the Debtor would not have been listed on the tax returns and therefore the return would not be indicative of insolvency. Additionally, Mr. Ouzts testified that based upon his investigation of the assets of the Debtor, the Debtor was insolvent at the time the Trustee took over operations. In further support of this, the Trustee introduced, without objection, a liquidation analysis done by Mr. Ouzts setting forth the assets and liabilities of the Debtor. Mr. Ouzts' expert opinion was that the Debtor was insolvent. In addition, Debtors' Schedules, both prepared by the Trustee and the Controlling Members, also indicate that the Debtor was not solvent.

Also telling of the Debtor's insolvency is the Trustee's testimony regarding the Debtor's inability to meet even the most fundamental operating expenses associated with its business, the purchase of video gaming licenses required by the State of South Carolina. When the Trustee took over the Debtor's operations on May 23, 1997, the licenses on Debtor's video poker machines were scheduled to expire on May 31, 1997. Under applicable South Carolina law, the Debtor could not operate without valid licenses. The Trustee testified that, after taking over the Debtor's operations, he discovered both that the machine licenses were scheduled to expire and that the Debtor had neither sufficient cash reserves on hand nor an available line of credit with which to purchase new licenses. There was no evidence that Members or insiders of the Debtor had made arrangements to replace the licenses or even considered how to raise funds for the purchase. The Debtor's inability to fund both day to day operating expenses and long term obligations is further evidence of the Debtor's insolvency. For these reasons, the Court finds the evidence and testimony offered by the Trustee more convincing and therefore finds that the Debtor was insolvent.

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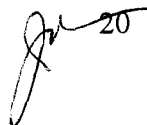
v. Funds of the Debtor were siphoned by Controlling Members and their agents.

The testimonial and documentary evidence shows that corporate funds were taken from the Debtor by M. Baumhaft and N. Barman. First, the Trustee presented evidence, in the form of ledgers prepared by Norman Barman evidencing approximately \$24,000.00 of post petition payments to H. Barman and M. Baumhaft. The fact of these transfers is confirmed by deposition testimony of N. Barman, H. Barman, and M. Baumhaft⁶

In addition to the cash directly removed from the Debtor's operations, there is evidence that funds generated by the Debtor's Golf Course Route, approximately \$56,000.00, remain unaccounted for. S. Baumhaft, through her agent, M. Baumhaft, had knowledge of the existence of the Golf Course Route, yet allowed the operation to continue without demanding an accounting of the revenues. Furthermore, there is evidence that assets, in the form of personalty purchased with the Debtor's revenues, seven TVs, a juke box and 50 CDs, 2 Victor 6 poker machines, and a pool table, remain unaccounted for.

There is further evidence that throughout the Debtor's operations, N. Barman, the Debtor's manager, was allowed to continually take funds from the Debtor, to the detriment of its creditors. The Trustee testified that, after his appointment, through his operation of the business, he was able to generate \$20,000 to \$25,000 per month of net profit, after payment of all operating expenses. The Trustee's ability to net such a substantial monthly profit is all the more significant when considered in light of the additional operating expenses the Trustee had that the Debtor did not have pre-

⁶ At trial, M. Baumhaft recanted his deposition testimony wherein he admitted accepting post-petition payments from the Debtor. M. Baumhaft testified that he only accepted \$3,000.00, and the remainder of the transfers he either returned, never got, or loaned back to the Debtor. The Court finds M. Baumhaft's revised testimony not credible, and therefore rejects the same.

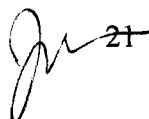


appointment or pre-petition [*i.e.* management fees to Gold Crown Management, repayment of the loan for the purchase of video gaming licenses, increased employee payroll]. Interestingly, prior to the Trustee's appointment, the Debtor allegedly operated at a loss.

vi. Corporate records were not maintained.

The Trustee, Mr. Ouzts, and Mr. David Gatti⁷ testified to the poor quality and sparseness of the records maintained for the Debtor. Mr. McGuffin testified that, despite his lengthy investigation, certain corporate records of the Debtor had not, to date, been located. The record shows that the records that were kept were of poor quality and of limited value for obtaining information regarding the Debtor's financial position and operations. There is evidence that accurate and complete payroll records were not maintained, and that there is no way to determine how much the Debtor spent on salaries. This is exacerbated by the fact that the Debtor paid certain employees by a combination of payroll check and cash. The Debtor's workers compensation insurance was canceled, in clear violation of applicable South Carolina law. *See* S.C. Code Ann. §§42-5-10, -20, -40, -45 (Law. Co.-op 1997). Assets of the Debtor, in the form of "comps" and "free play," were given away regularly to customers, but no record of the amount of these customer gifts was maintained. The Trustee could not locate any corporate minutes, or evidence that any real meetings or corporate votes took place at any point during the Debtor's existence. *See DeWitt*, 540 F.2d at 687. Aside from the seven (7) ledger pages, the Trustee located few similar daily operating records, and these were sparse. The Trustee did not locate any records or method by which the cash flow in and out of the business was consistently tracked. Mr. Ouzts also testified that the amount and quality of records maintained by the Debtor was woefully insufficient given the nature of the Debtor's cash intensive operation.

⁷ Debtor's pre-petition accountant.

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vii. Certain Members of the Debtor were “Non-Functioning”

The record contains testimony from Robert Horvath that he and his wife Lynette Horvath, (the non-defendant, 1/3 member of the Debtor), were “locked out.” M. Baumhaft challenged this characterization of their relationship. However, Mr. Horvath’s uncontroverted testimony was that after the lock out, he received no further accounting records, no information to allow him to participate in the decision making process of the Debtor, and neither he or his wife were involved in any further aspect of the business. While the nature of the parties’ dispute is not clear, the Court finds it significant that, initially, the Debtor operated with three members or their agents, however, when the involuntary petition was filed, one of these parties (R. Horvath) was a petitioning creditor.

b. Second Prong: Fundamental Unfairness

Having considered the first prong of *DeWitt*, the Court turns to the second prong, whether there is an element of fundamental unfairness to justify piercing the veil. The Court finds that it would be unjust and fundamentally unfair to permit S. Baumhaft to hide behind the corporate veil and escape liability to the Debtor’s creditors.

S. Baumhaft was completely indifferent and derelict in fulfilling her duties to the Debtor. S. Baumhaft admitted that she had not read the Agreement; clearly expressed her complete ignorance and disregard of the Debtor’s affairs; admitted her failure to supervise the activities of her agent; admitted her failure to fulfill her duties to the Debtor under the Agreement; admitted her failure to attend corporate meetings or to receive regular reports from her agent of the substance of meetings; admitted failure to monitor the activities of the Debtor; conceded that she obtained all her information related to the Debtor through her agent M. Baumhaft, and that she only obtained this information when her agent felt like telling her.

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Despite her knowledge of the financial plight of the Debtor and activities engaged in by her husband/agent M. Baumhaft, and N. Barman, S. Baumhaft failed to take any action to fulfill her duties as a member to directly investigate the activities of the Debtor, or to inquire of her agent as to the status of the business. S. Baumhaft's indifferent attitude towards the Debtor and her obligations is further evidenced by the fact that, even after the adjudication of bankruptcy and the appointment of a trustee, she failed to take an interest in the Debtor's financial condition or her obligations under the Agreement. While it was within S. Baumhaft's prerogative to retain an agent to manage her investment, her acceptance of the benefits afforded a Controlling Member placed upon her an obligation to accept the attendant responsibilities of a member. She cannot be allowed to rely on her ignorance and her abandonment of her obligations to the Debtor and under the Agreement to shield her from obligations to the Debtor's creditors. Unquestionably, it would be fundamentally unfair to allow S. Baumhaft to benefit from her inaction and escape liability to the Debtor's valid creditors.

One example of the adverse impact this dereliction of duty is the fact that the Debtor failed to maintain workman's compensation insurance as required by South Carolina Law. *See S.C. Code Ann. §§42-5-10 et seq.* (Law. Co.-op 1997). It appears from the evidence that the insurance was canceled, but that the Debtor continued normal business operations. Unfortunately, an employee suffered a serious injury in December, 1996, which resulted in a secured claim being filed against the estate by the South Carolina Second Injury Fund, which has been allowed as a secured claim for approximately \$55,000.00. This claim will be paid by the Trustee to the detriment of the unsecured creditors.

The Court finds that the Trustee has met his burden of proof and that the Court may exercise its power and pierce the corporate veil. To the extent that assets of the estate are insufficient to pay

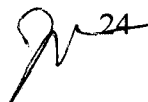
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the valid claims of creditors of the Debtor, there are, as a matter of law, ample grounds for the Court to issue judgment against the Controlling Member, S. Baumhaft, for the difference needed to pay valid claimants in full.

5. Third Cause of Action – [Breach of Fiduciary Duty – S. Baumhaft]

When a corporation becomes insolvent, fiduciary duty of the directors shifts to the creditors of the corporation. *Davis v. Woolf*, 147 F.2d 629 (4th Cir. 1945); *Federal Deposit Ins. Corp. v. Sea Pines Co.*, 692 F.2d 973 (4th Cir. 1982); see *Production Finishing Corp. v. Shields*, 405 N.W.2d 171 (Mi. Ct. App. 1986); *Maryland Metals, Inc. v. Metzner*, 382 A.2d 564 (Md. Ct. App. 1978); 19 C.J.S. §541 *Corporations*. Part of this obligation to creditors requires the directors to act as “trustees” for creditors, and to refrain from transferring assets of the corporation to themselves or preferred creditors. *Davis*, 147 F.2d at 633; *Sea Pines*, 692 F.2d at 977. When there is a question as to whether a director has fulfilled his fiduciary obligations to creditors, the issues of the director’s reasonableness and good faith are irrelevant, as is the severity of the breach; the only issue is whether there has been a breach at all. *Anthony v. Padmar, Inc.*, 320 S.C. 436, 465 S.E.2d 745 (Ct. App. 1995).

Reviewing the evidence before the Court, it is clear that S. Baumhaft breached her fiduciary duty to creditors of the Debtor and should be held accountable therefore. The Court finds that there is ample evidence that the Debtor was insolvent and that its creditors were not being paid. S. Baumhaft had constructive knowledge of this information through her agent, M. Baumhaft. When the Debtor became insolvent, S. Baumhaft’s fiduciary duty shifted to all of the Debtor’s creditors. *Sea Pines*, 692 F.2d at 976-77; *Hoffman Associates* at 35. S. Baumhaft had fiduciary obligation to ensure that assets of the Debtor were being preserved, and an obligation to make sure that actions were



being taken to either make the Debtor solvent again, or to preserve the Debtor's existing assets to pay its creditors. S. Baumhaft breached her fiduciary duty, and failed to ensure that assets of the Debtor were protected. She sat idly by, ignoring her obligations while the Debtor's assets were given away, transferred, or simply disappeared.

The Court finds that S. Baumhaft breached her fiduciary duty to the Debtor and its creditors, and the Trustee is entitled to judgment against S. Baumhaft for the difference needed to pay valid unsecured creditors in full.

6. Fourth and Ninth Causes of Action [Equitable Subordination – M. Baumhaft and N. Barman]

In his Fourth and Ninth Causes of Action, and in his objections to their claims, the Trustee asks the Court to equitably subordinate M. Baumhaft's and N. Barman's claims pursuant to § 510(c)(1). Under §510(c), the Court may, in its exercise of its equitable powers, after notice and hearing, "subordinate, for purposes of distribution, all or part of an allowed claim to all or part of another allowed claim" 11 U.S.C. §510(c)(1). To warrant equitable subordination, the Court must consider:

Whether the claimant has engaged in inequitable conduct, [*i.e.* conduct involving fraud, breach of fiduciary duty, under-capitalization];
Whether the conduct resulted in injury to creditors; and
Whether subordination would be consistent with other bankruptcy law.

Hoffman Associates at 36 (citing *In re ASI Reactivatin, Inc.*, 934 F.2d 1315, 1321 (4th Cir. 1991));
see generally Pepper v. Litton, 308 U.S. 295 (1939).

The Trustee has the initial burden of providing the Court with evidence of the claimant's inequitable conduct. Once the Trustee has met his initial burden, the burden shifts to the claimants

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(in this case M. Baumhaft and N. Barman) to show their good faith and fairness.⁸ *Matter of Fabricators, Inc.*, 926 F.2d 1458, 1465 (5th Cir. 1991); *In re LEMCO Gypsum, Inc.*, 108 B.R. 831, 834 (Bkrtcy. S.D. Ga. 1988).

Both M. Baumhaft and N. Barman are insiders of the Debtor. The Court recognizes that although insider claims cannot be subordinated simply by virtue of the fact that they are insider claims, these claims are more closely scrutinized. *Comstock v. Group of Institutional Inv.*, 336 U.S. 211, 229 (1948); *Hoffman Associates* at 37; see *In re Bellanca Aircraft Corp.*, 850 F.2d 1275 (8th Cir. 1988); *Tronze v. Smith, (In re Westgate-California Corp.)*, 642 F.2d 1174, 1177 –78 (9th Cir.1981). Furthermore, “virtually any conduct by which an insider gains an advantage over creditors constitutes inequitable conduct for the purposes of §510(c). *Hoffman Associates* at 37; *In re LEMCO Gypsum, Inc.*, 108 B.R. at 834.

a. Inequitable Conduct

The “inequitable conduct” contemplated by §510(c)(1) may be specifically related to the origins of the claim, or it may:

Arise out of any unfair act on the part of the creditor, which affects the bankruptcy results to other creditors and so makes it inequitable that he should assert a parity with them in the distribution of the estate. . . .

In re Mobile Steel Co., 563 F.2d 692, 700 (5th Cir. 1977) (citations omitted); *Zimmerman v. Central Penn Nat'l Bank, (In re Ludwig Honold Mfg. Co., Inc.)*, 46 B.R. 125, 128 (Bkrtcy. E.D. Pa. 1985) (inequitable conduct contemplated by §510(c) involves conduct such as fraud, overreaching, breach

⁸ The Court takes this opportunity to note that N. Barman failed to testify in this matter and failed to proffer any testimony as to his good faith and fairness to support his claim. Therefore, the Court concludes that the allegations contained in the Complaint as to this cause of action are true.



of fiduciary duty, undercapitalization, unfairness in dealings with the Debtor, or, in certain cases, "the violation of the rules of fair play and good conscience by the claimant").

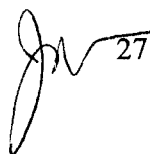
There is both testimonial and documentary evidence of M. Baumhaft and N. Barman's inequitable conduct:

1. M. Baumhaft accepted approximately \$12,000.00 in unauthorized post petition transfers of cash from the Debtor;
2. M. Baumhaft engaged in improper conduct in his activities involving BaumBar and Fifth Third Bank, and the post-petition, post appointment guaranty of the Fifth Third Bank loan by the Debtor;
3. N. Barman, while manager of the Debtor's operations, gave away assets of the Debtor, both pre and post petition, in the form of free play and other cash and valuables;
4. There was testimony that N. Barman ran a bookmaking operation from the Debtor's premises.
5. N. Barman removed an indeterminate amount of cash from the business.
6. After the adjudication of the Involuntary Petition, N. Barman transferred assets of the Debtor to H. Barman and M. Baumhaft, despite the fact that the Debtor was insolvent and was admittedly not making a profit.
7. From his takeover of the Debtor's operations in July, 1996, N. Barman freely used the Debtor's income/cash for his on personal benefit.
8. Pre-petition, N. Barman loaned approximately \$4,000 to a third party using proceeds from the Debtor's operations, yet failed to deposit the funds upon repayment in the Debtor's account or safe.
9. After the Trustee's appointment, N. Barman removed revenues generated by the Golf Course Route machines for his own personal benefit.
10. M. Baumhaft failed to satisfy his obligation under Article VI, §6.6.1 of the Agreement.

b. Injury to Creditors and unfair advantage to claimant

The doctrine of equitable subordination is remedial, not penal. If the Court finds that it is warranted, it should be exercised only to the extent necessary to offset the specific harm suffered by the creditors. *Hoffman Associates* at 37; see *Westgate-California Corp.*, 642 F.2d at 1178.

The Court finds that, as a result of their inequitable conduct, M. Baumhaft and N. Barman

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both gained an advantage over and injured creditors. Each was able to remove assets from the Debtor that should have been preserved for the benefit of creditors, N. Barman a substantial amount by virtue of his day to day control over the Debtor's operations. Based on the evidence of N. Barman's pre-petition dealings with the Debtor and his unfettered access to the Debtor's cash and other assets, it is probable that the funds taken by N. Barman are substantial. In fact, the Trustee testified, consistent with the testimony of Jim Babbit, that it is not inconceivable that there was sufficient income earned such that N. Barman could have taken over \$300,000.00 from the Debtor's business. While the Court does not have direct evidence of these Defendants' activities pre-petition, there is substantial evidence of significant post petition transfers of assets. That these Defendants took this action post petition, wholly indifferent to the bankruptcy petition, makes their actions all the more egregious and justifies equitable subordination of their claims.

c. Code consistency

This Court has previously held that:

Equitable subordination is consistent with other provision of the Bankruptcy Code if it is consistent with the basic goal of equality of distribution in bankruptcy. A claimant whose inequitable conduct has harmed other creditors has skewed the prospect for equal distribution, and subordination corrects this.

Hoffman Associates at 38.

The Court has no difficulty finding that the conduct of M. Baumhaft and N. Barman satisfies all of the elements of equitable subordination. As to N. Barman, the Court finds that N. Barman's claim⁹ should be equitably subordinated in its entirety to all other unsecured claims of the Debtor due

⁹ In closing arguments, counsel for N. Barman stated he consented to the subordination of his claim. Counsel further suggested that subordination of M. Baumhaft's claim was also appropriate.

to his inequitable conduct, as set forth herein.

As to M. Baumhaft, the Court finds that, because of his acceptance of unauthorized post petition transfers of cash, and his inequitable conduct in failing to comply with his obligations under the Agreement, his claim, should be equitably subordinated in full to all other unsecured claims of the Debtor.

Notwithstanding the foregoing, the Court further finds that M. Baumhaft's claim also is subject to subordination pursuant to §510(a), which provides for the enforcement of a subordination agreement in this Court to the extent the agreement is enforceable under applicable non-bankruptcy law. Although not specifically addressed by the parties, the Court finds evidence that Article VI, § 6.6.2 of the Agreement, provides that repayment of M. Baumhaft's loan to the Debtor [upon which his claim is based], "shall be made based upon Net Cash¹⁰ available for distribution. The Trustee has testified that he does not have sufficient revenues to pay all creditors of the Debtor. Consequently, there is no "Net Cash" available for payment of the balance of M. Baumhaft's claim, his claim must be subordinated as provided for in the Agreement until such time as all "current expenses" of the Debtor [*i.e.* all plan payments to arms length creditors] are made.

7. Sixth Cause of Action – [Breach of Contract – M. Baumhaft]

Trustee's Sixth Cause of Action relates to M. Baumhaft's alleged breach of the terms of the

¹⁰ The Agreement defines, "Net Cash" as:

all cash receipts of the Company from the designated source (*i.e.* disposition, reserves, refinancing or operations), less the sum of (i) all current expenses of the Company, (ii) adequate provision of payment of all outstanding current obligations of the Company . . . and (iii) adequate provision for reserves.

Agreement at 3.

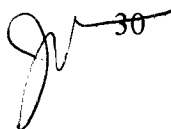
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Agreement by his failure to fund designated expenses by way of loans to the Debtor under Article VI, § 6.6.1. To show breach of contract, the Trustee has the burden of proving: (1) the existence of a contract; (2) its breach; and (3) damages that were a natural consequence of the breach. *See Smyth v. Fleischman*, 214 S.C. 263, 52 S.E.2d 199 (1949); *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996); *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co., Inc.*, 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990).

There is no dispute that Article VI, §6.6.1 of the Agreement required M. Baumhaft to make loans to the Debtor. Reviewing the Agreement, the Court finds that its terms are clear, unambiguous, and enforceable. M. Baumhaft's obligations under the Agreement were specific: he was required to loan the Debtor 50% of all acquisition costs for the Debtor's First Site, all costs of improving the First Site, and all costs of upfitting the First Site, including purchasing equipment, furniture, fixtures, and machine licenses. The Agreement contains no cap or limit on the amount of funds M. Baumhaft was required to loan. Therefore, the only question remaining is whether M. Baumhaft breached the Agreement and, if so, the amount damage suffered by the estate.

a. Breach:

Whether or not the Agreement was breached requires a consideration of the creditors appearing in the bankruptcy case. The Court, upon reviewing the Trustee's testimony, the confirmed Chapter 11 Plan, the claims and Disbursement Orders, finds that the Trustee both incurred additional administrative expenses and was required to pay the certain creditors either out of the operations of the Debtor or out of the proceeds of the sale of the Debtors assets, and that these expenses and claims should have been paid at the inception of the business operations through loans from M. Baumhaft. The evidence clearly shows that the loans advanced by M. Baumhaft were not adequate to pay these

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costs and expenses. Based on the foregoing, the Court finds that M. Baumhaft breached the Agreement.

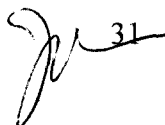
In an attempt to escape liability, M. Baumhaft testified that the terms of the Agreement had been altered in some respects to place caps on the amount of M. Baumhaft's obligation. The Court rejects this evidence. First, the Agreement, at Article XIII, §13.10, contains an integration clause, which provides that the Agreement is the entire agreement of the parties. Further, the Agreement is complete and unambiguous; consequently, parole evidence cannot be used to vary the terms of a fully integrated agreement.¹¹

b. Damages

In a breach of contract action, the amount of damages awarded should be designed to place the nonbreaching party in the same position it would have been in had the breach not occurred. *South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co., Inc.*, 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990). Special damages may be awarded when the plaintiff has both plead and proven the fact and amount of damage with a reasonable degree of certainty. The "fact" of damage is shown through evidence that the plaintiff would not have suffered the damage but for defendant's breach, and that the loss was a natural consequence of the breach that would have been within the parties contemplation at the time the contract was made. *Id.* at 78, 399 S.E.2d at 11.

The Court finds that the Trustee has met his entitlement to both actual and special damages, as follows:

¹¹ The parole evidence rule applies when evidence is introduced to vary or contradict the terms of an agreement. *TLT-Babcock, Inc. v. Emerson Elec. Co.*, 33 F.3d 397 (4th Cir. 1994). The rule precludes the introduction of prior or contemporaneous statements between the parties to alter or contradict the terms of a written agreement. *McLeod v. Sandy Island Corp.*, 265 S.C. 1, 216 S.E.2d 746 (1975).



<u>Damages</u>		
1.	Bobby's Bar B-Q:	\$399,000.00
2.	Mechanics Lien Creditors [secured portion] ¹²	\$109,263.00
3.	Mechanics Lien Creditors [unsecured portion]	\$ 20,079.00
4.	Miscellaneous Unpaid Equipment Claims ¹³	\$ 8,800.00
5.	<u>Lease Payments</u>	<u>\$ 57,160.00</u>
Sub Total		\$574,223.00
<u>Special Damages</u>		
1.	Defense of Bobby's Bar B-Q Litigation ¹⁴ :	\$17,000.00
2.	Attorneys' Fees of Mechanics Lien Creditors:	\$16,201.00

The foregoing figures represent acquisition costs incurred by the Debtor, as contemplated by Article VI, §6.6.1 of the Agreement, for which claims were filed by creditors and which have been paid for by the Trustee out of proceeds from the sale of the business. Had M. Baumhaft not breached the terms of the Agreement, these creditors would have been paid by loans from M. Baumhaft, and the Trustee could have utilized the proceeds from the sale of the Debtor's assets to pay other claims. The Court notes that, because the Trustee has established the fact of damages, he was not required to prove the amount of damages with mathematical certainty. *Id.* at 77-78, 399 S.E.2d at 11. The evidence submitted by the Trustee provides the Court with ample information upon which to assess

¹² Mechanics Lien Creditors include Jim Wood, Applied Insulation, Pawleys' Island Interior, Mindy McVay Interiors (some of whom are also known as "Petitioning Creditors").

¹³ This category includes the claims of Century Data Systems, and other claims for equipment and computers purchased in connection with furnishing the Debtor's premises.

¹⁴ Based on the Trustee's testimony, the Court finds that the administrative expenses incurred by the estate as a result of the Trustee's defense of the Bobby's Bar B-Q foreclosure action and related adversary were directly and proximately caused by M. Baumhaft's breach of the Agreement. Had M. Baumhaft fulfilled his obligations and paid for the costs associated with the purchase of the First Site from Bobby's Bar B-Q, the foreclosure action would not have been brought and the estate would not have incurred the additional fees. *See South Carolina Fed. Sav. Bank v. Thornton-Crosby Dev. Co., Inc.*, 303 S.C. 74, 77, 399 S.E.2d 8, 11 (Ct. App. 1990). Likewise, the Court finds that the attorneys fees of the Mechanics Lien Creditors were directly and proximately caused by M. Baumhaft's breach of the Agreement. Had M. Baumhaft fulfilled his obligations and paid for the costs associated with the upfit of the Debtor's the liens would not have been place and the involuntary petition would not have been brought.

the amount of loss sustained by the estate.

Debtors, through counsel, attempted to challenge the Trustee's right to damages by challenging the amount of claims that remain to be paid. The Court recognizes, however, that the Debtor has a confirmed Chapter 11 Plan of Reorganization that establishes, with certainty, the amount claims required to be paid. None of the Defendants filed an objection to the Plan. Therefore, the terms of the Plan are binding on all parties, including the Defendants, and Defendants are collaterally estopped from attacking its terms. *See* 11 U.S.C. §1141(a).

c. The Trustee has standing to assert rights under the Agreement.

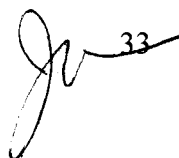
In arguments to the Court, Defendants alleged for the first time that the Trustee lacked standing to assert rights under the Agreement. According to the Defendants' argument, because the Debtor was not a signatory to the Agreement, the Debtor was not a party to the Agreement, was not in privity with the Defendants, and therefore, the Debtor could not sue Defendants for any alleged breach of the terms of the Agreement.

Defendants are correct that the Debtor was not a signatory to the Agreement. This is not surprising, since one of the purposes of the Agreement was to "create" the Debtor. However, Defendants are incorrect in their assertion that the Debtor was not a beneficiary to the Agreement.

South Carolina law recognizes the concept of "third-party beneficiaries" to contracts:

To qualify as a third-party beneficiary under a contract, a third party must show 'that the intent of the contracting parties was to confer a direct and substantial benefit on the third party.'

TC X, Inc. v. Com. Land Title Ins. Co., 928 F. Supp. 618, 623 (D.S.C. 1995) (citing *United States v. Chester Heights Assocs.*, 406 F. Supp. 600, 604 n.2 (D.S.C. 1975)). The Court finds that there

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is ample evidence to support a finding that the intent of the contracting parties was to confer a direct and substantial benefit on the Debtor, and that therefore, the Debtor is the third party beneficiary under the Agreement.

By its very terms, the Agreement provides for certain, specified benefits to be conferred upon or for the benefit of the Debtor by the Members or lenders. Specifically, with regards to loans from M. Baumhaft and E. Barman, Article VI, §6.6 the Agreement states:

Loans to the Company by Evelyn Barman and Michael Baumhaft: The Company has obtained commitments from Evelyn Barman and Michael Baumhaft to each loan to the Company fifty (50%) percent of the total amount required for the items delineated below (collectively the "Loans"). **Such amounts shall be paid to the Company.** . . . Evelyn Barman and Michael Baumhaft are executing this Agreement solely for the purposes of indicating their agreement and undertaking **to make these loans to the Company** and such undertaking by them shall be binding and enforceable under law.

See Agreement at 5-6 (emphasis added). Clearly, the Agreement evidences the intent of the Members and other signatories to the Agreement to engage in activities and make loans for the benefit of the Debtor.

In addition, there is evidence, in the form of testimony from Mr. Jim Wood, who was the general contractor for the Tycoon's building and a Petitioning Creditor, that creditors of the Debtor relied on the loan provisions of the Agreement to extend further credit and to engage in additional work on the building on behalf of the Debtor. Mr. Wood testified that Robert Horvath, at the prompting of M. Baumhaft, provide him with the Agreement and assured Wood that he would be paid the monies owed. Wood was not paid, and this failure of payment resulted in the filing of an involuntary petition against the Debtor. Although it appears, by virtue of the size of his claim that

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M. Baumhaft made substantial loans to the Debtor, the record is clear that the amounts loaned were not adequate to satisfy the acquisition costs as contemplated by the Agreement. Based on the foregoing, the Court finds that the Debtor was both a direct and third party beneficiary of the Agreement, and that the Trustee has standing to bring this action for enforcement of the Agreement. *See TC X, Inc. v. Com. Land Title Ins. Co., supra.*

8. Seventh Cause of Action [Specific Performance – M. Baumhaft]

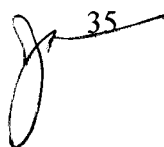
Under South Carolina law, a party has the option of pursuing either specific performance of a contract, or damages arising from the contract's breach. *McMaster v. Strickland*, 322 S.C. 451, 472 S.E.2d 623 (1996); *White v. Felkel*, 225 S.C. 453, 82 S.E.2d 813 (1954). Specific performance is an equitable remedy, and is exercised by the Court when there is no adequate remedy at law. *King v. Oxford*, 282 S.C. 307, 314, 318 S.E.2d 125, 129 (Ct. App. 1984).

In the case at bar, this Court has previously found that the Trustee is entitled to damages for M. Baumhaft's breach of the Agreement. Therefore, an order of specific performance would be superfluous. However, the Court notes that, had the Trustee pursued only this cause of action, the evidence presented by the Trustee was sufficient to order specific performance of the Agreement.

9. Tenth Cause of Action [Turnover – M. Baumhaft, S. Baumhaft, N. Barman, UVI]

In the Tenth Cause of Action, Trustee seeks an Order requiring Defendants to turnover what has been defined as "Missing Assets," TVs, video gaming devices, and other assets in the possession of third parties, corporations, or businesses owned and operated by the Defendants. Trustee brings this claim pursuant to §542, which provides that:

An entity in possession or control, during the case, of property that the Trustee may use, sell, or lease under section 363 of this title, . . . shall deliver to the trustee and account for such property of the value

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of such property.

11 U.S.C. §542. Trustee offered evidence of the existence and value of the following assets¹⁵ which should be turned over by Defendants:

7 televisions ¹⁶	\$2,093.00
Lease Payments for Machines on Golf Course Route ¹⁷ ;	\$12,675.00
Pool Table	\$1,595.00
Jukebox	\$1,695.00
CD's	\$500.00
2 Victor 6 gaming machines ¹⁸	\$3,700.00
Pot of Gold, Serial No. 2004730496	\$7,720.58.
<u>Golf Course Route Revenues</u>	<u>\$56,000.00</u>
Total	\$85,978.58

The Court finds that there is ample evidence to show that the foregoing are assets of the estate in the possession or control of one or more of the Defendants. Therefore, the Court finds that Defendants are required to turnover the foregoing assets.

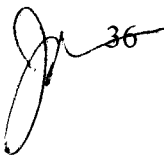
10. Eleventh Cause of Action [Conversion – Missing Assets – M. Baumhaft, S. Baumhaft, N. Barman, UVI]:

¹⁵ The specific damage awarded to the Trustee will be calculated based on the values of the Missing Assets as established by the Trustee's Testimony and Plaintiff's Exhibits.

¹⁶ Checks for purchase of TV's indicate that the TVs were purchased for \$299.00 each, resulting in a total value of \$2,093.00 for the seven (7) missing sets.

¹⁷ Additionally, the Debtor paid the lease payments on twenty three (23) machines leased in the name of UVI. Of these machines, five (5) were used on the Golf Course Route. Prior to the Trustee's appointment, the total lease payments made by the Debtor on these machines was approximately \$58,306.83. Consequently, it appears that by prorating the payments, the Trustee is entitled to recover 5/23ds of the lease payments attributable to the machines used on the Golf Course Route, or approximately \$12,675.00.

¹⁸ Plaintiff's Exhibit 49 shows the purchase of five (5) Victor 6 Machines. The Trustee took possession of three (3) such machines. The remaining 2 are unaccounted for.



“Conversion” is defined as the unlawful detention of property of another after demand. *Oxford Finance Co., Inc. v. Burgess*, 303 S.C. 534, 402 S.E.2d 480 (1991); *Causey v. Blanton*, 281 S.C. 163, 314 S.E.2d 346 (Ct. App. 1984). To show conversion, the Trustee has the burden of proving either title or right to the property in question at the time demand for turnover was made. *Oxford Finance*, 303 S.C. at 539, 402 S.E.2d at 482; *Causey*, 281 S.C. at 165, 314 S.E.2d at 348. The appropriate measure of damages for conversion is the value of the property converted, with interest. *Causey*, 281 S.C. at 166, 314 S.E.2d at 348.

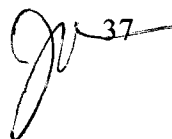
The Court finds that Trustee is entitled to judgment against Defendants for conversion of the Missing Assets. At the time of his appointment, the Trustee assumed the right to possession and control over all assets of the Debtor. Trustee, through the Complaint, demanded that Defendants surrender possession of any and all assets of the Debtor in their possession. Defendants failed to do so, and the Trustee became entitled to a monetary judgment against the Defendants for the value of the Missing Assets, plus interest at the legal rate from the date of the Trustee’s appointment, May 23, 1997.

11. Fifteenth and Sixteenth Causes of Action [Post Petition Transfers and their recovery—M. Baumhaft]

Section 549(a) provides that the Trustee:

may avoid a transfer of property of the estate (1) that occurs after the commencement of the case; and (2)...(B) that is not authorized under this title or by the Court.

11 U.S.C. §549(a). In addition, §550(a) provides that, when a transfer is avoided under § 548 or §549 of the Code, the Trustee may recover the property transferred or its value from the initial transferee. 11 U.S.C. §550(a).

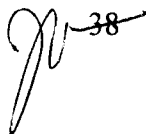
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The evidence before the Court clearly establishes that M. Baumhaft was the recipient of unauthorized, post petition transfers of \$12,000.00 of the Estate's cash from the period of April 7, 1997 through May 19, 1997. These transfers were not authorized by the Code, and not authorized by this Court. Therefore, the Trustee is entitled to judgment against M. Baumhaft for his receipt of unauthorized post-petition transfers of assets, and judgment, pursuant to §550, for the amount of the transfers. *See In re Bloch*, 207 B.R. at 948.

12. Seventeenth, Twentieth, Twenty First, Twenty Second Causes of Action [Accounting – Lost Profits (M. Baumhaft, N. Barman, UVI); Accounting – Additional Enterprises –(M. Baumhaft, N. Barman); Accounting – General (M. Baumhaft, S. Baumhaft, N. Barman, UVI); Accounting – Linville Loan (N. Barman)]

As to each of the referenced causes of action, the Court finds that the Trustee has established the allegation of Missing Assets, lost profits and revenues. The Court finds that the Trustee is entitled to an Order requiring Defendants to provide Trustee with an accounting of all profits generated by the Debtor from its inception to the date of the Trustee's appointment, a general accounting, and an accounting for the proceeds of the Linville Loan. However, the Court, mindful of the evidence before it regarding the poor records maintained by the Debtor, as well as the questionable dealings of the Defendants in matters related to the Debtor's operations, doubts that such information will be provided by the Defendants. Therefore, the Court orders the Defendants to provide the Trustee with an accounting, but notes that the Trustee remains free to pursue further recoveries against these Defendants and their related entities if the information provided by Defendants is not satisfactory to the Trustee.

13. Eighteenth and Twenty Ninth Causes of Action [Recovery of Lost Profits – M. Baumhaft, N. Barman, UVI; Turnover - UVI]:

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As stated in Section 9 *supra*, § 542(a) requires an entity in possession or control of estate assets to turnover and account for, the property. 11 U.S.C. §542(a). Section 542(a) is definite in its terms; it does not give the person in possession the "right" to decide whether or not to surrender property to the Trustee. Instead, it mandates the turnover of estate property. *Id.*; see *United States v. Whiting Pools*, 462 U.S. 198 (1983); *In re Sharon*, 200 B.R. 181, 189 (Bkrtcy. S.D. Ohio 1996). In fact, courts have held that failure to turnover property of the estate may give rise to damages pursuant to §362(k) for violation of the automatic stay. See, e.g., *In re Abrams*, 127 B.R. 239 (9th Cir. 1991); *In re Knaus*, 889 F.2d 773, 775 (8th Cir. 1989). The only exception to the requirement that estate property be turned over to the Trustee is if the property is of inconsequential value or benefit to the estate.

The Court finds that Trustee is entitled to an Order requiring Defendants N. Barman, M. Baumhaft, and UVI, to account for and turnover certain specified property of the Estate, and the entry of judgment against these Defendants for the value of the property not turned over.

a. Turnover of Linville Loan Proceeds

The evidence shows that N. Barman loaned David Linville \$4,000.00 in cash, received repayment of that loan, and cannot account for the proceeds of the loan. As set forth in the Findings of Fact, the Court rejects N. Barman's contention that the money loaned belonged to him. The Court finds that N. Barman is in possession or control of assets of the estate, in the form of \$4,000.00 proceeds from the loan made by the Debtor to David Linville, and the Trustee is entitled to turnover of these proceeds and judgment against the Defendant for these amounts.

b. Revenue from Golf Course Route Machines.

The evidence before the Court shows that the Debtor leased from UVI video poker machines

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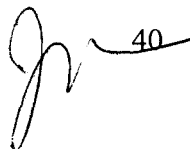
on a route, the “Golf Course Route,” that generated substantial revenues belonging to the Debtor. N. Barman admitted that, after the Trustee’s appointment, he continued to collect revenue from the Golf Course Route machines, and that he did not turn this revenue over to the Debtor. The Trustee is entitled to an Order requiring N. Barman and UVI to account for and turnover all revenues taken from the Golf Course Route Machines.

c. Lease Payments on Golf Course Route Machines.

The evidence before the Court shows that, prior to the Trustee’s appointment, the Debtor made lease payments on video poker machines leased in the name of UVI. UVI is owned by H. Barman, whose agent is N. Barman. N. Barman maintained the Golf Course Route, servicing the machines and collecting the net operating revenues from March, 1996 through September, 1997. During that time, the only records in the Trustee’s possession, indicate that UVI received the benefit of lease payments made by the Debtor in the amount of \$12,675. This amount represents the payments on five of the 23 leased machines. *See supra* at Section 9. Trustee is entitled to turnover of these lease payments from UVI.

14. Nineteenth Cause of Action [Theft of Corporate Opportunity – M. Baumhaft, N. Barman, UVI]

It is well settled that corporate officers and directors have a continuing duty of loyalty to the corporation, and that this duty prevents them from acquiring interests that are adverse to the corporation, or from appropriating for themselves business opportunities that should belong to the corporation. *See* 17 A.L.R.4th 480, § 2. The importance of this duty of loyalty and preservation of corporate opportunities for the corporation was recognized by the Defendants in their negotiation of the Agreement. *See* Agreement at Article IX, § 9.5.

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The Debtor was formed to own and operate video poker casinos, and other profitable business endeavors. M. Baumhaft had multiple roles: he was one of the Debtor's two primary lenders, was the agent for Controlling Member S. Baumhaft, and was a special employee of the Debtor, retained to assist it in obtaining financing for other business endeavors. N. Barman also had multiple roles: he was the Controlling Member H. Barman's agent, he was an employee of the Debtor and managed the Debtor's primary operation. As individuals so heavily involved with the running of the Debtor, the Court finds that M. Baumhaft and N. Barman were in positions of a fiduciary nature with the Debtor, and as such, owed the Debtor their loyalty.

The evidence also shows that, over the course of the Debtor's existence, various other related business opportunities came to the attention of M. Baumhaft and N. Barman, that should have first been preserved for the Debtor or, at least, made available to the Debtor. These business endeavors include "Barefoot Billiards," and the Golf Course Route. The Court finds that these business opportunities fall in line with the Debtor's standard business operations, and were opportunities that could have been taken on by the Debtor. However, N. Barman and M. Baumhaft failed to present these business opportunities to the Debtor, failed to make the opportunities available for the Debtor, and in fact, attempted to conceal them from the Trustee. Therefore, the Court finds that M. Baumhaft and N. Barman breached their duty of loyalty to the Company and appropriated for themselves corporate opportunities properly belonging to the Debtor. However, it is not clear from the evidence that the misappropriated opportunities (other than the Golf Course Route), were of any material value. In fact, Trustee expressed concern about the propriety of some of the transactions engaged in by M. Baumhaft, and N. Barman related to BaumBar and Barefoot Billiards and testified further that he was not seeking recovery of any assets that might be tainted by such questionable

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actions.

15. Twenty Fourth and Twenty Fifth Causes of Action [Fraudulent Transfers – UVI]:

The Court finds that, inasmuch as it has rendered judgment against UVI under the Twenty Ninth Cause of Action, that a finding of liability under these sections would be duplicative. Therefore, the Court finds that relief requested in these causes of action has been rendered moot by the Court's findings, *supra*.

AND IT IS SO ORDERED.

Columbia, South Carolina,
September 30, 1998.


UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

OCT 1 1998

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

LISA BAUGHMAN

Deputy Clerk

Briffin
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Strait
matheus
metzger
mcavethy
keenan

Naiful / Short
n. Barmon
E. Barmon
H. Barmon
M. Baumhaft
S. Baumhaft
Fortescue