UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: John B. Broughton, III, Debtor.	C/A No. 99-06953-W Adv. Pro. No. 00-80143-W
Kevin Campbell, Trustee, Plaintiff, v. Capital One Bank, Defendants.	**JUDGMENT** Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Capital One Bank's Motion for Summary Judgment is granted as to both the Anti-Assignment Cause of Action and the unjust enrichment Cause of Action. Furthermore, Plaintiff's request that the Court award Plaintiff attorneys' fees and costs incurred in conjunction with this matter is denied.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
March 20, 2001.

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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:

MAR 21 2001

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

Kevin Campbell
Rory Wikoleka
Jacquelyn Austin

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: John B. Broughton. III. Debtor.	C/A No. 99-06953-W Adv. Pro. No. 00-80143-W
Kevin Campbell, Trustee, Plaintiff, v Capital One Bank, Defendant.	**ORDER** Chapter 7

THIS MATTER comes before the Court upon the Motion for Summary Judgment (the "Motion") filed by Capital One Bank ("Defendant") on December 5, 2000 The Chapter 7 Trustee in this case filed a Complaint on August 2, 2000 seeking to avoid a transfer of property from John B. Broughton, III ("Debtor") to Defendant as an alleged improper assignment pursuant to S.C. Code Ann. §27-25-10, more commonly known as the Anti-Assignment Statute. As a Second Cause of Action, the Complaint also alleges that Defendant has been unjustly enriched through the transfer of the property by Debtor. Thus, the Trustee requests that the Court set aside the conveyance of the property to Defendant as violative of S.C Code §27-25-10, that the Court declare that Defendant has been unjustly enriched by the actions of Debtor, that the Court order Defendant to return all proceeds which has been received from Debtor to Plaintiff, and that it award Plaintiff attorney's fees and costs incurred in conjunction with this matter. Defendant's Motion is based on the ground that there is no evidence suggesting that Debtor was either

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insolvent at the time of the transfer or that the payment by Debtor to Defendant constituted the whole or a substantial portion of Debtor's estate. As a result, Defendant argues that there can be no application of S.C. Code Ann §27-25-10, and that the Motion should be granted in its favor. Defendant also argues that there are no grounds for the unjust enrichment claim asserted in the Complaint. The Trustee timely filed an Objection to the Motion on December 15, 2000. After considering the pleadings in the adversary proceeding and the arguments of counsel at the hearing on the Motion; the Court makes the following Findings of Fact and Conclusions of Law:[1]

FINDINGS OF FACT

1 Debtor filed for Chapter 7 relief under the Bankruptcy Code on August 18, 1999.

2. Kevin Campbell was appointed as the Chapter 7 Trustee of this estate at the First Meeting of Creditors held on September 29, 1999.

3. Defendant is a Virginia state member limited purpose credit card bank and is a creditor of Debtor. Defendant was listed in Debtor's Schedule F as holding an unsecured claim of $8,296.21.

4. On December 24, 1998, Defendant received a payment in the amount of $6,689.11 that was applied to Debtor's credit card account with Defendant, thus reducing Debtor's account

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[1] The 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.

balance at the time to $78.13.

5. Debtor's Schedules filed with the Court indicate that, at least as of the Petition Date, Debtor had at least one other creditor besides Defendant.[2]

CONCLUSIONS OF LAW

The Complaint seeks to set aside and annul the conveyance to Defendant that took place on December 24, 1998, as it violated S.C. Code Ann. §27-25-10. Being well beyond the 90 day reach-back period of 11 U S.C. §547,[3] the conveyance clearly would not satisfy the requirements of that preference section. Therefore, in this adversary proceeding, the Trustee seeks to avoid and recover the payment of $6,689 11 made to Defendant and argues that the Anti-Assignment Statute, made applicable through §544(b),[4] permits him to avoid said payment. As an avoided transfer pursuant to §544(b), the Trustee then seeks to employ §550 to recover the payment from Defendant. Thus, the issue before this Court is whether the Anti-Assignment Statute applies in this case, allowing the Trustee to recover the payment from Defendant. Furthermore, the

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[2] Debtors' Schedule F reflects a debt with Fleet Bank incurred around December of 1998, in the amount of $3,467 24

[3] Further references to the Bankruptcy Code shall be by section number only.

[4] Section 544(b) provides in pertinent part:

> (1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

Complaint also asserts that Defendant has been unjustly enriched by the actions of Debtor; thus, the Court must also determine whether the facts of this case warrant a cause of action for unjust enrichment.

A. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to adversary proceedings under the Bankruptcy Code by Fed. R Bankr. P. 7056, provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. Summary judgment is appropriate "if the evidence is such that a reasonable jury could not return a verdict for the nonmoving party." Anderson v Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether summary judgment is appropriate, the court must view all evidence in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The moving party has the initial burden to show that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Celotex Corp v. Catrett, 477 U.S. 317, 332 (1986). Once this initial showing is made, the burden of production shifts to the non-moving party The non-moving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial." Id. at 324; see also Fed. R. Civ. P. 5(e). In meeting this burden, the non-moving party "must do more than simply show that there is

some metaphysical doubt as to the material facts and must demonstrate there is a genuine issue for trial." Matsushita, 475 U.S at 586-87; see also Campbell v. Deans (In re J.R. Deans Co.), 249 B.R. 121, 128 (2000) (quoting Dunes Hotel Assoc. v. Hyatt Corp. (In re Dunes Hotel Assoc.), 194 B.R. 967, 976 (Bankr. D.S.C. 1995)) ("'[T]he party opposing summary judgment may not merely rely on his pleadings but must set forth specific facts which controvert the moving party's facts and which show the existence of a genuine issue for trial.'"). The Court should grant summary judgment "against a party who fails to make a showing sufficient to establish the evidence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Dunes Hotel Assoc., 194 B R. at 976 (citing Celotex, 477 U.S. at 322)

B. The Anti-Assignment Statute and Its Appropriate Context

In order to determine whether the Anti-Assignment Statute allows the Trustee in this case to annul the payment made to Defendant for the benefit of the estate, the Court must analyze the statute and determine whether it applies to the facts of this case.

The Anti-Assignment Statute is found at S.C. Code Ann §27-25-10 and provides.

> Any assignment by an insolvent debtor of his property for the benefit of his creditors in which any preference or priority is given to any creditor or creditors of the debtor by the terms of the assignment over any other creditor or creditors, other than as to any debts due to the public, or in which any provision or disposition of the property so assigned is made or directed other than that it be distributed among all creditors of the insolvent debtor equally, in proportion to the amount of their several demands and without preference or priority of any kind whatsoever, save only as to debts due to the public and save only as to such creditors as may accept the terms of such assignment and execute a release of their claims

> against the debtor, and except as hereinafter provided, shall be absolutely null and void and of no effect whatsoever.

S.C. Code Ann. §27-25-10 (Law. Co-op. 1976).

The Anti-Assignment Statute is the first of sixteen statutory provisions in Chapter 25 of Title 27 of the South Carolina Code, which is titled "Assignments for the Benefit of Creditors." An assignment for the benefit of creditors is an age-old common law device whereby an insolvent debtor would convey or pledge his property to a third party, *i.e* the assignee, in trust for the benefit of his creditors [5] See, e.g. 6 AM JUR. 2D *Assignments for Benefit of Creditors* §1 (1999) ("A general assignment for the benefit of creditors is a conveyance by a debtor without consideration from the grantee of substantially all his property to a party in trust to collect the amount owing to him, to sell and convey the property, to distribute the proceeds of all the property among his creditors, and to return the surplus, if any, to the debtor.")[6]

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[5] Legal commentators generally agree that transfers to creditors directly do not constitute true assignments for the benefit of creditors. See, e.g. 6 AM JUR 2D *Assignments for Benefit of Creditors* §1 (1999) ("Thus, a conveyance of property by a debtor directly to his creditors is not a general assignment for the benefit of creditors, because it creates no trust.") However, as will be discussed in more details in the Order, South Carolina state courts have held otherwise and have found that in certain cases even a direct transfer to a creditor may constitute an assignment if it was intended to constitute a transfer of all or substantially all of the debtor's property.

[6] Black's Law Dictionary defines "assignment for the benefit of creditors" as follows:

> Assignment of a debtor's property to another person in trust as to consolidate and liquidate the debtors' assets for payment to creditors, any surplus being returned to the debtor. . . . This procedure serves as a state-law substitute for federal bankruptcy proceedings The debtor is not discharged from unpaid debts by this procedure since creditors do not agree to any discharge.

BLACK'S LAW DICTIONARY 116 (7th ed. 1999).

Chapter 25 of Title 27 seems to follow the generally accepted view regarding assignments for the benefit of creditors. The statutory scheme set forth in Chapter 25 appears to contemplate that the assignment made for the benefit of creditors will be done in accordance with historical custom, so that the debtor will execute an instrument of conveyance to an assignee for distribution of property in accordance with the statutory regime. This is indicated by the language of the other statutes in Chapter 25. For example, S C Code Ann. §27-25-40 contemplates that the creditors of the insolvent debtor may appoint agents to work with the assignee in administering the debtor's property. Further, S.C. Code Ann. §27-25-60 requires the assignee to convene a meeting of the debtor's creditors within ten days of the execution of the assignment. Finally, and by way of additional example of the statutory scheme, S.C. Code Ann. §27-25-160 provides for the payment of a commission to the assignee and the creditors' agents for their efforts to administer, liquidate, and distribute the debtor's property. Consequently, the statutory scheme established by Chapter 25 of Title 27 on its face contemplates the existence of a third party assignee who will seize control of all of the debtor's property and pay creditors justly and in accordance with the law.

Although the general common law rule implies that payments made directly to creditors do not constitute assignments for the benefit of creditors and that for the Anti-Assignment Statute to be operative there must be an assignment for the benefit of creditors within the meaning of Chapter 25; the case law developed by the South Carolina state courts seems to bypass the requirement of a formal assignment and holds that even the granting of a single mortgage or confession of judgment may constitute an assignment pursuant to §27-25-10 if it was intended to be a transfer of all or substantially all of the debtor's property. For the reasons stated herein and

after careful review of the cases interpreting §27-25-10, the Court finds that the case law does not support the conclusion that the $6,689.11 payment to Defendant is an assignment for the benefit of creditors avoidable under the Anti-Assignment Statute; thus, summary judgment for Defendant is appropriate.

C. Case Law Interpreting the Anti-Assignment Statute

It is generally agreed that in order for a transaction to be annulled pursuant to the South Carolina Anti-Assignment Statute, three elements must be proven. As the Fourth Circuit Court of Appeals has stated: "The provision . . prohibits (1) an assignment of property (2) by an insolvent debtor (3) that gives a preference or priority to one or more of his creditors over his other creditors." Power Constr. Co v. Hoffman Assoc. (In re Hoffman Associates), 16 F.3d 410 (D.S C. 1993) (Unpubl) (citing First Carolinas Joint Stock Land Bank v. Knotts, 1 S.E 2d 797, 806 (S C. 1939)); Campbell v. Heritage Trust Fed. Credit Union (In re Martini), C/A No. 96-75484-W: Adv. Pro. No. 98-80091-W (Bankr D.S C. 11/16/1998). Standing alone, these three elements may appear easy to satisfy: thus implicating the Anti-Assignment Statute in the facts of this case. However, viewed in the context of the case law from which these elements have been distilled, it is apparent that the Trustee has failed to show a set of facts sufficient to avoid payment to Defendant under the Anti-Assignment Statute.

Opposite to the statutory scheme of Chapter 25 of Title 27, many of the cases interpreting the Anti-Assignment Statute indicate that there need not be a formal assignment for a benefit of creditors in order to implicate the Anti-Assignment Statute; rather, all that is needed is a set of facts proved, admitted, or pled that shows the challenged transaction to be tantamount to an

assignment. For example, in First Carolinas Joint Stock Land Bank v. Knotts, 1 S.E. 2d 797 (1939), on which the Fourth Circuit Court relied in the Hoffman decision, the South Carolina Supreme Court discussed the applicability of the Anti-Assignment Statute to situations not involving formal assignments for the benefit of creditors. Like Hoffman, which did not *per se* involve a formal assignment for the benefit of creditors, but rather dealt with a security agreement disguised as such, the court noted:

> In our view, however, the complaint states a good cause of action under the assignment statutes--Sections 9016 and 9107, 1932 Code [predecessor statutes to the Anti-Assignment Statute],--which prohibit any assignment by an insolvent debtor of his property for the benefit of his creditors in which any preference or priority is given to some over others. It is not only formal general assignments containing preferences, which these sections prohibit, but any transfer which amounts to such general assignments. Of course the Assignment Act has no application unless there is either an actual assignment or a state of facts fully proved and admitted, which in conscience or equity is tantamount to an assignment with unlawful preferences

Knotts, 1 S E.2d at 805, see also Powers Constr. Co v. Hoffman Assoc. (In re Hoffman Assoc.), 16 F.3d 410 (D.S.C. 1993) (Unpubl.) ("With respect to the [element dealing with assignment of property], the conveyance of a security interest in a debtor's property to one of its creditors is an 'assignment' under section 27-25-10 if the security interest 'is really designed to operate, not as a security merely, but as a means of transferring the debtor's property to the favored creditor'"); Monaghan Bay Co. v. Dickson, 17 S.E. 696, 698 (S.C. 1893); Putney v. Freisleben, 11 S.E 337, 338 (S.C. 1890) ("Ever since the passage of the assignment act, this court has uniformly held that an insolvent debtor may prefer a creditor by bona fide mortgage, and, as we suppose, by judgments confessed, if they were intended merely as securities; but, if such papers were only designed to operate as the means of transferring the debtor's property to one or more of his

creditors in preference to others, then they must be regarded in effect, though not in form, [as] an assignment, and, as such, null and void . . . ."); Verner v. McGhee, 2 S.E 113, 114 (S.C. 1887); Lamar v. Pool, 2 S.E 322, 324 (S.C. 1887); Wilks v. Walker, 1885 WL 3570, *3 (S.C 1985) ("The manifest object of the act is to prevent an insolvent debtor from transferring or assigning his property for the benefit of one or more of his creditors to the exclusion of all others; and whether this object is sought to be effected by a *formal* deed of assignment, or in any other mode, can make no difference ").

Thus, in order to satisfy the first element, the payment to Defendant has to be in "conscience and equity" tantamount to an assignment for the benefit of creditors. In other words, Debtor must have intended to transfer all or substantially all of his property to another party. See, e.g. Power Constr. Co v. Hoffman Assoc. (In re Hoffman Associates), 16 F.3d 410 (D.S.C. 1993) (Unpubl.) (finding that the execution of a security agreement in *all* of debtor's assets was tantamount to an assignment): Moore v Moore, 46 F. Supp. 330, 334 (D.S.C. 1942) (finding that execution by insolvent debtor of a mortgage of all of debtor's unencumbered property to her children was an invalid assignment); Monaghan Bay Co v. Dickson, 17 S.E. 696, 698 (S.C. 1893) (considering the issue of whether the mortgage was tantamount to an assignment and concluding that it was not in that "[the transfer] did not include the whole of the debtor's property, nor did it accomplish the leading purpose of an assignment, which is to transfer the title to the estate, but the debtor stipulated to 'retain and enjoy the said premises as his own, until default of payment should be made,' as in the case of a mortgage given as a security."); Campbell v. Heritage Trust Fed. Credit Union (In re Martini), C/A No. 96-75484-W, Adv. Pro. 98-80091-W (Bankr. D.S.C. 11/13/1998) (finding that the transfer at issue met the requirements of the

Anti-Assignment Statute where Debtors sold their restaurant and transferred substantially all of the net proceeds from the sale of their business to Defendant).

Despite the fact that the case law seems to uniformly agree that a formal assignment is not required in order for a transaction to be annulled pursuant to §27-25-10, and that as long as a debtor transfers all or substantially of his property to another party to serve the same purpose of a formal assignment the first requirement of the statute is satisfied; there are differences among the state court cases as to whether an intent to prefer one creditor over another is required Compare Porter v. Stricker, 21 S.E. 635 (S.C. 1895) with Middleton v Taber, 24 S.E. 282 (1896). The case of Porter v. Stricker indicates that in order to meet the requirements of the Anti-Assignment Statute, an element of bad faith or intent to prefer certain creditors over other creditors may be necessary. As the court stated in that case:

> From this review of the cases upon the subject in this state, the following propositions, applicable to the case under consideration, are clearly deducible: (1) that an insolvent debtor may be [sic] a bona fide mortgage, which is intended merely as a security for a just debt, prefer one of his creditors; (2) that if the mortgage is really designed to operate, not as a security merely, but as a means of transferring the debtor's property to the favored creditor, in preference of the other creditors, then it is void, under the assignment law; (3) that the question as to what was the intention is a question of fact.

Id. at 640 However, later cases have made clear that intent to prefer or bad faith is not a requirement. See, e.g. Pryor v Greene, 2 F.2d 234, 234-35 (D.S.C 1924) (affirming the referee's opinion and noting that "[o]ne of the chief legal controversies in the case was whether under the assignment law of the state it was necessary in order to avoid the preference created that the beneficiary as well as the insolvent should have been aware of his insolvency and should

have participated in the intent to create a preference. The opinion holds that such is not the law and sustains this view with ample and convincing citation of authorities."); Middleton v. Taber, 24 S.E. 282, 287 (1896); Lamar v. Pool, 2 S.E. 322, 324-25 (S.C. 1987) ("Two things must concur under that section to render an instrument void: (1) An assignment; and (2) a preference given in said assignment; and it is the preference which the act inhibits, whether that preference be founded upon a *bona fide* claim or a fraudulent one."); Campbell v. Heritage Trust Fed. Credit Union (In re Martini), C/A No. 96-75484-W; Adv. Pro. 98-80091-W (Bankr. D.S.C. 11/16/1998) (quoting Judge Bishop's case In re Parker Pontiac-Olds, Inc., C/A No. 90-01304-B, Adv. Pro. 91-8067 (Bankr. D.S.C. 9/8/1992)) ("[I]t appearing that the object of this section [South Carolina Anti-Assignment Act] is to prevent any preference being effectuated among creditors, except as specifically provided by the statute, the court must determine whether the transfer 'provides any preference whatsoever, other than those specifically allowed, without regard to the intention of the parties.'").

In concluding that in applying the Anti-Assignment Statute "it makes no difference whether the preference is fraudulent or not," the case of Lamar v. Pool, 2 S.E. 322 (S.C. 1887) draws a clear distinction between that statute and the Statute of Elizabeth and notes that §27-25-10 was not intended as a substitute for the latter. In Lamar, the court emphasized:

> [The Anti-Assignment Statute] was not intended to afford a new remedy against fraudulent deeds, mortgages, and such like papers The law was abundant by which such papers could be avoided, at the time of the passage of that act, and it was not passed to remedy the evil of such fraudulent papers, but it was enacted to meet the evil of debtors, when they undertook to assign their property for the benefit of their creditors, giving one creditor the advantage in the assignment; and to cut this evil up root and branch it declared that such a preference, whether *bona fide* or fraudulent, should

> *instanter*, without looking beyond the fact of preference, avoid the instrument.

Id at 325. Thus, while there needs not be proof of bad faith, fraudulent intent, or an intent to prefer one creditor over another; what is needed is an intent to make a transfer which is tantamount to an assignment. In considering whether a transaction meets the requirements of §27-25-10, the question to be posed is whether "the paper [is] a bona fide mortgage, intended as a security, which the law allows, or [whether it was] intended as an assignment in which the particular creditor is preferred, the form of the paper having been adopted to evade the act?". Id.

To recapitulate, in order to meet the requirements of the Anti-Assignment Statute to annul a transfer, three things need to be proved. First, an assignment has to have taken place. However, as explained above, it is clear that, according to South Carolina case law, there does not need to be any formal assignment for the Anti-Assignment Statute to apply. Any transfer of all or substantially all of the debtor's property would seem to meet the test. The second requirement is that the "assignment" be made by an insolvent debtor. Lastly, the Trustee needs to prove that the "assignment" results in a preference of one or more of the debtor's creditors over his or her other creditors, regardless of the intent behind the transaction.

In applying these three factors to the case presently before the Court, the Court concludes that the Motion should be granted in Defendant's favor. First of all, there is no allegation, let alone evidence, that Debtor's payment of $6,689.11 to Defendant was a transfer of all or substantially all of his property at that time, thus constituting an "assignment" within the meaning of the statute. Secondly, there is no evidence in the record to show that Debtor's payment to Defendant had the effect of preferring Defendant over other creditors given the fact

that the Trustee did not clearly present the amounts of Debtor's other debts nor did he assert that Debtor failed to pay his other creditors.[7]

As a Second Cause of Action, the Trustee alleges that Defendant had been unjustly enriched through the transfer of the property to Debtor and requested that the Court set aside the conveyance of the property from Defendant. The theory of unjust enrichment "is an equitable doctrine, akin to restitution, which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff." Ellis v. Smith Grading & Paving, Inc., 366 S.E.2d 12, 14 (S.C. Ct App. 1988) (citing Barrett v Miller, 321 S.E.2d 198, 199 (S.C. Ct. App. 1984)); see also Overstreet v. Kentucky Cen. Life Ins., 950 F.2d 931, 944 (4th Cir. 1991) ("A claim for unjust enrichment is not grounded in the plaintiff's damages but in the law's unwillingness to permit the defendant to retain benefits to which defendant is not entitled."). In this case, absent relief under the Anti-Assignment Statute, Defendant appears to have been entitled to the payment that it received from Debtor. Thus, the Court finds that the Trustee's cause of action against Defendant for unjust enrichment must fail.

CONCLUSION

Defendant met its initial burden to show that in this case there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. On the other hand, the Trustee did not present any affidavit or other statements in opposition to the Summary Judgment

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[7] The Court also notes that the Trustee's Complaint failed to allege whether Debtor was insolvent at the time of the payment to Defendant.

Motion to sufficiently rebut Defendant's Motion. For this reason and for the other reasons set forth above, the Court finds that based on the undisputed facts in this case, there is insufficient evidence to support a conclusion that the payment to Defendant was "tantamount" to an assignment for the benefit of creditors. It is therefore,

ORDERED that Capital One Bank's Motion for Summary Judgment is granted as to both causes of action based on the Anti-Assignment Statute and unjust enrichment.

IT IS FURTHER ORDERED that Plaintiff's request that the Court award Plaintiff attorney's fees and costs incurred in conjunction with the matter is denied.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
March 20, 2001.