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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

June 1, 2005

The Honorable Harry F. Cato
Member, House of Representatives
P. O. Box 11867
Columbia, South Carolina 29211

Dear Representative Cato:

You seek an opinion "regarding a conflict among several utility companies in South Carolina." You indicate that you have "received a letter from Damage Prevention Specialists, LLC, which raises some concerns regarding Palmetto Utility Protection Service (PUPS)." You have enclosed this letter for our review.

By way of background, you state the following:

> I am writing to seek your opinion on regarding a conflict among several utility companies in South Carolina. I received a letter from Damage Prevention Specialists, LLC, which raises some concerns regarding Palmetto Utility Protection Service (PUPS). I am attaching a copy of the letter for your convenience.
>
> I would like your opinion on two main issues addressed in the letter. First, can a non-profit company legally fund and operate a for profit company? South Carolina Code Section 33-31-302 currently allows a non-profit company to lend money and purchase, own and deal with shares or other interest of an entity. I would like your interpretation of this language as it applies to this situation.
>
> Secondly, does the relationship between PUPS, Palmetto Damage Prevention Services (PDPS) and the new company violate the South Carolina Unfair Trade Practices Act? Under the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Section 39-5-20(a), "unfair methods of competition and unfair ... acts or practices in the conduct of any trade or commerce are ... declared unlawful." The courts have qualified the SCUTPA by stating that a trade practice is "unfair" when it is "immoral, unethical, or oppressive" and the "unfair" act impacts the public interest. *See Liberty Mut. Ins Co. v. Employee Resource Mgmt, Inc., 176 F.Supp.2d 510 (2001)* and *Williams-Garrett v. Murphy, 106 F.Supp.2d 834 (2000).*

PUPS and PDPS appear to have a legitimate relationship, however, the problem arises when the third company begins its operations. This utility locating company will be owned by PDPS, which is owned by PUPS. PUPS's main responsibility is to supply all of the utility locating companies with crucial locating information for which they pay a ticket price. As an insider into PDPS and PUPS, Mr. Smith may take advantage of PUPS's privileged information for the benefit of his new company. Not only does this seem "unethical" and "immoral," the new company also negatively affects the other utility locating companies, denying them the same access to information they need to function in their service to the utility companies, and ultimately, the public.

Additional information is provided in the letter which you have enclosed from Damage Prevention Specialists, LLC. This letter provides the following background:

In 1978 the utility companies in South Carolina developed a one call center for the purpose of protecting their underground facilities. It is the duty of the one call center (PUPS) to dispatch to the utility companies any information regarding excavating that is taking place in the areas where the utility companies have underground facilities. This information is shared so that the companies can locate their facilities to prevent any damage to their utilities. The One Call Center (PUPS) is a not-for-profit organization. PUPS is funded by its members which are utility companies all over the state who have underground equipment and join the service in order to protect their lines. Before any excavation process can take place the excavator is required by law to call PUPS so that PUPS can notify all utilities in the area where the work is being done. After the call to PUPS is made the utility companies then have 72 hours to locate their facilities. The utility companies have worked with PUPS to electronically grid the areas in which each utility company has underground facilities. By doing this, PUPS knows who to notify when contractors and homeowners alert them. PUPS generates revenue by charging the utilities for tickets created when excavators and homeowners call in and alert PUPS of work to be done. Each utility company member is charged a per ticket fee for the amount of tickets generated in their particular grid. Volume of tickets generated, therefore, directly affects PUPS's profitability. To learn more about PUPS and the One Call Center itself I encourage you to visit their web site; www.sc1pups.org.

Utility companies hire sub-contractors such as DPS to handle their locating needs. DPS receives tickets from the One Call Center (PUPS) which detail scheduled excavation jobs. DPS professionals then locate the underground facilities of the companies we are contracted to. It is our job to make sure that the underground facilities which we locate are not damages by anyone doing excavation. We rely on the information PUPS makes available and though we are not members

of PUPS, we do have to pay a fee in order to receive the informational tickets. When DPS competes for a utility's locating contract we rely on the information that is given to us regarding the amount of tickets that the utility company receives, the amount of people needed to accurately locate their facilities and the size of the geographical area which needs covering. Without correct information, we may not be able to give a competitive bid and may therefore lose out on a contract. PUPS has all of this information for its utility members. All we can do is request that information and hope that we get it. I have requested information about certain utility companies and have never received it, and have therefore had to rely on my own resources. Possession of this information provides PUPS with a considerable advantage over DPS and its competitors in submitting bids for locating work.

The executive director of PUPS, Glyn Smith has started a company by the name of Palmetto Damage Prevention Services (PDPS). This company operates for profit and 80% of this company is owned by PUPS which is not for profit. PDPS offers the following services to utility companies: setting up a ticket screening system and a ticket management system, claims processing for companies that have hard time collecting money from excavators who damage facilities, and the conducting of field audits to the utility companies to find out if their underground locating is being done correctly. Glyn Smith is not only the executive director of PUPS, he is also the COO of PDPS. It is my understanding that since PDPS is 80% owned by PUPS, PDPS can borrow any sum of money from PUPS in order to conduct business without any written contract of a payback. It is also my understanding that PDPS can borrow this money without interest or any personal guarantees. It seems to me that PUPS is funding PDPS without PDPS having any risk involved. I was wondering if it is legally possible that a *non*-profit company could fund and operate a *for*-profit company. You can learn more about PDPS by going to their web site at www.pdps.net.

Smith is starting another company that I feel is in direct conflict with not only Damage Prevention Specialists but other contractors as well. This third company is going to be a utility locating company like DPS. Let me make it clear that I have no problem with anyone wanting to start a locating business. As far as I am concerned competition is a good thing. Here is where I have a problem: this company Smith is opening is going to be owned by PDPS and PDPS is 80% owned by PUPS. As the executive director of PUPS Smith has access to privileged information from every utility company that is a member of PUPS. As far as I am concerned this is an unfair advantage and a threat to capitalistic enterprise. Smith has every record from every year and the history of each company. Smith can look at any information about any company at any given time to see who needs what. If everyone else in this industry had access to the same information there could be fair competition, but my company and other locating services have thus far been denied information. If PUPS is willing

> to share all of this information with all locating contractors then I will not object to Smith's enterprise. However, it is my understanding that Smith's company will only offer its services to the members of PUPS. This indicates an intention to "box out" competitors. He will not approach a non-member because he does not have any information on that utility. It seems to me that if Glyn Smith starts this company under PDPS and PDPS is 80% owned by PUPS and can borrow money at any given time then essentially PUPS is going to be funding this new locating service. It also seems to me that since I pay a fee to PUPS each year then I am essentially funding a competitor.

Law / Analysis

Nonprofit Organizations Generally

Your first question involves whether or not a nonprofit corporation can "legally fund and operate a for profit company?" We have noted generally that the popular meaning of "nonprofit organization" is as follows:

> 'Non profit has been defined to mean 'not conducted or maintained for the purpose of making a profit; not based on the profit motive; or not organized on capitalistic principles.' WEBSTER'S NEW INTERNATIONAL DICTIONARY 'Nonprofit' at 761. 'Organization' means a group of persons that has a more or less constant membership, a body of officers, and a set of regulations, and no profit motives. Such an organization, however, must possess additional characteristics. It must have a limited membership."

Ops. S.C. Atty. Gen., November 14, 1967.

It has often been said that the purpose of a nonprofit corporation or eleemosynary corporation or organization is charitable in nature. For example, in *Ellerbe v. David*, 193 S.C. 332, 8 S.E.2d 518, 520 (1940), our Supreme Court defined a "charitable purpose" as an "eleemosynary purpose." In *Sandel v. State*, 126 S.C. 1, 119 S.E. 776, 778, (1922), it was stated that eleemosynary corporations are "those created for charitable and benevolent purposes." And, in *Op. S.C. Atty. Gen.*, November 21, 1979, citing *Ellerbe v. David, supra* and *Johnson v. Sptg. Co. Fair Assn.*, 210 S.C. 56, 41 S.E.2d 599 (1947) we commented that "[t]he South Carolina Supreme Court has previously defined eleemosynary purposes as 'charitable' or 'benevolent.'" We referenced therein S.C. Code Ann. Section 61-5-20 which states that nonprofit organizations are established for social, benevolent, patriotic, recreational or fraternal purposes. The Court has also stated that the word "eleemosynary" can be used in a broader sense to denote an unselfish purpose to advance the common good in any form. *See, Johnson v. Sptg. Co. Fair Assn. supra.*

Whether or not a corporation or organization is, in reality, entitled to nonprofit status is principally a question of fact. As our Supreme Court stated in *Columbia Country Club v. Livingston*, 252 S.C. 490, 494-5, 167 S.E.2d 300, 303 (1969),

> [w]hile much of the litigation in this field has involved exemptions under the federal tax law, the principles developed and enunciated in the cases are equally persuasive in determining the right of a corporation to tax exemption under a state statute. These principles are delineated in an annotation in 69 A.L.R.2d 871, from which we quote:
>
> 'The charter or other instrument by which an organization comes into being is not conclusive on the issue of the purposes for which it is organized, and the court may consider extrinsic evidence on the issue. And the fact that an organization was incorporated under the general business corporation laws, rather than under the laws relating to charitable, educational, or nonbusiness corporations does not preclude a finding that it was organized exclusively for exempt purposes. The purpose for which a corporation has been organized is a question of fact, to be determined from all the evidence, including statements in the charter and evidence concerning the circumstances surrounding its organization, the purposes and intentions of the incorporators, and the activities of the corporation and of any predecessor organization.'
>
> 'The fact that an organization which desired to conduct an exempt activity organized a corporation under the general business corporation laws, rather than under the laws relating to charitable, educational, or nonbusiness corporations does not preclude a finding that it was organized exclusively for exempt purposes. ***
>
> 'In some instances an organization which is exempt from taxation under federal law has to incorporate under the state business corporation law because the state laws do not give the right to organize such an organization under the statutes relating to corporations which are not organized for profit. In this situation the organization should not lose its exemption under federal statutes merely because of accidental variations or deficiencies in state laws.'

See the cited case of Hillcrest Country Club, Inc. v. United States (1957 D.C.Mo.) 152 F.Supp. 896.

South Carolina Nonprofit Corporation Act

In 1994, by Act No. 384, the General Assembly enacted the Comprehensive South Carolina Nonprofit Corporation Act, codified at § 33-31-101 *et seq*. The Act is modelled on the ABA/ALI

Revised Model Nonprofit Corporation Act. An overview of nonprofit corporations generally and the South Carolina Nonprofit Corporation Act specifically is provided in McWilliams, Cureton and Flanagan, "Sculpting a Nonprofit Corporation," 6 Jun S.C. Law. 21 (May/June, 1995). Therein, it is stated the following summary:

> [f]irst and foremost, a nonprofit corporation is a corporation with all that entails, including limited liability for its members and, if desired, perpetual existence. Like a business corporation, it is chartered by the General Assembly by delegation of authority to the Secretary of State. Nonprofits differ from business corporations in two fundamental ways. First, the nonprofit form is designed for entities that do not operate for profit but for "eleemosynary" purposes, to use the traditional description. The second difference is closely related to the first–unlike business corporations, nonprofits are not owned by shareholders seeking a return on investment.
>
> Despite these fundamental differences, for many years South Carolina's nonprofits have been governed largely by the Business Corporation Act. The former South Carolina Nonprofit Corporation Act contained only about 25 sections; anything not addressed directly by these few sections was governed by the Business Corporation Act. In other words, South Carolina nonprofits were governed by a statute designed to accommodate profit-making institutions owned by return-minded investors. This was a bad fit and caused plenty of confusion.
>
> The new Act is comprehensive and completely free-standing, requiring reference to no other statute. Because the Act is a first cousin to the Business Corporation Act and uses many of the same terms (including, for example, the standard of care for directors), it is likely that the Act will be construed with reference to cases decided under parallel provisions of the Business Corporation Act. Nevertheless, given the differing purposes of the two statutes, there is scope for differing judicial interpretation of identically worded provisions.
>
> It is important to remember that a nonprofit is not necessarily tax exempt. An eleemosynary enterprise organizing as a nonprofit has a number of significant benefits, including limited liability for members, but one of these benefits is not tax exemption. Exemption from tax can be determined only by reference to the relevant tax statutes and regulations.
>
> The concept of the nonprofit corporation was initially conceived to accommodate truly eleemosynary enterprises, such as churches, charities and institutions organized for the public benefit. Over time, however, the nonprofit form has come to provide a home for many additional categories of enterprise, including country clubs, fraternities and afterhours drinking clubs. The disparity of purposes to which the

> nonprofit form has been applied has baffled those trying to draft a statute encompassing all such purposes in a sensible way.

The authors of the foregoing Article also note that "[t]he Act creates three categories of nonprofit, each governed by its own appropriate rules: the religious corporation, the public benefit corporation and the mutual benefit corporation. Newly-formed nonprofits must designate a category in the article at the time of formation. *Id.* at 23. Existing nonprofits "are sorted into the appropriate category by operation of Code § 33-31-170 ...." *Id.* Section 33-31-1706 further provides as follows:

> (1) Any existing nonprofit required by statute to be included in a particular category is included in that category;
>
> (2) Any existing nonprofit not governed by (1), and organized "primarily or exclusively for religious purposes," is a religious corporation.
>
> (3) Any existing nonprofit not governed by (1) or (2), but tax exempt under § 501(c)(3) of the Internal Revenue Code, is a public benefit corporation.
>
> (4) Any existing corporation not governed by (1), (2) or (3), but organized for "a public or charitable purpose and that upon dissolution must distribute its assets" to a governmental or taxexempt entity, is a public benefit corporation.
>
> (5) Everything else is a mutual benefit corporation.

In terms of the tax exempt status of a nonprofit corporation, the Article by Professor McWilliams *et al.* additionally notes that "[p]ublic benefit corporations are most easily described as being designed to fit into the IRC [Internal Revenue Code] § 501(c)(3) tax exemption." The authors state that

> [i]f a corporation is not a religious corporation and desires the § 501(c)(3) exemption, it must choose the public benefit form. The requirements of § 501(C)(3) are incompatible with the mutual benefit form ....
>
> Religious nonprofits are similar in many respects to public benefits. For example, members are not permitted to have a financial interest in the corporation. On the other hand, the Attorney General has less oversight power with respect to religious corporations than with public benefit corporations.
>
> Mutual benefit corporations are governed by rules looking more like those of business corporations. This is because, if a mutual benefit corporation elects to have members, the members are permitted to have a financial interest in the corporation. Members may not receive distributions during the life of the corporation, but they may sell their membership to third parties and receive distributions upon liquidation and the corporation may repurchase memberships. Repurchase of memberships is controlled by provisions very similar to the restrictions on distributions found in the Business Corporations Act, including an equity insolvency test and a balance sheet

> test. See Code § 33-31-1301. As would be expected, members of a mutual benefit corporation have substantial rights to oversee management, and the Attorney General has concomitantly fewer powers of oversight.

Id. at 23-24.

Acquisition or Ownership of a "For Profit"Corporation By A Nonprofit Corporation

In *Op. S.C. Atty. Gen.*, Op. No. 1900 (September 2, 1965), we recognized as a general matter that there is no absolute prohibition upon a nonprofit corporation engaging in activities for a profit. There, we stated the following

> '[n]onprofit' does not mean that there can be no profit or gain realized from the corporation. It means, instead that gains realized are not paid out to stockholders. For instance, the Supreme Court of New Jersey said in *Greisman v. Newcomb Hospital*, 183 A.2d 878, 76 N.J. Super., 149, that a hospital was a 'nonprofit private corporation' where profit, if any accruing from its operation was required to be invested for or applied toward maintenance, betterment, or addition to, improvement or enlargement of buildings, grounds, equipment or increasing of endowment fund.... [other authorities discussed].
>
> In view of the foregoing authorities, it is the opinion of this Office that a country club whose charter or bylaws prohibit distribution of profits to its stockholders or members in the form of dividends, and the purpose for which is to provide, improve, and develop the club's facilities for the benefit and enjoyment of its membership, to which profits are actually put, is a 'nonprofit corporation or organization' within the meaning of Section 65-802(4) and that such club is not required to collect the admissions tax imposed by Section 65-802.

See also, Columbia Country Club v. Livingston, supra [status of corporation owning country club organized and operated on a nonprofit basis was not changed from a nonprofit corporation by enactment of 1962 Business Corporation Act]; *Wilson Area School District v. Easton Hospital*, 561 Pa. 1, 747 A.2d 877 (2000) [under federal law, nonprofit corporations can own for-profit corporations without losing their federal nonprofit tax status as long as the profits of the for-profit corporations are used to further the nonprofit purposes of the parent corporation.]; *In re Capitol Hill Healthcare Group D/B/A Capitol Hill Nursing Center*, 242 B.R. 199 (1999) [debtor, a registered nonprofit corporation that operated a nursing home was not a "moneyed, business, or commercial operation; alleged debtor had not issued stock, no distributions had been declared or made by alleged debtor to its sole member, and there was no contention that alleged debtor's payments to related entities were a subterfuge for making distributions to its sole member, who also owned or controlled the for-profit corporation which provided management services to alleged debtor and the company that owned the real property occupied by alleged debtor]; *Jabezenski v. So. Pacific Memorial*

Hospitals, 579 P.2d 53 (Ariz. 1978) [existence of mere interlocking directorates between defendant corporation organized for profit and defendant nonprofit corporation, each incorporated with a specific legitimate purpose, did not justify disregarding of corporate identities where no evidence showed that the dominant corporation controlled and used the other as a mere tool in carrying out its own plans and purposes]; *Gingrich v. Blue Ridge Memorial Gardens*, 444 Pa. 420, 282 A.2d 315, 318 (1971) ["The fact that the Diocese may receive a profit from the sale of markers and monuments does not detract from the charitable nature of the trust."].

We turn now to the relevant text of the Nonprofit Corporation Act. Section 33-31-302(6) empowers a nonprofit corporation to

> purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, pledge, or otherwise dispose of, and deal in and with, shares or other interest in or obligations of *any entity*.

(emphasis added). Subsection (17) of the same Section expressly provides that a nonprofit corporation is authorized to "carry on a business ...." Finally, § 33-31-302(18) declares that nonprofit corporations possess the power "to do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation."

The Official Comment to § 33-31-302 elaborates upon the authority of a nonprofit corporation to "conduct a business." Such Official Comment states as follows in this regard:

> [n]onprofit corporations have the power to engage in business. Nonprofit organizations operate hospitals, department stores, consulting firms, book stores, automobile associations clearing houses and other activities that could be characterized as business ....
>
> The fact that a nonprofit corporation has the power to operate a business does not mean that the corporation is acting properly in running the business. The business must be consistent with or in aid of the public or charitable purposes of a public benefit corporation, benefit the members of a mutual benefit corporation or be consistent with or in aid of the religious purpose of a religious corporation. A corporation that does not operate a business for those purposes can be challenged in a quo warranto or similar proceeding. See *Olsen v. National Memorial Gardens, Inc.*, 115 N.W.2d 312, 366 Mich. 492 (1962); *People v. Society of Good Neighbors*, 42 N.W.2d 761, 327 Mich. 620 (1950); *People v. White Circle League of America*, 97 N.E.2d 811, 408 Ill. 564 (1951). Also see *State v. National Ass'n of Angling & Casting Clubs*, 51 N.E.2d 662 (1943), where profit from business activities was used for the objects of the organization and the court found no wrongful activity.

In *State v. Nat. Assn. of Angling and Casting Clubs, supra*, the Court discussed at length the issue of whether a nonprofit corporation removes its nonprofit status by virtue of its engaging in for-profit activities. There, the Court, in concluding that the corporation did not forfeit its nonprofit status, stated the following:

> [c]onsidering the question as an original one, we are constrained to the view that the record fails to support plaintiff's claim that the defendant company has misused its franchise rights.
>
> Stating our position more directly, we do not find that the defendant's merchandising activities are in any sense a profit making purpose, and any excess in resale over cost was purely incidental and properly used for the expenses and maintenance of the organization. Our conclusion has the support of every reported case kindred in character.
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> In the case of Emrick v. Pennsylvania R. Y. M. C.A., 69 Ohio App. 353, 43 N.E.2d 733, the Court of Appeals of Crawford County had under consideration the character and powers of the defendant corporation. The state of facts was different than in the instant case, but the principle announced is the same. In the reported case the Y. M. C. A. under its articles of incorporation, as a non-profit corporation, described its purpose to be the spiritual, intellectual, social and physical welfare of men and boys.
>
> The Court held that the fact that an annual fee was charged to members, that sleeping rooms were conducted, as well as a restaurant, all open to members or the public, the further sales of tobacco, magazines, candy, deriving all its income from its activities and making a profit therefrom, would not take the organization out of its charter classification as a corporation not for profit.
>
> The Supreme Court of Ohio, in the case of Cleveland Library Association v. Pelton, Treasurer et al., 36 Ohio St. 353, had under consideration the question whether or not the Library Association, incorporated under the laws of Ohio, retained its status of a non-profit corporation after it acquired and owned a lot of ground with a block of buildings thereon, constructed as an entirety, some of the rooms of which were occupied by the association and others rented out and the rends received applied exclusively to keeping the property in good repair.
>
> The Supreme Court determined that so much of the property as was rented out for profit would be taxable, but it characterized the association as an institution of purely public charity.

Id. at 664.

And, in *Bontrager v. LaPlata Electric Assn.*, 68 P.3d 355 (Colo. 2003), the Court construed a Colorado statute, virtually identical to South Carolina's § 33-31-302(6) which authorized a nonprofit corporation to "purchase, receive subscribe for, and otherwise acquire shares and other interests in, and obligations of, any other entity; and to own, hold, vote, use, sell, mortgage, lend, pledge, and otherwise dispose of, and deal in and with, the same." There, the Court noted that Colorado law allowed nonprofits to "invest and reinvest its funds." In concluding that nothing in the Colorado governing statutes prohibited a nonprofit corporation from forming or investing in a for-profit subsidiary, the Court stated:

> [p]laintiff has cited no Colorado case, nor have we found one, holding that either a nonprofit cooperative association or a nonprofit corporation is precluded from investing in for-profit subsidiaries. The question of whether such investments might be prohibited if the nonprofit corporation thereby became a de facto for-profit corporation is not before us.
>
> Accordingly, we conclude the governing statutes do not prohibit LPEA from forming and investing in a for-profit subsidiary.

68 P.3d at 561.

Thus, South Carolina law does not absolutely prohibit a nonprofit corporation from engaging in for profit activity. Nothing in state law, of which we are aware, proscribes a nonprofit corporation from purchasing or owning a for profit company.

At the same time, it is also clear that a nonprofit corporation may not maintain its nonprofit status while, in reality, operating as a for-profit corporation. As one court recently noted,

> [i]n fact, it has been stated that "[t]he basic question to be asked in determining whether a corporation is 'nonprofit' is whether the corporation is being exploited for direct monetary gain." ... There is no prohibition on a nonprofit corporation conducting enterprises for income or from accumulating earnings. However, such revenues must be used for the purposes set forth in the charter and there must be no pecuniary gain to the incorporators or members, and no distribution of income or profits to them.

Summers v. Cherokee Children and Family Services, Inc., 112 S.W.3d 486, 501 (Tenn. 2002).

Whether or not a putative nonprofit corporation is, in reality, operating as a for profit corporation pursuant to the foregoing standards enunciated by various courts is, of course, a question of fact. As the Arkansas Attorney General has said, "[a] determination of whether a particular nonprofit organization's business enterprises are permissible or restricted is a very fact-intensive inquiry. An analysis of this issue, therefore, would require a thorough knowledge of the specific

facts surrounding the nonprofit organization in question and the for-profit enterprises in which it engages." Thus, while the Arkansas Attorney General noted that "[o]rganizations that have tax exempt status as nonprofit organizations under the provisions of 26 U.S.C. § 501(c)(3) can, under certain circumstances, engage in for-profit, taxable business enterprises without losing their tax exempt status (citing, *e.g.*, 26 U.S.C. §§ 501(b), 512, 513, 4943, 4944, and 4945), the Attorney General of Arkansas concluded that an opinion could not be issued because of the overriding factual issues involved.

Likewise, this Office has consistently stated that it is unable to resolve factual issues in an opinion of the Attorney General. *See, Op. S.C. Atty. Gen.*, December 12, 1983. For example, in an opinion dated March 7, 1996, we advised that "[w]hether or not the club is 'operated for profit' is, of course, a factual question which is beyond the scope of an opinion of this Office." Thus, beyond the legal authorities provided herein, we cannot advise you particularly concerning PUPS and its present legal structure or its operation, except to say that the ownership or operation by a nonprofit corporation of a for profit entity is not in itself a violation of South Carolina law. It is, however, a factual question as to how these profits are being used with respect to the nonprofit corporation's purpose.

Unfair Trade Practices Act

We turn now to your question regarding the Unfair Trade Practices Act (UTPA), codified at S.C. Code Ann. Section 39-5-10 *et seq.* You have asked whether the alleged conduct of PUPS as outlined in your letter, as well as the enclosed letter, are a violation of UTPA. Of course, it goes without saying that the ultimate determination of whether UTPA has been violated is a question of fact to be determined by a court of competent jurisdiction. As noted above, an opinion of the Attorney General cannot resolve factual issues, and thus we cannot definitively conclude in a given instance whether UTPA has been violated. However, in an effort to be of assistance with respect to your inquiry, we offer the following summary of UTPA and the case law and opinions of this Office in this area.

The Unfair Trade Practices Act expressly prohibits unfair or deceptive practices in trade or commerce. Section 39-5-20 provides as follows:

> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (b) It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

Our Supreme Court has stated the following summary of UTPA:

> [u]nder the UTPA, it is unlawful to engage in "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." .... An act is "unfair" when it is offensive to public policy or when it is immoral, unethical, or oppressive. An act is "deceptive" when it has a tendency to deceive. *Harris v. NCNB*, 85 N.C. App. 669, 355 S.E.2d 838 (1987) (cited in *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 396 S.E.2d 105 (Ct. App. 1989), *reversed on other grounds*, 309 S.C. 263, 422 S.E.2d 103 (1992).

And, in *Ardis v. Cox*, 314 S.C. 512, 431 S.E.2d 267 (Ct. App. 1994), the Court of Appeals concluded that

> [t]he SC UTPA is unavailable to redress private wrongs if the public interest is unaffected. *LaMotte v. The Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988); *Noack Enterprises, Inc. v. Country Corner Interiors*, 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986). An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the Act's embrace. *Noack*. Unfair deceptive acts or practices have the potential for repetition. *Id.* A deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the SCUTPA.

Id. at 518-519.

While the Act has a "de facto consumer orientation to it," the SCUTPA also includes transactions between businesses or commercial entities ...." *McTeer v. Provident Life and Accident Insurance*, 712 F.Supp. 512 (D.S.C. 1989). In *Bessinger v. Food Lion, Inc.*, 305 F.Supp. 574 (D.S.C. 2003), the District Court summarized a violation of SCUTPA this way:

> [t]he SCUTPA does not expressly define "unfair act." The General Assembly of South Carolina, however, has expressly stated:
>
> > It is the intent of the legislature that in construing paragraph (a) of this section the court will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1) ["FTCA"], as from time to time amended.
>
> S.C. Code Ann. § 39-5-20(b) (Cum. Supp. 2002) (emphasis added). The federal courts' construction of section 5(a)(1) of the FTCA may guide, therefore, this court's determination of the meaning of "unfair act" under the SCUTPA. *Bostick Oil Co. v. Michelin Tire Corp. Comm'l. Div.*, 702 F.2d 1207, 1220 (4th Cir. 1983).

> When construing section 5(a)(1) of the FTCA most federal courts have applied the definition of "unfair" set forth in *Spiegel Inc. v. F.T.C.*, 540 F.2d 287 (7th Cir. 1976). A practice is unfair within the meaning of the Federal Trade Commission Act when it "offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. *Id.* at 293 ....

305 F.Supp. at 582.

And, finally, in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F.Supp. 1224 (M.D.N.C.), the Court concluded that alleged conduct by two employees of Food Lion which breached their fiduciary duty to the employer stated a claim for violation of the North Carolina Unfair Trade Practices Act. The employees while working for Food Lion, allegedly gathered information for ABC's investigative program, "Prime Time Live" regarding Food Lion's practices which were highly criticized by that program. Noting that the North Carolina UTPA was restricted in only certain limited circumstances, and was otherwise broadly construed, the Court found that a claim for relief by Food Lion against ABC for a violation of UTPA had been presented by Food Lion's complaint. The Court cited a North Carolina case, *McDonald v. Scarboro*, 91 N.C.App. 13, 370 S.E.2d 680, 683 which had held that the NCUTPA does not "protect only individual consumers, but serve[s] to protect business persons as well." Therefore, the federal district court stated the following:

> [a]t the same time that the North Carolina courts were refusing to limit the Act in any real sense, they were stating that "[t]he act is directed toward maintaining ethical standards in dealings between persons engaged in business and to promote good faith at all levels of commerce." *McDonald*, 370 S.E.2d at 685. Because of the expansiveness of the Act and the lack of specific statutory provisions to address this situation, it can not be said at this time that Plaintiffs can not state a claim under the North Carolina Unfair Trade Practices Act. Defendant ABC is a business and the production of stories for its news magazine show *Prime Time Live* is one aspect of that business .... Defendants' actions in this case did have an effect on commerce. Plaintiff's Unfair Trade Practices Act will not be dismissed for failure to state a claim on which relief can be granted.

951 F.Supp. at 1232. Thus, at least one court has concluded that the North Carolina Unfair Trade Practices Act is sufficiently broad in scope to encompass breaches of ones fiduciary duty to an employer as an "unfair" trade practice.

Conclusion

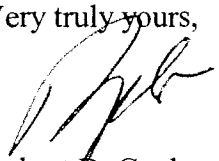
It is our opinion that there exists no absolute prohibition in South Carolina law with respect to a nonprofit corporation engaging in for profit business activities or owning and operating a for

profit company. Indeed, the South Carolina Nonprofit Corporation Act, § 33-31-302(6) expressly empowers a nonprofit corporation to "purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, sell, mortgage, lend, pledge or otherwise dispose of, and deal in and with, shares or other interest in or obligations of *any entity*. (emphasis added). Courts have interpreted similar language as not "prohibiting a nonprofit corporation from conducting enterprises for income or from accumulating earnings." *Summers v. Cherokee Children and Family Services, Inc., supra.*

However, these courts also emphasize that "such revenues must be used for the purpose set forth in the charter and there must be no pecuniary gain to the incorporators or members, and no distribution of income or profits to them." *Id.* Likewise, the Official Comment to § 33-31-302 expressly states that nonprofit corporations may conduct a business and suggesting that the limitations thereupon is that the "profit from business activities [be] ... used for the objects of the organization ...." Accordingly, it is our opinion that while a nonprofit organization is not prohibited from engaging in for profit activities, if it does so, such profits must be used in support of the nonprofit's eleemosynary purpose rather than distributing such profits to the incorporators or members. Whether or not this requirement is being met in a given instance is a factual question, beyond the scope of an opinion of this Office.

With regard to your second inquiry concerning whether a violation of the Unfair Trade Practices Act has occurred as a result of the alleged misuse of "privileged information" and harm to private enterprise, such a determination obviously must be made by a court based upon all of the facts. As demonstrated herein, the SCUTPA is quite broad in scope and prohibits all "unfair" trade practices. The definition of "unfair" is conduct which is offensive to public policy or is "immoral, unethical or oppressive." At least one court has held that an allegation of a breach of a fiduciary duty to a corporation states a claim for relief under the Unfair Trade Practices Act. However, such a question is a novel issue in South Carolina and only a court, after a full determination of all the facts, may make a determination as to whether the conduct alleged in your letters constitutes a violation of SCUTPA.

Very truly yours,



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