IT IS ORDERED as set forth below:

Date: March 30, 2016

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Barbara Ellis-Monro
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: RONALD GLYNN LOGAN and NANCY JACK LOGAN, Debtors.	CASE NO. 12-80113-BEM CHAPTER 7
NATIONAL IDENTITY SOLUTIONS, LLC and HEATHER SUE MERCER, Plaintiffs, v. RONALD GLYNN LOGAN, Defendant.	ADVERSARY PROCEEDING NO. 13-5092-BEM

O R D E R

This matter comes before the Court on Plaintiffs' complaint to determine dischargeability of a debt [Doc. 1]. Plaintiffs seek relief under 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), (a)(4), and (a)(6). Similar claims against Defendant Nancy Logan were dismissed on

the pleadings. [Docs. 52, 53]. The Court held a trial on the claims against Defendant Ronald Logan on October 13, 2015, October 15, 2015, and October 22, 2015. Steven M. Kushner appeared on behalf of Plaintiffs and Byron Crane Starcher appeared on behalf of Defendant. Plaintiff Heather Sue Mercer alleges Mr. Logan fraudulently induced her to invest $3 million in National Identity Solutions. Plaintiff National Identity Solutions alleges Mr. Logan misused corporate funds for his own benefit in violation of the operating agreement. Both Plaintiffs seek a money judgment in addition to a determination of nondischargeability. This is a core matter pursuant to 28 U.S.C. § 157(b)(2)(I); the Court has jurisdiction to rule on dischargeability and to liquidate the claims.[1] The Court heard testimony and received documentary evidence. Having considered the evidence and the legal authorities, the Court now enters its findings of facts and conclusions of law.

I. FINDINGS OF FACT

A. Background

Defendant Ronald Logan ("Mr. Logan") has spent most of his career as a computer programmer, beginning in the Army and continuing in the private sector, at which point he began working in more supervisory and leadership positions. Mr. Logan testified that in 2003 or 2004, he joined National ID Recovery ("NIDR"). Mr. Logan designed identity theft

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[1] *Islamov v. Ungar (In re Ungar)*, 633 F.3d 675, 679 (8th Cir. 2011); *Johnson v. Riebesell (In re Riebesell)*, 586 F.3d 782, 793 (10th Cir. 2009); *Morrison v. Western Builders of Amarillo, Inc. (In re Morrison)*, 555 F.3d 473, 480 (5th Cir. 2009*); Cowen v. Kennedy (In re Kennedy)*, 108 F.3d 1015, 1017–18 (9th Cir.1997); *Porges v. Gruntal & Co., Inc. (In re Porges)*, 44 F.3d 159, 163-65 & n. 7 (2d Cir.1995); *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 965–66 (6th Cir.1993); *N.I.S. Corp. v. Hallahan (In re Hallahan)*, 936 F.2d 1496, 1508 (7th Cir.1991). S*ee also Cai v. Shenzhen Smart-In Ind. Co., Ltd*, 571 Fed. Appx 580, 583 (9th Cir. 2014) (finding that *Stern v. Marshall*, 131 S. Ct. 3594 (2011) does not change this conclusion); *compare NWI Orthodontics v. Bell (In re Bell)*, 498 B.R. 463, 485 (Bankr. E.D. Pa. 2013) (questioning whether a bankruptcy court can enter a money judgment in a nondischargeability proceeding after *Stern*). The Court notes that the complaint and answer acknowledged this Court's jurisdiction but did not indicate whether the parties consent to entry of a final judgment by this Court as to liquidation of Plaintiffs' claims. [Doc. 1 ¶ 5; Doc 5 ¶ 5]. However, under *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1948 (2015), such consent may be implied.

software for NIDR and was hired as its chief information officer and chief operating officer in 2004 or 2005.

Mr. Logan testified that in late 2006, NIDR was on the verge of closing. He made a deal with the owner to try a new approach to identity theft solutions in exchange for a 50% interest in the business. Mr. Logan and another programmer developed a program called Kaizen, which used data supplied by an identity theft victim to produce all the completed forms necessary for local, state, and federal authorities to clear the victim's identity. Kaizen accounted for 65-70% of NIDR's revenues.

Mr. Logan testified that NIDR also provided services known as Data Breach. Data Breach was sold to businesses to protect against breaches of personal information or other data belonging to the business's employees or customers. In the event of a data breach. NIDR would file all the required paperwork and send out any required notices. Data Breach accounted for 28-30% of NIDR's revenues.

Mr. Logan testified that the remainder of NIDR's revenues were generated through a portal it had developed to verify identities. The portal relied on non-public information as opposed to the more easily available information found in sources such as credit bureaus. NIDR's tax returns show revenues of $1,581,391 in 2010 and revenues of $1,274,569 in 2011. [Defendant's exhibits 10, 11].

In September 2011, Mr. Logan owned 52% of the membership interests in NIDR and was its chief executive officer, although he was not working for NIDR at that time. [Stipulated Facts, Doc. 77, Exhibit E ("Stipulation") ¶ 69]. Also in September 2011, his wife Nancy Logan ("Ms. Logan") was the chief operating officer for NIDR. *Id.* H. Patrick Jack, Ms. Logan's brother and Mr. Logan's brother-in-law, testified he invested $250,000 in NIDR in the

fourth quarter of 2009 and obtained a 34% ownership interest. Mr. Jack testified that he was a board member for NIDR from the fall of 2009 until late 2010, at which point he reduced his involvement because his wife was ill. He said that on a number of occasions between late 2009 and late 2010, he made loans to NIDR to cover payroll and shortfalls in cash flow. Mr. Jack said that in late 2010 he learned NIDR had not been paying its tax obligations for that year. Mr. Jack's loans to NIDR totaled approximately $1.2 million and have not been repaid. Mr. Jack testified that NIDR needed the loans because it had lost a contract with LifeLock. Sometime thereafter NIDR initiated litigation against LifeLock and received a settlement in late 2010 or early 2011. Mr. Jack testified the settlement was approximately $500,000. Thomas Shepherd, who had worked as in-house counsel for NIDR until early 2010 and occasionally worked as outside counsel thereafter, testified that he was involved in the negotiation of the LifeLock settlement and he recalled the settlement amount as approximately $100,000 or $150,000. Thus, a significant portion of NIDR's cash inflows for 2010 and 2011 were from Mr. Jack's loans and the LifeLock settlement.

Mr. Logan formed National Identity Solutions, LLC ("NIS") on August 21, 2008. [Stipulation ¶ 1]. At that time, Mr. Logan was the sole member and sole manager of NIS. [Stipulation ¶ 3]. Mr. Jack testified that in 2009, he invested $500,000 in NIS. At some point between May 4, 2011 and September 19, 2011, Richard Konecky obtained a 4% Class A membership interest in NIS. [Stipulation ¶ 9]. Prior to September 19, 2011, Mr. Logan owned an 86% interest in NIS, Mr. Konecky owned a 4% interest, and Mr. Jack owned a 10% interest. [Plaintiffs' exhibit 19, Schedule 4.2(i)].

Mr. Logan testified that his vision for NIS was to protect identities by preventing fraud in a wide range of areas. NIS did not have any functional software in 2008 or 2009.

However, NIS was developing software called MIRS, or Managed Identity Recovery Software. Most of the work on MIRS was done in 2010 and 2011. Mr. Jack testified that MIRS was an improved, more user-friendly version of Kaizen that could be used for applications other than identity theft recovery. Mr. Jack testified that while he never saw MIRS completed, it was sufficiently developed to demonstrate to potential customers.

Mr. Logan testified that NIS had no revenues from the time it started through 2011. NIS was able to operate and develop software through a shared services agreement with NIDR (the "Shared Services Agreement"). The Shared Services Agreement was signed on January 3, 2011 by Mr. Logan as CEO of NIS and by Ms. Logan as COO of NIDR. [Plaintiffs' exhibit 6]. It provides for NIS and NIDR to split monthly rent and CAM 50/50, to split monthly utilities 50/50, to pay a proportionate share of information technology ("IT") staff salary and taxes, and to split the payroll and tax costs of the NIDR call center 50/50. [Stipulation ¶ 48, 49; Plaintiffs' exhibit 6 ¶ 1.10]. The Shared Services Agreement further provides that "since NIS will be utilizing the IT Staff for new development and testing, NIS will be responsible for 75% of the salary and taxes of the IT Staff and NIDR will be responsible for 25% of the salary and taxes of the IT Staff. Based upon utilization, both companies agree to adjust this proportionate payment each 6 months." [Plaintiffs' exhibit 6 ¶ 3.2]. Mr. Shepherd, who provided legal services for NIS, testified that he was aware of talk about a shared services agreement, but the contract itself was not his work, although it appeared to be prepared using one of his templates. Mr. Logan testified that because NIS had no revenues in 2011, he drafted a letter to NIDR saying NIS would reimburse NIDR for paying all the bills once NIS received funds. This letter was not part of the evidence at trial.

Ms. Logan testified that the purpose of the Shared Services Agreement was to avoid hiring two people for the same position, such as reception, housekeeping, and IT. With respect to IT employees, she said that NIDR no longer needed programming, and there was no reason to hire new IT staff for NIS. Mr. Logan testified that in 2010 NIDR's IT employees were working 50% for NIS and 50% for NIDR. In 2011, that changed to 75% for NIS and 25% for NIDR. NIDR paid their salaries with the understanding that it would later be reimbursed by NIS for NIS's proportionate share of the employees' work. Ms. Logan testified that the other shared positions, including reception, housekeeping, and mailroom were split 50/50 between NIDR and NIS. Ms. Logan testified that NIDR paid the salaries of the shared employees through December 31, 2011, at which time the payroll company Oasis began processing the payments. Ms. Logan testified that NIS paid Oasis for payroll, and NIDR reimbursed NIS for its share of the cost. Ms. Logan testified that NIDR also paid the salary of at least one NIS employee who provided no services to NIDR through December 31, 2011, when Oasis began processing payroll. Ms. Logan testified that she kept NIDR's books and signed all its checks. She further testified that NIDR employees did not report to her about their NIS activities, that she did not send a bill to NIS for the shared services, and that NIDR did not have any records from employees identifying the percentage of their time spent on NIS activities.

In addition to employees, Ms. Logan testified that the Shared Services Agreement covered utilities, firewall maintenance, rent, liability insurance, worker's compensation insurance, and building maintenance. She testified that NIDR and NIS shared building space. Prior to February 2011, NIDR paid the lease. Ms. Logan testified that beginning in March 2011, NIS paid the rent for offices located at 5655 Spalding Drive, Norcross, GA. The lease on Spalding Drive was between NIS and CEP-Triangle Partners, LLC, with NIDR as guarantor (the

"Lease"). [Plaintiffs' exhibit 7]. The Lease was executed on March 11, 2011 by Mr. Logan as CEO and managing member of NIS, by Mr. Logan as CEO and managing member of NIDR and by Ms. Logan as COO of NIDR. *Id.* at 30-31.

NIS and NIDR also entered into a Master Services Agreement, which was signed on October 21, 2010 by Mr. Logan as CEO of NIS and by Mr. Jack as chairman of NIDR. [Plaintiffs' exhibit 3]. Mr. Logan testified that the purpose of the agreement was to give NIS and NIDR each the ability to sell products developed by the other company. As an example, NIS entered into a Strategic Services Agreement with Veritec Financial Services, Inc. (respectively, the "Veritec Agreement" and "Veritec") on November 1, 2010. [Plaintiffs' exhibit 4]. Mr. Logan signed the agreement as CEO of NIS. *Id.*

Mr. Logan testified that the Veritec Agreement gave NIS limited exclusive access to toggle card technology, which enabled a prepaid credit card to be turned on and off. Veritec provided the issuing bank and NIS provided the card stock for the credit cards and the marketing. The cards included identity theft protection provided by NIDR. Mr. Jack testified that the toggle cards became NIS's first priority because additional investment was required to complete work on MIRS.

The Veritec Agreement required NIS to pay Veritec $125,000 upon execution and another $125,000 within 10 days after Veritec placed its source code for the toggle card technology in escrow. [Plaintiffs' exhibit 4 ¶ 6.1]. Based on Mr. Logan and Mr. Jack's testimony, at least one of the payments was not timely made.[2] Mr. Jack testified that Veritec was aware NIS did not have the money to make the payments. However, Mr. Jack said that NIS was talking to a number of potential investors, and Veritec met some of those prospects. Mr. Jack

[2] Counsel and the witnesses repeatedly referred to NIS's failure to pay the amount due 10 days after execution of the Veritec Agreement. It appears they meant the amount due upon execution of the Veritec Agreement.

testified that Veritec was willing to let the payment deadlines slide until NIS could secure outside investments. On May 20, 2011, the CEO of Veritec sent Mr. Logan a notice of cancellation "due to lack of financial commitment and lack of response." [Plaintiffs' exhibit 11]. Mr. Logan testified the Veritec Agreement was not terminated at that time and that the CEO of Veritec agreed to wait for payment until NIS was funded.

Mr. Jack testified that NIS was also developing palm scanner technology for use by healthcare facilities and other businesses for identity verification. A customer's identity would be verified through the identity verification portal and linked with his palm print. Then on subsequent visits, the identity would be re-verified with the palm scanner. The palm scanner equipment would be purchased from an outside vendor, but the interface into the verification system would be done through NIS.

Mr. Jack testified that he was involved in discussions between NIS and the American Association of Retired Persons ("AARP"), regarding the use of AARP's mailing list for direct marketing purposes. AARP was seeking an upfront payment of $300,000 from NIS. NIS would receive no revenue from AARP. Mr. Jack testified that NIS also had an agreement with Hughes Connect related to identity verification for mortgages through the portal and hand scanners. He said it was a substantial contract that would provide several hundred thousand dollars of revenue per month for NIS.

A balance sheet for NIS dated December 31, 2010 shows intangible assets of $100 million and owner's investment of $5,750,000. [Plaintiffs' exhibit 5]. The balance sheet was signed by Mr. Logan and Mr. Jack. Mr. Logan testified that at no time was $5,750,000 in cash invested in NIS. Mr. Logan testified that he invested some cash in NIS but he did not know how much. He further testified that Mr. Jack had invested $500,000 in NIS.

Mr. Logan signed a "Company Overview/Application" on behalf of NIS for Triton Capital Alliance dated May 5, 2011, showing annual revenues of $8 million, amount invested to date of $5,350,000, and a market value of $100 million. [Stipulation ¶ 50, 51; Plaintiffs' exhibit 59 at 1]. In the section labeled "Technology Overview," the application states that "Process patents are being filed." *Id.* at 3. Mr. Logan testified that Triton prepared the document and requested his electronic signature, which he gave them. NIS did not have annual revenues of $8 million as of May 5, 2011. [Stipulation ¶ 52]. In fact, Mr. Logan testified that NIS had no revenues in 2011. Mr. Logan stated he could not say whether the amount invested was correct because he did not know the value of his sweat equity. However, he conceded that NIS had not received cash investments of $5,350,000. Mr. Logan testified that NIS did not have any patents, and he was not aware of any being filed at that time.

A letter on NIS letterhead dated May 11, 2011, and addressed "To whom it may concern," states that Mr. Jack provided $500,000 and Mr. Logan provided $4,250,000 to complete research and development for NIS. [Plaintiffs' exhibit 8]. The letter further states that: "Upon the completion of development, both owners provided $250,000 each for the development of all marketing materials and to begin the launch of the NIS products." *Id.* Both Mr. Logan and Mr. Jack's signatures were affixed to the letter. Mr. Logan and Mr. Jack testified that Mr. Logan's contribution was primarily in sweat equity rather than cash. Mr. Logan did not provide $4,250,000 in cash to NIS. [Stipulation ¶ 43]. Mr. Jack testified that he did not contribute an additional $250,000 after his initial $500,000 investment. Mr. Jack testified that he first saw the letter the night before his testimony, that the signature on the letter was his electronic signature, and that he did not directly sign the letter. Mr. Jack testified that he only authorized the use of his electronic signature for two purposes: the redrafting of the NIS operating agreement and

preparation of a prospectus for NIS. Mr. Jack said his signature was required on every page of the prospectus. The letter may have been included in the prospectus package, but he never saw the completed prospectus.

B. The Investment and Related Documentation

On September 19, 2011, NIS received an infusion of funds via an investment by Heather Sue Mercer ("Ms. Mercer"). On that date, NIS and Ms. Mercer entered into the Class C Membership Interest Purchase Agreement (the "Purchase Agreement"). [Stipulation ¶ 10; Plaintiffs' exhibit 19]. Pursuant to the Purchase Agreement, Ms. Mercer invested $3 million in NIS in exchange for 10% of the newly created Class C membership interests, representing 10% of NIS's equity. [Stipulation ¶ 11]. The Purchase Agreement was signed by Mr. Logan as manager and CEO of NIS and by Ms. Mercer. [Plaintiffs' exhibit 19].

On September 19, 2011, NIS's Operating Agreement was amended through the Amended and Restated Operating Agreement of National Identity Solutions, LLC (the "Amended Operating Agreement"). [Stipulation ¶ 34; Plaintiffs' exhibit 20]. Upon entry into the Amended Operating Agreement and receipt by NIS of $3 million, Ms. Mercer was the holder of all Class C interests and a manager of NIS. [Stipulation ¶ 12, 35]. The Amended Operating Agreement was signed by members Mr. Logan, Mr. Konecky, Mr. Jack, and Ms. Mercer. [Plaintiffs' exhibit 20].

Ms. Mercer testified that she first learned of NIS and Mr. Logan through Michael Burke, who at some point became president of NIS, and that Mr. Logan was described as a mad scientist type that develops software, that he had invested $5 million of his own money, and that he had worked forever on the product. She testified that she hired the law firm of Willkie Farr & Gallagher LLP ("Willkie Farr") to perform due diligence on her behalf. She instructed the firm

that she needed to know how every dollar of her investment was spent, including any employees hired and contracts entered. She wanted to make sure Mr. Logan could not run amok with the funds. She testified that her intent was not to prevent Mr. Logan from conducting business and making routine expenditures, but she did not want him to be able to hire employees, set salaries, or execute contracts without her knowledge.

Attorney Jeffrey Fang represented Ms. Mercer in the negotiations. Mr. Shepherd testified that he represented NIS in the negotiations of both the Purchase Agreement and the Amended Operating Agreement. Ms. Mercer and Mr. Logan both testified that they had no direct contact with each other during the negotiations. Mr. Shepherd testified that most of the due diligence was done pursuant to the schedules in the Purchase Agreement and that, typically, purchase agreements for ownership interests contain extensive representations and warranties so the investor does not miss anything that should be disclosed. He said the Amended Operating Agreement included a lot of restrictions that are typical for angel investors or venture capitalists that are more protective than seen with a normal investor. Mr. Shepherd testified that he and Mr. Fang spent close to a month, including weekends, nights, and vacations, negotiating the agreements. Mr. Shepherd testified that based on his prior experience working on about 12 investments and subsequent experience working on 15 to 20 investments, the level of due diligence by Ms. Mercer did not strike him as odd or different; he has seen deals with more due diligence and deals with less due diligence.

1. The Purchase Agreement

In terms of required disclosures, two aspects of the Purchase Agreement and related schedules are of particular relevance—those sections related to the balance sheet and to the material contracts. Section 4.9 of the Purchase Agreement provides as follows:

> The Company has delivered to Purchaser the Company's unaudited balance sheet as of August 31, 2011 (the "Balance Sheet"). The Balance Sheet has been prepared in accordance with the books and records of the Company and presents fairly, in all material respects, the financial condition of the Company as of August 31, 2011. Other than liabilities and obligations disclosed in this Agreement (including without limitation, the obligation to pay all costs and expenses of the Parties pursuant to Section 10.10 of this Agreement) and in the Disclosure Schedules, and liabilities and obligations arising in the ordinary course of business consistent with past practice, the Company does not have any liabilities, indebtedness or obligations of any nature (whether accrued, absolute, contingent or otherwise) that would be required to be disclosed as a liability on a balance sheet prepared in accordance with United States generally accepted accounting principles.

[Stipulation ¶ 13; Plaintiffs' exhibit 19]. Mr. Shepherd testified that the purpose of Section 4.9 was to ensure that NIS did not have any undisclosed liabilities. If there were any undisclosed liabilities, NIS and its owners could be sued for misrepresentation. Mr. Shepherd testified that he explained the purpose of the section to Mr. Logan, and he is certain he would have discussed the liabilities with Mr. Logan although he does not recall the exact details of any such conversations. Further, Mr. Shepherd said he was not privy to NIS's financial information and would not have known if NIS failed to disclose any liabilities.

Schedule 4.9 to the Purchase Agreement is the Balance Sheet of NIS as of August 31, 2011 (the "NIS Balance Sheet). [Stipulation ¶ 14; Plaintiffs' exhibit 19, Schedule 4.9]. Mr. Shepherd testified that he did not participate in the creation of the NIS Balance Sheet and had no way to verify its accuracy. He said that the document would have come from Mr. or Ms. Logan. The NIS Balance Sheet lists cash on hand of $102,200. [Stipulation ¶ 15; Plaintiffs' exhibit 19, Schedule 4.9]. As of August 31, 2011, NIS did not have cash on hand of $102,200. [Stipulation ¶ 16]. The bank statement for NIS's account at Wells Fargo shows cash of -$3.79 on August 31, 2011. [Plaintiffs' exhibit 14]. Mr. Logan testified that Mr. Konecky told him to put $102,200 on

the NIS Balance Sheet because Mr. Konecky had those assets available and could transfer them. However, the money was not transferred to NIS.

The NIS Balance Sheet lists "Intangible Assets (Propiretry [sic] Software)" worth $5,847.800. [Stipulation ¶ 17; Plaintiffs' exhibit 19, Schedule 4.9]. Mr. Logan testified he does not know why the value of intangible assets on the NIS Balance Sheet as of August 31, 2011 was different from the value on the December 31, 2010 balance sheet, which showed a value of $100 million. [Plaintiffs' exhibit 5]. The NIS Balance Sheet did not list any liabilities to NIDR under the Shared Services Agreement. [Plaintiffs' exhibit 19, Schedule 4.9]. Mr. Shepherd testified that he would expect a large inter-company debt to be listed on the NIS Balance Sheet.

Mr. Logan testified that at the time he signed the Purchase Agreement he believed the NIS Balance Sheet fairly and accurately in all material respects presented the financial condition of the company. He said the NIS Balance Sheet was prepared by him, Mr. Konecky, and Mr. Shepherd, and that he relied on them to say it was good. Mr. Logan testified that he now believes the NIS Balance Sheet was not accurate, but he does not know for sure. Mr. Logan testified that Mr. Fang had no involvement in preparing the NIS Balance Sheet and was not the person who excluded any of the omitted liabilities.

Ms. Mercer testified that she reviewed the NIS Balance Sheet before signing the Purchase Agreement. She said it was important to her that NIS did not have outstanding debts, such as back taxes. Based on the NIS Balance Sheet showing money in the bank and about $400,000 in liabilities, her view of the company was that it was a start up. She further testified that if the NIS Balance Sheet had been materially different in a negative sense her investment decision would have been different.

Section 4.12.1 of the Purchase Agreement provides that NIS delivered to Ms. Mercer copies of the Material Contracts set forth on Schedule 4.12.1, including (1) performance contracts outside the ordinary course of NIS's business; (2) each material contract that involves the performance of services or delivery of goods or materials to NIS; (3) contracts not entered in the ordinary course of business that involve expenditures or receipts in excess of $25,000 per annum; (4) each joint venture, partnership, or other applicable contract involving a sharing of profits, losses, costs, or liabilities by NIS; and (5) each contact under which NIS is a lessor or lessee of real property. [Stipulation ¶ 18; Plaintiffs' exhibit 19 ¶ 4.12.1]. Schedule 4.12.1 to the Purchase Agreement lists the following agreements, among others: (1) the NIDR Master Services Agreement between NIS and NIDR; (2) the Veritec Agreement; and (3) the Lease dated March 11, 2011. [Stipulation ¶ 20, 22-23; Plaintiffs' exhibit 19, Schedule 4.12.1]. In addition, Schedule 4.12.1 identifies a single employment contract with Richard Konecky; no other employment agreements are listed. [Stipulation ¶ 42; Plaintiffs' exhibit 19, Schedule 4.12.1]. Schedule 4.12.1 does not list the Shared Services Agreement dated January 3, 2011 or an agreement with Finance Solutions of America. [Stipulation ¶ 21, 30; Plaintiffs' exhibit 19, Schedule 4.12.1]. Mr. Logan testified the Shared Services Agreement was in effect, but not listed in the schedules. He further testified that he disclosed the Shared Services Agreement to Mr. Fang, and Mr. Fang asked him the exact amount owed under the agreement. Mr. Logan told Mr. Fang he did not know the amount but both companies owed each other.

Mr. Shepherd testified that he is certain he would have discussed with Mr. Logan what a material contract is. And he remembered going through contracts that needed to be attached to the Purchase Agreement. Mr. Shepherd said he did not recall whether he received a

copy of the Shared Services Agreement, but in his view such an agreement would be a material contract and any associated debt should have been disclosed on the NIS Balance Sheet.

Section 4.12.2 of the Purchase Agreement provides that "Each Material Contract is valid and in full force and effect. Except as set forth on Schedule 4.12.2 of the Disclosure Schedules: (i) the Company is not in default … under any Material Contract and to the Company's knowledge, no other Person has violated or breached, or declared or committed any default under, any Material Contract …[.]" [Stipulation ¶ 16; Plaintiffs' Exhibit 19 ¶ 4.12.2]. Schedule 4.12.2 to the Purchase Agreement provides that NIS does not maintain insurance policies required by a service agreement with 1FORCE Government Solutions, LLC. [Stipulation ¶ 24; Plaintiffs' Exhibit 19 ¶ 4.12.2]. Schedule 4.12.2 does not list any other Material Contracts that are in default. *Id.* Mr. Shepherd testified that he was certain he would have discussed with Mr. Logan the importance that the schedule be accurate although he did not recall any specific conversation.

The Veritec Agreement provides in section 6.1 that NIS shall pay Veritec a one-time license fee of $250,000 in two installments: $125,000 upon execution of the Veritec Agreement and $125,000 within 10 business days of Veritec's placement of its source code in escrow. [Stipulation ¶ 24; Plaintiffs' Exhibit 4 ¶ 6.1]. The NIS Balance Sheet does not list any outstanding liabilities to Veritec. [Stipulation ¶ 25; Plaintiffs' Exhibit 19, Schedule 4.9]. Mr. Logan testified that the Veritec Agreement was not in default because Veritec had agreed to wait for payment until NIS was funded. The agreement waiving default was not in writing. Mr. Logan testified that he told Mr. Fang that the payments to Veritec had not been made. In a letter dated March 12, 2012, Veritec gave NIS 30 days notice of its intent to terminate the Veritec

Agreement. [Defendant's exhibit 18]. Mr. Logan testified NIS had been working with Veritec prior to that time.

The CEP Lease was in default for nonpayment of rent on September 1, 2011. [Stipulation ¶ 26]. The NIS Balance Sheet did not list the amount owed to CEP or any other liabilities to CEP. [Stipulation ¶ 27, 29; Plaintiffs' Exhibit 19, Schedule 4.9]. Mr. Logan testified that he now knows the Lease was in default, but he was not aware of the default at the time he signed the Purchase Agreement. He further testified that NIS had not paid the rent in two months. An invoice to NIS from CEP dated August 1, 2011 showed total rent due of $110,594.05, including $31,958.33 that was 61-90 days past due and $37,613.75 that was 31-60 days past due. [Plaintiffs' exhibit 12]. In a letter dated August 9, 2011, sent to Mr. Logan by certified mail, CEP notified Mr. Logan of the default and threatened to evict NIS if the default was not cured by August 15, 2011. [Plaintiffs' exhibit 13]. An invoice from CEP dated September 1, 2011, showed an amount due of $152,550.57. [Plaintiffs' exhibit 17]. On August 26, 2011, Mr. Logan signed a check from NIS to CEP in the amount of $106,845.08. [Plaintiffs' exhibit 18 at 6]. NIS's bank statement for September 2011 shows the check was returned for insufficient funds on September 8, 2011. [Plaintiffs' exhibit 68.] The amount owed to CEP was not listed as a liability on the NIS Balance Sheet. [Plaintiffs' exhibit 19, Schedule 4.9].

Section 4.15.1 of the Purchase Agreement provides that all individuals "who are currently performing services for" NIS are disclosed in the schedules. [Plaintiffs' exhibit 19 ¶ 4.15.1]. Section 4.15.3 provides that all employment contracts are disclosed on Schedule 4.12.1 for Material Contracts. *Id.* ¶ 4.15.3. Schedule 4.15.1 of the Purchase Agreement identifies ten individuals providing services to NIS, including CEO Ronald G. Logan, COO Richard Konecky, and CIO David Swinsky. [Stipulation ¶ 33; Plaintiffs' exhibit 19, Schedule 4.15.1]. As noted

above, the only employment contract listed on Schedule 4.12.1 is Mr. Konecky's contract. Mr. Shepherd testified that the purpose of identifying employment agreements is that when an investor puts money into a company, the investor does not want the owners of the company to deplete capital intended for operations by taking large salaries. Mr. Logan testified that almost all the employees listed on Schedule 4.15.1 were employees of NIDR who were performing services for NIS, a fact not disclosed in the Purchase Agreement.

Section 6.2 of the Purchase Agreement provides: "The proceeds received by the Company at the Closing shall be used for growth and development of the Company's business and general working capital purposes." [Plaintiffs' exhibit 19 ¶ 6.2]. Mr. Logan testified that he understood Section 6.2 to allow NIS to pay bills, solicit new business, and pay employees. Mr. Shepherd testified that a draft version of the Purchase Agreement included reference to Schedule 6.2. [Plaintiffs' exhibit 62 ¶ 6.2]. Mr. Shepherd testified that he sent a copy of Schedule 6.2 to Mr. Fang by email, but the schedule was not included in the final, executed Purchase Agreement. [Defendant's exhibit 7]. A draft version of the Purchase Agreement emailed to Mr. Logan from Mr. Fang provided that the proceeds from Ms. Mercer's investment would be used for growth and development and general working capital purposes, "including, without limitation, those items set forth on Schedule 6.2 of the Disclosure Schedules." [Defendant's exhibit 8 at WFG0000755]. Mr. Shepherd testified that Schedule 6.2 was a pro forma for use of funds (the "Use of Funds") he received from Mr. Logan. [Defendant's exhibit 7].

Mr. Logan testified that he prepared the Use of Funds with the assistance of Mr. Konecky and Mr. Burke. Schedule 6.2 identifies salaries of officers and other expenditures from October 2011 to March 2012. [Defendant's exhibit 7]. Salaries for the CEO, president, and COO are listed as $25,000 each per month. *Id.* Total expenditures over the six-month period are

projected as $5,598,358, broken down as follows: $691,343 for October 2011, $467,243 for November 2011, $647,443 for December 2011, $1,055,443 for January 2012, $1,256,443 for February 2012, and $1,480,443 for March 2012. *Id.* Mr. Logan testified that he had discussed the numbers with Mr. Fang. The Use of Funds also included a line item for "IP Purchase (Kaizen & Data Breach) $250,000" in October 2011. *Id.* Mr. Logan said the purpose of that item was to inform Ms. Mercer of NIS's intent to purchase Data Breach with a Kaizen license for $250,000. Ms. Mercer testified that she never saw the Use of Funds. However, Plaintiffs' counsel stipulated that Mr. Fang received Defendant's exhibit 7, which included a copy of the Use of Funds. [Trial transcript, Oct. 15, 2015, at 6:19:02-6:19:09].

Section 4.21 of the Purchase Agreement provides:

> To the Company's knowledge, none of this Agreement, the Amended and Restated Operating Agreement, any schedules or exhibits attached hereto or thereto, and any written certificate required herein or therein delivered (or to be delivered at Closing) by the Company to the Purchaser in connection with the transactions contemplated hereby or thereby, when read together, contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements contained herein or therein not misleading in light of the circumstances under which they were made.

[Plaintiffs' exhibit 19 ¶ 4.21].

Section 7.1 of the Purchase Agreement provides:

> Each of the representations and warranties of the Company contained herein shall be true and correct when made, and shall be true and correct in all material respects on the Closing Date with the same force and effect as if they had been made on and as of such date.

Id. ¶ 7.1.

Section 10.8 of the Purchase Agreement provides:

> For all purposes of this Agreement, the phrase 'to the Company's knowledge' or 'to its knowledge' and any derivations thereof shall mean, as of the applicable date, the knowledge of Mr. Ronald G. Logan after a reasonable investigation, including discussing the matters to which such phrases pertain with each of the Persons that report directly to Mr. Ronald G. Logan and whose work with the Company involves the subject matter being discussed; provided, however, that Mr. Ronald G. Logan shall not have any personal liability or obligations regarding such knowledge.

Id. ¶ 10.8.

Section 10.12 of the Purchase Agreement provides that the "Agreement constitutes the full and entire understanding and agreement among the Parties with regard to the subject hereof." *Id.* ¶ 10.12.

Mr. Logan testified that it appeared several representations in the Purchase Agreement were not accurate. He further testified that during the negotiations he told Mr. Fang about "pretty much everything," including the Shared Services Agreement, the Use of Funds, the employees and their salaries, and that NIS was behind on the Lease. [Trial 10/15/15 at 6:25:57 - 6:26:03]. Mr. Logan testified he does not know why Mr. Fang did not include the Shared Services Agreement or did not want it in the Purchase Agreement.

2. The Amended Operating Agreement

Mr. Shepherd testified the Amended Operating Agreement included greater protections for Ms. Mercer than a normal investor would receive and that he discussed the protections extensively with Mr. Fang. Part of the protections included provisions that would protect Ms. Mercer from losing control over the $3 million she invested.

Section 5.1 of the Amended Operating Agreement provides that NIS will be managed by a board of managers initially comprised of Mr. Logan, another member selected solely by Mr. Logan, and Ms. Mercer. [Plaintiffs' exhibit 20 ¶ 5.1]. Section 5.2 sets forth the

powers of the board including designating officers; executing "all instruments and documents … necessary … to the business of the Company"; entering into "any and all other agreements on behalf of the company"; and making any changes to "the level of salary, compensation or other employment benefits received by any Member, Officer or Manager …." *Id.* ¶ 5.2(b), (e), (f), (h). Mr. Shepherd testified that under these provisions any execution of any document required board approval, and consequently Ms. Mercer's knowledge. Mr. Logan testified that he did not comply with Section 5.2. He testified that during a telephone call among himself, Mr. Fang, and Mr. Shepherd he stated that NIS had contracts in the works and employees being paid. Mr. Logan testified that he was told a vote on those items would not be necessary. Mr. Logan acknowledged that no such exceptions to the requirement for board approval were included in the Amended Operating Agreement. Mr. Shepherd testified that in his discussions with Mr. Fang, Mr. Logan received no instructions regarding contracts in negotiation and whether they were subject to the requirements of the Amended Operating Agreement.

Section 5.7 of the Amended Operating Agreement provides that a member or manager may transact business with NIS on terms no less favorable than would be obtainable from an unaffiliated third person. [Stipulation ¶ 36; Plaintiffs' exhibit 20 ¶ 5.7]. Paragraph 5.7 also provides that no transactions with NIS in which a member or manager has a direct or indirect interest are voidable solely because the member or manager has a direct or indirect interest in the transaction "if either the transaction is fair to the Company or the disinterested Members, knowing the material facts of the transaction authorize, approve, or ratify such transaction." [Stipulation ¶ 37; Plaintiffs' exhibit 20 ¶ 5.7]. Mr. Shepherd testified that the type of transactions governed by Section 5.7 included those where one person was on both sides of

the deal or stood to gain personally, and where the transaction was with a company controlled by a member of NIS.

Section 5.6 of the Amended Operating Agreement provides that subject to Section 8.9, managers of NIS are "specifically authorized to employ, contract and deal with … any Member or Manager or Affiliate of any Member or Manager" provided that the dealings are "commercially reasonable and necessary or appropriate for Company purposes …." [Plaintiffs' exhibit 20 ¶ 5.6]. Mr. Shepherd testified that he interpreted Section 5.6 as authorizing a manager to engage in transactions with other members and managers or their affiliates so long as the transactions were fair and so long as the actions also complied with Section 8.9. Specifically, section 8.9(d) prohibits the board or any manager from causing NIS to take certain actions without the approval of the Class C interests, including "entering into a transaction with an Affiliate of the Company or any other Person controlled by any Member, manager, officer or employee of the Company … which transaction is not consummated on market-based terms … and approved by the Board." [Plaintiffs' exhibit 20 ¶ 8.9(d)]. Mr. Shepherd testified that based on Section 8.9, as a threshold matter, transactions with an affiliate of a manager would require approval via majority vote of the board. To his knowledge NIS only had two board members, Mr. Logan and Ms. Mercer. Mr. Shepherd further testified that pursuant to Section 6.2 a special board meeting could be called by no less than half the board members; thus, either Mr. Logan or Ms. Mercer could call a special meeting. Mr. Shepherd testified that he was not aware of any meetings of the managers of NIS other than a February or March 2012 meeting in New York and an April 2012 meeting at the NIS office in Georgia.

Section 5.9 of the Amended Operating Agreement provides that the "salaries and other compensation of the Managers shall be fixed from time to time by a Majority Vote …

provided, however, that any such matter shall also require the consent of holders representing a Majority Vote of the Class C Interests voting as a single class." [Stipulation ¶ 38; Plaintiffs' Exhibit 20 ¶ 5.9]. Section 5.13 of the Amended Operating Agreement provides that "[a]ny salaries and other compensation of the Officers shall be fixed by the Members …." [Stipulation ¶ 39; Plaintiffs' Exhibit 20 ¶ 5.13]. Section 8.9(e) prohibits the board or manager from causing NIS to alter "the level of salary, compensation or other employment benefits received by any Member, Officer or Manager, or entering into any agreement or other arrangement regarding the same" without the approval of the Class C interests. [Plaintiffs' exhibit 20 ¶ 8.9(e)].

Section 5.10 of the Amended Operating Agreement provides for managers to be reimbursed for out-of-pocket expenses "upon presentation of receipts and mileage logs." [Plaintiffs' exhibit 20 ¶ 5.10].

Section 10.1 of the Amended Operating Agreement provides that Ms. Mercer would be the first to receive any distributions from NIS until she has recouped the amount of her investment. [Plaintiffs' exhibit 20 ¶ 10.1].

C. Post-Investment Actions

Mr. Logan testified that after the investment transaction was completed he started paying himself and other officers a salary $25,000 per month. [Stipulation ¶ 40; Plaintiffs' exhibit 52, 53]. Mr. Logan signed checks from NIS to himself as follows:

- September 30, 2011: $12,250.00 for September 2011 pay. [Plaintiffs' exhibit 52].
- October 14, 2011: $12,250.00 for October 2011 pay. *Id.*
- October 31, 2011: $11,458.33 for October 2011 pay. *Id.*
- November 15, 2011: $11,458.33 for November 2011 pay. *Id.*
- November 30, 2011: $11,458.33 for November 2011 pay. *Id.*
- December 15, 2011: $11,458.33 for December 2011 pay. *Id.*
- December 30, 2011: $11,458.33 for December 2011 pay. *Id.*

Mr. Logan received four semi-monthly payments of $12,500 (gross) through the Oasis payroll service from January 13, 2012 through March 1, 2012. [Plaintiffs' exhibit 53]. Mr. Logan testified that at the time he received the salary, he was working full time at NIS. He further testified that he paid himself as set forth in the Use of Funds, and that Mr. Fang had agreed to the Use of Funds. He testified that he believed he had permission from Mr. Fang and Ms. Mercer to proceed in accordance with the Use of Funds and did not need a vote of the board. Mr. Logan testified that neither the board nor the members met and voted to set the salaries of the officers. [Stipulation ¶ 41]. Mr. Logan acknowledged that the Use of Funds was not included in the Purchase Agreement or Amended Operating Agreement. Mr. Logan testified that prior to the investment he had taken a salary from NIS, but he does not know the amount and he did not recall taking a salary in August 2011.

Mr. Logan testified that on September 20, 2011, he wrote himself a check from the NIS account for expense reimbursement in the amount of $7,111.02. [Stipulation ¶ 47; Plaintiffs' exhibit 22]. He testified that the expense predated Ms. Mercer's investment, but that no liabilities to himself were listed on the NIS Balance Sheet and he did not call a meeting of the members or managers about making the payment. On December 8, 2011 Mr. Logan signed a check from NIS to himself in the amount of $17,583.46 for partial payment and expense reimbursement. [Stipulation ¶ 47; Plaintiffs' exhibit 33]. Mr. Logan testified that he did not believe the expenses were incurred before Ms. Mercer's investment. He further testified that the expenses were set forth on a spreadsheet, but it was not provided to the board or any other members of NIS. Mr. Logan said he had disclosed to Mr. Fang amounts he intended to pay for equipment and understood he could spend up to $20,000 without a problem. The NIS Balance

Sheet does not show any liabilities owed to Mr. Logan. [Stipulation ¶ 46, Plaintiffs' exhibit 19, Schedule 4.9].

Mr. Logan is the majority member and an officer of NIDR. [Stipulation ¶ 45]. After Ms. Mercer's investment, Mr. Logan signed checks from NIS to NIDR as follows:

- September 20, 2011: $60,000 for shared services. [Stipulation ¶ 44; Plaintiffs' exhibit 23].
- October 28, 2011: $125,000 for shared services. [Stipulation ¶ 44; Plaintiffs' exhibit 26].
- November 29, 2011: $25,000 for shared services. [Stipulation ¶ 44; Plaintiffs' exhibit 30].
- December 14, 2011: $28,000 for shared services. [Stipulation ¶ 44; Plaintiffs' exhibit 34].
- December 21, 2011: $1,500 for a company Christmas party. [Stipulation ¶ 44; Plaintiffs' exhibit 38].
- December 29, 2011: $43,000 for shared services. [Stipulation ¶ 44; Plaintiffs' exhibit 40].
- February 2, 2012: $35,000 for shared services. [Stipulation ¶ 44; Plaintiffs' exhibit 48].

Mr. Logan testified the September 20, 2011 check was for shared services that pre-dated Ms. Mercer's investment and may have included services for September 2011. Mr. Logan testified the payments were in round numbers because he and Ms. Logan chose to round them up. Ms. Logan identified checks she signed on behalf of NIDR between March 15, 2011 and March 14, 2012 in the total amount of $162,352.45 for salaries and other expenses for which NIDR expected partial reimbursement from NIS under the Shared Services Agreement. [Defendant's exhibit 36]. Ms. Logan testified that at least some of the checks represented net rather than gross payroll amounts and thus the total check amounts do not represent the total expenses paid by NIDR. Ms. Logan further testified that NIDR had paid additional amounts under the Shared Services Agreement not represented in the checks, including utilities, insurance, and worker's compensation.

Mr. Logan signed a check from NIS to CEP for rent on September 21, 2011 in the amount of $106,845.08. [Stipulation ¶ 24; Plaintiffs' Exhibit 18 at 7]. As noted earlier, Mr. Logan had written an identical check on August 26, 2011, which had been returned for

insufficient funds. [Plaintiffs' exhibit 18 at 6 and Plaintiffs' exhibit 68]. NIS's bank account statement shows the second check, written after Ms. Mercer's investment, cleared. [Plaintiffs' exhibit 68].

On September 20, 2011, NIS purchased Data Breach and access to Kaizen from NIDR for $250,000. [Plaintiffs' exhibit 25]. According to the contract, NIS would receive Data Breach version 1.5 and NIDR would retain Data Breach version 2.0. *Id.* at 1. The contract also provided that NIDR would provide NIS optional access to Kaizen at a rate of 20% of the per breach amount NIS received from its client. *Id.* The contract was executed on October 20, 2011 by Ms. Logan as COO of NIDR and Mr. Logan as CEO of NIS. *Id.* at 13. However, the check from NIS for the sale in the amount of $250,000 was signed by Mr. Logan on September 20, 2011. [Stipulation ¶ 53; Plaintiffs' exhibit 21]. Mr. Logan testified that the contract was dated a month after the check because they had difficulty getting all the members of NIDR together for a board meeting, but the NIDR members had already informally agreed to the transaction. Although the NIDR board met to discuss the sale, the NIS board did not meet or vote on the purchase. [Stipulation ¶ 54]. Mr. Jack testified that in his opinion the minimum value of the Data Breach process alone was $250,000. He arrived at that value based on the cash flow from Data Breach over the years. NIDR continued to use a newer version of the Data Breach program after it sold the older version to NIS. [Stipulation ¶ 56]. Mr. Jack testified that to his knowledge there was only one version of Data Breach, not multiple versions, and that NIDR sold NIS the only version it had. Mr. Logan testified that Mr. Jack was wrong and that NIDR did keep a newer version of Data Breach. Mr. Jack further testified that before Ms. Mercer's investment, NIS did not have the capital to acquire Data Breach. Mr. Jack testified that NIDR sold Data Breach because it did not have sufficient resources to grow the Data Breach business segment. Mr. Jack

further testified that NIDR used some of the proceeds of the Data Breach sale to pay its outstanding 2010 tax liabilities and that NIDR had no other means of paying the liability. Mr. Logan testified that part of those tax liabilities were attributable to NIS because NIDR had been paying NIS employee salaries. Mr. Logan could not say whether or not NIDR had been paying NIS's tax obligations.

Mr. Logan testified that NIS's intent to purchase Data Breach was disclosed in Schedule 4.11.1 to the Purchase Agreement. [Plaintiffs' exhibit 19, Schedule 4.11.1]. Mr. Logan acknowledged that the Schedule does not list any terms of the sale, including price, but he said that he discussed the terms with Mr. Fang. And, as noted above, the price was included on the Use of Funds. [Defendant's exhibit 7]. Mr. Logan testified that there was no vote of the members or managers of NIS with respect to the purchase because it had been disclosed to Mr. Fang prior to Ms. Mercer's investment.

After receiving the $250,000 payment for Data Breach from NIS, NIDR immediately began disbursing the funds by checks signed by Ms. Logan, as follows:

- September 20, 2011: $6,000 to Mr. Logan for expense reimbursement. [Plaintiffs' exhibit 57, check number 1428].
- September 20, 2011: $5,653.09 to Ms. Logan for September 2011 payroll. [Plaintiffs' exhibit 57, check number 1425].
- September 29, 2011: $74,658.36 to the U.S. Treasury for 941 taxes for the first quarter of 2010. [Plaintiffs' exhibit 57, check number 1445].

In addition, on October 15, 2011, Mr. Logan signed a check from NIDR to the U.S. Treasury in the amount of $71,801.37 for 941 taxes for the second quarter of 2010. [Plaintiffs' exhibit 57, check number 1455].

Mr. Logan testified that on September 28, 2011, he withdrew $125,000 from the NIS bank account and transferred the money to Veritec for amounts that had come due under the Veritec Agreement in November 2010. [Plaintiffs' exhibit 24]. Mr. Logan testified that on

November 15, 2011, he paid Veritec the second $125,000 due under the Veritec Agreement. [Plaintiffs' exhibit 28]. No amounts due to Veritec had been disclosed on the NIS Balance Sheet; the contract was disclosed as a Material Contract but not listed as being in default. [Plaintiffs' exhibit 19, schedules 4.9, 4.12.1]. Mr. Logan testified both payments were made without a meeting or vote by the members or managers because Mr. Fang had told him it would not be a problem. On January 9, 2012, Mr. Logan wrote a check from NIS to Veritec for $200,000 for card stock for the toggle cards. [Plaintiffs' exhibit 45]. Mr. Logan testified that he made the payment without a meeting of the members or managers.

On November 23, 2011, Mr. Logan signed a check from NIS to Finance Solutions of America in the amount of $16,166.67. [Stipulation ¶ 32; Plaintiffs' exhibit 29]. No related contract or liability was disclosed in the Purchase Agreement, including the NIS Balance Sheet. [Stipulation ¶ 31; Plaintiffs' exhibit 19, Schedule 4.9]. Mr. Logan testified that NIS had a contract with Finance Solutions that was cancelled in July 2011, prior to Ms. Mercer's investment. Mr. Logan did not know the money was owed until November 2011. He made the payment without calling a meeting of the members or managers.

Mr. Logan testified that he agreed to use Charles Hill as a salesman for NIS, and that NIS paid Mr. Hill loans and advances on commissions in an amount exceeding $100,000 without any written agreement. Neither the members nor the board met to vote on the payments. On November 2, 2011, Mr. Logan wired $15,000 to Blue River Canyon Spa and $11,200 to Pamela Garrett of behalf of Mr. Hill. [Stipulation ¶ 58, 59; Plaintiffs' exhibit 41]. On November 3, 2011, Mr. Logan made a counter withdrawal of $23,800 from NIS's account for Mr. Hill. [Stipulation ¶ 61; Plaintiffs' exhibit 41, 42]. On November 7, 2011, Mr. Logan wired $45,800 to Jan Erwin on behalf of Charles Hill. [Stipulation ¶ 57; Plaintiffs' exhibit 41]. Between

November 9, 2011 and February 21, 2012, Mr. Logan signed checks from NIS to Mr. Hill as advance commissions or reimbursements in the amounts of $4,200, $2,500, $10,000, $20,000, $25,000, $25,000, $6,000, $10,000, $10,000, and $5,000, for a total amount of $117,000. [Stipulation ¶ 60; Plaintiffs' exhibit 43]. Mr. Logan testified that Mr. Hill brought in no revenue for NIS, but he did connect NIS with GO Corp International ("GO Corp") for marketing and selling the Veritec toggle cards. In addition, he put NIS in front of a number of other groups, including the National Security Agency and three Native American tribes.

Mr. Logan signed a check from NIS to GO Corp dated November 30, 2011 in the amount of $150,000 and a check from NIS to GO Corp dated December 8, 2011 in the amount of $100,000. [Stipulation ¶ 62; Plaintiffs' exhibits 31, 32]. However, the contract between NIS and GO Corp was not dated until December 14, 2011.[3] [Plaintiffs' exhibit 35]. Mr. Logan testified that GO Corp was going to market the Veritec toggle cards for NIS. Mr. Logan testified that there was no meeting of the members or managers of NIS regarding the payments or the contract.

Mr. Logan signed a check from NIS to Mike Soon for $6,000 on December 20, 2011. [Stipulation ¶ 63]. Mr. Logan testified that the payment was compensation for Mr. Soon setting up a series of meetings between NIS and Managed Medical Advisors ("MMA"). Mr. Logan testified he entered into a marketing agreement with MMA on December 19, 2011 without a meeting or vote of the members or managers. Mr. Logan testified that MMA was going to provide healthcare facilities as customers for the palm scan technology. The agreement provided a 20% commission to MMA for marketing and selling NIS's Medical Fraud Prevention solution and SecureDact solution. [Plaintiffs' exhibit 36]. In addition, MMA could "elect to

[3] Defendant produced a different version of the contract dated December 11, 2011. [Defendant's exhibit 23]. Defendant's version includes signatures of Mr. Logan on behalf of NIS and Barry Johnson on behalf of GO Corp. Plaintiffs' version does include the signatures.

receive a draw for the first three (3) months of $62,000.00 … to defray sales costs until the commission level from … closed contracts is sufficient to sustain Marketing Agents sales efforts." *Id.* Mr. Logan signed two checks from NIS to MMA dated January 2, 2012 and February 11, 2012, for $62,000 each as advances on commissions. [Stipulation ¶ 65; Plaintiffs' exhibits 44, 50]. He testified that he wrote the checks without notice to the members or managers. No sales ever occurred or closed for MMA, and Mr. Logan did not demand a return of the advanced commissions. [Stipulation ¶ 66].

On December 27, 2011, Mr. Logan signed a check from NIS to the Keating Network for $15,000, which states in the subject line that it is "per LOI Advisory Board $15,000 Loan at 8 percent interest." [Stipulation ¶ 64; Plaintiffs' exhibit 39]. Mr. Logan testified that he did not disclose the loan to the members or the board.

On January 10, 2012, Mr. Logan signed a check from NIS to Lighthouse Consulting, LLC in the amount of $6,000. [Plaintiffs' exhibit 46]. Mr. Logan testified that Michael Burke, the president of NIS, set up a contract with Lighthouse Consulting. Mr. Logan never saw the contract and does not know when it was executed. There was no meeting of the members or the board about the contract or the payment.

Mr. Logan signed checks from NIS to CM Processing for $12,500 dated February 1, 2012 for "new contract/endorsement fees (legal & travel)" and $2,500 dated February 9, 2012 for "liaison salary." [Stipulation ¶ 67; Plaintiffs' exhibits 47, 49]. Mr. Logan testified he could not recall whether NIS had a contract with CM Processing at the time the checks were issued. However, at least two contracts between NIS and CM Processing were not entered until March 5, 2012 and March 8, 2012. [Plaintiffs' exhibits 65, 66]. Mr. Logan testified that neither contract provided for the $12,500 payment, and that he believed both payments were actually related to a

contract with Hughes Connect. He further testified that there were no meetings of the members or the board with respect to the CM Processing payments or contracts. Mr. Logan testified that under the contracts, CM Processing was to market NIS products, including the toggle card, palm scanners, Data Breach, and data security, to its own companies and to other companies.

Mr. Logan testified that Hughes Connect offered mortgage programs aimed at reducing fraud. He further testified that under a contract with Hughes Connect dated March 5, 2012, the NIDR call center would serve as an answering service for Hughes Connect, and NIS would provide an office and part salary for a liaison. A review of the document indicates that NIS was to provide mortgage applicant verification services, biometric palm scanning, and data breach resolution services to Hughes Connect in exchange for a flat fee; NIDR is not a party to the agreement. [Defendant's exhibit 16]. Further, Mr. Logan testified the contract does not require any payments from NIS to Hughes Connect, notwithstanding that Mr. Logan believes the two CM Processing payments were actually related to the Hughes Connect contract.

Mr. Logan testified that Mr. Shepherd drafted or edited a number of the contracts NIS made after Ms. Mercer's investment, including contracts with Go Corp, Hughes Connect, and CM Processing. Mr. Logan further testified that Mr. Shepherd never indicated any of the agreements required approval of the NIS board. Further, Mr. Logan testified that based on Mr. Fang's statements, he did not believe he needed board approval for those contracts already in discussions prior to Ms. Mercer's investment and that such potential contracts did not need to be disclosed in the Purchase Agreement. Mr. Shepherd testified that he was not aware of any contracts or liabilities that were disclosed to Mr. Fang but not included in the Purchase Agreement. Mr. Shepherd testified that Mr. Logan and Mr. Jack would have identified the material contracts to be disclosed and that the three of them would have discussed the contracts

prior to disclosing them. Mr. Shepherd testified he was unaware of any discussions Mr. Logan and Mr. Fang had without him.

Mr. Shepherd testified that in 2012 he received an email from Mr. Fang or one of his superiors requesting a meeting of the managers. Mr. Shepherd said he contacted Mr. Logan immediately and told him the email did not sound like an ordinary course of business issue. Mr. Shepherd said he was unnerved by the email and that it sounded serious. Mr. Shepherd testified that Mr. Logan assured him everything was fine. At that time, Mr. Logan told Mr. Shepherd $1.6 million remained of Ms. Mercer's investment. Mr. Shepherd said he was surprised by that amount because only six or seven months had passed.

Mr. Shepherd testified that he and Mr. Logan went to New York for the meeting in March of 2012[4] (the "New York Meeting" or the "Meeting"); Mr. Fang, Ms. Mercer and a few others were present. He said the purpose of the meeting was to discuss where Ms. Mercer's investment monies had been spent, how much was left, what NIS had been doing with the investment, and why there had not been any reporting. Mr. Shepherd testified that during the meeting Mr. Logan said about $400,000 of the investment remained.

Ms. Mercer testified that no meetings of the managers or any other meetings were called after she made her investment. She testified the New York Meeting was called because she had repeatedly tried to find out the status of her investment and kept getting stonewalled. In February, she found out NIS had spent approximately $900,000 on payroll alone. She was concerned about how that much money could have been spent on payroll when she had not agreed to hire anyone. Ms. Mercer testified that to her knowledge NIS was not conducting any business because doing so would have required calling a board meeting and getting her approval

[4] The exact date of this meeting is not clear; the testimony varied as to whether it was held in February or March of 2012.

for contracts and hiring. When she was not getting answers from Mr. Logan, she contacted her attorneys.

At the New York Meeting, Ms. Mercer said Mr. Logan was asked very specific questions about where the money went and he did not have answers. She testified that no information was provided to her between the date of her investment and the date of the New York Meeting. Ms. Mercer said that when the Meeting was called, about one-third of the investment was gone. By the time the Meeting was held, one-half of the investment was gone, and Mr. Logan could not explain where the money had been spent.

Ms. Mercer testified that about one week after the New York Meeting, she went to Atlanta and spent a month trying to figure out what Mr. Logan had done with her investment. During that week, through conversations and emails, she learned the remaining $1.6 million dropped to $1.4 million and then $1.2 million and then $800,000 and then $600,000. On the Friday before she left for Atlanta, Mr. Logan told her only $400,000 remained. He could not explain how the additional funds had been used in the period after the New York Meeting. After Ms. Mercer arrived in Atlanta, she insisted that Mr. Logan accompany her to the bank to review NIS's bank statements. At that time, she discovered only $4,000 remained in the account.

Ms. Mercer testified that she did not approve any contracts between NIS and third parties. She testified that she did not and would not have approved any contracts between NIS and NIDR. Ms. Mercer testified that she did not approve any specific expenditures for employees or for software.

Mr. Shepherd testified that he participated in a more formal meeting of the managers on April 6, 2012. The meeting took place at NIS's office. Ms. Mercer was present, and Mr. Logan appeared by telephone. Mr. Shepherd took the minutes; the minutes were distributed

to those present for review and were deemed accurate. Ms. Mercer testified that during the meeting, Mr. Logan was asked for details about various transactions, including transactions with NIDR, and he failed to give satisfactory answers. The minutes of this meeting indicate that Mr. Logan could not explain NIS's various marketing agreements or payments made. [Plaintiffs' Ex. 51A].

Ms. Mercer testified that from September 19, 2011 until the meeting on April 6, 2012, as far as she could tell, NIS paid for a woman's wedding, transferred money to a salon, paid a lot of money to NIDR, and paid a lot of money to Ron Logan and three other principals. She was not aware of any of the transactions before they occurred and she did not approve them as either the Class C member or a board member.

II. CONCLUSIONS OF LAW

A. Burden of Proof

Pursuant to 11 U.S.C. § 727, a chapter 7 debtor is entitled to a discharge of prepetition debts. To carry out the bankruptcy purpose of providing a fresh start to honest but unfortunate debtors, exceptions to discharge are strictly construed in favor of the debtor. *United States v. Mitchell (In re Mitchell)*, 633 F.3d 1319, 1327 (11th Cir. 2011). "[T]he reasons for denying a discharge … must be real and substantial, not merely technical and conjectural." *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 304 (11th Cir. 1994) (quotation marks and citations omitted). A creditor objecting to dischargeability of a debt has the burden to prove its case by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 286, 111 S. Ct. 654, 659 (1991).

B. Section 523(a)(2)(A) and (B) – Money Obtained by Fraud

Ms. Mercer seeks a judgment for $3 million. She contends her investment was procured by fraud due to the misrepresentation of assets and omission of liabilities on the NIS Balance Sheet, omission of some Material Contracts, including the Shared Services Agreement, and omission of some contracts in default, including the Veritec Agreement and the Lease. Ms. Mercer contends that had the omitted information been included in the disclosures, she would not have invested in NIS.

As an initial matter, officers of a corporation are generally not liable for damages recoverable from the corporation. *Fields Bros. General Contractors v. Ruecksties*, 288 Ga. App. 674, 677, 655 S.E.2d 282, 285 (2007). However, if the officer participates in the commission of a tort by the corporation, the officer is personally liable for the tort. *Id.*; *Automotive Finance Corp. v. Miles (In re Miles)*, No. 05-147055, AP No. 06-1006, 2007 Bankr. LEXIS 631 at *5 (Bankr. N.D. Ga. January 10, 2007) (citing *WMH, Inc. v. Thomas,* 195 Ga App. 61 (Ga. App. 1990) *aff'd in part rev'd on other grounds*, 260 Ga. 654 (Ga. 1990)) (Drake, J.); *accord Peguero v. 601 Realty Corp*, 58 A.D. 3d 556, 558-59 873 N.Y.S.2d 17, 21 (2009). Furthermore, "the individual liability of a corporate officer can form the basis of a claim under section 523(a)(2)." *Yadkin Valley Paving, Inc. v. Hicks* (*In re Hicks*), No. 09-50390, AP No. 09-6024, 2010 WL 2180849, at *1 (Bankr. M.D.N.C. May 21, 2010). Accordingly, as an officer of NIS, Mr. Logan may be personally liable for his tortious conduct on behalf of NIS.

Pursuant to 11 U.S.C. § 523(a)(2)(A) and (B) a debt is nondischargeable if it is one:

> for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; [or]
> (B) use of a statement in writing--
> (i) that is materially false;
> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive[.]

11 U.S.C. § 523(a)(2)(A), (B).

Thus, to the extent a statement respects financial condition of the debtor or an insider and that statement is in writing, subsection (a)(2)(B) applies. By contrast, statements of financial condition are excluded from subsection (a)(2)(A). *See Navy Federal Credit Union v. Scott*, Adv. Pro. No. 14-5378 (Bankr. N.D. Ga. March 25, 2016). Therefore, the Court must determine whether the fraudulent representations alleged by Ms. Mercer respect the financial condition of Mr. Logan or an insider of Mr. Logan.

An insider is defined by the Bankruptcy Code to include a "corporation of which the debtor is a director, officer, or person in control[.]" 11 U.S.C. § 101(31)(A)(iv). It is undisputed that Mr. Logan was at all relevant times the CEO and majority owner of NIS. Accordingly NIS is an insider of Mr. Logan.

Unlike "insider," the Code does not define the phrase "respecting financial condition," and courts are split on the scope of the phrase. Some courts apply a broad definition that "includes any communication that has a bearing on the debtor's financial position," including statements "addressing the status of a single asset or liability …." *Prim Capital Corp. v. May (In re May)*, 368 B.R. 85, 2007 WL 2052185, at *6 (B.A.P. 6th Cir. July 19, 2007) (unpublished) (citing *Cadwell v. Joelson (In re Joelson)*, 427 F.3d 700, 705 (10th Cir. 2005)).

Other courts apply a narrow or strict interpretation, limiting it to statements addressing "overall net worth, overall financial health, or equation of assets and liabilities." *Id.*. The Eleventh Circuit has not ruled on the question, but bankruptcy courts in this circuit have generally applied the strict interpretation. *Allen v. Morrow (In re Morrow)*, 508 B.R. 514, 525 (Bankr. N.D. Ga. 2014) (Massey, J); *Lamar, Archer & Cofrin, LLP v. Appling (In re Appling)*, 500 B.R. 246, 251 (Bankr. M.D. Ga. 2013); *Generac Power Sys. v. Dato (In re Dato)*, 410 B.R. 106, 111 (Bankr. S.D. Fla. 2009); *The Cit Group/Sales Fin'g, Inc. v. Kim (In re Kim)*, No. 04-94694, AP No. 04-6521, 2005 WL 6488240, at *4 (Bankr. N.D. Ga. Sept. 29, 2005) (Murphy, J). The Court has previously adopted the strict interpretation of respecting financial condition. *Navy Federal Credit Union v. Scott*, Adv. Pro. No. 14-5378 (Bankr. N.D. Ga. March 25, 2016). Such a determination is not necessary in this case however, because the schedules to the Purchase Agreement constitute a statement respecting the financial condition of NIS regardless of which definition applies. The schedules include a balance sheet, list of persons providing services to NIS, and contracts to which NIS is a party. These not only address individual assets and liabilities of NIS but demonstrate its overall financial health. Therefore, Plaintiff must prove the elements of subsection (a)(2)(B).

To prove fraud for purposes of § 523(a)(2)(B), Ms. Mercer must show (1) the debt was obtained by a writing; (2) the writing is materially false; (3) the writing respects the debtor's or an insider's financial condition; (4) she reasonably relied on the writing; (5) and Mr. Logan caused the writing to be published with intent to deceive. *Miller*, 39 F.3d at 304. As already established, Ms. Mercer made her investment based on a writing respecting NIS's financial condition. Therefore, she must prove that the writing was materially false, that she relied on it, that her reliance was reasonable and that Mr. Logan published the writing with fraudulent intent.

Materially false: To show that the Purchase Agreement and schedules are materially false, Ms. Mercer must demonstrate that "the writing was false at the time it was created, the falsity was material in amount, and the falsity was material in the effect it had on the creditor receiving the writing such that it [a]ffected the creditor's decision making process." *Agribank, FCB v. Gordon (In re Gordon)*, 277 B.R. 805, 810 (Bankr. M.D. Ga. 2001) (citing *Enterprise Nat'l Bank of Atlanta v. Jones (In re Jones)*, 197 B.R. 949, 955 (Bankr. M.D. Ga. 1996)). Furthermore, "an omission can be materially false when there is an obligation to proffer the omitted information." *Leominster Housing Auth. v. Dunbar (In re Dunbar)*, 474 B.R. 14, 21 (Bankr. D. Mass. 2012) (citing *Shawmut Bank, N.A. v. Goodrich (In re Goodrich)*, 999 F.2d 22, 25 (1st Cir. 1993); *see also The Citizens Bank of Swainsboro v. Funderburke (In re Funderburke)*, No. 87-00082, AP No. 87-0026, 1988 WL 1607927, at *3 (Bankr S.D. Ga. January 18, 1988).

<u>Schedule 4.9 - The NIS Balance Sheet</u>: The NIS Balance Sheet showed NIS's assets and liabilities as of August 31, 2011. It was prepared by Mr. Logan, Mr. Konecky, and Mr. Shepherd. However, Mr. Shepherd was not privy to NIS's financial information and could not confirm the accuracy of the information in the NIS Balance Sheet.

The NIS Balance Sheet listed cash on hand in amount of $102,200. NIS did not have $102,200 on hand. Its bank account statement showed a balance of -$3.79 on August 31, 2011. The $102,200 figure was included based on the availability of funds from Mr. Konecky, although Mr. Konecky never transferred the funds to NIS. Ms. Mercer testified that she would not have invested in NIS if she knew it had a negative balance in its bank account. The Court finds that the inaccuracy as to the amount of cash on hand is a material misrepresentation. NIS,

through Mr. Logan, represented that it had a significant positive cash balance when it, in fact, was overdrawn on its bank account and no transfer from Mr. Konecky was made.

The NIS Balance Sheet listed intangible assets with a value of $5,847,800. A balance sheet for NIS as of December 31, 2010, listed intangible assets with a value of $100 million. Mr. Logan was unable to explain what amounts to a $94 million decrease in the value of intangible assets over a nine-month period. In the absence of any evidence as to the actual value of NIS's intangible assets or as to whether the value of intangible assets affected Ms. Mercer's investment decision, the Court cannot conclude that the value of NIS's intangible assets constitutes a material false statement.

The NIS Balance Sheet listed owner's investment of $5,692,000. Of that amount, Mr. Jack invested $500,000. The remaining amount primarily consisted of Mr. Logan's "sweat equity," although Mr. Logan testified that he also contributed an unspecified amount of cash. The NIS Balance Sheet did not indicate that Mr. Logan's investment was made in any form other than cash. Ms. Mercer testified that she heard Mr. Logan had invested $5 million of his own money in NIS, but she did not testify as to whether the nature of Mr. Logan's contribution affected her investment decision. Therefore, the Court cannot conclude that the amount listed for owner's investment is a material false statement.

The NIS Balance Sheet listed liabilities of $42,000 for accounts payable, $58,000 for salaries payable, and $352,000 for owners' short term loans. On August 31, 2011, NIS owed CEP at least $110,594.05 under the Lease and was obligated to Veritec for $250,000 that had not yet been paid under the Veritec Agreement. The Lease and the Veritec Agreement were both signed by Mr. Logan as CEO of NIS. The NIS Balance Sheet does not list any liabilities to CEP or Veritec. In addition, prior to September 19, 2011, NIS owed Mr. Logan not less than

$7,111.02 for expenses and owed NIDR not less than $60,000 under the Shared Services Agreement. Mr. Logan signed the Shared Services Agreement as CEO of NIS. The NIS Balance Sheet does not list any liabilities to Mr. Logan or NIDR. There is no evidence that any of the omitted liabilities were included in the amounts listed for accounts payable, salaries payable, or owners' short term loans. The foregoing liabilities total $427,705.07, or 14% of Ms. Mercer's $3 million investment. Ms. Mercer testified that it was important to her to see that NIS did not have any outstanding debts, especially debts to an affiliated company that was struggling financially.

Counsel for Mr. Logan argued that the Shared Services Agreement falls into the category of "liabilities and obligations arising in the ordinary course of business consistent with past practice" and therefore was excepted from disclosure on the NIS Balance sheet under section 4.9 of the Purchase Agreement. The Court does not find this argument persuasive. The Shared Services Agreement represented a significant pre-investment liability and an ongoing liability that was not disclosed in any way in the Purchase Agreement. Mr. Logan's testimony that he told Mr. Fang about the Shared Services Agreement is self-serving and not credible in light of the circumstances, including the fact that Mr. Shepherd was unaware of the agreement and any discussion of it with Mr. Fang.

Because the amount of liabilities omitted from the NIS Balance Sheet represented a significant portion of Ms. Mercer's total investment, the Court finds the omissions constitute a material misrepresentation.

Schedule 4.11.1 – Intellectual Property: The intellectual property spreadsheet listed Data Breach Prevention & Response as owed by NIDR and to be purchased by NIS. The spreadsheet did not provide the price of the software or any other terms of the purchase, although the price was disclosed on the Use of Funds. The spreadsheet also shows Kaizen as owned by

NIDR, with no indication that NIS intended to contract for the option to use Kaizen. There is no evidence that the omission of terms of the purchase affected Ms. Mercer's investment decision. Accordingly, the Court finds the omission did not constitute a material misrepresentation.

Schedule 4.12.1 – Material Contracts: The Purchase Agreement defined "Material Contracts" to include "each joint venture, partnership or other applicable Contract involving a sharing of profits, losses, costs or liabilities by the Company[.]" NIS listed eleven Material Contracts, including the Master Services Agreement with NIDR, the Veritec Agreement, the Lease, Mr. Konecky's employment agreement, and three letters evidencing various debts to Mr. Konecky and to Mr. Konecky as administrator of Empire Financial Profit Sharing Plan in the total amount of $354,000.[5] NIS did not list the Shared Services Agreement. The Shared Services Agreement involved the sharing of costs between NIS and NIDR. Mr. Logan testified that he told Mr. Fang about the Shared Services Agreement and the fact that NIS owed NIDR reimbursements under the agreement, although he did not know the exact amount owed. Mr. Shepherd testified that while he was aware of discussions about entering into a Shared Services Agreement, he was unaware of the existence of the agreement. In addition, Mr. Shepherd testified that he was unaware of any conversations between Mr. Logan and Mr. Fang without him.

As explained above, the omission of liabilities under the Shared Services Agreement was part of a material misrepresentation. Similarly, the failure to disclose the existence of the agreement and the possibility of ongoing liabilities under the agreement is a material misrepresentation. Mr. Logan's testimony that he disclosed the existence of the agreement to Mr. Fang is not credible in light of the fact that Mr. Shepherd was unaware of the

[5] The Court notes that this amount approximately corresponds to the $352,000 liability listed on the NIS Balance Sheet for owners' short term loans.

agreement. Mr. Logan's credibility is furthered hindered by his effort to blame the omission on Mr. Fang, when he testified that he did not know why Mr. Fang excluded the agreement from the schedules; the burden was on Mr. Logan, not Mr. Fang to provide complete disclosure in the schedules. Further, Mr. Logan offered no explanation as to why he would verbally disclose the contract but not disclose it in writing.

Schedule 4.12.2 – Material Contracts in Default: NIS listed one material contract in default, a contract with 1FORCE Government Solutions, LLC. The Lease was not listed, although it was at least two months in arrears. The Veritec Agreement was not listed, although NIS had not made the $125,000 payment due on the November 1, 2010 execution date. Mr. Logan testified that he was not aware the Lease was in default at the time he negotiated the Purchase Agreement. Mr. Logan also testified that Veritec had waived the default of the Veritec Agreement and agreed to wait for payment until NIS received funding. Ms. Mercer testified that NIS's lack of debt was important to her investment decision. NIS had undisclosed past due obligations on the Lease. With respect to the Veritec Agreement, assuming the default was waived, NIS had undisclosed unpaid obligations to Veritec. Even though the Veritec Agreement was disclosed, there was no way for Ms. Mercer to know the $250,000 owed by NIS had not been paid when it had originally come due and remained an outstanding liability. As noted above, the omission of the related liabilities from the NIS Balance Sheet constituted part of a material misrepresentation. Similarly, the failure to disclose that the Lease and Veritec Agreement were in default is a material misrepresentation.

Reasonable reliance: To prove reasonable reliance, Ms. Mercer must show by a totality of the circumstances that she had "'some basis for relying upon the debtor's representations.'" *City Bank & Trust Co. v. Vann (In re Vann)*, 67 F.3d 277, 280 (11th Cir. 1995)

(quoting *First Bank v. Mullet (In re Mullet)*, 817 F.2d 677, 679 (10th Cir. 1987)). "Reasonable reliance connotes the use of the standard of ordinary and average person." *Id.* Factors relevant to the reasonableness of the creditor's reliance include:

> - whether there had been previous business dealings with the debtor that gave rise to a relationship of trust;
> - whether there were any "red flags" that would have alerted an ordinarily prudent lender to the possibility that the representations relied upon were not accurate; and
> - whether even minimal investigation would have revealed the inaccuracy of the debtor's representations."

Davenport v. Frontier Bank (In re Davenport), 508 Fed. Appx. 937, 938 (11th Cir. 2013).

Counsel for Mr. Logan argues that Ms. Mercer's reliance was not reasonable because she had no direct communications with Mr. Logan or anyone else associated with NIS regarding its business, products or assets; she did not seek to have NIS's assets valued prior to making her investment; she did not ask for bank records; she did not inquire into who had signature authority on NIS's bank accounts; she did not inquire into how NIS was running prior to her investment despite the fact that it had no income; and she hired a third party to complete her due diligence rather than doing it herself.

Ms. Mercer argues to the contrary and relies upon the fact that she "paid Wilkie Farr a lot of money" and that she ""punted the deal to Willie Farr" for due diligence. [Trial 10/13/15 at 1:27:15-1:29:31], Ms. Mercer testified that she initially became aware of NIS and the opportunity to invest through Mike Burke, who was with 1Force and had contracted with NIS, that she saw a power point presentation and decided that NIS's technology was interesting and that she would invest. It is undisputed that Mr. Fang from Willkie Farr and Mr. Shepherd on behalf of NIS spent a month negotiating the transaction documents and that there were

significant controls in the documents to ensure that Ms. Mercer would know how her investment was being used.

What this evidence establishes is that Ms. Mercer hired legal counsel to draft strong documents. It does not establish that she conducted any financial due diligence. Ms. Mercer testified that with respect to the NIS Balance Sheet included as Schedule 4.9 of the Purchase Agreement that had she known that NIS had -$3.79 in the bank rather than $102,200 as set forth on the NIS Balance Sheet she would not have invested in the company. Similarly, she testified that if she had known about the significant inter-company obligations between NIS and NIDR she would not have invested in NIS. Notwithstanding, the evidence shows that not even the most simple diligence was done to determine if there were possible issues with NIS's financial position or its relationship with NIDR.

Based on the evidence, it appears that neither Ms. Mercer nor her counsel asked to see NIS's bank statement for August 2011 or September 2011, which would have shown that NIS had a negative bank balance at the time of Ms. Mercer's investment. In addition, there is no evidence that any inquiry was undertaken regarding the relationship between Mr. Logan, NIDR and NIS even though the schedules to the Purchase Agreement state that Mr. Logan developed software owned by NIDR and that there was a $340,000 default judgment against NIDR. [Plaintiffs' exhibit. 19, Schedules 4.8 and 4.11.1]. Further, there was no evidence that any inquiry was made regarding the 10 NIS employees disclosed in the Purchase Agreement and how NIS was presently paying them when the NIS Balance Sheet indicated it was a start-up. [Plaintiffs' exhibit 19, Schedule 4.15.1]. Finally there was no evidence that any questions were asked about the projected Use of Funds that was submitted to Mr. Fang. [Def. Ex. 7]. The Use of Funds included proposed salary expenditures in the first month after investment of $125,833.33

to pay 10 employees. Such a disclosure would lead an ordinary and reasonable person to inquire how those amounts had been ascertained, who held those positions, and whether NIS had been able to make payroll prior to the purchase. Given all these red flags, the Court is persuaded that even minimal investigation would have revealed Mr. Logan's misrepresentations. Because Ms. Mercer failed to undertake even such minimal investigation, the Court concludes that Ms. Mercer's reliance on the representations made in the schedules to the Purchase Agreement was not reasonable and thus, her claim under § 523(a)(2)(B) must fail.

C. Section 523(a)(4) – Embezzlement

Pursuant to 11 U.S.C. § 523(a)(4) a debt is nondischargeable if it is one "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]" NIS seeks a judgment for all the money that Mr. Logan paid to himself or NIDR on behalf of NIS solely on the grounds of embezzlement. To prove embezzlement, NIS must show (1) Mr. Logan was rightfully in possession of property owned by NIS; (2) Mr. Logan appropriated the property for his own benefit or personal use; and (3) Mr. Logan appropriated the property with fraudulent intent. *Flemm v. Trexler (In re Trexler)*, 528 B.R. 842, 848, 851 (Bankr. N.D. Ga. 2015) (Hagenau, J.) (citing *Hot Shot Kids Inc. v. Pervis (In re Pervis)*, 512 B.R. 348, 366 (Bankr. N.D. Ga. 2014)); *see also* O.C.G.A. § 51-10-6 (authorizing a civil action to recover damages for theft as defined in O.C.G.A. § 16-8-1 to -23); O.C.G.A. § 16-8-2 ("A person commits the offense of theft by taking when he unlawfully takes, or being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated."); O.C.G.A. § 16-8-4(a) (held unconstitutional on other grounds by *Sherrod v. State*, 280 Ga. 275 (2006) ("A person

commits the offense of theft by conversion when, having lawfully obtained funds or other property of another … under an agreement or other known legal obligation to make specified application of such funds or a specified disposition of such property, he knowingly converts the funds or property to his own use ….")

Mr. Logan was the CEO of NIS and a signatory on NIS's bank account. He was also a member of the board of managers, which had "full and complete authority, power and discretion to manage and control the business …" and had authority "to execute, on behalf of the Company all instruments and documents, including, without limitations, checks …." [Plaintiffs' exhibit 20 ¶ 5.1, 5.2]. Thus, he was lawfully in possession and control of NIS funds.

Mr. Logan was the majority owner of NIDR at all relevant times. Because the funds at issue were paid either directly to Mr. Logan or to NIDR, Mr. Logan benefitted from the payments. *Mirarchi v. Nofer (In re Nofer)*, 514 B.R. 346, 357 (Bankr. E.D.N.Y. 2014) (finding that the transfer of assets, business opportunities, and other assets from a company controlled by the debtor to a different company owned by the debtor was for the debtor's own benefit); *3N Int'l, Inc. v. Carrano (In re Carrano)*, 530 B.R. 540, 558 (Bankr. D. Conn. 2015) (finding that the debtor personally benefitted from funds diverted from one of his companies to another because it allowed the debtor "to keep his businesses operating when he admittedly would not have been otherwise able to do so."). In both *Nofer* and *Carrano*, the company that benefitted from the diversion of assets was wholly owned by the debtor. Here, Mr. Logan is a majority owner of NIDR, but not its sole owner. Nevertheless, as majority owner, Mr. Logan personally benefitted by the transfer of funds that allowed NIDR to continue operations.

The question remains as to whether Mr. Logan made the payments with fraudulent intent. In deciding whether NIS has shown fraudulent intent, the Court must consider

whether Mr. Logan intended to convert the funds; it need not conclude he intended to harm NIS. *KMK Factoring, L.L.C. v. McKnew (In re McKnew)*, 270 B.R. 593, 632 (Bankr. E.D. Va. 2001). Thus, NIS need not prove the debtor acted out of malice, spite, or ill will toward the plaintiff. *Id.* Because direct evidence of fraudulent intent is rarely available, the Court may infer fraudulent intent based on the totality of the circumstances and the conduct of the debtor. *Hot Shot Kids Inc. v. Pervis (In re Pervis)*, 512 B.R. 348, 366 (Bankr. N.D. Ga. 2014) (Hagenau, J.). However, "a breach of contract, without more, is not embezzlement." *Board of Trustees v. Bucci (In re Bucci)*, 493 F.3d 635, 644 (6th Cir. 2007).

After Ms. Mercer's investment, Mr. Logan wrote the following checks from NIS to himself in the total amount of $106,486.13:

- September 30, 2011: $12,250.00 for September 2011 payroll.
- October 14, 2011: $12,250.00 for October 2011 payroll.
- October 31, 2011: $11,458.33 for October 2011 payroll.
- November 15, 2011: $11,458.33 for November 2011 payroll.
- November 30, 2011: $11,458.33 for November 2011 payroll.
- December 15, 2011: $11,458.33 for December 2011 payroll.
- December 30, 2011: $11,458.33 for December 2011 payroll.
- September 20, 2011: $7,111.02 for expense reimbursement.
- December 8, 2011: $17,583.46 for partial payment and expense reimbursement.

In addition, he received four payroll payments through Oasis between January 13, 2012 and March 1, 2012 in the total gross amount of $50,000. According to Ms. Logan's testimony, NIS reimbursed Oasis for payroll. After Ms. Mercer's investment, Mr. Logan wrote the following checks from NIS to NIDR in the total amount of $566,000:[6]

- September 20, 2011: $250,000 for purchase of Data Breach and access to Kaizen.
- September 20, 2011: $60,000 for shared services.
- October 28, 2011: $125,000 for shared services.
- November 29, 2011: $25,000 for shared services.
- December 14, 2011: $28,000 for shared services.

[6] On December 21, 2011, Mr. Logan wrote a check from NIS to NIDR in the amount of $1,500 for a company Christmas party, which NIS has excluded from its claim.

- December 29, 2011: $43,000 for shared services.
- February 2, 2012: $35,000 for shared services.

Thus, the total amount subject to NIS's embezzlement claim is $722,486.13.[7] The Amended Operating Agreement contained a number of provisions relevant to the checks paid to Mr. Logan and NIDR. The Amended Operating Agreement authorized the board of managers to fix the compensation of managers by a majority vote and the consent of Ms. Mercer. [Plaintiffs' exhibit 20 ¶ 5.9]. The Amended Operating Agreement provided that the salaries of officers "shall be fixed by the Members …" *Id.* ¶ 5.13. The board was also authorized "to increase, decrease, modify, amend or adjust the level of salary, compensation or other employment benefits received by any Member, Officer or Manager, or enter into any agreement regarding the same" subject to section 8.9. *Id.* ¶ 5.2(h). Section 8.9 provides that the board of managers could not, without the approval of Ms. Mercer, in any way adjust the salary of an officer. *Id.* ¶ 8.9(e). Finally, the Amended Operating Agreement provides for reimbursement of out-of-pocket expenses of the managers "upon presentation of receipts and mileage logs." *Id.* ¶ 5.10.

The Amended Operating Agreement authorizes the board of managers "to execute, on behalf of the Company, all instruments and documents, including, without limitation, checks … or documents necessary, in the opinion of the Board, to the business of the Company[.]" [Plaintiffs' exhibit 20 ¶ 5.2(g)]. The Amended Operating Agreement provides that notwithstanding section 5.2, the written consent of members representing a majority vote is required to "participate in partnership agreements, joint ventures or other associations of any kind with any Person or Persons[.]" *Id.* ¶ 5.3(h). The Amended Operating Agreement authorizes each manager "to employ, contract, and deal with, from time to time, any Member or Manager or

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[7] Plaintiffs' proposed findings of fact and conclusions of law also sought to recover $210,000 paid to Charles Hill under the theory of embezzlement. However, they did not pursue those payments as embezzlement at trial and they did not produce any evidence that Mr. Logan benefitted from the payments to Mr. Hill.

Affiliate of any Member or Manager" subject to section 8.9. *Id.* ¶ 5.6. Under section 8.9, Ms. Mercer's approval is required for "entering into a transaction with an Affiliate of the Company or any other Person controlled by any Member, manager, officer or employee of the Company … which transaction is not consummated on market-based terms (i.e., terms that are no less favorable to the Company than those that would be available from a non-Affiliated third party on an arms; length basis) and approved by the Board[.]" *Id.* ¶ 8.9(d).

It is undisputed that the members of NIS never voted to set Mr. Logan's salary as an officer. It is further undisputed that Ms. Mercer never voted to authorize any adjustments to Mr. Logan's salary. Mr. Logan testified that he did not provide documentation for his reimbursed expenses. Mr. Logan did provide Mr. Fang with a Use of Funds that proposed a salary of $25,000 per month for Mr. Logan. However, Ms. Mercer testified that she did not approve the salary. Further, while the Use of Funds was included as a schedule in a draft of the Purchase Agreement, it was not part of the final executed Purchase Agreement.

The Shared Services Agreement pre-dated Ms. Mercer's investment and the Amended Operating Agreement. It is undisputed that after Ms. Mercer's investment the members did not vote to participate in the Shared Services Agreement. It is further undisputed that Ms. Mercer did not authorize the purchase of Data Breach from NIDR. NIS's intent to purchase Data Breach was disclosed on the intellectual property spreadsheet. The purchase price of $250,000 was disclosed on the Use of Funds. Mr. Jack testified that he believed the value of Data Breach was $250,000 based on cash flows generated from Data Breach although Mr. Jack also believed that NIS was purchasing the only version of Data Breach rather than an older version of the software.

Counsel for Mr. Logan argues Mr. Logan did not have fraudulent intent because the funds at issue were not appropriated to a use other than for which they were intended. Here, all the funds were used to pay legitimate expenses of NIS, and were not diverted to Mr. Logan's personal use. The Purchase Agreement provided that Ms. Mercer's investment would be used for growth and development of the business and general working capital purposes. Counsel for Mr. Logan contends the payment of Mr. Logan's salary when he was working full time for NIS was use of working capital. He also contends the reimbursements under the Shared Services Agreement was use of working capital and used to grow the business as NIS would not exist without NIDR carrying it because NIS had no revenues. The purchase of Data Breach was also to grow the business as the transaction was made so NIS could offer a wider range of products and services. The argument concludes that, while Mr. Logan may have breached the Amended Operating Agreement he did not embezzle funds.

With respect to the salary payments to Mr. Logan, the case law is clear that an officer of a company who draws excess compensation may be liable for embezzlement depending on the circumstances. *Reiss v. McQuillin (In re McQuillin)*, 509 B.R. 773, 786-87, (Bankr. D. Mass. 2014) (court found embezzlement when operating agreement required equal distributions to owners, but debtor took excess distributions for himself, and when debtor used corporate funds for unauthorized payments of his personal and separate business expenses); *NWI Orthodontics, P.C. v. Bell (In re Bell)*, 498 B.R. 463, 483 (Bankr. E.D. Pa. 2013) (court found embezzlement when debtor drew compensation that was unauthorized under his employment agreement without any business justification); *Caviness v. Lane (In re Lane)*, 445 B.R. 555, 565 (Bankr. E.D. Va. 2011) (court found embezzlement when debtor took unauthorized personal loans from corporation, opened two unauthorized bank accounts to divert corporate funds to

himself, and acknowledged his wrongdoing); *Farley v. Romano (In re Romano)*, 353 B.R. 738, 766-67 (Bankr. D. Mass. 2006) (although debtor's employment agreement did not limit his salary, embezzlement shown where debtor began taking large withdrawals to pay personal expenses as the company's financial position deteriorated); *McKnew*, 270 B.R. at 632-33 (court found embezzlement when debtor took compensation in excess of authorized amounts, concealed the excess draws, and admitted wrongdoing when discovered); *Ferraro v. Phillips (In re Phillips)*, 185 B.R. 121, 129-30 (Bankr. E.D.N.Y. 1995) (court found embezzlement when debtor drew compensation in excess of his compensation agreement and withdrew additional money to pay personal expenses from account holding client deposits designated to pay certain suppliers); *see also Hot Shot Kids Inc. v. Pervis (In re Pervis)*, 512 B.R. 348, 366-67 (Bankr. N.D. Ga. 2014) (Hagenau, J.) (when parties agreed to share commissions, debtor's failure to do so and concealment of commissions constituted embezzlement). *Compare Allentown Supply Co. v. McCurdy (In re McCurdy)*, 45 B.R. 728, 731-32 (Bankr. M.D. Pa. 1985) (no embezzlement when debtor's employment agreement authorized him to take bonuses without restriction so long as the company was profitable); *Detroit Auto Brokerage, Inc. v. Denson (In re Denson*, 7 B.R. 213, 215-16 (Bankr. E.D. Va. 1980) (no embezzlement where the employment agreement was ambiguous as to compensation, debtor believed he was entitled to the funds as commissions, and debtor did not hide his withdrawals). Some of the common threads among the cases where the courts have concluded that the debtor acted with fraudulent intent in drawing excess compensation are express terms regarding compensation, the debtor knowingly violating those terms, the debtor making some effort to conceal the excess draws, and the debtor's acknowledgement of wrongdoing upon being discovered.

Here, Mr. Logan testified that he had received some salary from NIS prior to Ms. Mercer's investment, although the Court has no evidence as to the frequency or amount of his draws. What is clear, however, is that immediately upon NIS receiving funding from Ms. Mercer Mr. Logan began paying himself a monthly salary of $25,000 and reimbursing undocumented expenses. Indeed, Mr. Logan paid himself salary and expenses in excess of $106,000 in slightly more than 3 months. Similarly, immediately upon NIS receiving funding from Ms. Mercer Mr. Logan began paying NIDR significant amounts owed from prior periods. Mr. Logan testified that Mr. Fang told him that he did not believe the proposed Use of Funds would be a problem, that he told Mr. Fang about the sale of Kaizen, that Mr. Fang told him he wouldn't have to go back and vote on each contract or payment to employees, and finally that Mr. Logan told Mr. Fang about the Shared Services Agreement and that there were intercompany obligations owing under that agreement.

Notwithstanding, the Use of Funds was not part of the final Purchase Agreement, and the Amended Operating Agreement provides that the members of NIS would set the salary of officers and required Ms. Mercer's approval for any adjustments to salary. It is undisputed that the members never set Mr. Logan's salary after Ms. Mercer's investment. Although it is not entirely clear from the Amended Operating Agreement whether an officer's salary set prior to Ms. Mercer's investment would require reauthorization given the requirement that all employment agreements had to be disclosed in the Purchase Agreement and that the Use of Funds was not included in the Purchase Agreement the Court concludes that Mr. Logan's salary was not authorized. That Mr. Logan knew this is evident from his refusal to provide Ms. Mercer with information about NIS's finances. Ms. Mercer testified that when she repeatedly sought information from Mr. Logan he "stonewalled" her and did not provide any information, that

when he was questioned at the New York Meeting he was unable or unwilling to explain where NIS's money had gone and that Ms. Mercer had to force him to go to the bank with her in April, 2012 to determine NIS's cash position.

Mr. Logan testified that he was providing services to NIS in exchange for his salary and thus, he believed he was entitled to compensation. Similarly, to the extent the payments to Mr. Logan were for undocumented expenses, he believed he was entitled to these funds. The Court did not find Mr. Logan's testimony credible because it was self-serving and attempted to place blame on others. With respect to the errors and omission in the Purchase Agreement, Mr. Logan testified that the NIS Balance Sheet was wrong because Mr. Konecky told him to include $102,200 even though Mr. Logan knew NIS did not have the funds, that Mr. Logan relied on others, including Mr. Shepherd to tell him the NIS Balance Sheet was okay, even though Mr. Shepherd had no knowledge of NIS's financials. Similarly, Mr. Logan testified that he disclosed the Shared Services Agreement to Mr. Fang in a discussion that apparently excluded Mr. Shepherd. Mr. Logan then implied that it was Mr. Fang's responsibility to add the Shared Services Agreement to the schedules, and Mr. Logan did not know why Mr. Fang failed to do so. Similarly, Mr. Logan testified he told Mr. Fang about just about everything and based on that believed he was authorized to pay himself a salary that had not been approved by Ms. Mercer.

Similarly, with respect to the payment of $250,000 to NIDR for the purchase of a version of Data Breach and access to Kaizen and payments made under the Shared Services Agreement, the Court finds Mr. Logan acted with fraudulent intent. It is not disputed that the Shared Services Agreement was not included in the Purchase Agreement and that the intercompany obligations owed pursuant thereto were not disclosed in the NIS Balance Sheet.

Yet Mr. Logan immediately, began paying NIDR for preexisting and undisclosed obligations. As previously discussed, the Court does not find Mr. Logan's testimony that he told Mr. Fang about the Shared Services Agreement and thus thought he could pay obligations owed pursuant thereto credible. Further, there was a complete lack of accounting for benefits provided and received by both NIS and NIDR under the Shared Services Agreement. Neither party produced any records to show actual time spent by NIDR employees in the service of NIS. According to Ms. Logan's testimony, no such records were kept. Furthermore, there is no accounting for any credits NIS was entitled to under the Shared Services Agreement for making Lease payments. Further indication of Mr. Logan's intent solely for his benefit is the payment of $250,000 to NIDR the day after NIS received funding and a month prior to execution of the contract to purchase Data Breach. Also relevant is the fact that, shortly after receiving the Data Breach payment and the first Shared Services payment, NIDR paid two past due trust fund tax obligations in the total amount of $146,459.73 that it otherwise could not fund and for which Mr. Logan was liable. Considering the totality of the circumstances, including the amount of payments and the rapidity of payments coupled with Mr. Logan's lack of credible explanations, convinces the Court that Mr. Logan intended to take the NIS investment and use it for his own benefit through unauthorized salary payments, reimbursements and payments to prop up NIDR. Consequently, the Court concludes that Mr. Logan is liable to NIS in the amount of $722,486.13, which is not dischargeable pursuant to 11 U.SC. §523(a)(4).

D. Section 523(a)(6) – Willful and Malicious Injury

Pursuant to § 523(a)(6), a debt is excepted from discharge when it is the result of "willful and malicious injury by the debtor to another entity or to the property of another

entity[.]" To prove willful and malicious injury, NIS must show "a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 977 (1998) (emphasis is original). An injury is willful when the debtor acted intentionally and deliberately; recklessness and negligence are not sufficient. *Maxfield v. Jennings (In re Jennings)*, 670 F.3d 1329, 1334 (11th Cir. 2012) (citing *Hope v. Walker (In re Walker)*, 48 F.3d 1161, 1163 (11th Cir. 1995)). A malicious injury is one that is "wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will. … Malice may be implied or constructive" and does not require "a showing of specific intent to harm another …." *Walker*, 48 F.3d at 1164 (internal citations and quotation marks omitted).

The only conduct specifically identified by NIS as willful and malicious were the payments made by Mr. Logan to GO Corp in the total amount of $250,000, to CM Processing in the total amount of $15,000, to Charles Hill in the total amount of $212,800, and to MMA in the total amount of $124,000. Thus, NIS appears to seek a judgment in the total amount of $601,800. The payments were comprised of advance payments for services and to the extent any services were actually performed, they did not produce any results for NIS.

To the extent the payments were the result of a breach of the Amended Operating Agreement, such a breach by itself is not sufficient to prove willful and malicious injury; "even a breach of contract informed by malice, is simply not enough to obtain relief under Section 523(a)(6). Along with the breach, there must also be an intentional tort." *Atlanta Contract Glazing, Inc. v. Swofford (In re Swofford)*, No. 08-20892, AP No. 08-2053, 2008 WL 7842040, at *2 (Bankr. N.D. Ga. Dec. 29, 2008) (Brizendine, J.). NIS did not identify any such intentional tort either in the complaint, the legal arguments at trial, or in the proposed findings of fact and

conclusions of law. However, NIS contends money was flying out the door in such a fashion that it amounted to more than poor business judgment.

Despite NIS's assertions, the payments at issue do not appear to represent anything other than extremely bad business judgment and breach of the Amended Operating Agreement. There is no evidence that Mr. Logan benefitted in any way from these payments, nor is there any evidence that he intended to harm NIS. On these facts, the Court cannot conclude that NIS has shown that Mr. Logan intentionally injured NIS by making the payments.

III. CONCLUSION

Ms. Mercer seeks a judgment of $3 million and a determination that the debt is nondischargeable under § 523(a)(2) on the basis that her investment was procured by fraud. Ms. Mercer has shown that the Purchase Agreement and accompanying schedules, which constituted a statement of the financial condition of an insider of Mr. Logan, contained material misrepresentations and omissions, however, she failed to show that she reasonably relied on these statements.

NIS seeks a judgment in the total amount of $722,486.13 for checks Mr. Logan paid to himself and to NIDR from NIS and a determination that the debt is nondischargeable under § 523(a)(4) based on embezzlement. NIS showed that Mr. Logan was lawfully in possession of the funds and that he benefitted either directly or indirectly from the payments. NIS showed that Mr. Logan made the payments with fraudulent intent. Thus, NIS is entitled to a judgment excepting $722,486.13 from discharge.

NIS seeks a judgment in the total amount of $601,800 for checks signed by Mr. Logan and other payments authorized by Mr. Logan from NIS to GO Corp, CM Processing, Charles Hill, and MMA for services that were either not performed or produced no results and a

determination that the debt is nondischargeable under § 523(a)(6) due to willful and malicious injury. NIS failed to show the payments represented anything other than breach of contract and poor business judgment. Accordingly, NIS is not entitled to a judgment for damages or a determination of nondischargeability under § 523(a)(6).

Based on the forgoing, the Court will enter a separate judgment in favor of NIS and excepting $722,486.13 from Ronald Logan's discharge.

END OF ORDER

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