IT IS ORDERED as set forth below:

Date: July 1, 2015

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 and NANCY JACK LOGAN, Defendants.	ADVERSARY PROCEEDING NO. 13-5092-BEM

O R D E R

This matter comes before the Court on Defendant Nancy Logan's Motion for Judgment on the Pleadings [Doc. no. 39], Plaintiffs' Response [Doc. no. 44], and Ms. Logan's

Reply [Doc. no. 48]. Plaintiffs' complaint (the "Complaint") alleges Ms. Logan's debts to Plaintiffs are nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), (a)(4), and (a)(6) [Doc. no. 1]. Ms. Logan contends the Complaint fails to state a claim upon which relief may be granted. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

I. FACTUAL ALLEGATIONS

The Complaint contains the following allegations: Defendant Ronald Logan formed Plaintiff National Identity Solutions, LLC ("NIS") on or about August 21, 2008. (Doc. No. 1 ¶ 7). At the time of its formation, Mr. Logan was the sole member and manager of NIS. *Id.* ¶ 9. As the manager of NIS, Mr. Logan owed fiduciary duties of good faith and loyalty to NIS and its members. *Id.* ¶ 10. On September 19, 2011, Plaintiff Heather Mercer entered into an agreement to purchase Class C shares in NIS (the "Purchase Agreement"). *Id.* ¶ 18. In reasonable reliance on the representations made in the Purchase Agreement and accompanying disclosures, Ms. Mercer purchased 10% of the Class C shares for $3 million. *Id.* ¶ 20. Also on September 19, 2011, NIS's operating agreement was amended. *Id.* ¶ 64. The amended operating agreement only permits a member or manager to transact business with NIS on terms no less favorable than would be obtainable from an unaffiliated third person. *Id.* ¶ 66. It also provides that transactions with NIS in which a member or manager has a direct or indirect interest are voidable if the transaction is not fair to NIS or to the disinterested members. *Id.* ¶ 67. The amended operating agreement prohibits certain transactions without the majority vote of the Class C interests, including transactions with affiliates or family members of a member or manager of NIS if not consummated on market-based terms. *Id.* ¶ 70. Immediately after Ms. Mercer made her capital contribution to NIS, Mr. Logan with the assistance of Ms. Logan, misappropriated, embezzled,

took, spent and dissipated the funds for their own benefit and not for the benefit of NIS or its members. *Id.* ¶ 73.

In the Purchase Agreement, Mr. Logan, as manager of NIS, represented that NIS did not have any liabilities, indebtedness, or obligations other than those disclosed in the Purchase Agreement and those occurring in the ordinary course of business that would be required to be disclosed on a balance sheet prepared in accordance with generally accepted accounting principles. *Id.* ¶ 22. The Purchase Agreement does not identify any liabilities or obligations of NIS to National ID Recovery, LLC ("NIDR"). *Id.* ¶¶ 23, 33. Mr. Logan owns 52% of membership interests of NIDR and is its manager; Ms. Logan is the chief operating officer of NIDR. *Id.* ¶ 24-26. The Purchase Agreement lists a Master Services Agreement between NIS and NIDR, which obligates NIDR to provide services to customers of NIS to be paid by NIS. *Id.* ¶¶ 35-36.

However, the Purchase Agreement does not list as a material contract the NIDR and NIS Shared Services Agreement, signed by Mr. Logan as CEO of NIS and Ms. Logan as COO of NIDR. *Id.* ¶ 54. The Shared Services Agreement provides for NIDR and NIS to pay their proportionate rate of use of rent, utilities, IT staff, and customer call center. *Id.* ¶ 55. The Purchase Agreement does not identify any amounts owed by NIDR to NIS as an asset or any amounts owed by NIS to NIDR as a liability. *Id.* ¶¶ 56-57. As of September 19, 2011, NIS had paid $255,297.49 in rent, but NIDR had not paid its portion of rent and utilities. *Id.* ¶¶ 58-59. Mr. Logan caused NIS to pay rent and utilities of $589,718.78 without any contribution from NIDR. *Id.* ¶ 80. After September 19, 2011 and without any meeting of managers, members, or the majority vote of Class C interests (Ms. Mercer), Mr. Logan caused NIS to pay NIDR at least $317,000 allegedly pursuant to the Shared Services Agreement without any accounting or

allocation of expenses and without any deduction or offset for amounts paid by NIS for NIDR's benefit. *Id.* ¶ 81. Also after September 19, 2011, and without any meeting of managers, members, or the majority vote of the Class C interests, Mr. Logan caused NIS to pay the salaries and expenses, including moving expenses, of NIDR employees without reimbursement from NIDR. *Id.* ¶ 88. Each payment from NIS to NIDR was in a round number: $60,000 on September 27, 2011; $125,000 on October 28, 2011; $25,000 on November 29, 2011; $28,000 on December 14, 2011; $1,500 on December 21, 2011; $43,000 on December 29, 2011; and $35,000 on February 2, 2012. *Id.* ¶ 82.

Mr. Logan paid NIDR $250,000 for "Purchase of DATA Breach & Kaizen IP" by check dated September 20, 2011. He did so without any meeting of managers, members or the majority vote of the Class C interests. *Id.* ¶ 76. The purchase was not commercially reasonable and directly and indirectly benefitted Mr. Logan and Ms. Logan. *Id.* ¶ 77. The purchase was not a fair transaction to NIS and was not approved by a vote of the managers, members or majority of the Class C interests. *Id.* ¶ 78. Neither Data Breach nor Kaizen is worth $250,000 independently or collectively, and no independent third party would have paid $250,000 for either or both of Data Breach or Kaizen. *Id.* ¶ 79. Mr. Logan on behalf of NIS and Ms. Logan on behalf of NIDR executed a purchase agreement allegedly dated October 20, 2011 for NIDR's purported sale of Data Breach, but not including Kaizen, to NIS for $250,000 (the "Software Agreement"). The Software Agreement does not reflect that NIS had already paid NIDR $250,000 on September 20, 2011 for Data Breach and Kaizen. *Id.* ¶ 100.

None of the transactions between NIS and NIDR were on market terms or on terms no less favorable than would be obtainable from an unaffiliated third person. *Id.* ¶ 101. None of the transactions between NIS and NIDR were fair to NIS or approved by a vote of the

managers, members, or majority vote of the Class C interests. *Id.* ¶ 102. All transactions between NIS and NIDR were for the benefit of NIDR and Mr. and Ms. Logan and were to the detriment of NIS. *Id.* at ¶ 103.

Ms. Logan caused willful and/or malicious injury to NIS by acting wrongfully and without just cause and with a conscious disregard for her duties. *Id.* ¶ 112. Mr. Logan also caused willful and/or malicious injury to NIS; he misappropriated funds of NIS for his own benefit; he acted with fraudulent intent or deceit in the use of NIS funds for the benefit of himself, Ms. Logan, and NIDR; and he fraudulently and wrongfully took and carried away the property of NIS with the intent to convert such property to his own use and with the intent to permanently deprive NIS of its property. *Id.* ¶¶ 111, 113-115. Ms. Logan knew of Mr. Logan's misconduct and participated in the wrongful use and enjoyment of the property of NIS. *Id.* ¶ 116.

II. LEGAL STANDARD

A motion for judgment on the pleadings is governed by Federal Rule of Civil Procedure 12(c), made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b). The Court may grant judgment on the pleadings when "there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Cannon v. City of W. Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001); *Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1335 (11th Cir. 2014). A motion for judgment on the pleadings "is governed by the same standards as a motion to dismiss for failure to state a claim …." *Adams v. City of Indianapolis*, 742 F.3d 720, 727-28. (7th Cir. 2014).

Under Federal Rule of Civil Procedure 8(a)(2) and Federal Rule of Bankruptcy Procedure 7008, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" To survive a motion for judgment on the pleadings by a

defendant, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' … A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 566 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (citations omitted). Although the complaint "does not need detailed factual allegations" to survive a motion for judgment on the pleadings, it "requires more than labels and conclusions[;] a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Id.*, 127 S. Ct. at 1965.

When, as in this case, the complaint includes claims for fraud, Federal Rule of Civil Procedure 9(b) and Federal Rule of Bankruptcy Procedure 7009 require the complaint to "state with particularity the circumstances constituting fraud …. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Specifically, Federal Rule of Civil Procedure 9(b) requires that a plaintiff allege: (1) the precise statements, documents, or misrepresentations made; (2) the time, place and person responsible for the statement; (3) the content and manner in which the statements mislead plaintiffs; and (4) what the defendants gained by the alleged fraud. *American Dental Assoc. v. Cigna Corp.,* 605 F.3d 1283, 1291 (11th Cir. 2010). Plaintiffs may plead circumstantial evidence from which the court may infer intent. *Old Republic Nat'l Title Ins. Co. v. Presley (In re Presley),* 490 B.R. 633, 638 (Bankr. N.D. Ga. 2013) (Diehl, J.) (citing, *In re OYZ Options, Inc.*, 154 F.3d 1262, 1271 (11th Cir. 1998).

In reviewing a motion for judgment on the pleadings, the Court "accept[s] as true all material facts alleged in the non-moving party's pleading, and … view[s] those facts in the light most favorable to the non-moving party." *Perez*, 774 F.3d at 1335; *see also Cline v.*

Tolliver, 434 Fed. Appx. 823, 825 (11th Cir. 2011) (citing *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678, 129 S. Ct. at 1949. Similarly, the Court need not accept as true a legal conclusion "couched as a factual allegation." *Id.* "If a comparison of the averments in the competing pleadings reveals a material dispute of fact, judgment on the pleadings must be denied." *Perez*, 774 F.3d at 1335.

Ms. Logan attached to her reply brief a copy of the Software Agreement for the Data Breach software and a copy of the $250,000 check signed by Mr. Logan in connection with the purchase of the Data Breach software. [Doc. no. 48, Ex. A, B.] On a motion for judgment on the pleadings, if the Court considers matters outside the pleadings, the motion must be converted to a motion for summary judgment. FED. R. CIV. P. 12(d); FED. R. BANKR. P. 7012(b). However, the Eleventh Circuit has stated that "on a motion for judgment on the pleadings, documents that are not a part of the pleadings may be considered, as long as they are central to the claim at issue and their authenticity is undisputed." *Perez*, 774 F.3d at 1340 n.12 (citing *Horsely v. Feldt*, 304 F.3d 1125, 1134-35 (11th Cir. 2002)); *see also Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993). As the Third Circuit explained, failing to consider such documents would enable a plaintiff "with a legally deficient claim [to] survive a motion to dismiss simply by failing to attach a dispositive document on which it relied." 998 F.2d at 1196 (citing *Cortec Indus., Inc. v. Sum Holding, L.P.*, 949 F.2d 42, 48 (2d Cir. 1991)). When the complaint relies on the document in question, "the plaintiff obviously is on notice of the contents of the document, and the need for a chance to refute evidence is greatly diminished." *Id.* at 1196-97. Because the Data Breach transaction is central to all Plaintiffs' claims against Ms. Logan and because the check and Software Agreement are expressly referenced in the Complaint, the Court

will consider the two documents without converting Ms. Logan's motion to one for summary judgment.

III. LEGAL ANALYSIS

A. Count Five: Section 523(a)(2)(A)

Count Five of the complaint alleges Ms. Logan directly and indirectly obtained money by false pretenses, false representations and/or actual fraud. (Doc No. 1 ¶ 131). Under 11 U.S.C. § 523(a)(2)(A) a debt is nondischargeable if it is a debt "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[.]" To establish a claim under § 523(a)(2)(A), Plaintiffs must allege: "(1) the debtor made a false representation to deceive the creditor, (2) the creditor relied on the misrepresentation, (3) the reliance was justified, and (4) the creditor sustained a loss as a result of the misrepresentation." *SEC v. Bilzerian* (*In re Bilzerian*), 153 F.3d 1278, 1281 (11th Cir. 1998).

Ms. Logan contends Plaintiffs failed to allege she made any statement to Plaintiffs and failed to allege Plaintiffs justifiably relied on any such statement. Plaintiffs contend an actual statement is unnecessary; the false representation can come in the form of an implied misrepresentation or conduct intended to create a false impression. In so arguing, they rely on the allegations regarding the transactions and agreements between NIS and Ms. Logan on behalf of NDIR as its COO to assert their claim under § 523(a)(2)(A).

Plaintiffs specifically point to the allegations regarding the purchase of Data Breach and Kaizen software without the consent of the members or managers of NIS. On September 20, 2011, Mr. Logan, on behalf of NIS, wrote a check in the amount of $250,000 to NIDR. On the memo line, he wrote: "Purchase of DATA Breach & Kaizen IP." (Doc. No. 48,

Ex. A.) Then, on October 20, 2011, Ms. Logan on behalf of NIDR and Mr. Logan on behalf of NIS executed the Software Agreement. The Software Agreement provided for the sale of the Data Breach program by NIDR to NIS for $250,000 "with optional access to [NIDR's] proprietary Kaizen Software …." for an additional per-use fee. (Doc. No. 48, Ex. B, p.1). The Software Agreement did not mention the September 20, 2011 check. Plaintiffs further allege that the transaction was not commercially reasonable because Data Breach and Kaizen were not worth $250,000, either individually or collectively.

Plaintiffs contend that these allegations show Ms. Logan knowingly accepted payment for a sale that had already occurred without disclosing same to Plaintiffs and that Plaintiffs justifiably relied on the fact that the October 20, 2011 Software Agreement represented the first and only payment for Data Breach.

The allegations show that Mr. Logan wrote a check to NIDR on behalf of NIS for $250,000 for the purchase of Data Breach and Kaizen on September 20, 2011. They also show that Ms. Logan executed the Software Agreement for the sale of Data Breach in the amount of $250,000 with optional access to Kaizen on October 20, 2011. These allegations alone do not show or allow the Court to reasonably infer that Ms. Logan made any misstatement of fact upon which Plaintiffs relied, especially with respect to the amount of payment NIDR received for the sale of Data Breach. Plaintiffs have not alleged when the September 20, 2011 check was delivered to NIDR or when it was negotiated. They have not alleged that any other payment was made or received pursuant to the Software Agreement. Their allegation that the $250,000 price was commercially unreasonable is a conclusion without factual allegations to support the same.

With respect to the other transactions between NIDR and NIS, the allegations show that the two entities had a cost sharing agreement and that between September 27, 2011

and February 2, 2012 NIS paid $317,500, in several round figure amounts, to NIDR under the agreement with no accounting and that the amount was not disclosed as a liability on NIS's balance sheet. Plaintiffs have not alleged that Ms. Logan was involved in this transaction on behalf of NIDR or that she had any involvement in preparing the NIS balance sheet. Therefore, Plaintiffs have not alleged any action by Ms. Logan that constitutes fraud or creates the reasonable inference of fraud. It would appear that Plaintiffs want the Court to infer knowledge and actions based solely on Ms. Logan's status as COO of NIDR. However, Mr. Logan was the majority owner and manager of NIDR and there are no allegations that Ms. Logan received the funds on behalf of NIDR. Other than signing two agreements, there are no other allegations regarding the extent of Ms. Logan's involvement in running NIDR. Consequently, the Court cannot reasonably draw the inference that payment, without more, constitutes a misrepresentation by Ms. Logan of the amount NIDR was owed under the cost sharing agreement. Similarly, with respect to the allegation that Mr. Logan caused NIS to pay employees of NIDR without reimbursement, there are no allegations that Ms. Logan had knowledge of this transaction or was involved with the same. Plaintiffs also appear to want the Court to infer Ms. Logan played some role in preparing the NIS balance sheet. However, the allegations in the Complaint are insufficient to allow such an inference to be drawn.

Finally, the Complaint alleges Plaintiff Heather Mercer relied on the representations in the Purchase Agreement, which included the balance sheet and a list of material contracts, when she agreed to purchase Class C shares in NIS. However, the Complaint does not allege that Ms. Logan was a party to the Purchase Agreement or that she was involved in its preparation or that any of the representations in the Purchase Agreement were made by Ms.

Logan to Ms. Mercer with the intent to deceive Ms. Mercer. Further, the Complaint fails to identify any misrepresentations made by Ms. Logan to NIS upon which NIS relied.

Because the Complaint does not contain facts sufficient to allege any statement or action by Ms. Logan that constitutes a false representation intended to deceive Plaintiffs, the Court concludes Plaintiffs have failed to state a claim under § 523(a)(2)(A). As a result, Ms. Logan is entitled to judgment on the pleadings as to Count Five of the Complaint.

B. Count Six: Section 523(a)(2)(B).

Count Six of the Complaint alleges Ms. Logan directly and indirectly obtained money by use of a statement in writing that was materially false, respecting the debtor's or an insider's financial condition on which Plaintiffs relied and that Ms. Logan caused to be made or published with an intent to deceive. (Doc. No. 1 ¶ 134). To establish a claim under § 523(a)(2)(B), Plaintiffs must show the debt "was obtained by a writing: (1) that is materially false; (2) respecting the debtor's or an insider's financial condition; (3) on which the creditor to whom the debt is liable for such money, property, services, or credit reasonably relied; and (4) that the debtor caused to be made or published with the intent to deceive." *Equitable Bank v. Miller* (*In re Miller*), 39 F.3d 301, 304 (11th Cir. 1994).

Ms. Logan contends the Complaint fails to allege facts as to any of the elements of § 523(a)(2)(B). Plaintiffs contend the allegations in the Complaint are sufficient for the Court to infer that the Software Agreement falsely represented that it evidenced the first and only payment for Data Breach and that it was on commercially reasonable terms.

As noted above, with respect to the Software Agreement, the Complaint alleges Mr. Logan wrote a check to NIDR on behalf of NIS for $250,000 on September 20, 2011, that Ms. Logan executed a purchase agreement for Data Breach for $250,000 on October 20, 2011,

and that the purchase price was commercially unreasonable. The Complaint fails to allege that the Software Agreement contains any information other than a promise by NIS to purchase the Data Breach product for $250,000. The Court notes that ¶ 4.3 of the Software Agreement provides: "Buyer currently has available, and at the time payable to Seller pursuant to the terms of this Agreement, Buyer will have available, sufficient cash to enable it to perform its obligations under this Agreement." (Doc. No. 48, Ex. B at p.5). Based on the foregoing allegations, the Software Agreement does not include a statement "respecting the debtor's or an insider's financial." First, the Software Agreement makes no representations regarding Ms. Logan's financial condition; therefore, Plaintiffs must allege that it does so for an insider of Ms. Logan. The only parties to the agreement are NIS and NIDR. When the debtor is an individual, an insider is defined as a relative of the debtor, a relative of a general partner of the debtor, a partnership in which the debtor is a general partner, a general partner of the debtor, and a corporation in which the debtor is a director, officer, or person in control. 11 U.S.C. § 101(31)(A). The Complaint alleges that Ms. Logan is an officer of NIDR; therefore NIDR is an insider of Ms. Logan. Thus, to the extent the Software Agreement purports to be a statement respecting the financial condition of NIDR as the seller of Data Breach, Plaintiffs have alleged the necessary relationship. However, the Plaintiffs have not identified and the Court has not located any language in the Software Agreement that relates to NIDR's financial condition. Further, the Complaint does not allege facts showing that NIS is an insider of Ms. Logan; it does not allege she has any ownership interest in NIS or that she is an officer or person in control of NIS. Therefore, to the extent the Software Agreement purports to be a statement respecting the financial condition of NIS, Plaintiffs have not alleged the necessary insider relationship to Ms. Logan.

As to the other elements of the claim, Plaintiffs have failed to allege that the Software Agreement contained a materially false representation. Plaintiffs argue in their response brief that they relied on the Software Agreement for the proposition that it represented the first and only payment for Data Breach and that it was not on commercially reasonable terms. These arguments fail under § 523(a)(2)(B) for the same reasons they failed under § 523(a)(2)(A): the Complaint does not allege that NIS paid more than the $250,000 specified in the Software Agreement, and the allegation of commercial unreasonableness is a conclusory statement that the Court need not accept as true.

Because the Complaint fails to allege a misrepresentation by Ms. Logan respecting her or an insider's financial condition, the Court concludes Plaintiffs have failed to state a claim under § 523(a)(2)(B). As a result, Ms. Logan is entitled to judgment on the pleadings as to Count Six of the Complaint.

C. Count Seven: Section 523(a)(6)

Plaintiffs allege that, by virtue of Ms. Logan's tortious and fraudulent conduct, Ms. Logan caused willful and malicious injury to Plaintiffs. (Complaint ¶ 137.) Under § 523(a)(6), a debt is excepted from discharge if it is a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity[.]" An injury is willful when the defendant "commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury." *Maxfield v. Jennings* (*In re Jennings*), 670 F.3d 1329, 1334 (11th Cir. 2012) (internal quotation marks and citations omitted); *see also Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S. Ct. 974, 977 (1998) (the debtor must intend the injury, not just the act that results in injury). An injury is malicious when it is "wrongful and without just cause or excessive even in the absence of personal hatred, spite or ill-will." *Hope v. Walker* (*In re*

Walker), 48 F.3d 1161, 1164 (11th Cir. 1995) (citations omitted). "Malice may be implied or constructive" and does not require specific intent to cause harm. *Id.*

Plaintiffs contend that any of the several transactions outlined in the Complaint involving NIDR and NIS state a claim for willful and malicious injury. But, Plaintiffs again focus specifically on the Software Agreement. In their response brief, Plaintiffs claim Ms. Logan "executed an Agreement accepting payment for DATA Breach after already having been paid via check by her husband, Mr. Logan, a month before for the same product AND 'Kaisen IP', which is not referenced as being purchased in the agreement." [Doc. no. 44, p.8]. As before, it seems Plaintiffs want the Court to infer that Ms. Logan received double payment on behalf of NIDR for the sale of Data Breach even though Plaintiffs have failed to allege any such double payment occurred. Such an inference is not reasonable. Plaintiffs also allege that the September 2011 check written by Mr. Logan references both Data Breach and Kaizen, while the Software Agreement only refers to Data Breach. However, this allegation mischaracterizes the Software Agreement, which provides for the sale of Data Breach with optional access to Kaizen. Thus, the notation on the check does not lead to a reasonable inference that Ms. Logan acted with intent to injure or with malice in executing the Software Agreement.

Plaintiffs also fail to allege willful and malicious injury as to the other transactions between NIDR and NIS, related to the cost-sharing agreement. As explained above, the Complaint alleges that NIDR and NIS agreed to share certain services and allocate the costs proportionately. The Complaint alleges further that NIS paid $317,500 to NIDR under the agreement without any accounting for the allocation or any offset for amounts NIDR owed to NIS. Plaintiffs did not allege any involvement by Ms. Logan in this transaction. Even if the Court were to infer such involvement, based on Ms. Logan's position with NIDR, Plaintiffs have

not alleged any facts to show that the omission was undertaken by Ms. Logan with an intent to injure Plaintiffs, although a failure to account for the allocation may be wrongful standing on its own.

Because Plaintiffs have not alleged any facts showing Ms. Logan knew or should have known her involvement with the Software Agreement and her involvement, if any, in the payments under the cost-sharing agreement would injure Plaintiffs, the Court concludes Plaintiffs have failed to state a claim under § 523(a)(6). As a result, Ms. Logan is entitled to judgment on the pleadings as to Count Seven of the Complaint.

D. Count Eight: Section 523(a)(4)

The Complaint alleges Ms. Logan assisted Mr. Logan in the appropriation of NIS' funds for her own benefit and that she acted with fraudulent intent and deceit. (Doc. No. 1 ¶ 140.) It further alleges that Ms. Logan assisted Mr. Logan in fraudulently and wrongfully taking and carrying away the property of NIS with the intent to convert it to her own use and benefit and with the intent to permanently deprive NIS of its property. *Id.* ¶ 141. Finally, the Complaint alleges Ms. Logan knew of Mr. Logan's misconduct and participated in the wrongful use or enjoyment of property of NIS. *Id.* ¶ 142.

Section 523(a)(4) excepts from discharge those debts for "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." To establish a claim for fiduciary fraud or defalcation, Plaintiffs must show: "(i) the debtor held a fiduciary position *vis a vis* the plaintiff under a technical, express or statutory trust; (ii) that the claim arose while the debtor was acting as a fiduciary; and (iii) that the claim is for fraud or defalcation." *Caitlin Energy, Inc. v. Rachel* (*In re Rachel*), 527 B.R. 529, 540 (Bankr. N.D. Ga. 2015) (Hagenau, J.) (emphasis in the original). To establish a claim for embezzlement, Plaintiffs must show improper

use of property of another that is lawfully in the debtor's possession. *See Old Republic Nat'l Title Ins. Co. v. Presley* (*In re Presley*), 490 B.R. 633, 639 (Bankr. N.D. Ga. 2013) (Diehl, J.) (quoting *Wilson Family Foods, Inc. v. Brown* (*In re Brown*), 457 B.R. 919, 926 (Bankr. M.D. Ga. 2011)). To establish a claim for larceny, Plaintiffs must show "a felonious taking of property with the intent to convert it or to permanently deprive the owner of it." *Bennett v. Wright* (*In re Wright*), 282 B.R. 510, 516 (Bankr. M.D. Ga. 2002); *see also Vu v. Ankoanda* (*In re Ankoanda*), 495 B.R. 599, 605 (Bankr. N.D. Ga. 2013) (Diehl, J.).

Ms. Logan contends Plaintiffs have failed to allege any fiduciary capacity on her part for purposes of fiduciary fraud or defalcation. As to embezzlement and larceny, Ms. Logan contends Plaintiffs have failed to allege she was in possession of Plaintiffs' property. Plaintiffs contend that to state a claim against Ms. Logan under § 524(a)(4) it need only show that Ms. Logan spent funds for her own benefit that she knew her husband took either through fiduciary fraud, embezzlement, or larceny.

With respect to fraud or defalcation while acting in a fiduciary capacity, Plaintiffs have failed to allege Ms. Logan was a fiduciary of either NIS or Ms. Mercer. They did allege Mr. Logan owed fiduciary duties of good faith and loyalty to NIS and its members based on his position as manager. (Doc. No. 1 ¶ 10.) Even if the Court were to somehow impute Mr. Logan's status to Ms. Logan, the fiduciary duties alleged in the Complaint are not the type required by § 523(a)(4). For purposes of § 523(a)(4), fiduciary capacity is narrowly construed, limited to technical or express trusts created prior to the actions giving rise to the debt. *Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir. 1993). As a result, state law definitions of fiduciary capacity, which often encompass broad concepts of loyalty, good faith, and fair dealing, fail to satisfy § 523(a)(4). *Tarpon Point, LLC v. Wheelus* (*In re Wheelus*), No. 07-30114, Adv. No. 07-3022,

2008 Bankr. LEXIS 348, at *6 (Bankr. M.D. Ga. Feb. 11, 2008) (citing *Hosey v. Hosey* (*In re Hosey*), 355 B.R. 311, 322 (Bankr. N.D. Ala. 2006)). "A technical trust requires property entrusted to the debtor." *Id.* (citing *Fowler Bros. v. Young* (*In re Young*), 91 F.3d 1367, 1371 (10th Cir. 1996)). And the contract or statute creating the trust "must impose trust-like duties, such as segregation of the res." *Id.* (citing *Angelle v. Reed* (*In re Angelle*), 610 F.2d 1335, 1340 (5th Cir. 1980)). *See also Parker v. Ferland* (*In re Ferland*), No. 09-52455, Adv. No. 09-5101, 2010 Bankr. LEXIS 1892, at *7 (Bankr. M.D. Ga. June 21, 2010); *Marbella, LLC v. Cuenant* (*In re Cuenant*), 339 B.R. 262, 274 (Bankr. M.D. Fla. 2006) (fiduciary capacity requires: "(1) a segregated trust res; (2) an identifiable beneficiary; and (3) affirmative trust duties established by contract or by statute.") An ordinary business relationship is insufficient to show fiduciary capacity. *Ferland*, 2010 Bankr. LEXIS 1892, at *7 (citing *Wheelus*, 2008 Bankr. LEXIS 348, at *6); *see also, Pollitt v. McClelland*, No. 90-61832, Adv. No. 09-9030; 2011 Bankr. LEXIS 2224 at *48-50 (Bankr. N.D. Ga. June 8, 2011) (Hagenau, J.).

The fiduciary status alleged by Plaintiffs is based on Mr. Logan's position as manager and member of a limited liability company. Under Georgia law governing limited liability companies, "[a] member or manager shall act in a manner he or she believes in good faith to be in the best interests of the limited liability company and with the care an ordinarily prudent person in a like position would exercise under similar circumstances." O.C.G.A. § 14-11-305(1). The Georgia Court of Appeals has described these duties as fiduciary duties. *Internal Med. Alliance, LLC v. Budell*, 290 Ga. App. 231, 236-37, 659 S.E.2d 668, 673-74 (Ga. App. 2008); *see also* O.C.G.A. § 14-11-305(4). Nevertheless, they are not the type of trust-like duties necessary to meet the strict standard for fiduciary capacity under § 523(a)(4). *See Wheelus*, 2008 Bankr. LEXIS 348, at *6; *see also Millburn Partners, LLC v. Miles* (*In re Miles*), No. 09-92601,

Adv. No. 10-6229, 2011 Bankr. LEXIS 945, at *11 (Bankr. N.D. Ga. March 17, 2011) (Murphy, J.) ("Defendant's status as a corporate officer is alone insufficient to establish a fiduciary duty.")

The Complaint alleged that various provisions of the operating agreement for NIS require the members and managers to conduct any disinterested transactions on a commercially reasonable and fair basis. But, as with the limited liability statute, these allegations do not demonstrate the type of fiduciary capacity necessary to state a claim under § 523(a)(4).

With respect to embezzlement and larceny, Plaintiffs have failed to allege that Ms. Logan improperly used property of the Plaintiffs that was lawfully or unlawfully within her possession. Plaintiffs cite *Wilson Family Foods, Inc. v. Brown* (*In re Brown*), 457 B.R. 919 (Bankr. M.D. Ga. 2011), for the proposition that they merely need to show Ms. Logan spent funds for her or her husband's benefit that Mr. Logan possessed by reason of embezzlement or larceny, if Ms. Logan knew at the time that the funds rightly belonged to creditors. In *Brow*n the plaintiff's amended complaint alleged that Mr. Brown diverted corporate funds to his personal checking account held jointly with his wife. *Id.* at 923. It further alleged that Ms. Brown knew her husband was diverting the funds because they were living beyond their means. *Id.* The allegations in *Brown* go further than the allegations by Plaintiffs in that they allege the funds were moved to a personal account and that they were spent in a manner that allowed the Browns to live above their means, such that Ms. Brown must have understood that the funds did not rightfully belong to her and her husband. In this case, Plaintiffs have merely alleged Ms. Logan spent their funds for her benefit. They have not alleged how she received the funds, how she spent the funds, or why she should know the funds rightfully belonged to Plaintiffs.

Because the Complaint fails to allege any facts showing a fiduciary relationship owed to Plaintiffs and fails to allege facts showing that Ms. Logan knowingly spent property of

Plaintiffs for her own benefit, Ms. Logan is entitled to judgment on the pleadings as to Count Eight of the Complaint.

IV. CONCLUSION

With respect to the claims against Ms. Logan, Plaintiffs' Complaint primarily relies on conclusory statements that do little more than recite the elements of the causes of action, offering few underlying facts to support the conclusions or to allow the Court to reasonably infer such conclusions. Because the Complaint fails to state a claim upon which relief may be granted as to Ms. Logan, the Court will grant Ms. Logan's motion for judgment on the pleadings. The Court will enter a separate judgment on even date herewith.

END OF ORDER

Distribution List

Steven M. Kushner
Fellows LaBriola LLP
2300 South Tower
225 Peachtree Street NE
Atlanta, GA 30303-1731

Byron Crane Starcher
Nelson Mullins Riley & Scarborough, LLP
Suite 1700
201 17th Street, N.W.
Atlanta, GA 30363

Ronald Glynn Logan
2203 Pond Road
Duluth, GA 30096

Nancy Jack Logan
2203 Pond Road
Duluth, GA 30096