IT IS ORDERED as set forth below:

Date: June 08, 2011

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	
	)	CASE NO. 09-61832
MICHAEL McCLELLAND and KAREN McCLELLAND,	)	CHAPTER 7
Debtors.	)	JUDGE WENDY L. HAGENAU
CINDY L. POLLITT,	)	
Plaintiff,	)	
v.	)	ADV. PROC. NO. 09-9030-WLH
KAREN McCLELLAND,	)	
Defendant.	)	

ORDER ON PLAINTIFF'S COMPLAINT REGARDING DISCHARGE OF DEBT

THIS MATTER was tried before the Court on Plaintiff's Complaint to Determine Dischargeability. Pursuant to the Pre-Trial Order, the Plaintiff's grounds for dischargeability were limited to 11 U.S.C. § 523(a)(2)(A), 11 U.S.C. § 523(a)(2)(B), and 11 U.S.C. § 523(a)(4).

Ms. Pollitt was represented by Jason White and Mrs. McClelland acted *pro se*. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I), and the Court has jurisdiction over it pursuant to 28 U.S.C. § 157 and 28 U.S.C. § 1334. The Court has considered the evidence presented and the pleadings of record, and the following constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

The Debtor Karen McClelland ("Mrs. McClelland") and the Plaintiff Cindy Pollitt ("Ms. Pollitt") are sisters who grew up together in Beaverton, Oregon. After schooling, Ms. Pollitt became an Alaska State Trooper and retired in 1997. Mrs. McClelland received her college degree in Information Systems and worked in various technology fields. In 1995, Mrs. McClelland formed McClelland Associates, Inc., an Oregon corporation through which she operated her own consulting firm. One consulting assignment placed her in Georgia to consult with a Georgia company on a merger integration project.

In approximately 1998, Mrs. McClelland decided to start a family business which she called McClelland Enterprise. That same year, Ms. Pollitt invested $25,000 in McClelland Enterprise, LLC and received stock certificates for a 17.5% membership interest in the LLC. Mrs. McClelland officially formed McClelland Enterprise, LLC as an Oregon corporation on March 31, 1999. There was no dispute that the purpose of Ms. Pollitt's money and McClelland Enterprise was to invest in a franchise of some sort. In September 2001, McClelland Enterprise returned $15,000 of Ms. Pollitt's investment to her per her request. In 2001 or 2002, Mrs. McClelland moved her family to Georgia, and she registered McClelland Enterprise to do business in Georgia in 2002. Ultimately, Mrs. McClelland decided to acquire a Godfather's Pizza franchise. In 2001 or 2002, as McClelland Enterprise was obtaining a loan for the opening

of the Godfather's Pizza restaurant, the bank requested financial information and potentially a guaranty from Ms. Pollitt as an investor in McClelland Enterprise. To shield herself from guaranteeing such a loan, on January 31, 2002, Ms. Pollitt transferred her remaining $10,000 interest in McClelland Enterprise to Michael McClelland, the Debtor's husband, for $100. Mrs. McClelland testified that Ms. Pollitt's interest in McClelland Enterprise had been reduced to zero at this time. McClelland Enterprise ultimately opened a Godfather's Pizza restaurant in 2003. Mrs. McClelland testified about the various challenges faced in opening and operating the restaurant, including various changes to the format dictated by the Godfather's franchisor. The Godfather's restaurant changed its name to Fathers da Joint at some point and then closed in 2006.

Throughout the period 2001-2005, the McClelland family and the Pollitt family remained close. There were visits between the relatives, and Mrs. McClelland helped raise two of Ms. Pollitt's children at various points in their lives. At least one of Ms. Pollitt's children worked in the Godfather's restaurant. Because Ms. Pollitt had visited Georgia a number of times, and at least one of Ms. Pollitt's children was living and working in Georgia, she had an interest in relocating to Georgia to be closer both to Mrs. McClelland and to her child who was living here.

As a result of the challenges in operating the restaurant, Mrs. McClelland decided that she would rather purchase a commercial building in which she could operate a sports bar restaurant. Mrs. McClelland initially contemplated this concept in 2003, but did very little work on it until 2005. In 2005, Mrs. McClelland began investigating potential sites for this commercial building investment. She was initially interested in the King's Crossing project, which was a strip shopping center with room for the sports bar and additional businesses. In October, 2005, Mrs. McClelland asked Ms. Pollitt for a $40,000 personal loan. Ms. Pollitt made

the loan on October 16, 2005, which is evidenced by a demand promissory note (Plaintiff's Ex. 808). The Note bears no interest. There were no restrictions on Mrs. McClelland's use of the money as it was a personal loan. Mrs. McClelland deposited the proceeds into her personal account.

In late November 2005 or early December 2005, Mrs. McClelland travelled to Oregon to visit her family and to meet with her financial advisors. While she was there, Mrs. McClelland learned of Ms. Pollitt's desire to open a candy shop. Ms. Pollitt took Mrs. McClelland to see an example of the franchise in which she was interested. Mrs. McClelland told Ms. Pollitt about her interest in purchasing a commercial building in which to operate a sports bar. Mrs. McClelland expressed an interest in having Ms. Pollitt locate her candy shop in the same building. As a result of these initial conversations in late November or early December 2005, Ms. Pollitt agreed to invest $100,000 in this venture to purchase a commercial building. Additionally, Mrs. McClelland agreed that the $10,000 which had been lost in McClelland Enterprise and the $40,000 which she owed Ms. Pollitt personally would be added to Ms. Pollitt's credit of investment in the commercial building venture.

Ms. Pollitt, however, did not have liquidity and needed to refinance her home in order to obtain the $100,000 to invest. Mrs. McClelland put Ms. Pollitt in contact with a mortgage broker who assisted Ms. Pollitt with her application for a home refinancing. In connection with the refinancing, Mrs. McClelland provided to the mortgage broker a stock certificate reflecting a $50,000 investment and 2% share in Reinventing Profits, LLC by Ms. Pollitt as of December 22, 2005. The refinancing was closed in December 2005, and Ms. Pollitt received over $135,000 from it. Ms. Pollitt retained $35,000 and obtained a cashier's check payable to "Reinventing Profits" for $100,000. This $100,000 check was deposited in the bank account for Reinventing

Profits, Inc. Ms. Pollitt received an additional 4% interest in Reinventing Profits, LLC with a stock certificate dated December 31, 2005.

Mrs. McClelland continued her due diligence on the commercial building. On February 24, 2006, a transfer in the amount of $50,000 was made from the Reinventing Profits, Inc. bank account to Gleichman & Debranski, LLC to be held in escrow for the purchase of the King's Crossing building. Mrs. McClelland testified she continued her due diligence on the building and ultimately felt uncomfortable with the asking price. Therefore, on March 31, 2006, the $50,000 escrow was returned to the Reinventing Profits, Inc. bank account. Mrs. McClelland testified that she continued due diligence on the following buildings throughout 2006 and 2007: King's Crossing, Mars Hill, Austell, SouthTrust, Wal-Mart/Sixes, and Village Trace.

In August 2006, Ms. Pollitt transferred $25,000 from her personal checking account to Mrs. McClelland's personal bank account. Ms. Pollitt testified that the $25,000 was given to Mrs. McClelland to hold so Mrs. McClelland could help Ms. Pollitt manage her money. Mrs. McClelland testified that the receipt of the $25,000 was "in the gray area" and she had no clear recollection of Ms. Pollitt's intent with regards to the proper treatment of those funds. However, Mrs. McClelland set up an account on her Quicken books for Cindy Pollitt – "retirement income management". This account begins in August 2006. The day after receipt of the funds, $23,000 was transferred from Mrs. McClelland's personal account to Reinventing Profits, Inc.'s bank account.

In late 2006, Mrs. McClelland presented to Ms. Pollitt a "partnership agreement" which was intended by Mrs. McClelland to represent the terms of Ms. Pollitt's $150,000 investment in Reinventing Profits, LLC. (Plaintiff's Exs. 800-803). Ms. Pollitt signed the agreement on December 30, 2006 and had her signature notarized. However, at some point, she decided the

agreement was not consistent with her understanding and crossed out her signature on the signed agreement. The signed "partnership agreement" was never returned to Mrs. McClelland.

In April 2007, Ms. Pollitt began asking for a return of various sums of money because she was in dire financial straits. Mrs. McClelland resisted repayment, taking the position that the investment in the commercial building venture was a long-term commitment of at least five years. She believes Ms. Pollitt knew this for, among other reasons, the time involved in getting the Godfather's restaurant opened was approximately five years and Ms. Pollitt had kept her investment in McClelland Enterprise for over three years. Nevertheless, by mid-2007, Ms. Pollitt retained legal counsel and the legal wrangling between the parties began. On April 18, 2008, Ms. Pollitt filed a state court action against Karen McClelland, Karen McClelland d/b/a RP Investments, Michael D. McClelland, Reinventing Profits, Inc., Reinventing Profits, LLC, and Father's Joint Enterprises, LLC.

As a result of the restaurant operations and its ultimate closure in 2006, Mrs. McClelland incurred business debts and was a defendant in a number of lawsuits. These debts, together with the lawsuit filed by Ms. Pollitt, led Mr. and Mrs. McClelland to file bankruptcy on January 26, 2009 ("Petition Date"). Ms. Pollitt began this adversary proceeding *pro se* in May 2009. After court-ordered mediation failed, Mr. White appeared to represent Ms. Pollitt. Mrs. McClelland represented herself throughout the litigation. After a number of discovery disputes, a three and one-half day trial was held and the Court took the matter under advisement.

Organizational Structure

Many of the issues raised at trial involved the confusing organizational structure within which Mrs. McClelland and her various business ventures operated. The following are the Court's findings with respect to the various business ventures.

1. **McClelland Enterprise LLC** was formed in Oregon in 1999 and later registered in Georgia to do business in 2002. On or about January 3, 2007, McClelland Enterprise LLC changed its name to Father's Joint Enterprise LLC. McClelland Enterprise LLC and Father's Joint Enterprise LLC operated the Godfather's Pizza franchise, which also later became known as Fathers da Joint.

2. **McClelland Associates, Inc.** was originally formed in Oregon in 1995. It registered to transact business in Georgia on December 3, 2002. McClelland Associates, Inc. did business as Reinventing Profits and ultimately changed its name to **Reinventing Profits, Inc.** on November 21, 2006. McClelland Associates, Inc. d/b/a Reinventing Profits a/k/a Reinventing Profits, Inc. was the corporate entity in which Mrs. McClelland conducted the following business:

(a) Consulting for third parties from 1995 through 2004;

(b) Providing back office services to McClelland Enterprise LLC/Father's Joint Enterprises LLC – Mrs. McClelland testified that she was not an employee of McClelland Enterprise LLC or Father's Joint Enterprises LLC or otherwise of the restaurant. All of her services for the restaurant were billed through Reinventing Profits, Inc. She testified that the billing included time she spent on contractors and vendors for the restaurant, and on financial and banking matters for the restaurant;

(c) Mr. and Mrs. McClelland owned a house (which they refer to as a cabin) in Union County, Georgia. The house was owned by Mr. and Mrs. McClelland individually. In 2004, the McClellands decided to rent the "cabin" and began incurring expenses to prepare the cabin for third-party rental. According to Mrs. McClelland, they received advice that, since third parties would be using the cabin, they should put the cabin in a corporate name to protect them

from liability. Thus, Mrs. McClelland began running all expenses of the cabin and all income of the cabin through Reinventing Profits, Inc. However, the title to the cabin was never transferred to Reinventing Profits, Inc. The cabin was identified in Mr. and Mrs. McClelland's bankruptcy schedules as property of the Debtors. Nevertheless, the Reinventing Profits, Inc. bank account and tax returns reflect income and expenses from managing the rental of the cabin; and

(d) Manager of Reinventing Profits, LLC – As described in further detail below, it is Mrs. McClelland's testimony that Reinventing Profits, Inc. was the manager for Reinventing Profits LLC and as such it incurred expenses on behalf of Reinventing Profits LLC and provided services to Reinventing Profits, LLC for which it was entitled to compensation.

Reinventing Profits, Inc.'s authority to transact business in Georgia was revoked on July 9, 2005. It was reinstated in January 2007. However, Plaintiff's Ex. 862 reflects the company remained a valid Oregon corporation until May 21, 2010, when it was administratively dissolved.

3. **Reinventing Profits, LLC** was formed in Georgia on April 25, 2003, for the purpose of acquiring a commercial building for the sports bar that Mrs. McClelland wanted to open. The only organizational documents in evidence regarding Reinventing Profits, LLC are the Secretary of State records regarding its incorporation, including the Articles of Organization (Plaintiff's Exs. 869, 871 and 872), and the "partnership agreement" which Ms. Pollitt signed and then crossed out (Plaintiff's Exs. 800-803). According to Mrs. McClelland and Plaintiff's Exs. 801 and 872, Mrs. McClelland is the managing member of the LLC and Reinventing Profits, Inc. is the manager which was entitled to a fee for services performed as manager. At some point, Reinventing Profits LLC became known as RP Investments, supposedly to alleviate confusion between Reinventing Profits, Inc. and Reinventing Profits, LLC.

4. In approximately 2006, Mrs. McClelland formed the company **Epochal Investments LLC** that was also intended to be part of the commercial enterprise. Mrs. McClelland views expenses incurred by Epochal to be part of the overall expense of the commercial building enterprise and therefore of Reinventing Profits, LLC.

5. Other LLCs are mentioned in various correspondence, but are not relevant to the matters at hand.

Additional facts will be discussed below as each of the causes of action are analyzed and determined.

CONCLUSIONS OF LAW

I. Personal Liability

Because the state court litigation was pending at the time of the bankruptcy filing, the initial dispute between the parties relates to Mrs. McClelland's personal liability to Ms. Pollitt; i.e., whether Mrs. McClelland owes a debt to Ms. Pollitt. Only after it is determined that Mrs. McClelland owes a debt to Ms. Pollitt can the issue of the dischargeability of that debt be analyzed under Section 523. The Court will review the possible causes of action for personal liability of Mrs. McClelland as to each of the transfers alleged by the Plaintiff.

A. $40,000 Transfer in August 2005.

In August 2005, Ms. Pollitt loaned Mrs. McClelland $40,000 for which Mrs. McClelland executed a personal demand note. Therefore, to the extent this $40,000 has not been repaid, Mrs. McClelland is personally liable for the note, notwithstanding the supposed "credit" of this loan as an investment in Reinventing Profits, LLC. The note calls for no interest and contains no provision for the payment of attorneys' fees, so the maximum amount of liability with respect to the note is $40,000. Payments on the note will be discussed below.

B. $10,000 Transfer from 2001

In 1998, Ms. Pollitt invested $25,000 in McClelland Enterprise and received stock certificates for her membership interest in the LLC. It is undisputed that $15,000 of the original $25,000 investment in McClelland Enterprise was returned by McClelland Enterprise to Ms. Pollitt in September 2001. It is also undisputed that the balance was not returned to Ms. Pollitt. There was no evidence presented that Mrs. McClelland at any time assumed an obligation to return the $10,000 on behalf of McClelland Enterprise, nor was there any evidence from which the Court could conclude that Mrs. McClelland was responsible for any obligation McClelland Enterprise may have had to return the $10,000. Nevertheless, in 2005, Mrs. McClelland agreed to give Ms. Pollitt a $10,000 credit in Reinventing Profits, LLC. This credit, however, was not a cash contribution, and no cash was ever transferred to Reinventing Profits LLC or any other company reflecting this interest. There was no evidence that Mrs. McClelland guaranteed the repayment of this $10,000 or undertook a personal obligation to repay the $10,000. At most, the evidence established that Ms. Pollitt had a $10,000 credit for an investment in Reinventing Profits, LLC. As such, the Court finds that Mrs. McClelland is not personally liable for the $10,000 transfer.

C. $25,000 Transfer in August 2006.

In August 2006, Ms. Pollitt transferred $25,000 to Mrs. McClelland personally. The Court finds this money was transferred by Ms. Pollitt to Mrs. McClelland with the expectation that the money would be used for Ms. Pollitt's personal expenses with any balance to be returned to her. Mrs. McClelland called this transfer "in the gray area" and did not dispute Ms. Pollitt's testimony. Moreover, Mrs. McClelland's actions are consistent with Ms. Pollitt's testimony. Mrs. McClelland established a Quicken account for managing Ms. Pollitt's retirement funds and

many payments were made to Ms. Pollitt or on her behalf consistent with this position. There was no evidence that Ms. Pollitt in any way intended this $25,000 to be invested in any business.

Under Georgia law, a party receiving money justly belonging to another who refuses to return it upon demand can be liable for "money had and received". The elements of the action are (1) a person has received money of the other that in equity and good conscience he should not be permitted to keep; (2) demand for repayment has been made; and (3) the demand was refused. Taylor v. PowerTel, Inc., 250 Ga. App. 356, 359 (2001). The evidence shows that Ms. Pollitt sent the $25,000 to Mrs. McClelland to manage for Ms. Pollitt's benefit. The evidence also shows that Ms. Pollitt made a demand for a return of the money. As such, the Court finds that Mrs. McClelland is personally liable to Ms. Pollitt for the $25,000 to the extent the same was not repaid. The allocation of re-payments is discussed below.

D. $100,000 Transfer in December 2005.

It is Ms. Pollitt's position that Mrs. McClelland is personally liable for the repayment of the $100,000 investment for the commercial building on one of several theories:

(i) Mrs. McClelland committed fraud when she induced Ms. Pollitt to transfer the $100,000 to Reinventing Profits;

(ii) No partnership or LLC ever existed and therefore the money was effectively given to Mrs. McClelland individually;

(iii) Mrs. McClelland breached her fiduciary duty to Ms. Pollitt;

(iv) Mrs. McClelland converted Mrs. Pollitt's funds, making her personally liable for its return;

(v) Reinventing Profits LLC and/or Reinventing Profits, Inc. are liable to Ms. Pollitt for the $100,000 "investment" and, by piercing the corporate veil of each of the companies, Mrs. McClelland is personally liable as well.

The Court will address each of the theories of recovery below.

1. Fraud

To prove fraud under Georgia law, the plaintiff must show that there was a false representation made with knowledge of its falsity, and with intent to deceive, and on which the plaintiff reasonably relied to her damage. Lester v. Bird, 200 Ga. App. 335, 338 (1991). Ms. Pollitt identified several representations she believed to be false.

First, Mrs. McClelland represented to Ms. Pollitt at the time the money was transferred in December 2005 that the money would be used for the purchase of a commercial building. The Court finds this representation to be true and finds that Mrs. McClelland intended to use the money for the purchase of a commercial building at the time the representation was made. The evidence shows without dispute that Mrs. McClelland was deep into due diligence on the King's Crossing project. The evidence shows further that, approximately two months after the money was received, a $50,000 payment was made into escrow for the potential purchase of that building. Moreover, throughout 2006, due diligence continued as to a variety of projects. This representation was not fraudulent.

Second, Ms. Pollitt alleges that Mrs. McClelland told her money was needed to close on a building by January 31, 2006. Mrs. McClelland disputes this statement. There is no corroborating evidence that the statement was made to Ms. Pollitt. Moreover, Ms. Pollitt testified she was aware throughout 2006 that a building had not been acquired yet she made no objection. Thus, the Court finds that Ms. Pollitt has not carried her burden of establishing that

such a representation was made. Moreover, the Court concludes, after reviewing all the evidence and observing the witnesses, that Ms. Pollitt did not understand the difference between the need for money to hold a building for potential purchase and the actual closing and acquisition of the building. However, this misunderstanding does not constitute fraud.

Next, Ms. Pollitt contends that Mrs. McClelland told her she was one of many partners. Ms. Pollitt contends the receipt of stock certificates showing a 6% interest in Reinventing Profits, LLC is further evidence of Mrs. McClelland's representation that Ms. Pollitt was a small player in a larger deal. However, Mrs. McClelland adequately explained the reason for the smaller partnership interest, given her expectation that other partners would be joining. The Court finds believable the testimony as to the other partners with whom Mrs. McClelland was negotiating. The Court concludes that, at the time of the transfer, both parties intended for Ms. Pollitt to be a small part of the transaction. Therefore, the Court concludes the statements made to Ms. Pollitt were not false and further concludes the statements were not made with any intent to deceive Ms. Pollitt. The Court concludes both parties intended to purchase a building in which the candy store and the sports bar would be located. Therefore, Ms. Pollitt's fraud claim fails.

2. Existence of an LLC

Ms. Pollitt contends there was not a valid partnership or limited liability company formed because she did not return the "partnership agreement" submitted to her by Mrs. McClelland in late 2006. However, the Court finds otherwise. The evidence shows that Reinventing Profits, LLC was a valid Georgia limited liability company in December 2005 when the money was transferred to "Reinventing Profits". The LLC was formed in 2003 in Georgia and was authorized to transact business at the time. The Articles of Organization filed with the Secretary

of State reflect the existence of the limited liability company and that Mrs. McClelland was a managing member thereof.

Under O.C.G.A.§ 14-11-505, as it existed in 2005, a person becomes a member of a limited liability company on the later to occur of: (1) the formation of the limited liability company; or (2) at the time provided in and upon compliance with the Articles of Organization and any written operating agreement; or if the Articles of Organization or a written operating agreement do not so provide, upon the consent of all members and when the person's admission is reflected in the records of the limited liability company. The Articles of Organization introduced into evidence contain no provisions regarding the admission of members. Moreover, it is undisputed that there was not a written operating agreement in 2005 when the transfer was made. However, it is undisputed in the evidence that the other members of the LLC (being Mr. and Mrs. McClelland in 2005) consented to Ms. Pollitt's membership in the limited liability company. Moreover, Ms. Pollitt's interest in the limited liability company was reflected in its records via the issuance of the stock certificates dated September 2, 2005 and December 31, 2005 (KAM Exs. 38 and 53) and also reflected in the stock transfer ledger (Plaintiff's Ex. 779). Therefore, the Court finds that a valid limited liability company existed and that Ms. Pollitt became a member of the limited liability company when she made her $100,000 transfer to "Reinventing Profits".

3. *Breach of Fiduciary Duty*

Ms. Pollitt contends next that Mrs. McClelland is liable for the $100,000 investment because she breached her fiduciary duty to Ms. Pollitt. The duties of members and managers of a limited liability company are set out in O.C.G.A. § 14-11-305. The 2005 version provided as follows:

> In managing the business or affairs of a limited liability company:
>
> (1) 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. A member or manager is not liable to the limited liability company, its members or its managers for any action taken in managing the business or affairs of the limited liability company if he or she performs the duties of his or her office in compliance with this Code section. …

As discussed further below, it is entirely likely that Mrs. McClelland did not act in the best interests of Reinventing Profits, LLC or with the care of an ordinarily prudent person in her position as managing member of the LLC. Nevertheless, the cause of action for breach of duties to the limited liability company typically lies with the limited liability company itself.

A member of a limited liability company is only authorized to pursue a cause of action against a manager breaching its duties either derivatively on behalf of the corporation or directly if the plaintiff shows some special injury separate and apart from all other shareholders. See Stoker v. Bellemeade, LLC, 272 Ga. App. 817, 822 (2005) rev'd on other grounds; Phoenix Airline Services v. Metro Airlines, Inc., 260 Ga. 584, 585 (1990). A third exception for allowing a direct action has been created under Georgia law with respect to closely-held corporations. See Rosenfeld v. Rosenfeld, 286 Ga. App. 61, 65 (2007); Southwest Health & Wellness, LLC v. Work, 282 Ga. App. 619, 626 (2006); Thomas v. Dickson, 250 Ga. 772, 774 (1983). The courts have articulated four reasons for requiring a member of an LLC or a shareholder to use the derivative process: (1) to prevent multiple suits by shareholders; (2) to protect corporate creditors by insuring that the recovery goes to the corporation; (3) to protect the interests of all of the shareholders by insuring that the recovery goes to the corporation rather than allowing recovery by one or a few shareholders to the prejudice of others; and (4) to adequately

compensate injured shareholders by increasing their share values. Id. If none of these reasons are applicable, the injured shareholder may proceed directly. Id. at 775.

Ms. Pollitt has not established any of the bases that would allow her to proceed directly against Mrs. McClelland for any violation of Mrs. McClelland's duties to the limited liability company. First, Ms. Pollitt did not plead a shareholder derivative action. She did not present any evidence of compliance with O.C.G.A. § 14-11-801, the provision of the Georgia Code which allows an individual member of an LLC to proceed derivatively on behalf of the corporation. Secondly, Ms. Pollitt neither pled nor proved any special injury which would provide an exception for requiring her to proceed derivatively on behalf of the corporation. Ms. Pollitt's injury is to her investment in the LLC and is shared by other members. Finally, the Court finds that the requirements for proceeding directly in the case of a closely-held corporation are not satisfied here. In the cases where courts apply the closely-held corporation exception, the parties to the lawsuit are typically all of the shareholders or all of the members of the limited liability company. As noted by the Court of Appeals in Southwest Health & Wellness LLC v. Work, where not all of the shareholders or members are party to the litigation, there is a risk of multiple suits by shareholders. Work, 282 Ga. App. at 626-27. In that case, the court declined to allow the member to pursue the officer directly. Moreover, it is important to the Court that neither Reinventing Profits, Inc. nor Reinventing Profits, LLC are parties to this litigation. The Court has before it no evidence or information as to any creditors of either of those entities that may need protection. Lastly, Mrs. McClelland took the position in her testimony that the "commercial partnership" continues in its efforts to locate a commercial building which may yet produce value for the shareholders. For all these reasons, the Court finds it inappropriate to

allow Ms. Pollitt to proceed directly against Mrs. McClelland for breach of duties under O.C.G.A. § 14-11-305.

4. Conversion

"Conversion consists of an unauthorized assumption and exercise of the right of ownership over personal property belonging to another, in hostility to his rights; an act of dominion over the personal property of another inconsistent with his rights; or an unauthorized appropriation … Any distinct act of dominion wrongfully asserted over another's property in denial of his right, or inconsistent with it, is a conversion." Decatur Auto Center v. Wachovia Bank, N.A., 276 Ga. 817, 819 (2003). While courts have been careful that a simple breach of contract claim not turn into a conversion claim, conversion is an appropriate cause of action where a sum of money entrusted to someone for a particular purpose is misapplied. See GLW Int'l Corp. v. Yao, 243 Ga. App. 38, 42 (2000).

Reinventing Profits, Inc. was the manager of Reinventing Profits, LLC.[1] As the manager, Reinventing Profits, Inc. was responsible for spending the money of Reinventing Profits, LLC only for the business of Reinventing Profits, LLC. Mrs. McClelland was the president of Reinventing Profits, Inc. and signed all of the checks for it. While ordinarily being an officer or agent or manager of a corporation does not render one personally liable for a tort committed by the corporation, directors, officers and managers can be individually liable to third parties for participating in or assenting to torts committed by them or their corporation. This liability arises from the tortious conduct of the individual and does not rely upon piercing the corporate veil.

[1] Ms. Pollitt argued that Reinventing Profits, Inc. was dissolved or not authorized to transact business at times from December 2005 to the Petition Date. However, the evidence before the Court showed that McClelland Associates, Inc., which changed its name to Reinventing Profits, Inc., was a valid Oregon corporation from June 11, 1998, when it was reinstated, until May 2010, when it was dissolved. Its authorization to transact business in Georgia was revoked on July 9, 2005, and it was reinstated in Georgia on January 17, 2007. However, a failure of a foreign limited liability company to register to do business in Georgia does not impair the validity of contracts. O.C.G.A. § 14-11-711.

See Beasley v. A Better Gas Co., Inc., 269 Ga. App. 426, 429 (2004); Ford Motor Credit Co. v. Owens, 807 F.2d 1556, 1559 (11th Cir. 1987); see also Murray v. Woodman (In re Woodman), 2011 WL 1100264 (Bankr. D. Idaho 2011). To the extent Mrs. McClelland caused Reinventing Profits, Inc. to spend the funds of Reinventing Profits, LLC for items other than the commercial building investment, she converted the funds of Reinventing Profits, LLC.

a. Reasonable Expenses

Determining the expenses properly chargeable to Reinventing Profits, LLC is complicated because Reinventing Profits, Inc. used one bank account for all of its business (cabin, restaurant and commercial building). A review of the bank account for Reinventing Profits, Inc. reflects numerous checks for cabin expenses, numerous checks to Mrs. McClelland, and multiple checks for personal expenses, like car payments, nail salons and the like. Mrs. McClelland testified that she did not take a salary from Reinventing Profits, Inc., so she viewed the personal checks and payment of personal expenses as distributions from the company. Mrs. McClelland, however, testified she kept separate books of account for each business and for her distributions.

The Court has reviewed the evidence regarding the expenses charged against the investments of Ms. Pollitt and the others in Reinventing Profits, LLC. The evidence includes (i) the testimony of Ms. McClelland, (ii) reports from her Quicken books (KAM Ex. 80, Plaintiff's Exs. 774 and 775), (iii) a cash in/cash out summary of the "commercial partnership" (KAM Ex. 62 and Plaintiff's Ex. 768), (iv) a summary of expenses which Mrs. McClelland prepared (KAM Ex. 31), and (v) actual invoices from Reinventing Profits, Inc. and certain third-party vendors. (Plaintiff's Exs. 691, 692, 693, 694, 695, 741, 742, 747, 749, 750, 753, 754, 757, 758, 759, 761, 762, 763, 764, 765). The Court concludes that only reasonable expenses incurred

through April 30, 2007 should be charged against Reinventing Profits, LLC. By April 30, 2007, Ms. Pollitt had made it clear she wanted her money back and disputed Mrs. McClelland's charges to the LLC. (See KAM Ex. 42). Further, Ms. Pollitt hired counsel in May 2007. Mrs. McClelland's own timeline (KAM Ex. 149) reflects that, in May 2007, Ms. Pollitt stated her intent to sue and filed a fraud claim with state agencies. The timeline states that "the partnership" hired counsel. The Court concludes it was not reasonable for Reinventing Profits, LLC to continue incurring expenses after April 2007 in light of these developments.

The Court concludes it is fair to charge Reinventing Profits, LLC for actual legal fees, accounting fees, architecture fees and other third-party fees incurred in connection with the due diligence for the acquisition of the commercial building, even though the building ultimately was not acquired. These fees were paid by Reinventing Profits, Inc. and billed by Reinventing Profits, Inc. to Reinventing Profits, LLC. The Court will analyze each category of expenses below.

Accounting Fees. Reinventing Profits, Inc. billed Reinventing Profits, LLC $3,000.00 for accounting fees. (Plaintiff's Ex. 749). The $3,000.00 in accounting fees is indicated on Mrs. McClelland's spreadsheet, KAM Ex. 31. The Court has also located canceled checks to the accountant to support that sum. The parties did not introduce copies of the accountant's bills. Nevertheless, the Court concludes that $3,000.00 for accounting charges through 2006 is appropriate. According to KAM Ex. 31, there were no other accounting fees charged to Reinventing Profits, LLC.

Architecture Fees. Reinventing Profits, Inc. billed to Reinventing Profits, LLC $9,704.00 in architecture fees. Included in the evidence are Plaintiff's Exs. 741 and 742, which are invoices from MOMA Architecture. The two invoices total $10,645.00. However, the canceled

checks reflect only $9,704.00 was paid MOMA. All of the architecture expenses were incurred during 2006, and the Court views the $9,704.00 as reasonable to be charged against the commercial partnership.

Legal Fees. According to KAM Ex. 62, Reinventing Profits, Inc. charged Reinventing Profits, LLC $8,613.00 for legal expenses through April 30, 2007. Plaintiff's Ex. 775, however, reflects legal expenses for the commercial venture for the period November 1, 2005 through March 14, 2007 to be $8,078.50. Only $88.00 is recorded in Plaintiff's Ex. 775 after that time. The Court views legal expenses of $8,078.50 to be properly chargeable to the commercial partnership.

Therefore, the Court concludes the following third-party expenses are properly chargeable to the commercial venture:

Legal fees	$ 8,078.50
Architecture fees	$ 9,704.00
Accounting fees	$ 3,000.00
Total	$20,782.50

By far the greatest expense charged to Reinventing Profits, LLC was Mrs. McClelland's time for due diligence which she billed through Reinventing Profits, Inc. When a person begins an initial venture, there are different ways in which the startup expenses can be handled. A new venture can simply keep track of an investor's time, classify the individual's time investment in the venture as "sweat equity" and justify a larger percentage share of the venture for that individual rather than solely on the basis of the amount of cash he/she might have actually invested. Alternatively, the person beginning the venture can keep track of, account for, and bill his/her time as an expense to the venture, which the venture would then amortize over the life of the asset. To the extent these expenses, though, are paid (which they must be in order to be

expenses), they cannot then be used as the sweat equity of the member or partner. Here, Mrs. McClelland appears to be trying to do both. On one hand, she bills through Reinventing Profits, Inc. for her time for due diligence work, and on the other hand, she increases her percentage share in the LLC for uncompensated time. Her testimony indicates the latter was because she billed at a lower rate ($100 per hour vs. normal rate of $300). Ms. Pollitt, on the other hand, testified she was not aware that any expenses would be charged by Mrs. McClelland or even that there would be expenses of an architect, legal fees or accounting fees. After reviewing all of the testimony and all of the exhibits, the Court concludes it is fair to allow Mrs. McClelland, through Reinventing Profits, Inc. to bill a reasonable amount of time for her efforts in connection with the due diligence in locating the building, but, as discussed below, does not credit Mrs. McClelland's share of the business with any sweat equity.

For the reasons discussed above, the Court will only consider invoices through April 2007. The Court considered the following invoices:

Exhibit	Date	Amount
Exhibit 747	01/16/2006	$ 20,800.00
Exhibit 749	07/31/2006	$ 18,800.00
Exhibit 750	12/29/2006	$ 14,600.00
Exhibit 753	03/30/2007	$ 8,600.00
Exhibit 754	04/30/2007	$ 7,400.00

While Plaintiff's Ex. 747 does not state the time period for which the invoice is issued, Mrs. McClelland testified the first invoice (Plaintiff's Ex. 747) included all of her time "up to that date". She further testified she began her work on the commercial venture in July 2005. Therefore, the Court concludes Plaintiff's Ex. 747 is for the period July 2005 through January 16, 2006. As to all subsequent invoices, the Court concludes the invoice is for the period beginning with the prior invoice date and ending with the date of the invoice under consideration. When the invoices are reviewed in this light, it appears that Mrs. McClelland

billed 208 hours in the first invoice period, which is an average of 34 hours a month; 188 hours in the second billing period, averaging 30 hours a month; 146 hours in the next billing period, averaging 25 hours a month; 86 hours in the next billing period, averaging 27 hours a month; and 74 hours in the last one-month period, for 74 hours a month, or an average of 19 hours per week. The Court generally views these invoices as reasonable and generally views $100/hour as a reasonable rate for Mrs. McClelland. The Court concludes the proper amount of Mrs. McClelland's time to charge to the commercial venture from July 2005 through April 30, 2007, is $70,200.00. Adding this to the allowed third-party expenses provides total expenses of the commercial building partnership through April 30, 2007 of $90,982.50.

b. Allocation of Investment

Next, the Court must determine the percentage ownership of Ms. Pollitt in Reinventing Profits, LLC so as to determine her portion of the expenses. There was conflicting evidence as to the percentage ownership of the various parties in the LLC. Initially, Ms. Pollitt received LLC certificates of 6%. The "partnership agreement" which was presented to Ms. Pollitt in late 2006 suggested she would have a 15% interest. However, the Court concludes, after reviewing all the evidence, that the actual percentage ownership should be based on the actual cash invested in the business as opposed to what Mrs. McClelland assumed would be invested by others. Since Mrs. McClelland is being allowed reasonable expenses for her time, the Court does not assign an ownership interest to Mrs. McClelland for "sweat equity" as any such amount is speculative based on the evidence. The evidence showed that Bob Tessina invested $47,000 in Reinventing Profits, LLC on May 16, 2006, and Mr. and Mrs. McClelland invested $140,000 in January 2007. The lower percentage ownership interest initially assigned to Ms. Pollitt is because Mrs. McClelland anticipated other investors coming into the LLC. Since they did not, as of the

Petition Date, the actual amount of Ms. Pollitt's investment in the company was $100,000 as compared to Mr. and Mrs. McClelland's $140,000 and Mr. Tessina's $47,000. Based on this total investment of $287,000.00, Ms. Pollitt's share of the LLC actually was 34.8%.

c. Misappropriation

Ms. Pollitt's share of the partnership expenses, based upon her percentage ownership of the LLC, is $31,661.91. Subtracting this amount from her $100,000 cash investment means that Ms. Pollitt should have had, as of April 30, 2007, a remaining investment in Reinventing Profits, LLC of $68,338.09. By no later than May 3, 2007, Ms. Pollitt made an unconditional demand for a return of her money. (KAM Ex. 42, p. 7051). With the exception of potential repayments discussed below, the funds were not returned to Ms. Pollitt.

The next question, though, is whether Ms. Pollitt was entitled to a return of her funds from Reinventing Profits, LLC. Mrs. McClelland testified that, in the original discussion with Ms. Pollitt regarding the $100,000 investment, she told Ms. Pollitt the investment would be a long-term investment. Ms. Pollitt, however, did not recall such a discussion. There was no evidence of a writing contemporaneous with the 2005 investment as to the length of time the investment was to be committed. Subsequently, in late 2006, Mrs. McClelland delivered to Ms. Pollitt a "partnership agreement" which provided in paragraph 10 that withdrawals could only be made from the partnership for the first five years for tax purposes. On December 1, 2006, Mrs. McClelland sent a letter to Countrywide Home Loans, Inc. in support of Ms. Pollitt's attempt to obtain an additional refinancing on her home, confirming that Ms. Pollitt held an investment of $150,000 in Reinventing Profits, LLC. (Plaintiff's Ex. 816.) The letter states as follows: "Our agreement in the event of her request for liquidity would be the selling of her stock in increments of $20,000 a year with reduced performance earnings. In the event of a family emergency, it

could be 30% with no earnings on her investment." Although the evidence is conflicting, the Court finds the letter of December 1, 2006 most probative since it is signed by Mrs. McClelland and is delivered to a third-party with the intent to have the third-party rely upon the letter in providing a loan to Ms. Pollitt. Based upon this letter, the Court concludes that Ms. Pollitt could have received her money back by the time Mrs. McClelland filed bankruptcy in January 2009. Under the terms of the December 1, 2006 letter, Ms. Pollitt could have received back as much as $30,000 a year on her $100,000 investment (or $45,000 a year on her $150,000 investment). By 2007, when Ms. Pollitt demanded the return of her money, she could have received $60,000, with the balance having been paid to her in 2008.

It is undisputed that, with the possible exception of payments discussed below, the funds delivered for investment in Reinventing Profits, LLC were not returned to Ms. Pollitt. In fact, Reinventing Profits, Inc. had a negative $2,766.00 in the bank as of February 1, 2009, immediately after the Petition Date. The evidence before the Court shows undisputedly that the funds in the Reinventing Profits, Inc. account were spent on other Reinventing Profits, Inc. businesses, such as the cabin (where expenses exceeded income), reimbursing Mrs. McClelland for time spent on the restaurant back-office work, payments for cars, and payments for other personal expenses. Ms. Pollitt's funds were therefore spent on expenses that were not authorized by Ms. Pollitt and Ms. Pollitt's funds were converted. There is no doubt that the acts of Reinventing Profits, Inc. were directed by Mrs. McClelland. Mrs. McClelland signed all of the checks which were used to pay other expenses of Reinventing Profits, Inc. as well as her personal expenses and those of her family. She not only assented to the tort of conversion but directed that conversion. As such, she is personally liable for the conversion of Ms. Pollitt's funds in the amount of $68,338.09.

5. Piercing the Corporate Veil

Because the Court has found Mrs. McClelland personally liable for the balance of the $100,000 investment, the Court need not reach the issue of whether the corporate veil of Reinventing Profits, LLC or Reinventing Profits, Inc. should be pierced.

E. Allocation of Repayments

Both parties agreed that Ms. Pollitt received repayment of some of her money, but the exact amount was in dispute, as well as the transaction to which the repayments should be credited. Mrs. McClelland testified she repaid to Ms. Pollitt $40,786.92 as evidenced by KAM Ex. 48. Ms. Pollitt testified she received around $40,000 from Mrs. McClelland in the form of cash or payment on her mortgage and other bills. Virtually all of the payments came from the Reinventing Profits, Inc. bank account.

Mrs. McClelland introduced KAM Ex. 48 and argued that all the payments should be credited against the $40,000 personal note. At the same time, she created a Quicken report, introduced as Plaintiff's Ex. 772, reflecting many of those same payments to Ms. Pollitt, only indicating they were for return of the retirement income, which the Court understands to be the $25,000 transferred from Ms. Pollitt to Mrs. McClelland in August 2006. Also in evidence is an e-mail from Mrs. McClelland to Ms. Pollitt at KAM Ex. 41, pg. 784, which indicates certain payments that have been made and credited to reduce the investment fund balance in Reinventing Profits, LLC from $150,000 to $92,500.00. After reviewing this conflicting evidence, the Court finds the payments indicated on Plaintiff's Ex. 772 as return of retirement income should all be credited to the $25,000 transferred from Ms. Pollitt to Mrs. McClelland. Additionally, the payments outlined in KAM Ex. 41 for the March and April house payments and the Visa payment, which are also reflected on KAM Ex. 48, are consistent with the purpose

of the transfer of the $25,000, i.e., to protect Ms. Pollitt's money and to help her manage it for her own personal expenses.

The full amount of the $25,000 retirement management fund was, therefore, returned to Ms. Pollitt. The balance of the $40,786.92 paid to Ms. Pollitt per KAM Ex. 48, or $15,786.92, should be credited to the $40,000 personal note, leaving a balance due on the note of $24,213.08. The Court concludes the repayments were not used to reduce the $100,000 cash investment in Reinventing Profits, LLC. The expenses identified in the e-mail, KAM Ex. 41, are either invalid charges or are included in the allocation of expenses or payments already considered by the Court. For example, Mrs. McClelland testified she created "frustration invoices" after Ms. Pollitt began seeking a return of her money. These invoices were for charges and expenses incurred in family matters or were otherwise baseless, such as the $25,000 penalty for early withdrawal. Thus, the court does not credit any of the payments on KAM Ex. 48 to the investment in Reinventing Profits, LLC.

F. <u>Summary of Amounts Due under State Law</u>

To summarize, the Court finds Mrs. McClelland personally liable for the following:

$24,213.08 due under the $40,000 personal note; and
$68,338.09 for return of Ms. Pollitt's $100,000 investment.

The Court concludes no interest or attorneys' fees are due the Plaintiff. The $40,000 note does not provide for interest and does not contain a provision for the payment of attorneys' fees. Pursuant to Plaintiff's Ex. 816, the only basis on which Ms. Pollitt could have received a refund of her investment at 30% per year excluded earnings on Ms. Pollitt's investment. Moreover, the only basis on which the Plaintiff alleges entitlement to attorneys' fees for failure to return the investment is O.C.G.A. § 13-6-11. This section provides that expenses of litigation are not

allowed as part of damages unless the party has acted in bad faith, been stubbornly litigious or caused the plaintiff unnecessary trouble and expense. Even then, an award of fees is discretionary and not required. See In re Estate of Zeigler, 295 Ga. App. 156, 161 (2008). Given the complexity of the transactions and the Court's finding that Mrs. McClelland acted appropriately in many circumstances, the Court cannot find that Mrs. McClelland was stubbornly litigious or caused the plaintiff unnecessary trouble and expense. While Mrs. McClelland's actions could support a finding of bad faith under O.C.G.A. § 13-6-11, the Court declines to award attorneys' fees. The evidence showed that Ms. Pollitt also acted recalcitrantly and made excessive demands and that Mrs. McClelland made multiple efforts to settle the matter short of litigation. The Court believes the award in this case is sufficient under the circumstances. See King Construction, LLC et al. v. Spivey (In re Spivey), 2010 WL 3980132 (Bankr. E.D. Tenn. 2010).

II. Dischargeability

The Court has previously ruled that Mrs. McClelland is liable to Ms. Pollitt for $68,338.09 of her $100,000.00 investment in Reinventing Profits, LLC and for $24,213.08 remaining due and owing on the $40,000 note. The Court must next consider whether either debt is non-dischargeable. Exceptions to discharge are to be strictly construed, and the burden is on the creditor to prove the exception by a preponderance of evidence. Grogan v. Garner, 498 U.S. 279 (1991); Laurent v. Ambrose (In re St. Laurent), 991 F.2d 672, 677 (11th Cir. 1993).

A. Personal Note

Ms. Pollitt alleges that the balance due on the $40,000 note is non-dischargeable under 11 U.S.C. §§ 523(a)(2)(A) or (B) or 523(a)(4). However, the Court concludes that none of these provisions is applicable to this $24,213.08 balance. This balance is owed from a personal loan

made by Ms. Pollitt to Mrs. McClelland. The loan was not in any way incurred through fraud, false pretenses, false representation or the use of a statement in writing that is materially false. Ms. Pollitt knew that it was a personal loan and there were no restrictions on Mrs. McClelland's use thereof. Ms. Pollitt has only a breach of contract claim for the return of those funds, and that claim is fully dischargeable. Moreover, Section 523(a)(4) is inapplicable because the funds were a loan with no restrictions on use, so there could be no larceny, embezzlement or defalcation.

B. Investment

Next, Ms. Pollitt seeks to make the balance due on her $100,000 investment non-dischargeable under 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B) or (a)(4). Under Section 523(a)(2)(B), a debt is non-dischargeable in bankruptcy when it is for money 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.

The Court finds that Ms. Pollitt's attempt to hold the debt non-dischargeable under Section 523(a)(2)(B) fails because there was no writing provided by Mrs. McClelland at the time of the $100,000 investment in the "partnership". The writings which Ms. Pollitt contends were false were e-mails exchanged between the parties long after the transfer of the funds had occurred and the website of Reinventing Profits, Inc. To be non-dischargeable under Section 523, the debt must have been a result of the specific act complained of, in this case the false writing. Subsequent e-mails cannot be the basis for a finding of non-dischargeability under Section 523(a)(2)(B). The website of Reinventing Profits, Inc. does not support a finding of non-dischargeability either. The website of Reinventing Profits, Inc. is unrelated to the debt incurred. It contains no representations about Reinventing Profits, LLC or a commercial building. It is

undisputed that Ms. Pollitt's investment was made based on personal representations by Mrs. McClelland regarding the use of the funds and not on the website or the e-mails. Moreover, not just any writing would satisfy the requirements of Section 523(a)(2)(B). The writing must be regarding the debtor's or other insider's financial condition. In this case, there was no evidence that Mrs. McClelland submitted any writing to Ms. Pollitt regarding her financial condition, or the financial condition of any insider. The website contains no such information either. Consequently, the Court finds that Ms. Pollitt's attempt to make the debt non-dischargeable under Section 523(a)(2)(B) fails.

Under Section 523(a)(2)(A) of the Bankruptcy Code, a debt is non-dischargeable if it is "for money, property, services or an extension, renewal or refinancing of credit to the extent obtained by false pretenses, a false representation, or actual fraud other than a statement respecting the debtor's or an insider's financial condition." The Court has already found that the debt was not incurred as a result of fraud, false pretenses or a false representation. As discussed earlier, the Court concludes that the representations by Mrs. McClelland regarding her intent to use the money to buy a commercial building, to acquire the building promptly, and that Ms. Pollitt would have a minority share in the partnership were all true statements at the time they were made and that Mrs. McClelland did not intend to deceive Ms. Pollitt with these statements. Consequently, the attempt to make the debt non-dischargeable under 11 U.S.C. § 523(a)(2)(A) fails.

Lastly, the Plaintiff argues that the debt is non-dischargeable under 11 U.S.C. § 523(a)(4). This Section provides that a debt is non-dischargeable if it is "for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny". While fraud or

defalcation must occur in a fiduciary capacity, larceny or embezzlement need not occur in a fiduciary capacity to make a debt non-dischargeable.

The term "fiduciary" as used in 11 U.S.C. § 523(a)(4) does not have the same meaning as it does under state law. The meaning of the word "fiduciary" in this section "is a question of federal law," Smith v. Khalif (In re Khalif), 308 B.R. 614, 621-22 (Bankr. N.D. Ga. 2004), although state law can be consulted in ascertaining whether such a duty has been imposed. See Quaif v. Johnson, 4 F.3d 950 (11th Cir. 1993). A fiduciary relationship under Section 523(a)(4) is to be construed narrowly. Quaif, 4 F.3d at 953 (citing Davis v. Aetna Acceptance Co., 293 U.S. 328, 55 S.Ct. 151 (1934)). "Section 523(a)(4) requires that the debtor, acting as a fiduciary in accordance with an express or technical trust that existed prior to the wrongful act, committed an act of fraud or defalcation." In re Lemmons, 2005 WL 6487216 (Bankr. N.D. Ga. 2005) (citing Eavenson v. Ramey (In re Eavenson), 243 B.R. 160, 164 (N.D. Ga. 1999)). A technical trust has been defined by the Eleventh Circuit as "an express trust created by statute or contract that imposes trust-like duties on the defendant and that pre-exists the alleged defalcation," as opposed to constructive or resulting trusts. Ferland v. Ferland (In re Ferland), 2010 WL 2600588 (Bankr. M.D. Ga. 2010) (citing Quaif, 4 F.3d at 953-54); see also Guerra v. Fernandez-Rocha (In re Fernandez-Rocha), 451 F.3d 813, 816 (11th Cir. 2006). "Mere friendship does not meet this standard, nor does an ordinary business relationship." In re Ferland, 2010 WL 2600588 (Bankr. M.D. Ga. 2010) (citing Tarpon Point, LLC v. Wheelus (In re Wheelus), 2008 WL 372470 (Bankr. M.D. Ga. 2008)). Thus, a plaintiff must show that (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.

A number of bankruptcy courts in Georgia have considered whether an officer or director of a Georgia corporation or a manager of a Georgia LLC or a partner in a partnership are fiduciaries under Section 523(a)(4). The near-unanimous result is that they are not. See Tarpon Point, LLC v. Wheelus (In re Wheelus), 2008 WL 372470 (Bankr. M.D. Ga. 2008) (concluding a manager of limited liability company is not a fiduciary under Section 523(a)(4)); Davis v. Conner (In re Conner), 2010 WL 1709168 (Bankr. M.D. Ga. 2010) (concluding a general partner is not a fiduciary); Milburn Partners, LLC v. Miles (In re Miles), 2011 WL 1124183 (Bankr. N.D. Ga. 2011) (concluding an officer and director is not a fiduciary); Blashke v. Standard (In re Standard), 123 B.R. 444 (Bankr. N.D. Ga. 1991) (concluding a partner is not a fiduciary); Omega Cotton Co., Inc. v Sutton (In re Sutton), 2008 WL 4527761 (Bankr. M.D. Ga. 2008) (concluding an officer and director is not a fiduciary). In each instance, the court begins with the language of the statute defining the duties of the manager, officer, or the like. As discussed above, O.C.G.A. § 14-11-305 requires a manager to 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." This Georgia statute does not impose a heightened duty on the manager and does not use the term "fiduciary" to describe the duties or in any way speak in terms of a trust. There are no additional "fiduciary" duties imposed on Mrs. McClelland by contract. Consequently, the Court joins those cited above in concluding that merely being a manager of an LLC, without more, does not create a fiduciary relationship for purposes of 11 U.S.C. § 523(a)(2)(A).

The last alleged basis for non-dischargeability is embezzlement or larceny. Larceny or embezzlement do not have to occur while the debtor is acting in a fiduciary capacity to provide a basis for non-dischargeability under 11 U.S.C. § 523(a)(4). Embezzlement is the fraudulent

appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come, while larceny is proven if the debtor has wrongfully and with fraudulent intent taken property from its owner. Bennett v. Wright (In re Wright), 282 B.R. 510, 516 (Bankr. M.D. Ga. 2002). The Court has concluded previously that Mrs. McClelland did not have a wrongful or fraudulent intent when the $100,000 was invested in the "partnership". Larceny, therefore, provides no basis for finding the debt non-dischargeable.

To establish embezzlement, then, the plaintiff must show (1) property owned by another which is rightfully in the possession of the debtor; (2) the debtor appropriates the property for personal use; (3) the appropriation occurred with fraudulent intent or by deceit. See Sandalon v. Cook (In re Cook), 141 B.R. 777, 780 (Bankr. M.D. Ga. 1992); KMK Factoring, LLC v. McKnew (In re McKnew), 270 B.R. 593, 631 (Bankr. E.D. Va. 2001); U-Save Auto Rental of America v. Mickens (In re Mickens), 312 B.R. 666, 680 (Bankr. N.D. Calif. 2004). The Court has previously found that the $100,000 investment in Reinventing Profits, LLC by Ms. Pollitt was lawfully entrusted to Reinventing Profits, LLC and to Mrs. McClelland as its managing member. The funds were entrusted to Mrs. McClelland and Reinventing Profits, LLC for the purpose of investing in a commercial office building. The Court has found above that a portion of the investment was in fact converted by Mrs. McClelland and used instead for other business ventures of Reinventing Profits, Inc. and for Mrs. McClelland and her family personally. The Court concluded that Mrs. McClelland misappropriated and converted the funds of Ms. Pollitt in the amount of $68,338.09.

The Court also concludes that the conversion of the funds was for the personal use of Mrs. McClelland. The evidence showed that funds from the Reinventing Profits, Inc. bank account were frequently paid directly to Mr. or Mrs. McClelland or transferred into their

personal account. Moreover, additional funds from the account were used to pay the expenses of the "cabin". Although Mrs. McClelland testified the cabin was owned by Reinventing Profits, Inc., she also testified that the title was never changed from the name of her and her husband. The cabin was identified as a personal asset in their bankruptcy case. Consequently, payments for the cabin were for Mrs. McClelland's benefit. Moreover, the dollars that were used from the Reinventing Profits, Inc. bank account to pay Mrs. McClelland for back-office work at the restaurant were also for her personal benefit. Not only did she frequently receive the money directly, but she and her family were the sole beneficiaries of McClelland Enterprise and the restaurant. Thus, the Court concludes that Ms. Pollitt has satisfied the requirement that the conversion be for Mrs. McClelland's personal use. See In re Woodman, 2011 WL 1100264 (Bankr. D. Idaho 2011) (concluding that, when debtor used funds invested in LLC to pay himself "compensation" and to make short-term "loans" to his other businesses, debtor misappropriated funds).

The final question for the Court then is whether the conversion was made with a fraudulent intent or under circumstances indicating fraud. "An intent to defraud is defined as 'an intention to deceive another person, and to induce such other person, in reliance upon such deception to assume, create, transfer, alter or terminate a right, obligation or power with reference to property.'" In re Cook, 141 B.R. at 781 (citations omitted). The Court is to take into consideration all the circumstances in order to make a determination of intent to defraud. Moreover, "[i]ntent is a state of mind which may be interpreted by the conduct of the person implicated." Id. at 783. Finally, a debtor's intent to repay the funds converted is not a defense to embezzlement. Id.

The Court concludes that Mrs. McClelland converted Ms. Pollitt's funds with fraudulent intent. As of April 30, 2007, the Court has found that $287,000 was invested in Reinventing Profits, LLC by Ms. Pollitt, the McClellands and Mr. Tessina. The Court has previously found that total expenses properly chargeable against Reinventing Profits, LLC as of April 30, 2007, was $90,982.50, thus leaving a book balance of $196,017.50 in "equity" as of April 30, 2007. The Court reviewed Mrs. McClelland's commercial partnership "cash in/cash out statement" (KAM Ex. 62). It appears from this statement that, as of April 30, 2007, even by Mrs. McClelland's own calculations, Reinventing Profits, LLC should have had over $170,000 remaining to its credit. Mrs. McClelland's KAM Ex. 62 reflects that her records only differed from the Court's calculation by $26,000 at this point in time. This tells the Court that, as of the date Ms. Pollitt made her demand for the return of her money, Reinventing Profits, LLC, even by Mrs. McClelland's own calculations, should have had the funds available to return Ms. Pollitt's money. According to the bank statements in evidence, however, Reinventing Profits, Inc. had $6,744.51 in its Bank of America account as of April 30, 2007 and had transferred $50,000 to a Wachovia money market account on March 27, 2007. The parties did not introduce the Wachovia statements into evidence. Even assuming the entire $50,000 remained at Wachovia, the money in Reinventing Profits, Inc. was woefully short of the $170,000 that should have been there for Reinventing Profits, LLC, according to Mrs. McClelland.

Despite the fact that, at the time Ms. Pollitt demanded a return of her money, Reinventing Profits, LLC should have been able to return the money, and had $57,000, it did not do so. Rather, Mrs. McClelland continued spending the remaining money for the due diligence on a commercial building venture, for the cabin and for herself personally, even though a shortfall of money and a dispute about the proper use of the money was apparent. Moreover, Mrs.

McClelland began to lie to Ms. Pollitt and to conceal the expenditures from Ms. Pollitt. Mrs. McClelland testified that, after the demand for the return of the money, she began to create invoices to show that Ms. Pollitt had little or no remaining investment in Reinventing Profits, LLC. She also sent various e-mails to Ms. Pollitt. These various invoices, charts and e-mails are conflicting as to the amount of the expenses actually charged to the investment. Mrs. McClelland created KAM Ex. 2 and KAM Ex. 31 which show ever increasing expenses charged to the partnership for the same projects. Mrs. McClelland testified that she created invoices, Plaintiff's Exs. 751 and 756 which she called "frustration invoices". According to her, these invoices were created in her frustration with Ms. Pollitt's demand for the return of her money. These invoices included charges that went back years, charges that had never been documented or had no basis, and charges that she never would have expected to recover. Further, Mrs. McClelland produced invoices for Reinventing Profits, Inc. for services allegedly provided to Reinventing Profits, LLC after Ms. Pollitt's demand for money, now billing Mrs. McClelland's services out at $200 - $300 per hour or more, rather than the $100 per hour which had previously been billed. (Plaintiff's Exs. 759, 761, 762, 763 and 764). Finally, the Court notes that KAM Ex. 70, p. 1026, which was prepared in 2008 to solicit additional investors or lending institutions for the purpose of acquiring a commercial building reflects the building will be owned by Epochal, rather than Reinventing Profits, LLC. Of course, Ms. Pollitt had no interest in Epochal. The name Reinventing Profits, LLC appears nowhere in KAM Ex. 70.

Concealment is frequently used by the courts as evidence of fraudulent intent. See In re Cook, 141 B.R. at 784 (stating debtor lied to plaintiff about the location of the property which was evidence of the debtor's fraudulent intent); In re McKnew, 270 B.R. at 633 (stating debtor concealed his removal of excessive compensation providing false and misleading financial

information to the other members of the LLC, which actions of concealment further buttressed the debtor's fraudulent intent); In re Spivey, 2010 WL 3980132 (Bankr. E.D. Tenn. 2010) (stating managing member's use of company funds for other projects and for personal use without authorization or knowledge of the plaintiffs, is embezzlement). In re Woodman, 2011 WL 1100264 (Bankr. D. Idaho 2011) (stating debtors falsely assured investors of return of funds after used for inappropriate purpose); see also In re Wright, 282 B.R.at 516-17 (distinguishing Cook because debtor in Wright case did not conceal or lie about the disposition of the property).

Here, Mrs. McClelland did everything she could to conceal the fact that the investment in Reinventing Profits, LLC had been largely spent and was continuing to be spent. The Court notes the volume of dollars spent by Reinventing Profits, Inc., particularly as compared to the income of Reinventing Profits, Inc. The only outside income which Reinventing Profits, Inc. received was from rental of the cabin. Otherwise, the other "income" of Reinventing Profits, Inc. was simply charges to Reinventing Profits, LLC or to McClelland Enterprise. According to the tax returns, Plaintiff's Ex. 146-215, the cabin rental for 2006 was only $18,475 and in fact Reinventing Profits, Inc. reported a net loss of $16,304 in connection with the operation of the cabin. Reinventing Profits, Inc. reported net losses from the cabin operation of $23,509 in 2007 and $15,845 in 2008 (Plaintiff's Ex. 1-145). At the same time, Mrs. McClelland was writing all of the checks from the Reinventing Profits, Inc. bank account. She had to know that the amount she was spending on the cabin, on the restaurant and for her personal use was in excess of what Reinventing Profits, Inc. was truly earning. Moreover, the Court believes that the actions of Mrs. McClelland after Ms. Pollitt made a demand for the return of her funds are not the actions of someone who thought she acted appropriately. Instead, all of the circumstances convince the

Court that the conversion of Ms. Pollitt's funds was with fraudulent intent. The Court therefore rules that the entire balance of $68,338.09 is non-dischargeable.

CONCLUSION

In summary, the Court concludes as follows:

1. Mrs. McClelland is personally liable to Ms. Pollitt for $24,213.08 remaining due and payable under the $40,000 personal note, but such debt is DISCHARGEABLE.

2. Mrs. McClelland is not liable to Ms. Pollitt for the $10,000 transfer remaining from 2001.

3. Mrs. McClelland is not liable to Ms. Pollitt for the $25,000 transfer in August 2006 as all of those funds have been repaid.

4. As to the $100,000 investment in 2005,

   a. Mrs. McClelland did not commit fraud.

   b. Reinventing Profits, LLC was a valid LLC and Ms. Pollitt was a member thereof.

   c. Ms. Pollitt does not having standing to state a claim against Mrs. McClelland for any breach of fiduciary duty.

   d. Mrs. McClelland converted Ms. Pollitt's funds in the amount of $68,338.09, for which she is personally liable to Ms. Pollitt, and such debt is NON-DISCHARGEABLE.

The Court will enter a judgment against Mrs. McClelland for this amount.

END OF ORDER

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