IT IS ORDERED as set forth below:

Date: May 20, 2013

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NO. 10-89519-WLH
TERALD L. MELTON,	:	CHAPTER 7
Debtor.	:	JUDGE WENDY L. HAGENAU
SMYRNA CHILDCARE CENTERS, LLC,	:	
Plaintiff,	:	
v.	:	ADVERSARY PROCEEDING NO. 10-6697
TERALD L. MELTON,	:	
Defendant.	:	

MEMORANDUM OPINION

This adversary proceeding comes before the Court on the complaint of Smyrna Childcare Centers, LLC ("SCC") against Terald L. Melton. Plaintiff seeks a judgment against Mr. Melton in the amount of $50,000 with interest, attorney's fees and punitive damages and a determination

that the claim is non-dischargeable under 11 U.S.C. § 523(a)(2)(A), (a)(4), and (a)(6). After trial held on February 19 and 20, 2013, at which both parties were represented by counsel, the Court determines SCC holds a claim against Mr. Melton in the amount of $50,000.00 plus interest, which is non-dischargeable. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and by reference under 28 U.S.C. § 157(a).

I. The Court's Authority to Enter a Final Judgment as to Both Amount and Dischargeability Post *Stern*.

Mr. Melton argued at the pre-trial conference that, in light of the Supreme Court decision of Stern v. Marshall, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), this Court lacks constitutional authority to enter a final judgment on the underlying claim of SCC.

Under 28 U.S.C. § 157(b)(1), bankruptcy judges may hear and enter final judgments in "all core proceedings arising under title 11 or arising in a case under title 11." 28 U.S.C. § 157(b)(1). Section 157(b)(2)(I) provides that "determinations as to the dischargeability of particular debts" are core proceedings. 28 U.S.C. § 157(b)(2)(I). The Debtor has not questioned the Court's constitutional authority to hear and make a final determination as to each of the elements of 11 U.S.C. §§ 523(a)(2)(A),(4), and (6). The Debtor questions whether Stern prohibits the Court from exercising authority to enter a final judgment as to the *amount* of the Plaintiff's claims in the bankruptcy case.

Since the issuance of the Stern opinion, courts have debated whether to read it narrowly and restrict its application to similar facts or to read it broadly to significantly limit the bankruptcy court's authority. This Court agrees with the courts which conclude the Supreme Court's holding was narrow: as an Article I court, a bankruptcy court "lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process

of ruling on a creditor's proof of claim" in a bankruptcy proceeding. Stern, 1315 S.Ct. at 2620. Stern did not question the Court's authority to determine the claim itself. Id. at 2616-17.

Since Stern was decided, multiple courts have addressed the extent of a Bankruptcy Court's constitutional authority to enter a final judgment on a non-dischargeability complaint. Not surprisingly, the opinions have varied.[1] Compare Pearson Educ., Inc. v. Almgren, 685 F.3d 691 (8th Cir. 2012) (authority when liquidation necessary part of claims allowance process); Deitz v. Ford (In re Deitz), 469 B.R. 11 (B.A.P. 9th Cir. 2012) (authority in light of binding pre-Stern Ninth Circuit precedent holding a bankruptcy court may liquidate claim in dischargeability

[1] See Ryckman v. Ryckman (In re Ryckman), 468 B.R. 754 (Bankr. W.D. Pa. 2012) (authority when plaintiffs consented to adjudication of all core and non-core matters required to make non-dischargeability determination); Williams v. Laughlin *(*In re Laughlin*)*, 2012 WL 1014754 (Bankr. S.D. Tex. 2012) (authority where discharge relief unique to Code or public rights exception applicable); Farooqi v. Carroll (In re Carroll), 464 B.R. 293 (Bankr. N.D. Tex. 2011) (authority in light of pre-Stern Fifth Circuit precedent and close integration between liquidation of state law claims and the Bankruptcy Code*);* Lawson v. Conley (In re Conley), 482 B.R. 191 (Bankr. S.D. Ohio 2012) (authority where pre-Stern Sixth Circuit precedent allowing liquidation and court unaware of post-Stern authority holding otherwise); Eaton v. Ford Motor Credit Co., LLC, 2012 WL 3579644 (M.D. Tenn. 2012) (authority since scope of debtor's discharge fundamental to bankruptcy process); Aumaugher v. Apostle (In re Apostle), 467 B.R. 433 (Bankr. W.D. Mich. 2012*)* (authority because Stern holding narrow); Dragisic v. Boricich (In re Boricich), 464 B.R. 335 (Bankr. N.D. Ill. 2011) (authority because no right to jury trial and liquidation necessary to resolve creditor's claim); Whited v. Galindo (In re Galindo), 467 B.R. 201 (Bankr. S.D. Cal. 2012) (authority based on pre-Stern Ninth Circuit precedent and consent of parties, but requesting treatment as report and recommendation upon disapproval by District Court); Gila Reg'l Med. Ctr. v. Lobera (In re Lobera), 2012 WL 3263730 (Bankr. D. N.M. 2012) (authority where debtor deemed to consent); Sheets v. Carter *(In re Carter)*, 2012 WL 3440431 (Bankr. M.D. Ga. 2012) (lack of authority where no effect on debtor's discharge or claims allowance process); Dulcetti v. Markwood Inv. Ltd. (In re Neves), 2012 WL 1831717 (S.D. Fla. 2012) (authority despite fact debtor waived discharge).See Ryckman v. Ryckman (In re Ryckman), 468 B.R. 754 (Bankr. W.D. Pa. 2012) (authority when plaintiffs consented to adjudication of all core and non-core matters required to make non-dischargeability determination); Williams v. Laughlin *(*In re Laughlin*)*, 2012 WL 1014754 (Bankr. S.D. Tex. 2012) (authority where discharge relief unique to Code or public rights exception applicable); Farooqi v. Carroll (In re Carroll), 464 B.R. 293 (Bankr. N.D. Tex. 2011) (authority in light of pre-Stern Fifth Circuit precedent and close integration between liquidation of state law claims and the Bankruptcy Code*);* Lawson v. Conley (In re Conley), 482 B.R. 191 (Bankr. S.D. Ohio 2012) (authority where pre-Stern Sixth Circuit precedent allowing liquidation and court unaware of post-Stern authority holding otherwise); Eaton v. Ford Motor Credit Co., LLC, 2012 WL 3579644 (M.D. Tenn. 2012) (authority since scope of debtor's discharge fundamental to bankruptcy process); Aumaugher v. Apostle (In re Apostle), 467 B.R. 433 (Bankr. W.D. Mich. 2012*)* (authority because Stern holding narrow); Dragisic v. Boricich (In re Boricich), 464 B.R. 335 (Bankr. N.D. Ill. 2011) (authority because no right to jury trial and liquidation necessary to resolve creditor's claim); Whited v. Galindo (In re Galindo), 467 B.R. 201 (Bankr. S.D. Cal. 2012) (authority based on pre-Stern Ninth Circuit precedent and consent of parties, but requesting treatment as report and recommendation upon disapproval by District Court); Gila Reg'l Med. Ctr. v. Lobera (In re Lobera), 2012 WL 3263730 (Bankr. D. N.M. 2012) (authority where debtor deemed to consent); Sheets v. Carter *(In re Carter)*, 2012 WL 3440431 (Bankr. M.D. Ga. 2012) (lack of authority where no effect on debtor's discharge or claims allowance process); Dulcetti v. Markwood Inv. Ltd. (In re Neves), 2012 WL 1831717 (S.D. Fla. 2012) (authority despite fact debtor waived discharge).

proceeding); with In re Aslansan, 2013 WL 1458855 (Bankr. E.D. Pa.) (court has authority to determine dischargeability of claim but no authority to issue judgment on claim).

This action is a dispute over the scope of the Debtor's discharge, a right established by the Bankruptcy Code. Section 727(b) discharges a debtor from "all debts that arose before the date of the order for relief" subject to the provisions of Section 523. Receiving a discharge is integral to the bankruptcy scheme, is unique to bankruptcy law, and is a core matter under 28 U.S.C. § 157(b)(2)(I). No court has held that the Bankruptcy Court has no constitutional authority to make final determinations of dischargeability. "When a bankruptcy court determines the extent of a creditor's non-dischargeable claim, the court simply decides that a particular creditor is entitled to something more than the creditor would otherwise get out of the bankruptcy bargain." In re Laughlin, 2012 WL 1014754, at *8 (Bankr. S.D. Tex. Mar. 23, 2012). But in order for this Court to decide whether Plaintiff's claims are non-dischargeable, the Court must first ascertain the claim. Plaintiff alleges the claim is non-dischargeable under Section 523(a)(2), (4) and/or (6). Each of the sections provides that a discharge under Section 727 does not discharge a debtor from "any debt for" …. Before the Court can determine if a debt is non-dischargeable, it must determine the debt because only then can it determine if it was "for" fraud, willful and malicious injury and the like. Dischargeability and validity and amount of the claim are intertwined. This case is also distinguishable from Stern because here it is the Debtor who invoked the bankruptcy court jurisdiction by filing the bankruptcy case who now objects to the entry of a final judgment. The creditor here has no objection to the Court entering a final judgment, while in Stern, it was the creditor who objected to jurisdiction. This posture makes a difference in the outcome because, in Stern, the creditor found itself involuntarily litigating certain issues in bankruptcy court, while here the Debtor chose this forum and the protection the Bankruptcy Code provides.

The Court concludes that, by filing bankruptcy and attempting to obtain a discharge of all pre-petition debts, Defendant has acknowledged this Court's authority to enter a final judgment as to non-dischargeability as well as consented to a final adjudication of all matters involved in making a non-dischargeability determination.

Accordingly, this decision constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052, some of which were stipulated to by the parties in the pre-trial order. However, if the United States District Court disagrees on any appeal and determines this Court does not have the authority to enter a final judgment in this action, then this Memorandum Opinion shall constitute the Court's proposed findings of fact and conclusions of law to the District Court pursuant to 28 U.S.C. § 157(c)(1).

II. Findings of Fact.

1. Prior to filing bankruptcy, Mr. Melton was in the real estate business. He was part owner in various projects. He also raised money for and managed real estate projects through Ivy Ridge Capital Consulting, Inc. ("IRCC").

2. In 2008 and 2009, Mr. Melton's primary source of income was IRCC, which was owned and controlled 100% by Mr. Melton.

3. Mr. Melton personally owned 44% of Melco Investments, LLC ("Melco"), a real estate holding company. Another 44% of Melco was owned by Stephen Cohen, and the remaining 12% was owned by Rafik B. Kashlan (Def. Ex. 2).

4. Melco invested in several real estate projects, one of which was Laurel Commons II, LLC a/k/a The Shoppes at Smyrna Heights ("LCII"). LCII was formed to construct a 17,000 square foot retail building located on Concord Road in Smyrna, Georgia. Melco held a 90% interest in LCII. The remaining 10% interest was held by an unrelated party.

5. Melco also owned 100% of Melco Residential Rentals, LLC ("MRR"), which owned 10 residential units located in Atlanta, McDonough, and Fayetteville, Georgia. Melco also owned a 90% interest in Laurel Commons, LLC ("Laurel Commons"), a 10,000 square foot retail/office building located on Concord Road in Smyrna, Georgia.

6. IRCC was the manager of Melco and the related entities including LCII, Laurel Commons and MRR and operated them on a day-to-day basis.

7. Mr. Melton had exclusive control over all bank accounts of IRCC.

8. Mr. Melton had check-writing authority over all Melco accounts, including the accounts of LCII, Laurel Commons and MRR for all amounts up to $50,000.00. Any check in excess of $50,000.00 required the signature of both Mr. Melton and Mr. Cohen.

9. Melco was the primary investor in three projects financed by Midtown Community Bank, a division of Buckhead Community Bank. Mr. Melton testified that, prior to 2008, he was able to refinance the loans whenever they matured, which typically occurred every 12 to 18 months.

10. In April 2008, any increased financing of the LCII project, as well as various other projects owned by Melco, was becoming increasingly unlikely from Midtown Community Bank. The note held by Midtown Community Bank secured by the LCII property matured in June 2008. (Def. Ex. 4). Mr. Melton began actively seeking new financing in early 2009, a process which continued for the next 18 months. During this time, Mr. Melton had active negotiations with lenders but none of the negotiations were successful. Unbeknownst to Mr. Melton at the time, Midtown Community Bank had been issued a cease and desist order by the FDIC. It and Buckhead Community Bank were closed by the FDIC on December 4, 2009. (Def. Ex. 4).

11. In early 2009, Buckhead Community Bank, holder of the various Midtown Community Bank notes, sued LCII, Mr. Melton, Mr. Cohen, MMR and Laurel Commons for over $4 million on several notes involving several properties, including The Shoppes at Smyrna Heights. On September 17, 2009, summary judgment was entered against all defendants for the full amount sought in the State Court of Cobb County.

12. SCC is a child day care center owned and operated by Lisa Abernathy-Taylor and her husband. Mr. Melton knew Ms. Taylor because his daughter attended another day care center operated by Ms. Taylor.

13. In June 2009, Ms. Taylor had closed her prior childcare center due to issues with mold, and was actively seeking a new location. Upon discovering Ms. Taylor was looking for a new building to lease for her day care center, Mr. Melton suggested she move her business to The Shoppes at Smyrna Heights.

14. The Shoppes at Smyrna Heights was directly across the street from Ms. Taylor's prior childcare center, and she was familiar with the property.

15. In order to obtain financing for The Shoppes at Smyrna Heights, Mr. Melton believed he needed to show a lender a lease of at least 50% of the property. He told Ms. Taylor he needed the lease to obtain financing to complete the project.

16. Mr. Melton, on behalf of LCII, and Ms. Taylor, on behalf of SCC, began to negotiate a lease of approximately 75% of the premises to SCC in 2009. As part of the lease, SCC was required to pay $50,000 to LCII as a security deposit.

17. Ms. Taylor informed Mr. Melton it would take approximately six months for a day care center in a new facility to be licensed. Because she planned to open her new center by September 2010, she needed to have the building constructed by March 2010.

18. The lease (Pl. Ex. 1) was signed by the parties in September 2009, but it is undated and certain terms regarding the construction remained to be negotiated.

19. Mr. Melton knew of the state court litigation with Buckhead Community Bank when he negotiated the lease with SCC. Mr. Melton never disclosed to SCC the existence of the state court litigation with Buckhead Community Bank or the entry of summary judgment against Mr. Melton, LCII and others.

20. Mr. Melton represented to Ms. Taylor on behalf of SCC that the $50,000.00 security deposit would be held in escrow, even though the terms of the lease did not require it.

21. Ms. Taylor relied on Mr. Melton's representation that he would hold the funds in escrow and would not have given him the security deposit otherwise.

22. SCC paid the first installment of the security deposit in the amount of $10,000.00 by wire on September 17, 2009 (Pl. Ex. 6), coincidentally the same date that the order granting summary judgment against Mr. Melton, LCII and others was entered. The remaining $40,000.00 of the security deposit was paid by SCC by cashier's check on October 21, 2009. (Pl. Ex. 12, 13, 14).

23. On September 15, 2009, Mr. Melton sent an e-mail to Ms. Taylor on behalf of SCC stating, "I have attached the wiring/book transfer instructions for the Laurel Commons II, LLC Escrow Account. Please go ahead and wire/transfer the $10,000 of the Security Deposit into this account today." (Pl. Ex. 3). As to the remaining $40,000, Mr. Melton instructed Ms. Taylor to make the check out to "Laurel Commons II, LLC Escrow Account". The check was made out that way. (Pl. Ex. 12). Mr. Melton was aware that Ms. Taylor and SCC thought the money was being set aside in an escrow account. In actuality, the "escrow account" was the general operating account of LCII at Wachovia Bank, NA.

24. Mr. Melton intended to repay the $50,000.00 security deposit.

25. There were no other tenants under contract for The Shoppes at Smyrna Heights, or who had expressed an interest in writing in being a tenant.

26. By e-mail on November 17, 2009, Ms. Taylor on behalf of SCC inquired as to the update on LCII obtaining funding for completion of the building. (Pl. Ex. 7).

27. Mr. Melton believed he could obtain the financing to construct the project.

28. Since Ms. Taylor's prior day care center operated across the street from The Shoppes at Smyrna Heights, she was aware there had been no progress on construction of the building since at least the fall of 2008 and perhaps 2007.

29. By March 31, 2010, Ms. Taylor sent an e-mail to Mr. Melton asking for the return of the security deposit since it was clear no progress was being made on the building. Mr. Melton replied the deposit would only be returned upon LCII determining "it was absolutely impossible to complete the project within the timeframe allowed by the lease." Mr. Melton further informed Ms. Taylor that, should the property be foreclosed upon or if LCII filed Chapter 7 bankruptcy, the deposit would be returned. (Pl. Ex. 8).

30. The Shoppes at Smyrna Heights was foreclosed on by the successor to Buckhead Community Bank on September 7, 2010. (Pl. Ex. 9).

31. On September 21, 2010, Mr. Melton sent a letter to Ms. Taylor and SCC informing SCC that LCII was unable to obtain financing, the property was being marketed for sale, and the deposit would be returned within 90 days. (Pl. Ex. 9). Mr. Melton testified completion of the project and performance of the lease was not possible at that time.

32. On October 4, 2010, Mr. Melton filed Chapter 7 bankruptcy, and included SCC's claim as a general unsecured claim on Schedule F.

33. At the time the $10,000.00 portion of the security deposit was deposited in LCII's Wachovia business checking account, LCII had only a $10.00 balance in its account. (Pl. Ex.

11). On the day of the deposit, $484.12 was transferred to Tamara Melton for a car payment for an Acura that was in Mrs. Melton's name.

34. On the same day, $550.00 was transferred to Terald Melton/Ivy Ridge Capital Consulting. Another $200.00 was transferred to Bernice Melton, Mr. Melton's mother on September 18.

35. On September 18, 2009, Mr. Melton also transferred funds to Ella Parks, Rhonda Elaine Han, Expert Accounting, and IRCC in the amount of $2,233.32. Each transfer indicates it would be charged to the "due tofrom IRCC" account or the "due tofrom LCII LLC" account. Other withdrawals continued in the account, including another payment of $484.12 to Tamara Melton for the Acura car payment, so that by September 30, less than two weeks later, $955.95 was the closing balance in the account. The remaining money from the initial $10,000.00 security deposit was completely spent by October 13, 2009. (Pl. Ex. 10, 11).

36. On October 13, 2009, the Wachovia account had a balance of a negative $25.00, and by the end of the month the account was closed. (Pl. Ex. 10).

37. Some of the $10,000.00 security deposit was used for items which could be business expenses, such as SCANA Energy, Verizon and bank charges. (Pl. Ex. 11).

38. The $40,000.00 portion of the security deposit was deposited into an LCII account at SunTrust Bank on October 22, 2009. (Pl. Ex. 14).

39. The balance in the LCII account at the time of the deposit was $50.00. On the same day as the deposit of the $40,000.00, Mr. Melton withdrew $1,500.00 in an over-the-counter withdrawal.

40. The next day, the balance of the $40,000.00 ($38,450.00) was transferred from the LCII account to the MRR account. (Pl. Ex. 14, 15).

41. The balance in the MRR account as of the date of the $38,450.00 transfer was also only $50.00.

42. On the same day, October 23, 2009, $15,000.00 was transferred from the MRR account. One $5,000.00 transfer went directly to Mr. Melton's checking account, and another $10,000.00 transfer is simply indicated as "miscellaneous debit". (Pl. Ex. 15).

43. Another $5,000.00 was transferred on October 27, 2009 from the MRR account to Mr. Melton's checking account. (Pl. Ex. 15, 16, 17, 18). The source of these funds was the $40,000.00 security deposit.

44. In the next month, November 2009, an additional $20,500.00 was withdrawn from the MRR account, which held only the remainder of the $40,000.00 security deposit. (Pl. Ex. 19). By the end of November 2009, the balance in that account was $9,308.55. At least $1,000.00 of those transfers was paid directly to Mr. Melton's account. (Pl. Ex. 20).

45. While some of the funds from the MRR account are transferred back into the LCII account during November and December 2009, it is the same money being circulated between LCII, MRR and IRCC.

46. By the end of December 2009, the balance in the MRR account was $72.53, the balance in the LCII account was $155.00, and the balance in the IRCC account was $31.95. (Pl. Ex. 23, 24, 25).

47. Based on a review of Exs. 10, 11 and 14 through 25, Mr. Melton diverted the security deposit from SCC to himself, his family, and his wholly owned company, IRCC. Additionally, there were a number of large transfers from the LCII account and the MRR account (after the security deposit funds were transferred there) which Mr. Melton directed and made, but which he could not explain. The Court's summary of the transactions is below:

Transfers to Melton and family		
Date	Amount	Notes
9/17/09	$484.12	From LCII's Wachovia account ("LCII-W") to Tamara Melton, for car payment
9/18/09	$200.00	From LCII-W to Bernice Melton
9/30/09	$484.12	From LCII-W to Tamara for car payment
10/13/09	$84.23	From LCII-W to Tamara
10/23/09	$5,000.00	From MRR's account to Melton's checking account
10/27/09	$5,000.00	From MRR to Melton's checking account
11/2/09	$1,000.00	From MRR to Melton's checking account
Total:	**$12,252.47**	

Transfers to Ivy Ridge Capital Consulting		
Date	Amount	Notes
9/17/09	$550.00	From LCII-W
9/18/09	$1,400.00	From LCII-W
9/24/09	$200.00	From LCII-W
11/9/09	$200.00	From LCII-SunTrust ("LCII-S"), out of funds previously transferred to MRR
	$1,000.00	From LCII-S, from funds to MRR
11/17/09	$2,440.58	From MRR
11/20/09	$1,500.00	From MRR
12/3/09	$300.00	From LCII-S, from funds to MRR
12/4/09	$800.00	From LCII-S, from funds to MRR
12/9/09	$759.42	From LCII-S, from funds to MRR
12/14/09	$500.00	From LCII-S, from funds to MRR
12/16/09	$1,000.00	From LCII-S, from funds to MRR
12/17/09	$500.00	From LCII-S, from funds to MRR
12/21/09	$100.00	From LCII-S, from funds to MRR
	$100.00	From LCII-S, from funds to MRR
12/22/09	$1,650.00	From LCII-S, from funds to MRR
12/23/09	$600.00	From LCII-S, from funds to MRR
12/31/09	$2,100.00	From LCII-S, from funds to MRR
Total:	**$15,700.00**	

Unexplained Withdrawals, Debits, and Checks		
Date	Amount	Notes
9/21/09	$1,500.00	Transfer from LCII-W to an unknown account
9/25/09	$300.00	Transfer from LCII-W to an unknown account
10/22/09	$1,500.00	Over-the-Counter withdrawal from LCII-S account
10/23/09	$10,000.00	Unknown debit from MRR's account
11/3/09	$3,000.00	Check from MRR
	$600.00	Check from MRR
11/5/09	$600.00	Check from MRR

Unexplained Withdrawals, Debits, and Checks		
11/9/09	$500.00	Transfer from LCII-S to unknown account
11/24/09	$1,000.00	Transfer from LCII-S to unknown account, from funds originally transferred to MRR
11/25/09	$660.00	ATM withdrawal from MRR
12/7/09	$250.00	Transfer from LCII-S to unknown account, from funds originally to MRR
12/17/09	$500.00	Transfer from LCII-S to unknown account, from funds originally to MRR
12/21/09	$400.00	Check from LCII-S, from funds originally from MRR
Total:	**$20,810.00**	

48. Mr. Melton made or directed the transfer of the funds from the LCII, MRR and IRCC accounts. All of the transfers were in an amount less than $50,000.00 so a co-signer was not required.

49. For accounting purposes and tax return purposes, LCII reported it paid IRCC a $50,000.00 commission on the SCC lease. No evidence was presented that such a commission was due, particularly since IRCC was the property manager, and not a real estate agent or broker.

50. SCC incurred legal fees in attempting to collect the security deposit and in bringing this action. Plaintiff's Exhibits 27 and 28 detail work performed by Michael Solis as counsel for SCC. These exhibits include charges for time spent on unrelated matters for SCC or its principal, Ms. Taylor. Mr. Solis told Ms. Taylor on more than one occasion that the amounts he was billing SCC were not the amounts he expected her to pay.

III. Conclusions of Law.

SCC argues that Mr. Melton is liable to SCC on the theories of fraud, breach of fiduciary duty, and conversion. Plaintiff seeks damages in the amount of $50,000.00 plus interest, punitive damages and attorneys' fees. The Court will address each of the theories of recovery below.

A. Fraud.

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

First, SCC contends Mr. Melton took the $50,000.00 deposit knowing he could never build out the property and consummate the lease. SCC's contention is based on the fact that, simultaneously with receiving the security deposit, Mr. Melton and LCII had judgments entered against them by the lender for defaulting on the note secured in part by the Shoppes at Smyrna Heights real estate. At the trial, Ms. Taylor testified Mr. Melton told her he was trying to get new financing to complete the build out of the Shoppes at Smyrna Heights and he needed a lease to support his request for financing. She knew at the time she delivered the security deposit to him that financing was not in place and that Mr. Melton was seeking financing on behalf of LCII. Ms. Taylor testified that, because her existing childcare center was across the street from the Shoppes at Smyrna Heights, she was aware no work had been done on the property for over a year and perhaps longer. Because Mr. Melton told Ms. Taylor the lease was necessary in order to seek financing, the Court finds Mr. Melton did not misrepresent the facts to Ms. Taylor and he had no intent to deceive her about the status of his ability to complete the project. While in hindsight Mr. Melton's belief he could obtain financing for the project with a lease in hand seems unrealistic, the intent of the parties must be determined at the time of the transaction. It must be remembered that, in 2009 and 2010, the Atlanta area was in a recession unprecedented in the lifetime of most people, both as to the depth of the recession and the length of the recession. The number of bank failures occurring during that time period was exceeded only by the Great Depression. Mr. Melton was not alone in failing to recognize the seriousness of the

country's financial situation. Further, any reliance by Ms. Taylor on his representations regarding completing the project was not reasonable given that he had told her he needed financing to complete the project and because the project had been stagnant for so long.

SCC also alleges Mr. Melton misrepresented that the security deposit paid by SCC would be held in an escrow account. The lease agreement identified as Plaintiff's Exhibit 1 does not require the security deposit to be held in escrow. In fact, it provides just the opposite – that the security deposit can be commingled with the funds of the lessor. Moreover, the lease agreement contains a merger clause, which states in relevant part, "This lease contains the entire agreement between the parties. No oral statements or representations or written matter not contained in this Lease shall have any force or effect."

The facts in this case are similar to those in Novare Group, Inc. v. Sarif, 290 Ga. 186 (2011). There, the plaintiffs alleged that the seller of residential condominiums orally represented that the view from the condominiums would not be obstructed by future development; when the views were, in fact, obstructed by the same developer's project across the street from the condominium, the plaintiffs prayed for rescission of the contract and damages for fraud. The purchase agreement, however, contained a clause stating, "the views … may change over time due to … additional development …." The purchase agreement also contained a merger clause. The Supreme Court held that the plaintiffs did not and could not rescind the contract based upon fraudulent misrepresentations when the contract expressly contradicted the oral representations of the seller, and that the valid merger clause precluded any claim for fraud based upon oral representations made before execution of the contract. Id. at 190; see also, Giacomantonio v. Romagnoli, 306 Ga. App. 26, 31-32 (2010) (a party alleging fraudulent inducement may either affirm the contract and sue for damages or rescind the contract and sue in

tort for fraud; however, where a party affirms a contract with a merger clause, he is estopped from asserting reliance upon the other party's oral representations).

Fraud is not the only basis for rescission though. A party may rescind a contract "on the ground of nonperformance". O.C.G.A. § 13-4-62. "[T]o justify rescission, there must be a material nonperformance or breach by the opposing party. If the breach is not material, the party is limited to a claim for damages…. A breach is material when it is so substantial and fundamental as to defeat the subject of the contract". Vidalia Outdoor Products, Inc. v. Higgins, 305 Ga. App. 836, 837-38 (2010).

Once a party validly rescinds a contract, the merger clause is no longer effective and thus does not preclude the party from asserting reliance upon the other party's representations. See Cotton v. Bank South, 231 Ga. App. 812, 814 (1998) ("If the defrauded party has … elected to affirm the contract … the merger clause will prevent his recovery. If, on the other hand, he does rescind the contract, the merger clause will not prevent his recovery[.]") quoting Jones v. Cartee, 227 Ga. App. 401, 403 (1997). In Jones, the prospective purchaser of a golf course chose to rescind the sales agreement after discovering misrepresentations; the court stated, "Having concluded … that Jones rescinded the contract, it follows that Jones did avoid the merger clause." 277 Ga. App. at 405.

In the present case, SCC did not have the choice to affirm or rescind the contract upon discovering the fraudulent misrepresentation; rather, SCC discovered the fraudulent misrepresentation because the contract was rescinded. A valid basis for rescission in this case exists because the object of the contract – the lease of space at The Shoppes at Smyrna Heights – was defeated. When SCC demanded the return of the security deposit in March 2010, it did so because the building was not in existence and it needed the space completed by March 2010 in order to have the facility licensed by September 2010. Certainly by September 7, 2010, when

the property was foreclosed, any possibility of the lease being performed was eliminated. Parties may also rescind a contract by mutual consent, which consent need not be explicit, but may be implied by the conduct of the parties. C. Brown Trucking Co., Inc. v. Henderson, 305 Ga. App. 873, 874 (2010); Vildibill v. Palmer Johnson of Savannah, Inc., 244 Ga. App. 747 (2000). SCC and LCII rescinded the lease by virtue of SCC's demand for the return of the security deposit and LCII's acknowledgement that the foreclosure prevented the completion of the project and agreement to return the security deposit to SCC. (Pl. Ex. 9).[2] The reasoning of Jones v. Cartee applies – once the contract is rescinded, the parties are not bound by the merger clause, and thus the merger clause cannot preclude reliance on statements made in contradiction of the contract. Cf. Southern Prestige Homes, Inc. v. Moscoso, 243 Ga. App. 412, 417 (2000) ("Rescission of a contract is a complete abrogation of the contract; it does not leave the parties where the rescission finds them. The parties must be returned as nearly as possible to the status quo ante.")

Ms. Taylor testified without dispute that Mr. Melton represented to her the security deposit would be held in escrow. Ms. Taylor relied on that representation in paying the funds to Mr. Melton and LCII. Ms. Taylor's reliance on the representation on behalf of SCC was reasonable because Mr. Melton, in an e-mail, stated he was providing her wiring instructions for the LCII "escrow account". (Pl. Ex. 3). Mr. Melton testified at the hearing that Laurel Commons did not have an escrow account and the account number he gave her for wiring funds was an operating account. He agreed, however, she would have thought it was an escrow account. Further evidence of SCC's reliance on the representation is that the $40,000.00 portion of the security deposit was paid with a cashier's check made out to the "Laurel Commons II Escrow Account". (See Pl. Ex. 12). The evidence was undisputed there was no escrow account and

[2] At the hearing, Mr. Melton testified that the contract was clearly over by the time he sent the letter on September 21, 2010. Moreover, the Complaint does not pursue any contract-related theories of recovery – it seems undisputed that the contract was no longer in effect between the parties.

never had been. The evidence was also undisputed that immediately upon receipt of each portion of the security deposit the funds were removed from the account into which SCC wired them or into which they were initially deposited.

The evidence shows that, at the time the $10,000 portion of the security deposit was received, LCII had only a $10.00 balance in its account. On the day of the deposit, $484.12 was transferred to Tamara Melton for a car payment for a car she drove. Payments were made to Mr. Melton individually or other of his companies, to his mother, or were generally transferred. Some of the deposit was used for items which could be recognized as business expenses, such as SCANA Energy, Verizon and bank charges. Nevertheless, in less than 30 days, the entire $10,000.00 was spent and the balance in that account as of October 13, 2009 was a negative $25.00. The account was closed.

The results were similar when the $40,000.00 portion of the security deposit was paid on October 22, 2009. At the time, the LCII account held only $50.00. On the same day as the deposit of the $40,000.00, Mr. Melton withdrew $1,500.00 in an over-the-counter withdrawal. The next day, $38,450.00 was transferred to a MRR account. The transfer to MRR, an affiliated company, is not in and of itself violative of the use of the funds if the funds were held. Over the next 60 days, though, almost $26,000.00 of the funds was spent in cash, checks, debits, etc. from the MRR account. Some of the funds were transferred to IRCC's account or back to LCII's account. At least $11,000.00 from the MRR account was deposited directly in Mr. Melton's individual account. Another telling fact is the balance in the MRR account, as of the date of the transfer of $38,450.00 of the security deposit, was also only $50.00. By the end of December 2009, there was a total balance between the LCII account, the MRR account and the IRCC account of $259.48. Based on these facts, it is clear to the Court the Debtor had no intention at the time he made the representation of holding the $50,000.00 security deposit in an escrow

account or treating it as if it were held in an escrow account. In fact, it is clear the Debtor intended to use the funds immediately to operate his business and pay various personal expenses. The Court therefore concludes Mr. Melton committed fraud against SCC for which he is liable to SCC in the entire amount of the security deposit not properly held and not returned in the amount of $50,000.00.

Mr. Melton argues he should not be personally liable for the loss of the $50,000.00 security deposit because it was paid to LCII and he held only a minority interest in that entity. 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 on piercing the corporate veil. See Beasley v. A Better Gas Co., Inc., 269 Ga. App. 426, 429 (2004); Ford Motor Credit Company v. Owens, 807 F.2d 1556, 1559 (11th Cir. 1987); see also Murray v. Woodman (In re Woodman), 2011 WL 1100264 (Bank. D. Ida. 2011). To the extent Mr. Melton caused LCII to commit fraud, he is personally liable for the damages suffered.

The evidence shows Mr. Melton was the sole owner and manager of IRCC, which also managed LCII and MRR. He made or directed the transfer of the funds, all of which were less than the $50,000.000 level where a co-signer was required. The representation the funds would be held in escrow was made by him and the immediate diversion of funds was made by him. The Court concludes he is personally liable for the fraud.

B. 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 … [a]ny 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).

Mr. Melton represented the security deposit would be held in escrow so the security deposit funds belonged to SCC. Mr. Melton undeniably was the individual operating LCII, MRR and IRCC on a day-to-day basis. There was no dispute in the testimony at trial that Mr. Melton was the one who made the various transfers from the bank accounts. Consequently, to the extent conversion has occurred, Mr. Melton is personally liable for it.

The conversion theory operates independently of the theory of fraud discussed above. Even without the representations of Mr. Melton, the use by Mr. Melton of funds in the LCII bank accounts for his personal benefit would constitute conversion. The Court views transfers to Mr. Melton or his family or IRCC, his wholly owned company, as for his personal benefit. Additionally, Mr. Melton was asked about a number of large, unexplained withdrawals from the LCII account and the MRR account after $38,500.00 was transferred there. He could not explain the disposition of the funds, so the Court concludes he used them for his personal benefit. The chart set forth above in Findings of Fact No. 46 indicates Mr. Melton converted for his personal benefit $48,762.47. If the Debtor were not already liable to SCC for $50,000.00 for fraud, the Court finds the Debtor would be liable to SCC for conversion in the amount of $48,762.47.

C. Breach of Fiduciary Duty.

Next, SCC argues Mr. Melton individually breached a fiduciary duty he owed to SCC. SCC has not cited the Court to any law providing that Mr. Melton had a fiduciary duty to SCC.

While Georgia law requires security deposits for residential properties to be held in escrow and in trust, O.C.G.A. § 44-7-31, there is no such similar requirement for commercial leases. The lease itself does not create an obligation of trust nor create any fiduciary duties for Mr. Melton individually to SCC. The Court therefore finds for the Debtor on the Plaintiff's claim of breach of fiduciary duty.

D. Punitive Damages.

In addition to the return of the $50,000.00 security deposit, Plaintiff seeks punitive damages. Under Georgia law, punitive damages may be awarded "only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b). The purpose of punitive damages under Georgia law is not to compensate the plaintiff but "solely to punish, penalize, or deter a defendant." O.C.G.A. § 51-12-5.1(c). Finally, the award of punitive damages is left "to the enlightened conscience of [the] fair and impartial jury". Scott v. Battle, 249 Ga. App. 618, 621 (2001). In this case being tried without a jury, the award of punitive damages, or the amount thereof, is left to the enlightened conscience of the trier of fact.

While the Court has found the Debtor civilly liable to SCC for fraud or alternatively conversion, the Court declines to award punitive damages. This Court has found that Mr. Melton intended to deceive SCC about how the funds would be used, but this Court has not found, and does not find, that Mr. Melton intended SCC to lose the security deposit. On the contrary, the evidence supports that Mr. Melton believed he would be able to obtain financing and repay the security deposit. As such, the Court does not find the evidence "raises a presumption of conscious indifference to consequences." Moreover, the Court notes that finding a debt non-

dischargeable is a significant deterrent in and of itself and no further deterrent in the form of punitive damages is necessary.

E. Attorney Fees.

Next, SCC seeks recovery of attorney's fees. SCC submitted legal fee statements from their counsel, Michael Solis, Pl. Ex. 27 and 28. The testimony was clear though that these fees included time spent on unrelated matters for SCC or its principal, Ms. Taylor. Ms. Taylor also testified Mr. Solis had told her on more than one occasion that the amounts he was billing SCC were not the amounts he expected her to pay. In addition to Mr. Solis, who withdrew from representing Ms. Taylor on the eve of trial, Mr. David Wood incurred attorney's fees in his representation of SCC. SCC seeks recovery of these attorney's fees under O.C.G.A. § 13-6-11, which 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). Based on a review of all the facts, the Court determines that Plaintiff is not entitled to recovery of attorney fees. No evidence was presented that the Debtor acted in bad faith in the litigation or was stubbornly litigious. The Debtor was correct in some of his positions, and SCC did not prevail on all theories and counts. Simply losing at trial does not establish a basis for recovery of attorney's fees.

F. Interest.

SCC asks for interest on the unreturned security deposit. Since the lease has been rescinded, it provides no basis for interest. Moreover, paragraph 27 of the lease (Pl. Ex. 1) provides that "Landlord shall have no liability for the accrual or payment of any interest" on the security deposit, so even if it governed, payment of interest is inappropriate. Nevertheless, O.C.G.A. § 7-4-15 provides "All liquidated demands, where by agreement or otherwise the sum

to be paid is fixed or certain, bear interest from the time the party shall become liable and bound to pay them…" The legal rate of interest under O.C.G.A. § 7-4-2 is seven percent (7%). While it is arguable the Debtor became obligated to repay the $50,000.00 security deposit, which is a liquidated sum, upon SCC's demand on March 31, 2010, there is no doubt the Debtor was obligated to make payment as of the date it acknowledged such obligation on September 21, 2010. The Court therefore awards interest on the $50,000.00 security deposit in the amount of seven percent (7%) per annum beginning September 1, 2010 through the date of the entry of this Order.

Similarly, where the property converted is money, the plaintiff may recover interest from the date of conversion at the legal rate. Felker v. Chipley, 246 Ga. App. 296, 296-97 (2000). Because the security deposit was fully converted by December 31, 2009, interest would begin to run on December 31, 2009.

G. Summary of Claims.

In summary then, the Court has found the Defendant liable under the theories of both fraud and conversion, but the amounts recoverable are slightly different. Under the theory of fraud, the Court determines and finds Mr. Melton is liable to Smyrna Childcare Center in the amount of $50,000.00 plus interest at the legal rate from September 21, 2010 to the date hereof. Under the alternative theory of conversion, the Court determines and finds Mr. Melton is liable to Smyrna Childcare Center in the amount of $48,762.47 plus interest at the legal rate from December 31, 2009 to the date hereof.

IV. Dischargeability.

Now that the Court has ruled the Debtor is personally liable to SCC, the Court must next consider whether any of the 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); St. Laurent v. Ambrose (In re St. Laurent), 991 F.2d 672, 677 (11th Cir. 1993).

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 the Debtor is liable to SCC for fraud. The only difference between the elements of fraud under Georgia state law and under Section 523(a)(2)(A) is the type of reliance required. Under state law, the type of reliance is "reasonable", while under Section 523(a)(2)(A) the reliance must be "justifiable". Field v. Mans, 516 U.S. 59, 74-75 (1995). The justifiable reliance standard is an individual standard that requires examination of the surrounding circumstances and the qualities of the particular plaintiff. Id. at 59-60. The Court reiterates its findings above with respect to state law fraud. It also finds that Ms. Taylor's reliance on behalf of SCC on the representation of Mr. Melton that the security deposit would be held in escrow was justifiable. Not only was the statement made, it was reasonable on its face, and the statement was reiterated in an e-mail. The Court therefore finds the entire amount of the claim for fraud non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

If the theory of recovery is conversion, the Court also finds the debt non-dischargeable. One of the bases for non-dischargeability under 11 U.S.C. § 523(a)(4) is embezzlement. Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come. Bennett v. Wright (In re Wright), 282 B.R. 510, 516 (Bankr. M.D. Ga. 2002). To establish embezzlement, 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). There is no doubt the $50,000.00 security deposit was rightfully in the possession of Mr. Melton acting on behalf of LCII and, as the Court has previously found, no doubt that SCC and LCII, through Ms. Taylor and Mr. Melton, understood the $50,000.00 was to be held in escrow and not used for any other purpose. The Court has already found under the discussion of conversion above that Mr. Melton appropriated $48,762.47 for his personal use. The Court next must determine if 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. 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 SCC's funds were converted by the Debtor with fraudulent intent. As discussed above, the Debtor began spending the funds deposited by SCC immediately upon their receipt. Moreover, SCC demanded return as early as March 2010, but LCII and the Debtor refused to return the funds, continuing to lead SCC to believe the funds were available and would be repaid if the project were unsuccessful. 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). The Court concludes Mr. Melton did convert the funds of SCC with fraudulent intent and thus that all the elements of embezzlement as defined under 11 U.S.C. § 523(a)(4) have been established.

CONCLUSION

The Court has found in this Order alternative bases for the entry of judgment and for non-dischargeability. The Court will enter judgment against the Debtor in the greater amount, which is $50,000.00 plus interest at the legal rate from September 21, 2010 to the date hereof, with said judgment being non-dischargeable.

END OF DOCUMENT

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