IT IS ORDERED as set forth below:

Date: June 26, 2013

C. Ray Mullins

C. Ray Mullins
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: DIANA MORALES a/k/a DIANA KING, Debtor.	CASE NO. 08-64785-CRM CHAPTER 7
MERCHANTS BANK OF CALIFORNIA, N.A., Plaintiff, v. DIANA MORALES a/k/a DIANA KING, Defendant.	ADVERSARY PROCEEDING NO. 11-5637-CRM
SERVICIO UNITELLER, INC., Plaintiff, v. DIANA MORALES a/k/a DIANA KING, Defendant.	ADVERSARY PROCEEDING NO. 11-5644-CRM

ORDER

On May 28, 2013, the Court held a trial on the complaints filed by Merchants Bank of California, N.A. and Servicio Uniteller, Inc. against Diana Morales. The complaints seek determinations that debts owed by Defendant are nondischargeable pursuant to section 523(a)(4) of the Bankruptcy Code. 1These matters are core proceedings pursuant to 28 U.S.C. § 157(b)(I) and the Court has jurisdiction pursuant to 28 U.S.C. § 157 and 28 U.S.C. § 1334. For the reasons stated below, the Court grants judgment in favor of the Defendant.

I. FACTS

In June 2003, Defendant's husband[1] Daniel King incorporated Folio Express, Inc. ("Folio") to offer money transmission services to the public.[2] Defendant was not listed on Folio's articles of incorporation filed with the Secretary of State of Georgia and had no part in starting Folio. Defendant has been a fulltime employee at WorldSpan LP for at least the past eleven years. Her involvement in Folio was limited to signing some documents for her husband. Defendant operated under the belief that Folio was owned and operated by her husband. She did not participate in the management of the company and did not have access to Folio's bank accounts or books. She never received funds from Folio and never directed anyone to spend Folio funds.

Unbeknownst to the Defendant, between May 18, 2006 and August 1, 2007, Daniel King changed Folio's officers on record with the Secretary of State of Georgia several times. According to the 2006 Corporation Annual Registration filed on May 18, 2006, Daniel King was the CEO and

[1] Defendant and Daniel King were married in April 1998. They divorced and were later remarried on January 2, 2008. They have been separated for the last few years.

[2] The Court knows very little about Folio's business operations. Plaintiffs presented no evidence about where the business was located, where Folio's bank accounts were located and their value, about who handled Folio's bank statements and corporate correspondence, about whether there were any employees and, if so, where those employees worked.

Registered Agent of Folio. Defendant was listed as the Secretary. The individual certifying the information at that time was Daniel King. Def.'s Ex. 3. On May 24, 2007, Daniel King submitted a 2007 Corporation Annual Registration listing Defendant as Folio's CEO. Def.'s Ex. 4. Defendant did not authorize or know of this filing. On June 25, 2007, Daniel King submitted a second 2007 Corporation Annual Registration that listed Defendant as Folio's CEO. Def.'s Ex. 5. On August 1, 2007, Daniel King once again changed the status of Folio to list Defendant as Folio's CEO, CFO, Secretary, and Registered Agent. Def.'s Ex. 6. This change was again made without Defendant's permission. Defendant did not know that she was listed as a corporate officer on any of these state filings submitted to the Secretary of State.

Folio offered money transmission services to the public, including Merchants Bank of California, N.A. ("Merchants"), a California Bank. In January 2006, Defendant signed an Agency and Trust Agreement with Merchants.[3] Defendant signed the Agency and Trust Agreement based on representations made by her husband that signing the document would help him because he had poor credit. Because she trusted her husband, Defendant signed the document. She did not fully understand or appreciate the terms of the agreement that she was signing. Pursuant to the Agency and Trust Agreement, Folio was an authorized agent of Merchants and agreed to offer Merchants' money transmission service to the public. Folio was authorized to receive money on Merchants' behalf from customers; it was responsible for the funds until it they were deposited in Merchants' bank account. Under the Agency and Trust Agreement, Defendant personally guaranteed Folio's debts owed to Merchants.

[3] The evidence is disputed as to when and where Defendant signed the agreement. Merchants contends that Defendant signed the agreement while both Jose Xuconxtli, a representative from Merchants, and Daniel King were present. Defendant testified that her husband called her while she was at work and requested her to sign the Agency and Trust Agreement. She states that she met her husband in her office building and signed the document there with no representative from Merchants present.

Folio also offered the money transmission services of Servicio Uniteller, Inc. ("Servicio"), a New Jersey based financial institution. In June 2007, Folio entered into a selling agent agreement and guaranty with Servicio. It appears Defendant's name was forged on this document. There is no evidence that Defendant signed the agreement and the signature on the document does not match Defendant's signature as it appears on other documents. Pursuant to this agreement, Folio was authorized to receive money on Servicio's behalf from customers who used the wiring service; Folio was responsible for the funds until they were transmitted to the customer's intended recipients and otherwise deposited in Servicio's bank account.

In 2007-2008, Folio collected funds from customers but failed to pay Merchants funds totaling $56,009. Folio voluntarily paid Merchants $16,570; $39,439 remains unpaid. Merchants initiated a lawsuit in Cobb County State Court to recover the funds against Defendant, Folio, and Defendant's husband, Daniel King (*Merchs. Bank of California, N.A. v. Folio Express, Inc.*, Case No. 08-A-15169-3). When served with process, Defendant saw that the matter related to Folio and passed the summons and complaint on to her husband to address. Defendant failed to respond to the complaint and a default judgment in the amount of $57,923.14 was entered on January 7, 2009 in favor of Merchants. [4]

Similarly, certain funds were not deposited into Servicio's bank accounts or otherwise paid to Servicio. These funds totaled $17,450. Servicio initiated a lawsuit in Cobb County State Court to recover the funds against Defendant, Folio, and Defendant's husband, Daniel King (*Servicio Uniteller, Inc. v. Folio Express, Inc.*, Case No. 08-A-3925-1). Defendant again passed the summons

[4] While Merchants referred to this judgment in its pleadings and counsel for Merchants mentioned the judgment during argument at trial, the judgment has not been admitted into evidence.

and complaint on to her husband and did not respond to the complaint. A default judgment in the amount of $20,916.79 was entered on June 3, 2009 in favor of Servicio. [5]

On March 13, 2008, Debtor filed a chapter 7 bankruptcy petition. Defendant did not list either Merchants or Servicio as creditors on her bankruptcy schedules. Debtor's case was closed on July 7, 2008. On October 6, 2011, the Court reopened Debtor's bankruptcy case to allow her to file motions to avoid liens and to add creditors, including Merchants and Servicio. On October 12, 2011, Debtor filed an amended Schedule F on which she listed Merchants as a creditor holding an unsecured claim in the amount of $57,923.14 and Servicio as a creditor holding an unsecured claim in the amount of $20,916.79.

On November 9, 2011, Merchants initiated an adversary proceeding by filing a complaint to determine the nondischargeability of a debt pursuant to section 523(a)(4) of the Bankruptcy Code. Merchants contends that Defendant, as personal guarantor, is responsible for the debt owed to it. Defendant answered the complaint on December 9, 2011. On July 16, 2012, Merchants filed a motion for summary judgment. On August 15, 2012, Defendant filed a response to the motion for summary judgment. The Court entered an order on December 14, 2012 denying the motion for summary judgment.

On November 14, 2011, Servicio initiated an adversary proceeding by filing a complaint to determine the nondischargeability of a debt pursuant to section 523(a)(4) of the Bankruptcy Code. Defendant filed an answer on December 9, 2011. On July 16, 2012, Servicio filed a motion for summary judgment. On August 15, 2012, Defendant responded to the motion for summary judgment. The Court found that summary judgment was not appropriate and denied the motion for summary judgment on December 14, 2013.

[5] This judgment is also not in evidence.

1On May 28, 2013, the Court held a trial on the complaints. Plaintiffs called two witnesses, Mr. Jose Xuconxtli and Mr. Lucas Rosario. Mr. Xuconxtli, an account executive at Merchants, testified that he sold services to Folio. He said that he met Defendant once, when he met with Defendant and her husband to sign the Agency and Trust Agreement. [6] Mr. Xuconxtli stated that it was Mr. King who approached him about using Merchants' money transmission services and that, after meeting Defendant a single time, he had no other contact with Defendant. He continued to communicate and deal with Mr. King. Mr. Rosario, national sales director for Servicio, then took the stand to discuss the terms of the Servicio seller agreement. Mr. Rosario stated that he had never met Defendant and had no personal contact with her. When asked to look at the Defendant's signature on the Merchants Agency and Trust Agreement, Pls.' Ex. 1, at 1, and compare it with the signature on the Servicio seller agreement, Pls.' Ex. 13, at 4, Mr. Rosario stated that the signatures were not the same. Defendant was the sole witness for the defense. She testified that she was not involved in Folio's operations, did not participate in managing the company, and did not have access to Folio's bank accounts or books.

At the close of Plaintiffs' case, Defendant's counsel moved to dismiss the complaints. The Court denied Defendant's motion to dismiss and turned to consider the ultimate disposition of the issues. After hearing the testimony of Mr. Xuconxtli, Mr. Rosario, and Ms. Morales, and considering the evidence presented at trial and the argument of counsel, the Court stated its findings of fact and conclusions of law on the record pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure. The Court reserved the right to supplement its findings of fact and conclusions of law. For the reasons stated on the record and below, the Court finds that judgment in favor of Defendant is appropriate in both adversary proceedings.

[6] Defendant denies ever meeting Mr. Xuconxtli. Nevertheless, she does admit that she signed the Merchants Agency and Trust Agreement.

II. ANALYSIS

In these adversary proceedings, Plaintiffs seek determinations that debts owed to them are nondischargeable under § 523 of the Code. A presumption exists that all debts owed by the debtor are dischargeable unless the party contending otherwise proves nondischargeability. 11 U.S.C. § 727(b). The purpose of this "fresh start" is to protect the "honest but unfortunate" debtors. *United States v. Fretz (In re Fretz)*, 244 F.3d 1323, 1326 (11th Cir. 2001). To this end, "courts generally construe the statutory exceptions to discharge in bankruptcy liberally in favor of the debtor, and recognize that the reasons for denying a discharge must be real and substantial, not merely technical and conjectural." *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301 (11th Cir. 1994) (citations omitted). Accordingly, Plaintiffs, as creditors, have the burden of proving an exception to discharge by a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279, 287–88 (1991); *St. Laurent v. Ambrose (In re St. Laurent)*, 991 F.2d 672, 680 (11th Cir. 1993).

Plaintiffs seek to except debts owed to them pursuant to § 523(a)(4) of the Bankruptcy Code. Section 523(a)(4) excepts from discharge debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement or larceny." 11 U.S.C. § 523(a)(4). While fraud or defalcation must occur in a fiduciary capacity, larceny or embezzlement do not have to occur while the debtor is acting in a fiduciary capacity to provide a basis for nondischargeability under 11 U.S.C. § 523(a)(4). To prevent discharge of a debt under section 523(a)(4) for defalcation, a creditor must demonstrate that: (1) the debtor was acting in a fiduciary capacity within the meaning of section 523(a)(4); and (2) that the debtor's actions constituted a defalcation. The Court will now consider whether Plaintiffs have proved each of these elements by a preponderance of the evidence.

a. **Whether Defendant was acting in a fiduciary capacity**

Section 523(a)(4) requires that the debtor was acting as a fiduciary prior to the wrongful act. *See Eavenson v. Ramey (In re Eavenson)*, 243 B.R. 160, 164 (N.D. Ga. 1999). Fiduciary is narrowly construed under § 523(a)(4). "The Supreme Court has consistently held that the term 'fiduciary' is not to be construed expansively, but instead is intended to refer to 'technical' trusts.'" *Quaif v. Johnson*, 4 F.3d 950, 953 (11th Cir. 1993) (citing *Davis v. Aetna Acceptance Co*., 293 U.S. 328 (1934)); *see also Commonwealth Land Title Co. v. Blaszak (In re Blaszak)*, 397 F.3d 386, 391 (6th Cir. 2005) (noting that the term "fiduciary capacity" is construed more narrowly in the context of § 523(a)(4) than in other circumstances). 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." *Lewis v. Lowery (In re Lowery)*, 440 B.R. 914, 926 (Bankr. N.D. Ga. 2010). "Mere friendship does not meet this standard, nor does an ordinary business relationship." *In re Ferland*, Adv. No. 09-5101, 2010 Bankr. LEXIS 1892, *7 (Bankr. M.D. Ga. June 21, 2010) (citations omitted).

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. Thus, under § 523(a)(4), the debtor must owe a fiduciary duty to his or her creditors which pre-existed the act creating the debt. *Quaif*, 4 F.3d at 954. Additionally, the fiduciary duties must be specifically set forth so that a trust relationship is expressly and clearly imposed. Some cases have also found that a separately identifiable *res* is essential to a trust. *Eavenson v. Ramey (In re Eavenson)*, 243 B.R. 160, 165 (N.D. Ga. 1999). In *In re Cross*, 666 F.2d 873, 881 (5th Cir. 1982), the Court of Appeals for the Fifth Circuit considered whether a set of printed forms signed by the debtor were sufficient to bind the debtor as a fiduciary. The court found that the documents imposed

no specific fiduciary obligations (e.g., segregation of funds, holding money in trust) and contained none of the language traditionally used to create an express, technical trust. *Id*. at 881 n.12. The court explained that "[a]bsent evidence revealing a clear manifestation of intent to create a trust or the imposition of specific fiduciary duties," the requirement of a fiduciary relationship is not met. *Id*.[7] Because the circumstances regarding Folio's adoption of the operating agreements and the language of the documents differ in these two adversary proceedings, the Court will consider whether Defendant was acting in a fiduciary capacity with respect to each of the Plaintiffs in turn.

i. **Merchants**

Merchants has offered evidence of a contractual trust as the basis for the Defendant's fiduciary capacity. Defendant admits that, in January 2006, she signed an Agency and Trust Agreement with Merchants at her husband's request. Pursuant to the Trust Agreement, Folio was authorized to receive money on Merchants' behalf from customers; it was responsible for the funds until it they were deposited in Merchants' bank account. Under the Trust Agreement, Defendant personally guaranteed Folio's debts owed to Merchants. The agreement provides:

> Merchants hereby appoints [Folio] as its trustee authorized to receive money for transmission on its behalf and [Folio] shall be trustee and shall act in a fiduciary capacity with respect to such monies until deposited to the established bank account. [Folio] expressly acknowledges and agrees that all funds acquired by [Folio] from the receipt of money transmitted on behalf of Merchants shall constitute trust funds owned by and belonging to Merchants. [Folio] shall maintain such monies separate and apart from all other funds and monies of Folio . . .

Pls.' Ex. 3, at 1.

The parties agree that this contract established an express trust and fiduciary relationship between Merchants and the Defendant. PreTrial Order ¶ 13(A), ECF No. 32 ("Prior to the acts which created the debt, a pre-existing express trust and fiduciary relationship between the Plaintiff

[7] The court was construing the former Bankruptcy Act and the predecessor to section 523(a)(4), § 17(a)(4) of the Bankruptcy Act.

and the Defendant was established by contract signed by the Defendant as both the officer of her company and a party to the agreement."). "In the contract, the fiduciary duties were specifically set forth so that the trust relationship is expressly and clearly imposed. The Defendant personally agreed in the contract to deposit funds held in trust for [Merchants] into a separate bank account for the benefit of [Merchants]." *Id*. at ¶ 13(B)-(C). Looking at the language of the agreement and the list of stipulated facts submitted by the parties, the Court finds that the first element of defalcation under section 523(a)(4) – acting in a fiduciary capacity – is met in the Merchants proceeding.

ii. **Servicio**

With respect to Servicio, Defendant contends that she was not acting in a fiduciary capacity in accordance with an express or technical trust. She states that she never entered into an agreement with Servicio. While a seller agreement exists between Folio and Servicio, Defendant testified that her husband, Daniel King, forged her signature on the agreement. This testimony was not rebutted. In fact, no one saw Defendant sign the Servicio seller agreement and Mr. Rosario, Servicio's national sales director, testified that he never communicated with Defendant in any capacity. The evidence supports this testimony. The documents admitted at trial show that Defendant's signature on the Merchants Agency and Trust Agreement, which Defendant admits to signing, is markedly different from the signature that appears on the Servicio seller agreement. *Compare* Pls.' Ex. 1, at 1, *with* Pls.' Ex. 13, at 4.

Putting aside the question of whether Defendant signed the agreement, it is not evident that the seller agreement even established an express trust. Plaintiff states that the agreement "specifically and expressly notes that the monies are trust funds belonging to Servicio . . . and at no time did the Debtor have authorization to take or use the funds for her own personal gain or for that of others." Compl. ¶ 20. The seller agreement provides that Folio "will receive the transaction

amount, less the seller fee, as trust funds owned and belonging to customer, and seller will continue to hold those funds as trust funds for the benefit of customer and [Servicio] while in seller's possession and under seller's control." Pls.' Ex. 13, at 19. The seller agreement goes on to provide when and how to deposit the transaction amounts into Plaintiff's account. Pls.' Ex. 13, at 20. While the agreement is in writing and refers to "trust funds," it otherwise fails to show that Plaintiff intended to create a trust. The agreement includes a section on the relationship between parties and provides that Folio is a special agent of Servicio; it does not describe Folio as a trustee. The agreement does not refer to fiduciary duties or to other aspects of a trust relationship. While the law does not require formal words to create a trust, there must be a clear intention to create a trust. As explained above, an ordinary business relationship does not qualify as a technical trust. *In re Ferland*, 2010 Bankr. LEXIS 1892, at *7. Plaintiff has not proved that this agreement established anything other than an ordinary business relationship.

For a debt to be deemed nondischargeable pursuant to § 523(a)(4), a debtor must be acting in a fiduciary capacity in accordance with an express or technical trust; it is not clear that the Servicio seller agreement created an express trust. Even if the Servicio agreement did create an express trust, Plaintiff has not proved that Defendant committed a defalcation.

b. **Defendant did not commit a defalcation**

For a debt to be dischargeable pursuant to § 523(a)(4), a plaintiff must establish not only that the defendant was acting in a fiduciary capacity but also that the defendant's actions constituted a defalcation. A breach of fiduciary duty claim is not per se sufficient unless it rises to the level of fraud or defalcation. *Omega Cotton Co. v. Sutton (In re Sutton)*, Case No. 06-60373, Adv. No. 07-6006, 2008 Bankr. LEXIS 2593, at * 5 (Bankr. M.D. Ga. Oct. 2, 2008). Generally speaking, defalcation is a failure to produce funds entrusted to a fiduciary. *See Quaif*, 4 F.3d at 954-55; *Cent.*

Hanover Bank & Trust Co. v. Herbst, 93 F.2d 510, 512 (2d Cir. 1937) (explaining that "when a fiduciary takes money upon a conditional authority which may be revoked and knows at the time that it may, he is guilty of a defalcation"). Until recently, the precise meaning of defalcation for purposes of § 523(a)(4) was hotly debated and there was a split of authority concerning the mental state required to prove a defalcation. *Bullock v. BankChampaign, N.A. (In re Bullock)*, 670 F.3d 1160, 1164 (11th Cir. 2012), *cert. granted*, 184 L. Ed. 2d 337 (2012) (citing *Quaif*, 4 F.3d at 955).

In *Bullock*, the Eleventh Circuit reviewed the split and summarized the different approaches: the Fourth, Eighth and Ninth Circuits concluded that even an innocent act by a fiduciary can be a defalcation; the Fifth, Sixth, and Seventh Circuits required a showing of recklessness by the fiduciary; and the First and Second Circuits required a showing of extreme recklessness. *Bullock*, 670 F.3d at 1165-66 (citations omitted) (the court noted that the Third Circuit has not addressed the issue, and the Tenth Circuit made a brief statement in an unpublished opinion that defalcation requires some portion of misconduct). The Eleventh Circuit joined the second group (the Fifth, Sixth, and Seventh Circuits) in holding that defalcation under § 523(a)(4) required a showing of recklessness by the fiduciary. The court held that a "defalcation under § 523(a)(4) requires more than mere negligence"; it "requires a known breach of a fiduciary duty, such that the conduct can be characterized as objectively reckless." *Id*. at 1166.[8]

The debtor appealed and, ultimately, the United States Supreme Court granted certiorari to address the split of authority on the issue. *Bullock v. BankChampaign, N.A.*, 670 F.3d 1160 (11th Cir. 2012), *cert. granted*, No. 11-1518, 133 S. Ct. 526 (U.S. Oct. 29, 2012). The petitioner asked

[8] The court went on to conclude that the defendant's conduct in making three loans while he was the trustee of his father's trust and knowingly benefitting from the loans could be characterized as objectively reckless and, as such, it constituted a defalcation under § 523(a)(4). *Id*.

the Court to consider whether defalcation under § 523(a)(4) requires some degree of intent. [9] In a unanimous decision, the Court held that the term "defalcation" in the Bankruptcy Code "includes a culpable state of mind requirement" which involves the "knowledge of, or gross recklessness in respect to, the improper nature of the relevant fiduciary behavior." *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1756 (2013).

The Supreme Court explained that "where the conduct at issue does not involve bad faith, moral turpitude, or other immoral conduct, the term requires an intentional wrong." *Id*. at 1759. The Court included as "intentional not only conduct that the fiduciary knows is improper but also reckless conduct of the kind that the criminal law often treats as the equivalent." *Id.* This includes "reckless conduct of the kind set forth in the Model Penal Code." *Id*. Thus, there may be a defalcation "if the fiduciary 'consciously disregards' (or is willfully blind to) 'a substantial and unjustifiable risk' that his conduct will turn out to violate a fiduciary duty." *Id.* (citing ALI, Model Penal Code § 2.02(2)(c), 226 (1985)). The "risk 'must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves *a gross deviation* from the standard of conduct that a law-abiding person would observe in the action's situation." *Id*. at 1760. The Court vacated the judgment affirming that petitioner's debt was nondischargeable and remanded the case for further proceedings.

In its opinion, the Supreme Court favorably cited opinions from the First and Second Circuits that required a showing of extreme recklessness: *Denton v. Hyman (In re Hayman)*, 502 F.3d 61, 68 (2d Cir. 2007) ("defalcation under § 523(a)(4) requires a showing of conscious misbehavior or extreme recklessness – a showing akin to the showing required for scienter in the securities law

[9] More specifically, the petitioner asked the Court "to decide whether the bankruptcy term 'defalcation' applies 'in the absence of any specific finding of ill intent or evidence of an ultimate loss of trust principal.'" *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754, 1758 (May 13, 2013) (citations omitted).

context."); and *Butanen v. Baylis (In re Baylis)*, 313 F.3d 9, 20 (1st Cir. 2002) ("defalcation requires something close to a showing of extreme recklessness"). These decisions are instructive and further explain the heightened defalcation standard. In *Baylis*, the Court of Appeals for the First Circuit explained that "for an act to fall under the 'defalcation' exception to discharge, it must be a serious one indeed, and some fault must be involved." *Id*. at 19. Thus, "[a] creditor must be able to show that a debtor's actions were so egregious that they come close to the level that would be required to prove fraud, embezzlement, or larceny." *Id*. at 21-22. The court found that the law of securities, which requires "scienter," provided a useful analogy and stated that the mental state required for defalcation is akin to the level of recklessness required for scienter, a mental state embracing intent to deceive, manipulate, or defraud. *Id*. at 22. The court concluded that the required mental state for a defalcation is more than the mere conscious taking of risk associated with the usual torts standard of recklessness; defalcation requires something close to extreme recklessness. *Id.* at 23.

Applying the standard announced in *Bullock* to the facts presented here, the Court finds that Defendant did not commit a defalcation within the meaning of § 523(a)(4). The evidence presented at trial does not establish that Defendant knew of, or consciously disregarded, a substantial and unjustifiable risk that her conduct would violate a fiduciary duty. In fact, the evidence demonstrates the opposite – that Defendant was not involved in Folio's business and did not know of, or consciously disregard, any substantial risk. While Defendant may have exercised poor judgment in trying to help her husband with his business, that does not rise to the level of intentional wrongdoing, moral turpitude, or scienter required to prove a defalcation.

Plaintiffs have not proved that Defendant misappropriated funds or failed to produce funds entrusted to her. Because defalcation refers to a failure to produce funds entrusted to a fiduciary, *Quaif*, 4 F.3d 950, a court considering a § 523(a)(4) defalcation claim will typically consider

evidence of bank statements, accounts, tax returns, business books, and similar information relating to business operations. *See e.g., Allen v. Scott (In re Scott)*, 481 B.R. 119 (Bankr. N.D. Ala. 2012) (considering various bank statements and accounts in finding that defendant misappropriated $188,090); *Ga. Lottery Corp. v. Premji (In re Premji)*, Case No. 05-80931, Adv. No. 05-6588, 2006 Bankr. LEXIS 2571 (Bankr. N.D. Ga. Sept. 14, 2006) (bank statements indicated that withdrawals and electronic transfers totaling over $10,000 were made from a trust account). Plaintiffs have offered no evidence of this sort. There is no evidence to show that Defendant failed to produce funds entrusted to Folio and no evidence to substantiate the amounts alleged missing. The Court has nothing to go on other than the statement by Plaintiffs' counsel that judgments were entered in favor of Plaintiffs on a default basis – the judgments themselves were not entered into evidence.

Moreover, the evidence offered at trial does not establish that Defendant knew of, or consciously disregarded, a substantial and unjustifiable risk that her conduct would violate a fiduciary duty. In *Bullock*, the Supreme Court recognized that there may be a defalcation "if the fiduciary 'consciously disregards' (or is willfully blind to) 'a substantial and unjustifiable risk' that his conduct will turn out to violate a fiduciary duty." *Bullock*, 133 S. Ct. at 1759 (citing ALI, Model Penal Code § 2.02(2)(c), 226 (1985)). Here, there is nothing to suggest that Defendant consciously disregarded a substantial and unjustifiable risk; there is no evidence that Defendant was even involved in Folio's day-to-day operations. All that the Court can consider is the testimony and evidence before it, all of which suggests that Defendant was not involved in the business.

Mr. Rosario testified that he never met the Defendant and never spoke with her. Mr. Xuconxtli similarly testified that he never communicated with the Defendant and that all of his dealings after meeting with Defendant to sign the Merchants Agency and Trust Agreement were with Daniel King. Defendant testified that she did not make any decisions concerning Folio and that she

was not aware that any funds were missing until legal action ensured. Further, Defendant testified that she was been working full time for a different company when Plaintiffs' funds were allegedly misappropriated, making Defendant's purported involvement with Folio questionable and practically quite difficult. While Plaintiffs introduced documents that listed Defendant as a corporate officer, Defendant produced evidence to show that there were four different sets of corporate documents filed with the Georgia Secretary of State, each significantly changing the corporate roles. Defendant did not know that these documents listed her in corporate positions. That so many different documents were filed with the Georgia Secretary of State without Defendant's knowledge buttresses her testimony that she had little, if any, knowledge of Folio's business. The Court finds credible Defendant's testimony that she did not know anything about the business. [0][1] Plaintiffs have failed to establish that the Defendant disregarded a risk of such a nature and degree that, considering the circumstances known to her, would constitute a gross deviation from the standard of conduct that a law-abiding person would observe.

Finally, while Defendant may have exercised poor judgment in trying to help her husband with his business, Defendant's actions do not rise to the level of intentional wrongdoing, moral turpitude, or scienter required to prove a defalcation. Defendant admits that she signed some documents for her husband including the Merchants Agency and Trust Agreement. However, Defendant signed the agreement based on representations made by her husband that signing the document would help him because he had poor credit history. Because she trusted her husband, Defendant signed the agreement. She did not fully understand or appreciate the terms of the agreement that she was signing. While Defendant may have exercised poor judgment in signing documents for her husband, that does not constitute a defalcation. As explained above, "for an act

[10] After hearing the evidence, the Court does not know much about the business. As stated above, Plaintiff presented no evidence about Folio's operations.

to fall under the 'defalcation' exception to discharge, it must be a serious one indeed, and some fault must be involved." *Baylis*, 313 F.3d at 19. Plaintiffs have not shown that Defendant's actions were so egregious that they come close to the level that would be required to prove fraud, embezzlement, or larceny. Plaintiffs have failed to show that Defendant's conduct meets the heightened standard announced in *Bullock*. Thus, Defendant's conduct cannot be characterized as so reckless so as to constitute defalcation under § 523(a)(4).

III. CONCLUSION

For the reasons stated above, the Court finds that Plaintiffs failed to prove by a preponderance of the evidence that Defendant committed a defalcation while acting in a fiduciary capacity. Accordingly, the Court grants judgment in favor of the Defendant.

The Clerk's Office shall serve a copy of this Order on Plaintiffs, Plaintiffs' counsel, Defendant, Defendant's counsel, and the United States Trustee.