IT IS ORDERED as set forth below:

Date: July 3, 2013

Barbara Ellis-Monro
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	
HENRY EDELSON, Debtor.	CASE NO. 08-77595-BEM CHAPTER 7
STEVEN C. SILVER, FOR AND ON BEHALF OF W.R. AGENCY, LLC, Plaintiff, v. HENRY EDELSON, Defendant.	ADVERSARY PROCEEDING NO. 11-05720-BEM

ORDER

A trial was held in this adversary proceeding on March 27, 2013 (the "Trial"). Plaintiff Steven Silver, for and on behalf of W.R. Agency, LLC ("WRA"), alleges in

Count I of the Complaint that Defendant Henry Edelson ("Edelson") embezzled WRA's property such that the obligation created in a Final Order and Judgment as to Defendants Henry Edelson and the William Rhodora Agency, Inc. ("Rhodora") for damages in the amount of $653,000 entered by the DeKalb County Superior Court on June 30, 2011 (the "Judgment") should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(4). [Doc. No. 1, ¶ 86]. In Count II, Plaintiff alleges Defendant created HE Office Solutions, LLC ("HE") as a means of escaping liability, diverting assets, and conducting personal business, such that HE should be considered Edelson's alter ego and be liable as a successor entity. [Doc. No. 1, ¶¶ 98-101]. Counts III and IV are, respectively, claims for attorneys fees pursuant to applicable state and federal law. [Doc. No. 1, ¶¶ 108-115].

After carefully considering the pleadings, the evidence presented and the applicable authorities, the Court enters the following findings of fact and conclusions of law on Count I, and to the extent the claims raised in Counts III and IV seek attorneys' fees for prosecution of Plaintiff's claims in Count I on Counts III and IV in accordance with Fed. R. of Bankr. P. 7052. With respect to Count II and those portions of Counts III and IV that seeks attorneys' fees for prosecution of Plaintiff's claims in Count II, the Court submits proposed findings of fact and conclusions of law to the District Court for de novo review pursuant to 28 U.S.C. § 157(c)(1) and Fed. R. Bankr. P. 9033.

I. JURISDICTION

A. Standing

"[S]tanding is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims." *Bochese v. Town of Ponce Inlet*, 405

F.3d 964, 974 (11th Cir. 2005) (quoting *Dillard v. Baldwin Cnty. Comm'rs,* 225 F.3d 1271, 1275 (11th Cir. 2000) (citing *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998))); *Florida Ass'n of Med. Equip. Dealers v. Apfel,* 194 F.3d 1227, 1230 (11th Cir. 1999) (stating that "every court has an independent duty to review standing as a basis for jurisdiction at any time, for every case it adjudicates."); and *EF Hutton & Co., Inc. v. Hadley,* 901 F.2d 979, 983 (11th Cir. 1990)). The Court has an independent duty to consider standing and does so in this proceeding even though no party has questioned Plaintiff's ability to seek to have the amounts awarded in the Judgment held non-dischargeable on behalf of WRA, to declare that HE is an alter ego of Edelson and to impose successor liability on HE.

In evaluating whether a party has standing to bring a suit in federal court, the Court must look at both constitutional and prudential considerations in exercising its authority. Article III of the Constitution requires that Plaintiff demonstrate a "case or controversy." *See Massachusetts v. E.P.A.,* 549 U.S. 497 (2007) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992)). Courts have interpreted this requirement to mean that a litigant must have "suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Id.* at 517.

In addition to proving constitutional standing, a litigant must establish that their claim satisfies "self-imposed rules" of prudential requirements. *In re D'Anello,* 477 B.R. 13, 21 (Bankr. D. Mass. 2012) (citing *In re Hayes,* 393 B.R. 259 (Bankr. D. Mass. 2008)). Courts have held that prudential standing factors include consideration of whether

the litigant: "(1) asserts the rights and interests of a third party and not his or her own, (2) presents a claim arguably falling outside the zone of interests protected by the specific law invoked, or (3) advances abstract questions of wide public significance essentially amounting to generalized grievances more appropriately addressed to the representative branches." *Id.* While Plaintiff must be able to demonstrate he satisfies both constitutional and prudential standing requirements, the prudential standing requirements "can be waived if . . . not properly or timely raised." *Id.*

Plaintiff has shown a sufficient particularized injury caused by the Defendant through the findings and award of the Judgment. The State Court found that Edelson violated his fiduciary duty to WRA directly causing harm to WRA. Further, the ability to award a pecuniary judgment to satisfy the wrongdoing satisfies the requirement that the matter be able to be redressed by the Court. Additionally, Plaintiff's claim passes the prudential threshold because it is not a generalized third-party claim, but a specific private action pursuant to O.C.G.A. § 14-11-801.[1] Therefore Plaintiff has standing in this Court to pursue WRA's claims on behalf of WRA.

[1] O.C.G.A. §14-11-801 states: "(1) Either management of the [LLC] is vested in a manager or managers who have the sole authority to cause the [LLC] to sue in its own right or management of the [LLC] is vested in the members but the plaintiff does not have the authority to cause the [LLC] to sue in its own right under the provisions of the articles of organization or a written operating agreement; (2) The plaintiff has made written demand on those managers or those members with such authority requesting that such managers or such members take suitable action; (3) Ninety days have expired from the date the demand was made unless the member has earlier been notified that the demand has been rejected by the limited liability company or unless irreparable injury to the [LLC] would result by waiting for the expiration of the 90 day period; (4) The plaintiff (A) is a member of the [LLC] at the time of bringing the action, and (B) was a member of the [LLC] at the time of the transaction of which he or she complains, or his or her status as a member of the [LLC] has devolved upon him or her by operation of law from a person who was a member at the time of the transaction; and (5) The plaintiff fairly and adequately represents the interests of the [LLC] in enforcing the right of the [LLC]."

B. Core and Non-Core Claims

Bankruptcy courts are courts of limited jurisdiction whose jurisdiction is "derivative of and dependent upon" the three categories of proceedings set forth in 28 U.S.C. § 1334(b). *See In re Toledo,* 170 F.3d 1340, 1344 (11th Cir. 1999). Thus, bankruptcy courts are permitted to hear only matters: (1) arising under title 11, (2) arising in a case under title 11, and (3) those matters related to a case under title 11. 28 U.S.C. § 157(a); *Id*. Matters arising under title 11 and arising in a case under title 11 are core matters in which a bankruptcy court has authority to enter a final judgment[2] while matters related to a case under title 11 are non-core and the bankruptcy court may hear such matters, but does not have the authority to enter a final judgment. 28 U.S.C. § 157(b)(1) and (c)(1).

Matters arising under title 11 involve "matters invoking a substantive right created by the Bankruptcy Code while matters arising in a case under title 11 are generally administrative-type matters that could arise only in bankruptcy." *In re Toledo*, 170 F.3d at 1344. Non-core or "related to matters" are those matters that "could conceivably have an effect on the estate being administered in bankruptcy . . . . An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *In re Lemco Gypsum, Inc.*, 910 F.2d

[2] The Court's ability to enter a final order on a dischargeability complaint is not altered by *Stern v. Marshall*, 131 S.Ct. 2594 (2011); *In re Ryckman*, 468 B.R. 754, 758-9 (Bankr. W.D.Pa. 2012)(citing *In re Ritz*, 459 B.R. 623 (Bankr. S.D. Tex. 2011)); *see also In re Melton*, 2013 WL 2383657 (Bankr. N.D.Ga. 2013).

784, 788 (11th Cir. 1990) (adopting the *Pacor* formulation set forth in *Pacor, Inc. v. Higgins,* 743 F.2d 984, 994 (3rd Cir. 1984)).

Here, Plaintiff seeks a determination that the obligation contained in the Judgment is excepted from discharge, a matter squarely within this Court's core jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I). In addition, Plaintiff seeks a judgment declaring that HE is an alter ego or successor entity to Edelson and Rhodora, BCG and WRA. If HE is found to be Defendant's alter ego, its liabilities would be charged against the estate and its assets property of the estate; thus adjudicating this claim could have an impact, positive or negative, on the estate. Accordingly, there is a conceivable effect such that the matter is non-core and this Court has jurisdiction to hear the claim and enter proposed findings of fact and conclusions of law on Count II of the Complaint.

To the extent Counts III and IV seek attorneys' fees for prosecution of Count I of the Complaint, the Court may enter a final judgment on the claim. *See In re Antioch Co.,* 451 B.R. 810 (Bankr. S.D.Ohio 2011) (attorneys' fees core claims to the extent sought in connection with claims pursuant to the Bankruptcy Code, but non-core to the extent premised on state law claims); *see also In re New York Skyline, Inc.*, 471 B.R. 69, 80 (Bankr. S.D.N.Y. 2012) (court had authority to enter final judgments on attorneys' fees incurred in relation to core matters). To the extent Plaintiff seeks attorneys' fees based upon Count II, a non-core claim, the Court cannot enter a final judgment. *Id.* Thus, the Court may not enter a final judgment awarding complete relief under Counts III and IV.

II. FINDINGS OF FACT AND PROPOSED FINDINGS OF FACT

By order entered November 8, 2012, this Court denied Plaintiff's Motion for Summary Judgment on Count I of the Complaint and held that the Judgment was preclusive as to the facts set forth in the Judgment, but that a question of material fact remained, that is, whether Edelson possessed the requisite fraudulent intent when he undertook the actions established in the Judgment. [Doc. No. 36]. Thus, a trial on this issue was necessary.

The facts established in the Judgment are:

> 1. Silver was a member of W.R. Agency, LLC ("WRA")[3], a Georgia limited liability company.
>
> 2. The only official members of WRA were Silver and [co-defendant] The William Rhodora Agency, Inc. ("Rhodora").
>
> 3. The sole shareholder of Rhodora was Edelson.
>
> 4. WRA was in the business of buying and selling used office equipment.
>
> 5. In February of 2006, Edelson locked Silver out of WRA.
>
> 6. Edelson opened a new business bank account without Silver's knowledge, an account to which Silver had no access.
>
> 7. Edelson concluded that "as of March of 2006," he had taken over "the responsibilities of administration and payables for WRA".
>
> 8. Edelson then continued to operate the same business, under the same trade name, at the same location, for over a year-and-a-half after the lockout - until September of 2007.
>
> 9. WRA's "d/b/a" or trade name was "Workplace Ready America." Yet, after locking Silver out of the operation, Edelson continued to operate his new business (with a co-defendant, Michael Lenig, and his company, Business Concepts Group ("BCG") out of the same location while continuing to use WRA's original trade name.

[3] This Court's November 8, 2012, Order Denying Plaintiff's Summary Judgment referred to W.R. Agency, LLC as "LLC". For clarity, in this Order, this reference is changed to WRA.

10. Edelson accepted payments made to WRA, but then endorsed them over for deposit into Rhodora's own bank account.

11. Edelson paid Lenig and BCG $100,000 of WRA funds to "straighten out the books" of WRA, but later ended up operating WRA's business with Lenig.

12. Edelson admitted to sending "my [Edelson's] clients" to Lenig and BCG. Edelson admitted to selling WRA's warehouse equipment, including a forklift, power drills, and dollies, to Lenig and BCG.

13. Edelson admitted that he served as the "sole salesman," for BCG. Edelson further admitted that BCG received "the funds" and "all the receivables" generated by his work. Edelson admitted to having "produced $600,000 of business" for Lenig/BCG by January of 2007.

14. Edelson violated his fiduciary duty to WRA.

15. Edelson retained all of the assets of WRA.

16. Edelson sold inventory of WRA "off the books."

17. Edelson made or took wrongful distributions from WRA.

[Doc. No. 36].

In addition to the facts established in the Judgment, the evidence at the Trial established that Edelson engaged a business broker to market the sale of Rhodora. [Plaintiff's Exhibit 1]. Instead of purchasing Rhodora, the parties agreed that Silver would purchase a majority interest in the business and a new company would be formed to continue Rhodora's business. It was anticipated that Silver, who has a background in information technology, would be responsible for the administrative functions of WRA while Edelson would be responsible for sales. The management of WRA was vested in each of Edelson and Silver. [Plaintiff's Exhibit 4]. Key to Silver's duties was management of inventory and creation of software to track WRA's inventory. Silver paid

Rhodora $232,000 for his interest in WRA, of which $23,000 was contributed to WRA by Rhodora. Rhodora also contributed all of its tangible personal property to WRA. [Plaintiff's Exhibit 2].

The relationship between Edelson and Silver soured quickly because, according to Edelson, Silver did not learn the product line, never completed a physical inventory of WRA's product, did not create inventory tracking software, did not manage the accounting function competently, generally did not care and was irresponsible. Silver, in contrast, believed Edelson bought substantially too much inventory, did not price sales correctly and that Edelson's business practices stopped working because the business, as set forth in the offering memoranda, declined in the 9-12 months Silver was involved. Silver did acknowledge that he was never able to complete an inventory for WRA or create an inventory tracking system, and that there were some difficulties with the accounting function.

After WRA had operated for approximately ten months, Edelson called an emergency board meeting in which these issues were discussed. Although the parties disagree as to what transpired at the emergency meeting, it appears from both Silver's and Edelson's testimony that Silver acknowledged some short comings in his performance (as he also did during cross examination) and Edelson demanded $43,000 from Silver to stay with WRA. Silver did not want Edelson to leave WRA so he paid Edelson the $43,000. Edelson testified that, of the $43,000, approximately $22,000 was paid to employees because Silver went on vacation without paying employees and had

left no funds to pay them. Edelson considered the remaining amount to be salary because he had not been paid anything since February, 2005.

What transpired next in the relationship is also in dispute. Edelson testified that when Silver returned from a vacation taken in December, 2005, Silver said he did not want to continue with WRA, that Edelson implored Silver to retain competent administrative assistance and suggested that a business broker market Silver's interest in WRA, but that Silver would not pay a broker's retainer. Silver, in contrast, testified that Edelson wanted Silver out of the business. Silver testified that he wasn't ready to go because he felt if inventory and inventory buying were decreased while pricing was increased the company could be more successful. At some point, Edelson offered to sell product and pay Silver if Silver would stay out of the day-to-day operations of WRA, but it is unclear whether this possibility was raised prior to March 13, 2006. [Plaintiff's Exhibit 27]. Edelson testified that he did not ask Silver to leave the company but that Silver disappeared and Edelson could not get in touch with him. In February, 2006, Edelson locked Silver out of the business and in March, 2006, Silver sued Edelson for enticement alleging fraudulent representations in the sale of the business interest to Silver. This suit was dismissed.

Around that time, Mike Lenig ("Lenig") was brought in by Edelson to do the books for WRA. Silver testified that there was a meeting with Lenig in which the parties discussed trying to get WRA back on track. Edelson testified that Lenig offered to sell Silver's portion of WRA's inventory and give Silver the money from any such sales. According to Edelson, Silver declined this offer. Silver testified that he didn't recall an

offer to sell his portion of WRA's inventory, but conceded that such a discussion may have taken place. At some point thereafter, Edelson segregated WRA's inventory based on each member's ownership percentage. The dispute between the parties on this point is not whether inventory was segregated but the value of the inventory segregated on account of Silver's interest. Silver testified that the inventory put into trailers for him was scrap worth about $4,000. Edelson, in contrast indicated the inventory in the trailers was worth $300,000 and that the discrepancy in value was because Silver did not understand space planning.[4]

Edelson testified without contradiction that he sought to mediate the dispute in an effort to resolve the relationship but Silver left the mediation. It is also undisputed that Silver took funds from one of WRA's bank accounts and wrote at least two checks in the amount of $2,499, the maximum allowed without requiring Edelson's signature, to pay down an equity line opened to provide cash flow to WRA. Silver also conceded that while he was locked out of WRA's bank account he still had online access and could monitor the account and, further, that his authority on the account was later restored. Neither party complied with WRA's operating agreement with respect to compensation, distributions to members, or winding down or terminating WRA. [Plaintiff's Ex. 4]. Finally, Edelson testified that the creation of WRA and the sale to Silver was intended to be his exit strategy for retirement. Edelson was, and remains, angry that Silver (according

[4] The facts established in the Judgment include the finding that Edelson retained all assets of WRA. Given the parties' disagreement about the value of the inventory segregated, and the default nature of the Judgment, the evidence as to value informs the findings in the Judgment.

to Edelson) did not want to learn the business or take it over. [Plaintiff's Exhibits 26 & 27].

BCG was an entity that Lenig formed. BCG operated from the same location as WRA, used the same equipment, employed the same people and answered the telephone using WRA's trade name, Workplace Ready America. Edelson testified, without contradiction, that BCG paid rent for WRA's prior location and that the only difference between BCG and WRA was Silver's portion of WRA's inventory and that BCG bought Edelson's portion of the inventory. Silver testified that he had no knowledge of BCG and that Edelson did not tell him about BCG. Although the timing is not completely clear, it appears that Edelson went to work for BCG as a sales person in July 2006. Edelson sold product for BCG just as he had done for WRA and was paid $1,000 per week for his work with BCG, which was consistent with the salary he expected from WRA.

In August, 2007, a receiver was appointed for WRA. What actions the receiver took and whether there was any recovery for creditors or members is unknown. The suit resulting in the Judgment was the third lawsuit resulting from WRA's short lived operation and was brought by Silver as a derivative action on behalf of WRA. Edelson testified that in his mind WRA ceased to exist in April, 2006.

III. CONCLUSIONS OF LAW AND PROPOSED CONCLUSIONS OF LAW

A. Standards for Finding a Debt Nondischargeable under § 523(a)(4)

Section 523(a)(4) of the Bankruptcy Code states that "a discharge under section 727 . . . does not discharge an individual debtor from any debt . . . for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. § 523(a)(4).

Count I of the Complaint seeks to hold the Judgment amount non-dischargeable under the embezzlement prong of § 523(a)(4). Embezzlement is defined as "the fraudulent appropriation of property by a person to whom such property has been entrusted, or into whose hands it has lawfully come." *In re Hatchett*, 2011 WL 1789960, *2 (Bankr. N.D.Ga. 2001)(Drake, J.) (citing *In re Neal*, 300 B.R. 86 (Bankr. M.D.Ga. 2003)).

To establish embezzlement, then, 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. *Pollitt v. McClelland (In re McClelland)*, 2011 WL 2461885 (Bankr. N.D. Ga. 2011)(Hagenau, J.)(citing *Sandalon v. Cook (In re Cook)*, 141 B.R. 777, 780 (Bankr. M.D. Ga. 1992)). "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 funds converted is not a defense to embezzlement. *Id.* Concealment is frequently used by the courts as evidence of fraudulent intent. *Id.* at 777.

The primary purpose of our bankruptcy system is a "fresh start" for the honest but unfortunate debtor. *Local Loan Co. v. Hunt*, 292 U.S. 234, 54 S.Ct. 695, 78 L.Ed. 1230 (1934); *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971).

Because of this clearly stated policy, exceptions to discharge are generally construed narrowly against a creditor and liberally in favor of the debtor. Thus, the creditor has the burden to prove, by a preponderance of the evidence, that a particular obligation of the debtor falls within an exception to discharge. *See Grogan v. Garner*, 498 U.S. 654, 112 L.Ed.2d 755 (1991).

1. Count I – Embezzlement Pursuant to § 523(a)(4) (Conclusions of Law)

The facts contained in the Judgment, which Edelson is precluded from re-litigating, establish that Edelson took sole control of the WRA and exercised control over property of WRA, that is, property that originally came into his possession rightfully but was then used for improper purposes for the benefit BCG and/or Edelson. The evidence at trial established that after Silver purchased his interest in WRA, WRA's business declined[5] and that the parties' relationship deteriorated rapidly. This culminated in Edelson's locking Silver out of the business in February, 2006. Notwithstanding the "lock out," Silver acknowledged that he still had online access to WRA's bank account. Edelson testified, without contradiction, that he used proceeds of sales of "his" inventory to pay WRA's unpaid vendors and taxing authorities. [Plaintiff's Exhibit 7]. It is also not disputed that Silver knew that a portion of WRA's inventory had been put in trailers for him, that Silver inspected this inventory and that Silver used WRA's funds to pay a personal credit line.

[5] More specifically Rhodora's business, which was purchased by WRA, declined.

Edelson's actions in ending his relationship with Silver and terminating WRA's business, while not consistent with WRA's operating agreement, are not indicative of fraudulent intent because there is no evidence of deceit or concealment. Rather, the evidence showed that Edelson blocked Silver's access to WRA's bank account, continued to operate WRA's business and pay its vendors, sought on at least two occasions to meet and mediate the parties' differences, and when that was not successful, Edelson segregated WRA's inventory. Silver was aware of the segregation of inventory. Silver testified that he was unaware of the existence of BCG. The evidence does not show what, if any, opportunity may have presented itself for Edelson to tell Silver about BCG, thus the Court cannot find that Edelson concealed the existence of BCG. Further, although Edelson was clearly angry and wanted Silver to sell his interest in WRA, anger without more does not establish fraudulent intent and the Court finds that Plaintiff has not established that Edelson's actions were accompanied by the fraudulent intent necessary to except the Judgment debt from discharge pursuant to § 523(a)(4).

2. Count II – Assignment of Liability to Successor/Alter-Ego Entities (Proposed Conclusions of Law)

In Count II of the Complaint, Plaintiff seeks a declaratory judgment holding that HE is liable on the Judgment. Plaintiff contends that HE is a mere continuation of Rhodora, WRA and BCG, and was used to transact Edelson's personal affairs such that its separate corporate existence should be disregarded.

a. Declaratory Judgment Standard

Consistent with the constitutional standing requirements of Article III, a Plaintiff seeking to establish entitlement to a declaratory judgment must demonstrate an "actual

controversy" to the court.[6] *Malowney v. Fed. Collection Deposit Grp.*, 193 F.3d 1342, 1347 (11th Cir. 1999); Declaratory Judgment Act, 28 U.S.C. § 2201. Next, Plaintiff must prove that the conflict is ongoing, with a reasonable expectation that the wrongful acts will continue. Additionally, Plaintiff must show that the conduct is *actual*, not inferred, threatened, or hypothetical. *Id.*

As previously discussed, the proceedings here are actual conflicts between the parties which satisfy constitutional "case or controversy" requirements. Furthermore, Plaintiff presented evidence specific to Count II to demonstrate that Defendant continues to operate HE and sell product through HE without any indication that Defendant plans to alter or discontinue these actions. Finally, evidence showed that HE exists in the State of Georgia as a functioning business such that HE could be Edelson's alter ego and the claim is not hypothetical. Thus, Plaintiff is entitled to seek entry of a declaratory judgment.

b. Analysis

Under the alter ego doctrine in Georgia, equitable principles are used to disregard the separate and distinct legal existence possessed by a corporation where it is established that the corporation served as a mere alter ego or business conduit of another. *Kissun v. Humana, Inc.*, 267 Ga. 419, 419-20 (1997) (citing *Farmers Warehouse v. Collins*, 220 Ga. 141, 150, 137 S.E.2d 619 (1964)); *Amason v. Whitehead*, 186 Ga. App. 320, 367 S.E.2d 107 (1988). "To establish the alter ego doctrine it must be shown that the stockholders' disregard of the corporate entity made it a mere instrumentality for the

[6] See previous discussion of "case or controversy," pg. 8.

transaction of their own affairs; that there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist; and to adhere to the doctrine of corporate entity would promote injustice or protect fraud." *See S. Envtl. Grp v. Rosebud Landscape Gardeners,* 196 Ga. App. 392, 394 (1990). This finding depends on the particular circumstances of the case and is a factual inquiry. *Id.* at 392. In making this determination, courts look to evidence of comingling of money, facilities, or records between the two corporations, or the sharing of officers or employees. *See NEC Techs., Inc. v. Nelson,* 267 Ga. 390 (1996); *Baillie Lumber Co. v. Thompson,* 279 Ga. 288, 299 (2005).

The evidence presented with respect to HE established that HE was organized on July 30, 2009 and applied for a business license on July 31, 2009. [Plaintiff's Exhibits 14, 16]. The sole owner of HE is Sue Edelson, Edelson's wife. [Plaintiff's Exhibits 15, 16]. Edelson admitted that he did not want the business in his name because he was in a pending Chapter 13 case, so he put the business in his wife's name. By at least April, 2010 Edelson was the manager of HE. [Plaintiff's Exhibit 22]. Edelson continues to work for HE selling used office furniture, but the location and employees, with the exception of Edelson, are different from those who worked for WRA and BCG. This being the sum total of the evidence presented with respect to HE, it is insufficient to support a finding that HE is a mere continuation of WRA or BCG, or that HE is Edelson's alter ego. Thus, the Court will deny Plaintiff's request for a judgment declaring that HE is an alter ego of Edelson and a mere continuation of WRA and BCG. Further, because the Court did not find that Edelson is the alter ego of HE, the Court will not impose successor liability.

1. Counts III & IV - State-Law and Federal Law Claim For Attorneys' Fees and Expenses of Litigation (Conclusions of Law and Proposed Conclusions of Law)

The Judgment obligation is not excepted from discharge, thus, to the extent the claims for attorneys' fees relate to Count I, no award of attorneys' fees under Counts III and IV will be made.[7] To the extent the claims for attorneys' fees relate to Count I, the Court will enter a final judgment as to Count III and IV. With respect to the attorneys' fees claims related to Count II the Court finds and recommends that the District Court find that HE is not the alter ego of Edelson such that successor liability is not warranted and no award under Counts III and IV for prosecution of Count II should be made. The Court will submit these proposed findings of fact and conclusions of law to the District Court. *See* 28 U.S.C. § 157(c)(1); Fed. R. Bankr. P. 9033.

IV. CONCLUSION

The evidence presented does not support a finding that the debt owed to Plaintiff pursuant to the Judgment is excepted from discharge pursuant to 11 U.S.C. § 523(a)(4) because Plaintiff failed to demonstrate that Edelson acted with the fraudulent intent necessary to cause a debt to be nondischargeable under the embezzlement prong of 11 U.S.C. § 523(a)(4). Further the evidence was insufficient to find that HE was a mere continuation of Rhodora, WRA or BCG such that imposition of successor liability under Count II is not warranted. Finally, because the Judgment debt is dischargeable, no award of attorneys' fees will be made under Counts III and IV A separate judgment will be

[7] If the Judgment debt was non-dischargeable, a further hearing would be necessary to consider the attorneys' fee request because there is no amount contained in the Plaintiff's demand and no evidence of fees incurred was presented at Trial.

entered on Counts I, III and IV to the extent the fee requests in Counts III and IV relate to Count I.

Based upon the proposed findings of fact and conclusions of law contained herein, the undersigned respectfully recommends that the District Court deny the relief requested in Count II of the Complaint and deny the request for attorneys' fees in Counts III and IV to the extent the relief sought in Counts III and IV relates to Count II of the Complaint.

The Clerk is directed to transmit these proposed findings of fact and conclusions of law along with the record in this adversary proceeding to the Clerk for the United States District Court for the Northern District of Georgia, to serve a copy of the same on the parties and to note the date of service on the parties on the docket in this proceeding.

END OF DOCUMENT

Distribution List

Richard S. Alembik, PC
315 W. Ponce De Leon Ave
Suite 250
Decatur, GA 30030-5100

Henry Edelson
6100 Polo Drive
Cumming, GA 30040

Richard K. Valldejuli, Jr.
Valldejuli & Associates, WRA
Suite A
2199 Lenox Road, NE
Atlanta, GA 30324

The William Rhodora Agency, Inc.
c/o Doug Robinson, R/A
3340 Peachtree Road, NE
Ste. 2150
Atlanta, GA 30326

HE Office Solutions, LLC
c/o Sue A. Edelson, R/A
399 Curie Drive
Alpharetta, GA 30005