SIGNED this 13th day of July, 2011

Shelley D. Rucker
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

ERIC JASON TETER,
Debtor;

ROBERT NABORS

Plaintiff,

v

ERIC JASON TETER,

Defendant.

No. 09-16718
Chapter 7 Debtor

Adversary Proceeding
No. 10-1300

Memorandum Opinion

Plaintiff Robert Nabors ("Plaintiff" or "Nabors"), a general creditor of the Defendant Debtor Eric Jason Teter ("Defendant" or "Debtor"), has filed this action against the Defendant asserting that this court should deny a discharge to the Defendant pursuant to 11 U.S.C. §§

727(a)(2)(A), 727(a)(4)(A), and 727(a)(5). [Doc. No. 1, Complaint].[1] The Defendant contends that he is entitled to a discharge and has filed a counterclaim against the Plaintiff seeking attorneys' fees based on his assertion that the Plaintiff's position is not substantially justified. [Doc. No. 5, Answer and Counter-Claim ("Answer")].

The court makes the following findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

I. Facts

Defendant Eric Jason Teter filed a Chapter 7 Bankruptcy petition on October 16, 2009. [Bankruptcy Case 1:09-bk-16718, Doc. No. 1]. Prior to filing, he had purchased and operated two dry cleaning businesses, Esquire Cleaners and Old Fort Cleaners, in the Chattanooga area and borrowed funds to purchase the dry cleaning businesses. He operated the businesses as limited liability companies, of which he was the owner. *See* Trial Testimony of Eric Jason Teter, 3/16/11 at 10:18 a.m.

He purchased those businesses from the Plaintiff and received an extension of credit from the Plaintiff to help finance the purchase. Trial Testimony of Eric Jason Teter, 3/16/11 at 9:28-9:29 a.m. The Plaintiff is an unsecured creditor with a claim of $150,000. [Bankr. Case. No. 1:09-bk-16718, Doc. No. 1, Schedule F – Creditors Holding Unsecured Nonpriority Claims, p. 26]. The Plaintiff testified at trial that the Debtor provided him with a $35,000 down payment for the purchase of the dry cleaning business and that he provided the Plaintiff with a loan of $105,000 plus another $10,000 to finance the rest of the purchase of the business. Trial Testimony of Robert Nabors, 3/16/11 at 1:18 - 1:21 p.m.

There has been extensive litigation between the parties regarding whether there were misrepresentations made by the Plaintiff at the time of the purchase which Plaintiff partially

[1] All citations to the court's docket entries are for the docket pertaining to Adversary Proceeding 10-1300, unless otherwise noted.

financed and whether the businesses and the collateral were mishandled by the Debtor in his operation of the businesses. The businesses have been shut down, and the Defendant defaulted on the note to the Plaintiff. But this case is not about the failed business.

This is a case in which the Plaintiff is objecting to the Debtor's discharge. The Plaintiff asserts claims against the Debtor pursuant to 11 U.S.C. §§ 727(a)(2)(A) (intentional fraudulent transfer), 727(a)(4)(A) (false oath), and 727(a)(5) (failure to explain assets). The Plaintiff alleges that the Defendant engaged in a number of fraudulent transfers within one year of filing his petition for bankruptcy. The Plaintiff further asserts that the Defendant made a number of false statements or misrepresentations in relation to his bankruptcy petition. Finally, he contends that the Debtor has failed to explain the loss of a substantial amount of personal property.

Fraudulent Transfers

First, Plaintiff focuses on Defendant's admitted transfers of a 2001 Ford F-150 truck and $30,000 to his wife Melanie Teter in July 2009. Both transfers were listed on the Debtor's schedules. *See* [Bankr. Case No. 1:09bk16718, Doc. No. 1, Statement of Financial Affairs, p. 9]. Each of these transfers was made within one year of the date of the filing of the petition.

At trial the Debtor testified that the amount that was actually transferred to his wife was substantially more. The Debtor previously had asserted that the purpose of the transfer was to give his wife "her half" of the home equity line of credit. [Doc. No. 1, Complaint, ¶ 3].

At trial, the evidence was different. In July of 2008, the Debtor opened a home equity line of credit on his home at 23 Shoal Creek Falls, Signal Mountain, TN in the amount of $50,000.00 with Regions Bank. Defendant's Trial Exhibit 19. On June 8, 2009, the Debtor obtained an advance on the line and deposited $50,000.00 in his joint checking account at Regions Bank to pay bills. On June 19, 2009, the Debtor's wife, using an unnumbered counter check, moved $47,500.00 of these funds to her checking account at SunTrust Bank. These funds were used for ordinary and reasonable living expenses of the couple until the date of the

filing of the bankruptcy petition. At filing, $30,000.00 remained of the $47,500.00 initially deposited in Mrs. Teter's account on June 19, 2009. [Bankr. Case No. 1:09bk16718, Doc. No. 1, Statement of Financial Affairs, p. 9]; Defendant's Trial Exhibit 17. The Debtor described the transfer as a transfer of $30,000 to Melanie Teter dated July, 2009. [Bankr. Case No. 1:09bk16718, Doc. No. 1, Statement of Financial Affairs, p. 9].

Mrs.Teter testified at trial that she had been distressed about her husband's business losses and was desperate to save their home. She took the money without the Debtor's knowledge or consent. She told him about it shortly after it had been transferred to her. The Debtor testified that he was aware of his wife's taking the money but that he listed only $30,000 in his statement of financial affairs because he understood the question to be asking about how much money remained at the time he was completing the schedules, and that the amount he listed was the amount that remained.

Question 10 of the Statement of Affairs states:

> List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **two years** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

[Bankr. Case No. 1:09bk16718, Doc. No. 1, Statement of Financial Affairs, p. 9].

The Debtor responded regarding the transfer of the home equity funds as follows:

NAME AND ADDRESS OF TRANSFEREE, RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED
Melanie Teter	July, 2009	$30,000.00

Id.

False Oath

Second, the Plaintiff contends that the Debtor's schedules contain three false oaths. He cites a deposit into the Debtor's checking account for $47,000 that is not accounted for by the

Debtor's income. This deposit was explained at trial as being the proceeds of the equity line account loan. He also cites that the Debtor lists a transfer to his wife for $30,000 when it was really $47,000. The Debtor's explanation given above contradicts the position taken in his trial memorandum in which he asserted that he transferred the money to his wife and not that she took it without his knowledge. *See* [Doc. No. 27, p. 2]. Finally, the Plaintiff cites to the Debtor's statement that he only had $2100 of personal property which Plaintiff contends appears to be false when compared to the values listed on a financial statement provided to Northwest Georgia Bank. This financial statement is also the basis for Plaintiff's last allegation regarding the failure to explain the loss of assets.

Loss of Assets

On December 29, 2008, the Debtor completed a personal financial statement at the request of Northwest Georgia Bank listing personal property of $250,000.00. Financial Statement of Teter dated 12/29/08, Plaintiff's Trial Exhibit 1 ("NWGB Financial Statement"). With respect to the Debtor's schedules, the Defendant listed household goods and jewelry worth $2100. The personal financial statement provided to Northwest Georgia Bank on December 29, 2008 stated that he owned furniture, jewelry, an all-terrain vehicle ("ATV"), and tools valued at $242,000. At trial, the Debtor testified that the tools, fixtures and equipment used by Old Fort Cleaners and Esquire Cleaners accounted for the majority of the value, and that those assets were not included because they had been surrendered to the creditors, including the Plaintiff, by the time his bankruptcy petition was filed. Plaintiff questioned the loss of assets because the statement of financial affairs failed to list any repossessions, foreclosures, or returns of these items. [Bankr. Case No. 1:09bk16718, Doc. No. 1, Statement of Financial Affairs, p. 8, Question 5].

The failure to list the returns is mitigated by the fact that the Debtor had listed that he was involved in four different lawsuits during the year immediately preceding his filing for

bankruptcy, including two in Hamilton County Circuit Court, one in Hamilton County Chancery Court, and one in Lyon County, Minnesota District Court. [Bankruptcy Case No. 1:09-bk-16718, Doc. No. 1, pp. 7-8]. The lawsuit listed as pending in Hamilton County Chancery Court is a suit between the Debtor and the Plaintiff. The Debtor explains the loss of the truck by his admission that he transferred his 2001 Ford F-150 to his wife.

Debtor's Defense and Counterclaim

The Debtor generally denies that the Plaintiff can state a cause of action pursuant to 11 U.S.C. §§ 727(a)(2)(A), 727(a)(4)(A), and 727(a)(5). He further denies that there has been any loss of assets relating to his household goods and jewelry as alleged by the Complaint. Answer, ¶ XVII. The Debtor brings a counterclaim against the Plaintiff pursuant to 11 U.S.C. § 523(d).[2] He contends that the Plaintiff's position of "requesting a determination of dischargeability of a consumer debt under 11 U.S.C. § 523(a)(2) is not substantially justified." He seeks attorney's fees and costs from the Plaintiff. At trial, the parties acknowledged that the complaint was not one objecting to dischargeability under section 523 but rather an objection to discharge under section 727.

II. Jurisdiction

28 U.S.C. §§ 157 and 1334, as well as the general order of reference entered in this district provide this court with jurisdiction to hear and decide this adversary proceeding. The Plaintiff's objection to the Defendant's discharge is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(J).

[2] Although the Answer states the Debtor is bringing a counterclaim pursuant to 11 U.S.C. § 523(b), the court assumes that the Debtor is attempting to bring a claim pursuant to 11 U.S.C. § 523(d) seeking costs and attorney's fees due to lack of substantial justification for a § 523(a)(2) claim. However, the Plaintiff's Complaint does not assert a cause of action pursuant to 11 U.S.C. § 523(a)(2).

III. Analysis

A. Non-Dischargeability Pursuant to 11 U.S.C. § 727(a)(2)(A)

11 U.S.C. § 727(a)(2)(A) provides:

> (a) The court shall grant the debtor a discharge unless – . . . (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed –
> (A) property of the debtor, within one year before the date of the filing of the petition. . . .

11 U.S.C. § 727(a)(2)(A). The Plaintiff must prove the elements of 11 U.S.C. § 727(a)(2)(A) by a preponderance of the evidence, and courts generally construe § 727(a) liberally in favor of the debtor. *Keeney v. Smith (In re Keeney)*, 227 F.3d 679, 683 (6th Cir. 2000); *see also, Roberts v. Oliver (In re Oliver)*, 414 B.R. 361, 373 (Bankr. E.D. Tenn. 2009).

In *In re Keeney* the Sixth Circuit emphasized that § 727(a)(2)(A) "encompasses two elements: 1) a disposition of property, such as concealment, and 2) 'a subjective intent on the debtor's part to hinder, delay or defraud a creditor through the act disposing of the property.'" 227 F.3d at 683 (quoting *Hughes v. Lawson (In re Lawson)*, 122 F.3d 1237, 1240 (9th Cir. 1997)). The Sixth Circuit Bankruptcy Appellate Panel has determined that the term "concealment" in § 727(a)(2)(A) "includes the withholding of knowledge of an asset by the failure or refusal to divulge information required by law to be made known." *Buckeye Retirement Co., LLC, LTD. v. Swegan (In re Swegan*), 383 B.R. 646, 655 (B.A.P. 6th Cir. 2008).

In this case the Debtor denies that he transferred the property with intent to defraud his creditors. In fact he denies that he transferred the property at all. Both he and his wife testified that she made a unilateral decision to take the funds and put them in his name. There was no evidence presented to the contrary at the hearing. So the court must determine whether the circumstances surrounding the transfer and the conduct with respect to the transferred vehicle and funds indicate an intent to hinder, delay and defraud creditors.

In *Jahn v. Flemings (In re Flemings)* this court had the opportunity to discuss determination of fraudulent intent through circumstantial evidence, including evidence of "badges of fraud." 433 B.R. 230, 236 (Bankr. E.D. Tenn. 2010). This court recognized the following "badges of fraud":

> (i) the lack of adequate consideration for the transfer; (ii) the family, friendship, or close relationship between the parties; (iii) the retention of possessions, benefit, or use of the property in question by the debtor; (iv) the financial condition of the party sought to be charged prior to and after the transaction in question; (v) the conveyance of all of the debtor's property; (vi) the secrecy of the conveyance; (vii) the existence or cumulative effect of a pattern or series of transaction[s] or course of conduct after incurring of debt, onset of financial difficulties, or pendency or threat of suit by creditors; and (viii) the general chronology of events and transactions under inquiry.

Id. (quoting *Gordon v. Courtney (In re Courtney)*, 351 B.R. 491, 500 (Bankr. E.D. Tenn. 2006)).

The Plaintiff asserts that the Debtor's transfer of $30,000 to his wife within the year before he filed for bankruptcy, as well as the transfer of the Ford F-150 constitute fraudulent transfers pursuant to § 727(a)(2)(A). At least with respect to the transfer of the $47,000, there is a question of whether the Debtor should be held accountable for making the transfer. Mrs. Teter testified that she unilaterally made the transfer without Mr. Teter's knowledge or consent. Courts have been hesitant to disallow a debtor's discharge based on a transfer in which the debtor did not undertake any action. *Syngenta Seeds, Inc. v. Terry Lynn Wingate (In re Wingate)*, 377 B.R. 687, 702 (Bankr. M.D. Fla. 2006); *Bartlett Futures, Inc. v. Davis (In re Davis)*, 124 B.R. 831, 835 (Bankr. D. Kan. 1991).

With respect to the other badges of fraud, the Plaintiff has shown that the recipient of the transfer was a family member, and there was no evidence that the Debtor made any effort to have the transfer reversed after its discovery. The funds were used to pay the living expenses of the couple, so it appears that the Debtor received the benefit of the funds although there were no extraordinary expenditures from the account for either the Debtor or his wife. The Debtor was also having serious financial difficulties at the time of the transfer. His financial

condition was Mrs. Teter's motivation for taking the funds out of his name. The equity in the Debtor's house was a significant portion of the Debtor's property, although the transfers' impact on creditors was not so significant since the home was owned jointly with his wife. Other than these two transfers, there is no evidence of a pattern of transferring assets to his wife. The diminution in the Debtor's financial condition was primarily caused by his failing businesses that consumed his income and the substantial financial settlement he received following the termination of his prior employment, rather than by a pattern of transferring his assets to others for no consideration.

There also is little or no evidence of concealment. Although the Debtor did not list the correct amount of the transfer, he did provide an explanation for the difference. He also stated a significant number as the amount of the transfer such that a trustee would be likely to investigate the transfer further. The Debtor testified that he answered all questions honestly and to the best of his knowledge and that he had no intent to deceive anyone. The issue comes down to the credibility of the Debtor, and the court finds his testimony credible in light of his disclosures in his statement of affairs and his accounting of the funds in question. The court finds that the Plaintiff has not carried his burden of proof on this issue and that the Debtor's discharge may not be denied based on the transfers alleged.

B. Non-Dischargeability Pursuant to 11 U.S.C. § 727(a)(4)(A)

The Bankruptcy Code provides that a debtor shall receive a discharge from the court unless "the debtor knowingly and fraudulently, in or in connection with the case – (A) made a false oath or account; . . ." 11 U.S.C. § 727(a)(4)(A). Courts in this Circuit have determined that to state a claim pursuant to § 727(a)(4)(A), a plaintiff must demonstrate by a preponderance of the evidence the following five elements:

> (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the statement was false; (4) the debtor made the statement with fraudulent intent; and (5) that the statement related materially to the bankruptcy

case.

Clippard v. Jarrett (In re Jarrett), 417 B.R. 896, 903 (Bankr. W.D. Tenn. 2009) (citing *In re Keeney*, 227 F.3d at 685).

Statements made by a debtor in his bankruptcy schedules, his personal statement of financial affairs, and at 341 meetings are all statements made under oath. *Noland v. Johnson (In re Johnson)*, 387 B.R. 728, 743 (Bankr. S.D. Ohio 2008) (citing *Hamo v. Wilson (In re Hamo)*, 233 B.R. 718, 725 (B.A.P. 6th Cir. 1999)) (other citations omitted). Whether a false statement under oath has been made pursuant to 11 U.S.C. § 727(a)(4)(A) is a question of fact. *In re Jarrett*, 417 B.R. at 903.

In addition, circumstantial evidence or a debtor's course of conduct may be used to infer the debtor's intent. *Id.* However, a finding of fraudulent intent "is a question of fact that is highly dependent on the bankruptcy court's assessment of the debtor's credibility." *Roberts v. Debusk (In re Debusk*), No. 3:08-cv-427, 2009 WL 1256891, at *4 (E.D. Tenn. May 1, 2009). An inference of deceitful intent may be found where the evidence demonstrates that a series or pattern of errors occurred. *See General Motors Co. v. Heraud (In re Heraud*), 410 B.R. 569, 581 (Bankr. E.D. Mich. 2009). "If the trustee meets his burden of proof on the issue of intent, the burden shifts to the debtor to rebut the presumption." *In re Flemings*, 433 B.R. at 240.

In *In re Hamo* the Bankruptcy Appellate Panel for the Sixth Circuit quoted a bankruptcy court regarding the purpose of § 727(a)(4)(A):

> The very purpose of . . . 11 U.S.C. § 727(a)(4)(A), is to make certain that those who seek the shelter of the bankruptcy code do not play fast and loose with their assets or with the reality of their affairs. The statutes are designed to insure that complete, truthful, and reliable information is put forward at the outset of the proceedings, so that decisions can be made by the parties in interest based on fact rather than fiction . . . . Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight.
> . . . .
> A discharge is a privilege and not a right and therefore the strict requirement of accuracy is a small quid pro quo. The successful functioning of the bankruptcy

> code hinges upon the bankrupt's veracity and his willingness to make a full disclosure.

233 B.R. at 725-726 (quoting *Hillis v. Martin, Martin v. Martin (In re Martin)*, 124 B.R. 542, 545, 547-48 (Bankr. N.D. Ind. 1991)).

The Sixth Circuit explained in *In re Keeney* how courts should analyze section 727(a)(4)(A) claims:

> " 'Complete financial disclosure' " is a prerequisite to the privilege of discharge. The Court of Appeals for the Seventh Circuit has explained that intent to defraud "involves a material representation that you know to be false, or, what amounts to the same thing, an omission that you know will create an erroneous impression." A reckless disregard as to whether a representation is true will also satisfy the intent requirement. " '[C]ourts may deduce fraudulent intent from all the facts and circumstances of a case.' " However, a debtor is entitled to discharge if false information is the result of mistake or inadvertence. The subject of a false oath is material if it " 'bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.' "

227 F.3d at 685-86 (citing *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998)) (quoting *Williamson v. Fireman's Fund Ins. Co.*, 828 F.2d 249, 251 (4th Cir. 1987); *Beaubouef v. Beaubouef (In re Beaubouef)*, 966 F.2d 174, 178 (5th Cir. 1992)).

With respect to the third element of knowledge required to demonstrate a false oath or omission, " '[k]nowledge that a statement is false can be evidenced by a demonstration that the debtor knew the truth, but nonetheless failed to give the information or gave contradictory information.' " *In re Flemings*, 433 B.R. at 239 (quoting *In re Courtney*, 351 B.R. at 506). The elements of knowingly and fraudulently must both be proven separately. *See In re Oliver*, 414 B.R. at 374. In addition, regarding the fifth element of materiality, "[t]he concealment of a potential preference action clearly bears a relationship to the bankrupt's estate." *In re Flemings*, 433 B.R. at 241.

The Plaintiff asserts that the Debtor failed to disclose pertinent information regarding his income in his bankruptcy petition. He contends that the Debtor made these omissions with the

intent to conceal income and assets from his creditors. The Plaintiff bears the burden of demonstrating that the Debtor acted with both knowledge and intent and that the Debtor's omissions were material to his bankruptcy case. The court finds that the Defendant did not make a false oath about additional income. The questionable deposit was traced to the advance on the home equity line and did not come from other income. The income from the Debtor's employment and his wife'e employment were adequately accounted for. The court found his testimony that his settlement had been spent to be credible. With respect to misrepresenting the amount of personal property, the Debtor owned substantial equipment, but it had been foreclosed by the time of the filing. Finally, with respect to the amount of the transfer, the court has already found that the Debtor's explanation under the circumstances of this case was credible and the Plaintiff has not demonstrated intent by a preponderance of the evidence. The court finds no pattern of errors or omissions that would allow the court to find the requisite intent.

C. Non-Dischargeability Pursuant to 11 U.S.C. § 727(a)(5)

11 U.S.C. § 727(a)(5) states:

(a) The court shall grant the debtor a discharge, unless –

. . .

> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities. . . .

11 U.S.C. § 727(a)(5). As one bankruptcy court in this district has explained:

> Section 727(a)(5) is broad enough to include any unexplained disappearance or shortage of assets. The initial burden is on the objecting party to introduce some evidence of the disappearance of substantial assets or of unusual transactions. The debtor must then satisfactorily explain what happened. To be satisfactory, an explanation must convince the judge.

In re Heraud, 410 B.R. at 581 (quoting *Solomon v. Barman (In re Barman)*, 244 B.R. 896, 900

(Bankr. E.D. Mich. 2000)). Vague and unsubstantiated explanations are insufficient. *In re Heraud*, 410 B.R. at 582. The explanation " 'must be reasonable and credible so as to satisfy the court that the creditors have no cause to wonder where the assets went.' " *In re Johnson*, 387 B.R. at 739 (quoting *Strzesynski v. Devaul (In re Devaul)*, 318 B.R. 824, 839 (Bankr. N.D. Ohio 2004)). A satisfactory explanation is one that explains "the losses or deficiency in such a manner as to convince the court of good faith and business-like conduct. The explanation need not be meritorious to be satisfactory." *Skyles v. Stinson (In re Stinson*), 364 B.R. 269, 278 (Bankr. W.D. Ky. 2007) (citing *Rawlings v. Tapp (In re Tapp)*, 339 B.R. 420, 427 (Bankr. W.D. Ky. 2006)).

The Plaintiff claims that the Debtor has failed to account for the diminishment in the value of his household items such as furniture, jewelry, tools and an ATV. The Debtor informed Northwest Georgia Bank in December of 2008 that he owned such items having a total value of $242,000. On his bankruptcy schedules filed in October of 2009, the Debtor listed these items as having a value of only $2,100. The Debtor has adequately explained the loss of the value of such items. They were surrendered to his creditors. The Plaintiff has shown no evidence of specific jewelry or home furnishings that were listed or insured for substantial amounts. He himself placed a substantial value on the business equipment when he sold it to the Plaintiff. The court finds that the Debtor has satisfactorily explained the difference in the amounts listed on the NWGB Financial Statement and the amount listed in his Schedules.

D. Counterclaim Pursuant to 11 U.S.C. § 523(d)

11 U.S.C. § 523(d) states:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorneys' fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. § 523(d). The Debtor's claim pursuant to § 523(d) must relate to a claim brought pursuant to 11 U.S.C. § 523(a)(2) that was not substantially justified or was not brought pursuant to special circumstances. However, the Plaintiff has brought a claim against the Debtor pursuant to 11 U.S.C. § 727(a)(2)(A), not 11 U.S.C. § 523(a)(2).

As another bankruptcy court in this district has noted, " '[a] creditor's position is substantially justified if it has 'a reasonable basis in both law and in fact' . . . .' " *Knoxville TVA Employees Credit Union v. Sallie (In re Sallie*), No. 08-5034, 2009 WL 1917959, at *10 (Bankr. E.D. Tenn. 2009) (quoting *Providian Bancorp v. Stockard (In re Stockard)*, 216 B.R. 237 (Bankr. M.D. Tenn. 1997)). This standard is known as the reasonable person standard. *See In re Stockard*, 216 B.R. 237, 241 (Bankr. M.D. Tenn. 1997). The standard of reasonableness creates a three part test:

> (1) a reasonable basis in law for the theory propounded; (2) a reasonable basis in truth for the facts alleged; and (3) a reasonable connection between the facts alleged and the legal theory advanced. Further, a determination of substantial justification
>
> > should turn on a totality of the circumstances. This analysis permits a trial court to examine a number of factors, including, but not limited to, whether the creditor attended the 341 meeting or conducted an examination under Rule 2004, as well as the extent of its pre-trial investigation.

Bank of America v. Miller (In re Miller), 250 B.R. 294, 296 (Bankr. E.D. Ky. 2000) (quoting *AT&T Universal Card Servs. Corp. v. Williams (In re Williams)*, 224 B.R. 523, 531 (B.A.P. 2d Cir. 1998)).

In addition, it is clear that § 523(d) only applies to consumer debts, not to commercial transactions. *See National City Bank v. Beatty (In re Beatty)*, 401 B.R. 278, 280 (Bankr. S.D. Ohio 2009) (citing 11 U.S.C. § 523(d)). A consumer debt is a "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). Such debt normally involves "obtaining an extension of credit as a consumer." *Swartz v. Strausbaugh (In*

re Strausbaugh), 376 B.R. 631, 638 (Bankr. S.D. Ohio 2007) (citing *Internal Revenue Serv. v. Westberry (In re Westberry)*, 215 F.3d 589, 591 (6th Cir. 2000)).

To prevail on a claim under § 523(d), a debtor must demonstrate: " '(1) the creditor requested a determination of the dischargeability of the debt [under § 523(a)(2)], (2) the debt is a consumer debt, and (3) the debt was discharged.' " *In re Strausbaugh*, 376 B.R. at 636 (quoting *American Sav. Bank v. Harvey (In re Harvey)*, 172 B.R. 314, 317 (B.A.P. 9th Cir. 1994)) (other quotations omitted). The Plaintiff's action is based on discharge not dischargeability and as such, the Debtor has failed to demonstrate the first element needed for a successful counterclaim.

IV. Conclusion

The Plaintiff has failed to establish his claims, including the requisite level of intent, by a preponderance of the evidence. The Debtor will be granted his discharge. The Debtor's counterclaim may be dismissed as a matter of law as the Plaintiff has not brought a claim pursuant to 11 U.S.C. § 523(a)(2).

A separate order will enter.