Dated: August 03, 2010
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re SEDRICK T. TURNER, Debtor.	Case No. 08-33854-L Chapter 7

THE ORANGE LAW FIRM and
HARTFORD FINANCIAL PRODUCTS,
Plaintiffs,

v. Adv. Proc. No. 09-00149

SEDRICK T. TURNER,
Defendant.

MEMORANDUM OF OPINION

INTRODUCTION

THIS ADVERSARY PROCEEDING came on for trial on April 21, 2010, upon the complaint of the Orange Law Firm and Hartford Financial Products against Sedrick T. Turner, Chapter 7 debtor, alleging that certain debts held by the plaintiffs should be excepted from discharge. The debts that are the subject of this litigation arose prior to the filing of the debtor's bankruptcy petition and were secured by judgment liens. In 2005, Turner transferred ownership of his residence to his father, William Turner, by warranty deed. The Orange Law Firm acted as closing agent. Based upon its work, Chicago Title issued a policy of title insurance to the purchaser, William Turner. The law firm's review of title failed to disclose the existence of the judgment liens and the liens were not paid from the proceeds of closing. The judgment creditors made demand upon the Orange Law Firm and Chicago Title to satisfy the judgments. In settlement of these demands, the Plaintiffs, Orange Law Firm, together with Hartford Financial Products, its insurer, paid the judgments, which were then assigned to them. Further, the plaintiffs were appointed attorneys-in-fact for the judgment creditors to collect the judgments. The bankruptcy petition was filed on December 30, 2008. The plaintiffs filed their complaint on April 3, 2009, but did not file proofs of claim.[1] The plaintiffs allege that the judgments should be excepted from discharge pursuant to 11 U.S.C. § 523(a)(2)(A) and/or (B) because Turner fraudulently failed to disclose the existence of the judgment liens in connection with the sale.

Having heard the testimony of Carlton Orange, Sedrick Turner, William H. Turner, and Cedric Wooten, and having carefully reviewed the written exhibits, the court is of the opinion that the debts owed to the plaintiffs are subject to discharge. The court makes the following findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(I).

[1] The trustee filed a no asset report on February 18, 2009, so no deadline for filing proofs of claim was established. *See In re Sedrick T. Turner,* Bankruptcy Case No. 08-33854, Doc. No. 10.

ISSUE BEFORE THE COURT

The issue before the court is whether the debts held by the plaintiffs should be excepted from discharge in Turner's bankruptcy case pursuant to 11 U.S.C. §§ 523(a)(2)(A) and (B).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Because the complaint arises under two subsections of section 523(a)(2), the court will make findings of fact in addition to those set forth in the Introduction in its discussion of each subsection.

A. The Claim that the Debts Should Be Excepted from Discharge Under 523(a)(2)(A)

In order to prevail under section 523(a)(2)(A), the plaintiffs must prove by a preponderance of the evidence that the debts held by them are ones for money, property, services, or an extension, renewal or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition. 11 U.S.C. § 523(a)(2)(A); *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 661, 112 L. Ed. 2d 755 (1991). The plaintiffs hold the following debts:

1. A judgment rendered May 28, 2004, in favor of Institutional Distributors, Inc., in the amount of $86,639.39, against Exquisite Dining, LLC, and Sedrick Turner. Tr. Ex. 3.
2. A judgment rendered June 3, 2002, in favor of Memphis Publishing Co. dba The Commercial Appeal in the amount of $3,027.00, against Exquisite Dining, dba Red Robin; and Sedrick Turner. Tr. Ex. 4.

3. A judgment rendered June 19, 2003, in favor of Floyd Lancaster in the amount of $23,812.19, against Sedrick Turner and Sed-Rick Enterprises. Tr. Ex. 6.

Turner testified that each of these judgments arose in connection with restaurants that he owned and operated through corporate entities, and that he was under the impression at the time of the transfer of his home to his father that the judgments were against the entities, but not against him personally. Turner testified that he got into the restaurant business in 1994-95, and that he had been fairly successful. At one time, he operated five to six Subway Sandwich Shops. His problems started with the Red Robin store, which was not successful and caused problems with his vendors. Turner acknowledged that he personally guaranteed many of the obligations of the entities that owned the restaurants, but said that at the time, he was emotionally distraught and did not read the summonses carefully. He mistakenly believed that the entities shielded him from personal liability.

The Court of Appeals for the Sixth Circuit has provided the following guidance for determining whether a debt should be excepted from discharge under section 523(a)(2)(A):

> In order to except a debt from discharge under section 523(a)(2)(A), a creditor must prove the following elements: (1) that the debtor obtained money through a material misrepresentation that, at the time the debtor knew was false or made with gross recklessness as to its truth; (2) the debtor intended to deceive the creditor; (3) the creditor justifiably ... relied on the false representation; and (4) its reliance was the proximate cause of loss.
>
> *See Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 961 (6th Cir. 1993). In order to except a debt from discharge, a creditor must prove each of the these elements by a preponderance f the evidence. *See Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 661, 112 L. Ed. 2d 755 (1991). Further, exceptions to discharge are to be strictly construed against the creditor. *See Manufacturer's Hanover Trust v. Ward (In re Ward)*, 857 F.2d 1082, 1083 (6th Cir. 1988).

Rembert v. AT&T Universal Card Services, Inc. (In re Rembert), 141 F.3d 277, 280-81 (6th Cir. 1998).

Listing these elements in order, the plaintiffs must prove:

1. that the debtor obtained money;
2. by making a material representation
3. that was false;
4. that the debtor knew was false, or that the debtor made with gross recklessness as to its truth
5. with the intent to deceive;
6. that the creditor justifiably relied upon the representation; and
7. that its reliance was the proximate cause of its loss.

In support of their complaint, the Plaintiffs allege that Turner made three false representations at the closing of the sale of his residence to his father. First, they allege that he issued a warranty deed to William Turner that states in pertinent part that he was "'lawfully seized in fee of the above-described real estate[, had] a good right to sell and convey the same [and that it was] unencumbered[.]'" Doc. No. 1, ¶ 2. Second, they allege that Turner "signed an Affidavit on August 11, 2005, stating that there were no disputes or questions as to the title of the property, nor indebtedness, judgments, liens, or other interests connected thereto except for a mortgage and taxes." Doc. No. 1, ¶ 3, and Exhibit 2 thereto. Third, they allege that "[o]n August 11, 2005, [] Turner signed a Certification of Buyer/Seller Relationship, certifying that he was not family related nor affiliated through business relationship with debtor, the seller of the property." Doc. No. 1, ¶ 4, and Exhibit 3 thereto. Each of these allegations is true; i.e., each of the listed statements by Turner was false. The Plaintiffs have satisfied the second and third requirements of proof.

The first requirement, however, is that a debtor obtain money, property, services, or an extension, renewal or refinancing of credit by means of a false representation. This requirement has not been fulfilled in this case. The plaintiffs have not sued the debtor for breach of warranty or contract. They have asserted no direct action against the debtor. Rather, standing in the shoes of three judgment creditors as the result of the purchase of their claims, the plaintiffs ask the court to declare those claims nondischargeable. The plaintiffs have presented no proof tending to show that the money, property or services obtained by the original vendors were procured by fraud or misrepresentation. *See McClellan v. Cantrell*, 217 F.3d 890, 895 (7th Cir. 2000) (The phrase "obtained by" modifies "money, property, or services," not "debt."). The claims now held by the plaintiffs resulted from Turner's guaranty of certain business debts. They appear to arise from garden variety vendor claims that could not be paid when Turner's businesses failed. The Plaintiffs have failed to satisfy the first requirement of proof under section 523(a)(2)(A). For this reason, the Plaintiffs' claims under that section must fail. Nevertheless, in the interest of completeness, the court will consider each of the remaining requirements.

The fourth requirement is that the plaintiffs prove that the debtor knew that the allegedly fraudulent statements were false. Turner testified that he did not know that the statements were false. He testified that he had been under tremendous emotional strain as the result of the failure of his businesses, and that he relied upon others to conduct his business affairs. He said that he assumed that the limited liability company shielded him from personal liability. The court found Turner to be a credible and forthright witness. Other than introducing the underlying documents leading to the entry of the judgments, the Plaintiffs introduced no proof that at the time of closing, Turner actually knew that the representations he was making were false. Nor did the Plaintiffs introduce evidence tending to show that Turner made these representations with gross recklessness. He and his father both testified about the precautions they took to ensure that the transaction was as close to an arms-length transaction as possible: they obtained an independent appraisal of the property in order to establish the purchase price, and the property was conveyed by warranty deed rather than by simple quit claim deed. As a prerequisite for issuing a title policy,[2] Chicago Title required the opinion of the law firm that title was clear of encumbrances. Turner cooperated with these efforts. Further, with respect to the Certification of Buyer/Seller Relationship, the court notes that for whatever reason, there were two Certifications of Buyer/Seller Relationship given on August 11, 2005, one of which indicates a relationship between the purchaser and the seller and the other of which does not. Cf. Tr. Ex. 11 to Tr. Ex. 12. The Orange Law Firm could have inquired about this discrepancy, but apparently did not because the relationship between the seller and purchaser was well known to Cedric Wooten who attended the closing on behalf of the Orange Law Firm because Cedric Wooten and Sedrick Turner were fraternity brothers. None of these facts indicates reckless disregard for the truth. The plaintiffs have failed to establish the third proof requirement of section 523(a)(2)(A).

The plaintiffs have also failed to establish the fifth requirement, that Turner intended to deceive them by making the misstatements they rely on. The Orange Law Firm was acting as closing agent for this transaction, and was compensated for this activity as the result of the firm's legal expertise. Carlton Orange, principal of the Orange Law Firm, testified that the closing was witnessed by Cedrick Wooten who is now, but was not then, an attorney. Orange indicated that

[2] It is not clear from the record whether this was a mortgagee's policy or an owner's policy, but the distinction is immaterial to the court's decision.

Wooten and Turner were fraternity brothers. He said that the loan documents were prepared by the lender, not by his office, and thus Wooten had nothing to do with preparing the documents. Orange indicated that his role was to issue the title opinion as agent for Chicago Title. He candidly testified that at the time of this transaction, the Orange Law Firm employed an abstractor, Tony Jackson, who simply missed the outstanding judgment liens. Orange relied upon Jackson's work in rendering his opinion, which made no reference to the judgment liens. Orange testified that as a result of this closing and one other, Jackson was dismissed from his employment, and the Orange Law Firm no longer employs an in-house abstractor. Turner had no incentive to make false statements to the law firm when he knew or certainly expected that Orange would review the public records before issuing a title opinion. The Plaintiffs have failed to establish that Turner intended to deceive the Orange Law Firm.

The Plaintiffs have also failed to establish the sixth element of proof – justifiable reliance.

> Justifiable reliance is a less demanding standard than reasonable reliance; it requires only that the creditor did not "blindly [rely] upon a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation." *Field [v. Mans,]* 516 U.S. [59] at 71, 116 S. Ct. 437 [(1995)] (internal quotation marks omitted). Under the justifiable reliance standard, a creditor has no duty to investigate unless the falsity of the representation would have been readily apparent. *Id.* at 70-71, 116 S. Ct. 437. But the justifiable reliance standard is not an objective one. Rather, it is determined by looking at the circumstances of a particular case and the characteristics of a particular plaintiff. *Id.* at 71-72, 116 S. Ct. 437.

Ojeda v. Goldberg, 599 F.3d 712, 717 (7th Cir. 2010). In order to establish that a creditor's reliance was justifiable, a showing must first be made that the creditor *actually* relied upon a false representation. *Field* at 70, 116 S. Ct. 437, 444. See also, *Andresen & Arronte, PLLC v. Hill (In re Hill)*, 425 B.R. 766, 777 (Bankr. W.D. N.C. 2010); *Haney v. Copeland (In re Copeland)*, 291 B.R. 740, 767 (Bankr. E.D. Tenn. 2003). As the attorney charged with issuing a title opinion for Chicago

Title, Carlton Orange candidly admitted that he relied upon the abstract work of Tony Jackson, not the representations of Turner, in rendering his title opinion. Thus, although Orange did say that the Seller's Affidavit provided a back up to his review of the public records, it cannot be said that the Orange Law Firm actually relied upon the Seller's Affidavit in issuing the title opinion. Moreover, given the specific expertise and role of the Orange Law Firm in this transaction, it cannot be said that any reliance upon the statements of Turner was justified.

Finally, the plaintiffs have failed to establish that the misrepresentations by Turner were the proximate cause of their loss. Proximate cause requires a showing that there is a "direct link" between the alleged fraud or misrepresentation and the creation of the debt. *Copeland*, 291 B.R. at 767. For the reasons stated previously, the proximate cause of the Orange Law Firm's loss was its reliance upon an employee who made a serious mistake and failed to discover the existence of public records creating the judgment liens. It was the plaintiffs' issuance of an inaccurate title opinion in reliance on that report that caused the plaintiffs' loss. Turner's statements, even though false, were not the proximate cause of the loss to the Orange Law Firm.

B. The Claim that the Debts Should Be Excepted from Discharge Under 523(a)(2)(B)

The claim that the debts held by the Orange Law Firm should be excepted from discharge pursuant to Bankruptcy Code section 523(a)(2)(B) will require less discussion than the previous claim. In order to prevail under section 523(a)(2)(B), the Plaintiffs must show that the allegedly false statements made by Turner were statements in writing concerning his financial condition. *See* 11 U.S.C. § 523(a)(2)(B), which excepts from discharge a debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by:

(B) use of a statement in writing–

> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive;....

11 U.S.C. § 523(a)(2)(B).

The Plaintiffs' claim under section 523(a)(2)(B) must fail for two of the same reasons that their claim under section 523(a)(2)(A) fails: the Plaintiffs have failed to prove that Turner made statements to them with the intent to deceive them; and the Plaintiffs did not rely in fact upon the representations of Turner, but rather upon the work of Jackson. The claim under section 523(a)(2)(B) fails for the additional reason that the written statements made by Turner did not concern his financial condition.

There are two views on proper interpretation of the phrase, "respecting the debtor's . . . financial condition." *Buckeye Retirement Co., LLC v. Kakde (In re Kakde),* 382 B.R. 411, 422 (Bankr. S. D. Ohio 2008), citing, *Prim Capital Corp. v. May (In re May),* 368 B. R. 85, 2007 WL 2052185, at *6 (B.A.P. 6th Cir. 2007) (table decision) and *Schneiderman v. Bogdanovich (In re Bogdanovich),* 292 F.3d 104, 112-13 (2nd Cir. 2002). According to the Bankruptcy Appellate Panel:

> The "broad interpretation" includes any communication that has a bearing on the debtor's financial position. In other words, any communication addressing the status of a single asset or liability qualifies. *See Cadwell v. Joelson (In re Joelson),* 427 F.3d 700, 705 (10th Cir. 2005), cert. den. [547] U.S. [1163], 126 S. Ct. 2321 (2006). The "strict interpretation," on the other hand, limits statements "respecting the debtor's . . . financial condition" to communications that purport to state the debtor's overall net worth, overall financial health, or equation of assets and liabilities. *See Id.* at 705.

May, 2007 WL 2052185, at *6. In *May*, the BAP adopted the narrow or strict interpretation concluding that "defining financial condition as statements that are made regarding a debtor's overall net worth, assets and liabilities, best adheres to the meaning and purpose of the Bankruptcy Code . . . ." *Id.* at *7. This court is persuaded that the BAP's conclusion and interpretation is correct. The Warranty Deed, Seller's Affidavit, and Certification of Buyer/Seller Relationship signed by Turner related to the status of the title to his residence. They were not statements regarding his overall net worth, assets, or liabilities and are merely tangential to his financial condition. They do not satisfy the section 523(a)(2)(B) requirement that the statement concern the debtor's financial condition.

CONCLUSION

For the foregoing reasons, the claim that the debts held by the Orange Law Firm and/or Hartford Financial Products should be excepted from Turner's discharge pursuant to section 523(a)(2)(A) and (B) is **DENIED**. The court declares those debts to be subject to discharge in the ordinary course of the administration of Turner's bankruptcy case. In conformity with Federal Rule of Bankruptcy Procedure 7058, a separate judgment will issue.

cc: Debtor/Defendant
Attorney for Debtor/Defendant
Plaintiffs
Attorney(s) for Plaintiffs
Case Trustee (if any)