The relief described hereinbelow is SO ORDERED.

SIGNED this 11th day of May, 2023.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

MATTHEW WILFRED ROBERTS and SHELLEY D. ROBERTS,

Debtors.

Case No. 18-20906
Chapter 7

FREEBIRD COMMUNICATIONS, INC., PROFIT-SHARING PLAN, et al.,

Plaintiffs,

v.

MATTHEW WILFRED ROBERTS and SHELLEY D. GARZA-ROBERTS,

Defendants.

Adv. No. 18-06063

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Freebird Communications, Inc. ("**Freebird**"), Freebird Communications, Inc., Profit Sharing Plan (the "**Plan**"), and Michael Scarcello filed this adversary proceeding to determine whether the claims they assert against Chapter 7 debtors Matthew and Shelley Roberts are excepted from discharge under 11 U.S.C. § 523(a)(2), (4), (6), and/or (19). This matter comes before the Court on Debtors' motion for summary judgment.[1] The Court will grant Debtors' motion as it relates to Plaintiffs' claims for violation of the Defend Trade Secrets Act and the Kansas Uniform Trade Secrets Act. However, because Debtors have not otherwise demonstrated that they are entitled to summary judgment, the remainder of their motion will be denied.

I. Undisputed Facts

While working at Kansas City's KCTV-5 television station in the late 1990s, Matthew Roberts ("**Roberts**") and Michael Scarcello decided to open an independent satellite uplink business together.[2] In 2001, Roberts and Scarcello incorporated Freebird and, using rollover funds from their 401K accounts,

[1] ECF 126. Fed. R. Civ. P. 56 applies to this adversary proceeding through Fed. R. Bankr. P. 7056.

[2] Debtors' Stmt. Uncontroverted Facts ¶¶ 1-2, ECF 127. Satellite uplink involves taking audio and video from a remote location, such as a sporting event or breaking-news location, and transmitting that data via satellite to a customer. The customer then broadcasts the audio and video to the general public. *Id.* ¶¶ 22-23.

established the Plan to hold Freebird's stock.[3] Roberts and Scarcello received biweekly salaries of $3,000 each from Freebird.[4]

At some point between January 1, 2002, and December 2008, Freebird's accountant set up "Notes Receivable" accounts for Roberts and Scarcello.[5] A unanimous written consent of Freebird's board dated January 1, 2002, approved the accounts, which authorized Roberts and Scarcello to borrow up to $250,000 each from Freebird.[6]

According to Roberts, Notes Receivable were repaid in the following way:

> At the end of the fiscal year, each shareholder would, if funds were available, take a "paycheck" for the amount owed (plus interest) but would not receive the income shown on the paycheck as it was a repayment for the loan. The paycheck would include payroll taxes which were paid to the taxing authorities.[7]

---

[3] Debtors' Stmt. Uncontroverted Facts ¶¶ 3, 5-6.

[4] *Id.* ¶ 11.

[5] *Compare* Debtors' Stmt. Uncontroverted Facts ¶ 12 *with* Pls.' Resp. Stmt. Uncontroverted Facts ¶ 12.

[6] *See* Debtors' Ex. 2 (cited in Debtors' Stmt. Uncontroverted Facts ¶ 12).

[7] Debtors' Stmt. Uncontroverted Facts ¶ 14. Plaintiffs deny that Scarcello "knew or approved of this practice followed unilaterally as a general matter." Pls.' Resp. Stmt. Uncontroverted Facts ¶ 14. However, the only evidence they cite is "Scarcello Declaration ¶¶ 64-75," which does not address how Notes Receivable were repaid. Moreover, the Scarcello Declaration itself—which is unsigned—is not competent evidence for purposes of summary judgment. *Cf.* 28 U.S.C. § 1746; Fed. R. Civ. P. 56(c)(4); D. Kan. Rule 56.1(d); *Elder-Keep v. Aksamit*, 460 F.3d 979, 984 (8th Cir. 2006) (holding that district court could exclude unsigned affidavits from consideration on summary judgment), *cited in Howell v. N.M. Dept. of Aging & Long Term Servs.*, 398 F. App'x 355, 359 (10th Cir. 2010).

On April 21, 2004, Shelley Roberts ("**Shelley**") wrote a $6,000 check to herself from Freebird's checking account.

In 2008, Roberts and Scarcello signed promissory notes in favor of Freebird—Roberts, for $195,032.81 at 5.15% interest; Scarcello, for $205,111.25 at 5.15% interest.[8]

Scarcello suffered a back injury in January 2011 that severely restricted his ability to work.[9] He had back surgery in May 2011 and subsequently told Roberts that he wanted to retire.[10] Scarcello did not come to work between January 2014 and May 2015.[11]

From 2013 to 2015, Roberts made offers to buy out Scarcello's interest in Freebird, but Scarcello rejected his offers.[12] By 2015, Roberts and Scarcello were

---

[8] Debtors' Stmt. Uncontroverted Facts ¶ 17.

[9] *Id.* ¶ 41. Although Plaintiffs cite "Scarcello Declaration at 94" in response, that paragraph (or page) does not exist (and the declaration itself is unsigned).

[10] Debtors' Stmt. Uncontroverted Facts ¶¶ 41, 43. Although Plaintiffs "den[y] that [Scarcello] told Roberts he wanted to retire," the only evidence they cite is "Scarcello Declaration at 94," which does not exist (and the declaration itself is unsigned).

[11] Debtors' Stmt. Uncontroverted Facts ¶ 43. Although Plaintiffs cite "Scarcello Declaration ¶ 95" in response, that paragraph does not exist (and the declaration itself is unsigned).

In their reply brief, Debtors argue that Scarcello's assertion that he came to work at all between November 2013 and June 2016 is inconsistent with his prior deposition testimony. However, such inconsistency is not enough, without more, to exclude the newer statements from consideration here. *See Law Co., Inc. v. Mohawk Const. & Supply Co.*, 577 F.3d 1164, 1168-69 (10th Cir. 2009).

[12] Debtors' Stmt. Uncontroverted Facts ¶ 43.

deadlocked and agreed that Freebird needed to be liquidated.[13] Roberts and his brother Brian began discussing forming a new satellite uplink company in April 2016.[14]

Roberts submitted his resignation from Freebird on or before June 11, 2016.[15] The resignation was effective as of June 30, 2016.[16] After his resignation from Freebird became effective, Roberts took no actions on behalf of or with respect to the Plan.[17]

II. Analysis

A court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670-71 (10th Cir. 1998). The movant can do so by pointing out to the court a lack of evidence for the nonmovant on an essential element of the nonmovant's claim. *Adler*, 144 F.3d at 671 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). If the movant makes the required showing, the burden shifts to the nonmovant to

---

[13] Debtors' Stmt. Uncontroverted Facts ¶ 44. Although Plaintiffs characterize this statement as "controverted," the only evidence they cite is "Scarcello Declaration ¶ 102," which does not exist (and the declaration itself is unsigned).

[14] Debtors' Stmt. Uncontroverted Facts ¶ 45.

[15] *Id.* ¶ 46.

[16] *Id.*

[17] *Id.* ¶ 58. Although Plaintiffs characterize this statement as "controverted," the only evidence they cite is "Scarcello Declaration ¶¶ 97-98," which do not exist (and the declaration itself is unsigned).

show that a genuine dispute of material fact remains for the factfinder to resolve. *See Adler*, 144 F.3d at 671. The court may not make credibility determinations at this stage; it must view the evidence and draw all reasonable inferences in favor of the non-movant. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

Although Debtors' motion requests summary judgment on all counts, their brief addresses only five of Plaintiffs' claims, namely those that involve: (1) Roberts's alleged misappropriation of Freebird's trade secrets under the Defend Trade Secrets Act and the Kansas Uniform Trade Secrets Act;[18] (2) a $9,500 capital contribution Scarcello allegedly made to Freebird (and Roberts allegedly kept for himself) in July 2001;[19] (3) the $6,000 check Shelley wrote to herself in April 2004;[20] (4) Roberts's loans and salaries through 2011;[21] and (5) a May 2011 conversation between Roberts and Scarcello regarding the work-related back injury Scarcello had suffered four months earlier.[22]

---

[18] Second Am. Compl. ¶¶ 203-23, ECF 91.

[19] *Id.* ¶¶ 60-79. Plaintiffs allege that Roberts thereby committed "embezzlement from Scarcello, defalcation from Freebird, and breach of fiduciary duty to the Plan," arguing that such claims are nondischargeable under § 523(a)(4). *Id.* ¶ 79.

[20] *Id.* ¶¶ 80-87. Plaintiffs allege that the check was "larceny" on Shelley's part and "breach of fiduciary duty to Freebird and the Plan and larceny" by Roberts, arguing that such claims are nondischargeable under § 523(a)(4). *Id.* ¶¶ 86-87.

[21] *Id.* ¶ 100-111. Plaintiffs allege that Roberts's actions regarding his Notes Receivable account constitute "embezzlement, defalcation, breach of fiduciary duty, and/or larceny," arguing that such claims are nondischargeable under § 523(a)(4). *Id.* ¶ 111.

[22] *Id.* ¶¶ 149-65. Plaintiffs allege that Roberts instructed Scarcello not to pursue a worker's compensation claim for his injury, and that as a result, (1) Scarcello "lost the amount of the payments that should have been paid by the worker's compensation carrier," (2) Scarcello "lost the substantial workers' compensation award to which he was entitled for permanent partial disability," and (3) Freebird

Debtors argue that they are entitled to summary judgment because Plaintiffs' trade-secret-based claims are unsupported by the record[23] and because the other four claims are all time-barred under Kan. Stat. Ann. § 60-513.[24] Of course, as the Court has previously reminded the parties, this adversary proceeding is about dischargeability of debts under 11 U.S.C. § 523(a). Debtors—whose arguments address liability rather than dischargeability—thus appear to be arguing that if there is no liability, then there is no "debt" for purposes of § 523(a).[25]

A. Trade secrets

To show that information constitutes a protectable trade secret under the federal Defend Trade Secrets Act or the Kansas Uniform Trade Secrets Act, a plaintiff must prove that (1) the owner has taken reasonable measures to keep such information secret and (2) such information derives independent economic value

---

made "unnecessary payments of medical bills." Second Am. Compl. ¶¶ 162-64, ECF 91. They characterize this as "misrepresentation and breach of Roberts' fiduciary duty to Freebird, the Plan, and Scarcello," arguing that such claims are nondischargeable under § 523(a)(2) and (4). *Id.* ¶ 165.

[23] Specifically, Debtors argue that (1) Plaintiffs have not identified their trade secrets with any specificity; (2) Plaintiffs' secrets are not trade secrets; (3) Plaintiffs did not take the required steps to safeguard their secrets; (4) there is no evidence of misappropriation; and (5) Roberts had no fiduciary duties to Plaintiffs after June 30, 2016. *See* ECF 127 at 17-23.

[24] Debtors' brief also cites Kan. Stat. Ann. § 60-511, which provides a five-year statute of limitations for breach of a written contract, and Kan. Stat. Ann. § 60-512, which provides a three-year statute of limitations for breach of an oral contract. Those statutes are inapplicable because none of the claims at issue here sound in contract. *See supra* notes 18-22 and accompanying text.

[25] *Cf.* 11 U.S.C. § 523(a) ("A discharge under section 727 . . . of this title does not discharge an individual debtor from any *debt* . . . .") (emphasis added); 11 U.S.C. § 101(12) (defining "debt" as "liability on a claim").

from not being generally known to, and not being readily ascertainable through proper means by, another person. *See Freebird Commc'ns, Inc. Profit Sharing Plan v. Roberts*, Case No. 18-cv-02026-HLT, 2019 WL 5964583, at *4 (D. Kan. Nov. 13, 2019); *id.* (observing that "the elements required to establish a claim for misappropriation are essentially the same under both the DTSA and the KUTSA"). Here, Debtors' brief points out that the record contains no evidence of either element.[26] Plaintiffs' opposition brief contains no argument whatsoever in response.[27] Because Plaintiffs point to no evidence of a protectable trade secret, and thus no evidence that Debtors are liable for misappropriation thereof, there is no evidence of a trade-secret-based "debt." Debtors are therefore entitled to summary judgment that 11 U.S.C. § 523(a) does not except Plaintiffs' trade-secret-based claims from discharge.

B. Statute of limitations

If the statute of limitations on a claim has expired, then there is no "debt" for purposes of § 523(a). *See Resolution Trust Corp. v. McKendry (In re McKendry)*, 40 F.3d 331, 337 (10th Cir. 1994) ("[I]f suit is not brought within the time period allotted under state law, the debt cannot be established.").[28] All of the claims at issue in Debtors' motion (*see supra* page 6) are subject to a two-year statute of

[26] *See* Debtors' Br. 17-21, ECF 127.

[27] *See* Pls.' Opp'n Br. 17-21, ECF 134.

[28] *See also Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958, 967 (Kan. 1992) ("A statute of limitations extinguishes the right to prosecute an accrued cause of action after a period of time. It cuts off the remedy.").

limitations under Kansas law. *See* Kan. Stat. Ann. § 60-513(a). Plaintiffs first asserted those claims on December 12, 2016.[29] Thus, to establish that there is no "debt" for purposes of § 523(a), Debtors must prove[30] that the claims accrued before December 12, 2014. And because this is a motion for summary judgment, Debtors must demonstrate that there is no genuine dispute of material fact on that point. *See Robert L. Kroenlein Trust ex rel. Alden v. Kirchhefer*, 764 F.3d 1268, 1274 (10th Cir. 2014).

A fraud claim accrues when the plaintiff discovers the fraud. Kan. Stat. Ann. § 60-513(a)(3).[31] Discovery of the fraud occurs when a plaintiff "learn[s] facts that would cause a reasonably prudent person to investigate." *Hemphill v. Shore*, 289 P.3d 1173, 1183-84 (Kan. 2012); *see Jennings v. Jennings*, 507 P.2d 241, 250 (Kan. 1973) (reasoning that fraud claim had not accrued where "plaintiffs did not have knowledge or information which would arouse suspicion or alert them to wrongdoing"). Other tort claims accrue when "the act giving rise to the cause of

[29] *See Roberts v. Scarcello*, Case No. 2:16-cv-02720-JWL-GEB, ECF 6 (answer and counterclaims), Dec. 12, 2016.

[30] The statute of limitations is an affirmative defense; the burden is on the defendant to prove that it applies. *See Slayden v. Sixta*, 825 P.2d 119, 122 (Kan. 1992). In contrast, when a plaintiff argues that the defendant should be equitably estopped from raising the statute of limitations as a defense, then the burden is on the plaintiff to show that equitable estoppel applies. *See L. Ruth Fawcett Trust v. Oil Producers Inc. of Kan.*, 507 P.3d 1124, 1146 (Kan. 2022).

[31] "Fraud," for purposes of § 60-513(a)(3), appears to include embezzlement. *Cf. Hartford Accident & Indemnity Co. v. Richards*, 294 P.2d 236 (Kan. 1956) (applying statute of limitations for fraud to embezzlement claim).

action first causes substantial injury"[32] or, "if the fact of injury is not reasonably ascertainable until some time after the initial act," when "the fact of injury becomes reasonably ascertainable to the injured party." Kan. Stat. Ann. § 60-513(b). "Reasonably ascertainable" means that a reasonably prudent person would have investigated (and thereby discovered the injury). *See Armstrong v. Bromley Quarry & Asphalt, Inc.*, 378 P.3d 1090, 1099 (Kan. 2016).

1. July 2001 capital contribution

Debtors argue that Plaintiffs' claims arising out of Scarcello's alleged July 2001 capital contribution (see *supra* note 19) accrued before December 12, 2014, because "Scarcello had full access to the company's bank accounts" and "could have asked [Freebird's bookkeeper] to provide him with access or information."[33] However, it is not enough to say that Plaintiffs *could* have investigated—the issue is whether a reasonably prudent person *would* have done so. In *Jennings*, the Supreme Court of Kansas reasoned:

> Defendant contends plaintiffs cannot avoid the running of the statute by claiming ignorance of the facts when on reasonable diligent investigation the facts were discoverable. We believe defendant's contention should be tempered to the extent that a beneficiary of a trust is not charged with the duty to investigate the action of the trustee until such facts as would prompt a normally alert person to make further inquiry are known to him.

[32] "Substantial injury" means "actionable injury," which occurs "when the plaintiff could first have filed and prosecuted an action to a successful conclusion." *LCL, LLC v. Falen*, 422 P.3d 1166, 1173-74 (Kan. 2018) (quoting *Mashaney v. Bd. of Indigents' Def. Servs.*, 355 P.3d 667, 673 (Kan. 2015)).

[33] Debtors' Br. 14, ECF 127.

Jennings, 507 P.2d at 249. Because Debtors have not demonstrated that a reasonably prudent person would have examined Freebird's financial records (and discovered the allegedly missing capital contribution) prior to December 12, 2014, they are not entitled to summary judgment on these claims.

2. April 2004 check

Debtors argue that Plaintiffs' claims arising out of Shelley's April 2004 check to herself (*see supra* note 20) are time-barred because Scarcello knew that Shelley was a signatory on Freebird's bank account.[34] According to Roberts:

> Shelley Roberts was . . . added as a signatory on the account during a meeting to sign and close our first SBA loan agreement . . . . The following parties were present: Michael Scarcello, Matthew Roberts and Shelley Roberts. The bank representative met with us in a conference room and we all three signed the signature cards. There was a discussion that Shelley Roberts would be added as a signatory in the event a bill needed to be paid or a check otherwise issued while Scarcello and I were out of town.[35]

But those factual assertions were not included in Debtors' statement of uncontroverted facts. And even if they had been included, Debtors do not connect them to accrual of Plaintiffs' claims—i.e., Debtors do not explain why, or when, a reasonably prudent person who knew that Shelley had check-writing authority would have discovered the $6,000 check she wrote to herself. Because Debtors have not made that showing, they are not entitled to summary judgment on Plaintiffs' claims arising out of the April 2004 check.

---

[34] Debtors' Br. 15, ECF 127 (citing Roberts Decl. ¶ 12, ECF 127-11).

[35] Roberts Decl. ¶ 12, ECF 127-11.

3. Roberts's use of the Notes Receivable account through 2011

Debtors argue that Plaintiffs' claims arising out of Roberts's use of his Notes Receivable account through 2011 (*see supra* note 21) are time-barred because Scarcello was aware of the Notes Receivable accounts by December 2008 at the latest.[36] It is uncontroverted that Scarcello signed a number of documents related to those accounts no later than December 2008. But those documents only establish Scarcello's knowledge that Roberts could take *loans* from Freebird. They do not establish that Scarcello knew that Roberts would take year-end "paychecks" to *repay* those loans. Because Debtors point to no evidence that a reasonably prudent person would have discovered Roberts's year-end "paychecks" prior to December 12, 2014, Debtors are not entitled to summary judgment on Plaintiffs' claims arising out of Roberts's use of the Notes Receivable account through 2011.

4. May 2011 conversation re: worker's compensation

Debtors argue that Plaintiffs' claims arising out of a May 2011 conversation in which Roberts allegedly told Scarcello not to pursue a worker's compensation award (*see supra* note 22) are time-barred because "the deadline to have filed any claim against [Roberts] would have been January 8, 2014 [i.e., three years after Scarcello injured his back]."[37] Since Plaintiffs' claims are for "misrepresentation and breach of fiduciary duty," the applicable statute of limitations is two years. But more importantly, the claims at issue do not arise out of the back injury itself—they

[36] *See* Debtors' Br. 16, ECF 127; *see also* Debtors' Reply 2, ECF 135.

[37] Debtors' Br. 17, ECF 127.

arise out of the May 2011 conversation and Plaintiffs' subsequent (alleged) financial injuries. Because Debtors have not demonstrated when the claims at issue accrued, they are not entitled to summary judgment on those claims.

5. Statute of repose

In their reply brief, Debtors point out that Kan. Stat. Ann. § 60-513 also contains a 10-year statute of repose, measured from "the time of the act giving rise to the cause of action."[38] According to Debtors, "all of the allegations and complaints lodged by Plaintiffs against the Defendants for actions in . . . 2001-2006 would be extinguished by this statute."[39]

There are two problems with Debtors' argument. First, fraud claims are not subject to the statute of repose. *See Hemphill*, 289 P.3d at 1183-84 (citing *Jennings v. Jennings*, 507 P.2d 241, 251 (Kan. 1973)). Second, while the statute of repose may entitle Debtors to judgment on Plaintiffs' non-fraud claims for actions taken between 2001 and December 12, 2006,[40] Debtors do not point out which claims those are. Because Debtors have not identified the claims to which their argument applies, they are not entitled to summary judgment based on the statute of repose. *Cf.* Fed. R. Civ. P. 56(a) ("A party may move for summary judgment, *identifying*

[38] Debtors' Reply 6, ECF 135 (citing Kan. Stat. Ann. § 60-513(b)).

[39] *Id.*

[40] Whether equitable estoppel can apply to toll the statute of repose "is a debatable issue in Kansas." *Dunn v. Dunn*, 281 P.3d 540, 556 (Kan. Ct. App. 2012); *see Doe v. Popravak*, 421 P.3d 760, 772 (Kan. Ct. App. 2017) (discussing cases).

each claim or defense—or the part of each claim or defense—on which summary judgment is sought.") (emphasis added).

III. Conclusion

Section 523(a) of the Bankruptcy Code does not except Plaintiffs' claims under the Defend Trade Secrets Act and the Kansas Uniform Trade Secrets Act from discharge in Debtors' Chapter 7 bankruptcy case. Debtors' motion for summary judgment is hereby granted in part as to those claims; the motion is otherwise denied.

IT IS SO ORDERED.

###