ORDERED.

Dated: March 31, 2022

Caryl E. Delano
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re:

Timothy Yablonowski,

Debtor.
_____/

Case No. 2:20-bk-03093-FMD
Chapter 7

Richard B. Pfeil; Richard B. Pfeil as Trustee of the Richard B. Pfeil Revocable Trust; and David R. Brach as Trustee of the M.J. Pfeil Special Trust No. 2,

Plaintiffs,

vs.

Timothy Yablonowski,

Defendant.
_____/

Adv. Pro. No. 2:20-ap-398-FMD

ORDER (1) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO SECOND AMENDED COMPLAINT; (2) GRANTING DEBTOR/DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON SECOND AMENDED COMPLAINT; AND (3) GRANTING DEBTOR/DEFENDANT'S MOTION TO EXCLUDE PORTIONS OF MR. JERRY McHALE'S TESTIMONY PURSUANT TO FED. R. EVID. 702

THIS PROCEEDING came before the Court for hearing on January 18, 2022, to consider (1) *Plaintiffs' Motion for Summary Judgment as to Second Amended Complaint* ("Plaintiffs' SJ Motion");[1] (2) *Debtor/Defendant's Motion for Summary Judgment on Second Amended Complaint* ("Debtor's SJ Motion");[2] and (3) *Debtor/Defendant's Motion to Exclude Portions of Mr. Jerry McHale's Testimony Pursuant to Fed. R. Evid. 702* (the "Motion to Exclude").[3] The motions are fully briefed.[4]

As set forth below, the Court will grant Debtor's Motion to Exclude paragraph 5 of Mr. McHale's October 20, 2021 affidavit.[5] And after careful consideration of the parties' summary judgment motions, the Court finds that Plaintiffs did not meet their burden on summary judgment to prove the elements of a claim under 11 U.S.C. § 523(a)(2)(A).[6] In addition, the Court finds (a) Debtor met his burden on summary judgment to show an absence of evidence to support Plaintiffs' claim under § 523(a)(2)(A); (b) the burden then shifted to Plaintiffs; and (c) Plaintiffs did not meet their burden to show an issue of fact. Therefore, the Court will deny Plaintiffs' SJ Motion and grant Debtor's SJ Motion.

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[1] Doc. No. 84.
[2] Doc. No. 87.
[3] Doc. No. 96.
[4] Doc. Nos. 90, 91, 93, 95, and 97.
[5] Doc. No. 85, p. 5, ¶ 5.
[6] Unless otherwise indicated, statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101, et seq.

I. FACTS

Ultrawatt Energy Systems, Inc. ("Ultrawatt") was formed as a Delaware corporation in 1992 to develop and sell "energy-efficient building technologies," primarily technology referred to as the PowerGate Management System (the "PowerGate System").[7] Generally, the PowerGate System is intended to improve power quality and reduce energy costs for large lighting circuits.

Debtor was the president, founder, and a major shareholder of Ultrawatt.[8] Plaintiffs contend that Debtor solicited them in 1997 to purchase stock in Ultrawatt.[9] Debtor, on the other hand, contends that Plaintiffs' financial advisor introduced Plaintiffs to Debtor.[10] In any event, the parties agree that Plaintiffs purchased stock in Ultrawatt for the aggregate purchase price of $1,700,000.00 on the following four dates in 1997 and 1999:[11]

Date	Number of shares	Purchaser
January 30, 1997	83,334	R.B. Pfeil Revocable Trust
April 25, 1997	83,333	M.J. Pfeil Special Trust No. 2
December 10, 1997	62,500	R.B. Pfeil Revocable Trust
August 1, 1999	80,000	R.B. Pfeil, individually
August 1, 1999	145,834	R.B. Pfeil Revocable Trust
August 1, 1999	83,333	M.J. Pfeil Special Trust No. 2

[7] Doc. No. 71-1, pp. 3, 7, ¶¶ 4, 15.
[8] Doc. No. 87, p. 10, Debtor's Affidavit, ¶ 4.
[9] Doc. No. 71, ¶ 8.
[10] Doc. No. 87, p. 3, ¶ 2.
[11] Doc. No. 71-1, pp. 7-8, ¶¶ 21-22; Doc. No. 87, pp. 3-4, ¶ 3.

In 2006, Plaintiffs filed a lawsuit against Debtor, Ultrawatt, and other defendants in the Circuit Court for Collier County, Florida (the "State Court" and the "State Court Case").[12] In their first amended complaint (the "State Court Complaint"), Plaintiffs alleged that Debtor and the other defendants engaged in fraudulent and deceptive trade practices by misrepresenting material facts about Ultrawatt to them, and that Debtor had used Ultrawatt to "raise millions of dollars from third-party investors, all under the guise of false representations regarding the financial viability of the company."[13] Plaintiffs sought the appointment of a receiver and damages against Debtor for his alleged breach of fiduciary duty, conversion, fraud, and violations of Florida's Deceptive and Unfair Trade Practices Act. The State Court appointed Gerard A. McHale, Jr., as the receiver for Ultrawatt.[14]

In February 2013, Debtor signed a stipulation in the State Court Case in which he agreed to the entry of a final judgment (the "Stipulation for Judgment"),[15] and the State Court entered a stipulated final judgment (the "State Court Judgment") in favor of Plaintiffs and against Debtor in the total amount of $3,638,709.93.[16]

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[12] Doc. No. 71-1.
[13] *Id.*, p. 4, ¶ 11.
[14] *See* Doc. No. 71-3.
[15] Doc. No. 71-4.
[16] Doc. No. 71-5.

II. THE DISCHARGEABILITY PROCEEDING

On April 16, 2020, Debtor filed a petition under Chapter 7 of the Bankruptcy Code. Plaintiffs timely filed their initial complaint to determine the dischargeability of the State Court Judgment under § 523(a)(2)(A).

In their Second Amended Complaint (the "Complaint"), Plaintiffs allege that Debtor intentionally made two false statements of material fact to Plaintiff Richard Pfeil to induce Plaintiffs to invest in Ultrawatt: (a) that Plaintiffs would be "purchasing and receiving stock in Ultrawatt directly" in exchange for their investment; and (b) that the PowerGate System was revolutionary patented technology that would lead to a multimillion dollar profit for Ultrawatt.[17] Plaintiffs allege these statements were false because (a) the stock sold to Plaintiffs was Debtor's own stock rather than stock held by Ultrawatt; and (b) the PowerGate System was not "real" and did not work.[18]

Plaintiffs attached the following exhibits to the Complaint: (a) the State Court Complaint; (b) a May 15, 2007 *Report to the Special Litigation Committee of Ultrawatt Energy Systems, Inc.*, authored by an attorney at the Quarles & Brady law firm (the "Quarles & Brady Report"); (c) an April 8, 2009 Receiver's Report filed in the State Court Case; (d) the Stipulation for Judgment; and (e) the State Court Judgment.[19]

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[17] Doc. No. 71, ¶¶ 9-15.
[18] *Id.*, ¶18.
[19] Doc Nos. 71-1, 71-2, 71-3, 71-4, and 71-5.

III. ANALYSIS

A. Summary Judgment Standard

Under Federal Rule of Civil Procedure 56(a), a party "may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought." Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law.[20]

For issues on which the movant bears the burden of proof, the movant must come forward with credible evidence that, if not controverted at trial, would entitle the movant to a directed verdict. But for issues on which the nonmovant bears the burden at trial, the moving party may either show that there is an absence of evidence to support the non-moving party's claim or may come forward with affirmative evidence showing that the non-moving party will be unable to prove its claim or defense at trial. If the moving party carries its initial burden, the responsibility shifts to the non-moving party to show the existence of a genuine issue of material fact.[21]

The standard is the same for cross-motions for summary judgment.[22] In such cases, the court must evaluate each motion on its own merits and draw all reasonable

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[20] Fed. R. Civ. P. 56(a), made applicable to this proceeding by Fed. R. Bankr. P. 7056.
[21] *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-16 (11th Cir. 1993); *In re Fields*, 2018 WL 1616840, at *2 (Bankr. M.D. Fla. Mar. 30, 2018).
[22] *In re Van Arsdale*, 2017 WL 2267021, at *2 (Bankr. N.D. Cal. May 18, 2017) (citing *Taft Broadcasting Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991)).

inferences against the party whose motion is under consideration. However, in evaluating cross-motions, courts may "assume that there is no evidence which needs to be considered other than that which has been filed by the parties."[23]

Here, Plaintiffs bear the burden of proof to establish each required element of a claim under § 523(a)(2)(A).[24]

B. The doctrine of collateral estoppel does not apply to the State Court Judgment.

Shortly after filing their initial complaint in this adversary proceeding, Plaintiffs filed a motion for summary judgment asserting that the State Court Judgment was "predicated on fraud" and therefore precluded the relitigation of Plaintiffs' fraud claims in this proceeding.[25] The Court determined that neither the Stipulation for Judgment nor the State Court Judgment contain any "factual findings or anything that would be evidence of the parties' intent in entering into the stipulation and the consent judgment."[26] Therefore, the Court ruled that the State Court Judgment has no collateral estoppel effect in this proceeding and denied Plaintiffs' first motion for summary judgment.[27]

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[23] *In re Van Arsdale*, 2017 WL 2267021, at *2 (quoting *Greer v. U.S.*, 207 F.3d 322, 326 (6th Cir. 2000)).
[24] *In re Daniel*, 613 B.R. 374, 379 (Bankr. M.D. Fla. 2020).
[25] Doc. No. 14.
[26] Doc. No. 38, Transcript of December 15, 2020 Hearing on Plaintiffs' first motion for summary judgment, p. 20.
[27] Doc. No. 34.

Shortly thereafter, Plaintiffs filed a second motion for summary judgment in which they asserted that the record in the State Court Case, in its entirety, established that the State Court Judgment was premised on the fraud counts of the State Court Complaint, and that the State Court Judgment therefore precluded the relitigation of Debtor's alleged fraud in this proceeding.[28]

The Court held a hearing on Plaintiffs' second motion for summary judgment and determined that the State Court Judgment did not establish the elements of a cause of action under § 523(a)(2)(A).[29] Therefore, the Court again determined that the State Court Judgment has no collateral estoppel effect in this proceeding and denied Plaintiffs' second motion for summary judgment, without prejudice to Plaintiffs' filing an amended complaint.[30]

C. Paragraph 5 of the McHale Affidavit is not admissible.

Mr. McHale, the court-appointed receiver for Ultrawatt in the State Court Case, is a Certified Public Accountant. In his October 20, 2021 affidavit (the "McHale Affidavit"),[31] Mr. McHale attests that he reviewed the PowerGate System and determined that the technology was not as represented by Debtor.

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[28] Doc. No. 45.
[29] Doc. Nos. 46, 49, 50, 51, 52, 54, 55, and 56.
[30] Doc. No. 57.
[31] Doc. No. 85, pp. 4-6.

Under Federal Rule of Evidence 701, the opinion testimony of a lay witness is admissible only if it is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."[32] And under Federal Rule of Evidence 702, only a witness who is qualified as an expert by knowledge, skill, experience, training, or education may render an opinion.[33]

The Court finds that an opinion regarding the functionality of the PowerGate System is based on specialized or technical knowledge, and that the record does not establish that Mr. McHale has the knowledge, skill, experience, training, or education required by Rule 702 to qualify as an expert witness on the technology. Accordingly, the Court finds that Mr. McHale's opinion regarding the PowerGate System is inadmissible and will grant Debtor's Motion to Exclude paragraph 5 of the McHale Affidavit.

D. Nondischargeability Under § 523(a)(2)(A)

Under § 523(a)(2)(A), a debt is nondischargeable if it is obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition."[34] Section 523(a)(2)(A) applies to three types of conduct: (1) false pretenses, which is an implied misrepresentation intended to create or foster a false impression; (2) a false representation, which is an

[32] Fed. R. Evid. 701(c).
[33] Fed. R. Evid. 702.
[34] § 523(a)(2)(A).

express misrepresentation; and (3) actual fraud, which is a false or misleading representation made with the intent to induce reliance, and upon which the plaintiff detrimentally relied.[35]

The required elements for a claim under § 523(a)(2)(A) are that (1) the debtor made a false representation to deceive the creditor; (2) the creditor relied on the misrepresentation; (3) the reliance was justified; and (4) the creditor sustained a loss as a result of the misrepresentation.[36] The court's determination of whether the creditor's reliance was justified involves a subjective measurement of the creditor's individual capacity and knowledge.[37] Exceptions to the dischargeability of a debt are strictly construed in favor of the debtor[38] and a creditor must prove each of the required elements by a preponderance of the evidence.[39]

E. Plaintiffs' SJ Motion

After the Court denied Plaintiffs' second motion for summary judgment, Plaintiffs filed their first amended complaint.[40] The Court granted Debtor's motion to dismiss the first amended complaint, with leave to file a second amended

[35] *In re Polasky*, 2021 WL 614032, at *5 (Bankr. M.D. Fla. Feb. 17, 2021) (citing *In re Osborne*, 604 B.R. 582, 597 (Bankr. M.D. Ga. 2019)).
[36] *In re Vega*, 2014 WL 2621118, at *2, n. 18 (Bankr. M.D. Fla. June 12, 2014) (citing *In re Bilzerian*, 153 F.3d 1278, 1281 (11th Cir. 1998)).
[37] *In re Kovacs*, 2021 WL 1603600, at *9 (Bankr. E.D.N.Y. Apr. 23, 2021); *In re Polasky*, 2021 WL 614032, at *5 (citations omitted).
[38] *In re Kanewske*, 2017 WL 4381282, at *6 (Bankr. M.D. Fla. Sept. 29, 2017).
[39] *Grogan v. Garner*, 498 U.S. 279, 287-88, 111 S. Ct. 654, 660, 112 L. Ed. 2d 755 (1991).
[40] Doc. No. 59.

complaint,[41] and Plaintiffs filed their second amended complaint (the operative "Complaint" herein).[42] Plaintiffs then filed their third motion for summary judgment ("Plaintiffs' SJ Motion").[43]

In Plaintiffs' SJ Motion, Plaintiffs assert that they invested $1,700,000.00 in Ultrawatt after Debtor made representations "as to the viability of this [PowerGate] product" and that they "would receive stock in [Ultrawatt]." In addition, although Plaintiffs do not allege in the Complaint that Debtor falsely represented Ultrawatt's financial condition, in Plaintiffs' SJ Motion, they contend that Debtor made false representations that Ultrawatt was "sound financially."[44]

Plaintiffs' SJ Motion is supported by two exhibits: the McHale Affidavit[45] and Pfeil's 2021 Affidavit.[46] In paragraph 5 the McHale Affidavit, Mr. McHale opines on the functionality of Ultrawatt's technology. But, as set forth above, the Court has ruled that paragraph 5 of the McHale Affidavit is not admissible under the Federal Rules of Evidence.

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[41] Doc. Nos. 60, 70.
[42] Doc. No. 71.
[43] Doc. No. 84.
[44] Doc. No. 84, p. 5. In his October 18, 2021 affidavit (Doc. No. 86, pp. 4-5) ("Pfeil's 2021 Affidavit"), Plaintiff Richard Pfeil does not address Plaintiffs' SJ Motion's contention that Debtor represented that Ultrawatt was financially sound. However, in his April 21, 2011 affidavit filed in the State Court Action (Doc. No. 87, pp. 15-19) ("Pfeil's 2011 Affidavit"), Mr. Pfeil attested that he requested, but did not receive, Ultrawatt's financial information, that Debtor represented that Ultrawatt "was on sound financial grounds," and that Debtor did not tell him that Ultrawatt was insolvent.
[45] Doc. No. 85.
[46] Doc. No. 86, pp. 4-5.

In Pfeil's 2021 Affidavit, Mr. Pfeil states that: (1) Debtor contacted him on multiple occasions to solicit his investment in Ultrawatt, and that "it was represented to" him that he would purchase shares of Ultrawatt stock directly from Ultrawatt; and (2) Debtor told him (a) that Ultrawatt's PowerGate System included patented technology that was going to go public; (b) that NASA endorsed the PowerGate System, as evidenced by videos that Debtor showed to Mr. Pfeil; (c) that the PowerGate System was unique and that Debtor "had substantial contacts with Fortune 500 companies;" and (d) that "the global company Philips was supporting the technology and would guarantee enormous business for Ultrawatt."[47]

1. Debtor's Alleged Misrepresentations

a. Alleged Misrepresentations Regarding the PowerGate System

Plaintiffs assert that Debtor falsely represented to Mr. Pfeil that the PowerGate System was a functioning product that could be marketed to national companies at great profit to Ultrawatt.[48] In light of the Court's ruling that paragraph 5 of the McHale Affidavit is inadmissible, the only evidence provided by Plaintiffs to support their assertion is Pfeil's 2021 Affidavit, in which Mr. Pfeil attests:

> 5. That at all times, [Debtor] advised that Ultrawatt had an excellent product through this powergate system that had patented technology and was going to go public.

[47] Doc. No. 86, pp. 4-5, Pfeil's 2021 Affidavit, ¶¶ 4-10.
[48] Doc. No. 71, ¶¶ 9-11, 18; Doc. No. 84, pp. 5, 9.

> 6. [Debtor] showed me videos of alleged NASA endorsements of the technology, to induce additional investments by me.
>
> 7. That [Debtor] made false representations to me was [sic] that this product was unique and that he had substantial contacts with Fortune 500 companies.
>
> 8. That [Debtor] made false representations that the global company Philips was supporting the technology and would guarantee enormous business for Ultrawatt.[49]

To establish a claim under § 523(a)(2)(A), a plaintiff must prove that the debtor made a material misrepresentation.[50] Here, Mr. Pfeil's statements regarding Debtor's alleged representations lack the specificity necessary to establish a claim for fraud, such as when and where the representations were made, who was present at the time of the representations, or the circumstances surrounding the representations.[51]

And even if Plaintiffs proved the alleged representations with specificity, Plaintiffs did not establish that the representations were false. For example, Plaintiffs did not prove that the PowerGate System was unpatented, or that Debtor had not contacted large companies who were interested in paying Ultrawatt to use the PowerGate System. In fact, the Quarles & Brady Report filed by Plaintiffs as an

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[49] Doc. No. 86, p. 4, Pfeil 2021 Affidavit, ¶¶ 5-8.

[50] *In re Redburn*, 202 B.R. 917, 921 (Bankr. W.D. Mich. 1996).

[51] *In re Cruz-Brewer*, 609 B.R. 1, 10-11 (Bankr. M.D. Penn. 2019) ("Where fraud is alleged, the complainant should accompany a pleading with a first paragraph of any news story – that is, the who, what, when, where, and how of the events at issue. . . . Therefore, the plaintiff must allege the date, time, and place of the alleged fraud or otherwise provide some measure of substantiation to the fraud allegation.")

exhibit to the Complaint contradicts Plaintiffs' assertions under the heading "Relevant Factual Information:"

> Based on the review of the documents and witness interviews, the following facts do not seem to be in dispute.
>
> [Debtor] invested $250,000 to purchase the Ultrawatt Powergate™ technology. This money was invested in the early 1980's. *There are approximately ten patents issued, both foreign and in the United States, on the technology.*
>
> . . .
>
> On June 20, 2005, Ultrawatt signs an authorized representative agreement with Jabil Circuit. (Tab 3.).
>
> The Jabil Circuit agreement can be renewed for an additional six months, *and provides for a monthly $200,000 licensing fee to be repaid upon the sale of the PowerGate™ system to the "Stop and Shop" account*. (Tab 3.).[52]

And the Quarles & Brady Report's "Conclusion and Recommendations" state:

> Based on our extensive review of Ultrawatt's books and records and our interviews of relevant witnesses, *it first appears that Ultrawatt's technology is valid and saleable. Jabil Circuit, a Fortune 500 company, has placed considerable funds into the company in return for the right to market and use the technology in its locations.* At least one recent installation has occurred with Graybar Electric and Ultrawatt has been successful in selling a large number of new installations. Furthermore, a significant large company has recently expressed an interest in purchasing the technology. None of this would occur if the technology did not exist.[53]

[52] Doc. No. 71-2, pp. 10, 16 (emphasis supplied).
[53] Doc. No. 71-2, p. 25 (emphasis supplied).

In other words, the Quarles & Brady Report negates Plaintiffs' claim that the PowerGate System was not real, did not work, and that any representations by Debtor regarding its function were false.

The Court notes that third-party reports may be considered inadmissible hearsay in some circumstances, and that Jabil Circuit's arrangement with Ultrawatt occurred *after* Plaintiffs' stock purchase.[54] But the Court finds the Quarles & Brady Report's findings and conclusions regarding the existence and viability of the PowerGate System to be admissible because (i) it is not considered for the truth of the matter asserted but as a contradiction of Plaintiffs' otherwise unproven assertions; (ii) Plaintiffs themselves introduced the Quarles & Brady Report in this proceeding by attaching it to the Complaint;[55] (iii) Plaintiffs allege in the Complaint that Debtor's "fraud on Pfeil" is summarized in the Quarles & Brady Report;[56] (iv) the factual information related to the PowerGate System is presented in the Quarles & Brady Report as being "undisputed;"[57] and (v) in Plaintiffs' reply in

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[54] Plaintiffs assert that Jabil Circuit "also discovered that this product did not function as advertised" and obtained a judgment that Debtor scheduled in his bankruptcy case. (Doc. No. 90, p. 4). But Jabil Circuit did not file a proof of claim in Debtor's case, Debtor listed the claim as disputed, and there is no evidence of a judgment against Debtor or the basis for any judgment in the record.

[55] Doc. No. 71-2. Plaintiffs stated in the Complaint that Quarles & Brady was appointed "on behalf of Ultrawatt" in the State Court Case to prepare the Quarles & Brady Report.

[56] Doc. No. 71, ¶ 29.

[57] *See In re FiberMark, Inc.*, 339 B.R. 321, 325-26 (Bankr. D. Vt. 2006) (listing cases where examiner's reports were admitted because they were not in dispute) (citing *In re DeLorean Motor Company Litigation*, 59 B.R. 329, 336 (E.D. Mich. 1986), and *In re Granite Partners, L.P.*, 219 B.R. 22, 26 (Bankr. S.D.N.Y. 1998)).

support of Plaintiffs' SJ Motion, they refer to the Quarles & Brady Report as "uncontroverted."[58]

After considering the record evidence, the Court finds that Plaintiffs did not establish that Debtor falsely represented that the PowerGate System was a functioning, marketable product. Accordingly, the Court concludes that Plaintiffs did not meet their burden of proof on summary judgment to show that the State Court Judgment is nondischargeable under § 523(a)(2)(A) based on Debtor's alleged misrepresentations regarding the PowerGate System.

b. Alleged Misrepresentations Regarding the Identity of the Seller of the Ultrawatt Stock

Plaintiffs assert that Debtor never informed them that he was selling them his individual shares of Ultrawatt, as opposed to "company stock," and further assert that Debtor's omission is a fraudulent representation.[59] In Pfeil's 2021 Affidavit, Mr. Pfeil attests that "*it was represented to me* that I [Mr. Pfeil] would purchase shares of stock directly from Ultrawatt."[60] Notably, Mr. Pfeil does not attest that it was *Debtor* who represented that Plaintiffs would purchase their shares "directly" from Ultrawatt.

[58] Doc. No. 93, p. 4.
[59] Doc. No. 71, ¶ 18(a); Doc. No. 84, p. 8.
[60] Doc. No. 86, p. 5, Pfeil's 2021 Affidavit, ¶ 10 (emphasis added).

And in Pfeil's 2011 Affidavit, filed by Debtor in support of Debtor's SJ Motion, Mr. Pfeil attests only that Debtor represented that Mr. Pfeil "would be purchasing stock in the company known as [Ultrawatt]."[61] In other words, Mr. Pfeil does not attest that Debtor told him that the stock was "company stock" (or treasury stock) or that Debtor made any other representations regarding the identity of the stock's seller. Furthermore, Debtor's alleged representation is not false because Plaintiffs did—as described by Mr. Pfeil himself—purchase "stock in the company known as [Ultrawatt]."[62]

The Court concludes that Plaintiffs did not meet their burden of proof on summary judgment to show that the State Court Judgment is nondischargeable under § 523(a)(2)(A) based on Debtor's alleged misrepresentations regarding the identity of the stock's seller.

c. Alleged Misrepresentations Regarding Ultrawatt's Financial Condition

Although Plaintiffs' Complaint does not expressly allege that Debtor falsely represented Ultrawatt's financial condition, Plaintiffs' SJ Motion alleges that Debtor made such misrepresentations.[63] In any event, § 523(a)(2)(A) applies to false

[61] Doc. No. 87, pp. 15-19, Pfeil's 2011 Affidavit, ¶¶ 11, 17(b).
[62] *See* Doc. No. 87, pp. 20-25.
[63] The State Court Complaint attached to the Complaint alleges that Debtor did not inform Plaintiffs that Ultrawatt was insolvent. (Doc. No. 71-1, ¶¶ 25-26.)

representations "*other than* a statement respecting the debtor's or an insider's financial condition."[64]

Under § 101(31)(A)(iv), a corporation of which an individual debtor is an officer is an "insider" of the debtor.[65] Therefore, even if Debtor made any statements regarding Ultrawatt's financial condition, they were statements respecting an insider's financial condition and are outside the scope of § 523(a)(2)(A).[66] And although false statements regarding a debtor's or an insider's financial condition are excepted from discharge under § 523(a)(2)(B), such statements must be in writing.[67]

Here, Mr. Pfeil attested in Pfeil's 2011 Affidavit that he never received any of Ultrawatt's written financial information, and Plaintiffs have not alleged that they received any written statements regarding Ultrawatt's financial condition.[68]

The Court concludes that Plaintiffs did not meet their burden of proof on summary judgment to show that the State Court Judgment is nondischargeable under § 523(a)(2)(A) based on Debtor's alleged misrepresentations of Ultrawatt's financial condition.

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[64] § 523(a)(2)(A) (emphasis added).
[65] § 101(31)(A)(iv).
[66] *In re Polasky*, 2021 WL 614032, at *6.
[67] The Complaint is based solely on § 523(a)(2)(A) and does not allege that the State Court Judgment is nondischargeable under § 523(a)(2)(B).
[68] Doc. No. 87, p. 16, Pfeil's 2011 Affidavit, ¶ 10.

2. Justifiable Reliance

The Court has found that Plaintiffs did not establish that Debtor made false representations regarding the PowerGate System or the identity of the seller of the Ultrawatt stock, and that Debtor's alleged representations regarding Ultrawatt's financial condition are outside the scope of § 523(a)(2)(A). But even if Plaintiffs had proven the first required element of § 523(a)(2)(A)—that Debtor made a false representation to deceive Plaintiffs—they must also prove that they justifiably relied on the alleged representations.

In Pfeil's 2021 Affidavit, Mr. Pfeil stated only that he relied on Debtor's alleged representations in making his investment decision,[69] and in their reply to Debtor's response to Plaintiffs' SJ Motion, Plaintiffs quote Mr. Pfeil's deposition testimony that he relied only on what Debtor told him about Ultrawatt and that he did not do any due diligence before purchasing the stock.[70] Further, Mr. Pfeil stated in Pfeil's 2011 Affidavit that Debtor told him that he would receive "financial statements," "disclosure documents," and "subscription documents."[71] But despite Mr. Pfeil's never having received *any* of these documents, Plaintiffs proceeded to purchase $1,700,00.00 of stock over a three-year period—during which Plaintiffs had ample opportunity to investigate Debtor's alleged representations.

[69] Doc. No. 86, p. 5, Pfeil's 2021 Affidavit, ¶ 11.
[70] Doc. No. 93, p. 5 (quoting Doc. No. 89, p. 22).
[71] Doc. No. 87, p. 17, Pfeil's 2011 Affidavit, ¶ 17.

As the bankruptcy court held in *In re Scialdone*,[72] the Court must subjectively measure justifiable reliance under § 523(a)(2)(A) based on what these particular Plaintiffs knew at the time that they purchased their shares in Ultrawatt. Here, Plaintiffs knew that they had not received allegedly promised financial information, they had the opportunity to investigate Ultrawatt before their purchases, and they admit they did not perform a due diligence inquiry. The Court finds that Plaintiffs' reliance on Debtor's alleged representations was not justifiable.

Accordingly, the Court finds that even if Plaintiffs had proven that Debtor made false representations, they have not shown that they justifiably relied on Debtor's alleged representations. Therefore, Plaintiffs have not met their burden of proof on summary judgment to show that the State Court Judgment is nondischargeable under § 523(a)(2)(A).

F. Debtor's SJ Motion

As discussed above, Plaintiffs bear the burden of proof to establish the required elements of their claim under § 523(a)(2)(A). Therefore, as a moving party on summary judgment, Debtor's burden is to prove that there is an absence of evidence to support Plaintiffs' claims or to come forward with affirmative evidence that Plaintiffs will be unable to prove their claim at trial.

[72] 533 B.R. 53, 61 (Bankr. S.D.N.Y. 2015).

In Debtor's SJ Motion, Debtor asserts that "there is no evidence that the debt to be discharged was predicated on fraud" for three primary reasons: first, Plaintiffs were represented by a financial advisor and an attorney during their purchase of the Ultrawatt stock, and the attorney informed Plaintiffs before the stock purchase that Ultrawatt had substantial debt; second, Plaintiffs' stock purchases took place over a period of three years; and third, Ultrawatt's PowerGate System was "real" and generated customers who benefitted from the technology.[73]

Debtor supported Debtor's SJ Motion with five exhibits:

(1) Debtor's July 26, 2011 affidavit originally filed in the State Court Case ("Debtor's Affidavit"), in which Debtor attests that (a) he provided Ultrawatt's financial information to Plaintiffs' financial advisor and attorney before Plaintiffs purchased their stock, (b) at the time of the stock purchase, he informed Plaintiffs' financial advisor that Ultrawatt was incurring losses, (c) Ultrawatt's Board of Directors directed and approved the sale of stock to Plaintiffs, and (d) he [Debtor] never prevented Plaintiffs from inspecting Ultrawatt's records;[74]

(2) Pfeil's 2011 Affidavit, in which Mr. Pfeil stated that Plaintiffs purchased Ultrawatt stock in four blocks beginning in January 1997 and ending in August 1999;[75]

[73] Doc. No. 87, p. 7 and ¶¶ 2, 3, 4, 5.
[74] Doc. No. 87, pp. 10-13, ¶¶ 9-12, 16.
[75] Doc. No. 87, pp. 15-16, ¶¶ 6, 7.

(3) a composite exhibit consisting of (a) a facsimile transmission dated January 29, 1997—the day before Plaintiffs' first stock purchase—from attorney Frederick W. London to James Cunningham referring to two letters "to be provided to investors prior to wiring of funds;" (b) a letter dated January 29, 1997, from James A. Cunningham, who identifies himself as Mr. Pfeil's "purchaser representative in connection with evaluating the merits and risks of the investment" in Ultrawatt; and (c) a letter dated January 29, 1997, from attorney London to Mr. Pfeil, in which Mr. London writes that Ultrawatt's 1995 income statement indicated a net loss of $1.4 million and that Ultrawatt had substantial debt and continued to incur losses;[76]

(4) documents that Debtor asserts are studies of the PowerGate System by Jabil Green Services and a contractor for NASA;[77] and

(5) the transcript of an October 25, 2021 deposition that the parties agree erroneously identifies the deponent as "Richard Grady," but who is actually Mr. Pfeil.[78]

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[76] Doc. No. 87, pp. 27-32. Mr. Pfeil testified at deposition that Mr. Cunningham was his friend but not his financial advisor, that he had never heard of Mr. London and did not know who he was, and that he did not remember receiving the letters. (Doc. No. 89, pp. 15, 19).

[77] Doc. No. 87, pp. 34-61.

[78] Doc. No. 89. Debtor filed the transcript as the "deposition transcript of Richard B. Pfeil" (Doc. No. 89, p. 1), and Plaintiffs state that Mr. Pfeil's deposition was taken in October 2021, and that the transcript was filed "with many errors including misidentification of the actual deponent on the first page. (Dkt. 89)" (Doc. No. 93, p. 5). Plaintiffs quote the transcript as

Based on the record, Debtor asserts that there is "no evidence that Debtor/Defendant engaged in fraud or deception to induce Plaintiffs to purchase stock in Ultrawatt on *four* separate occasions over a *three-year* time period" between January 1997 and August 1999.[79]

1. Plaintiffs have no evidence that Debtor made false representations.

Plaintiffs repeatedly assert that their claim under § 523(a)(2)(A) is based on two false representations allegedly made by Debtor: the "actual stock fraud perpetrated by Debtor/Defendant was the fact that he misrepresented the state of the technology and viability of this product and also misrepresented that he was selling them stock in Ultrawatt and instead sold Pfeil his individual shares."[80]

But the only record evidence on these two allegedly false misrepresentations is that Debtor represented the PowerGate System as an excellent product that large companies were supporting, and that Plaintiffs would be buying stock "in Ultrawatt."[81] For example, when asked at deposition to identify Debtor's specific representations, Mr. Pfeil testified that Debtor told him that the PowerGate System

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the testimony of Mr. Pfeil in their reply in support of Plaintiffs' SJ Motion. (Doc. No. 93, pp. 5-6).

[79] Doc. No. 87, p. 7 (emphasis in original).

[80] Doc. No. 93, p. 3.

[81] Doc. No. 86, p. 4, ¶¶ 5-9; Doc. No. 87, pp. 16-17, ¶¶ 11, 17.

was "great technology" and that Ultrawatt was doing "great" and on the verge of going public."[82]

But there is no record evidence that Debtor made specific false statements regarding the PowerGate System or the identity of the seller of the Ultrawatt stock. And even though the PowerGate System studies attached to Debtor's SJ Motion are dated after Plaintiffs acquired the Ultrawatt stock, Plaintiffs have presented no record evidence that Debtor was not marketing the PowerGate System as a valid technology at the time that they were considering an investment in Ultrawatt.[83] As the bankruptcy court in *In re de Montfort* stated: "Courts have long distinguished between statements utilizing opinion and exaggeration that constitute mere puffery and factual statements that constitute fraudulent misrepresentations."[84]

The Court concludes that Debtor met his burden of proof on summary judgment to show that there is an absence of evidence to support Plaintiffs' claim regarding Debtor's alleged false representations, that the burden shifted to Plaintiffs to show the existence of an issue of fact, and that Plaintiffs did not meet their burden.

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[82] Doc. No. 89, pp. 14, 51.

[83] The document titled "Field Testing of the Powergate Product Line at the Kennedy Space Center" that was "performed/prepared by EG&G Florida Energy Management Office/Project Integration Office, Base Operations Contractor for NASA at the Kennedy Space Center, Florida" is dated July 2, 2001. (Doc. No. 87, p. 51). In its conclusions, the Quarles & Brady Report states that Debtor had promoted Ultrawatt's prospects for years, but "none of these prospects apparently panned out until 2005 (with the exception of the Symga contract)" (Doc. No. 71-2, p. 25).

[84] *In re de Montfort*, 2017 WL 4582171, at *7 (Bankr. N.D. Ohio Oct. 12, 2017).

2. Plaintiffs have no evidence that they justifiably relied on any alleged misrepresentations.

The second element of Plaintiffs' claim under § 523(a)(2)(A) is justifiable reliance on Debtor's alleged misrepresentations. As stated above, justifiable reliance is a subjective measurement that depends on what these particular Plaintiffs knew at the time of the alleged fraud. Mr. Pfeil holds a bachelor's degree in finance from Arizona State, worked as a futures trader for approximately 30 years, and was involved in multiple investments other than the Ultrawatt investment.[85]

In Debtor's Affidavit, Debtor states that he never denied Plaintiffs access to Ultrawatt's documents and that he provided financial information about Ultrawatt to Plaintiffs' financial advisor and attorney.[86] Although Plaintiffs deny that the individuals named by Debtor acted as their advisors,[87] they do not dispute Debtor's assertion that they had access to Ultrawatt's records, and Mr. Pfeil testified at deposition that nothing prohibited him from independently researching the investment.[88] In fact, Mr. Pfeil expressly testified (a) that he knew that Ultrawatt was a "start-up company" at the time of the stock purchases;[89] (b) that he did not do any due diligence prior to purchasing the stock, instead relying solely on his

[85] Doc. No. 89, pp. 6-8, 24-25, 52-53. For example, Mr. Pfeil testified that he invested in apartments, a basketball team, and a clothing store (Doc. No. 89, p. 9).
[86] Doc. No. 87, p. 11, Debtor's Affidavit, ¶¶ 10, 12.
[87] Doc. No. 89, pp. 15, 19.
[88] *Id.*, p. 55.
[89] *Id.*, p. 28.

conversations with Debtor;[90] (c) that he had attorneys available to him, but did not think he needed them;[91] (d) that he did not meet any officers or personnel at Ultrawatt before his investment;[92] and (e) that he asked for Ultrawatt's books and records at various times, but "absolutely" purchased the stock without seeing the records.[93]

Plaintiffs made the initial purchase in January 1997 and, almost three years later, made additional purchases of three more stock certificates. If Debtor had falsely represented the seller's identity or the marketability of the PowerGate System in 1997, the 2½ years between Plaintiffs' first stock purchase and their last provided them with ample opportunity to determine that Debtor's alleged representations were false.

The Court concludes that Debtor met his burden of proof on summary judgment to show that there is an absence of evidence to support Plaintiffs' claim that they justifiably relied on false representations allegedly made by Debtor, that the burden shifted to Plaintiffs to show an issue of fact, and that Plaintiffs did not meet their burden.

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[90] *Id.*, pp. 17, 22, 35, 53.
[91] *Id.*, p. 25, 52.
[92] *Id.*, pp. 29-30, 35.
[93] *Id.*, pp. 31-33.

IV. CONCLUSION

For Plaintiffs to prevail on their claim that their State Court Judgment is excepted from discharge under § 523(a)(2)(A), they must prove that Debtor made a false representation to induce them to invest in Ultrawatt and that they justifiably relied on the false representation. Plaintiffs did not meet their burden of proof on summary judgment to show the required elements of a claim under § 523(a)(2)(A), and Debtor met his burden of proof on summary judgment to show the absence of evidence to support Plaintiffs' claim.

Accordingly, it is

ORDERED:

1. Debtor's *Motion to Exclude Portions of Mr. Jerry McHale's Testimony Pursuant to Fed. R. Evid. 702* (Doc. No. 96) is **GRANTED,** and paragraph 5 of the McHale Affidavit is excluded.

2. Plaintiffs' *Motion for Summary Judgment as to Second Amended Complaint* (Doc. No. 84) is **DENIED.**

3. Debtor's *Motion for Summary Judgment on Second Amended Complaint* (Doc. No. 87) is **GRANTED.**

4. The Court will enter a separate final judgment in Debtor's favor.

Clerk's office to serve on interested parties via CM/ECF.