**COURT OF CHANCERY**
**OF THE**
**STATE OF DELAWARE**

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County Courthouse
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Date Submitted: June 13, 2012
Date Decided: August 2, 2012

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James D. Crombie
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Re: *Paron Capital Management v. James D. Crombie*
Civil Action No. 6380-VCP

Dear Counsel and Mr. Crombie:

On May 22, 2012, the Court issued a post-trial Memorandum Opinion (the "Post-Trial Opinion") rendering its findings of fact and conclusions of law in this action,[1] and a Judgment and Order (the "Judgment") reflecting those rulings.[2] Currently before the Court are three motions related to the Post-Trial Opinion and Judgment: (1) Defendant's motion to alter or amend the Judgment and for reargument under Court of Chancery Rule

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1 *Paron Capital Mgmt., LLC v. Crombie*, 2012 WL 2045857 (Del. Ch. May 22, 2012) [hereinafter Post-Trial Op.]. The Court presumes familiarity with the Post-Trial Opinion and generally employs the same nomenclature as used therein.

2 *Paron Capital Mgmt., LLC v. Crombie*, 2012 WL 1850728 (Del. Ch. May 22, 2012) (ORDER) [hereinafter Judgment].

59(e) and (f) (the "Rule 59 Motion"); (2) Defendant's motion to stay execution of the Judgment pursuant to Rule 62 (the "Stay Motion"); and (3) Plaintiffs' request for attorneys' fees under the Judgment. This Letter Opinion contains the Court's rulings on those motions.

## I. BACKGROUND

Crombie asserts three primary arguments in support of his Rule 59 Motion. First, he claims that an amendment or alteration of the Judgment is necessary to prevent manifest injustice insofar as financial hardship precluded him from attending trial and Plaintiffs abused the discovery process.[3] Second, he purports to have found new evidence that (1) Lyons is employed, (2) McConnon foreclosed on Crombie's home, and (3) both Lyons and McConnon knew of Crombie's financial and legal liabilities before forming Paron in June 2010. Crombie avers that this new evidence undermines, respectively, the Court's (1) award of lost future earnings to Lyons, (2) award of mitigation costs to McConnon, and (3) finding that Plaintiffs justifiably relied on

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[3] While Crombie's Rule 59 Motion discussed his financial hardship and the alleged discovery abuses by way of background, he did not invoke explicitly the "necessary to prevent manifest injustice" standard or even refer to these issues in the Argument section of his Motion. Nevertheless, as discussed *infra*, the need to prevent manifest injustice is among the grounds upon which a court may grant a motion under Rule 59(e), and, as I noted earlier in this action, I hold Crombie's *pro se* filings "to a somewhat less stringent technical standard than those drafted by lawyers." *Paron Capital Mgmt., LLC v. Crombie*, 2012 WL 214777, at *4 n.31 (Del. Ch. Jan. 24, 2012) [hereinafter Evidentiary Op.] (internal quotation marks

Crombie's representations regarding his financial and legal liabilities. Third, Crombie argues that the Court misapprehended material facts regarding Paron's trading model, Lyons and McConnon's lost future earnings, Plaintiffs' attorneys' fees, and the forged FIMAT and Access Securities account statements.[4] As to all of these arguments, Plaintiffs respond that Crombie is attempting either (1) to relitigate arguments already addressed or (2) to introduce as "new" evidence documents or information he could have discovered earlier in the exercise of reasonable diligence.

As to his Stay Motion, Crombie requests that the Court (1) stay enforcement of the Judgment in its entirety pending resolution of his Rule 59 Motion and (2) suspend the

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omitted). Therefore, I consider Crombie's Rule 59 Motion to have raised an argument that the Judgment reflects a manifest injustice.

[4] Crombie also argued in a letter to the Court dated June 6, 2012 that Plaintiffs failed to respond in a timely fashion to, and thereby waived their right to challenge, his Rule 59 Motion. That argument is without merit. Rule 59(f) affords nonmoving parties five days to file opposition papers. In that regard, Rule 6(a) provides: "In computing any period of time prescribed or allowed by these Rules [or] by order of Court, . . . the day of the act, event, or default after which the designated period of time begins to run is not to be included" and "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and other legal holidays shall be excluded in the computation." Crombie filed his Rule 59 Motion on Wednesday, May 30, 2012. Five days thereafter, exclusive of his filing date and the intermediate weekend of June 2-3, was Wednesday, June 6, the same date on which Plaintiffs filed their Opposition. Furthermore, Rule 6(e) would have provided Plaintiffs an "additional 3-day period" because the "prescribed period [began] after being served . . . by mail or by e-Filing." Hence, contrary to Crombie's argument, Plaintiffs' Opposition, in fact, was timely.

injunctions ordered by the Judgment pending appeal. Plaintiffs oppose any such stay or suspension unless Crombie posts a hefty bond as security of their rights.

Finally, pursuant to Paragraph 12 of the Judgment, Plaintiffs request reimbursement of the attorneys' fees and expenses they reasonably incurred in connection with this action. Crombie mistakenly urged the Court to deny Plaintiffs request as untimely,[5] but did not raise any other objection to the request for fees and expenses.

## II. ANALYSIS

### A. Crombie's Rule 59 Motion

"Under Rule 59(e), a motion to alter or amend a judgment may be granted 'if the plaintiff demonstrates (1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or to prevent manifest injustice.'"[6] Under Rule 59(f), a motion for reargument may be granted if the moving party demonstrates that "the Court's decision was predicated upon a

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[5] Like he argued in connection with his Rule 59 Motion, *see supra* note 4, Crombie challenges Plaintiffs' request for attorneys' fees as untimely. The Judgment issued on May 22, 2012 directed Plaintiffs to "submit a request for attorneys' fees with supporting documentation within ten (10) days." Judgment, 2012 WL 1850728, at *1. Thus, excluding the issue date and intermediate weekends, Plaintiffs' motion for fees and supporting documentation were due by June 5. *See* Ct. Ch. R. 6(a). Plaintiff filed its request on June 4. Therefore, the request, in fact, was timely.

[6] *Adams v. Calvarese Farms Maint. Corp.*, 2011 WL 383862, at *1 n.3 (Del. Ch. Jan. 13, 2011) (quoting *Chrin v. Ibrix, Inc.*, 2005 WL 3334270, at *1 (Del. Ch. Nov. 30, 2005)).

misunderstanding of a material fact or a misapplication of the law."[7] "A misapprehension of the facts or the law must be both material and outcome determinative of the earlier litigation for the movant to prevail."[8] Additionally, the Court generally does not consider new evidence on a motion for reargument, unless the moving party can "show the newly discovered evidence came to his [or her] knowledge since the trial and could not, in the exercise of reasonable diligence, have been discovered for use at the trial."[9] Finally, under either asserted subsection of Rule 59, the Court will deny the motion if it merely restates arguments already considered and rejected during the litigation.[10]

**1. Manifest injustice**

Having reviewed carefully Crombie's Rule 59 Motion, I conclude that there has been no manifest injustice requiring alteration or amendment of the Judgment. As to Crombie's absence from trial due to financial hardship, Crombie moved in August 2011

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7 *Fisk Ventures, LLC v. Segal*, 2008 WL 2721743, at *1 (Del. Ch. July 3, 2008) (internal quotation mark omitted) (quoting *Forsythe v. ESC Mgmt. Co. (U.S.)*, 2007 WL 3262205, at *1 (Del. Ch. Oct. 31, 2007)), *aff'd*, 984 A.2d 124 (Del. 2009) (TABLE).

8 *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 6392906, at *1 (Del. Ch. Dec. 16, 2011).

9 *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007) (citing *Bata v. Bata*, 170 A.2d 711, 714 (Del. 1961)).

10 *Chrin*, 2005 WL 3334270, at *1.

to dismiss this action under the doctrine of *forum non conveniens* based on the same financial hardship. In ruling on that motion, I noted that: (1) managers of Delaware LLCs (as Crombie was of Paron) consent to the personal jurisdiction of this Court pursuant to 6 *Del. C.* § 18-109(a); (2) "Delaware has serious interests in the operation of its LLCs and in allegations of fraud that are made against the LLCs"; and (3) the familiar *Cryo-Maid* factors[11] did not support depriving Plaintiffs of their choice of forum.[12] Crombie's Rule 59 Motion raises nothing to dissuade me of that prior ruling or that suggests the Court misunderstood either the facts or the applicable law. Moreover, because Crombie argued and lost on this very issue during the litigation, it provides no basis for relief pursuant to his Rule 59 Motion.[13]

Similarly, I previously addressed Crombie's contention that Plaintiffs abused the discovery process when I ruled on his various evidentiary objections in January 2012

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[11] *See Gen. Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681 (Del. 1964). For a list of six factors that a court must consider under *Cryo-Maid* and its progeny in determining whether the *forum non conveniens* doctrine applies, *see Lisa, S.A. v. Mayorga*, 993 A.2d 1042, 1047 n.10 (Del. 2010).

[12] Sept. 9, 2011 Hr'g Tr. 13-17.

[13] *See Fisk Ventures*, 2008 WL 2721743, at *1 ("relief under Rule 59 is available to prevent injustice—not to offer a forum for disgruntled litigants to recast their losing arguments with new rhetoric" (internal quotation marks omitted)).

(*i.e.*, after trial but before issuance of the Post-Trial Opinion).[14] As I noted then, "the proper time to raise a discovery dispute is before trial and, ideally, as soon as the issue arises"; therefore, "the proper time for presenting discovery disputes has passed."[15] Crombie's redoubled argument in this regard neither undermines that earlier ruling nor provides any basis for relief under Rule 59(e).

**2. New evidence**

Crombie similarly fails to identify any new evidence warranting amendment or alteration of the Judgment. Regarding the Court's award of Lyons's lost future earnings, Crombie asserts that "Lyons has been gainfully employed *during this litigation period*"[16] and that Lyons began his employment at Bearing Management Group in August 2011.[17] Trial in this matter, however, commenced in October 2011, and Crombie does not claim that his "new" evidence of Lyons's employment was concealed from him or otherwise

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14 *See* Evidentiary Op., 2012 WL 214777, at *2, *6 & n.48 (concluding Plaintiffs did not violate their discovery obligations and Crombie suffered no prejudice during discovery).

15 *Id.* at *6 n.48 (citing *Levy v. Stern*, 1996 WL 33170054, at *1 (Del. Ch. Apr. 19, 1996)).

16 Mot., Docket Item ("D.I.") No. 116, at 5 (emphasis added). All docket items cited in this Letter Opinion refer to the docket in this action, *Paron Capital Mgmt., LLC v. Crombie*, C.A. No. 6380-VCP.

17 Def.'s Reply, D.I. No. 124, at 2.

beyond his ability to discover it. Hence, he has failed to carry his burden "to show that with reasonable diligence [he] could not have discovered the evidence before trial."[18]

As to the allegedly new evidence that McConnon foreclosed on Crombie's home, the Post-Trial Opinion expressly awarded McConnon "damages for legal fees incurred in connection with . . . foreclosing on collateral pledged by Crombie for the loan intended to satisfy the Porteous judgment."[19] Evidence that McConnon foreclosed on Crombie's home, therefore, is not "new"; indeed, it forms the factual predicate for the portion of the Post-Trial Opinion dealing with this issue.[20]

Finally, Crombie has not proffered new evidence that Lyons and McConnon knew of his financial and legal liabilities before, or at least shortly after, forming Paron. As discussed in the Post-Trial Opinion: Lyons and McConnon obtained a comprehensive background report on Crombie on May 12, 2010; six days later, the Lamar Suit was filed against Crombie; Paron was formed approximately two weeks later on June 2; and

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18 *Sussex Poultry Co. v. Am. Ins. Co.*, 301 A.2d 281, 283 (Del. 1973).

19 Post-Trial Op., 2012 WL 2045857, at *8.

20 To the extent Crombie may be arguing that, as a matter of law, the foreclosure itself provided the only relief to which McConnon was entitled, that would be a new argument. But, a party cannot raise a new argument for the first time on a Rule 59 motion. *See Kern v. NCD Indus., Inc.*, 316 A.2d 576, 584 (Del. Ch. 1973) (holding parties may not raise on a motion for reargument "an issue which they should have raised at trial").

"Lamar eventually prevailed on his fraud claims against Crombie."[21] Crombie now alleges that he only recently discovered that, in September 2010, Lyons obtained a credit report on him. Indeed, Exhibit E to Crombie's Motion is a two-page excerpt from a credit report on Crombie generated by AnnualCreditReport.com on February 1, 2012, which indicates that Lyons inquired into Crombie's credit on September 16, 2010. Exhibit E, however, discloses only the fact of Lyons's credit search, not what information the search revealed. That is, the new evidence to which Crombie now points does not show that Plaintiffs knew of the Lamar Suit and corresponding judgment in September 2010. Moreover, even if it did, that fact would not undermine the Court's findings in the Post-Trial Opinion that Plaintiffs justifiably relied on the exhaustive due diligence they performed on Crombie before forming Paron in June 2010 or that, thereafter, Crombie breached his fiduciary duty to Plaintiffs by not correcting or affirmatively disclosing his earlier misrepresentations. And, in any case, Crombie has not explained why he could not have discovered the evidence he now proffers before trial with the exercise of reasonable diligence.

In sum, none of the purportedly new evidence relied upon by Crombie provides a basis to alter or amend the Judgment.

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[21] Post-Trial Op., 2012 WL 2045857, at *2, *5. The judgment against Crombie in the Lamar Suit is dated January 26, 2011. PTX 71.

### 3. Misapprehension of material facts

Lastly, Crombie has not shown that the Court misapprehended any material fact in the Post-Trial Opinion. As to whether Crombie marketed Paron's trading program, I found—based on "unrebutted evidence"—that the program Crombie marketed in 2011 was "substantially similar to Paron's trading program."[22] Even assuming that Crombie's Rule 59 Motion presents a plausible theory as to why his 2011 program might look and operate like Paron's software and yet actually not be similar to it, the record produced at trial does not support that theory. "[A] motion for reargument properly seeks only a re-examination of the facts in [the] record at the time of decision or the law as it applies to those facts."[23] As just indicated, the only evidence adduced at trial supports a finding that the two programs are similar.

Regarding the Court's decision to award Plaintiffs lost future earnings and attorneys' fees, Crombie appears to misunderstand the Post-Trial Opinion. Crombie contends that he did not induce Lyons or McConnon to leave their former employment and, therefore, should not be liable for their lost future earnings. The Post-Trial Opinion, however, did not predicate these damages on such a finding. Rather, the Court credited the expert opinion of Michael Curran that Plaintiffs' association with Crombie and his

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[22] Post-Trial Op., 2012 WL 2045857, at *14.

[23] *Miles, Inc. v. Cookson Am., Inc.*, 677 A.2d 505, 506 (Del. Ch. 1995) (quoting *Maldonado v. Flynn*, 1980 WL 272822, at *3 (Del. Ch. July 7, 1980)).

fraud has stigmatized them and ruined the prospects they otherwise would have had for employment in the financial services industry for the foreseeable future, even if Paron had failed for legitimate business reasons. Crombie has not identified any misapprehension of material fact in that regard.

Likewise, Crombie argues that fee-shifting was improper because he did not cause the litigation with the CFTC. As stated in the Post-Trial Opinion, however, the Court awarded McConnon "legal fees and other costs he incurred as a result of having to participate in regulatory and other proceedings directly arising from Crombie's fraudulent conduct" under the fraud exception to the American Rule.[24] That is, because litigation with the CFTC was a foreseeable consequence of Crombie's fraud, the fees McConnon incurred in connection with those proceedings constitute part of the damages he suffered due to Crombie's bad faith conduct. Whether Crombie directly instigated the CFTC litigation is simply irrelevant.[25]

Finally, Crombie maintains that he did not forge the FIMAT and Access Securities account statements. The Court, however, found otherwise based on the evidence adduced

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[24] Post-Trial Op., 2012 WL 2045857, at *8-9.

[25] The Court further awarded both Lyons and McConnon their attorneys' fees because "[t]he prosecution of *this action* to clear Plaintiffs' names, among other things, is a direct and foreseeable consequence of Crombie's wrongdoing." *Id.* at *15 (emphasis added).

at trial.[26] Indeed, Crombie's protests of innocence are no more convincing now than they were in his post-trial brief.[27] On that basis alone—*i.e.*, because he already has litigated this very issue—Crombie's motion for reargument in this respect must be denied.

In sum, Crombie failed to show that the interests of justice or new evidence warrant altering or amending the Judgment pursuant to Rule 59(e) or that the Court misapprehended any material fact or applicable principle of law sufficiently to support granting reargument under Rule 59(f). Accordingly, I deny Crombie's Rule 59 Motion in all respects.

### B. Crombie's Stay Motion

Crombie moved to stay execution of the Judgment pending his post-trial motions and appeal pursuant to Rule 62(b) and (c). Rule 62(b) provides, in pertinent part, that: "the Court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59." Having just disposed of Crombie's Rule 59 Motion, I consider this aspect of his Stay Motion to be moot.

Rule 62(c) provides:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the Court in its discretion may suspend, modify, restore, or grant

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[26] *Id.* at *5.

[27] *See* Corrected Def.'s Post-Trial Br., D.I. No. 93, at 12-13, 23-25.

> an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

Plainly, this rule relates only to stays of injunctive relief, and not to stays of the execution upon or enforcement of judgments for money damages.[28]

In this case, the Judgment provides for only the following injunctive relief:

> 6. James D. Crombie shall return or destroy all Paron assets within his possession, custody, or control, including, without limitation, all copies or versions of Paron's software trading program that Crombie attempted to market to new prospective clients or investors.
>
> 7. James D. Crombie is enjoined from marketing any version of Paron's software trading program, including, without limitation, any such version presented by Crombie to new firms or clients through Barclay's Capital.[29]

As noted in the Post-Trial Opinion, however, Crombie consented in an earlier action (1) to refrain from using or accessing any Paron assets and (2) to return all Paron assets, information, and intellectual property within his control.[30] Thus, the injunctive relief

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[28] To stay enforcement of a judgment for money damages pending appeal, Rule 62(d) directs litigants to article IV, § 24 of the Delaware Constitution and the Rules of the Supreme Court. "Article IV, Section 24 of the Delaware Constitution requires that the appellant 'shall give sufficient security' (*e.g.*, a supersedeas bond) as a condition to the granting of a stay." Donald J Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 14.09, at 14-17 (2012).

[29] Judgment, 2012 WL 1850728, at *1.

[30] *See* Post-Trial Op., 2012 WL 2045857, at *14 (citing *Paron Capital Mgmt., LLC v. Crombie*, C.A. No. 6371-VCP, Final Judgment, at 2 (Del. Ch. May 11, 2011)).

granted by the Post-Trial Opinion and Judgment primarily is duplicative of that earlier, stipulated judgment. Indeed, as a practical matter, it merely adds a finding that the software Crombie had been attempting to market constitutes one of Paron's assets that the *earlier* judgment prohibited Crombie from using or accessing. Furthermore, that earlier judgment remains in effect and is beyond appeal. Consequently, suspending the Judgment's injunctions, as Crombie requests, would have no meaningful effect on the continued enforceability of the virtually coextensive, earlier judgment; it would be a futile exercise. Under these circumstances, I decline to exercise my discretion to suspend the Judgment's injunctions.

In addition, I note that Crombie is self-represented and, in fact, probably seeks a stay of execution of the damages portion of the Judgment entered against him under Rule 62(d), although he did not cite that subsection. If that is true, however, Crombie would have to post a supersedeas bond for at least the full amount of the Judgment.[31] Nothing in the record on the pending motions, however, suggests Crombie could satisfy such a requirement; indeed, the evidence indicates that he could not.

For all of these reasons, Crombie's Stay Motion is denied.

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[31] *See supra* note 28.

### C. Plaintiffs' Request for Attorneys' Fees

Among other things, the Judgment grants Plaintiffs "reimbursement of the attorneys' fees and expenses, including expert witness fees, they reasonably incurred in connection with this action."[32] Plaintiffs seek $429,189.40 in such fees and expenses. Having reviewed Plaintiffs' supporting affidavits, I find both the rates charged and hours billed by Plaintiffs' attorneys in litigating this action through trial and the expenses they incurred, including expert witness fees, to be reasonable in light of the issues involved, results obtained, and the ability of counsel.[33] Furthermore, Crombie did not challenge Plaintiffs' request for fees on any ground other than his mistaken claim that it was untimely. Accordingly, I grant Plaintiffs' request for reimbursement of attorneys' fees and expenses in the full requested amount of $429,189.40.

## III. CONCLUSION

For the foregoing reasons, I deny Crombie's Rule 59 Motion and Stay Motion and am entering herewith a Supplemental Judgment and Order granting Plaintiffs' request for reimbursement of their attorneys' fees and expenses.

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[32] Judgment, 2012 WL 1850728, at *1.

[33] *See Mahani v. Edix Media Gp., Inc.*, 935 A.2d 242, 247-48 (Del. 2007) (holding courts must determine reasonableness of fee awards in reference to Del. Lawyers' R. Prof'l Conduct 1.5(a) and "whether the number of hours devoted to litigation was 'excessive, redundant, duplicative or otherwise unnecessary'" (quoting *All Pro Maids, Inc. v. Layton*, 2004 WL 3029869, at *5 (Del. Ch. Dec. 20, 2004))).

**IT IS SO ORDERED**.

Sincerely,

*/s/ Donald F. Parsons, Jr.*

Donald F. Parsons, Jr.
Vice Chancellor

DFP/ptp