

1 Crombie's Answer to the 1AC (Answer) ¶ 12; see Commodity Futures
2 Trading Comm'n v. Savage, 611 F.2d 270, 273 (9th Cir. 1979).

3 The National Futures Association (NFA) is a private
4 corporation that is registered as a futures association with the
5 USCFCTC pursuant to 7 U.S.C. § 21. 1AC ¶ 15; Answer ¶ 15. The NFA
6 has delegated responsibility for certain aspects of the regulation
7 of certain futures professionals and entities that comprise its
8 membership and their associated persons. Id. The NFA focuses
9 primarily on the qualifications, proficiency, financial
10 conditions, retail sales practices and business conduct of its
11 members. Id.

12 The NFA's members include commodity trading advisers (CTAs),
13 who are defined under the Act generally to include persons who are
14 in the business of advising others of the value or advisability of
15 trading in items such as commodity futures contracts or who
16 promulgate analyses or reports on these topics as a regular part
17 of business. 1AC ¶¶ 15, 19; Answer ¶¶ 15, 19; see also 7 U.S.C. §
18 1a(12).

19 JDC Ventures, LLC is a California corporation incorporated in
20 2005. 1AC ¶ 18; Answer ¶ 18; Crombie Decl. ¶ 8, Ex. 7, Docket No.
21 252-2.¹ JDC Ventures was registered as a CTA with the NFA from
22 February 2009 to May 2010 and remains an active limited liability
23 company within California at the present time, but "it does not
24 _____

25 ¹ The exhibits attached to Crombie's declaration appear to
26 mistakenly include two exhibits labeled as Exhibit 6 and do not
27 include any exhibits labeled as Exhibits 5 or 7. See Docket No.
28 252-2, 37, 59. The first Exhibit 6 appears to be accurately
labeled. Docket No. 252-2, 37. The second Exhibit 6 appears to
have been mistakenly marked as Exhibit 6 instead of Exhibit 7, and
will be referred to herein as Exhibit 7. Docket No. 252-2, 59.

1 have any business currently" and "hasn't had business in several
2 years." 1AC ¶ 18; Answer ¶ 18; Crombie Decl. ¶ 8, Ex. 7; Robell
3 Decl. ¶ 4, Ex. 3 (Crombie Depo.),² Docket No. 234-2, 88:5-13.
4 Crombie states that he was the sole member of JDC Ventures from
5 2005 to 2011. Crombie's Opp. and Cross-Mot. for Summ. J. (Cross-
6 Mot.), 2. JDC Ventures held itself out as an investment advisor
7 registered with the NFA that utilized a proprietary quantitative
8 model for trading commodity future contracts. Robell Decl. ¶ 5,
9 Ex. 4, Docket No. 234-2, 114, 121.

10 Paron Capital Management, LLC (Paron) was founded as a
11 Delaware corporation in 2010 by Crombie, Peter McConnon and
12 Timothy D. Lyons. Robell Decl. ¶ 3, Ex. 2, Docket No. 234-2, 18.
13 The Operating Agreement forming the company stated that it "was
14 formed as JDC Trading, LLC on or about March 29, 2010," and that
15 the name of the company was later changed to Paron. Id. In the
16 Operating Agreement, Crombie agreed to transfer all property and
17 assets of JDC Ventures, including those in its trading system, to
18 Paron. Id. As part of the inducement for Crombie to transfer
19 these assets to Paron and admit McConnon and Lyons, McConnon
20 agreed to loan the company \$300,000, with the understanding that
21 Crombie would "immediately withdraw all of the proceeds of the
22 Loan and use of all of such proceeds solely to settle that certain
23 _____

24 ² As explained in further detail below, separate litigation
25 involving Crombie, Peter McConnon, Timothy D. Lyons and Paron
26 Capital Management, LLC took place in Delaware Chancery Court.
27 Depositions were taken during that litigation and a trial took
28 place. Excerpts of the transcripts from the depositions and trial
in the Delaware case were submitted by both parties. References
to depositions taken in the Delaware action are indicated by the
abbreviation "Del. Depo." and references to depositions taken in
the instant action are referred to simply as "Depo."

1 judgment against Crombie and JDC in the matter of Paul D. Porteous
2 v. James D. Crombie et al. filed in the Superior Court of
3 California in the County of Ventura." Id.

4 Pursuant to the Operating Agreement, Crombie owned seventy-
5 five percent of Paron, McConnon owned twenty percent and Lyons
6 owned five percent. Id. at 24-25. Crombie was designated as the
7 Initial Manager of Paron, and was given, with limited exceptions,
8 "full and complete authority and discretion to make all decisions
9 and determinations, and take or authorize all actions, which he
10 deems appropriate" on behalf of Paron. Id. at 20.

11 During the period from August 2010 through March 2011, Paron
12 used promotional material in the form of a PowerPoint
13 presentation, known as the "Flip book," a monthly newsletter, and
14 a due diligence questionnaire (DDQ) in order to solicit potential
15 clients. 1AC ¶¶ 3, 22; Answer ¶¶ 3, 22.

16 In March 2011, acting on the basis of anonymous complaints
17 that Crombie was advertising fictitious performance information
18 and that he and JDC Ventures had been charged in several civil
19 lawsuits in connection with loans made to them that totaled more
20 than \$1 million, NFA initiated an investigation of Paron pursuant
21 to its authority delegated from the USCFTC. Robell Decl. ¶ 11,
22 Ex. 10, Docket No. 234-3 (Aff. of Patrick Moongthaveephongsa,
23 hereinafter Moongthaveephongsa Aff.), ¶¶ 3-4; see also 1AC ¶ 21;
24 Answer ¶ 21. An NFA team led by Patrick Moongthaveephongsa began
25 an onsite examination of Paron on March 21, 2011 and interviewed
26 Crombie in a conference call on March 29, 2011.

27 Moongthaveephongsa Aff. ¶¶ 4, 11, 16. Crombie states that the
28

1 onsite examination lasted until March 23, 2011. Crombie Decl.,
2 Ex. 90 (Crombie Aff.), ¶ 5.³

3 During its audit, the NFA obtained Paron promotional material
4 consisting of the Flip book, the newsletter and the DDQ. 1AC
5 ¶ 22; Answer ¶ 22. For historical information predating the
6 creation of Paron, the promotional materials represented the
7 performance of JDC Ventures. Crombie Depo., 195:4-196:2; Robell
8 Decl., Ex. 5, 7 (Flip book stating, "The management company was
9 founded as JDC Ventures LLC in 2005 as a company solely owned and
10 managed by James Crombie as investment adviser and was re-named
11 Paron Capital Management LLC in May 2010 with three admitted
12 members. This track record is inclusive of the live and verified
13 track record of the investment adviser as Managing Member of JDC
14 formerly and of PCM currently."). The Flip book and newsletter
15 each claimed that JDC and Crombie had previously achieved annual
16 rates of return as high as 38.6% in 2008. 1AC ¶ 22; Answer ¶ 22.
17 The DDQ claimed that the total assets "managed/advised" by Paron
18 in 2011 were approximately \$35 million, and that the largest
19 current account was \$20 million. Id. Crombie admitted in his
20 answer here that the DDQ listed these figures incorrectly. Answer
21 ¶ 22.

22 The NFA requested that Crombie provide it with supporting
23 documentation for the historical returns cited in certain
24 promotional material for Paron. 1AC ¶ 23; Answer ¶ 23. In
25 response, Crombie provided the NFA with certain documents,
26 _____

27 ³ Crombie has submitted both a declaration signed under
28 penalty of perjury and a notarized affidavit, which is attached as
an exhibit to the declaration.

1 including (1) monthly account statements or summaries purportedly
2 from Fimat USA, LLC; (2) monthly account statements or summaries
3 purportedly from Access Securities, LLC (Access); and (3) a
4 Trading Advisory Agreement (TAA) dated December 13, 2007,
5 purportedly signed by Richard Breck. Moongthaveephongsa Aff. ¶ 6.
6 See also Robell Decl. ¶ 12, Ex. 11, 141 (emailed document from
7 Crombie to NFA personnel, stating, "On behalf of all PCM
8 Principals, Crombie provided the documents per the NFA's initial
9 requests."); Crombie Depo. 37:8-25 (testifying that he provided
10 the Fimat statements to the NFA); Answer ¶¶ 26, 28 (admitting to
11 providing the NFA with the Access statements and TAA). The USCFTC
12 contends that these documents were fraudulent. It also contends
13 that Crombie made a number of misstatements to the NFA during the
14 course of the investigation.

15 A. The Fimat statements

16 Crombie testified that the Fimat statements showed the
17 activity in two accounts held at that institution by SCR Financial
18 Group, Inc. that traded based on Crombie's futures trading
19 algorithm. Crombie Depo. 37:21-38:5. When Crombie provided these
20 documents to the NFA, he characterized them as "account
21 summaries." Moongthaveephongsa Aff. ¶ 6.⁴

22 SCR Financial was founded in late 2005 or early 2006 and was
23 in the business of marketing financial guaranty products to
24 customers seeking alternatives to posting letters of credit or
25 _____

26 ⁴ Crombie testified that "the company, SCR" had three trading
27 accounts: one for "SCR Capital, LLC," one for "SCR Financial
28 Group, Inc." and one for "Dynasty International," the last of
which was SCR's largest client and account. Crombie Del. Depo.
30:3-12.

1 other collateral for business operations funding. Robell Decl.,
2 Ex. 20 (Deposition of Robert Chmiel), 12:15-16:7. Robert Chmiel
3 served as the CFO of SCR Financial from its founding until March
4 2007, and Andrew Wielbacher worked at the firm for "essentially"
5 the entire time it was in existence. Chmiel Depo. 15:25-17:14;
6 Robell Decl., Ex. 21 (Deposition of Andrew Weilbacher), 21:17-
7 22:11. Crombie had no role in the operation of SCR Financial.
8 Chmiel Depo. 33:11-34:5; Weilbacher Depo. 21:17-25. By late 2006
9 and early 2007, the principals realized that the business model
10 for SCR Financial was not going to work out successfully and began
11 winding it down. Chmiel Depo. 16:22-17:23; Weilbacher Depo.
12 20:16-21:5. Chmiel left in March 2007 and through at least that
13 time, SCR Financial did no trading activities, and specifically
14 did not trade or invest in futures or securities. Crombie Decl.,
15 Ex. 77 (Chmiel Depo.) 26:16-21, 81:25.

16 As SCR Financial was winding down, another entity, SCR
17 Capital came into existence. Crombie began working for SCR
18 Capital in early 2007 and was given the title of Chief Investment
19 Officer in March 2007. Crombie Depo. 66:2-67:23. Weilbacher also
20 worked at SCR Capital until October 2007. Unlike SCR Financial,
21 SCR Capital was to be a management company over private investment
22 funds. Weilbacher Depo. 17:4-5, 21:14-16. It launched two funds,
23 an off-shore and an on-shore fund. Id. at 17:6-8. In March 2007,
24 Fimat provided SCR Capital with Fimat account numbers for both
25 funds: C230288 for the domestic fund, referred to as the "SCR
26 Market Neutral Fund LP," and C230299 for the off-shore fund,
27 referred to as the "SCR Market Neutral Fund, LTD." Robell Decl.,
28 Ex. 23, 36. An employee at Fimat stated that SCR Capital's

1 account was a "futures-centric account" and, because that employee
2 was not licensed, when he was contacted by Crombie to open up the
3 account, he directed Crombie to contact a different desk to do
4 this. Crombie Decl., Ex. 74 (Deposition of Michael Liciardello),
5 15:18-24. However, Crombie repeatedly testified that SCR Capital
6 traded securities and did not trade futures. Crombie Depo. 83:5-
7 7, 87:7-8. See also Crombie Decl., Ex. 74 (Deposition of Douglas
8 Patterson), 48:1-3 (Fimat manager testifying, "There was futures
9 trading for an account traded by somebody affiliated with at [sic]
10 SCR Capital, not in the name of SCR Capital as the account
11 itself."); Weilbacher Depo. 60:13-14, 62:19-63:9 (recalling
12 Crombie trading futures in 2007 and stating his recollection of
13 Crombie's trading was that, "in addition to the activities that
14 [Crombie was] doing with SCR," at that time, Crombie was also
15 trading futures separately from the company).

16 The traders at SCR Capital used a "quantitative equity market
17 neutral strategy" developed by Crombie to make trading decisions,
18 as well as doing some discretionary trading. Weilbacher Depo.
19 26:21-28:15. During the time that SCR Capital was trading
20 actively, Weilbacher, Crombie and several others received daily
21 statements from Fimat, which were sent by email from their primary
22 contact at Fimat, Steve McNamee. Weilbacher Depo. 40:9-42:22.
23 Crombie testified that he "was intimately aware of the daily
24 performance on a gross basis." Crombie Depo. 168:7-16 (addressing
25 the performance of JDC Ventures during the time period covered by
26 the Yulish & Associates review, discussed below).

27 SCR Capital's on-shore and off-shore funds suffered
28 significant losses in July and August of 2007. Weilbacher Depo.

1 17:20-23. SCR Capital decided to liquidate both funds at that
2 time and returned investments to its investors in August. Id. at
3 18:2-6. SCR Capital stopped trading and did not operate again.
4 Crombie Depo. 68:4-6.

5 The Fimat documents that Crombie provided to the NFA
6 contained monthly information for "summary periods" from November
7 2006 to December 2008 for two funds identified as an "Onshore
8 Fund: SCR Market Neutral Fund, LP / FIMAT Acct. # C-230288" and an
9 "Offshore Fund: SCR Market Neutral (Cayman) Fund, Ltd. / FIMAT
10 Acct. # C-230299." Robell Decl., Ex. 14, 39-64. The summaries
11 showed that the net liquidating value of the off-shore account
12 grew from about \$7 million in November 2006 to about \$24 million
13 in December 2008. Id.

14 After the NFA received the Fimat statements, it asked Newedge
15 USA, LLC, the corporate successor to Fimat, to provide NFA with
16 the monthly account statements for the same accounts covered by
17 the statements provided by Crombie. Moongthaveephongsa Aff. ¶ 8;
18 Robell Decl., Ex. 15 (Dep. of Steven Jones), 15:10-16. Unlike the
19 summaries provided by Crombie, the statements provided by Newedge
20 for the same time period showed a total value of about eighty
21 dollars in the account from September 2007 through February 2008,
22 when the accounts were closed. See Robell Decl., Ex. 12, 15-21
23 (showing balance for account number C230288 between \$39.90 and
24 \$40.16 from September 2007 to February 2008); Robell Decl., Ex.
25 13, 32-37 (showing balance for account number C230299 between \$40
26 and \$40.16 for the same time period); Jones Depo. 19:24-20:14,
27 25:7-9 (testifying that SCR Capital was a customer of Fimat from
28 spring 2007 "effectively" through September 2007, after which it

1 was inactive for several months before it was closed and that he
2 had not heard of SCR Financial).

3 The USCFTC contends that the Fimat documents that Crombie
4 provided to the NFA were formatted differently than authentic
5 Fimat statements and that the latter contained certain items such
6 as legal disclosures and a tax identification number, which the
7 documents provided by Crombie did not. The formatting differences
8 between the formal monthly statements and the documents provided
9 by Crombie are immaterial. Crombie maintains that the documents
10 that he provided to the NFA were summaries and not a standard
11 monthly statement, and the general formatting of the documents he
12 gave to the NFA is similar to that of summaries that a Fimat
13 employee, Douglas Patterson, created for the SCR funds in response
14 to a request from Crombie. Patterson Depo. 13:16-25, 15:4-7;
15 compare Robell Decl., Ex. 14 (summaries given by Crombie to the
16 NFA) with Robell Decl., 18 (summaries prepared by Patterson for
17 the SCR funds).

18 However, the summaries provided by Crombie to the NFA do
19 differ materially from the summaries that Patterson prepared for
20 the accounts during the same time period. For example, Crombie
21 provided the NFA with a summary for the time period from August 1-
22 30, 2007, a time period for which Patterson created a summary for
23 the same accounts. Compare Robell Decl., Ex. 14, 48 with Robell
24 Decl., Ex. 18, 48. In that month, the two summary documents have
25 different numbers for the same categories. Further, the document
26 Crombie provided has no information for the domestic account,
27 while the Patterson document does.

28

1 In his briefs, Crombie does not cite any evidence to
2 establish that Fimat actually sent him the summaries that he gave
3 to the NFA, and did not attest to this in his declaration.⁵
4 Apparently to explain why he has no evidence that the summaries
5 came from Fimat, Crombie stated in his affidavit that, in March
6 and April 2012, Newedge's general counsel, Gary Prish, told him by
7 email that "the ftp website Fimat had maintained for all SCR
8 customer and related accounts," which Crombie contends was the
9 means by which Fimat would give him these statements, "were not
10 maintained or archived by Newedge," and "that the SCR accounts
11 related reports and other customer files are permanently
12 destroyed." Crombie Aff. ¶ 28. Crombie has submitted emails from
13 Prish that were sent in March and April 2012 in which Prish stated
14 that the SCR ftp site "no longer exists," but nothing in which he
15 stated that any reports or customer files were permanently
16 destroyed. Crombie Decl., Ex. 75. In his reply, Crombie appears
17 to suggest that Fimat employees said that the ftp site was used as
18 its archive of customer documents and that if the ftp site is no
19 longer there, Fimat has necessarily destroyed customer files.
20 However, the depositions of the Fimat employees that he cited
21 about the ftp site do not state any such thing, and instead say
22 that the reports were put on the ftp site as a means to give them
23 to the customers. See Patterson Depo., 12:8-9 (we "put those off
24 to an FTP for clients to grab"), 13:4-5 (they were "put up online
25 and people could go and grab them"); 40:19-41:4 (explaining that
26

27
28 ⁵ Crombie alleged in his answer that "Fimat Preferred had generated the statements for Crombie." Answer ¶ 24.

1 there were "two methods that a client would use to access
2 information from Fimat at that point . . . Either they would come
3 in through a website, generic for all customers with a login and
4 password, and be able to obtain the standard monthly statements.
5 For certain clients [such as SCR], we created an FTP protocol site
6 where we would put specific information up to that site so they
7 could retrieve them.") (errors in original). Although Crombie
8 argues--without evidence--that Fimat provided him with the
9 summaries and suggests that the summaries referred to SCR accounts
10 other than the ones in the statements later produced by Fimat,
11 Crombie also does not submit evidence that the Fimat summaries
12 contained accurate information.

13 B. Access statements, Trading Advisory Agreement and Crombie's
14 business with Richard Breck

15 Crombie provided the NFA with "monthly account
16 statements/summaries which on their face appear to be from Access
17 Securities, LLC ('Access'), an introducing broker NFA member, for
18 an account Crombie managed in the name of FTGC LLC, for the
19 benefit of Richard Breck." Moongthaveephongsa Aff. ¶ 6; see also
20 1AC ¶ 26; Answer ¶ 26 (acknowledging that he provided the
21 statements to the NFA). Crombie also provided the NFA with a
22 Trading Advisory Agreement (TAA) dated December 13, 2007 and
23 purportedly signed by Breck. 1AC ¶ 28; Answer ¶ 28; see also
24 Moongthaveephongsa Aff. ¶ 6.

25 Breck is the president of Source Trading, a division of
26 Access. Robell Decl., Ex. 26 (Deposition of Richard Breck in his
27 personal capacity and as Rule 30(b)(6) representative of Access),
28 11:9-21. In depositions for the Delaware litigation, he testified

1 that Crombie never worked for Access or Source Trading but that,
2 for several months in about 2007, Crombie provided some consulting
3 services regarding the trading of index options to Breck on behalf
4 of Source Trading and Access. Crombie Decl., Ex. 86 (Breck Del.
5 Depo.), 11:9-16:5; see also Breck Depo. 31:7-37:18 (stating that
6 Crombie provided trading ideas for index options). Crombie made
7 recommendations to Breck, who made the transactions himself with
8 Access's own funds. Breck Del. Depo. at 11:21-13:16. Access paid
9 Crombie a total of \$35,000 in consulting fees for his services;
10 \$25,000 was paid in 2007 and the balance was paid by check on
11 January 8, 2008. Id. at 19:5-21:23; see also Crombie Decl., Ex.
12 87 (2007 1099-MISC form issued to Crombie from Access showing
13 \$25,000 in nonemployee compensation); Crombie Decl., Ex. 88 (2008
14 1099-MISC form issued to Crombie from Access showing \$10,000 in
15 nonemployee compensation); Breck Depo. 31:7-37:18 (testifying that
16 1099-MISC forms reflected the entirety of the payments by Access
17 to Crombie). This reflected a consulting fee and not a commission
18 because Crombie was not a registered broker with Access. Breck
19 Del. Depo. 20:20-24. After Breck stopped trading using Crombie in
20 2007, they did not speak for years. Id. at 18:12-23.

21 The TAA is dated December 13, 2007 and is purportedly signed
22 by Breck as "Client" and Crombie as "Manager." Robell Decl., Ex.
23 24, 85. It provides,

24 Client hereby appoints the Manager, and the Manager
25 hereby accepts such appointment, to render trading
26 advisory services for the management of the Client's
27 sub-account for Manager (the "Account") at an [sic]
28 nationally recognized futures commission merchant
("FCM") in the amount of US \$3,000,000.00 ("Account
Size"). The Account will initially be funded with US
\$3,000,000.00 in cash margin balances.

1 Id. at 81. Breck testified that he first became aware of the
2 purported TAA document in March 2011, that the signature that
3 appeared on the document was not his and that he did not authorize
4 anyone to sign it on his behalf. Breck Depo. 59:3-20, 60:4-6,
5 61:22-62:20. He also testified that neither he nor Access funded
6 an account with three million dollars to be managed by Crombie.

7 Id. at 64:3-16.

8 Crombie testified that, when Paron commissioned Rothstein,
9 Kass & Company, LLP (Rothstein Kass) in 2010 to do a report on
10 Paron's track record, he remembered entering into the TAA in 2007,
11 but he did not have a copy of the TAA to provide to Rothstein
12 Kass. Crombie Depo. 103:1-17. As a result, he directed Connie
13 Lau of Rothstein Kass to contact Source Trading for a copy and
14 stated that he was later told by Rothstein Kass that it received
15 that item from Source Trading. Id. Crombie, however, provides no
16 non-hearsay evidence that Source Trading or Access had the TAA or
17 provided it to Rothstein Kass. With its exhibits, the USCFTC has
18 submitted a copy of a purported facsimile, dated October 24, 2010,
19 of the TAA with a cover sheet that bears Breck's letterhead and
20 fax number and is addressed to Lau in handwriting that Breck
21 testified looked to him like Crombie's handwriting, although he
22 stated that he could not be sure that it was Crombie's. See Breck
23 Depo. 58:18-61:15; Ex. 24, 80-85.

24 The disputed statements purport to have been issued by
25 Access, located at 30 Buxton Farm Road #300 in Stamford,
26 Connecticut, to "FTGC LLC FBO RICHARD BRECK," located at #120 at
27 the same address. Crombie Decl., Ex. 67. They are dated between
28 January 31, 2009 and August 31, 2010. Id. at 21-59. They appear

1 to show an account worth about three million dollars in January
2 2009 and about three and a half million dollars in August 2010.

3 Id. The statements seem to show futures trading transactions.

4 In deposition testimony for the Delaware action, Breck
5 testified that, in the spring of 2010, Crombie urgently need money
6 and that he loaned him \$200,000 initially and some additional
7 amount thereafter. Breck Del. Depo. 42:2-14, 44:23-24. Breck
8 wired Crombie the money, drew up a promissory note and sent it to
9 him in April 2010, although Crombie did not sign the note until
10 nine or ten months later. Id. at 43:5-20; see also Breck Depo.
11 69:21-70:12. The note stated in part,

12 For value received, the undersigned, James D. Crombie
13 (the "Borrower") agrees to pay to the order of Richard
14 F. Breck, Jr. (the "Lender") at Ridgefield, CT (or at
15 such other place as the Lender may designate in writing)
16 the sum of Two Hundred Thousand and no/100 Dollars
17 (\$200,000.00) with interest from April 1, 2010 at the
18 rate of 5% per annum.

19 . . .

20 The loan entitles Richard F. Breck to a 10% interest in
21 JDC Ventures or any other money management venture going
22 forward. The 10% interest will have veto power over the
23 hiring or adding of any new partners going forward in
24 perpetuity.

25 Robell Decl., Ex. 45. At the Delaware deposition, when asked if
26 this was "meant to be a loan" or "meant to be an investment at
27 that time," Breck responded, "[I]t was sort of both. It was as a
28 loan with the caveat that if his business ended up being
successful, that I would own warrants or an option on a tenth, I
believe, of the business, 10 percent. But, in fact, this was a
loan." Breck Del. Depo. 43:21-44:4. At his more recent
deposition in the instant action, when asked if he intended "this
\$200,000 payment to be a loan or an investment," Breck responded,

1 "I think I described it properly. It was a loan. That short
2 paragraph indicates what my intent was; that if he was successful,
3 I would be remunerated for making a speculative loan, if you
4 will." Breck Depo. 78:23-79:5; see also id. at 14:12-20 ("it was
5 a loan and it was a loan sort of--almost with a warrant, if you
6 will, that if his--if he was successful in raising money and
7 building a money management firm around his trading program, that
8 I would own a percentage of that.").

9 Crombie testified that the April 2010 agreement was "a
10 personal guarantee on [Breck's] fee advance." Crombie Decl., Ex.
11 10 (Crombie Del. Depo. 121:9-13. He explained that Breck advanced
12 him fees and that it was memorialized as Crombie's personal
13 responsibility if he "didn't earn profits back and if fees weren't
14 covering it." Id. Crombie stated that it was later "memorialized
15 . . . as a loan in the fall of 2010." Id. at 120:21-25. See also
16 id. at 125:3-13 ("He wanted it collateralized as a loan. . . . I
17 signed it as a personal guarantee on \$200,000 and a fee advance
18 from him."); but see Crombie Del. Depo. 147:22-148:6
19 (acknowledging that the document memorializing "Breck's loan to
20 you in the amount of \$200,000" was dated April 1, 2010 and signed
21 by Crombie). In his interrogatory responses in the instant
22 action, Crombie described this as a "\$200,000 fee advance loan
23 from Richard Breck to James Crombie in 2010." Crombie Decl., Ex.
24 120, 4.

25 Breck set up FTGC LLC as part of the 2010 loan to Crombie, as
26 a "sort of indirect ownership structure" over any money management
27 firm built around Crombie's trading program. Id. at 14:12-23. It
28 did not exist before that time. Id.

1 Breck, testifying both individually and on behalf of Access,
2 attested that a number of factors show that the Access account
3 statements were fraudulent. First, FTGC was established in 2010
4 and did not exist in 2009, when many of the statements are dated.
5 Breck Del. Depo. 37:8-16; Breck Depo. 53:5-22. As noted above,
6 Breck stated that he never funded an account with three million
7 dollars. He also testified that he did not know about this
8 account, stating that if it did exist with "three million bucks in
9 it, I probably would have known about it. Because supposedly it's
10 mine." Breck Depo. 53:5-25; see also Breck Del. Depo. 37:23-38:2.
11 Further, the statements showed various currency balances and
12 Access did not trade currencies or have the ability to do so.
13 Breck Del. Depo. 37:20-23; Breck Depo. 53:5-17. The account
14 number on the statements is not an Access account number and is
15 not formatted in the way that Access formats its account numbers.
16 Breck Del. Depo. 35:21-36:23; Breck Depo. 54:10-55:14. The
17 statement did not have legal disclaimers that normally appear on
18 Access's statements, or the information for its clearing firm.
19 Breck Del. Depo. 39:3-16. The suite number that appears for
20 Breck's office, number 120, is incorrect; although Breck
21 previously was in that suite, he moved from it at some point in
22 2008. Breck Depo. 55:15-21. Breck also attested that the
23 statements appeared fake because they seemed to show futures
24 trading, which his firm did not do.

25 One of Breck's employees, Matthew Weber, testified that,
26 while he worked at Access between June 2009 and March 2011, he did
27 do trading on an equity trading account owned by FTGC that Breck
28 had control over, that Breck also executed trades in that program

1 and that he was unaware of trading being done for FTGC that was
2 distinct from this. Weber Depo. 6:9-13:14, 36:4-7. He also said
3 that, during the time of his employment, he utilized software
4 authored by Crombie, and was also monitoring and executing trades
5 based on the "James Crombie model" or "Paron model" that "was all
6 Futures," but that this futures trading was not done on behalf of
7 Access, FTGC or Breck, and that he had never seen an account
8 statement for FTGC or sent one to Crombie. Id. at 7:14-12:18,
9 33:4-15. He also testified that he was not aware of any three
10 million dollar futures account that Breck had at Access and that
11 he did not have any knowledge of Crombie trading futures on behalf
12 of FTGC or Breck. Id. at 35:19-36:7.

13 Breck attested that he questioned his employees and that no
14 one at Access sent the statements to Crombie. Breck Depo. 56:5-
15 58:17. Crombie testified that he was sent the statements by
16 Access, although he did not know by whom specifically and that
17 Access must have lied when it denied this. Crombie Depo. 267:17-
18 268:19. Although Crombie avers that someone at Access sent him
19 the statements, he does not argue or assert that the statements
20 contain accurate information.

21 Breck testified that he considered the 2010 loan to be
22 defaulted as of the time that he learned of the fraudulent
23 brokerage account. Breck Depo. 78:4-13. In his interrogatory
24 responses, Crombie described the loan as "disposed of and not
25 owing due to fees earned earlier and later in arrears on same
26 balance." Crombie Decl., Ex. 120, 4.

27 Crombie also asserts that Breck had served as a professional
28 reference for him and that Breck told people that he had invested

1 in Paron and had done so for many years. Crombie cites several
2 pieces of evidence in support of this; however, most of it is
3 inadmissible. First, at the Delaware trial, McConnon testified
4 that he spoke with Breck as one of Crombie's references in May
5 2010. Crombie Decl., Ex. 27, 116:20-24; see also Crombie Decl.,
6 Ex. 82 (email from McConnon on March 28, 2011 stating that, as
7 part of his due diligence process, he had relied on a "reference
8 from Richard Breck at Access"). However, there is no admissible
9 evidence as to what Breck said to McConnon or anyone else; the
10 remaining evidence cited by Crombie is inadmissible hearsay. See
11 Crombie Del. Depo. 91:11-19 (Crombie testifying that McConnon and
12 Lyons spoke to Breck in the spring of 2010); Crombie Decl., Ex. 84
13 (document that Crombie states contains notes made by Michale
14 Glennan of Tudor Investment Corp., purportedly from a conversation
15 between Glennan and Breck, in which Breck said that Crombie had
16 offered Breck the "opportunity to invest" and that Breck gave
17 Crombie "\$200-250K for management and is now a small stakeholder
18 in the business"); Crombie Decl., Ex. 85 (unsworn email from
19 Philip Kent Cooke, Director of Barclays Wealth, stating that he
20 had met with Breck and Crombie in December 2010 and that Breck had
21 said "that he had been an investor in Paron with Jim for many
22 years" and "that he owned 9.2% of the Paron entity").

23 C. Purported misstatements made by Crombie to the NFA

24 The USCFTC accuses Crombie of having made a number of
25 misstatements to the NFA during the course of the NFA's
26 investigation about payments to or from Paron, loans and
27 litigation involving Paron and its principals.

28

1 1. Loans and payments to and from Paron

2 Two NFA representatives, Moongthaveephongsa and Sharon
3 Pendleton, have submitted declarations stating that, on March 29,
4 2011, after the NFA completed its onsite examination of Paron,
5 they participated in a phone conference call with Crombie. Robell
6 Decl., Ex. 31 (Pendleton Decl.) ¶ 6; Moongthaveephongsa Decl. ¶ 9.
7 Crombie stated in his affidavit that the "NFA audit terminated on
8 March 29, 2011" and referred to this call as the "post-audit call"
9 but also stated that he "was told at the end of the March 29, 2011
10 phone call with NFA agents that the Paron audit was completed and
11 that NFA would issue an enforcement action against Paron and
12 against me as a result of adverse findings." See Crombie Aff.
13 ¶¶ 20, 22 (emphasis added).

14 In his affidavit, Crombie stated that, other than certain
15 questions related to Paul Porteous, Weston Capital and his home
16 mortgage, NFA agents did not ask him other verbal questions
17 regarding loans "during the NFA audit." Crombie Aff. ¶ 11.
18 Nonetheless, he does not seem to dispute that NFA agents asked him
19 about payments made to or from him or JDC. He also does not seem
20 to dispute that he was asked about loans during the March 29 phone
21 call: he stated in his affidavit that "NFA agents did not ask me
22 any verbal questions about purported loans or loans agreements
23 between JDC or me" with "anyone else during the NFA onsite audit
24 or at any other point prior to a March 29, 2011 phone call I
25 received from NFA agents." Id. at ¶ 14.

26 Both Moongthaveephongsa and Pendleton attested that, during
27 the March 29, 2011 conference call, Pendleton "asked Mr. Crombie
28 whether he, individually or through JDC Ventures, had any loans

1 outstanding" and "whether Paron had any loans outstanding."
2 Pendleton Decl. ¶ 8; Moongthaveephongsa Decl. ¶ 11. Both also
3 stated that, in response, Crombie "identified only a loan from his
4 brother-in-law" and that he "did not identify any other loans."
5 Pendleton Decl. ¶ 9; Moongthaveephongsa Decl. ¶ 12.

6 The USCFTC accuses Crombie of failing to disclose that
7 certain payments about which the NFA asked him during the
8 interviews were loans or that he had outstanding loans at the time
9 of the March 29, 2011 phone call.

10 a. Transactions involving Paul Porteous

11 During the onsite audit, the NFA asked Crombie "about
12 transactions involving . . . Paul Porteous," and Crombie "replied
13 . . . that the transaction with Mr. Porteous involved an
14 investment in JDC Ventures, LLC." Robell Decl., Ex. 32
15 (Moongthaveephongsa Decl.) ¶ 9. In his answer, Crombie admitted,
16 "In response to NFA's questions concerning a \$200,000 payment from
17 JDC to Porteous on May 6, 2009, Crombie informed NFA that Porteous
18 had previously contributed capital to JDC in 2008, and that the
19 \$200,000 payment to Porteous was in repayment of Porteous' capital
20 contribution." 1AC ¶ 32; Answer ¶ 32; see also Robell Decl., Ex.
21 34 (March 23, 2011 email from Crombie to NFA explaining the nature
22 of transactions between Porteous and JDC as follows: "Porteous
23 contributed invested capital amounts into JDC in 2008 which were
24 not for an investment account, but was an investment in JDC for a
25 share of profits in the management company. . . . Under the
26 structure of his investment he had the option to put it for cash
27 consideration, and did so in May 2009. Thus, \$200,000 he had
28

1 invested as a silent non-operating fee share investor at the
2 management company was repaid to Mr. Porteous on" May 6, 2009).

3 In his affidavit, Crombie stated that NFA agents asked him
4 "who Porteous was because they had identified \$367,000 in payments
5 from JDC to him between May 2009 and May 2010." Crombie Aff. ¶ 6.
6 He stated that he told them that "they were payments owing to
7 Porteous from a prior business investment that was collateralized
8 by a promissory note executed by me." Id. He also stated that
9 "NFA agents asked if I owed Porteous money and I stated no, and
10 referenced them to page one of the Paron Op. Agmt." Id.

11 During his deposition, Crombie testified that Porteous had done "a
12 private loan with me in the early fall 2008" for \$1.15 million.
13 Crombie Depo. 94:19-95:10. Crombie further testified, "It was a
14 personal loan . . . and I technically used all of it for personal
15 expenses. Some of it went to my business and some of it went to
16 my personal. . . . It was not a business loan. It was a personal
17 loan." Id. at 101:8-17.

18 In his answer, Crombie further admitted, "The \$200,000
19 payment from JDC to Porteous was a partial payment of a promissory
20 note, dated September 24, 2008, which Crombie had issued to
21 Porteous and which later became the subject of Porteous' lawsuit
22 against Crombie and JDC." 1AC ¶ 33; Answer ¶ 33. In his
23 interrogatory responses, Crombie described this loan as a "\$1.15
24 million loan from Paul Porteous to James Crombie in September
25 2008, which was partially repaid in full with interest and fees in
26 2010." Crombie Decl., Ex. 120, 4.

1 b. Transactions involving Steven Lamar

2 During the NFA investigation, NFA asked Crombie to explain
3 deposits into a JDC bank account of \$50,000 and \$250,000 on May 4
4 and 5, 2009 respectively. 1AC ¶ 34;⁶ Answer ¶ 34; see also Robell
5 Decl., Ex. 63 (email from the NFA to Crombie on March 23, 2011
6 asking about a May 4, 2009 counter credit and a May 5, 2009
7 payment from Jennifer Lamar). In response, Crombie told the NFA
8 that these deposits were payments from Steven Lamar to JDC for
9 "financial engineering services" that Crombie and JDC provided to
10 a hedge fund Lamar was setting up. 1AC ¶ 34; Answer ¶ 34; see
11 also Moongthaveephongsa Aff. ¶ 15; Robell Decl., Ex. 63 (email
12 from Crombie to the NFA, explaining the May 4 and 5, 2009 deposits
13 as follows: "Jennifer Lamar and Steven Lamar had started 39 Main
14 Street Capital, LLC, a new hedge fund in 2009 and the investment
15 manager for this was MAX Trading, LLC. MAX Trading LLC and JDC
16 entered an arrangement where JDC would provide financial
17 engineering services (building models, execution systems) as a
18 consultant to the Lamars as they started their business. In lieu
19 of an ownership in the SEC securities funds to be managed by 238
20 Main Street Capital, LLC, JDC took one time payment consideration
21 of \$300K. The \$250K payment came on 5/5 in the form of a wire
22 transfer. The prior day, 5/4, a payment via counter credit was
23 made from MAX Trading LLC to JDC to total \$300,000."). In his
24 affidavit, Crombie stated that he "informed NFA agents" that "JDC
25

26 ⁶ The 1AC refers to May 4 and 5, 2010 instead of 2009;
27 Crombie answered, admitting to the contents of the paragraph in
28 its entirety. However, the supporting emails refer to May 4 and
5, 2009. Most other references to these transactions state 2009,
so the reference to 2010 was likely a typographical error.

1 and I provided professional services including software I
2 developed for 39MS [a hedge fund company owned by Steven Lamar],
3 that salaried trading and CFO staff and office space to 39MS" and
4 "that Lamar made a May 2009 investment into JDC and that JDC had
5 provided these specific services and resources to 39MS in 2009."
6 Crombie Aff. ¶ 12.

7 In his opposition, Crombie states that "Lamar did not loan
8 any money to me; he made a \$300,000 investment into JDC." Opp. at
9 18. Crombie cites a signed agreement between himself and Lamar
10 that stated that, in exchange for a \$300,000 investment by Lamar,
11 Lamar would receive between ten percent and twenty percent of the
12 net profits of JDC Ventures. Crombie Decl., Ex. 8. It further
13 provided,

14 Of the US\$300,000 investment in JDC Ventures, LLC by
15 Lamar, \$250,000 will immediately be used to defease a
16 liability, and \$50,000 will be initially retained for
17 working capital. This \$50,000 in working capital will
18 be returned to Lamar with no interest within four
19 months. If unpaid after four months, it will be made
20 whole out of first fees received on month five or
21 beyond.

22 Id. (errors in original).

23 Crombie has repeatedly admitted that the \$50,000 portion of
24 the money received from Lamar was a "working capital loan." See
25 Robell Decl., Ex. 11, CFTC-0000448.0005 (Crombie May 4, 2011
26 email); Robell Decl., Ex. 51 (Crombie April 5, 2011 email stating
27 that "\$50K of his \$300K investment was structured as a working
28 capital loan to be paid out of fees"); Crombie Aff. ¶ 13
(admitting that the "May 2009 agreement stipulated that \$50,000 of
the \$300,000 investment Lamar made into JDC would be a working
capital loan"). For example, in his sworn interrogatory

1 responses, Crombie described the money from Lamar as a "\$50,000
2 working capital loan from Steven Lamar to JDC Ventures, LLC in May
3 2010 which was not repaid and was in default following the
4 business insolvency of JDC in 2010." Crombie Decl., Ex. 120, 4.

5 c. Transactions involving Weston Capital Management

6 In an email exchange dated March 23, 2011, the NFA asked
7 Crombie about three payments from Weston Capital Management to JDC
8 between February and April 2009 totaling \$200,000. See Crombie
9 Decl., Ex. 101, 2. After seeking clarification about the dates of
10 the transactions for which the NFA sought information, Crombie
11 responded by email,

12 JDC contracted a relationship with Weston Capital
13 Management. Weston Capital owns and manages funds under
14 the Wimbledon label . . . In the relationship Weston
15 owns the funds, and the investment advisor is hired as a
16 consultant to the fund for compensation. . . . These
17 were for professional fees paid to JDC from Weston
18 Capital Management totaling \$200,000 for the first
19 calendar quarter of 2009.

20 Id. at 1.

21 In his affidavit, Crombie also stated that

22 during the onsite audit, NFA agents asked me about
23 \$200,000 in fee advance payments to JDC from Weston
24 Capital ("Weston") in 2009. I told NFA agents these
25 were working capital advances. NFA agents asked me if I
26 still had a relationship with or open working capital
27 balances owing to Weston and I said no; and added that
28 the Weston relationship ended with the November 2009
insolvency of a Weston hedge fund which invested in JDC
and that the working capital advances were not owed by
me or JDC to Weston. The working capital advances were
extinguished by the insolvency of the Weston fund in
2009, and this was confirmed to me by Jeffrey Hallac who
was an officer of Weston and also a member of the Board
of Directors of the insolvent Weston fund. NFA agents
did not query me further about Weston, the Weston fund
or any money balances owing from or to Weston by JDC or
me.

1 Crombie Aff. ¶ 9; see also Crombie Decl., Ex. 20, viii
2 (identifying Jeffrey Hallac as a director of the Wimbledon
3 Tactical Futures Trading Fund Offshore SPC and a Senior Managing
4 Director of Weston); Crombie Del. Depo. 147:1-10 (stating that he
5 has no written documentation of the waiver and that Jeffrey and
6 Albert Hallac "said that with the closure of their fund, the legal
7 closing of the entity, there would be no agreement between us").
8 Crombie has not offered any non-hearsay evidence regarding
9 statements made by Jeffrey or Albert Hallac. As previously noted,
10 Crombie has stated that the onsite audit ended on March 23, 2011.
11 In his interrogatory responses, Crombie described these payments
12 as "\$200,000 business working capital loans from Weston Capital to
13 JDC Ventures, LLC in 2009. The capital was not repaid or
14 collected, and was disposed and not owing of following the
15 insolvency of Weston Capital's Wimbledon branded fund that
16 retained JDC." Crombie Decl., Ex. 120, 4. See also Crombie Del.
17 Depo. 128:13-129:15 (testifying that he was given a "\$200,000 fee
18 advance" that was "structured as a loan" and that they "waived the
19 loan").

20 Weston's CEO, Albert Hallac, who was deposed as its Rule
21 30(b)(6) representative, testified that the loans made to Crombie
22 were not a payment of professional fees by Weston or an investment
23 of any kind in JDC. A. Hallac Depo. 9:21-22; 40:23-46:10, 48:13-
24 19. Albert Hallac also testified that he had "no idea" if Jeffery
25 Hallac told Crombie that the loans had been forgiven but that he
26 did not have the authority to forgive a loan on behalf of Weston.
27 Id. at 47:15-24. He testified that he did not tell Crombie that
28 the loan was waived or forgiven. Id. at 47:25-48:4. As the

1 representative of Weston, he also testified he considered the
2 loans outstanding today. Id. at 48:5-6.

3 d. Paul LeCoque

4 Paul LeCoque testified in a deposition for the Delaware
5 matter that he was a good friend of Crombie and that, in February
6 or March 2010, Crombie called him and told him that he had lost a
7 lot of money and needed "a quick loan, just to get me through,
8 help me pay the mortgage." Robell Decl., Ex. 47 (LeCoque Delaware
9 Depo.) 6:6-14, 8:1-17. Crombie was adamant that he would be able
10 to pay it back very quickly, by the next month. Id. at 9:14-17.
11 Crombie asked for \$15,000 and LeCoque agreed. Id. at 8:21-24.
12 They did not enter into a formal loan agreement. Id. at 8:18-20.
13 According to LeCoque, Crombie never paid the loan back. Id. at
14 9:19-20.

15 In his affidavit, Crombie attested that "I did not have in
16 March 2011, or at any other time, any loan agreements or
17 outstanding loans owing to" LeCoque. Crombie Aff. ¶ 19 (no
18 corresponding statement made for JDC).

19 Crombie testified likewise in his depositions that LeCoque
20 had not lent him money but had paid him for services and was
21 seeking a return of the money paid. Crombie Del. Depo. 131:11-
22 132:1; 161:15-16; see also Crombie Depo. 276:10-15 (testifying
23 that LeCoque was lying when he stated that he lent Crombie
24 \$15,000). However, in the two depositions, Crombie provided
25 different accounts of what services he provided LeCoque and why
26 LeCoque wanted the payment returned. Crombie testified in his
27 Delaware deposition that, in 2009, he "referred an investor who
28 invested a small amount of money with an investment manager in the

1 East Bay named Paul LeCoque, and that investor redeemed at a loss
2 three months later, and [LeCoque] wanted his finder's fee [of
3 \$15,000 given] back to him." Crombie Del. Depo. 131:11-18. In
4 his deposition in the instant matter, Crombie stated that LeCoque
5 had paid him \$15,000 because "I had provided to him options
6 trading formulae which he had used to hedge his portfolio and his
7 hedge fund," and that LeCoque asked for the money back "[b]ecause
8 he was not happy with the results. I was not happy with his use
9 of the program, and he was not happy with the results." Crombie
10 Depo. 278:20-279:4. Crombie also stated in his affidavit that the
11 NFA asked him for work product samples for work performed for
12 LeCoque, Beckham and Steele (who are discussed below), and that he
13 told the NFA that he did not retain that. See Crombie Aff. ¶ 17
14 (he told NFA agents that "all software work product that he
15 executed on for JDC customers were provided to them in original
16 digital copies onto disk copies or onto servers via ftp downloads
17 to the customers and were the intellectual property of the
18 customers alone. I do not keep the items that are proprietary to
19 customers after the work product is provided to them.").

20 The USCFTC has offered two email exchanges purportedly
21 between Crombie and LeCoque to support that LeCoque had loaned
22 Crombie \$15,000. Robell Decl., Exs. 48 and 49. In the first
23 email exchange, which allegedly took place on August 19, 2010,
24 LeCoque sent Crombie an email stating, "My wife is getting very
25 upset over this whole situation. I told her we'd have the money
26 back in a few weeks and it's now been 6 months. This was her
27 money too. It's causing some real strains between us." Robell
28 Decl., Ex. 48. He received a response from jim@jdcventuresllc.com

1 that stated, "I am begging for it. I am so sorry, but this will
2 be amended close to immediate." Id. In the second exchange which
3 allegedly took place on September 2, 2010, LeCoque asked Crombie
4 when he expected to be paid \$30,000 by Tudor and how much Crombie
5 could pay him out of that amount right away, and received a
6 response from jim@jdcventuresllc.com stating in part, "I put
7 invoice into Tudor this AM for 30K, so hope they can turn that
8 around promptly." Robell Decl., Ex. 49.

9 The USCFTC, however, has not offered any testimony or
10 declaration by Crombie or LeCoque to authenticate these emails.
11 LeCoque was not asked about the emails in the portion of his
12 deposition that was offered into evidence. Crombie was asked in
13 his depositions about one of the email exchanges and the email
14 address. In the deposition in the instant case, Crombie testified
15 that he did not write the email to LeCoque in August 2010, that he
16 was not using the jim@jdcventuresllc.com email address in the
17 "normal course of business in August 2010" and that, if he was
18 using the email address at all at that time, "it was by mistake."
19 Crombie Depo. 277:6-281:3. In the Delaware deposition, Crombie
20 stated that he "stopped using that e-mail account in the--in the
21 early--actually in the winter of 2010, . . . January/February,
22 something like that. I mean, but I literally stopped--close to
23 stop using it." Crombie Del. Depo. 231:22-232:25. He also said
24 that he accessed it in the spring of 2011 and found correspondence
25 from several people that had been sent to him from a while
26 earlier. Id. at 231:22-234:2.

1 e. Daniel Beckham

2 Daniel Beckham testified in his deposition in the Delaware
3 action that Crombie had approached him about financial problems he
4 was having in the summer of 2010 and that he had agreed to loan
5 Crombie money to support himself and his family. Robell Decl.,
6 Ex. 46 (Beckham Del. Depo.) 7:2-10:15; see also id. at 6:6-17
7 (explaining that he met Crombie through their children who went to
8 school together). He stated that Crombie "said that he needed
9 \$200,000" and that he wired Crombie \$150,000 on August 24, 2010.
10 Id. at 9:18-25. Beckham said that he transferred another \$50,000
11 to Crombie's account on February 2, 2011 which he understood would
12 be used by Crombie for various expenses; Beckham explained that he
13 viewed this as following through on the \$200,000 that he had
14 originally agreed to loan Crombie. Id. at 12:3-13:7. He also
15 stated that no loan documents were drawn up. Id. at 10:16-17.
16 Beckham testified that the money was not given to Crombie in
17 connection with any business arrangement between the two,
18 including any investment, payment for services, advance on work or
19 as a performance fee for trading, and that he did not have a
20 working relationship with Crombie, other than to loan him this
21 money; he had never invested money with Crombie or licensed
22 software from him. Id. at 10:18-22:11.

23 On March 24, 2011, Crombie responded to an email from the NFA
24 in which it asked him to provide written agreements with "David
25 Beckham" and "explain what the loan to David Beckham was
26 regarding." Crombie Decl., Ex. 96. Crombie responded,

27 JDC and Crombie do not have a relationship with a David
28 Beckham. JDC and Crombie have had past business
dealings with Daniel Beckham, a hedge fund manager and

1 entrepreneur. JDC/Crombie has no formal contract with
2 Dan Beckham, but has had a non-futures trading business
3 relationship with Beckham. JDC provides consulting
4 services for quantitative research and other
5 computerized models for trading securities in earlier
6 times. For Dan Beckham JDC deployed costs to research
7 options and baskets trading of stocks and has been
8 repaid for those costs and also compensated for work
9 done. There is no formal contract between the parties
10 for services: services were provided and then paid for
11 or compensated.

12 Crombie/JDC have never had a direct futures related
13 mandate with this party, has not traded a proprietary
14 account or had POA over any accounts for these parties
15 and has had no activities as a CTA or as a futures
16 trader with these party, and has never had a futures
17 related mandate for this party.

18 . . .

19 The business relationship between Crombie and Beckham is
20 fully explained above.

21 JDC/Crombie did have expenses drawn to research an
22 initiative together with Beckham for securities trading
23 (not futures) and was paid for these expenses and was
24 paid additional amounts for services.

25 Id. at 2, 4 (errors in original).

26 During his deposition in the Delaware matter, Crombie
27 testified that he "was paid money by Mr. Beckham for development
28 of what we've discussed and will continue to do," and that Beckham
had paid him \$200,000 in the fall of 2010 as "an advance on the
work I did in 2009/2010, payable in 2010." Crombie Del. Depo.
120:8-20. Beckham, who was deposed after Crombie, stated that
Crombie's testimony on this was not truthful. Beckham Del. Depo.
17:2-18:9. In his more recent testimony in the instant matter,
Crombie testified that Daniel Beckham had transferred \$150,000
dollars to him on August 24, 2010 and \$50,000 on February 2, 2011,
but that these were not loans and that he and JDC Ventures did not
have a loan from Beckham outstanding. Crombie Depo. 252:1-254:6.
He stated that these instead were payments for business services

1 involving financial analysis and a part of a potential future
2 business venture. Id. Crombie also testified that Beckham's
3 testimony that he loaned Crombie \$200,000 was false. Id. at
4 254:25-255:3. In his affidavit, Crombie also attests that "I did
5 not have in March 2011, or at any other time, any loan agreements
6 or outstanding loans owing to" Beckham. Crombie Aff. ¶ 19 (no
7 corresponding statement made for JDC).

8 f. Mark Steele and KKS Securities

9 In email exchanges on March 23 and 24, 2011, the NFA asked
10 Crombie what a "\$50,000 payment to Mark Gordon Steele" was for and
11 about his relationship with Steele and his company, KKS
12 Securities. Robell Decl., Exs. 34, 39. Crombie responded that he
13 "did consulting work for Mark Steele," which included "financial
14 modeling and analysis" and "code work," built computer models,
15 research sheets and "client trade allocations" for KKS, and that
16 Crombie and JDC were paid in compensation for these services. Id.
17 Steele testified in depositions in both the instant case and the
18 Delaware matter that Steele and KKS each lent Crombie \$50,000.
19 Robell Decl., Ex. 40 (Steele Depo.), 51:1-17; Robell Decl., Ex. 41
20 (Steele Del. Depo.), 6:9-9:1. In the Delaware deposition, he
21 explained that he and Crombie had "been friends for a long time"
22 and that Crombie had asked to borrow \$250,000 for seven days
23 "because he had some cash flow shortages" as a result of clients
24 being "slow at paying things." Steele Del. Depo. 6:12-8:7. He
25 said that Crombie wrote a loan agreement for \$250,000 and signed
26 it, and that Steele told him that he did not need a written loan
27 agreement and did not need to charge him interest for a short term
28 loan because they were friends. Id. at 7:17-8:7. He testified

1 that Crombie had "never done any work" for KKS and Steele and that
2 it "was just a personal loan to him." Id. at 8:18-19:1. He also
3 stated that Crombie never paid back KKS and paid Steele back only
4 \$2,400. Id. at 9:2-5. He also testified that neither Steele nor
5 KKS had ever given Crombie a Form 1099. Id. at 9:17-21.

6 At his deposition in the instant case, Steele gave similar
7 testimony. See Steele Depo. 38:3-9, 51:1-22 (Steele and KKS lent
8 Crombie money because they were purportedly friends); 39:6-40:23
9 (to the best of his knowledge, Crombie did not do any work for
10 Steele or KKS and they never gave him W2s or 1099s); 57:19-58:20
11 (to the best of his knowledge, Crombie never provided computer
12 code to KKS, never referred clients or financial professionals to
13 KKS and did not have an arrangement with KKS for payment for any
14 such referrals, JDC Ventures did not do work for KKS and no
15 company affiliated with Crombie did work for KKS or Steele).
16 Steele also identified a check that he brought with him to the
17 deposition as the check that KKS had issued to Crombie as its loan
18 to him and stated that he got the copy of the check from Joe
19 Klein, KKS's CFO. Steele Depo. 51:8-14; 120:11-15; see also
20 Robell Decl., Ex. 42. The check had the words "personal loan"
21 noted on the memo line. Id.

22 During both of his depositions, Crombie testified that the
23 money he received from Steele and KKS was in payment for doing
24 work for the company, including doing software development work
25 revamping its execution and order management systems, and that
26 Steele lied when he said that these were loans. Crombie Depo.
27 234:24-236:1, 241:23-242:4; Crombie Del. Depo. 129:19-130:19; see
28 also Crombie Del. Depo. 161:15-18 (the NFA "asked about Mark

1 Steele, and I said correctly that I did investment services for
2 his firm"). He also testified that Steele or his registered
3 broker dealer affiliate, Girard Securities, Inc., provided him or
4 his accountant with a 1099 for the payments. Crombie Depo.
5 236:21-25; Crombie Del. Depo. 131:8-10; Crombie Aff. ¶ 17.⁷ In
6 his affidavit, Crombie attested, "I did not have in March 2011, or
7 at any other time, any loan agreements or outstanding loans owing
8 to" Steele. Crombie Aff. ¶ 19. He made no corresponding
9 statement made for JDC. He also stated that the check that he
10 received from KKS "did not have . . . any notation as a loan on
11 the check memo section" and that he "executed no loan agreements
12 and signed no loan documents with Steele or his company KKS for
13 any sum of money at any time." Crombie Aff. ¶ 18; see also
14 Crombie Ex. 10, 129-130-131, 161 ("they asked about Mark Steele,
15 and I said correctly that I did investment services for his
16 firm").

17 2. Purported Misstatements Regarding Litigation

18 On March 14, 2011, McConnon sent the NFA a list of documents
19 and Paron's answers to audit questions that the NFA had propounded
20 in advance of the onsite interview. Crombie Decl., Exs. 42, 43.
21 In response to a request for "Customer Complaint File Including
22 any Litigations, Arbitrations, or Settlements with Customers
23 During the Past 2 Years for APs, Principals, and PCM," Paron
24 answered, "No formal complaints," and identified "[o]ne informal
25 email complaint." Crombie Decl., Ex. 43, 140.

26
27 ⁷ Crombie has not offered either of these 1099 forms into
28 evidence and states that the "1099-MISC form Steele provided to me
appears to be a forgery." Crombie Aff. ¶ 17 n.3.

1 McConnon testified at his deposition in the instant matter
2 that Crombie filled out the questionnaire, told McConnon that he
3 was having computer problems, sent him the files, and asked him to
4 send them to the NFA. Crombie Decl., Ex. 80 (McConnon Depo.)
5 126:8-128:5. In his affidavit, Crombie disputed this, stating
6 that he had "no internet service issues" during that weekend and
7 that, if he had, he could not have sent the files to McConnon.
8 Crombie Aff. ¶ 29. In Crombie's declaration, he further stated
9 that McConnon "had authored the edits of including [sic] all Paron
10 responses to NRA questionnaire." Crombie Decl. ¶ 44.

11 In his recent affidavit, Crombie attested that NFA agents
12 "did not ask me about legal matters or lawsuits during the NFA
13 audit." Crombie Aff. ¶ 6; see also Crombie Del. Depo. 166:3-19
14 ("I told them the Porteous matter was discharged . . . They did
15 not ask me directly about lawsuits, nor did I answer it."); 168:2-
16 6 (affirming that the "NFA agent has misrepresented or perjured
17 himself in respect to this affidavit regarding his questions"
18 because he "didn't ask me directly about loans, and he didn't ask
19 me directly about lawsuits"). Moongthaveephongsa attested,
20 "During NFA's examination, Crombie represented that there were no
21 lawsuits against him, PCM, or JDC," but did not state what
22 questions, if any, NFA agents asked Crombie about litigation.
23 Moongthaveephongsa Aff. ¶ 13. He also stated that, during the
24 onsite examination of Paron, Crombie did not disclose the Porteous
25 and Lamar lawsuits. Id. at ¶¶ 7-8.

26 In an email that he sent on April 5, 2011, Crombie stated in
27 part,
28

1 The NFA asked about current litigation from futures
2 clients in specific. They also mentioned the Porteous
and Lamar payments from bank accounts, and asked about
those disputes. . . .

3 The NFA did ask about open lawsuits and they were aware
4 that Porteous was a closed matter and not open
litigation. The original Operating Agreement for Paron
5 also noted it, and they asked about it. They also asked
6 about the Lamar investment (and deemed this to be a loan
not an investment) and I told them of the failed
investment and the dispute. . . .

7 I was asked about litigation directly and answered their
8 questions directly as noted above.

9 Robell Decl., Ex. 51 (Crombie email to Rory Cohen).

10 In his interrogatory responses, Crombie stated that he was
11 involved in six lawsuits between January 1, 2008 and the date of
12 the responses, including five that were filed before the NFA
13 investigation began in March 2011. Robell Decl., Ex. 33, 3.
14 According to his responses, none of those five lawsuits, including
15 two involving Porteous and one involving Lamar, were still pending
16 in March 2011. Id.

17 II. The Paron promotional materials

18 Both the Flip book and the Newsletter had monthly performance
19 tables that date back to 2006, four years before Paron was formed.
20 Robell Decl., Exs. 5, 52. Both relied upon Crombie's purported
21 track record at JDC Ventures for the performance data prior to
22 Paron's inception. Id.; see also Robell Decl., Ex. 53 (Crombie
23 email to the NFA explaining that the "returns record is for my
24 program pre-Paron"). Both claimed that Crombie's annual rate of
25 return at JDC Ventures was about 27.5 percent in 2007, about 38.6
26 percent in 2008 and 9.8 percent in 2009. Robell Decl., Exs. 5,
27 52.
28

1 In a March 19, 2011 email from Crombie to the NFA, in
2 response to a request for information underlying the claimed
3 performance statistics, Crombie identified SCR as "the specimen
4 account for November 2006 - January 2009" and noted that the
5 performance review of that time period was conducted by a third
6 party, Yulish & Associates. Robell Decl., Ex. 53. At his
7 deposition, he further stated that Omega Advisors, Inc., through
8 Peninsula LP, was also a client account upon which the purported
9 percentage rate of return for 2008 was based, although he
10 continued to testify that "Yulish would be the only entity that
11 could say what JDC Ventures' performance was on a yearly basis."
12 Crombie Depo. 146:5-147:20. The yearly and monthly numbers
13 provided in the Flip book and the Newsletter for this time period
14 correspond to the net rates of return calculated in the Yulish
15 report. Compare Crombie Decl., Ex. 60, with Robell Decl., Exs. 5,
16 52.

17 The Yulish report, when explaining the procedures performed,
18 stated that the firm "obtained third party brokerage statements
19 for the trading account to which JDC serves as investment manager
20 to trade futures in the S&P 500 and in the Nikkei 225 indices.
21 . . . We relied upon the information contained in these statements
22 as an accurate representation of the investment activity and
23 results for each period verified." Crombie Decl., Ex. 60. At the
24 Delaware trial, McConnon attested that he had spoken with someone
25 at Yulish who said the report was accurate that they "had done the
26 third-party verifications." Crombie Decl., Ex. 27, 63:5-16. He
27 also testified that the person from Yulish later admitted to him
28

1 that he had not received the statements from the broker. Id. at
2 157:1-20; 208:8-20.⁸

3 According to Crombie, in conducting its review, Yulish
4 "focused on the SCR Financial statements," which were discussed
5 previously. Id. at 301:9-12 (Crombie testifying, "That's all they
6 did, yes."); see also Crombie Del. Depo. 29:13-30:12 (Crombie's
7 testimony that Yulish verified "the trading account relationship
8 that I had with the company, SCR," with which he had three trading
9 accounts); 35:9-14 (testifying that he provided Yulish with the
10 SCR summary reports and the contact information for individuals
11 from whom he could obtain the full account statements).

12 When the NFA asked for documentation to support the
13 historical returns, for the period for January 2009 through August
14 2010, Crombie identified the Access account and referred to a
15 review that was conducted by the accounting firm Rothstein Kass.
16 Robell Decl., Ex. 53. The monthly rates of return provided in the
17 Flip book and the Newsletter for this time period match the
18 "monthly net of hypothetical fees rate of return" calculated in
19 the Rothstein Kass report. Compare Crombie Decl., Ex. 68, with
20 Robell Decl., Exs. 5, 52.

21
22 _____
23 ⁸ Crombie asserts that Albert Hallac from Weston testified
24 that the JDC performance record from SCR was also independently
25 confirmed to Weston in 2009, suggesting that this was separate
26 from the Yulish report. Opp. at 8. Hallac testified that, before
27 Weston sponsored Crombie as a manager on its fund, Weston was
28 "given [a] performance track record, which was verified by outside
third parties" that included "an accounting firm" but that he
could not recall "what outside parties" in particular they were.
Hallac Depo. 25:24-26:22. This is consistent with Weston having
been provided the Yulish report and does not suggest that there
was a separate verification conducted.

1 Crombie testified in the Delaware deposition that, in the
2 fall of 2010, Paron decided to seek an additional review of
3 Crombie's track record after the time period covered by the Yulish
4 review "for marketing purposes, to not leave a gap in the investor
5 promotion materials . . . So that marketing materials could be
6 written." Crombie Del. Depo. 90:12-91:1; see also id. at 91:9-12
7 (The review was "seeking to confirm performance for the purpose of
8 track record."). For the second review, Rothstein Kass analyzed
9 the Access statements described above. Crombie Depo. 301:5-21;
10 see also Crombie Del. Depo. 91:4-8 ("I was asked for a specimen
11 account, and I provided Richard Breck" and no other account,
12 "[b]ecause Richard Breck was the only one that was contiguous
13 through the entire period."), 103:18-103:25 (stating that he
14 provided the Access monthly statements to Rothstein Kass).
15 Crombie testified in the Delaware deposition that Rothstein Kass
16 had asked him for additional information that he did not have,
17 including the TAA, that he told Rothstein Kass to contact Access
18 and ask for that information because "part of the scope of your
19 engagement is to get that, confirm that," and that "they did so"
20 and told him that they did. Crombie Del. Depo. 102:24-103:25.

21 The DDQ that Paron sent to customers claimed that the total
22 assets managed or advised by Paron in 2011 was approximately \$35
23 million. Robell Decl., Ex. 1. During the course of the audit,
24 Crombie admitted to the NFA that this amount was incorrect. 1AC ¶
25 42; Answer ¶ 42; see also Crombie Aff. ¶ 8.

26 II. Procedural history

27 On September 15, 2011, the USCFTC filed this action against
28 Defendants Paron and Crombie.

1 In a separate lawsuit brought on April 14, 2011 in Delaware
2 Chancery Court, Paron, along with McConnon and Lyon, sued Crombie
3 for fraud. In the suit, they alleged that Crombie forged account
4 statements from Fimat Futures USA LLC and Access Securities, LLC
5 and made misrepresentations about his performance record,
6 employment history and personal financial situation, to induce
7 McConnon and Lyons to leave their jobs and form Paron with him,
8 providing him with access to their money and valuable client
9 contacts. Paron Capital Mgmt., LLC v. Crombie (Paron I), 2012 WL
10 2045857, at *4 (Del. Ch.). Because Crombie purportedly continued
11 to make and perpetuate these misrepresentations while working as
12 the initial manager of Paron, they also asserted that he breached
13 his fiduciary duty of loyalty to McConnon, Lyon and Paron under
14 the incorporation agreement. Id.

15 The Delaware Chancery Court held a trial in early October
16 2011. Id. Claiming financial hardship, Crombie did not appear at
17 trial and did not present any evidence in his defense. Id. The
18 Delaware Chancery Court denied his motion to dismiss the action on
19 the grounds of forum non conveniens due to his purported financial
20 hardship. Paron I, 2012 WL 3206410, at *2 (Del. Ch.) (summarizing
21 its earlier holding).

22 On December 21, 2011, Crombie filed a third-party complaint
23 against McConnon and Lyons in this Court, alleging that they were
24 responsible for the misrepresentations in the promotional
25 material, which they had authored and distributed, and that they
26 had made false statements to the NFA, CFTC, this Court and the
27 Delaware Chancery Court, including the denial of their involvement
28 in the creation of the fraudulent promotional materials.

1 On January 24, 2012, the Delaware Chancery Court issued a
2 memorandum opinion, denying various post-trial motions made by
3 Crombie. Paron I, 2012 WL 214777, at *1-8 (Del. Ch.). In the
4 opinion, the court indicated that it considered the "matter fully
5 submitted and ripe for a final determination on the merits." Id.
6 at *8.

7 On February 10, 2012, Crombie filed a voluntary petition for
8 bankruptcy. In re Crombie, Case No. 12-10389 (Bankr. N.D. Cal.),
9 Docket No. 1. As a result, the Delaware action was stayed. Paron
10 I, 2012 WL 2045857, at *4. Pursuant to a motion by McConnon and
11 Lyons, the stay was lifted on or about February 23, 2012. Id.; In
12 re Crombie, Docket No. 16.

13 On April 6, 2012, this Court granted McConnon and Lyons'
14 motion to dismiss Crombie's third-party complaint and quashed
15 service upon them. Docket No. 117. The Court found, among other
16 things, that Crombie had not sufficiently plead the elements of
17 fraud and misrepresentation under California law and that he
18 lacked standing to pursue his claims because of his bankruptcy
19 filing.

20 On May 11, 2012, the bankruptcy trustee moved for an order
21 permitting him to abandon the claims that were the subject of
22 Crombie's dismissed third-party complaint. In re Crombie, Docket
23 No. 40.

24 On May 15, 2012, the bankruptcy court granted Crombie a
25 discharge. In re Crombie, Docket No. 45.

26 On May 22, 2012, the Delaware Chancery Court issued an
27 opinion adjudicating the merits of the Delaware action and finding
28 Crombie liable on both claims. Paron I, 2012 WL 2045857, at *4.

1 On that date, the Delaware Chancery Court also issued a judgment
2 based on the opinion. Paron I, 2012 WL 1850728 (Del. Ch.).

3 On May 23, 2012, Crombie filed a motion in this case for
4 leave to file an amended third-party complaint against McConnon
5 and Lyons asserting claims for negligence, misrepresentation and
6 violation of sections 9(a)(4) and 4b(a)(1)(A),(B) of the Commodity
7 Exchange Act. Docket No. 137.

8 On June 6, 2013, the bankruptcy court granted the trustee's
9 motion and confirmed the abandonment of the claims in the proposed
10 third-party complaint. In re Crombie, Docket No. 49.

11 On June 25, 2012, this Court denied Crombie's motion for
12 leave to file a third-party complaint against McConnon and Lyons,
13 holding that the proposed complaint failed to state a claim.
14 Docket No. 157.

15 On August 2, 2012, the Delaware Chancery Court denied
16 Crombie's motion to alter the judgment entered there and to stay
17 execution of that judgment. Paron I, 2012 WL 3206410, at *2. The
18 court concluded there was no manifest injustice that required
19 alteration of the judgment, noting that it had previously
20 considered Crombie's arguments based on financial hardship and
21 proceeding in Delaware and his contentions that McConnon and Lyons
22 abused the discovery process. Id. The Chancery Court entered a
23 supplemental judgment against Crombie at that time. Id. at *5.

24 On September 5, 2012, this Court entered a consent order
25 resolving the USCFTC's claims against Paron in the present case,
26 prohibiting Paron from, among other things, trading or entering
27 into any transactions involving commodity futures and options.
28 Docket No. 190.

1 On March 13, 2013, the Delaware Supreme Court affirmed the
2 Chancery Court's judgment based on its May 22, 2012 and August 2,
3 2012 orders. Paron I, 62 A.3d 1223, at *1 (Del. 2013).

4 On April 1, 2013, the bankruptcy trustee filed a report and
5 certification, showing that the bankruptcy estate had been fully
6 administered and that the claims that Crombie seeks leave to
7 assert now were abandoned. In re Crombie, Docket No. 75. The
8 following day, the bankruptcy court discharged the trustee and
9 closed Crombie's bankruptcy case. In re Crombie, Docket No. 76.

10 DISCUSSION

11 I. Cross-motions for summary judgment

12 A. Legal standard

13 Summary judgment is properly granted when no genuine and
14 disputed issues of material fact remain, and when, viewing the
15 evidence most favorably to the non-moving party, the movant is
16 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.
17 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);
18 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.
19 1987).

20 The moving party bears the burden of showing that there is no
21 material factual dispute. Therefore, the court must regard as
22 true the opposing party's evidence, if supported by affidavits or
23 other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg,
24 815 F.2d at 1289. The court must draw all reasonable inferences
25 in favor of the party against whom summary judgment is sought.
26 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
27 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952
28 F.2d 1551, 1558 (9th Cir. 1991).

1 Material facts which would preclude entry of summary judgment
2 are those which, under applicable substantive law, may affect the
3 outcome of the case. The substantive law will identify which
4 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S.
5 242, 248 (1986).

6 Where the moving party does not bear the burden of proof on
7 an issue at trial, the moving party may discharge its burden of
8 production by either of two methods:

9 The moving party may produce evidence negating an
10 essential element of the nonmoving party's case, or,
11 after suitable discovery, the moving party may show that
12 the nonmoving party does not have enough evidence of an
13 essential element of its claim or defense to carry its
14 ultimate burden of persuasion at trial.

Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d
1099, 1106 (9th Cir. 2000).

15 If the moving party discharges its burden by showing an
16 absence of evidence to support an essential element of a claim or
17 defense, it is not required to produce evidence showing the
18 absence of a material fact on such issues, or to support its
19 motion with evidence negating the non-moving party's claim. Id.;
20 see also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990);
21 Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If
22 the moving party shows an absence of evidence to support the non-
23 moving party's case, the burden then shifts to the non-moving
24 party to produce "specific evidence, through affidavits or
25 admissible discovery material, to show that the dispute exists."
26 Bhan, 929 F.2d at 1409.

27 If the moving party discharges its burden by negating an
28 essential element of the non-moving party's claim or defense, it

1 must produce affirmative evidence of such negation. Nissan, 210
2 F.3d at 1105. If the moving party produces such evidence, the
3 burden then shifts to the non-moving party to produce specific
4 evidence to show that a dispute of material fact exists. Id.

5 If the moving party does not meet its initial burden of
6 production by either method, the non-moving party is under no
7 obligation to offer any evidence in support of its opposition.
8 Id. This is true even though the non-moving party bears the
9 ultimate burden of persuasion at trial. Id. at 1107.

10 B. Discussion

11 In the 1AC, the USCFTC charges Crombie with three counts of
12 violating the Commodity Exchange Act: (1) concealing material
13 facts and making false statements or representations to the NFA in
14 violation of § 9(a)(4) of the Act; (2) solicitation fraud in
15 violation of § 4b(a)(1)(A) and (B) of the Act; and (3) fraud by a
16 CTA in violation of § 4o(1)(A) and (B) of the Act.

17 1. Section 9(a)(4) of the Commodity Exchange Act

18 Section 9(a)(4) of the Act makes it illegal for

19 Any person willfully to falsify, conceal, or cover up by
20 any trick, scheme, or artifice a material fact, make any
21 false, fictitious, or fraudulent statements or
22 representations, or make or use any false writing or
23 document knowing the same to contain any false,
24 fictitious, or fraudulent statement or entry to a . . .
25 futures association designated or registered under this
26 Act acting in furtherance of its official duties under
27 this Act.

28 7 U.S.C. § 13(a)(4).

In the 1AC, the USCFTC alleges that Crombie violated
§ 9(a)(4) because, in March 2011, in response to the NFA
investigation and audit, he willfully made false statements and
misrepresentations to the NFA, including

1 (1) providing fraudulent account statements to NFA;
2 (2) providing a fraudulent TAA to NFA; (3) making false
3 statements to NFA concerning the existence of lawsuits
4 in which the Defendants were named parties; (4) making
5 false statements to NFA concerning capital contributions
6 to Paron; (5) making false statements to NFA concerning
7 large-sum payments to and from JDC; (6) making false
8 statements to NFA concerning the number of outstanding
9 loans owed by Paron; and (7) making false statements to
10 NFA regarding the sources of the fraudulent documents.

11 1AC ¶ 47.

12 In its motion, the USCFTC seeks summary judgment that Crombie
13 willfully violated this section by willfully providing the
14 fraudulent Fimat and Access statements and the fraudulent TAA to
15 the NFA and by making false statements regarding the payments to
16 and from Crombie and JDC Ventures, about outstanding loans and
17 about lawsuits filed against him. The USCFTC has not requested a
18 finding that Crombie violated § 9(a)(4) by making false statements
19 about the sources of the fraudulent documents. In his cross-
20 motion, Crombie seeks summary judgment on each of the seven
21 purported violations listed in the 1AC.

22 There is no dispute of material fact that the NFA is a
23 registered futures association under the Act or that it was acting
24 in furtherance of its official duties when investigating Paron.
25 First Amended Complaint (1AC) ¶¶ 15, 21; Answer ¶¶ 15, 21. The
26 parties disagree about whether there is a material dispute of fact
27 regarding whether the documents were false, whether, if they were
28 false, Crombie willfully provided them to the NFA, and whether he
made false statements to it.

a. Documents provided to the NFA

i. Fimat statements

The USCFTC alleges that Crombie willfully provided the NFA
with fraudulent account summaries purportedly from Fimat. There

1 is no dispute of material fact that the information in the Fimat
2 summaries that Crombie gave the NFA was false. Although Crombie
3 appears to suggest that the summaries may have referred to a
4 different account that was also controlled by SCR and that was the
5 source of the discrepancies, the summaries he provided did not
6 match the financial information contained in the authentic
7 statements for the Fimat accounts with the same account number.
8 Thus, even if some other SCR account may have had other activity,
9 the accounts purportedly reflected on the summaries did not.

10 There is also no dispute of material fact about whether
11 Crombie acted willfully. "For purposes of the Act, . . . it is
12 well settled that: 'if a person 1) intentionally does an act which
13 is prohibited,-- irrespective of evil motive or reliance on
14 erroneous advice, or 2) acts with careless disregard of statutory
15 requirements, the violation is willful.'" Lawrence v. Commodity
16 Futures Trading Comm'n, 759 F.2d 767, 773 (9th Cir. 1985) (quoting
17 Flaxman v. Commodity Futures Trading Comm'n, 697 F.2d 782, 787
18 (7th Cir. 1983)). To establish willfulness, the USCFTC need only
19 show that Crombie's actions were "intentional as opposed to
20 accidental." Id. "Proof of an evil motive is unnecessary." Id.
21 (citing Hinkle Northwest, Inc. v. SEC, 641 F.2d 1304, 1307-08 (9th
22 Cir. 1981)).

23 The USCFTC argues that Crombie either knew that the Fimat
24 summaries contained inaccurate information about the amount of
25 money in the accounts, or "[a]t the very least" that he acted with
26 "careless disregard" of their falsity, when he gave them to the
27 NFA. Reply at 2 & n.2. The USCFTC has submitted evidence that
28 Crombie acknowledged that he knew of the daily performance of his

1 trading program and that he received daily reports from Fimat of
2 the performance on the SCR Capital accounts, which bore the
3 numbers of the accounts reflected on his statement. Thus, even if
4 Crombie did not create the summaries himself, he should have known
5 that they did not reflect the actual performance of those
6 accounts.

7 ii. Access statements and TAA

8 There is no dispute of material fact that the Access
9 statements provided by Crombie to the NFA contained inaccurate
10 information. Breck testified that he did not have an account
11 during the relevant years for FTGC that traded futures and that he
12 did not sign a TAA with Crombie. Crombie testified that he
13 recalled signing a trading agreement with Breck, but never
14 testified that the copy of the TAA that he gave to the NFA was an
15 actual copy of that agreement; instead, he primarily argued that
16 he got the copy from a third party. The USCFTC offered evidence
17 that the statements were fraudulent: Breck testified that the
18 account did not exist to his awareness, that he did not trade in
19 futures, that he had never given Crombie three million dollars
20 with which to fund the account, and that no one at Access sent
21 Crombie the statements. Crombie did not introduce evidence
22 sufficient to create a dispute of fact: although Weber testified
23 that Breck had a trading account for FTGC and Crombie testified
24 that he received the statements from Access, Crombie did not
25 introduce any evidence that the statements contained accurate
26 information, including that the account traded in futures, as the
27 statements reflected, or that Breck had ever funded the account
28 with three million dollars.

1 There is also no dispute of material fact that Crombie
2 provided the NFA with the fraudulent documents willfully. Crombie
3 has testified that he received the copy of the TAA from Rothstein
4 Kass, which told him that it obtained the copy of the Access
5 statements. He also testified that Access sent him the
6 statements. However, even if he did not create the documents
7 himself, Crombie has cited no evidence, not even his own sworn
8 statement, to support that the Access account actually existed or,
9 more importantly, that he believed that it did. Thus, he has
10 raised no dispute of material fact about whether he knew that the
11 statements were fraudulent.

12 iii. Payments to Porteous

13 There is no dispute that the NFA asked Crombie by email to
14 provide a written explanation of the purpose of the \$200,000
15 payment to Porteous or that Crombie responded that it was a
16 repayment of a capital investment in JDC Ventures. Crombie
17 admitted during his deposition that Porteous had actually made a
18 personal loan to him. Accordingly, there is no dispute of
19 material fact that Crombie willfully made a misstatement to the
20 NFA about the loan from Porteous.

21 iv. Payments from the Lamars

22 There is no dispute that the NFA asked Crombie by email to
23 provide a written explanation of the payments totaling \$300,000
24 from the Lamars, or that Crombie responded in writing that these
25 deposits were payments from Steven Lamar to JDC for "financial
26 engineering services" that Crombie and JDC provided for a hedge
27 fund Lamar was setting up.

28

1 There is also no dispute of fact that \$50,000 of this money
2 was in fact a loan from the Lamars to Crombie. Although Crombie
3 asserts in his opposition that "Lamar did not loan any money to
4 me: he made a \$300,000 investment into JDC," Opp. at 18, Crombie
5 has repeatedly admitted, including in his interrogatory responses,
6 that \$50,000 was a "working capital loan." The agreement between
7 Steven Lamar and Crombie is not to the contrary; it specifically
8 provides that Crombie will use \$50,000 as working capital and will
9 repay the amount in some fashion. Thus, there is no dispute that
10 Crombie misrepresented the nature of the payments from the Lamars
11 when he told the NFA that they were for "financial engineering
12 services."

13 Further, Crombie admitted in his interrogatory responses that
14 this loan "was not repaid and was in default following the
15 business insolvency of JDC in 2010." There is no material dispute
16 that the NFA agents asked Crombie during the March 29, 2011
17 conference call what outstanding loans he, JDC or Paron had, and
18 that he disclosed only a loan from a family member. Although
19 Crombie states in his opposition that "NFA put no verbal questions
20 . . . to me about loans to JDC or me . . . during the NFA audit,"
21 in the evidence that he cites, his affidavit, he distinguishes the
22 "NFA audit" from "the post-audit phone call" and states only that
23 he was not asked these questions during the audit "or at any point
24 prior to a March 29, 2011 phone call I received from NFA agents."
25 See Opp. at 15; Crombie Aff. ¶¶ 11, 14. Accordingly, there is no
26 dispute of material fact that Crombie made a false representation
27 when he told the NFA that the only outstanding loan that he had at
28 the time of the phone call was the one from his family member.

1 v. Payments from Weston Capital

2 There is no dispute that the NFA asked Crombie by email on
3 March 23, 2011 about the payments totaling \$200,000 from Weston
4 Capital Management to JDC or that he responded on that day that
5 these payments were for "professional fees." However, he also
6 attests in his affidavit that he provided a verbal explanation to
7 the agents sometime during the onsite audit that took place
8 between March 21 and 23, 2011 that these were "working capital
9 advances" and that he did not have a balance owed to Weston
10 because of the insolvency of the Weston fund he had been hired to
11 manage in 2009.

12 Crombie later admitted in his interrogatory responses that
13 these payments amounted to a "business working capital loan."
14 This is obviously inconsistent with the written representation
15 that the payments were "professional fees." However, there is a
16 dispute of fact as to whether Crombie was being willfully
17 untruthful because he has attested that he provided a roughly
18 contemporaneous verbal explanation to the NFA agents during the
19 onsite audit that these were "working capital advances." Thus,
20 there is a dispute as to whether he was being recklessly or
21 intentionally false when he wrote that the payments were
22 "professional fees."

23 Although Crombie has not introduced any non-hearsay evidence
24 that Weston in fact forgave the loan, there is also a dispute of
25 material fact as to whether Crombie reasonably believed that the
26 debt was forgiven and thus that it was no longer outstanding at
27 the time of the audit and did not need to be disclosed when the
28 NFA agents asked him to provide details of all outstanding loans.

1 Although the younger Hallac may not have had the authority to say
2 the loan was forgiven, if he did say that it was forgiven, as
3 Crombie has attested, there is a material dispute regarding
4 whether Crombie could have reasonably believed that it was.

5 vi. Payments from LeCoque, Beckham and Steele

6 There is also a material dispute of fact as to whether
7 Crombie made misstatements to the NFA regarding the nature of the
8 payments from LeCoque, Beckham and Steele when he told the NFA
9 that these were payments for services provided and did not
10 disclose that these were personal loans. In each instance,
11 Crombie has testified that he provided them or their companies
12 with services and that their payments were not loans. He also
13 stated in his affidavit that he never had any loans outstanding to
14 these individuals. LeCoque, Beckham and Steele have testified
15 that these were loans and that he did not provide them with
16 services in return for payment, which supports that Crombie lied
17 about the nature of these transactions. Although the government
18 argues that Crombie has not offered evidence to support his claims
19 and has just "concoct[ed] unsupported conspiracy theories," he has
20 offered sworn statements that are sufficient to create a dispute
21 of material fact about the real nature of these transactions and
22 thus whether he lied in his statements to the NFA.

23 vii. Involvement in litigation

24 There are several disputes of material fact that preclude
25 summary adjudication for either party on whether Crombie made
26 fraudulent statements about whether he, Paron or JDC had been
27 involved in litigation.

28

1 First, there is a material dispute of fact as to whether it
2 was Crombie or McConnon who authored the written response to the
3 USCFTC, in answer to its request for information on all
4 litigation, arbitrations or settlements it was involved in with
5 customers during the two years prior to the audit. McConnon
6 testified that Crombie wrote the response, and Crombie stated in
7 his declaration that McConnon did.

8 Second, Crombie has attested that the NFA did not ask him
9 about litigation during the audit and there is a material dispute
10 of fact as to what he was asked. Although the USCFTC contends
11 that Crombie's assertion is contradicted in its entirety by the
12 contemporaneous email he wrote stating that he was asked about
13 litigation, that email appears to refer to questions from the NFA
14 about ongoing litigation. At the time of the NFA audit, there was
15 no ongoing litigation involving Crombie, Paron or JDC.

16 viii. Sources of the fraudulent documents
17 Crombie seeks a finding that he did not violate § 9(a)(4) by
18 misrepresenting the source of the fraudulent documents. However,
19 there is a material dispute of fact on this point.

20 Crombie told the NFA that he obtained the statements from
21 Fimat and Access and that he got the copy of the TAA from
22 Rothstein Kass, which in turn obtained it from Access. The USCFTC
23 has submitted evidence suggesting that these statements were
24 false: Access has denied that it sent the statements, Fimat has
25 provided summaries that it says were the correct ones, and there
26 is some evidence that Access never sent the TAA to Rothstein Kass
27 and that Crombie may have done so instead.

28

ix. Summary

The Court grants the USCFTC's motion for summary judgment on its first cause of action charging Crombie with violation of § 9(a)(4) of the Commodity Exchange Act and denies Crombie's cross-motion for summary judgment. There is no material dispute that Crombie willfully provided the NFRA with fraudulent FIMAT and Access statements and that he made false statements to the NFA about the payments to and from Porteous and the Lamars. The disputes of fact as to the other statements do not preclude summary judgment on this cause of action.

2. Sections 4b(a)(1)(A),(B) and 4o(1)(A),(B) of the Commodity Exchange Act

In relevant part, § 4b(a)(1) of the Act makes it unlawful for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any other person; . . .

to cheat or defraud or attempt to cheat or defraud the other person; [or]

willfully to make or cause to be made to the other person any false report or statement or willfully to enter or cause to be entered for the other person any false record . . .

7 U.S.C. § 6b(a)(1).

"The elements of a fraud action under section 4b of the CEA are 'derived from the common law action for fraud.'" Commodity Futures Trading Comm'n v. King, 2007 WL 1321762, at *2 (N.D. Tex.) (quoting Puckett v. Rufenacht, Bromagen & Hertz, Inc., 903 F.2d 1014, 1018 (5th Cir. 1990)). Thus, to establish a violation, "CFTC had the burden of proving three elements: (1) the making of a misrepresentation, misleading statement, or a deceptive

1 omission; (2) scienter; and (3) materiality." Commodity Futures
2 Trading Comm'n v. R.J. Fitzgerald & Co., 310 F.3d 1321, 1328 (11th
3 Cir. 2002). "Unlike a cause of action for fraud under the common
4 law of Torts, 'reliance' on the representations is not a requisite
5 element in an enforcement action." Id. at 1328 n.6.

6 "The CFTC must additionally show that the fraud was (1) in
7 connection with an order to make or the making of a contract of
8 sale of a commodity for future delivery, and (2) made for or on
9 behalf of another person." United States Commodity Futures
10 Trading Comm'n v. Driver, 2012 U.S. Dist. LEXIS 93038, at *13
11 (C.D. Cal.) (citation omitted). "Actionable misrepresentations
12 include those made to customers when soliciting their funds." Id.
13 at *14 (citing Commodity Futures Trading Comm'n v. Rosenberg, 85
14 F. Supp. 2d 424, 447-48 (D.N.J. 2000); Saxe v. E.F. Hutton & Co.,
15 789 F.2d 105, 110-11 (2d Cir. 1986)).

16 Similarly, § 4o(1) of the Act makes it

17 unlawful for a commodity trading advisor . . . by use of
18 the mails or any means or instrumentality of interstate
commerce, directly or indirectly---

19 to employ any device, scheme, or artifice to defraud any
20 client or participant or prospective client or
participant; or

21 to engage in any transaction, practice, or course of
22 business which operates as a fraud or deceit upon any
client or participant or prospective client or
23 participant.

24 7 U.S.C. § 6o(1). Here, there is no dispute that Paron was a
commodity trading adviser or that Crombie was one of its
25 principals. See 1AC ¶ 14; Answer ¶ 14. Thus, the elements of a
26 violation of § 4o(1) largely overlap with those of a violation of
27 § 4b.
28

1 Unlike § 4b of the Act, § 4o(1)(B) does not have a scienter
2 requirement because it "does not expressly require 'knowing' or
3 'willful' conduct as a prerequisite for establishing liability."
4 Commodity Futures Trading Comm'n v. Weinberg, 287 F. Supp. 2d
5 1100, 1108 (C.D. Cal. 2003). Thus, to succeed on an enforcement
6 claim for violation of this provision, the USCFTC must "prove only
7 that the commodity trading advisor intentionally made the
8 statements complained of, and not that the advisor acted with the
9 intent to defraud." First Nat'l Monetary Corp. v. Weinberger, 819
10 F.2d 1334, 1342 (6th Cir. 1987); see also Commodity Futures
11 Trading Comm'n v. Savage, 611 F.2d 270, 285 (9th Cir. 1979)
12 (holding that "an action for injunctive relief by the [US]CFTC
13 under section 40(1) requires only that the violator have acted
14 intentionally. That is, he must have intended to employ the
15 'device, scheme, or artifice' but it is not necessary that he know
16 that its result will be to defraud the client or prospective
17 client.").

18 a. Misrepresentations and omissions to prospective
customers

19 The USCFTC contends that, even if Crombie did not author the
20 promotional material himself--as he contends--he provided the
21 false information about his performance history that was used in
22 the promotional material, including by giving the Fimat and Access
23 statements to Yulish and Rothstein Kass for their review. He has
24 offered no evidence that he did not do this. As previously
25 discussed, he has also raised no dispute of fact that the
26 information in the statements themselves was false or thus that
27 the reports based on these statements were as well. Further,
28 Crombie has admitted that the DDQ contained false information

1 about the amount of assets managed or advised by Paron. 1AC ¶ 22;
2 Answer ¶ 22; see also Crombie Aff. ¶ 8 ("Following the onsite call
3 I made admissions to NFA agents the managed account AUMs were
4 materially less than \$10 million").

5 There is no dispute that Paron did use these materials to
6 solicit potential clients. See 1AC ¶ 22; Answer ¶ 22 (admitting
7 that, between August 2010 and March 2011, "Defendants used the
8 Flip Book, the Newsletter, and the DDQ as promotional materials
9 for the solicitation of potential clients for Paron"). Crombie
10 himself has testified that he participated in meetings in which
11 potential clients were solicited and were given these materials.
12 Crombie Depo. 183:23-184:16, 194:13-196:2. Although Crombie
13 states in his opposition that his "communications with investors
14 on calls or at meeting[s] was [sic] limited to demonstrating
15 software systems I had authored or was expert in," Opp. 3, the
16 cited deposition transcript does not support his assertion.
17 Instead, at the deposition, he testified that he did not discuss
18 JDC Venture's past performance but that, at these meetings, Paron
19 did give potential customers the Flip book, DDQ and other
20 materials which had the performance information for JDC Ventures.
21 Crombie Depo. 183:23-184:16, 194:13-196:2. Thus, there is no
22 dispute of material fact that Crombie directly participated in the
23 solicitation of clients using these materials.

24 b. Scierter

25 As discussed above, scierter is an element of a § 4b claim.
26 Thus, to prove that claim, the USCFTC must show that Crombie
27 "intentionally violated the Act or acted with 'careless disregard'
28 of whether his actions violated the Act." CFTC v. Noble Metals

1 Int'l, Inc., 67 F.3d 766, 774 (9th Cir. 1995). "Mere negligence,
2 mistake, or inadvertence fails to meet Section 4b's scienter
3 requirement.'" Id. (quoting Wasnick v. Refco, Inc., 911 F.2d 345,
4 348 (9th Cir. 1990)). "Scienter has been found when the
5 defendant's conduct involves intentional omissions or
6 misrepresentations that present a risk of misleading customers,
7 either known to the defendant or sufficiently manifest that the
8 defendant 'must have been aware of' the risk." Commodity Futures
9 Trading Comm'n v. King, 2007 WL 1321762, at *2 (N.D. Tex.)
10 (quoting R.J. Fitzgerald, 310 F.3d at 1328).

11 For the same reasons that the Court found there was no
12 material dispute of fact that Crombie acted willfully in providing
13 the fraudulent statements to the NFA, the Court also finds that
14 there is no material dispute that he acted with scienter as to the
15 rates of return in the promotional materials. In addition,
16 Crombie has admitted knowledge that the DDQ contained false
17 information about the amount of assets managed or advised by
18 Paron. That he knew that the DDQ contained misrepresentations,
19 did not take steps to address these--even if he were not the one
20 who prepared the DDQ--and participated in its distribution
21 demonstrates that he acted in "careless disregard" of whether his
22 actions violated the Act.

23 c. Materiality

24 "A statement or omitted fact is 'material' if there is a
25 substantial likelihood that a reasonable investor would consider
26 the information important in making a decision to invest." R & W
27 Tech. Servs., Ltd. v. CFTC, 205 F.3d 165, 169 (5th Cir. 2000); see
28 also R.J. Fitzgerald, 310 F.3d at 1332 (finding misrepresentations

1 material where "an objectively reasonable investor's decision-
2 making process would be substantially affected" by them and they
3 would, "as a matter of law, alter the total mix of relevant
4 information available to the potential commodity option
5 investor").

6 The USCFTC contends that an objectively reasonable investor's
7 decision-making would have been affected by misrepresentations of
8 the historic rate of return and the amount of assets under
9 management, particularly in light of how dramatically overstated
10 they were. Crombie has not disputed that such misrepresentations
11 would be material to a reasonable investor.

12 d. Controlling person liability

13 The USCFTC argues that, in addition to being directly liable
14 for his own actions, Crombie is also liable for the acts of Paron
15 as a controlling person.

16 Section 13(b) of the Act provides,

17 Any person who, directly or indirectly, controls any
18 person who has violated any provision of this Act or any
19 of the rules, regulations, or orders issued pursuant to
20 this Act may be held liable for such violation in any
action brought by the Commission to the same extent as
such controlled person.

21 7 U.S.C. § 13c(b). To establish liability under this section, the
22 USCFTC must prove that "the controlling person did not act in good
23 faith or knowingly induced, directly or indirectly, the act or
24 acts constituting the violation." Id. "To satisfy the latter
25 standard, CFTC must show that the controlling person had actual or
26 constructive knowledge of the core activities that make up the
27 violation at issue and allowed them to continue." R.J.
28 Fitzgerald, 310 F.3d at 1334. "Section 13c(b), therefore, is

1 about power, and imposing liability for those who fail to exercise
2 it to prevent illegal conduct." Id.

3 The parties dispute whether Crombie controlled Paron. The
4 USCFTC argues that Crombie controlled Paron based on the facts
5 that he was a principal of Paron, was its Initial Manager, had a
6 seventy-five percent ownership of it and controlled its trading
7 program. Crombie argues that he was not the controlling person,
8 because the Operating Agreement placed various limits on his
9 control and because he was in debt to McConnon. Crombie also
10 argues that McConnon was the controlling person of Paron and
11 should be held liable instead of him.

12 Even if McConnon could be held liable as a controlling
13 person, this does not preclude Crombie from being deemed a
14 controlling person as well. See CFTC v. Baragosh, 278 F.3d 319,
15 330 (4th Cir. 2002) ("Because control may be exercised jointly by
16 a group, several persons may simultaneously be controlling persons
17 of the same corporation."). To be a control person, the
18 individual "needs to have actually exercised general control over
19 the operations of the wrongdoer," and also "must have had the
20 power or ability--even if not exercised--to control the specific
21 transaction or activity that is alleged to give rise to
22 liability." Donohoe v. Consolidated Operating & Prod. Corp., 30
23 F.3d 907, 911-912 (7th Cir. 1994); see also Baragosh, 278 F.3d at
24 330.

25 Crombie asserts that he did not have general control over the
26 company because, even though he was the Initial Manager and held a
27 seventy-five percent interest, the operating agreement provided
28 that many decisions had to be approved by a super-majority vote of

1 at least ninety percent in interest of the members. Robell Decl.
2 ¶ 3, Ex. 2, 22. The operating agreement listed twenty-five
3 actions that required a super-majority vote, including "engaging
4 in any activity not authorized by a business plan adopted by a
5 Supermajority Vote of the Members," or "entering into or
6 modifying, amending, extending or terminating any Investment
7 Management Account." Id. Because Crombie held a seventy-five
8 percent ownership interest, McConnon a twenty percent interest and
9 Lyons a five percent interest, this clause means that in practical
10 terms, at least McConnon and Crombie had to agree on any of the
11 listed actions for it to take place. However, that McConnon also
12 had to agree does not mean that Crombie was not a control person.
13 At most, this suggests that both had power and control over the
14 decision, not that Crombie was not in control.

15 Crombie further asserts that McConnon actually had control
16 because Crombie was in debt to him. However, Crombie cites no
17 evidence that supports that the fact that Crombie was in debt to
18 McConnon meant that McConnon had effective control. The operating
19 agreement specifically provided that Crombie alone was to have
20 control over all decisions except those that required a super-
21 majority vote, even though it also provided that Crombie was to
22 get a loan from the company and McConnon. Thus, the agreement
23 contemplated that he would be in debt to McConnon, yet still gave
24 him general control over the company. Further, although Crombie
25 contends that McConnon and Lyons were in control of marketing and
26 solicitation, he has admitted that he was actually in control of
27 the trading program itself and that he provided the account
28 statements from his past trading to the auditors. These were the

1 core activities which made up the violations and which formed the
2 basis of the fraudulent numbers contained in the marketing
3 documents. In addition, Crombie has admitted that he edited the
4 marketing documents and thus at least had actual or constructive
5 knowledge of the figures in them, yet allowed them to be used.

6 Accordingly, the Court finds that there is no material
7 dispute of fact that Crombie is liable as a controlling person for
8 the acts of Paron.

9 e. Summary

10 For the reasons set forth above, the Court finds that there
11 is no material dispute of fact that Crombie violated
12 §§ 4b(a)(1)(A) and (B) and 4o(1)(A) and (B) of the Commodity
13 Exchange Act. Accordingly, the Court grants the USCFTC's motion
14 for summary judgment on its second and third causes of action
15 against Crombie and denies his cross-motion for summary judgment
16 on these claims.

17 3. Affirmative defenses

18 Crombie has asserted that he should be granted summary
19 judgment on all claims because "Plaintiff's damages, if any, were
20 not caused by me." Opp. at 27 (formatting omitted). However, the
21 USCFTC is a government agency charged with enforcing compliance
22 with the Act by commodity trading professionals and is not seeking
23 damages to remedy a harm to itself, as may have been the case if
24 it were a private litigant seeking damages as a result of the
25 fraud or misconduct. The USCFTC is not required to prove damages
26 to itself as an element of its case.

27 Crombie also asserts that he is not liable for the actions of
28 McConnon or Lyons and that he had no control over them, apparently

1 relying again on his argument that they actually were responsible
2 for writing the marketing documents. However, as explained above,
3 Crombie's liability is the result of his own actions in providing
4 fraudulent documents that served as the basis for the numerical
5 representations made in the promotional materials.

6 Finally, Crombie claims that the USCFTC's claims against him
7 are barred by unclean hands. The Court notes that this defense
8 was not asserted in his answer. Further, he has not made a
9 showing that this defense may be applicable here.

10 "[E]quitable defenses against government agencies are
11 strictly limited." SEC v. Elecs. Warehouse, Inc., 689 F. Supp.
12 53, 73 (D. Conn. 1988) (collecting cases). "Where courts have
13 permitted equitable defenses to be raised against the government,
14 they have required that the agency's misconduct be egregious and
15 the resulting prejudice to the defendant rise to a constitutional
16 level." Id. "Furthermore, 'courts have permitted the defense
17 only where the alleged misconduct occurred during the
18 investigation leading to the suit and the misconduct prejudiced
19 the defendant in his defense of the action.'" SEC v. Follick,
20 2002 U.S. Dist. LEXIS 24112, at *23 (S.D.N.Y.) (quoting Elecs.
21 Warehouse, 689 F. Supp. at 73); see also SEC v. Cuban, 798 F.
22 Supp. 2d 783, 794 (N.D. Tex. 2011) (reviewing case law involving
23 government enforcement actions and concluding that, "to the extent
24 the defense of unclean hands is available in an SEC enforcement
25 action, it is in strictly limited circumstances. The SEC's
26 misconduct must be egregious, the misconduct must occur before the
27 SEC files the enforcement action, and the misconduct must result
28 in prejudice to the defense of the enforcement action that rises

1 to a constitutional level and is established through a direct
2 nexus between the misconduct and the constitutional injury.").

3 Here, Crombie has not offered evidence that the USCFTC has
4 engaged in misconduct that caused prejudice rising to the
5 constitutional level. He argues, in essence, that the USCFTC did
6 not investigate its claims thoroughly, discredited his evidence
7 and testimony, and relied on the testimony of others. Crombie's
8 allegations do not demonstrate egregious misconduct and, even if
9 true, he has not shown that it prejudiced his defense of this
10 action, especially to a constitutional level.

11 II. Crombie's motions for leave to file new claims

12 Crombie moves for leave to file claims against the USCFTC,
13 the NFA, McConnon, Lyons, Paron and the law firm BraunHagey &
14 Borden LLP for negligence, misrepresentation, defamation, fraud or
15 breach of fiduciary duty. Docket Nos. 191 and 194.

16 The case management order in this action provided that the
17 deadline to add additional parties or claims was March 23, 2012.
18 Docket No. 67. Under Rule 16(b), "[a] schedule shall not be
19 modified except upon a showing of good cause and by leave of the
20 district judge." Fed. R. Civ. Pro. 16(b). Where a schedule has
21 been filed, a party's ability to amend the pleadings is "governed
22 by Rule 16(b), not Rule 15(a)." Johnson v. Mammoth Recreations,
23 Inc., 975 F.2d 604, 608 (9th Cir. 1992). Therefore, where, as
24 here, a party seeks to amend a pleading after the date specified
25 in a scheduling order, it must first show "good cause" for the
26 amendment under Rule 16(b). Id.

27 In order to determine whether good cause exists, courts
28 primarily consider the diligence of the party seeking the

1 modification. Id. at 609; see also Coleman v. Quaker Oats Co.,
2 232 F.3d 1271, 1294 (9th Cir. 2000). “[N]ot only must parties
3 participate from the outset in creating a workable Rule 16
4 scheduling order but they must also diligently attempt to adhere
5 to that schedule throughout the subsequent course of the
6 litigation.” Jackson v. Laureate, Inc., 186 F.R.D. 605, 607 (E.D.
7 Cal. 1999).

8 If good cause is shown, the party must next demonstrate that
9 the amendment is proper under Rule 15. Johnson, 975 F.2d at 608.
10 Under that rule, courts consider five factors when assessing the
11 merits of a motion for leave to amend: undue delay, bad faith,
12 futility of amendment, prejudice to the opposing party and whether
13 the plaintiff has previously amended the complaint. Ahlmeyer v.
14 Nev. Sys. of Higher Educ., 555 F.3d 1051, 1055 n.3 (9th Cir.
15 2009). Although these five factors are generally all considered,
16 “futility of amendment alone can justify the denial of a motion.”
17 Id. at 1055.

18 Even if Crombie had made a showing that he acted diligently
19 in seeking a modification of the schedule of this case, his
20 proposed amendments would be futile for a variety of reasons.
21 First, as an agency of the United States, the USCFTC is immune to
22 suit, in the absence of a waiver of sovereign immunity, on
23 Crombie’s claims. Crombie has made no showing that any such
24 waiver is applicable here. See also United States v. Agnew, 423
25 F.2d 513, 514 (9th Cir. 1970) (“The filing of a suit in the name
26 of the United States does not amount to a waiver of sovereign
27 immunity subjecting the United States to an affirmative adverse
28 judgment on a counterclaim filed by the defendant.”).

1 Further, many of Crombie's allegations against the USCFTC,
2 NFA and BraunHagey are barred by California's litigation
3 privilege. Crombie alleges, for example, that the USCFTC was
4 "reckless and grossly negligent in bringing the complaint and
5 amended complaint," causing him harm, and that BraunHagey made
6 unfounded, untrue statements about him "in litigation." Such
7 allegations are not actionable due to the litigation privilege,
8 which, as explained by the California Supreme Court, is intended
9 "to afford litigants . . . the utmost freedom of access to the
10 courts without fear of being harassed subsequently by derivative
11 tort actions." Silberg v. Anderson, 50 Cal. 3d 205, 213 (1990).
12 "The litigation privilege applies to any communications (1) made
13 in a judicial proceeding; (2) by litigants or other participants
14 authorized by law; (3) to achieve the objects of the litigation;
15 (4) that have some connection or logical relation to the action."
16 Sharper Image Corp. v. Target Corp., 425 F. Supp. 2d 1056, 1077
17 (N.D. Cal. 2006) (citing Silberg, 50 Cal. 3d at 212). The
18 privilege also applies to "prelitigation communication" that
19 "relates to litigation that is contemplated in good faith and
20 under serious consideration." Action Apartment Ass'n Inc. v. City
21 of Santa Monica, 41 Cal. 4th 1232, 1251 (2007).

22 In addition, as Paron, McConnon and Lyons argued in
23 opposition to Crombie's first motion for leave to amend, the
24 claims that he seeks to assert against them are barred by res
25 judicata. Crombie alleges, among other things, that McConnon and
26 Lyons made false and misleading statements in Paron marketing and
27 solicitation materials and in connection with the Rothstein Kass
28 and Yulish reports and the NFA investigation. These, and the

1 other related issues raised by Crombie, were previously at issue
2 in the Delaware litigation and were resolved on their merits
3 adversely to Crombie. Accordingly, his attempt to re-litigate
4 these issues is futile.

5 Finally, Crombie does not seek to assert proper third-party
6 claims under Federal Rule of Civil Procedure 14. Rule 14(a)
7 provides that "a defending party, as a third-party plaintiff, may
8 cause a summons and complaint to be served upon a person not a
9 party to the action who is or may be liable to the third-party
10 plaintiff for all or part of the plaintiff's claim against the
11 third-party plaintiff." As the Ninth Circuit instructs, a "third-
12 party claim may be asserted only when the third party's liability
13 is in some way dependent on the outcome of the main claim and is
14 secondary or derivative thereto." Stewart v. Am. Int'l Oil & Gas
15 Co., 845 F.2d 196, 199-200 (9th Cir. 1988) (affirming dismissal of
16 third-party complaint when it failed to show the requisite
17 derivative or secondary liability on the part of the third-party
18 defendants). Quoting Professors Wright and Miller, the court in
19 Stewart explained, "The crucial characteristic of a Rule 14 claim
20 is that the defendant is attempting to transfer to the third-party
21 defendant the liability asserted against him by the original
22 plaintiff. The mere fact that the alleged third-party claim
23 arises from the same transaction or set of facts as the original
24 claim is not enough." Id. at 200 (quoting 6 Wright & Miller, Fed.
25 Practice & Proc. § 1446 at 257 (1971 ed.)). Here, at most,
26 Crombie's purported third-party claims arise from the same
27 transaction or set of facts as the original claims. Accordingly,
28 allowing him to amend to assert them would be futile.

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CONCLUSION

For the reasons set forth above, the Court GRANTS the USCFTC's motion for summary judgment (Docket No. 234) and DENIES Crombie's cross-motion for summary judgment (Docket No. 252) and motions for leave to file counterclaims and third-party claims (Docket Nos. 191, 194).

In its motion for summary judgment, the USCFTC did not address the relief it seeks to address the violations of the Commodity Exchange Act for which Crombie has been found liable. Within two weeks of the date of this Order, the USCFTC shall file a motion addressing the relief that it seeks and shall include a proposed judgment. Within two weeks thereafter, Crombie may file an opposition to the USCFTC's motion. Any reply is due one week later. The motion will be resolved on the papers.

IT IS SO ORDERED.

Dated: 7/26/2013



CLAUDIA WILKEN
United States District Judge