EFiled: May 22 2012 11:09AM EDT
Transaction ID 44394474
Case No. 6380-VCP

# IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| PARON CAPITAL MANAGEMENT, LLC, a Delaware limited liability company, PETER MCCONNON, and TIMOTHY LYONS, | ) | |
| Plaintiffs, | ) | C.A. No. 6380-VCP |
| v. | ) | |
| JAMES D. CROMBIE, | ) | |
| Defendant. | ) | |

## MEMORANDUM OPINION

Date Submitted: February 23, 2012
Date Decided: May 22, 2012

Peter J. Walsh, Jr., Esq., Tye C. Bell, Esq., POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; J. Noah Hagey, Esq., Mark Fickes, Esq., Greg Call, Esq., BRAUNHAGEY & BORDEN LLP, San Francisco, California; *Attorneys for Plaintiffs Paron Capital Management, LLC, Peter McConnon, and Timothy Lyons.*

James D. Crombie, *Pro se Defendant*.

**PARSONS, Vice Chancellor.**

This action involves claims of fraud and breach of fiduciary against an individual defendant, James D. Crombie. Crombie is a former investment professional accused of having committed a massive fraud related to a quantitatively-based trading program that Crombie allegedly developed to trade futures contracts. Like so many investment schemes promising the type of consistent double-digit annual returns that Crombie claimed, Crombie's program was a fraud. Unfortunately for the plaintiffs, Crombie's former business partners, they discovered this painful truth only after leaving lucrative positions at other firms to join forces with Crombie to develop a platform for his program. As a result of their association with Crombie and Paron Capital Management, LLC ("Paron" or the "Company"), the firm they founded with Crombie, the plaintiffs now claim that they have been stigmatized and thus face dismal prospects of finding employment in the financial services industry.

This action currently is before the Court following a trial on the merits. This Memorandum Opinion constitutes my post-trial findings of fact and conclusions of law. For the reasons set forth herein, I find that Crombie committed fraud and breached his fiduciary duties to the plaintiffs and the Company by making false statements of fact about his program, his investment track record, and his personal financial situation. As a result, the plaintiffs are entitled to extensive damages against Crombie based on their lost future earnings and other costs associated with the formation and operation of Paron. I also award the plaintiffs limited injunctive relief requiring Crombie to destroy or return copies of Paron's trading program and to stop marketing any versions of that trading program.

## I. FACTUAL BACKGROUND

### A. The Parties

Plaintiff Paron is a Delaware limited liability company founded by Plaintiffs Peter McConnon and Timothy Lyons and Defendant Crombie. Paron was established to manage a hedge fund product and client accounts utilizing a software-based futures trading program developed by Crombie.[1]

Plaintiff McConnon is the CEO of Paron and a resident of Toronto, Canada. Before starting Paron, McConnon was a principal of a multi-billion dollar hedge fund based in London.

Plaintiff Lyons is the CFO and Head of Business Development for Paron. He resides in Incline Village, Nevada. Before joining Paron, Lyons worked as a senior investment professional for a number of financial institutions.

Defendant Crombie is a former manager and member of Paron and a resident of Tiburon, California. Crombie developed the futures trading program around which Paron was founded.

### B. Facts

Plaintiffs first met Crombie in April 2010. At that time, Crombie was looking for an equity investor in his company, JDC Ventures, LLC ("JDC"), which allegedly utilized Crombie's software program to trade futures on intraday trendlines. A mutual acquaintance of both Plaintiffs contacted Lyons about the opportunity with Crombie and

[1] Although Paron is one of three Plaintiffs in this action, I generally use the term "Plaintiffs" herein to refer to McConnon and Lyons unless otherwise noted.

Lyons, in turn, forwarded to McConnon an email from Crombie containing marketing materials for JDC.

The marketing materials detailed, among other things, Crombie's annual and daily returns using his program, potential clients that were considering investing with JDC, and the terms Crombie was seeking from a potential equity investor. Primarily, Crombie sought a $1 million investment in exchange for a 20% interest in JDC. The marketing materials also included an independent verification from accounting firm Yulish & Associates, which certified that the returns claimed by Crombie were actual returns, verified through a third-party clearing broker. According to Crombie's marketing materials, his trading program had annual returns of 25% in 2007 and 38% in 2008. McConnon described such performance as being in the top quartile of similar programs in the market. Crombie also asserted in his initial correspondence with Plaintiffs that he had $30 million in assets under management, $21 million of which belonged to a proprietary trading account of Gelber Group ("Gelber"), Crombie's former employer.

Believing that Crombie and JDC showed promise, McConnon and Lyons conducted due diligence on Crombie and his program. As part of their due diligence, Plaintiffs contacted multiple references for Crombie, including former investors and colleagues, as well as mutual acquaintances of Plaintiffs and Crombie who had known Crombie from his days as a trader at J.P. Morgan. Each person Plaintiffs contacted about Crombie provided a positive assessment, describing Crombie as "honest" and a sensible trader.

In addition to interviewing references, McConnon interviewed Crombie in person and observed his program operate in real time at his office in San Francisco. Plaintiffs also searched industry databases for negative regulatory events involving Crombie, but found nothing. In addition, they interviewed Crombie's lawyer about a lawsuit between Crombie and Paul Porteous, his equity partner in JDC, who Crombie was looking to replace. Based on that interview, Plaintiffs were satisfied that the dispute with Porteous was a legitimate business dispute over a note Porteous had given Crombie in relation to his investment in JDC (the "Porteous Note") and that the nature of the case comported with what Crombie had disclosed to them. In terms of the obligations and debts Crombie had personally, Crombie claimed that they were limited to his mortgage and a home equity loan.

Plaintiffs also commissioned international risk consulting firm, Kroll, Inc., to perform a comprehensive background search on Crombie. Kroll researched, among other things, Crombie's credit history, property records, and corporate affiliations, as well as his legal, educational, and employment history. On May 12, 2010, Kroll provided Plaintiffs with a 39-page report that failed to raise any red flags about Crombie's history or personal situation.

Satisfied with their initial due diligence on Crombie, Plaintiffs decided to enter into business with him. On June 2, 2010, Plaintiffs and Crombie founded Paron and entered into the Operating Agreement of Paron Capital Management, LLC (the "LLC

Agreement").[2] As part of that transaction, McConnon made a direct loan to Crombie of $766,000, which was to be secured by a third mortgage on Crombie's home. McConnon also made a loan of $300,000 directly to Paron. The parties intended for both loans to be used by Crombie to settle his dispute with Porteous. Under the new arrangement, Crombie would be a 75% owner of Paron and its Initial Manager,[3] McConnon would receive a 20% interest, and Lyons would hold a 5% interest in the venture.

After establishing Paron, Plaintiffs and Crombie began marketing the firm to potential clients. As part of their marketing efforts, Plaintiffs engaged a national accounting firm, Rothstein, Kass & Company ("Rothstein"), in September 2010 to perform an updated independent verification of Crombie's track record. Rothstein provided that verification based on materials supplied by Crombie and claimed that they also had received independent third-party broker verification of those materials. Plaintiffs used Rothstein's verification in their marketing materials for Paron, which they sent to well over a hundred of McConnon's and Lyons's client contacts.

Plaintiffs and Crombie continued to operate and grow Paron throughout the winter of 2010-2011. Then, on March 10, 2011, Paron received an audit request from its regulator, the National Futures Association ("NFA"). As part of the audit, Plaintiffs and Crombie provided the NFA with numerous documents detailing the operation and performance of Paron, as well as the performance of JDC, Paron's predecessor. In

2 Pls.' Trial Exhibit ("PTX") 33.

3 Capitalized terms not otherwise defined herein are given the meanings ascribed to them in the LLC Agreement.

particular, Crombie provided the NFA with account statements from an entity called FIMAT, which had served as the basis for Yulish's independent verification of Crombie's investment performance between November 2006 and January 2009. Crombie also provided the NFA with account statements from Access Securities,[4] which had provided the basis for the Rothstein report confirming Crombie's performance between January 2009 and August 2010.

On March 28, 2011, McConnon received an email from the NFA requesting additional information. In the email, the NFA requested further information about the Access Securities account statements, noting that those statements showed changes in assets under management without corresponding trading activity. Confused, McConnon contacted Richard Breck, the account owner at Access Securities. After reviewing the statements, Breck informed McConnon that the account statements were obvious fakes, that Access Securities had no account with Crombie, and that Access Securities did not even trade in futures.

Alarmed, McConnon put an immediate halt to all trading by Paron and, with Lyons, confronted Crombie as to the veracity and origin of the Access Securities account statements. Although Crombie continued to claim that the statements were real, McConnon and Lyons did not believe him. McConnon and Lyons then contacted the NFA to alert them to the problem with the Access Securities account statements. That

4 Plaintiffs use the names Access Securities and Source Trading interchangeably in their briefs. Source Trading is a business unit of Access Securities. For purposes of simplicity, I refer to both as "Access Securities" in this Memorandum Opinion.

same day, Plaintiffs also contacted all of their investors to inform them that they had stopped trading and were investigating the situation.

After confirming that Crombie had forged the Access Securities account statements, on March 31, 2011, Plaintiffs removed Crombie as a member and Initial Manager of Paron. In a formal resolution, Plaintiffs determined that Crombie's conduct: (1) was fraudulent; (2) had a material negative effect on Paron; (3) constituted gross mismanagement and gross abuse of authority; and (4) was not curable. On April 1, 2011, Plaintiffs' counsel informed Crombie in writing of his removal as Initial Manager and the termination of his membership in Paron.[5] Around the same time, the NFA issued a Notice of Member Responsibility Action and Associate Responsibility Action under NFA Compliance Rule 3-15 (the "NFA Notice") detailing Crombie's fraud and prohibiting Crombie and Paron from, among other things, accessing, disbursing, or transferring any funds in his name or a client's name without prior approval of the NFA.[6]

### C. Procedural History

After Crombie's removal, Plaintiffs filed two actions against him in this Court. The first case, filed on April 13, 2011, sought declaratory relief related to Crombie's removal as the Initial Manager of Paron under 6 *Del. C.* §§ 18-110 and 18-111.[7] On May 11, 2011, the parties entered into an Amended Stipulated Final Judgment under which

---

[5] PTX 90.

[6] PTX 75a.

[7] *See Paron Capital Mgmt., LLC v. Crombie*, C.A. No. 6371-VCP (Del. Ch. May 11, 2011) (Amended Stipulated Final Judgment).

Crombie admitted that he was "properly, validly and permanently removed as Initial Manager and member of [Paron]" and that he was prohibited from acting for Paron in any form.[8] Crombie also stipulated to being permanently enjoined from using or accessing any Paron assets, entering into Paron premises, or holding himself out as a member of Paron or as presently affiliated with Paron.[9] Crombie additionally certified that he had provided Plaintiffs with "access to all assets and information of [Paron] within his possession, custody or control, including without limitation, all file servers and other media containing [Paron] intellectual property or information controlled by Plaintiff's former information technology consultant."[10]

Plaintiffs filed this action on April 14, 2011, alleging fraud and breach of fiduciary duty against Crombie. A trial was held on October 3-5, 2011. Claiming financial hardship, Crombie failed to appear at trial and did not present any evidence in his defense. Following trial, Crombie submitted a post-trial brief with twelve exhibits, all of which I found to be inadmissible.[11]

Crombie filed for bankruptcy in the U.S. Bankruptcy Court for the Northern District of California on February 10, 2012, and this action was automatically stayed.

---

8 *Id.* at 1-2.

9 *Id.* at 2.

10 *Id.*

11 *Paron Capital Mgmt., LLC v. Crombie*, 2012 WL 214777, at *10-15 (Del. Ch. Jan. 24, 2012).

Pursuant to a motion by McConnon and Lyons, however, the stay was lifted on or about February 23, 2012.[12]

### D. Parties' Contentions

Plaintiffs claim that Crombie orchestrated a massive fraud against them, their investors, and their regulator, by forging account statements and making misrepresentations about his performance record, employment history, and personal financial situation. McConnon and Lyons allege that Crombie made these misrepresentations to induce them to leave their jobs and form Paron, giving Crombie access to Plaintiffs' money and their valuable client contacts. Because Crombie continued to make and perpetuate these misrepresentations while acting as the Initial Manager of Paron, Plaintiffs also assert that Crombie breached his fiduciary duty of loyalty to Plaintiffs.

Although Crombie did not appear at trial or present any evidence, he did file a post-trial brief. Consistent with the rules of evidence and this Court's procedural rules, no factual assertions made by Crombie in that brief in support of his position can be accepted as admissible evidence. Nevertheless, I have considered the legal arguments Crombie raised in his brief. To the extent the Court can understand them, Crombie appears to argue that he improperly was denied a chance to cure the alleged wrongdoing

---

[12] Since that time, the parties have filed a few additional submissions, including a May 15, 2012 letter from Crombie and a May 17 response from Plaintiffs. Attached to Plaintiffs' May 17 letter was an affidavit from J. Noah Hagey, Esq., along with several exhibits. The Court has reviewed those submissions, but because the trial has concluded, does not consider the Hagey affidavit to be part of the trial record and has not relied on it for purposes of this Memorandum Opinion.

under the terms of the LLC Agreement. Crombie also challenges the sufficiency and veracity of Plaintiffs' evidence and argues that Plaintiffs have failed to satisfy their burden of proof.

## II. ANALYSIS

### A. Fraud

To prove a claim for fraud, a plaintiff must prove by a preponderance of the evidence that: (1) the defendant made a false representation; (2) the defendant knew the representation was untrue or made the statement with reckless indifference to the truth; (3) the defendant intended for the plaintiff to rely on the representation; (4) the plaintiff justifiably relied on the representation; and (5) damage occurred to the plaintiff as a result of that reliance.[13] "Fraud need not take the form of an overt misrepresentation; it also may occur through concealment of material facts, or by silence when there is a duty to speak."[14] For the following reasons, I find that Plaintiffs have proven by a preponderance of the evidence that Crombie committed fraud against them.

#### 1. Crombie made numerous false representations of fact to Plaintiffs before forming Paron

As Plaintiffs discovered in March 2011, many of the representations Crombie made about his track record, employment history, and personal financial situation were outright lies. From the very start of their relationship, Crombie supplied Plaintiffs with marketing materials about JDC that contained false information about Crombie's track

---

13 *Winner Acceptance Corp. v. Return on Capital Corp.*, 2008 WL 5352063, at *6 (Del. Ch. Dec. 23, 2008) (footnotes omitted).

14 *Id.*

record with his trading program. As it turns out, Crombie had forged the account statements from FIMAT that purported to show his investment performance between November 2006 and January 2009. Those statements purported to show that Crombie had earned annual returns of 25% and 28% in 2007 and 2008, respectively, on assets of approximately $24 million. In reality, the FIMAT accounts controlled by Crombie had a balance of approximately $40. Steven Jones, a representative from NewEdge, the successor firm to FIMAT, testified that the forged account statements bore "no resemblance" to official FIMAT account statements and that no account statements under the trade name "FIMAT" had been issued following the merger of FIMAT and NewEdge in January 2008.[15]

Likewise, as discussed *supra*, the Access Securities account statements from which Rothstein supposedly had verified Crombie's performance from January 2009 to August 2010 were also forgeries. At trial, Plaintiffs presented evidence that the Access Securities statements were authored by "Jim Crombie" on Microsoft Word five minutes before he sent the documents to Rothstein. Access Securities's Breck also testified that the documents were fabrications and that his name had been forged on the Trading Account Authorization provided by Crombie to the NFA.

Crombie denies knowing that the account statements were fraudulent, because he received them from third parties. This assertion is belied, however, by the fact that the statements purport to confirm accounts and transactions supposedly overseen and

---

15 Jones Dep. at 8-9.

managed by Crombie or of which he had personal knowledge. As the NFA concluded in the Notice:

> even if Crombie did receive the phony FIMAT statements/summaries from third persons, as he claims—he knew that the information contained in such documents was false because he had at one time been the chief investment officer at SCR Capital, the pool operator for the pool accounts at FIMAT, and had received daily statements from FIMAT for these pool accounts and, therefore, knew the actual performance and value of these accounts—which was dramatically different from the information shown on the phony FIMAT statements/summaries.[16]

Crombie did not challenge any of this evidence or testimony at trial. Therefore, I find that Crombie forged the FIMAT and Access Securities account statements.

Crombie also misrepresented his relationship with Gelber. Crombie told Plaintiffs in April 2010 that he was trading more than $21 million for Gelber and had been doing so since 2008. Yet, according to Robert Foley, his direct supervisor at Gelber, Crombie had not been hired by Gelber until 2009 and he was fired from Gelber in early 2010, less than a year into his employment, for poor performance and repeated violations of the company's trading rules.[17] Furthermore, Foley testified that, while at Gelber, Crombie did not have any specified amount of assets under his management.[18]

In addition to his track record and employment history, Crombie also misrepresented his personal financial situation to Plaintiffs. Although Crombie did

---

[16] PTX 75a at 4.

[17] Foley Dep. at 19-20.

[18] *Id.* at 14.

disclose the Porteous lawsuit to them, he failed to disclose another lawsuit brought against him by Steven Lamar for fraud that was filed on May 18, 2010 (the "Lamar Suit"). Unfortunately for Plaintiffs, that was six days *after* Kroll concluded its background check on Crombie.[19] Lamar eventually prevailed on his fraud claims against Crombie. In addition, Crombie failed to disclose numerous personal debts that he owed to various acquaintances. While he claimed that his only outstanding obligations were a mortgage, a home equity loan, and the Porteous Note, Crombie actually owed approximately $1 million in personal debts to people like Breck, Lamar, Weston Capital Management, LLC, and Daniel Beckham. Rather than disclosing the true nature of these debts, Crombie told Plaintiffs that the various parties from whom he had received personal loans, including Gelber and Breck, actually owed him money for past performance fees.

**2. Crombie intended for Plaintiffs to rely on his misrepresentations**

The effect of Crombie's extensive misrepresentations was to create a false image of Crombie as having been a successful investor when, in reality, by April 2010, he was unemployed and unable to cover his own expenses. Because Crombie first made these misrepresentations to McConnon and Lyons while marketing JDC, I find that Crombie intended for Plaintiffs to rely on these statements in deciding to go into business with him.[20] Each of Crombie's misrepresentations related either to his investment track

---

19 PTX 71.

20 *See State v. Anderson*, 74 A. 1097, 1099 (Del. 1910) ("Such guilty knowledge, like an intent to defraud, being a matter wholly within the mind of the accused,

record, employment history, or personal financial situation, information that he undoubtedly knew was material to Plaintiffs' decision to work with him. Moreover, Crombie made many of these misrepresentations during Plaintiffs' due diligence investigation, the purpose of which was to uncover information that potentially could cause McConnon and Lyons to decide not to work with Crombie.

Through the formation of Paron, Crombie received $1 million to pay his debt to Porteous. Crombie also gained access to Plaintiffs' skills in selling investment opportunities and their client contacts, which allowed Crombie to continue to perpetuate his fraud and receive compensation as a hedge fund manager. For all these reasons, I find that Crombie made intentional misrepresentations in order to induce McConnon and Lyons to enter into business with him.

### 3. Plaintiffs justifiably relied on Crombie

As discussed *supra*, Plaintiffs conducted extensive due diligence on Crombie. They checked references from ten of Crombie's former clients and colleagues, extensively interviewed Crombie himself, and received two supposedly independently verified reports from accounting firms, as well as a clean background check by Kroll. Plaintiffs also searched industry databases for negative regulatory events relating to Crombie and performed testing on Crombie's program before starting Paron. Everyone they talked to, including mutual acquaintances they shared with Crombie, gave positive

---

may be found by direct evidence, such as the admissions or declarations of the accused, or by indirect evidence; that is by the rational inferences to be drawn from what the accused is proven to have done or said, and from all the facts and circumstances involved in the transaction.").

reviews of Crombie and none of the third-party verifiers Plaintiffs hired raised any red flags regarding him. Based on the extent of their due diligence, I find that Plaintiffs acted reasonably in investigating Crombie and were simply the victims of Crombie's deceit, as well as some bad luck, bad timing, and, perhaps, third-party failures. Therefore, I find that Plaintiffs justifiably relied on Crombie's fraudulent representations.

#### 4. Plaintiffs suffered damages as a result of Crombie's fraud

As will be discussed further *infra*, McConnon, Lyons, and Paron suffered significant damages in the form of lost earnings, as well as reliance and mitigation damages, as a result of Crombie's fraud.

### B. Breach of Fiduciary Duty

Plaintiffs also claim that Crombie breached his fiduciary duties to Plaintiffs by failing to correct his misrepresentations and continuing to make additional misrepresentations after the formation of Paron. Article 3.1(a)(i) of the LLC Agreement states, in part, that

> [t]he fiduciary duty imposed on Crombie by the foregoing provisions of this Subsection . . . shall not limit or be in derogation of any other fiduciary or other duties that [Crombie] or any other Manager has or shall have, including but not limited to fiduciary duties of a Manager to the Company and to the other Members pursuant to 6 *Del. C.* § 18-1104.[21]

Plaintiffs interpret this clause as implying that Crombie owed Plaintiffs the traditional fiduciary duties of loyalty and care, in addition to the duty to "devote and render his

[21] PTX 33 at 5.

diligent best efforts and full-time professional and trading and advisory skills and services to the Company" as enumerated earlier in that same section.[22] Crombie does not contest Plaintiffs' interpretation of Article 3, but rather argues that Plaintiffs failed to meet their burden of proving that he violated these duties during his time as Initial Manager of Paron.[23] Therefore, I accept the premise that Crombie owed Plaintiffs and Paron fiduciary duties of loyalty and care.

Having established that Crombie owed Plaintiffs a general duty of loyalty, I find that Crombie breached that duty by preparing fraudulent marketing materials for Paron and by continuing to conceal material information about his track record, employment history, and personal finances. Under Delaware law, "a fiduciary who learns that her earlier communications to her beneficiaries were false and nonetheless knowingly and in bad faith remains silent even as the beneficiaries continue to rely on those earlier statements also breaches her duty of loyalty."[24]

---

22 *Id.* at 4. Under Delaware law, "despite the wide latitude of freedom of contract afforded to contracting parties in the LLC context, 'in the absence of a contrary provision in the LLC agreement,' LLC managers and members owe 'traditional fiduciary duties of loyalty and care' to each other and to the company." *Kelly v. Blum*, 2010 WL 629850, at *10 (Del. Ch. Feb. 24, 2010) (citing various authorities).

23 Def.'s Post-Trial Br. at 4 ("Plaintiffs have failed to prove by means of sufficient evidence that Crombie did not at all times adhere to act in good faith, [and] with loyalty and due care . . . .").

24 *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 153 (Del. Ch. 2004).

As the Initial Manager of Paron, Crombie continued to conceal the truth about his previous misrepresentations. Crombie never disclosed his debts, the Lamar Suit, or the truth about his track record or employment history to McConnon and Lyons. Instead, Crombie continued to take affirmative steps to perpetuate his fraud, providing Rothstein with fraudulent account statements in order to obtain an independent verification that could then be used to market Paron to clients. In addition, Crombie authored fraudulent marketing materials based on his false record, exposing Paron to potential liability and regulatory sanctions.[25] Therefore, I find that Crombie breached his fiduciary duty of loyalty to McConnon, Lyons, and Paron.

### C. Damages

Plaintiffs claim that the full extent of their injuries resulting from Crombie's fraud and breach of fiduciary duties is at least $44,500,000 in the form of reliance damages, mitigation damages, and lost earnings. This is an unusually large claim, but the vast majority of these alleged damages result from Plaintiffs', and in particular, McConnon's, lost earnings as the result of their association with Crombie and Paron. The remainder of the damages resulted from loans to Crombie, expenses for Paron, and legal fees associated with other lawsuits and regulatory proceedings related to Crombie's fraud. Before addressing Plaintiffs' lost earnings claims, I briefly discuss their claims for reliance and mitigation damages.

---

[25] Under Delaware law, a director will breach his fiduciary duty of loyalty where he "knowingly disseminate[s] false information that results in corporate injury or damage to an individual stockholder . . . ." *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998).

### 1. McConnon's reliance damages

McConnon claims that he provided loans and advanced costs to Crombie and Paron in reliance on Crombie's misrepresentations. In particular, McConnon asserts that he incurred costs related to the formation and operation of Paron, including expenses for the due diligence investigation on Crombie, legal expenses related to the loan agreements with Crombie and Paron, travel expenses for meeting with Crombie in California, rent payments for Crombie, and legal and accounting fees related to the formation of Paron.[26] In total, these costs amount to $773,190, a figure supported by the report of Plaintiffs' damages expert.[27] Having reviewed the record and Plaintiffs' expert report, I find McConnon has established a sufficient basis for these damages. McConnon incurred the claimed expenses and, but for Crombie's fraud, he would not have done so. Therefore, I grant McConnon's request for reliance damages of $773,190.

### 2. McConnon's mitigation costs

McConnon also seeks damages for legal fees, expert costs, and other costs to mitigate the damage inflicted by Crombie's fraud. In particular, McConnon seeks damages for legal fees incurred in connection with (1) participating in regulatory

---

[26] PTX 118.

[27] *See id.* Crombie did not submit an opposing expert report or challenge any of Plaintiffs' damages figures.

proceedings against Crombie and Paron,[28] and (2) foreclosing on collateral pledged by Crombie for the loan intended to satisfy the Porteous judgment.

In considering McConnon's claims for mitigation damages in the form of attorneys' fees and costs from related litigation arising from Crombie's fraud, I note that Delaware follows the American Rule on attorneys' fees, which generally requires litigants to pay their own legal expenses. Here, however, McConnon's legal expenses have been incurred as a direct consequence of Crombie's fraudulent conduct. Therefore, these costs fall under an exception to the American Rule, which provides that:

> One who through the tort of another has been required to act in the protection of his interests by bringing or defending an action against a third person is entitled to recover reasonable compensation for loss of time, attorney fees and other expenditures thereby suffered or incurred in the earlier action.[29]

Here, because McConnon seeks legal fees and other costs he incurred as a result of having to participate in regulatory and other proceedings directly arising from Crombie's fraudulent conduct, he is entitled to recover these costs in damages. Therefore, I grant McConnon mitigation damages in the claimed amount of $752,133.

---

28 In addition to the NFA investigation, the U.S. Commodities Futures Trading Commission began investigating Paron in September 2011.

29 Restatement (Second) of Torts § 914 (1979); *Ramada Inns, Inc. v. Dow Jones & Co.*, 543 A.2d 313, 331 (Del. Super. 1987) ("[W]hether characterized as an exception to the American Rule or as a rule in its own right, § 914(2) of the Restatement, Second, Torts allows for the recovery of legal fees and costs from an earlier action where: One who through the tort of another has been required to act in the protection of his own interests in bringing or defending an action against a third person . . . .").

### 3. Plaintiffs' lost earnings

The vast majority of Plaintiffs' damages claims are for lost future earnings. Plaintiffs assert that their association with Crombie and Paron has stigmatized them and ruined their prospects for future employment in their chosen field, *i.e.*, the financial services industry. Specifically, Plaintiffs claim that their association with Crombie and Paron damaged their relationships with clients and effectively made them unemployable because they would be required to disclose their association with Paron to future employers, who, in turn, would have to disclose it to investors.

In support of their contention that Crombie's fraud essentially destroyed their future career prospects in the hedge fund industry, McConnon and Lyons provided live testimony and expert evidence from Michael Curran, an executive search professional within the financial services industry and the founder of the Curran Group. In forming his expert opinion about Plaintiffs' employment prospects, Curran interviewed both Plaintiffs and considered information related to their employment and educational backgrounds, the NFA Notice, the complaint against Crombie and Paron filed by the CFTC, and other documents related to this litigation. At trial, Curran credibly described Plaintiffs' employment prospects. McConnon and Lyons also submitted expert evidence on the amount of their future lost earnings from Michael G. Ueltzen, a certified public accountant and partner at Ueltzen & Company, who is certified in fraud examination and financial forensics. Ueltzen testified at trial and I also found him to be credible.

### a. McConnon's lost earnings

As to McConnon, Curran noted that, prior to Paron, McConnon had enjoyed a "highly successful" career in the financial services industry that included employment with J.P. Morgan & Co., Bank of America, and BlueCrest Capital Management. At BlueCrest, which Curran described as one of the top five hedge funds in Europe, McConnon managed hundreds of millions of dollars in assets and raised millions of dollars from high-level institutional investors. McConnon's average annual earnings at BlueCrest exceeded $3.4 million.[30]

Based on his knowledge of people with similar experience and qualifications to McConnon, Curran estimated that McConnon likely would have been able to obtain employment with annual compensation between $3 and $5 million in his first year after leaving BlueCrest if he had not started Paron. Curran further testified that he could have marketed McConnon for high-paying positions in the hedge fund industry even if Paron had failed due to poor performance. In Curran's opinion, it was not unusual for investment professionals to leave their jobs to form their own firms and fail, only to return to larger firms. Indeed, he personally has had experience and success marketing such individuals. Because of McConnon's association with Paron, however, Curran opined that the clients he represents would not hire McConnon. In fact, Curran stated that he would be unwilling even to market McConnon because marketing an individual associated with fraudulent activity would be bad for Curran's own business. According

---

[30] Tr. 185 (McConnon).

to Curran, in the post-Madoff period, many large institutional clients simply would not consider such a candidate.

As a result of McConnon's tainted record, Curran testified that he will be unemployable for the foreseeable future. Furthermore, as time passes, McConnon's client contacts will become stale, further diminishing his marketability if he eventually were to reenter the financial services industry. Curran predicted that, at best, in a few years McConnon could find a beginning position doing work only tangentially related to the capital markets. More specifically, McConnon probably could find such work after three years at a compensation level of up to $300,000 per year.

Based on Curran's expert opinions, Ueltzen calculated McConnon's lost future earnings in two ways. First, Ueltzen reviewed McConnon's historical earnings over a ten-year period and found that, but for Crombie's wrongdoing, McConnon was likely to have continued to earn an average of approximately $3.4 million a year for the next ten years. Ueltzen also assumed that beginning in 2015, McConnon could begin to mitigate his damages by $300,000 per year until he was able to reenter the financial services industry after the ten-year term. Applying a discount rate of 0.4%, Ueltzen calculated the present value of McConnon's lost earnings based on these assumptions to be $32,160,816.[31] In an alternative calculation, Ueltzen assumed that McConnon could have

[31] Ueltzen derived the 0.4% discount rate based on the difference between the six-month average U.S. Treasury Bond rate of 4% and the sum of the estimated Compensation Inflation Rate (2%) and the estimated General Inflation Rate (1.6%). Ueltzen obtained the figures for the Compensation Inflation Rate and General Inflation Rate from reports of the U.S. Department of Labor Bureau of Labor Statistics. In applying a nominal compensation growth rate of 3.6%,

earned $5 million a year if he had left BlueCrest for another large hedge fund instead of forming Paron. Making the same assumptions regarding mitigation earnings and the discount rate, Ueltzen calculated the present value of McConnon's lost earnings in this more optimistic case to be $47,428,888. Giving each scenario equal weight, Ueltzen estimated McConnon's lost future earnings to be $39,794,852.

Although Ueltzen's approach generally seems logical, I consider his final opinion on McConnon's lost earnings to be overly generous. Ueltzen based his opinion on two scenarios: a base case of what McConnon would have earned had he stayed at BlueCrest or operated his own fund successfully and a more optimistic case of what he would have earned if he had left BlueCrest and sought employment at another fund. I find the exclusive consideration of these two scenarios to be overly optimistic in the sense that they do not take into account the risk McConnon took when he decided to leave a stable, extremely well-paying job at BlueCrest to go out on his own. Furthermore, in the more optimistic case, Plaintiffs would have the Court believe that, had McConnon left to start Paron and Paron had failed for non-fraud related reasons, McConnon would have been able to reenter the market and find employment paying almost 50% more than he previously earned at BlueCrest. BlueCrest, however, was one of the most successful hedge funds in Europe when McConnon left.[32] The record suggests that there were only

---

Ueltzen took a more conservative approach than Curran, who estimated that McConnon could expect annual salary and bonus increases in the range of 10-20%. In the circumstances of this case, I find Ueltzen's approach in this regard to be more reliable and, therefore, have adopted that approach.

[32] PTX 119 at 2.

a few funds of the same level and prestige as BlueCrest from which McConnon could have expected to receive similar compensation, and it is uncertain what, if any, openings would have been available when McConnon reentered the market. Moreover, there is no basis to assume that McConnon's record would have been enhanced by his decision to leave BlueCrest and the failure of a new venture he formed, even if it failed for strictly legitimate reasons.

For these reasons, I find that Plaintiffs' claim for McConnon's lost earnings requires a downward adjustment. Although McConnon apparently had every right to leave BlueCrest as he did in the hope of pursuing a more lucrative endeavor, there has been no showing that he could have done so without assuming significant risk. It is also possible that McConnon would have had to accept a lower paying position if Paron had failed as a business, a contingency that Ueltzen's expert report and testimony did not convincingly address.[33] Based on these considerations and my assessment of the evidence presented, I find that McConnon's earnings before leaving BlueCrest provide a more reliable measure of his lost earnings than the two equally weighted scenarios presented by Ueltzen. Therefore, I award McConnon damages for lost earnings in the amount of $32,160,816.

**b. Lyons's lost earnings**

As for Lyons, Curran opined that Lyons similarly is unemployable in the financial services industry. Although Lyons is Princeton-educated, has significant contacts in the

[33] In his analysis, Ueltzen relied on Curran's estimations of Plaintiffs' future alternative earning potential.

industry, and has a strong history of business development activity, his association with Crombie and Paron has made him unmarketable. Curran further testified that but for the problems with Paron, Lyons could have found employment with compensation of $200,000 to $400,000 per year.

Ueltzen applied the same methodology and assumptions to determine Lyons's lost future earnings as he did for McConnon. Using a historical average earnings figure of $188,924 per year, Ueltzen projected this figure out ten years and reduced it for mitigation earnings of $100,000 beginning in 2015.[34] Discounting to present value, Ueltzen calculated Lyons's lost future earnings to be $1,272,746. In an alternative calculation, Ueltzen assumed that Lyons could earn $400,000. Under this assumption, Ueltzen calculated Lyons's lost future earnings to be at least $3,349,153. Again giving equal weight to both estimations, Ueltzen concluded that Lyons's lost future earnings are at least $2,310,950.

As in the case of McConnon, I find the assumptions regarding Lyons's alternative career prospects Ueltzen used in his analysis to be overly optimistic. Curran's estimation of Lyons's alternative earnings potential at another firm includes a range of compensation substantially above what Lyons made before he joined Paron. Moreover, Ueltzen utilized the high end of this range in his analysis, estimating Lyons's potential alternative compensation at more than twice what he was making before Paron. Neither Curran nor Ueltzen, however, provided a credible explanation for believing that Lyons would have

[34] Curran suggested that Lyons could find entry-level work with compensation up to $100,000 per year by 2015. Tr. 366 (Ueltzen).

earned that much. Therefore, I adjust Ueltzen's optimistic projection for Lyons's lost earnings figure downward by 25%, effectively assuming that he eventually could have earned up to $300,000 per year. Applying equal weight to that scenario and Ueltzen's base case projection for Lyons, I calculate Lyons's lost earnings damages to be $1,892,305.

### 4. Paron's damages

In addition to their personal damages, Plaintiffs seek $943,600 in damages on behalf of Paron to compensate the Company for guaranteeing the losses of its clients arising from Crombie's fraud. Paron appears to have promised to cover its investors' losses in exchange for the investors' forbearance from bringing claims against the Company. It is unclear from the record, however, whether Paron has made binding promises to each of its investors or whether Paron simply anticipates that it may be asked to satisfy these "contingent liabilities" at some point in the future. Plaintiffs did not present any documentary evidence of these promises or prove that such documentation exists. Similarly, although Plaintiffs have represented that they promised to pay third parties for their losses, they did not adduce evidence that any of these third parties have agreed to forbear bringing suit against Paron in exchange for Plaintiffs' promises.[35] Therefore, Plaintiffs have not proven the existence of an enforceable contract against Paron for its investors' losses.

---

[35] PTX 118 at 11.

Plaintiffs also have not articulated any legal basis to support the proposition that a defendant may be held liable for gratuitous promises to guarantee losses caused by the defendant's fraudulent acts. Although the alleged investors' losses were likely the direct and proximate result of Crombie's fraud, Paron's promise to cover any losses caused by that fraud is a step removed from the fraud. In substance, Plaintiffs effectively seek on behalf of Paron to have Crombie preemptively indemnify Paron for any losses related to, for example, the settlement of potential claims against Paron arising from Crombie's fraud. Such claims, however, are neither ripe nor adequately supported by the evidence in the record. Therefore, I deny Paron's request for damages without prejudice to its ability to seek such damages in the future if it, in fact, incurs them.

**5. Declaratory relief**

In addition to monetary damages, Plaintiffs seek various forms of declaratory and injunctive relief. Plaintiffs claim that Crombie continues to make public and private assertions that Plaintiffs were responsible for Paron's false marketing materials and demise. As a result, McConnon and Lyons assert that if they are not granted declaratory relief, Crombie will continue to perpetuate his false version of events and Plaintiffs will be required to bring suit continually against Crombie to recover for additional reputational damage. To avoid such a contingency, Plaintiffs seek declarations that, in breaching his fiduciary duties, Crombie: (1) acted completely adversely to each Plaintiff's interest; (2) acted contrary to the LLC Agreement and outside the scope of his authority; and (3) is the sole author of any misstatement made by Paron in its marketing materials to investors and clients.

The decision to grant declaratory relief "involves the exercise of judicial discretion which should turn importantly upon a practical evaluation of the circumstances present."[36] Although this discretion should be "liberally exercised so that the remedial purpose of the act may be well served,"[37] declaratory relief should only be granted when the Court is presented with an "actual controversy"[38] that is ripe for judicial determination.[39]

Here, I already have found that Crombie committed fraud and breached his fiduciary duties to Plaintiffs in violation of the LLC Agreement. I also have made various findings of fact regarding what occurred between Crombie and Plaintiffs during the formation and operation of Paron. Therefore, to the extent Plaintiffs are seeking a declaration that Crombie violated the LLC Agreement, this ruling already provides such a declaration.

Plaintiffs' other requests for declaratory relief are more problematic. In seeking a declaration that Crombie acted "completely adversely" to Plaintiffs' interests, Plaintiffs

---

36 *Schick Inc. v. Amalgamated Clothing & Textile Workers Union*, 533 A.2d 1235, 1238 (Del. Ch. 1987).

37 *Id.*

38 In order for an action for a declaratory judgment to involve an "actual controversy," it must: "(1) . . . be a controversy involving the rights or other legal relations of the party seeking declaratory relief; (2) . . . be a controversy in which the claim of right or other legal interest is asserted against one who has an interest in contesting the claim; (3) [involve a] controversy . . . between parties whose interests are real and adverse; and (4) the issue involved in the controversy must be ripe for judicial determination." *Rollins Int'l, Inc. v. Int'l Hydronics Corp.*, 303 A.2d 660, 662-63 (Del. 1973).

39 *Schick Inc.*, 533 A.2d at 1239.

appear to be seeking a legal determination that is broader than the issues litigated in this action. Moreover, the effect and scope of such a declaration is unclear. In this Memorandum Opinion, I have found that Crombie acted adversely and improperly towards Plaintiffs during his involvement with Paron. It is difficult to predict what effect a more sweeping declaration would have, other than as a potential defense for Plaintiffs in third-party litigation related to their involvement in Paron. In such a case, it may or may not be relevant whether Crombie acted "completely adversely" to Plaintiffs' interests and, if it is relevant, the question is better left to judicial resolution at that time based on the context of the specific dispute then before the Court.[40] Therefore, I deny Plaintiffs' request for a declaration that Crombie acted "completely adversely" to their interests as not ripe.

Plaintiffs' request for a declaration that Crombie was the sole author of any misstatement made by Paron in its marketing materials is denied for similar reasons. This issue was not subjected fully to the adversarial process in this action and is better left for a time where it actually is in controversy.[41] Furthermore, from the record before

---

[40] *See id.* ("Thus, in deciding whether a particular declaratory judgment action is ripe for judicial determination, a practical evaluation of the legitimate interest of the plaintiff in a prompt resolution of the question presented and the hardship that further delay may threaten is a major concern. Other necessary considerations include the prospect of future factual development that might affect the determination to be made; the need to conserve scarce resources; and a due respect for identifiable policies of the law touching upon the subject matter of the dispute.").

[41] *See id.* at 1238-39 ("[T]o the extent that the judicial branch contributes to law creation in our legal system, it legitimately does so interstitially and because it is required to do so by reason of specific facts that necessitate a judicial judgment.

me, I am not fully satisfied that Plaintiffs were not co-authors of Paron's marketing materials. Plaintiffs admittedly participated in the creation and presentation of at least some of those materials. According to McConnon, he edited the marketing materials and provided input as to their presentation, including suggestions as to "better ways to describe what [Paron was] doing."[42] Moreover, McConnon testified that he and Lyons "provided sort of what [he] would term stylistic or flow edits," as to which Crombie "would have the ultimate sign-off on" and which they would "run . . . by [Crombie] for accuracy."[43] Based on such evidence, a later Court conceivably might find that McConnon's and Lyons's contributions to Paron's marketing materials constituted a form of co-authorship. Consequently, although nothing in the record before me indicates that McConnon or Lyons knowingly subscribed to any of Crombie's misstatements on behalf of Paron, Plaintiffs still could be considered "authors" in a broad sense of some of those misstatements. Therefore, I deny Plaintiffs' request for a declaration that Crombie was the sole author of the marketing materials.

### 6. Injunctive relief

Plaintiffs also seek injunctive relief in the form of: (1) an order that Crombie either return or destroy all copies or versions of Paron's software trading program; (2) an

---

To address a matter before the facts surrounding the dispute are fully developed necessarily not only increases the risk of an incorrect judgment in the particular case, but risks, as well, an inappropriate or unnecessary step in the incremental law building process itself.").

42 Tr. 85.

43 Tr. 86.

injunction precluding Crombie from marketing or selling any versions of Paron's software trading program that he may have modified; (3) indemnification for any future losses that may arise in connection with Paron's response to litigation and proceedings arising from Crombie's misconduct; and (4) an order requiring Crombie to "[s]ubmit to immediate post-Judgment discovery of all of [his] personal and family assets and liabilities, including as to all financial transactions conducted by him or his immediate family within the last three (3) years."[44]

As to Plaintiffs' first two requests for injunctive relief, Crombie already stipulated in the Amended Stipulated Final Judgment (the "Final Judgment") that he, among other things, (1) "is permanently enjoined from using or accessing any [Paron] assets . . . or holding himself out as a member of [Paron] or as presently affiliated with [Paron]" and (2) that he has "provided Plaintiffs with access to all assets and information of [Paron] within his possession, custody or control, including without limitation, all file servers and other media containing [Paron] intellectual property or information controlled by Plaintiff's former information technology consultant."[45] That Final Judgment remains effective. Furthermore, to the extent Plaintiffs seek additional mandatory relief in furtherance of that Final Judgment, I conclude they are entitled to such relief. Crombie is no longer a member of Paron and he has no right to its assets. Plaintiffs have introduced unrebutted evidence, however, that Crombie continues to market software programs

44 Pls.' Post-Trial Br. 85.

45 *See Paron Capital Mgmt., LLC v. Crombie*, C.A. No. 6371-VCP (Del. Ch. May 11, 2011) (Final Judgment) at 2.

substantially similar to Paron's trading program.[46] Therefore, I order Crombie to return or destroy all Paron assets within his possession, custody, or control, including all copies or versions of Paron's software trading program that Crombie attempted to market to new prospective clients or investors.

Plaintiffs' request for indemnification for future liability arising from Crombie's fraud is denied as premature. Plaintiffs seek a blanket judgment that indemnifies them for any liability arising from potential, but not yet filed, claims against them and Paron related to Crombie's fraud. This aspect of Plaintiffs' request for relief is novel, and they have not cited a single case in which such prospective relief was granted. This is not surprising, because what Plaintiffs really seek is not injunctive relief, but rather a preemptive indemnification judgment that would be applicable in future lawsuits. The findings of fact and conclusions of law reflected in this post-trial Memorandum Opinion and the resulting judgment will give Plaintiffs a very significant "leg up" on Crombie in any future litigation. To grant still broader relief of the kind Plaintiffs request would require the Court to engage in undue speculation about the nature and circumstances of future disputes that may arise among the parties. Therefore, I deny this aspect of Plaintiffs' request as unripe.[47]

---

46 *See* PTX 102.

47 *See Stroud v. Milliken Enters., Inc.*, 552 A.2d 476, 480 (Del. 1989) ("Courts . . . in Delaware . . . decline to exercise jurisdiction over cases in which a controversy has not yet matured to a point where judicial action is appropriate. . . . Whenever a court examines a matter where facts are not fully developed, it runs the risk not only of granting an incorrect judgment, but also of taking an inappropriate or premature step in the development of the law.") (internal citations omitted).

Similarly, Plaintiffs' request for discovery in aid of the judgment that will result from these rulings is premature. Upon entry of the judgment, Crombie will be required to follow this Court's post-trial procedures and will have the opportunity to appeal. If Crombie fails to comply with the applicable post-trial procedures or the resulting judgment, Plaintiffs presumably will be entitled to discovery in aid of execution in this or another jurisdiction. In the meantime, Plaintiffs' request is denied without prejudice.

### D. Attorneys' Fees and Expenses

Although Delaware generally adheres to the American Rule for attorneys' fees, in certain instances of particularly egregious or fraudulent behavior, attorneys' fees may be awarded as part of a plaintiff's damages.[48] Here, Crombie committed an extensive and calculated fraud that resulted in severe damage to the reputations and livelihoods of McConnon and Lyons. The prosecution of this action to clear Plaintiffs' names, among other things, is a direct and foreseeable consequence of Crombie's wrongdoing. Therefore, I find that McConnon and Lyons are entitled to recover their attorneys' fees and litigation expenses, including their expert witness fees, as well as any costs permitted under Rule 54(d).[49]

---

48 *Barrows v. Bowen*, 1994 WL 514868, at *2 (Del. Ch. Sept. 7, 1994) ("[T]here are those cases in which attorney's fees are awarded against a defendant . . . because the action giving rise to the suit involved bad faith, fraud, 'conduct that was totally unjustified, or the like' and attorney's fees are considered an appropriate part of damages.").

49 Ct. Ch. R. 54(d) ("Except when express provision therefor is made either in a statute or in these Rules, costs shall be allowed as of course to the prevailing party

### E. Pre- and Post-Judgment Interest

Finally, Plaintiffs seek pre- and post-judgment interest on their damages awards. The award of prejudgment interest is intended "to ensure that a plaintiff to whom payment was owed does not suffer injury by the defendant's unjustified delay."[50] Here, however, the overwhelming majority of the relief granted is for lost future earnings related to time periods after the expected date of the judgment in this case. At least some adjustments for the impact of interest rates already are included in the reduction of the damages based on future earnings to present value. Therefore, I deny Plaintiffs' request for prejudgment interest. Plaintiffs still are entitled, however, to post-judgment interest.[51]

## III. CONCLUSION

For the reasons stated, Crombie is liable for fraud and breaches of his fiduciary duty of loyalty. As a result, I award Plaintiffs reliance, mitigation, and lost earnings damages in the amounts detailed in this Memorandum Opinion and reflected in the Judgment and Order being entered concurrently herewith. In addition, I order Crombie to return or certify under oath that he has destroyed all copies or versions of Paron's software trading program in his possession, custody, or control, including without

---

unless the Court otherwise directs. The costs in any action shall not include any charge for the Court's copy of the transcript of the testimony or any depositions.").

50 *Citrin v. Int'l Airport Ctrs. LLC*, 922 A.2d 1164, 1167 (Del. Ch. 2006).

51 *Wilm. Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000) ("Delaware law provides that Post-Judgment Interest is a right belonging to the prevailing plaintiff and is not dependent upon the trial court's discretion. Interest on a judgment begins to accrue when the judgment is entered as final and determinative of a party's rights.").

limitation all copies or versions of Paron's software trading program that he attempted to market to Defendant's new prospective clients or investors. Finally, I award Plaintiffs their attorneys' fees, litigation expenses, and costs incurred in this action. In all other respects, I deny Plaintiffs' remaining claims for declaratory and injunctive relief.