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: January 20, 2012
Date Decided: January 24, 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 by Peter McConnon, Timothy Lyons, and Paron Capital Management, LLC ("Paron" and, together with McConnon and Lyons, "Plaintiffs") against Defendant, James D. Crombie. In June 2010, McConnon, Lyons, and Crombie co-founded Paron to manage client accounts using a software-based futures trading strategy Crombie had developed. Plaintiffs now accuse Crombie of fabricating records and making other false statements concerning that trading software, fraudulently inducing McConnon and Lyons to form Paron, and breaching fiduciary duties to Paron. A trial on the merits of those accusations was held October 3-5, 2011. This Memorandum Opinion addresses several outstanding procedural issues raised after trial concerning the post-trial briefing and the exhibits to be considered as part of the record.

I. Crombie's Objections to Plaintiffs' Trial Exhibits

In two filings submitted during trial and also in his post-trial brief, Crombie formally objected to the admissibility of approximately ninety of Plaintiffs' Trial Exhibits ("PTX").[1] Crombie makes a blanket objection to about half of those exhibits, PTX 118-145(e), as being "withheld" from him and untimely.[2] As to the remaining exhibits,

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[1] Objection, Docket Item ("D.I.") No. 78 (Oct. 3, 2011); Objection, D.I. No. 79 (Oct. 5, 2011); Corrected Def.'s Post-Trial & Closing Br., D.I. No. 93, at 10-12 (Oct. 27, 2011).

All citations to docket items in this Memorandum Opinion refer to the docket in this action, *Paron Capital Mgmt., LLC et al. v. James D. Crombie*, C.A. No. 6380-VCP.

[2] D.I. No. 79 at 5. Crombie makes additional, particularized objections to seven of those exhibits, PTX 118, 128-29, 135-37, and 139. *Id.*

Crombie asserts particularized objections on an exhibit-by-exhibit basis, mostly in terms of authenticity or hearsay. Plaintiffs responded by letter dated October 14, 2011.

Because Crombie is a self-represented litigant, I provide some brief comments about the nature of trial practice in the Court of Chancery and the admissibility of evidence to put the analysis that follows in context. Because there are no jury trials in Chancery, the Court usually considers evidentiary objections only to the extent a party attempts to rely on an objected-to exhibit in its post-trial briefs or argument. In this case, therefore, Crombie's objections to exhibits not cited in Plaintiffs' post-trial brief are moot.[3]

As to Crombie's remaining objections, Delaware Rule of Evidence 402 provides that, in general, "[a]ll relevant evidence is admissible," and Rule 401 defines "relevant evidence" as that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Delaware Rule of Evidence 402 does not require, however, that evidence definitively prove the proposition for which it is offered. Instead, it merely requires that evidence have some probative value."[4] In other words, by ruling on the relevance of evidence, I am deciding only whether, as the factfinder, the Court can

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[3] Of the ninety exhibits to which Crombie objected, only the following are cited in Plaintiffs' post-trial brief: PTX 1-3, 6, 10, 13-14, 17, 37, 42, 50, 56, 63-64, 75(a), 85-86, 93, 98-99, 102(b)-(c), 113-14, 118-19, 129, 133-38, 140(a)-(i), 141, and 144(a)-(e). If, for any reason, this Court relies on an uncited exhibit in its opinion on the merits, it will address any objection by Crombie at that time.

[4] *Grunstein v. Silva*, 2011 WL 378782, at *7 (Del. Ch. Jan. 31, 2011).

consider such evidence in deciding the merits of this litigation, not what weight it deserves or what inferences to draw from it.

Turning first to Crombie's blanket objections to PTX 118-145(e), he asserts they constitute evidence withheld from him and submitted after the deadline imposed by the Court. In this regard, the circumstances of this case are somewhat unusual. Representing himself, Crombie has made various procedural and dispositive motions and otherwise argued his case via pre- and post-trial briefs. Although he had the right to participate in and present evidence at the trial held October 3-5, 2011, Crombie did not do so. In fact, he gave advance notice that he would not attend the trial.

Due to these unusual circumstances, during a pretrial conference held on September 27, 2011, I ordered Plaintiffs' counsel to deliver their trial exhibits to Crombie by Friday, September 30, and permitted Crombie to file written objections to those exhibits even though he did not intend to attend the trial.[5] This procedure was intended to further the truth-testing function of the adversarial process by enabling Crombie to make appropriate objections to any trial exhibits he believed were inadmissible. It became necessary because Crombie failed to comply with Rule 16, which generally requires counsel, or "parties not represented by an attorney," to confer and submit a pretrial order containing, among other things, "a listing of any exhibits which are objected to and the nature of the evidentiary objection . . . ."[6] Indeed, Plaintiffs'

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5 *See* Tr. of. Sept. 27, 2011 Teleconf. ("9/27/11 Tr.") at 6-8.

6 Ct. Ch. R. 16(c)(7).

counsel's first order of business during the pretrial conference was to request direction from the Court because "[w]e attempted to meet and confer with the defendant but did not receive any response."[7]

As sometimes occurs, Plaintiffs identified additional exhibits during the course of trial. More specifically, Plaintiffs identified PTX 118-145(e) on October 3, the first day of trial, and provided those documents to Crombie and the Court concurrently. In that sense, Crombie is correct that he received various exhibits after the "deadline" of September 30. That "deadline," however, did not result from any rule of evidence or procedural necessity. Accordingly, so long as Crombie suffered no unfair prejudice from Plaintiffs' delay in indentifying PTX 118-145(e), the delay itself does not automatically render the exhibits inadmissible.[8] Moreover, in the circumstances of this case, Crombie only needed to be able to raise evidentiary objections to the additional, late-identified exhibits and have those objections considered to avoid material prejudice. By examining Crombie's particularized objections to PTX 118-145(e) here,[9] the Court has afforded Crombie that ability. Therefore, Crombie's blanket objection to PTX 118-145(e) as untimely is overruled.

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7 9/27/11 Tr. at 1. Crombie did not dispute that assertion. *Id.* at 2.

8 *See* D.R.E. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . or by considerations of undue delay . . . ."); *Concord Towers, Inc. v. Long*, 348 A.2d 325, 326 (Del. 1975) (holding whether the existence of surprise is reversible error depends on whether the surprise is prejudicial).

9 *See supra* note 2.

I next address Crombie's particularized objections to specific exhibits. Those objections fall into one of three general categories: objections based on (a) lack of authenticity; (b) hearsay; and (c) effectively, absence of probative value. I discuss each of these categories in turn.

a. Objections to authenticity

Crombie objects to the authenticity of numerous emails because his work "emails can be manipulated by the Plaintiffs who had sole possession of Defendant's Paron's email account" and because he was not afforded an opportunity to withhold personal or privileged emails from his personal email account.[10] A document may be authenticated, however, in various ways, including by testimony of a trial witness with personal knowledge that the document is what its proponent claims it to be or by distinctive characteristics taken in conjunction with the surrounding circumstances.[11] "Distinctive characteristics" for purposes of an email may include, for example, the purported sender's email address.[12]

In this case, many of the contested emails indicate that the sender's address is, depending on the exhibit, "james.d.crombie@gmail.com," "jim@jdcventuresllc.com," or

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10 D.I. No. 78 at 1. Crombie, in fact, has not objected to any personal email as privileged, but rather only for lack of authentication. *Id.*

11 D.R.E. 901(b)(1), (b)(4).

12 *See* 31 Charles Alan Wright et al., *Federal Practice & Procedure: Evidence* § 7109 & n.23.1 (1st ed., rev. vol. 2011) (discussing authentication of email by the sender's email address under the similar Fed. R. Evid. 901 and citing federal case law); *see also* D.R.E. 901 cmt. (noting that "D.R.E. 901 tracks [Fed. R. Evid.] 901").

"jcrombie@paroncap.com." Crombie has used the first email address to communicate with Court personnel, and he testified at his deposition that he used the second address at least as recently as March 2011.[13] As to the third email address, I note that PTX 8, for example, is an email from that address to which Crombie does not object. The distinctive characteristics of these email addresses themselves support the authenticity of the challenged emails. Furthermore, to the extent that participants in an email chain such as Lyons, McConnon, or other witnesses testified that they replied to or forwarded emails from any of those Crombie email addresses, their testimony reinforces the authenticity of the initial email and the reply or forward. Based on this evidence, therefore, I overrule Crombie's objections to the authenticity of the following emails: PTX 1-3, 6, 13,[14] 14,[15] 17, 42,[16] 50, 56, 93,[17] 129,[18] and 137.[19]

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[13] Crombie Dep. 231-33. The only email with this address that is objected to is PTX 50, which is dated August 19, 2010.

[14] PTX 13 is an email chain between Lyons and McConnon; Crombie is neither an author nor recipient of any part of that chain. McConnon, a witness with personal knowledge, authenticated this exhibit at trial. Trial Tr. 49.

[15] PTX 14 indicates that the sender is "James Crombie," and McConnon, the recipient, authenticated the exhibit. *See* Trial Tr. 65-66.

[16] PTX 42 identifies "James Crombie" as the sender, and Mark Steele, the recipient, authenticated PTX 40-43 in his deposition. *See* Steele Dep. 9-13.

[17] Richard Breck, Jr. authenticated PTX 93 in his deposition testimony. *See* Breck Dep. 47-48.

[18] McConnon, a recipient, authenticated PTX 129. *See* Trial Tr. 87.

[19] Lyons authenticated PTX 137. *See* Trial Tr. 245-46.

Four of the emails to which Crombie objects, however—PTX 85-86 and 98-99—do not contain a distinctive email address and were not authenticated by a witness with personal knowledge. Nor have Plaintiffs advanced any other basis to authenticate these emails. Thus, because "authentication or identification [i]s a condition precedent to admissibility,"[20] I sustain Crombie's objections to these four emails and will not admit them.[21]

b. Objections as hearsay

"Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[22] Generally, hearsay is not admissible. There are several exceptions to this proposition, however, including one for so-called party-opponent admissions, *i.e.*, statements made by a party to the litigation and offered against that party.[23] Many of Crombie's hearsay objections fall within this exception. For example, he objects on hearsay grounds to many of the emails he wrote. Provided those emails are not

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20 D.R.E. 901

21 As to all four exhibits, Plaintiffs assert that McConnon has personal knowledge of their authenticity and request leave to file a sworn declaration to that effect. Letter from J. Noah Hagey, Esq. to V.C. Parsons, D.I. No. 81 Ex. B, at Ex. 1 at 16-19 (Oct. 14, 2011). For similar reasons to those discussed in Part II, *infra*, regarding Crombie's request to introduce evidence after the close of trial, I deny Plaintiffs' request as untimely. Crombie provided notice of his objections to these emails before the end of trial. Hence, Plaintiffs had an adequate opportunity to address them during trial.

22 D.R.E. 801.

23 D.R.E. 801(d)(2).

inadmissible based on some other objection Crombie has raised, they are admissible as party-opponent admissions. On that basis, I overrule Crombie's hearsay objections to the following exhibits: PTX 1-3, 6, 10, 13-14, 17, 42, 50, 56, 85-86, 93, 98-99, 113, 129, and 137, as to the transmittal email, exclusive of attachments.

Crombie also objects on hearsay grounds to PTX 118 and the attachments to PTX 137 on the basis that they are "[s]peculative projections which are not based in any fact basis."[24] The first of those exhibits, PTX 118, is the report of Plaintiffs' damages expert, Michael G. Ueltzen. Because Ueltzen testified regarding his report at trial, the report falls outside the definition of hearsay—*i.e.*, the declarant essentially made the challenged statements while testifying and, theoretically at least, was open to cross-examination. Furthermore, to the extent Ueltzen's report incorporates several financial projections attached as appendixes, the hearsay nature of those projections does not make them inadmissible in the context of this case. "The facts or data . . . upon which an expert bases an opinion or inference . . . need not be admissible in evidence in order for the opinion or inference to be admitted," so long as experts in the relevant field typically rely on the same type of fact or data.[25] Financial experts typically rely on financial projections provided by others; therefore, Uelzen's reliance on the challenged projections does not make his expert opinions inadmissible.

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[24] D.I. 79 at 5.

[25] D.R.E. 703.

Second, PTX 137 is an email, purportedly written by Crombie, to which various trading records from Access Securities are attached. Plaintiffs did not proffer those trading records to prove their veracity. Quite to the contrary, Plaintiffs claim that Crombie forged those records. As such, and because Lyons authenticated the transmittal email and its attachments,[26] PTX 137 is admissible for the limited purpose of substantiating Plaintiffs' allegation that Crombie sent Lyons and others falsified documents, not to prove the truth of the financial information contained within those documents.

Three other exhibits to which Crombie objects—PTX 102(b)-(c) and 135—may be inadmissible hearsay. All three exhibits are newspaper articles purporting to quote various statements made by Crombie. To the extent Plaintiffs rely on these articles to prove that Crombie, in fact, made the various statements attributed to him, the newspaper articles are written assertions of reporters who did not testify at trial and, thus, meet D.R.E. 801's definition of inadmissible hearsay.[27] But, assuming Plaintiffs rely on the articles for some other purpose (*e.g.*, to prove the mere fact that statements allegedly attributable to Crombie have been reported), the articles may be admitted for that limited purpose. Therefore, I sustain Crombie's objections to these three articles and hold that

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[26] Trial Tr. 245-47.

[27] *See Capano v. State*, 781 A.2d 556, 640 n.310 (Del. 2001) ("Statements in newspaper articles are hearsay, and in most cases their accuracy cannot be assumed."); *see also* Daniel E. Feld, Annotation, *Admissibility of Newspaper Articles as Evidence of the Truth of the Facts Asserted Therein*, 55 A.L.R.3d 663 (1974, rev. weekly) (conducting 50-state and federal survey; "newspaper articles are generally not admissible as evidence of the facts stated in the articles").

they only may be admitted into evidence for a purpose other than to prove the truth of any matter asserted in them.

c. Objections to probative value

Finally, Crombie objects to five exhibits—PTX 37, 63-64, 75(a), and 114—for reasons best characterized as objections to their probative value or weight. Complaints about the inferences that may be drawn from evidence, however, are not evidentiary objections, but arguments. Consequently, because Crombie relies on extrinsic information and his contrary characterization of the exhibits in question, I consider his arguments against them to be inadmissible attempts to testify.[28] In any event, they are not evidentiary objections. Therefore, I overrule Crombie's challenges to the *admissibility* of these trial exhibits.

In sum, Crombie's objections to Plaintiffs' trial exhibits other than those identified in Note 3, *supra*, are moot. As to the exhibits that were so identified, I sustain Crombie's authenticity objections to PTX 85-86 and 98-99 and his hearsay objections to PTX 102(b)-(c) and 135, and I overrule all of his other objections to Plaintiffs' trial exhibits.

II. Admissibility of Exhibits Attached to Crombie's Post-Trial Filings

Attached to a letter dated October 24, 2011 and to Crombie's post-trial brief are, collectively, twelve documents not introduced at trial that he now seeks to admit into

[28] *See, e.g.*, D.I. No. 78 at 16 (objecting to PTX 63, a 1099 statement for SCR Market Neutral Fund, because "[t]his is one of three SCR accounts, and not the one for the JDC futures program. This is for a different short lived equities long versus short strategy.").

evidence.[29] Trial concluded on October 5, 2011, and the record thus closed before Crombie filed either his October 24 letter or post-trial brief. Crombie nevertheless requests "an evidentiary hearing on the items [*i.e.*, the attached documents], a stay on this proceeding and also a [sic] guidance on submitting a summary judgment motion."[30] In other words, Crombie effectively moves to reopen the record and admit additional evidence before judgment.[31] For the following reasons, that motion is denied.

Motions to reopen the record are committed to the Court's discretion.[32] "The Court will allow the introduction of additional evidence when doing so will serve the interests of fairness and substantial justice."[33] Among the relevant factors in considering

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29 Although labeled Exhibits 1-12, Crombie attached thirteen distinct documents to his post-trial brief. His Exhibit 1, however, is an excerpt from PTX 91 that Plaintiffs introduced at trial. *See* Def.'s Post-Trial & Closing Br., D.I. No. 92, at Exs. 1-12 (Oct. 27, 2011). Moreover, the seven documents attached to Crombie's October 24 letter are among the thirteen documents he attached to his post-trial brief. *See* Letter from James D. Crombie to V.C. Parsons, D.I. No. 91, at Exs. 1-7 (Oct. 24, 2011) [hereinafter Crombie Letter]. Thus, collectively, Crombie seeks to introduce a total of twelve new exhibits.

30 Crombie Letter at 1.

31 Because Crombie represents himself, the Court may "look to the underlying substance of [his] filings . . . and hold those *pro se* filings to 'a somewhat less stringent technical standard' than those drafted by lawyers." *Sloan v. Segal*, 2008 WL 81513, at *7 (Del. Ch. Jan. 3, 2008) (quoting *Vick v. Haller*, 1987 WL 36716, at *1 (Del. 1987) (ORDER)).

32 *Fitzgerald v. Cantor*, 2000 WL 128851, at *1 (Del. Ch. Jan. 10, 2000) (footnote omitted).

33 *Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, 2010 WL 1818907, at *1 (Del. Ch. Apr. 23, 2010) (citing *El Paso Natural Gas Co. v. Amoco Prod. Co.*, 1992 WL 43925, at *10 n.15 (Del. Ch. Mar. 4, 1992)).

such a motion is whether the moving party had the ability to introduce the evidence at trial.[34]

As mentioned above, Crombie elected not to participate in the trial, claiming without competent record support that he could not afford to come to Delaware. He was accorded, however, the right to attend trial and to present his evidence at that time. Furthermore, as contemplated by Court of Chancery Rule 16, Crombie also could have identified prospective exhibits or proposed stipulated facts for inclusion in the pre-trial order, and those exhibits or stipulations could have been admitted into evidence, assuming Plaintiffs did not object to them, without the need to travel to Delaware. Thus, Crombie had an opportunity to present evidence before the record closed, but did not take advantage of it.

Additionally, before trial commenced, the Court considered and expressly rejected the possibility of post-trial submissions of evidence. Indeed, the Court stated explicitly on several occasions that judgment would be rendered only upon the record as it was made at trial. For example, during the pretrial conference held on September 27, Plaintiffs' counsel asked, "I assume that when we're done [presenting our case] and Mr. Crombie hasn't appeared at trial, the case would be closed [and] there's no further submitting of evidence," to which the Court replied, "that would be correct."[35] Later during that same conference, the Court again clarified that:

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[34] *Id.* (footnotes omitted).

[35] 9/27/11 Tr. at 9.

> The evidentiary record from which everybody will have to argue [in their post-trial briefs] is going to be the record that will be created next week [*i.e.*, at trial]. And then at that point, if Mr. Crombie wants to put in . . . a written statement of his position based on that evidentiary record, arguing from those depositions and that testimony, those exhibits, he can do that.[36]

As a participant on that call, Crombie was on notice that everyone, himself included, would have to rely on the evidentiary record created at trial. The Court again noted at trial that Crombie would be free to make legal arguments in his post-trial brief, and that the Court would consider those arguments.[37] At no time, however, did the Court invite post-trial submission of evidence. To the contrary, the Court made clear that Crombie's decision not to appear at trial did not exempt him from the ordinary rules of trial practice and procedure.[38] In these circumstances, I am not persuaded that fairness or substantial justice supports reopening the record to permit the submission of additional evidence.

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[36] *Id.* at 11. The Judicial Action Form docketed the following day also reflected the Court's decision on this point, stating, "Briefs must be based on factual record from trial." D.I. 71 at 1 (Sept. 28, 2011).

[37] Trial Tr. 489-90. I also informed the parties during the pretrial conference that Courtroom View Network would stream the trial over the internet, both live and on-demand, presumably for a fee in either case. 9/27/11 Tr. at 3-4. Although Crombie acknowledged that he could watch the proceedings live via that service, *id.* at 4, the record does not reflect whether he actually did so.

[38] *Cf. In re Food Ingredients Int'l, Inc.*, 2012 WL 112498, at *1 (Del. Jan. 12, 2012) (ORDER) ("An appellant's pro se status does not excuse a failure to comply strictly with the jurisdictional requirements of Supreme Court Rule 6 [requiring notice of appeal to be filed within 30 days].").

Finally, although Crombie characterizes the seven documents attached to his October 24 letter as "newly discovered,"[39] he failed to demonstrate that, with the exercise of reasonable diligence, he could not have uncovered these documents in time for trial. The first document allegedly "was discovered on October 20, 2011 in the scanner output folder of Crombie's home lap-top computer."[40] Thus, while Crombie only recently realized that he had this document, it was in his possession well before the time of trial. Similarly, Crombie contends that Bloomberg Finance L.P faxed the second through seventh documents to him on October 20, 2011.[41] Yet, he offers no explanation why he could not have requested these documents sooner. The issues for which Crombie seeks to use these documents, authentication of a trading relationship between Crombie and Richard Breck,[42] have been in this case since the Complaint was filed.[43] Thus, in the exercise of reasonable diligence, Crombie could have unearthed all seven documents in a timely fashion and sought to introduce them before the end of trial.[44] Condoning his failure to do so would not serve the interests of fairness and substantial justice.

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39 Crombie Letter at 1.

40 Def.'s Corrected Post-Trial & Closing Br., D.I. No. 93, at 23 (Oct. 27, 2011).

41 *Id.*

42 Crombie Letter at 1.

43 *See* Compl. ¶¶ 24-25, 29.

44 *Cf. Bata v. Bata*, 170 A.2d 711, 714 (Del. Ch. 1961) (requiring, on motion for reargument, a showing that "exercise of reasonable diligence" could not have led to discovery of new evidence before trial); *Norberg v. Sec. Storage Co. of Wash.*,

In sum, Crombie had ample opportunity to introduce evidence at trial, was on notice that he would not be permitted to submit evidence after trial, and could have introduced the twelve documents now at issue in a timely fashion had he exercised reasonable diligence. For these reasons, I conclude that reopening the record to admit additional evidence is not in the interests of fairness or substantial justice and, therefore, deny Crombie's motion to reopen the record.

III. Crombie's Requests to Disregard Plaintiffs' Post-Trial Brief and for Sanctions

On October 31, 2011, Plaintiffs filed their post-trial brief and certified that they served it on Crombie by U.S. Mail. In a "Response to Plaintiffs' Post-Trial Brief," Crombie alleges, among other things, that he did not receive Plaintiffs' post-trial brief until November 3 and, even then, service was made via email rather than U.S. Mail. "Therefore, Crombie asks that the Court dismiss all documents Plaintiffs submitted to the Court on October 31, 2011 and sanction them appropriately."[45] Plaintiffs have not responded to Crombie's allegations or requests in this regard.

Rule 11(c) provides that the Court, "after notice and a reasonable opportunity to respond, . . . *may*" impose sanctions for misrepresentations made in papers filed with the Court.[46] The imposition of such sanctions, therefore, is wholly discretionary. Here, even

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2002 WL 31821025, at *2 (Del. Ch. Dec. 9, 2002) (footnote omitted) (requiring same showing on motion to admit new evidence after final judgment).

[45] Def.'s Resp. to Pls.' Post-Trial Br., D.I. No. 98, at 1 (Nov. 7, 2011).

[46] Ct. Ch. R. 11(c) (emphasis added).

accepting Crombie's allegations as true, Crombie concedes that Plaintiffs' counsel corrected the error on their own initiative within a few days. Furthermore, the briefing schedule stipulated to by the parties and ordered by the Court does not call for any reply briefs.[47] Thus, Crombie cannot seriously claim to have been prejudiced by a few days delay. Under these circumstances, Crombie's request to disregard Plaintiffs' post-trial brief and for monetary sanctions is without merit and must be denied.

IV. Crombie's Motion for Involuntary Dismissal

On January 4, 2012, Crombie moved for involuntary dismissal and, in support of that motion, filed an affidavit of Mike Trung Nguyen and over one hundred pages of exhibits. Plaintiffs filed an opposition brief on January 9, and Crombie replied on January 20.[48] For the following reasons, that motion is also denied.

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47 D.I. No. 86, at 1 (Oct. 12, 2011).

48 In his reply brief, Crombie argued for the first time that Plaintiffs not only withheld trial exhibits from him, as discussed in Part I, *supra*, but also that Plaintiffs failed to respond to his discovery requests. *See* Reply, D.I. No. 102, ¶ 1. The procedurally proper method to raise discovery disputes is to file a motion to compel discovery. Additionally, to the extent I could construe Crombie's reply brief as a motion to compel, *see supra* note 31, the proper time to raise a discovery dispute is before trial and, ideally, as soon as the issue arises. Here, the pretrial scheduling order, to which the parties stipulated after a teleconference on September 9, 2011, required "[a]ll discovery [to] be completed by September 23, 2011." D.I. No. 64 at 1. Consequently, the proper time for presenting discovery disputes has passed. *Levy v. Stern*, 1996 WL 33170054, at *1 (Del. Ch. Apr. 19, 1996). Therefore, I reject Crombie's argument and attempt to introduce new evidence as untimely.

Court of Chancery Rule 41(b) "is intended as a tool to expedite the course of litigation . . . ."[49] It provides in pertinent part as follows:

> For failure of the plaintiff to prosecute or to comply with these Rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff has completed the presentation of plaintiff's evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The Court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.[50]

Thus, Rule 41(b) may apply where there has been a failure to prosecute, a party has violated court rules or orders, or the plaintiff's evidence is insufficient as a matter of law. Here, Plaintiffs cannot be accused of failure to prosecute; less than six months elapsed between the filing of their Complaint and the start of trial. As to the sufficiency of the evidence, the plain language of Rule 41(b) relates to a motion made after the presentation of the plaintiff's evidence and before the trial is completed. In that regard, the Rule explicitly permits the court to "decline to render any judgment *until the close of all the evidence*." Such an approach is also consistent with the Rule's purpose to promote expediency. But, the trial in this case has concluded. Technically, therefore, Crombie's Rule 41(b) motion premised on insufficiency of evidence is moot. Instead, the Court will

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[49] *Cantor Fitzgerald, L.P. v. Cantor*, 1999 WL 413394, at *9 (Del. Ch. June 15, 1999) (quoting *Weinberger v. UOP, Inc.*, 1980 WL 6425, at *2 (Del. Ch. June 23, 1980)). Although Crombie initially purported to move under Federal Rule of Civil Procedure 41(b), he clarified in his reply brief that he intended to move pursuant to Court of Chancery Rule 41(b). Reply, D.I. No. 102, ¶ 3.

[50] Ct. Ch. R. 41(b).

consider his arguments on the merits of this dispute as part of its review of the post-trial briefing. Accordingly, the only basis upon which Crombie could succeed on his motion to dismiss under Rule 41(b) is by showing that Plaintiffs violated the Rules of this Court or its orders.

Crombie argues that dismissal under Rule 41(b) is warranted because Plaintiffs and their counsel committed fraud on the Court. This Court has held that "only extrinsic fraud will justify dismissal to remedy a fraud on the court, and only where established by clear and convincing evidence."[51] Extrinsic fraud "'affects the integrity and fairness of the judicial process itself,' and includes situations 'where a party is prevented by trick, artifice, or other fraudulent conduct from fairly presenting his claim or defenses or introducing relevant and material evidence.'"[52] Thus, even assuming that Rule 41(b) is the procedurally proper mechanism to assert a claim of fraud on the Court, to succeed on this motion, Crombie must show by clear and convincing evidence that Plaintiffs' and their counsel's conduct unfairly prevented him from presenting his defense.

Crombie has not made such showing. Ultimately, his motion is an attempt to refute Plaintiffs' case and evidence via his own contrary evidence (*i.e.*, the attached exhibits and affidavit). Crombie, however, has presented no clear and convincing evidence that any trick, artifice, or fraud on the part of Plaintiffs prevented him from

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[51] *Postorivo v. AG Paintball Hldgs., Inc.*, 2008 WL 3876199, at *21 (Del. Ch. Aug. 20, 2008).

[52] *Id.* (quoting *Smith v. Williams*, 2007 WL 2193748, at *5 (Del. Super. July 27, 2007)).

arguing his defense in his pre- and post-trial briefs. Moreover, even if Crombie's belatedly proffered exhibits and affidavit were admissible,[53] the mere fact that the opposing sides to a lawsuit presented conflicting evidence does not show clearly and convincingly that one side must have committed a fraud on the court.

For all of these reasons, I deny Crombie's motion for involuntary dismissal under Rule 41(b) in its entirety.

V. Conclusion

For the foregoing reasons, I hereby:

(1) Overrule in part and sustain in part Crombie's various objections to a number of Plaintiffs' Trial Exhibits as indicated in Part I, *supra*;

(2) Deny Crombie's motion to reopen the record and admit additional evidence as discussed in Part II, *supra*;

(3) Deny Crombie's request that the Court disregard Plaintiffs' post-trial brief and award sanctions against them, *see* Part III, *supra*; and

(4) Deny Crombie's recent motion for involuntary dismissal as stated in Part IV, *supra.*

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[53] For the reasons discussed in Part II, *supra*, those documents are not admissible. Also as discussed *supra*, the exhibits attached to Crombie's motion and Ngyuen's affidavit are not "newly discovered" within the meaning of Delaware law. Even if Crombie just received those documents, as he asserts, he has not shown that he could not have obtained them earlier, from Ngyuen or anyone else, in the exercise of reasonable diligence. *See* Reply, D.I. No. 102, ¶ 11.

Furthermore, because I perceive no useful purpose to be served by scheduling a post-trial argument in this case,[54] especially by telephone as presumably would be necessary, no argument will be scheduled. Instead, I consider this matter fully submitted and ripe for a final determination on the merits.

IT IS SO ORDERED.

[54] *See* Trial Tr. 504-05.