COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Date Submitted: June 20, 2012
Date Decided: July 20, 2012

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Re: *Frank C. Whittington, II v. Dragon Group, LLC*
Civil Action No. 2291-VCP

Dear Counsel:

This Letter Opinion addresses another dispute in the ongoing saga between Plaintiff, Frank Whittington, II, and the rest of his family, members of Defendant Dragon Group, LLC ("Dragon Group" or the "Company"). Litigation between these parties has dragged on in some form or another for more than a decade, and, regrettably, this Letter Opinion is unlikely to be the last chapter.

Currently at issue is whether the post-trial record in this action should be reopened to allow Defendants to submit supplemental evidence and whether the Court should reconsider the sufficiency of the evidence on which it based its May 25, 2012 Letter Opinion (the "May 25 Letter Opinion").[1] In support of their Combined Motions for Reconsideration and to Supplement the Record (the "Motion"), Defendants assert that they possess potentially outcome-dispositive evidence that could result in a reversal of the rulings in the May 25 Letter Opinion. Defendants also contend that the Court failed to accord sufficient weight to purportedly dispositive evidence already in the record that supported their position.

Having considered Defendants' arguments, I conclude that, with the exception of one stipulated correction to the award granted in the May 25 Letter Opinion, Defendants' Motion should be denied. Defendants have not demonstrated a sufficient basis for reopening the record and their motion for reconsideration largely recycles arguments made during the accounting phase of this litigation that I already have rejected. Therefore, for the reasons stated herein, with one exception, I deny Defendants' Motion.

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[1] *Whittington v. Dragon Gp., LLC*, 2012 WL 2052792 (Del. Ch. May 25, 2012).

I. Motion to Supplement the Record

A. Background

On April 15, 2011, I issued a final decision on the merits in this action (the "Opinion") in which I held, among other things, that Frank was a member of Dragon Group, he owned an 18.81% interest in the Company, and he was entitled to his share of any previous distributions made by the Company to the other members. Although I determined in the Opinion that Frank was entitled to at least $162,175.10 plus prejudgment interest from previous distributions, I also ordered an independent accounting of the financial records of Dragon Group to determine if Frank was entitled to any other distributions.[2] The parties chose Michael D. Wollaston of the accounting firm Belfint Lyons & Shuman ("BL&S") to conduct the independent accounting. As part of the accounting, Wollaston requested additional information from Defendants regarding the books and records of Dragon Group. The Company responded by producing additional documentation to Wollaston on September 14, 2011.

On October 19, 2011, Wollaston issued his report (the "Final Accounting"). In the Final Accounting, Wollaston determined that Frank was entitled to total distributions in the amount of $396,195 and that Frank should have a capital account with Dragon Group

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[2] Order ¶ 6, Docket Item ("D.I.") 245 (May 11, 2011).

of $7,352.[3] Relevant to Defendants' present Motion, Wollaston also concluded in the Final Accounting that Dragon Group had not provided sufficient documentation regarding the disposition of $478,000 from two deposits the Company had received (the "Deposits").

Frank filed a challenge to the Final Accounting on November 11, 2011. In his challenge, Frank claimed that the insufficiently documented Deposits, which totaled $478,000, should be treated as if they were distributed to the other members of Dragon Group and that he should receive his pro rata share of that amount. Defendants responded to Frank's challenge on November 18, asserting that "[s]ufficient supporting documentation for these transactions d[id] in fact exist" and that the "Company [was] collecting the backup materials—namely invoices and disbursement checks—relating to the transactions at issue and will produce them to Plaintiff expeditiously."[4]

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[3] Specifically, the Final Accounting indicated that Frank was entitled to total distributions of $409,096 and was required to make a contribution of $12,931. The Final Accounting did not state explicitly whether the $396,195 net figure included the $162,175.10 the Court previously awarded. In the May 25 Letter Opinion, the Court erroneously assumed that net amount did not include the $162,175.10 amount. As recited *infra* Part II.A the parties have stipulated to the correction of that item.

[4] Defs.' Reply Submission Regarding the Independent Accountant's Report ¶ 11.

The Court scheduled a post-trial hearing for January 26, 2012 (the "Hearing") to consider the issues raised by Frank's challenge to the Final Accounting. In the lead-up to the Hearing, Defendants provided Frank and Wollaston with additional evidence on January 3, 2012 and January 17, allegedly documenting the expenditure of the Deposits.

At the Hearing, I determined that, despite Defendants additional production, the evidence presented was insufficient to document the disposition of the Deposits because Defendants failed to include sufficient third-party verification of the alleged expenses. Dragon Group's accountant, Laurie Mason, testified, however, that, although Defendants had not provided it previously, she was in possession of all backup documentation, including canceled checks, necessary to document the Deposits conclusively.[5] Mason further offered to provide that documentation to Frank after the Hearing.[6]

Relying on Mason's testimony, I informed the parties at the conclusion of the Hearing that "I [was] convinced that we [didn't] have the proofs yet at the level that I would want, and it [was] significant that Ms. Mason ha[d] said several times that she

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[5] Jan. 26, 2012 Hr'g Tr. ("Tr.") 143. Mason also acknowledged that there was no documentation for the approximately $240,000 that allegedly was transferred to Whittington, Ltd. as a result of an accounting error. Tr. 127.

[6] Tr. 142.

thinks she has canceled checks and whatnot."[7] I then ordered Defendants to turn over to Plaintiff within five business days any additional evidence they had documenting the disposition of the Deposits.[8] Defendants claim they complied with the Court's instructions by emailing Frank copies of cancelled checks, deposit slips, bank statements, and other backup material on February 2, 2012.[9]

At the conclusion of the Hearing, I also directed the parties to submit post-hearing briefs. The parties agreed to submit simultaneous opening and reply briefs with reference to the Hearing on the challenges to the Final Accounting on February 17 and February 24, 2012, respectively.[10]

In both his briefs, Frank continued to contest the sufficiency of Defendants' documentation as to the Deposits.[11] In response to Plaintiff's refusal to concede the

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[7] Tr. 148.

[8] *Id.*

[9] Defs.' Br. in Support of their Combined Mot. for Reconsideration and to Supplement the Record ("Defs.' Mot. Br.") 6.

[10] Stipulated Briefing Schedule, D.I. 269 (Feb. 1, 2012).

[11] Pl.'s Post-Hr'g Opening Br. 8-9; Pl.'s Post-Hr'g Ans. Br. 3.

sufficiency of their documentation, Defendants stated in their post-hearing reply brief that:

> On February 2, 2012, over two weeks before Plaintiff filed his opening papers, the Company furnished Plaintiff and the independent accounting firm all outstanding documentation detailing the deposits that are the subject of Plaintiff's challenge. Yet Plaintiff makes no mention of this supplemental information—much less contend that the latest information is deficient in some respect. There is no excuse for this failure and Defendants submit that, as a matter of fact, the supplemental information sufficiently details the two transactions at issue.[12]

Defendants made no effort, however, to submit the supplemental documentation to the Court, even though they easily could have done so by attaching the documents as exhibits to their brief or to a motion requesting leave to put them in the record.

In the May 25 Letter Opinion deciding Frank's challenges to the Final Accounting, I found that Defendants failed to provide sufficient documentation regarding the disposition of the Deposits. In so ruling, I expressly acknowledged that "[a]lthough I am loath to reject Defendants' claims on what is allegedly an incomplete record,

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[12] Defs.' Post-Hr'g Ans. Br. 6.

Defendants have had multiple opportunities to submit the necessary documentation to this Court and have failed to do so."[13]

On June 4, 2012, Defendants filed the pending Motion seeking to submit the supplemental evidence allegedly produced to Frank on February 2. Defendants seek to excuse their earlier failure to provide the supplemental evidence to the Court by characterizing it as the result of "justifiable confusion or, at worst, excusable neglect" and asserting that allowing them to supplement the record now with potentially outcome-dispositive evidence would serve the interests of fairness and substantial justice without materially prejudicing Frank. According to Defendants, they reasonably misinterpreted this Court's statement at the end of the Hearing that these proceedings were "not an exercise on the part of this Court to go back through every single transaction that's been done by Dragon Group and Whittington, Ltd. and see about everything being right or wrong or whatever in their books . . . ."[14] as expressing a preference that Defendants not submit their allegedly outcome-dispositive evidence to the Court.

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[13] *Whittington*, 2012 WL 2052792, at *5.

[14] Tr. 147-48.

B. Analysis

There is no express rule governing motions to reopen the evidentiary record after the close of evidence, but before entry of a final judgment.[15] Instead, such matters are left to the sound discretion of the Court.[16] Generally, this Court "will allow the introduction of additional evidence when doing so serves the interests of fairness and substantial justice."[17] The factors Delaware courts consider in determining whether to grant a motion to reopen the record include: (1) whether the evidence has come to the moving party's knowledge since the trial[18]; (2) whether the exercise of reasonable diligence would have caused the moving party to discover the evidence for use at trial[19]; (3) whether the evidence is so material and relevant that it will likely change the

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15 *See Vianix Del. LLC v. Nuance Commc'ns, Inc.*, 2011 WL 487588, at *3 (Del. Ch. 2011).

16 *See, e.g.*, *Lola Cars Int'l Ltd. v. Krohn Racing, LLC*, 2010 WL 1818907, at *1 (Del. Ch. Apr. 23, 2010); *Pope Invs. LLC v. Benda Pharm., Inc.*, 2010 WL 3075296, at *1 (Del. Ch. July 26, 2010); *Carlson v. Hallinan*, 925 A.2d 506, 519-20 (Del. Ch. 2006).

17 *Lola Cars Int'l Ltd.*, 2010 WL 1818907, at *1.

18 *Poole v. N.V. Deli Maatschappij*, 257 A.2d 241, 243 (Del. Ch. 1969) (motion to reopen record to conform to appellate court's ruling).

19 *Id.*

outcome[20]; (4) whether the evidence is material and not merely cumulative[21]; (5) whether the moving party has made a timely motion[22]; (6) whether undue prejudice will inure to the nonmoving party[23]; and (7) considerations of judicial economy.[24] Ultimately, however, a motion to reopen turns on the interests of fairness and justice.[25]

Here, it would not serve the interests of fairness, justice, or judicial economy to allow Defendants to supplement the record. This is not a situation where newly discovered evidence warrants reopening the record to avoid undue prejudice. Instead, Defendants have been in possession and aware of this evidence at all relevant times.

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20 *Id.*

21 *Id.*; *See also Procter & Gamble Co. v. Paragon Trade Brands, Inc.*, 15 F. Supp. 2d 406, 409 (D. Del. 1998) (motion for a new trial or, alternatively, to alter or amend the judgment).

22 *Fitzgerald v. Cantor*, 2000 WL 128851, at *2 (Del. Ch. Jan. 10, 2000).

23 *Id.*; *Kahn v. Tremont Corp.*, 1997 WL 689488, at *5 (Del. Ch. Oct. 28, 1997) (motion to reopen record on remand after appellate court shifted burden of proof).

24 *Fitzgerald*, 2000 WL 128851, at *2; *Tremont Corp.*, 1997 WL 689488, at *5; *see also Vianix Del. LLC v. Nuance Commc'ns, Inc.*, 2011 WL 487588, at *3 (Del. Ch. 2011) ("In exercising my discretion in the circumstances of this case, I consider the Rule 60(b)(2) standard for evaluating whether to reopen a judgment to consider newly discovered evidence, though not controlling, to be both analogous and instructive.").

25 *Tremont Corp.*, 1997 WL 689488, at *5.

Defendants try to avoid this fact by arguing that "[t]his is not the typical request to reopen the record" because this evidence was not required at trial.[26] Although undoubtedly not intended to be, this argument is somewhat misleading. This Court did conduct a trial on the merits of the underlying dispute in this action in 2008, and the newly proffered evidence was not required for that trial. After rendering its Opinion on the merits, however, the Court ordered an accounting and established a procedure for handling objections to the accounting. That process resulted in the Final Accounting dated October 12, 2011, and a written objection to it filed by Frank on November 11, 2011, which Defendants opposed on November 18, 2011. Thereafter, I scheduled the January 26, 2012 Hearing at which I accepted evidence and heard witnesses on matters relating to Frank's objections. The "trial" for purposes of the accounting was the Hearing. The newly proffered documents constitute alleged backup for certain expenditures and receipts relevant to the issues raised in connection with the accounting and Frank's challenge to it. In downplaying the late submission of these documents, Defendants ignore the fact that they were asked to produce this evidence, which was in their sole possession and control, on at least three different occasions—in the initial request of Wollaston, after Frank's challenge to the Final Accounting, and after the Hearing.

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[26] Defs.' Mot. Br. 1.

Defendants' failure to timely submit the supplemental evidence could have been avoided through the exercise of reasonable diligence. Defendants were called upon repeatedly to produce such evidence, but failed to do so. Even accepting the proposition that Defendants reasonably expected that their production of documents in September 2011 would be sufficient, it is inexcusable that Defendants evidently did not meaningfully involve Dragon Group's own accountant, Mason, in their efforts to collect and produce relevant documents until approximately ten days before the Hearing, when she acknowledged she was the person "most likely to be able to answer" questions related to the documentation for the Deposits.[27] Furthermore, Defendants received notice of Frank's challenge to the sufficiency of their documentation in mid-November 2011 and of the January 26, 2012 Hearing in late December. Yet, Defendants failed to give Mason adequate notice to prepare properly for the Hearing, thereby squandering an opportunity to timely provide the supplemental evidence and causing Mason to have to acknowledge that, although Dragon Group had the necessary documentation, she could not provide it until after the Hearing.[28] Even then, however, the Court still allowed Defendants to produce the new documents well before they had to file either of their post-hearing briefs.

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[27] Tr. 142.

[28] Tr. 143.

Thus, to the extent any of those documents were important to the resolution of Frank's challenges to the Final Accounting, Defendants had ample opportunity to put them in the record.

I also consider unreasonable Defendants' interpretation of the Court's statement that the proceedings were "not an exercise on the part of this Court to go back through every single transaction that's been done by Dragon Group and Whittington, Ltd. and see about everything being right or wrong or whatever in their books . . . ."[29] as expressing a preference that Defendants not submit their allegedly outcome-dispositive evidence to the Court. Defendants supposedly understood that statement to imply "that the Court did not intend to independently review the backup data, but rather would, consistent with the approach taken leading up to and at the Hearing, evaluate only the parties' specific challenges to the Accounting."[30] This argument is puzzling for several reasons. First, a principal focus of the post-trial proceedings regarding the accounting has been on the sufficiency of Defendants' evidence and their failure to produce documentation from which this Court could verify what happened to the Deposits. Second, although the Court eschewed reviewing *every single transaction* done by Dragon Group and Whittington,

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[29] Tr. 147-48.

[30] Defs.' Mot. Br. 8.

Ltd., that statement cannot reasonably be interpreted to mean that the Court would not examine the handful of transactions that were in dispute for purposes of the Final Accounting. Indeed, the remainder of the Court's comment about not wanting to go through the accuracy of Dragon Group's and Whittington's books as to "every single transaction" supports that conclusion. The remainder of the paragraph Defendants quoted from the transcript states: "I mean, if you want to bring an accounting action for malpractice, I don't care what you do. But this is not what this accounting is intended to get to. What it's intended to get to is whether people on the previous -- the defendants' side got more money handed out to them than they should have such that Mr. Frank Whittington got shortchanged. And if he did, I need to rectify that in some sense."[31] Fairly read, the Court's observations at the Hearing strongly suggest that it considered the evidence that had been presented by Dragon Group as of the end of the Hearing to be insufficient to enable the Court to rule in Defendants' favor.[32]

Moreover, even if I were to accept Defendants' interpretation of the Court's remarks as reasonable, that would not excuse their failure to submit their supplemental evidence after Frank refused to acknowledge the sufficiency of their evidence in his post-

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[31] Tr. 147.

[32] *See, e.g.*, Tr. 147-48.

hearing briefs. Defendants' contention that Frank did not, and has not, challenged the sufficiency of their supplemental evidence ignores the plain language of Frank's briefs. Frank dedicated two pages of his opening brief to contesting the sufficiency of Defendants' evidence, claiming that "[b]ecause Defendants are unable to sufficiently account for the expenditure of $478,000, Plaintiff should be awarded his proportionate share."[33] Likewise, in his post-hearing answering brief, Frank reiterated the argument he made in his opening brief, stating that "Defendants have lots of excuses but have not been able to sufficiently account for the expenditure of $478,000."[34] Both these briefs were filed after Defendants had provided Frank with their supplemental evidence. Consequently, Defendants knew that Frank continued to dispute the sufficiency of their evidence, albeit without specifically addressing any of the supplemental documents he received. As a result, the issue was joined and this Court would have to resolve it based on the evidence of record. In this context, Defendants had a full and fair opportunity to respond to Frank's arguments by submitting their supplemental evidence in conjunction with their post-hearing briefs. Perhaps their failure to provide that evidence reflected a tactical decision. In any event, I find that this is not a case of excusable neglect.

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[33] Pl.'s Post-Hr'g Opening Br. 8-9.

[34] Pl.'s Post-Hr'g Ans. Br. 3.

Finally, it is important that this litigation come to a final resolution soon. The Order appointing Wollaston to perform the accounting was entered on June 28, 2011, more than one year ago, yet there still is no final judgment. As I stated in the May 25 Letter Opinion, I am loathe to decide this aspect of the challenge to the Final Accounting with an allegedly incomplete record. Nevertheless, Defendants have had more than an ample opportunity to provide the appropriate documentation during the accounting process itself, at the Hearing on January 26, 2012, and in the two rounds of post-hearing briefing. Therefore, I deny Defendants' motion to supplement the record.

II. Motion for Reargument

Defendants also have moved for reargument, claiming that the Court (1) improperly failed to credit the testimony of the independent accountant supporting a finding that the Company provided backup documentation substantiating roughly half of the amount in controversy, (2) overlooked the fact that the "accounting error" which allegedly transferred funds from Dragon Group to Whittington, Ltd. did not cause a unique injury to Frank, and (3) erred in awarding Frank an additional $396,165 on top of the $162,175.10 awarded in the Opinion.

The standard applicable to a motion for reargument is well settled. To obtain reargument, the moving party has the burden to demonstrate either that the Court has overlooked a controlling decision or principle of law that would have controlling effect or

has misapprehended the facts or the law such that the outcome of the decision would be different.[35] A misapprehension of the facts or the law must be both material and outcome determinative of the earlier litigation for the movant to prevail.[36] Moreover, "[r]eargument under Court of Chancery Rule 59(f) is only available to re-examine the existing record; therefore, new evidence generally will not be considered on a Rule 59(f) motion."[37] As such, motions for reargument must be denied when a party merely restates its prior arguments.[38]

A. Plaintiff's Award Should Be Reduced By $162,175.10

As an initial matter, both parties agree that the Court's ruling in the May 25 Letter Opinion should be adjusted to reflect the fact that the $396,165 the independent accountant determined is owed to Frank includes the $162,175.10 awarded in the Court's April 15, 2011 Opinion. Therefore, I grant Defendants' motion as to this issue and

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35 *See, e.g.*, *Medek v. Medek*, 2009 WL 2225994, at *1 (Del. Ch. July 27, 2009); *Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007); *Nevins v. Bryan*, 2006 WL 205064, at *2 (Del. Ch. Jan. 20, 2006).

36 *See, e.g.*, *Aizupitis v. Atkins*, 2010 WL 318264, at *1 (Del. Ch. Jan. 27, 2010); *Medek*, 2009 WL 2225994, at *1; *Serv. Corp. of Westover Hills v. Guzzetta*, 2008 WL 5459249, at *1 (Del. Ch. Dec. 22, 2008).

37 *Reserves Dev. LLC*, 2007 WL 4644708, at *1; *Nevins*, 2006 WL 205064, at *3.

38 *Guzzetta*, 2008 WL 5459249, at *1; *Reserves Dev. LLC*, 2007 WL 4644708, at *1; *Nevins*, 2006 WL 205064, at *3.

reduce the net distribution awarded to Plaintiff in the May 25 Letter Opinion from $558,340.10 to $396,165, plus prejudgment interest.

B. The Sufficiency of Evidence Supporting $238,600 of the $478,000

Defendants' further contention that the Court erred in finding that Defendants did not sufficiently account for any of the $478,000 in the Deposits is not persuasive. Defendants' argument on this point essentially boils down to a contention that dispositive weight should have been given to the testimony of Dave Jennings, a representative of BL&S, who testified that there was sufficient documentation for approximately $238,600 from the Deposits. In the context of Plaintiff's objection, however, this Court, as the finder of fact, is not bound to accept an expert's conclusions as controlling. Instead, it is the role of the Court to determine whether the expert's testimony is reliable and whether it sufficiently supports the proposition for which it is being offered.[39]

On this issue, Defendants do not contend that the Court misapprehended the law, but rather that it misapprehended the facts such that the outcome would have been different otherwise. The May 25 Letter Opinion discusses at length the Court's reasons for rejecting Defendants' argument in the first place. Importantly, in reaching its

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[39] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 521 (Del. 1999) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) (quotation marks omitted)).

conclusion, the Court considered all the available evidence, including the direct and cross examination of Jennings, as well as the inadequacy of the documentation provided by Dragon Group. In contrast, Defendants focus almost exclusively on the importance of Jennings and portions of his testimony and attempt to excuse his failure to look at Whittington, Ltd.'s books because BL&S allegedly did not consider that to be part of the agreed-upon procedures of engagement. The latter point lacks merit because, among other things, the evidence showed that certain aspects of Whittington, Ltd.'s books would be highly relevant in attempting to overcome certain inadequacies and mistakes in the documentation provided by Dragon Group. A number of the challenged expenditures by Dragon Group involved payments to Whittington, Ltd. or alleged entries on its books mistakenly crediting Whittington, Ltd. with income. In this context, I found it significant that Jennings had arrived at his conclusions without reviewing any third-party confirmatory evidence or the books of Whittington, Ltd.[40] Therefore, Defendants effectively seek another bite at the apple by rehashing their argument that the evidence presented should have been weighted differently, in favor of an outcome to their benefit.

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[40] *See Whittington*, 2012 WL 2052792, at *5 ("Jennings did not satisfactorily explain why he came to believe that the mortgage payment had been made and he evidently did not rely on any third-party evidence or even the books of Whittington, Ltd. in reaching that conclusion."), *13; Tr. 45.

Because that is not an appropriate basis for reargument, I deny Defendants' Motion as to the sufficiency of the evidence supporting $238,600 of the disputed $478,000.

C. Whether Plaintiff Suffered a Unique Harm

Finally, Defendants' Motion asserts that the Court overlooked their contention that Frank did not suffer a unique injury as a result of the alleged accounting error involving Dragon Group and Whittington, Ltd. Defendants claim that "[t]he record establishes that about half of the $478,000 in question was attributable to an accounting error involving $240,000 of income incorrectly booked to [Whittington, Ltd.] rather than Dragon Group."[41] This is incorrect. In the May 25 Letter Opinion, I expressly held that "Defendants have failed to present sufficient confirmatory evidence in support of their contention that the remaining $239,403.45 erroneously was recorded as income on the books of Whittington, Ltd."[42] Having determined, as an initial matter, that Defendants failed to establish that the missing $239,403.45, in fact, was transferred to Whittington, Ltd., I had no need to consider whether Frank would have suffered a unique harm if it had been. Once again, Defendants failed to provide sufficient documentation as to what happened to the money in question. Accordingly, I also deny this aspect of Defendants' Motion.

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[41] Defs.' Mot. Br. 16.

[42] *Whittington*, 2012 WL 2052792, at *5.

III. Conclusion

For the reasons stated, I deny Defendants' Combined Motion for Reconsideration and to Supplement the Record in all respects, except that I grant Defendants' motion for reconsideration relating to the total amount of distributions owed to Frank and reduce the total amount of net distributions awarded to Frank in the May 25 Letter Opinion from $558,340.10 to $396,165, plus prejudgment interest. Plaintiff's counsel shall submit, on notice, within five (5) days of the date of this Letter Opinion, an appropriate form of judgment reflecting these rulings and conforming to the agreed upon format referenced in the letter of Ms. Evans to the Court of July 2, 2012.

IT IS SO ORDERED.

Sincerely,

/s/ Donald F. Parsons, Jr.

Donald F. Parsons, Jr.
Vice Chancellor