UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 9:20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a/ PAR FUNDING, et al.,

Defendants
______________________________________/

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S RESPONSE OPPOSING DEFENDANT JOSEPH COLE BARLETA'S MOTION TO STAY EXECUTION OF JUDGMENT PENDING APPEAL

I. INTRODUCTION

The Court should deny Defendant Joseph Cole Barleta's ("Cole") Motion to stay execution of the Final Judgment against him pending an appeal. The essential bases of Cole's motion to stay are alleged errors in the Court's Order calculating disgorgement and determining an appropriate monetary penalty, which Cole asserts amount to a meritorious appeal. Cole fails to meet his burden of demonstrating that any of the supposed errors are likely to lead to a meritorious appeal. Further, Cole admits that if the Court denies his request for a stay the prejudice to Cole would be minimal, makes nothing more than a flippant argument that the Commission will not be prejudiced by an appeal, and fails to demonstrate that a stay would serve the public interest.

Additionally, Cole seeks a stay pursuant to Federal Rule of Civil Procedure 62(d), offering that the assets of a company called Capital Source 2000, Inc. ("CS 2000") in the Receivership can secure the Commission's rights to the disgorgement and civil money penalty entered against Cole. As Cole is aware, the Receiver is releasing CS 2000 from the Receivership because discovery

revealed that the CS 2000 received less money than it paid to Complete Business Solutions Group ("CBSG"), CS 2000 is co-owned by a third party who is not represented in this case, and CS 2000 has more than 100 investors who invested in CS 2000 promissory notes through securities offerings. As such, the Receiver is currently negotiating an agreement with Cole and the co-owner of CS 2000 for the release of CS 2000 from the Receivership.

The balance of equities weighs against staying the proceedings below because such a delay would likely result in further harm to the victims of the fraud, who have already been waiting years for the return of their funds. In these circumstances, a stay is not warranted.

II. STANDARD FOR PREVAILING ON A MOTION TO STAY PENDING APPEAL

The standard for prevailing in a motion to stay an order pending appeal was set forth by the U.S. Supreme Court in *Hilton v. Braunskill*, 481 U.S. 770, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987). In that case, the Court held that while different rules of procedure govern the power of the district courts and courts of appeal [See F.R.Civ.P. 62 and F.R.App.P. 8(a)], under both rules, the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id*. at 776. *See also Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

III. COLE FAILS TO MEET HIS BURDEN

A. Cole Fails to Demonstrate the Likelihood of Success on Appeal[1]

1. Disgorgement

[1] This response brief should not be construed to limit in any way the arguments the Commission may make during the appeal.

First, Cole has not met his burden of demonstrating that he is likely to succeed on the merits of his appeal and relies on evidence and argument he failed to raise before this Court. The Eleventh Circuit will review for abuse of discretion a district court's calculation of disgorgement. *See SEC v. Monterosso*, 756 F.3d 1326, 1337 (11th Cir. 2014). On appeal, Cole intends to argue that the Court erred in ordering Cole to disgorge his compensation and funds received by New Field Ventures, Inc. ("New Field"), and failing to reduce disgorgement by the amount of taxes Cole paid [ECF No. 1460 at 17-22].

Cole's arguments center on arguments about the evidence in the case and the bases for the Court's decisions. Specifically, he argues that "what the Court did was, assume true, the allegations contained in the SEC's complaint [but] . . . nothing in the Consent Decree of Joseph Cole Barleta even closely functions as an admission. Specifically, Cole does not admit or deny any of the allegations in the complaint except for jurisdictional allegations." [ECF No. 1460 at 29]. However, this is simply wrong. Cole entered into a Consent Judgment pursuant to which the Court is to accept the allegations of the Amended Complaint as true for purposes of ruling on remedies. Cole's entire motion to stay seems to be predicated on this factual inaccuracy.

Cole argues that the Court erred in ordering Cole to disgorge the compensation he received from Par Funding "[b] ecause the SEC has not shown any evidence that Cole acted with scienter, or individually mislead investors, nor has the SEC shown how Cole's salary pertained to any securities law violation…." [ECF No. 1460 at 17-18, 20]. This argument has no likelihood of success on appeal because pursuant to Cole's Consent in this case, disgorgement was determined based on the allegations of the Amended Complaint being deemed as true [ECF Nos. 1016-1018]. The Complaint alleged that Cole acted with scienter, misled investors, and received compensation for his role]. [ECF No. 119, Amended Complaint]. Further, Cole's argument ignores the evidence

cited in the Court's Order. Under the abuse of discretion standard applied on appeal it is unlikely the Eleventh Circuit will find the Court's factual findings to be clear error, and Cole fails to demonstrate otherwise.

Next, Cole argues that the Court lacked a legal basis for ordering Cole to disgorge a portion of New Field Venture's ill-gotten gains [ECF No. 1460 at 20-21]. This argument ignores the Amended Complaint allegations, which Cole admitted are deemed as true, that Cole received money from New Field Ventures and owned that company with defendant Perry Abbonizio. According to the Judgment to which Cole consented, Cole is barred from arguing facts contrary to the Amended Complaint allegations, and therefore the likelihood of his success on appeal by arguing the allegations are wrong is *de minimus* at best.

Cole also argues that he will likely prevail in his appeal because the Court erred in not deducting the amount Cole paid in taxes because according to Cole this has only occurred in cases where there is a Ponzi scheme [ECF No. 1460 at 21]. This is simply wrong. It is well-established that taxes are not deducted from disgorgement amounts and Cole cites no legal support for his argument that there is a distinction in the law relating to whether the case also involved a Ponzi scheme. *See SEC. v. U.S. Pension Tr. Corp.*, 444 F. App'x 435, 437 (11th Cir. 2011) (holding that no authority requires the court to deduct from the disgorgement figure the amount of ill-gotten gains paid to the government in income tax); *SEC. v. Merch. Cap., LLC*, 486 F. App'x 93, 96 (11th Cir. 2012) (rejecting argument that the district court was required to take into account the amount of income taxes paid). Courts have found that a defendant's tax status is irrelevant to a disgorgement calculation, and the defendant should go to tax authorities, who are in a better position to evaluate his overall tax position. *SEC v. Koenig*, 532 F. Supp. 2d 987, 994 (N.D. Ill. 2007), aff'd in part and remanded on other grounds, 557 F.3d 736 (7th Cir. 2009) (rejecting

argument to deduct taxes, noting that "he may be able to obtain future tax deductions for taxes he previously paid on the ill-gotten gains if he pays the ordered disgorgement[;]" stating [w]e leave tax consequences of this decision for Koenig to work out with the IRS").

In addition, Cole's claim that it would be a matter of first impression to determine if taxes are deducted from a disgorgement amount under *Liu* is simply wrong. *See, e.g., SEC v. Ahmed*, 2021 WL 916266, at *4 (D. Mass. Mar. 10, 2021) (rejecting post-Liu argument to deduct taxes from disgorgement and stating "vague assertions about 'expenses' and 'taxes' are insufficient to demonstrate that the disgorgement figure in the Judgment is not a reasonable approximation of Ahmed's net profits.").

Thus, Cole has not shown that he is likely to succeed on the merits of his appeal. Even if he could, he is not entitled to a stay because he has failed to demonstrate that relief is justified under the remaining factors.

B. Cole Admits That There Is Little Prejudice To Him If The Stay Is Denied

Second, "[a]n injury is 'irreparable' only if it cannot be undone through monetary remedies.... Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987); *see also Transcon. Gas Pipe Line Co. v. 6.04 Acres*, 910 F.3d 1130, 1165 (11th Cir. 2018). Plaintiff claims he would suffer monetary loss by paying disgorgement and a penalty pursuant to the Final Judgment. Even if Respondent incurred financial harm, he could be monetarily remedied if he succeeds on appeal. *See In re Advanced Telecomm. Network, Inc.*, 2011 LEXIS 22844, at *8 (M.D. Fla. Feb. 23, 2011); *SEC v. Marin*, Case No. 19-cv-20493, 2019 WL 13216127 (S.D. Fla. Oct. 25, 2019). In fact, Cole admits that he does not meet this element, arguing in his motion that, "[i]n all candor to the tribunal, . . . there is a little irreparable injury

absent a stay . . . ." [ECF No. 1460 at 22]. Thus, Cole fails to demonstrate the second element for a stay concerning his disgorgement appeal. *See Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (in an injunctive relief setting: "Plaintiffs still have not shown irreparable injury, let alone that the district court clearly abused its discretion in finding no irreparable injury on the record then before it, the denial of the preliminary injunction must be affirmed on that basis alone.").

2. Civil Monetary Penalty

A district court abuses its discretion in setting a penalty amount when it omits a factor "that should be given significant weight," relies heavily on an irrelevant factor, or unreasonably balances the relevant factors. *See In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310 & n.4 (5th Cir. 2008) (en banc). That standard leaves the district court substantial latitude in structuring its decision-making process.

Cole first argues that erred in finding a substantial risk of losses because the Court should have considered whether "investors were appraised of the potential risk." [ECF No. 1460 at 24]. Cole provides no legal support that this is the proper legal framework, and therefore fails to demonstrate that he will succeed on appeal in getting the law changed to include this novel approach to civil penalties where there is no substantial risk of losses if investors are told there is a risk to the investment. Even if Cole were correct, and he is not, this would be but one factor for the Court to consider and it would not necessarily change the Court's finding that third tier penalties are appropriate – nor has Cole even argued that it would.

Next, Cole flippantly claims that teams of accountants and lawyers reviewed and prepared the promissory notes and reports he utilized to engage in the fraudulent conduct. [ECF No. 1460 at 24]. It appears that Cole intends to argue on appeal that the Court erred in not finding reliance on advice of counsel or accountants. However, Cole offers no support whatsoever for this

argument in his motion and does not even articulate how the Court erred in not finding reliance on advice of counsel or experts. Further, the Court cannot have abused its discretion in not accepting arguments Cole failed to present fully when the Final Judgment was litigated.

Additionally, Cole again fails to accept the allegations of the Amended Complaint that support the Court's determination, as he agreed to do in his Consent. And even if these new or additional facts Cole presents in his Motion would have helped the district court assess his scienter, that would answer only a small part of the ultimate question: the appropriate penalty amount. The district court enjoys broad discretion in deciding what was relevant to that inquiry and how much weight to give each factor. Cole's scienter was far from the controlling factor in its analysis, and there is no indication that if Cole had demonstrated reliance on advice of counsel and professionals (which he did not) that this would have outweighed the other factors for setting a penalty amount. Nor does Cole even broach this analysis in his Motion or demonstrate that the Court even rejected these arguments in ruling on the Final Judgment.

Cole's third argument is that he did not testify that CBSG merely broke even, despite the clear testimony he cites in his Motion. [ECF No. 1460 at 25]. Cole fails to demonstrate that there was no substantial risk of losses. Nor can he. He focuses on whether investors actually lost funds (the reality is that the evidence in this case is that investors are currently out more than $250 million in principal alone). However, the standard is *risk of loss*, and no actual loss is required. The nature of the misrepresentations and omissions clearly implicated a substantial risk of losses, as the Court appropriately found. And again, as with all of Court's arguments concerning a penalty, Cole fails to argue let alone demonstrate that the argument – if accepted – would have altered the Court's ultimate decision based on the factors considered when setting a penalty amount.

Cole's fourth argument is that the Court erred in not finding reliance on advice of counsel for the misrepresentations and omissions Cole made to investors. [ECF No. 1460 at 28-30]. However, again Cole ignores the fact that he consented to the Complaint allegations being deemed as true for purposes of setting the disgorgement and penalty figures, and he ignores the evidence presented to the Court. Incredibly, Cole takes issue with the Court deeming the allegations in the Amended Complaint as true and argues that he did not admit the allegations [ECF No. 1460 at 29]. However, Cole consented to a Judgment that explicitly provided that the Court would determine relief based on the Complaint allegations being deemed as true [ECF Nos. 1016-1018].

As with his disgorgement arguments, Cole has utterly failed to demonstrate a likelihood of success on the merits of his civil penalty arguments.

C. The Commission, Which Operates In The Public's Interest, Would be Harmed if a Stay of Judgment Were Entered and It Would Not Be In the Investing Public's Interest to Stay the Final Judgment

The SEC operates in the public interest, so the third and fourth elements of consideration for a stay can be argued as one. "[T]he government's interest is in large part presumed to be the public's interest" in agency enforcement proceedings. *Marin,* 2019 WL 13216127, at *4 (citing *United States v. Rural Elec. Convenience Coop. Co.*, 922 F.2d 429, 440 (7th Cir. 1991); *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1377 (D.C. Cir. 1980)).

The third point of consideration for a stay pending appeal is whether issuance of the stay will substantially injure the other parties interested in the proceeding. The fourth point of consideration, is where the public interest lies. *Hilton v. Braunskill, Id.* at 776. As a practical matter, the injunction in this action seeking the civil enforcement of the federal securities laws was entered by the Court on Cole's Consent in November 2021 and was incorporated into the Final Judgment Cole now seeks to stay [ECF Nos. 1016-1018]. If the Final Judgment were stayed pending appeal, the investing public of the United States would be without the benefit of the full

injunction against Cole. Injunctions are entered in the public interest to prevent violators from repeating their conduct. It is clearly against the public interest to remove that protection. Further, a stay of the Final Judgment would prevent the Commission from collecting the disgorgement and monetary penalty amounts against Cole, which are set to be returned to investors who have already waited years for the return of their funds. It bears reminding that neither Cole nor any other individual defendant is in the Receivership. As to Cole's assertion that the investors can be made whole using the assets in the Receivership and judgments against other Defendants, this is utterly false. The investors lost more than $250 million in principal and the Final Judgments entered to date do not meet that amount. Even if every penny of each judgment is collected, which is highly unlikely, the investors will not be made whole in this case from the disgorgement entered against the various parties.[2]

The public interest lies in deterring securities violations without unnecessary delay and returning the defrauded investors' funds to them. *Marin,* 2019 WL 13216127, at *4. Further, Cole "has failed to show that a stay would serve the public interest." *Id.*

Accordingly, this Court should deny Cole's motion to issue a stay pending appeal.

IV. COLE FAILS TO PRESENT A BOND

Cole asks this Court to deem the assets of CS 2000 in the receivership as a bond securing the Final Judgment against Cole. This argument fails for at least two reasons. First, the

[2] Even more misplaced is Cole's argument that "the Receivership Estate has more than enough assets to cover any disgorgement amount issued by the Court. As such, it is not as if the money is nowhere to be found." [ECF No. 1460 at 23]. Cole lacks a fundamental understanding of how the Receivership and collections work. The funds in the Receivership are held in connection with various *corporate defendants.* The Final Judgment against Cole is not joint and several with any corporate defendant. In the highly unlikely event that the Receivership holds assets exceeding the judgments against the corporate defendants, then those remaining assets are not simply given away to Cole so he can use them to disgorge his own ill-gotten gains.

receivership assets are held in connection with the corporate defendants, and specifically CBSG. Not Cole. Cole is not in the receivership, and the receivership assets are not held in connection with Cole but in connection with the corporate defendants under the plan language of the Receivership order.

Second, CS 2000 is not owned solely by Cole. It is owned by Cole and a third party who is not a party to this case. CS 2000 is a merchant cash advance company that engaged in its own *independent* offering of notes in connection with CS 2000's business and there are more than 100 investors who hold those CS 2000 notes. CS 2000 transferred funds to CBSG in exchange for MCA deals that CBSG did not want to do itself. CS 2000 received less from CBSG than it paid to CBSG for those MCA agreements. The Commission previously (and well before Cole filed the instant motion) advised the Receiver that the Commission will not seek to collect on the Judgment against any corporate Defendant in this case from the proceeds of CS 2000 and that CS 2000 is not appropriately in the Receivership and should be released from the receivership. Even if CS 2000 were properly in the Receivership – and it is not – those assets cannot be used to secure Cole's judgment because, as Cole knows, CS 2000 is not owned solely by him and there are more than 100 investors in CS 2000 who have an interest in that company independent of CBSG or any fact in this case. It is Cole's burden – not the Commission's – to demonstrate that CS 2000 can be used to secure his judgment and he offers nothing while concealing the facts about that company and the investors to whom he and his partner in CS 2000 owe money in connection with investments in CS 2000. As Cole is well aware, Cole and the co-owner of CS 2000 are currently negotiating the logistics for the release of CS 2000 from the Receivership.

Accordingly, for the reasons set forth above, the Court should deny Cole's Motion.

January 9, 2023 Respectfully submitted

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