UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No: 9:20-CV-81205

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

vs.

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

Defendants

REPLY TO SECURITY AND EXCHANGE COMMISSIONS
OPPOSITION TO JOSEPH COLE BARLETA'S MOTION TO STAY

COMES NOW, Defendant JOSEPH COLE BARLETA ("Cole"), by and through his undersigned counsel, writes this instant Reply to the Opposition filed by the Plaintiff, Securities and Exchange Commission ("SEC") pertaining to Cole's Motion for Stay Pending Appeal.

PREABLE AND PROCEDURAL POSTURE OF APPEAL

A. Procedural Posture of the Appeal

From a procedural matter, the appeal that has been filed with the Eleventh Circuit is moving at a quick pace. There is a mandatory mediation between Cole and the SEC on January 30, 2023, with Cole's initial brief on the merits being due on January 30, 2023. There has been no indication that Cole is attempting to procure a stay for the sole purpose of causing a delay, nor does it appear the SEC is indicating that.

B. Overview of SEC's Response and SEC's Misrepresentations to this Court

Cole filed a Motion with incorporated supportive brief with copies amounts of case law, direct citation from various transcripts, and other evidence that was before this Court at the time this Court entered its Final Judgment of Disgorgement. However, statements from the SEC such as, "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" are patently false.

Another falsity is the statement,

> "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."

Even a cursory and half-eyed review of the Consent of Defendant Joseph Cole Barleta shows how untrue the SEC's statement is. First of all, the Consent of Joseph Cole Barleta [D.E. 1016-1] says, exactly:

> Without admitting or denying the allegations of the complaint (except as provided herein in paragraph and except as to personal and subject matter jurisdiction, which Defendant admits), Defendant hereby consents to the entry of the Judgment in the form attached hereto (the "Judgment") and incorporated by reference herein, which, among other things

As such, the very first sentence holds that Cole did not admit to the allegations of the Complaint. As such, when this Court found made various findings in its Final Judgement of Disgorgement citing to no other evidence other than to the SEC's allegations in the Amended Complaint, this was patently inappropriate in light of the ample depositions, declarations, affidavits, and document evidence before the Court. Statements from the Court holding, "Given the allegations in the Amended Complaint, however, some percentage of the New Field distributions must be allocated to Cole" are likewise inappropriate.

Cole went into painstaking detail, citing to the actual record, citing to precedent, and citing to the actual Judgment entered into by this Court. The SEC attempts to unwind all of the well-founded evidence by saying, essentially, the legalistic version of, "Nope. Cole's wrong" without any support. Making matters worse, the SEC has taken the approach of "don't believe your lying eyes" pertaining to both the record evidence and the Consent Decree[1].

SEC ADMITS TO COLE'S REPRESENTATION OF THE STANDARD OF REVIEW

It appears that in the SEC's "Standard for Prevailing On a Motion To Stay Pending Appeal" section, the SEC has admitted that the four prongs of a motion to stay are "factors" and not "elements." Although the SEC cites to generally old case law, as recent as 2016, the Eleventh Circuit has held in *LabMD, Inc. v. FTC*, 678 F. App'x 816, 819 (11th Cir. 2016) that granting a stay that simply maintains the status quo pending appeal "is appropriate when a serious legal question is presented, when little if any harm

[1] One of the issues to be decided by the Appellate Court is the issue of Vacating the Consent Decree in its entirety. That issue was raised by Defense counsel, and heard during the May 19, 2022 hearing. Defense counsel moved to vacate the consent judgment based on misconduct of the SEC. The Court refused to hear it and stated:

> "The Court is in no way, shape, or form, persuaded that any of the parameters of Rule 60 are remotely satisfied, and I'm not intending to let anyone out of any consent judgment today. So I can tell you, that certainly is not going to happen. I understand that it's alternative relief you're asking for and that you believe that under the several sub provisions under Rule 60, you may trigger what's necessary for such relief. I respectfully disagree that this is in the realm of Rule 60 and hits the extraordinary and compelling requirements we need for relief from judgements, let alone consent judgements."

Obviously, the thrust of the Rule 60 argument was that the SEC acted with falsehood. As stated in Cole's initial Motion to Stay,

> "There was never an attempt to conceal. In fact, the SEC's representation that they were concealing LaForte's identity at this investor dinner when he was specifically introduced by name is a shocking misrepresentation."

will befall other interested persons or the public and when denial of the [stay] would inflict irreparable injury on the movant."

DISGORGEMENT

A. SEC Misinterprets The Consent Decree

The SEC argues that Cole will have little, if any, success on appeal because

> "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. . ."

Cole is sure that the SEC wants to believe that the Consent Decree deemed the allegations of the Amended Complaint as true, but that is not what the Consent Decree states. As articulated below, all the Consent Decree does, generally, is consent to a judgment that the Court will enter an Order that:

> "permanently restrains and enjoins Defendant from violation of Sections 5(a),5(c) and 17(a) of the Securities Act of 1933 ("Securities Act"), and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, and orders that the Court will determine whether to order the Defendant to pay disgorgement, prejudgment interest and a civil penalty and, if so, the amounts thereof;"

The Consent Decree also allows the Court to enter a judgment without an evidentiary hearing. Finally, the Consent Decree allows for the Court to determine issues on the basis of "of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence" [D.E. 1016-1, paragraph 5].

Nothing in the Consent Decree says that the Court is bound by the Amended Complaint, and must accept as true the allegations of the Amended Complaint, ignoring what the deposition transcripts hold.

As such, the SEC's argument of,

> "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."

is misplaced.

The problem that Cole has, generally, is that the Court Order does not cite to anything outside of the Amended Complaint. The Court does not cite to the copious amounts of evidence showing that Cole's duties in any of the Defendant Entities is primarily focused on accounting and human resources; the Court does not cite to, literally, a battalion of professionals advising Cole, and approving everything Cole did[2] [3]. Moreover, the Court, in at least one instance, cited to a measure of damages that is not even alleged in the Amended Complaint. The Court stated, "Given the allegations in the Amended Complaint, however, some percentage of the New Field distributions must be allocated to Cole." However, in allocating "some percentage" to Cole, the Court took an arbitrary number, not supported by the evidence, and not even supported by the Amended Complaint.

[2] SEC seems to ignore the evidence. Cole provided the Court with a list of law firms and accountants. That list, to refresh the Court's recollection, is as followed:

1. Brett Berman of Fox Rothschild
2. Phil Rutledge of Bybel Rutledge
3. Lauren Taylor Wolfe of Fox Rothschild
4. Stephen M. Cohen of Fox Rothschild
5. Norman Valz as in-house counsel, replaced by Cynthia Clark in 2018
6. Rod Ermel Associates out of Colorado Springs (prepared taxes for CBSG and reviewed the KPI Reports that Cole sent out)
7. Lisa Jacobs of DLA Piper
8. Friedman LLP (Accounting firm conducted audit in 2018)
9. Clifton Larson Allen (Accounting firm conducted audit in 2019, also provided guidance on bank purchase transaction)

[3] Militarily speaking, a battalion consists of four to six companies and can include up to 1,000 soldiers. A company can consist of a few dozen to a few hundred soldiers. Cole employed some of the largest and most well-known firms in the United States. Fox Rothschild, alone, has 882 lawyers in various specialists according to their Law.com profile.

The position of the SEC that Cole is "barred" from arguing facts contrary to the Amended Complaint is incorrect and utter nonsense. Cole is not barred from arguing facts contrary to the Amended Complaint that are supported by "declaration, affidavits, excerpts of sworn deposition or investigative testimony, and documentary evidence" [D.E. 1016-1, paragraph 5].

B. Disgorgement Pertaining To Taxes

The SEC cites to case law, claiming that they hold that the taxes are not a deductible expense where there has been no claim or allegation of a Ponzi Scheme. However, the SEC, either intentionally or accidentally, misstates and misapplies the cases they cite too.

1. S*EC v. United States Pension Tr. Corp*., 444 F. App'x 435 (11th Cir. 2011)
    a. This is a case where the defendant made a strange and inconsistent argument where it agreed with the conclusion that it "materially misled potential investors," but that there was no scienter. Essentially saying, "yes, I lied to people, but I didn't know I was lying to people." Cole's position is very different. Cole is stating, "not only did I not lie to people because it was not my job to solicit, but I thought what I was saying is true because it was reviewed by a bunch of professionals."

2. *SEC v. Merch. Cap., LLC*, 486 F. App'x 93, 96 (11th Cir. 2012)
    a. The Court specifically relied on the issue of income taxes pertaining to Ponzi schemes, which has specifically been addressed by this Court, and rejected.
    b. The Court in *Merch. Cap., LLC*., cited to *Donell v. Kowell*, 533 F.3d 762, 779 (9th Cir. 2008) (declining to allow good faith investors in a Ponzi scheme to offset disgorgement by amounts paid in federal income taxes).
    c. As can be seen, the Eleventh Circuit is relying heavily on the taxes should not be deducted in instances of a Ponzi scheme or that the defendants were "con artists." There is no case that holds for an outright ban on tax deductions. The SEC alleged no Civil RICO claims, no mail fraud, and no wire fraud. Not allowing Cole to set-off his tax burden would put the disgorgement in punitive damages territory because it would not constitute a "net profit." See generally *SEC v. First City Fin. Corp*., 890 F.2d 1215, 1233, 281 U.S. App. D.C. 410 (D.C. Cir. 1989), and *SEC v. Grossman*, No. 87 Civ. 1031 (SWK),

1997 U.S. Dist. LEXIS 6225, 1997 WL 231167, at *9 (S.D.N.Y. May 6, 1997))

3. *SEC v. Koenig*, 532 F. Supp. 2d 987, 994 (N.D. Ill. 2007)
    a. The *Koenig* Court did not say, "no tax deductions." The *Koenig* Court stated, "Notably, Koenig did not provide the court with a copy of his 1992 tax return and 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."
    b. Essentially, the *Koenig* Court punted because the taxes could not be determined with any measure of certainty. See similarly *SEC v. Aragon Cap. Mgmt*., 672 F. Supp. 2d 421, 443 (S.D.N.Y. 2009).

4. *United States SEC v. Ahmed*, Civil Action No. 15-cv-13042-ADB, 2021 U.S. Dist. LEXIS 45726, at *9 (D. Mass. Mar. 10, 2021)
    a. The Ahmed case, "Defendants' vague assertions about 'expenses' and 'taxe' are insufficient to demonstrate that the disgorgement figure in the Judgment is not a reasonable approximation of Ahmed's net profits."
        i. Essentially, Ahmed claimed a set-off based on taxes without demonstrating what those taxes were that he paid. This is very different from this case where the taxes paid by Cole are known by the SEC.
    b. Moreover, this is not a post-*Liu* case, as the SEC claims. See *United States SEC v. Ahmed*, Civil Action No. 15-cv-13042-ADB, 2021 U.S. Dist. LEXIS 45726, at *11 n.6 (D. Mass. Mar. 10, 2021)

PREJUDICE TO COLE

The SEC argues that the Court should deny Cole's motion because the injury is not "irreparable" because the issue involved is a money judgment. Although true that the law does not treat the injury to Cole as "irreparable" because it could be "repaired" by an appellate outcome favorable to him, the SEC fails to stand by the standard of review that it already admitted to. The irreparability portion of a motion to stay is not an "element," but merely a factor[4]. As such, the Court is obligated to weigh the factor of likelihood of success on the merits against other factors. As such, although it is clear that

[4] The SEC calls these parts "factors" in their standard of review.

"irreparability" weights against granting a stay, the main factor, such as likelihood of success on the merits, weights in Cole's favor.

ADDRESSING THE CIVIL MONETARY PENALTY

The SEC in its section called "Civil Monetary Penalty" starts on the right track, and then instantly deviates from it. The SEC is correct when it writes, "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). However, the SEC is incorrect when it claims that it was proper for the Court not to consider that the note holders were appraised of the potential risk and that teams of accountants and lawyers reviewed and prepared the promissory notes and KPI reports. The SEC is also incorrect in stating that Cole never argued that position to the Court, and that it is being raised the first time here. Those assertions are simply not true. Not only did Cole consistently and ardently argue that the only information he disseminated were reviewed and prepared by some of the most "brilliant" securities lawyers and accountants that money could buy, but the SEC knew about it because everything that Cole wrote in his Motion to Stay, and everything that Cole will write in his Appellate Brief, was disclosed in discovery and known to the SEC.

Ultimately, the argument of ". . . the Court cannot have abused its discretion in not accepting arguments Cole failed to present fully when the Final Judgment was litigated" has little merit. True, Cole cannot complain that the Court abused its discretion when he failed to present certain arguments. The complaint that Cole has is that he did

present argument, as well as testimony of his reliance on various professionals. In fact, the Court acknowledges this in its final judgment, citing to Cole's deposition:

> "His evidentiary support for this contention consists of his own deposition testimony and a purported agreement between Par Funding and New Field . . ." [D.E. 1432, pg. 27].

As such, Cole provided clear evidence in his own testimony, and in the testimony of others such as Mr. Berman, that Cole acted, at all material times, with professional advice:

> THE WITNESS: And with that objection, I will answer it again, but I did answer it before. I was involved in phone calls with Joe LaForte, Joe Cole and maybe others and Phil Rutledge where that discussion was had with me present on the phone where Phil Rutledge gave them advice as to what needed to be disclosed. (Dep. Tran. Berman, pg. 58; ln. 7-13

This testimony was known to both the SEC and the Court.

To get around the clear evidence that there was no scienter, the SEC falls back to its Amended Complaint saying, "Cole again fails to accept the allegations of the Amended Complaint [as true]. . ." However, again, neither Cole nor the Court is limited to the Amended Complaint and the facts alleged therein. In fact, the Court was already aware of this when it wrote,

> "While this evidence is sufficient to meet the SEC's burden of "reasonable approximation", **the Court must engage in a more fulsome analysis to determine Cole's appropriate disgorgement amount.** [D.E. 1432, pg. 26](emphasis added).

Although it is true that "scienter" was not controlling as to whether to implement disgorgement or not, it was controlling in the tier level of the punitive remedies. Third tier remedies are only available if Cole acted with Fraud (requires scienter), deceit

(requires scienter), manipulation (requires scienter), or deliberate or reckless disregard for the regulatory requirement (requires scienter).

It is clear to see one does not get to tier 3 without scienter. One cannot commit fraud, deceit, or act with disregard if one thinks he is acting correctly based on the advice of professionals. Now, if Cole knew that what he was doing was wrong, but did it anyways, the SEC's position would be correct. However, there is no evidence, except for the allegations of the Amended Complaint, that support the SEC's position. In fact, every document in this case, every deposition in this case, every expert analysis in this case, show that Cole did not make a single move without consulting an accountant or lawyer (on many times multiple accountants and lawyers). As such, the SEC misplaces the importance of scienter.

Pertaining to "risk of loss," the SEC has fails to mention that what is required is "substantial losses" or "significant risk of substantial losses." In this, the SEC is forced to admit that there were no actual losses and the company. Although the company went through some rough periods during COVID-19, it was generally in fair financial condition. According to Melissa Davis, this activity generated $478,332,407.00 in revenue in addition to the 1.3 billion dollars funded to CBSG's clients. This also does not consider that after funding and receiving 1.3 billion dollars CBSG still had an additional 24 million dollars in cash and was owed 399 million in accounts receivables when the company was seized by the SEC. After all of the accounting is said and done, the CBSG entity had a positive delta of over a billion dollars. With that accounting in mind, there was no actual loss, nor was there a significant risk of substantial loss greater than any other investment that puts money "at risk."

PUBLIC'S INTEREST AND BOND

The issue of the Public Interest and Bond go hand-in-hand. The goal of the SEC in this case, as they have stated multiple times, is to secure money for the various note holders. The vast majority of that money to be repaid will not come from Cole, or any of Cole's entities. In a typical SEC case where there is not enough money to go around, this is a case with more than enough money to pay the judgment, including the punitive elements of the judgment.

Next, one should look at Cole's actual judgment, which is $12,140,150.30. Looking at Exhibit B of the Motion to Stay, which was obtained by the Receiver in this case, there is a potential net positive assets in CS2000 of $30,000,000.00. The SEC is correct that Cole does not own 100% of CS2000. However, Cole does own 60% of CS2000. 60% of $30,000,000.00 is $18,000,000.00. As such, even if Cole monetizes and liquidates CS2000, takes his roughly $18,000,000.00, he would still have enough money to pay the total judgment amount.

It should be assumed that Cole will continue with the CS2000 business as he is in active negotiations with the Receiver for the return of this entity. Most likely, the Court will either have an Agreed Order on its "desk" regarding the CS2000 entity, and its return to Cole in due time.

As such, if the question is the Public's Interest, and the public is mostly interested in getting their money back that they "lost," surely that is not such a concern in this case as in other SEC cases. Likewise, the stay does not touch the issue of "injunctive relief," which appears to be a red herring in the SEC's ultimate argument.

Finally, the position of

> "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."

is simply not true. The Court found tier three penalties for ALL of the Defendants. As such, the Court not only entered a judgment for the total loss, minus expenses which were legally allowed to be reduced, but also punitive (exemplary) damages and interest. The Receiver has in his control enough real estate, vehicles, watercraft, and watches, to fully and completely cover the Judgment. That is ignoring the fact that tens, if not hundreds, of millions of dollars are being left on the table in Receivables of the various corporate entities.

REMAINING ISSUE

It appears that, at the very least, the SEC has consented to the issue of Cole's salary. In their Response in Opposition, the SEC mentions the term "salary" once, lumping it into the scienter analysis. It appears that the SEC failed to mention a single case cited pertaining to salary. To quote Cole's Motion to Stay:

> The Court cannot require a defendant to disgorge compensation that is NOT tied to unlawful activity. *SEC v. Faulkner*, Civil Action No. 3:16-CV-1735-D, 2021 U.S. Dist. LEXIS 4258, at *20 (N.D. Tex. Jan. 8, 2021); *SEC v. E-Smart Techs., Inc*, 139 F.Supp.3d 170, 189 (D.D.C. 2015) (SEC not entitled to disgorgement of defendant's entire salary when "most of the salary appears to have been earned before the violation at issue."); *SEC v. Levin*, 2015 WL 11199843, at *3 (S.D. Fla. July 15, 2015) (disgorgement of entire salary received in 2008 and 2009 not subject to disgorgement when securities violations did not begin until halfway through 2008); *Liu v. SEC*, 140 S. Ct. 1936, 1956 (2020)(citing *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000 (1878)(rejecting liability for an individual officer who merely acted as an agent of the defendant and received a salary for his work); *Seymour v. McCormick*, 57 U.S. 480, 16 How. 480, 490, 14 L. Ed. 1024 (1854) (rejecting a blanket rule that infringing one component of a machine warranted a remedy measured by the full amounts of the profits earned from the machine); *Mowry v. Whitney*, 81 U.S. 620, 14 Wall. 620, 649, 20 L. Ed.

860 (1872) (vacating an accounting that exceeded the profits from infringement alone).

A responding party waives any opposition to an opponent's argument in one of two ways: Either by expressly conceding a point or by failing to respond to opponent's argument. S.D. Fla. L.R. 7.1(c) (failure to respond to a motion or argument "may be deemed sufficient cause for granting the motion by default"); G*rant v. Miami-Dade Cty*., No. 13-22008-CIV, 2014 U.S. Dist. LEXIS 182583, 2014 WL 7928394, at *9 (S.D. Fla. Dec. 11, 2014).

Although Cole does not want to play “gotch-ya” games with the SEC’s failure to address certain arguments, it is clear that the disgorgement of salary should only be allowed when it can be linked to illicit activity. There is nothing in the record that reflects that Cole’s salary was linked to anything other than his job. There is clear record evidence of Cole acting in furtherance of his job in hiring a team of professionals and acting on their advice.

The SEC fails to point to a single piece of evidence showing how Cole is not entitled to the salary he worked for.

CONCLUSION

It is clear that a stay pertaining to Cole is not only warranted, but is necessary.

Date: January 17, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on December 7, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Andre G. Raikhelson
Andre G. Raikhelson Esq.