

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-13811

Non-Argument Calendar

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

versus

COMPLETE BUSINESS SOLUTIONS GROUP, INC.

d.b.a. Par Funding, et al.,

Defendants,

JOSEPH COLE BARLETA,

a.k.a. Joe Cole,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 9:20-cv-81205-RAR

Before NEWSOM, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

This appeal arises out of a civil action that the SEC brought against Complete Business Solutions Group and its officers for selling unregistered securities. After discovery, the defendant officers—including Joe Cole—consented to a judgment of liability and the issuance of a permanent injunction, with corresponding damages to be determined at a later hearing. By agreement in the Consent Judgment, the district court was to take all allegations in the Amended Complaint as true in that later hearing.

After an evidentiary hearing, the district court entered final judgment against Cole, ordering disgorgement of profits and other civil penalties. Cole appealed that judgment against him, raising three issues. We'll address each in turn. For the reasons explained below, we affirm the district court's judgment on all counts.

I

Cole first contends that we should go back to the beginning and dismiss the Amended Complaint on constitutional grounds—namely, that the SEC conducted an illegal search by basing its

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investigation of CBSG on information provided by a private third party that Cole contends should be considered a state actor.

We need not reach the merits of this claim because Cole consented to judgment as to liability and waived any appeal from the entry of that judgment. “As a general rule, a party has no standing to appeal an order or judgment to which he consented.” *Hofmann v. De Marchena Kaluche & Asociados*, 657 F.3d 1184, 1187 (11th Cir. 2011). Accordingly, Cole cannot now challenge the district court’s denial of his motion to dismiss.

II

Cole next presents two arguments arising out of the damages phase of this case. Cole claims (1) that so-called “[t]hird-tier” penalties were not appropriate because he lacked the necessary scienter and (2) that his salary and related taxes should have been deducted from any disgorgement amount pursuant to *Liu v. SEC*, 140 S. Ct. 1936 (2020). We review a district court’s imposition of remedies for abuse of discretion. *SEC v. Calvo*, 378 F.3d 1211, 1216–17 (11th Cir. 2004) (per curiam). We disagree with Cole on both counts.

First, the district court acted within its discretion in imposing third-tier penalties against Cole. Third-tier penalties—the most severe category of civil penalties available—are allowed when “[1] the violation . . . involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; and . . . [2] such violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.” 15

U.S.C. § 78u(d)(3)(B)(iii)(aa)–(bb) (enumeration added). Cole asserts that neither condition is satisfied.

Cole first contends that he lacked the requisite scienter for “fraud, deceit, [or] manipulation” or acting with “deliberate or reckless disregard” of the securities requirements.¹ The district court concluded that the SEC “set forth sufficient facts, accepted as true, to support a finding of scienter as to Cole.” The Amended Complaint is “replete with examples of Cole’s scienter.”² In one example on which the district court specifically relied—the details of which the parties will understand—“Cole actively assisted in concealing LaForte’s criminal background by ‘providing LaForte with a Par Funding email address bearing the name of his alias, joemack@parfunding.com, and a Par Funding business card for his alias, Joe Macki.’” Because there was adequate evidence of scienter available from the Amended Complaint and the evidentiary hearing,³ the district court did not abuse its discretion in determining that Cole satisfied the scienter requirement of § 78u(d)(3)(B).

¹ Cole “admitted to selling unregistered securities and making a litany of serious misrepresentations to investors in violation of the antifraud provisions of the Securities Act and the Exchange Act.” So his position on appeal is narrow, contesting only his scienter underlying those actions.

² The allegations in the Amended Complaint “shall be accepted as and deemed true by the [district c]ourt” for purposes of a motion for disgorgement or civil penalty—the stage of the case in question.

³ The district court also relied on allegations in the Amended Complaint that “Cole signed an Amended Form D on behalf of Par Funding” that “falsely stated that none of the gross proceeds of the offering would be used for

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Cole further argues that his actions did not result in “substantial losses.” But that’s not the whole statutory requirement. Section 78u(d)(3)(B)(iii)(bb) also contemplates “creat[ing] a significant risk of substantial losses.” Par Funding’s profitability is not sufficient to disprove a risk of substantial losses. The district court did not abuse its discretion in concluding, based on the evidence, that Cole’s actions had created a significant risk of loss. Accordingly, third-tier penalties were an appropriate remedy.

That brings us to Cole’s second damages-related argument—that the district court should have deducted his salary and related taxes from the disgorgement amount. The district court acted within its discretion in declining Cole’s proposed disgorgement deductions. Courts must restrict disgorgement awards to “net profits from wrongdoing after deducting legitimate expenses.” *Liu*, 140 S. Ct. at 1946. That includes deducting “legitimate expenses,” which are “marginal costs incurred in producing the revenues that are subject to disgorgement.” *Id.* at 1950. But when the “entire profit of a business or undertaking results from the wrongful activity,” *id.* at 1945 (quotation omitted), a court can deny deductions that would enrich the beneficiary of the ill-gotten gains.

The district court provided a thorough accounting of Cole’s ownership interests in and disbursements from each company in question. It concluded that Cole’s salary—and related taxes that he paid—came from the company engaged in securities fraud as

payments to executive officers or others listed as related persons, including himself.”

payment for services which furthered that fraud. As the district court put it, there “personal services” charges are “merely wrongful gains under another name.” The district court’s decision to deny Cole’s proposed disgorgement deductions was based on the Amended Complaint, the SEC’s expert report, and the court-appointed receiver’s “analysis of the books and records.” Cole’s assertions that the district court issued a blanket rejection of deductions without considering the evidence is unfounded. And the district court permitted some salary and tax deductions for the other defendants, further undermining Cole’s contention.

Because the district court’s conclusion was grounded in fact, we hold that it did not abuse its discretion in denying Cole’s request to deduct his salary and taxes from the disgorgement amount.

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For those reasons, we hold that Cole cannot challenge the district court’s denial of his motion to dismiss. We further hold that the district court did not abuse its discretion in awarding third-tier penalties or in declining to deduct Cole’s salary and taxes from the disgorgement amount.

AFFIRMED.