FILED
United States Court of Appeals
Tenth Circuit

July 17, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee.

v.

RAPOWER-3, LLC; INTERNATIONAL AUTOMATED SYSTEMS; LTB1; R. GREGORY SHEPARD; NELDON P. JOHNSON,

Defendants - Appellants.

No. 18-4119
(D.C. No. 2:15-CV-00828-DN-EJF)
(D. Utah)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RAPOWER-3, LLC; INTERNATIONAL AUTOMATED SYSTEMS; LTB1; R. GREGORY SHEPARD; NELDON P. JOHNSON,

Defendants - Appellants,

and

HEIDEMAN & ASSOCIATES, re 290 Motion,

Respondent.

No. 18-4150
(D.C. No. 2:15-CV-00828-DN-EJF)
(D. Utah)

ORDER

Before **LUCERO**, **HARTZ**, and **MATHESON**, Circuit Judges.

This matter is before the court on "Appellants' Petition for Hearing [sic]" ("Petition"). The Petition raises only one issue. Relying on the Supreme Court's very recent opinion in *Liu v. SEC*, 140 S.Ct. 1936 (2020), it argues that the district court's disgorgement order was excessive because it was based on gross receipts and "courts must deduct legitimate expenses before ordering disgorgement." *Id.* at 1950. But Petitioners waived this issue by not presenting it in their briefs on appeal.

Petitioners' opening brief on appeal states that disgorgement should "extend[] only to the amount the defendant profited from wrongdoing." Aplt. Br. at 25. But it then states an exception to that rule: "Generally, a defendant is not allowed to deduct business expenses from the disgorgement amount if the business was created and run to defraud investors." *Id.* (internal quotation marks omitted). (This appears to be a broader exception than a similar exception recognized in *Liu*. *See* 140 S.Ct. at 1950 ("when the entire profit of a business or undertaking results from the wrongdoing, a defendant may be denied inequitable deductions such as for personal services" (internal quotation marks omitted))). The only argument made by Petitioners against applying the exception they recognized was that "Plaintiff did not show Defendants intentionally defrauded investors." Aplt. Br. at 25. Our opinion disposed of this argument on the ground that Petitioners had not adequately challenged the sufficiency of evidence of fraud. *See United States v. RaPower-3, LLC*, 960 F.3d 1240, 1251 (10th Cir. 2020). In addition, the petition for rehearing fails to identify any expenses that were not part and parcel of

Petitioners' scheme and should be deducted from the disgorgement order under the standard stated in *Liu*.

Accordingly, Appellants' Petition is DENIED.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk