

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 6223/October 18, 2018

ADMINISTRATIVE PROCEEDING  
File No. 3-16386

---

In the Matter of

TRACI J. ANDERSON, CPA, :  
TIMOTHY W. CARNAHAN, and : ORDER  
CYIOS CORPORATION :

---

The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings, pursuant to Section 8A of the Securities Act of 1933, Sections 4C and 21C of the Securities Exchange Act of 1934, and Rule 102(e) of the Commission’s Rules of Practice on February 13, 2015. Only Timothy W. Carnahan and CYIOS Corporation (Respondents) remain in the proceeding. On December 21, 2015, an Initial Decision (ID) dismissed the proceeding as to Traci J. Anderson, CPA, and imposed various sanctions on Respondents; the ID became the final decision of the Commission as to Anderson. *Traci J. Anderson, CPA*, Initial Decision Release No. 930, 2015 SEC LEXIS 5189 (A.L.J.), *finality order as to Anderson*, Securities Act Release No. 10032, 2016 SEC LEXIS 380 (Feb. 2, 2016). As a result of the Supreme Court’s decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Commission ordered that respondents in pending proceedings, including this one, “be provided with the opportunity for a new hearing before an ALJ who did not previously participate in the matter,” and that “the ALJ shall issue an order directing the parties to submit proposals for the conduct of further proceedings”; the proceeding was reassigned to the undersigned. *Pending Admin. Proc.*, Securities Act Release No. 10536, 2018 SEC LEXIS 2058, at \*2-4 (Aug. 22, 2018) (August 22 Order); Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264 (C.A.L.J. Sept. 12, 2018). The undersigned issued the required order on October 1, 2018. *Traci J. Anderson, CPA*, Admin. Proc. Rulings Release No. 6126, 2018 SEC LEXIS 2705 (October 1 Order).

The October 1 Order recounted the foregoing procedural history and, as required by the Commission’s August 22 Order, ordered the parties “to submit proposals for the conduct of further proceedings” by November 16, 2018. The ordering clause read in full: “Respondents and the Division of Enforcement should submit a joint proposal for the conduct of further proceedings by November 16, 2018. A party who is unable to agree should submit a separate proposal by that date.”

Under consideration is the motion filed by Respondents Carnahan and CYIOS on October 9, 2018, for certification of the October 1 Order for appeal; the Division of Enforcement’s opposition, filed October 12, 2018; and Respondents’ reply, filed October 15, 2018.

Respondents style their motion as pursuant to 28 U.S.C. § 1292(b), which applies to interlocutory appeals of rulings of U.S. District Courts to Courts of Appeal and does not apply to this

administrative proceeding, to which the Commission’s Rules of Practice, 17 C.F.R. §§ 201.100, *et seq.*, apply. The motion will be treated as a motion for certification of ruling for interlocutory review pursuant to 17 C.F.R. § 201.400(c)(2) (Rule 400(c)(2)), which provides, in relevant part:

(c) *Certification Process.* A ruling submitted to the Commission for interlocutory review must be certified in writing by the hearing officer . . . . The hearing officer shall not certify a ruling unless:

...

(2) Upon application by a party, within five days of the hearing officer’s ruling, the hearing officer is of the opinion that:

(i) The ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) An immediate review of the order may materially advance the completion of the proceeding.

Respondents do not address the October 1 Order’s “ruling” – that the parties should submit proposals for the conduct of further proceedings by November 16, 2018. They question the October 1 Order’s description of the history of the proceeding, specifically, the sentence that reads in part: “On December 21, 2015, an Initial Decision (ID) dismissed the proceeding as to Traci J. Anderson, CPA, and imposed various sanctions on Respondents.” Respondents urge that the sentence is incorrect and should be corrected by adding “no ‘Sanctions’ where (sic) imposed – if so, they have been vacated.” Motion at 3. In fact, the ID did impose sanctions on Respondents: a cease-and-desist order, disgorgement, and civil penalties.<sup>1</sup> Respondents’ attention is directed to the Commission’s language in the August 22 Order: “The assigned ALJ shall exercise the full powers conferred by the Commission’s Rules of Practice and the Administrative Procedure Act and shall not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in the matter.” *Pending Admin. Proc.*, 2018 SEC LEXIS 2058, at \*3-4.

In their reply, Respondents question the Division’s statement in its opposition – “This is not a truly unusual case” – pointing to the Chief ALJ’s characterization of the bulk reassignment of more than 150 cases as an “unusual situation” and an article in Law360 describing the personnel who conducted the investigation that led to the institution of this proceeding. Whether or not this case is unusual is not at issue in this proceeding.

---

<sup>1</sup> The sanctions ceased to have any force or effect on January 12, 2016, when Respondents filed a petition for review of the ID. See *Gregory M. Dearlove, CPA*, Exchange Act Release No. 57244, 2008 SEC LEXIS 223, at \*34 n.42 (“The law judge’s opinion ceased to have any force or effect once Dearlove filed his petition for review”) (Jan. 31, 2008), *pet. denied*, 573 F.3d 801 (D.C. Cir. 2009). The August 22 Order “vacated” any prior *Commission* opinion in an affected proceeding. See *Pending Admin. Proc.*, 2018 SEC LEXIS 2058, at \*2. The Commission had not issued any opinion in this proceeding at the time of the August 22 Order; Respondents’ petition for review was pending.

Respondents also urge that an interlocutory review would address the question of “what proceeding was dismissed and to whom . . . and . . . what . . . violations were vacated.” Reply at 2. As stated in the October 1 Order, the ID dismissed the proceeding as to Traci J. Anderson, CPA, which became the final decision of the Commission on February 2, 2016. The time for a putative appeal of that finality order has long since passed. Concerning the allegations against Respondents (Carnahan and CYIOS), their attention is again directed to the Commission’s August 22 Order: “The assigned ALJ shall exercise the full powers conferred by the Commission’s Rules of Practice and the Administrative Procedure Act and *shall not give weight to or otherwise presume the correctness of any prior opinions, orders, or rulings issued in the matter.*” *Pending Admin. Proc.*, 2018 SEC LEXIS 2058, at \*3-4 (emphasis added). The prior opinions, orders, or rulings to be disregarded may include both those which are favorable and those which are unfavorable to Respondents.

Respondents also note that the five year statute of limitations set forth in 28 U.S.C. § 2462 applies to this proceeding. However, the proceeding does not run afoul of 28 U.S.C. § 2462 because it was instituted on February 13, 2015, and the OIP alleges violations occurring within five years of that date. Finally, Respondents urge there is a question of law “as how would the interlocutory appeal process work under the new ALJ appointments.” Reply at 2. The August 22 Order addressed this question: “The assigned ALJ shall exercise the full powers conferred by the Commission’s Rules of Practice” and “[t]he Rules of Practice as amended on July 13, 2016 shall govern all pending proceedings,” with an exception for situations arising in connection with an amended rule as applied to a proceeding instituted prior to the effective date of the amended rule. *Pending Admin. Proc.*, 2018 SEC LEXIS 2058, at \*3-5. Rule 400(c)(2) was not amended. *See* Amendments to the Commission’s Rules of Practice, 81 Fed. Reg. 50,212 (July 29, 2016).

Referring again to the Law360 article, Respondents argue that the Division is prejudiced against them and “singled [them] out . . . from day 1.” Reply at 2. However, the Division is not required to be “uncritical or even . . . neutral” in the investigative process and “the Supreme Court has recognized the propriety of affording Commission staff ‘considerable discretion in determining when and how to investigate’ potential securities law violations.” *Kevin Hall, CPA, Exchange Act Release No. 61162, 2009 SEC LEXIS 4165, at \*78-79 (Dec. 14, 2009) (quoting SEC v. Jerry T. O’Brien, Inc., 467 U.S. 735, 744-45 (1984).*

Respondents’ request for certification of the October 1 Order for interlocutory review patently fails to meet the standards of Rule 400(c) and must be denied. First, they do not even ask for review of the only “ruling” in the October 1 Order – setting a due date for the parties’ proposals for the conduct of further proceedings. Further, the October 1 Order does not even advert to a controlling question of law as to which there is substantial ground for difference of opinion. Additionally, immediate review of the October 1 Order would not materially advance the completion of the proceeding; rather, it would delay it.

IT IS SO ORDERED.

/S/ Carol Fox Foelak  
Carol Fox Foelak  
Administrative Law Judge