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

Administrative Proceedings Rulings
Release No. 6549 / April 24, 2019

Administrative Proceeding
File No. 3-16386

In the Matter of

Traci J. Anderson, CPA, **Timothy W. Carnahan**, and **CYIOS Corporation**

Order Deferring Ruling on, in Part, and Denying, in Part, Respondents' Motion for Ruling on the Pleadings

Respondents Timothy W. Carnahan and CYIOS Corporation move to dismiss all charges in the order instituting proceedings (OIP), which I construe as a motion for a ruling on the pleadings under Commission Rule of Practice 250(a). The Division of Enforcement opposes the motion. For the reasons discussed below, I defer ruling on whether the charges under Section 105(c)(7)(B) of the Sarbanes-Oxley Act of 2002 and Section 17(a)(2) of the Securities Act of 1933 are not pending, subject to further briefing by the parties. The remainder of Respondents' motion is denied.

Background

The OIP alleges claims against Carnahan, CYIOS, and Traci J. Anderson. It alleges that Anderson violated Section 105(c)(7)(B) of the Sarbanes-Oxley Act of 2002,[1] by associating with an issuer—CYIOS—after being barred by the Public Company Accounting Oversight Board from being

[1] Pub. L. 107-204, § 105(c)(7)(B), 116 Stat. 745, 764, *as amended by* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, § 982(f), 124 Stat. 1376, 1929-30 (2010) (codified as amended at 15 U.S.C. § 7215(c)(7)(B)).

associated with a registered public accounting firm.[2] According to the OIP, CYIOS also violated Sarbanes-Oxley Section 105(c)(7)(B) and Carnahan caused CYIOS's violation.[3]

The OIP also alleges that (1) CYIOS violated, and Carnahan caused CYIOS's violations of, Section 17(a)(2) and (3) of the Securities Act of 1933; (2) CYIOS violated, and Carnahan caused CYIOS's violations of, the periodic-reporting requirements found in Section 13(a) of the Securities Exchange Act of 1934 and Exchange Act Rules 13a-1 and 13a-13; (3) Carnahan violated Exchange Act Rule 13a-14 (requiring an issuer's principal executive and principal financial officer to make certain certifications); and (4) Carnahan violated Exchange Act Rule 13a-15(c) (requiring annual evaluation of an issuer's internal control over financial reporting).[4]

The case was previously assigned to Administrative Law Judge Cameron Elliot, who issued an initial decision in December 2015.[5] On retroactivity grounds, Judge Elliot dismissed the charge under Sarbanes-Oxley Section 105(c)(7)(B); held that CYIOS did not violate, and Carnahan did cause CYIOS's violation of, Section 105(c)(7)(B); and dismissed the proceeding as to Anderson.[6] With the exception of the charge under Securities Act Section 17(a)(2), he ruled against Carnahan and CYIOS on the remaining charges and imposed sanctions.[7]

---

[2] OIP ¶ 21. Section 105(c)(7)(B) provides that if the Board bars or suspends any person from associating with a registered public accounting firm, it shall be unlawful for the barred person to associate in an accountancy or a financial management capacity with an issuer, broker, or dealer. It also makes it unlawful for an issuer, broker, or dealer, "that knew, or in the exercise of reasonable care should have known, of such suspension or bar, to permit such an association, without the consent of the Board or the Commission." 15 U.S.C. § 7215(c)(7)(B). According to the OIP, the Board barred Anderson by consent in August 2010. OIP ¶¶ 1, 5.

[3] OIP ¶ 21.

[4] *Id.* ¶¶ 22–25.

[5] *See Traci J. Anderson, CPA*, Initial Decision Release No. 930, 2015 WL 9297356 (ALJ Dec. 21, 2015).

[6] *Id.* at *9–17.

[7] *Id.* at *17–24.

CYIOS and Carnahan petitioned the Commission for review. The Division did not file a cross-petition and thus did not seek review of the decision dismissing the proceeding as to Anderson or the decision that Carnahan and CYIOS were not liable for violating Sarbanes-Oxley Section 105(c)(7)(B) or Securities Act Section 17(a)(2). In February 2016, the Commission granted Respondents' petition[8] and simultaneously issued a notice that the initial decision had "become the final decision of the Commission with respect to" Anderson.[9] In their brief in support of their petition, CYIOS and Carnahan challenged the initial decision's findings and imposition of sanctions.[10] The Division opposed the petition for review and asked the Commission to affirm the initial decision.[11] It noted that it had not appealed Judge Elliot's retroactivity-based rejection of the Sarbanes-Oxley Section 105(c)(7)(B) charge[12] and conceded that it had "not appeal[led] or cross appeal[led]."[13] As to the alleged violations under Securities Act Section 17(a), the Division limited its argument to the Section 17(a)(3) charge and made no argument about the Section 17(a)(2) charge.[14]

While the proceeding was pending before the Commission, the Commission issued an omnibus order ratifying the appointment of its administrative law judges and remanding all cases pending on appeal so that the assigned administrative law judge could reconsider the record in each case and determine whether to ratify all past actions taken.[15] Following remand, the Division urged Judge Elliot to ratify all prior actions and decisions and did not mention the Sarbanes-Oxley Section 105(c)(7)(B) or

---

8 *Timothy W. Carnahan*, Securities Act Release No. 10031, 2016 WL 401944 (Feb. 2, 2016).

9 *Traci J. Anderson*, Securities Act Release No. 10032, 2016 WL 9990696 (Feb. 2, 2016).

10 Br. in Supp. of Pet. for Review (Mar. 2, 2016).

11 Br. in Opp'n to Pet. for Review at 9 (Mar. 31, 2016).

12 *Id.* at 1, n.1.

13 *Id.* at 3.

14 *Id.* at 8–9.

15 *Pending Admin. Proc.*, Securities Act Release No. 10440, 2017 WL 5969234, at *1–2 (Nov. 30, 2017).

Securities Act Section 17(a)(2) charge.[16] In January 2018, Judge Elliot reconsidered the record and ratified all prior actions taken in this proceeding.[17]

After Judge Elliot issued the ratification order, Respondents' appeal resumed and the Commission requested additional briefing "addressing any matters that [the parties] deem pertinent in light of the … ratification order."[18] In its supplemental brief, the Division again urged the Commission to deny Respondents' petition and affirm Judge Elliot's decision, and noted it was relying on its March 2016 brief opposing review.[19]

In August 2018, following the Supreme Court's decision in *Lucia v. SEC*, the Commission remanded all pending cases, ordered that they be reassigned, and directed the newly assigned administrative law judges to give each respondent the opportunity for a new hearing.[20] On remand, this proceeding was reassigned to Administrative Law Judge Carol Fox Foelak, who ordered the parties to submit a joint proposal for the conduct of further proceedings.[21]

Respondents moved to certify Judge Foelak's order to the Commission.[22] She denied Respondents' motion because it did not address her actual "ruling" that the parties submit proposals.[23] Judge Foelak also addressed

---

[16] Br. in Resp. to Resp'ts' Reply Br. and in Supp. of Ratification of All Prior Actions (Jan. 10, 2018).

[17] *Traci J. Anderson*, Admin. Proc. Rulings Release No. 5461, 2018 SEC LEXIS 92 (ALJ Jan. 12, 2018).

[18] *Timothy W. Carnahan*, Securities Act Release No. 10457, 2018 WL 777004 (Feb. 8, 2018).

[19] Br. in Opp'n to Pet. for Review at 2 n.10, 3 (Mar. 12, 2018).

[20] *Pending Admin. Proc.*, Securities Act Release No. 10536, 2018 WL 4003609, at *1 (Aug. 22, 2018); *see also Lucia v. SEC*, 138 S. Ct. 2044 (2018).

[21] *Traci J. Anderson*, Admin. Proc. Rulings Release No. 6126, 2018 SEC LEXIS 2705, at *2 (ALJ Oct. 1, 2018).

[22] *See Traci J. Anderson*, Admin. Proc. Rulings Release No. 6223, 2018 SEC LEXIS 2894, at *3 (ALJ Oct. 18, 2018).

[23] *Id.* at *4, *8.

several misconceptions evident in Respondents' motion.[24] Additionally, she rejected the argument that this proceeding is barred by the five-year statute of limitations.[25] Judge Foelak later denied Respondents' motion for reconsideration and again explained that the statute of limitations does not bar this proceeding.[26]

Instead of filing a proposal for further conduct of this proceeding, Respondents moved in November 2018 to dismiss. The Division filed a timely proposal in November 2018, stating that "[t]he remaining issues are narrow" and relate to whether CYIOS failed to make required periodic filings; whether Carnahan failed to properly evaluate CYIOS's internal control over financial reporting, and, if he did, whether CYIOS made, and Carnahan caused CYIOS to make, materially untrue statements in public filings; and whether Carnahan made inaccurate financial report attestations.[27] The Division's proposal did not address the Sarbanes-Oxley Section 105(c)(7)(B) or Securities Act Section 17(a)(2) charges and did not indicate that either charge remains a live issue.

This case was reassigned to me in early March 2019.[28] During a telephonic prehearing conference, Carnahan argued that the Sarbanes-Oxley Section 105(c) charge is not pending and was dismissed and I told him that he could brief the issue and I would rule on it.[29] Respondents have since moved to dismiss and the Division has filed an opposition.

Discussion

Although Respondents style their motion as a "response to order for revised answer, in alternative, motion to dismiss this case," it is functionally a motion for a ruling on the pleadings. It is therefore governed by Commission Rule of Practice 250(a), which requires me to "accept[] all of the

---

[24] *Id.* at *4–7.

[25] *Id.* at *7; *see* 28 U.S.C. § 2462.

[26] *Traci J. Anderson*, Admin. Proc. Rulings Release No. 6293, 2018 SEC LEXIS 3150 (ALJ Nov. 5, 2018).

[27] Proposal for the Conduct of Further Proceedings at 2 (Nov. 19, 2018).

[28] *Traci J. Anderson*, Admin. Proc. Rulings Release No. 6474, 2019 SEC LEXIS 295 (ALJ Mar. 4, 2019).

[29] *See* Prehearing Tr. 5–10.

non-movant's factual allegations as true and draw[] all reasonable inferences in the non-movant's favor."[30]

1. Respondents move to dismiss the charge under Section 105(c)(7)(B) of the Sarbanes-Oxley Act based on the argument that it was previously dismissed.[31] Given Respondents' pro se status, I construe this argument to encompass the previously dismissed Securities Act Section 17(a)(2) charge as well. If this proceeding were in federal court, Respondents would likely prevail. Under Supreme Court precedent, an appellee must file a cross-appeal in order to "enlarg[e] his own rights" or "lessen[] the rights of" an appellant.[32] In federal court, therefore, the Division's failure to seek review of the initial decision would foreclose any argument on remand that the Sarbanes-Oxley Section 105(c)(7)(B) and Securities Act Section 17(a)(2) charges are still at issue.[33]

---

[30] 17 C.F.R. § 201.250(a). A motion filed under Rule 250(a) must be filed within 14 days after a respondent's answer has been filed. *Id.* Because I gave Respondents until March 28, 2019, to file a new answer, their motion is timely. *See Traci J. Anderson*, Admin. Proc. Rulings Release No. 6510, 2019 SEC LEXIS 531 (ALJ Mar. 18, 2019).

[31] Mot. at 1.

[32] *Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191 (1937); *see Greenlaw v. United States*, 554 U.S. 237, 244–45 (2008) ("[I]t takes a cross-appeal to justify a remedy in favor of an appellee."). The Commission has favorably cited this proposition. *See BDO China Dahua CPA Co.*, Exchange Act Release No. 72134, 2014 WL 1871077, at *4 n.25 (May 9, 2014). Without filing a cross-appeal, an appellee may, however, argue in support of a district court's decision based on any matter appearing in the record, even if his defense of the district court's judgment rests on a ground not mentioned by the district court or "involve[s] an attack upon the [district's court's] reasoning." *Morley Constr. Co.*, 300 U.S. at 191 (quoting *United States v. Am. Ry. Exp. Co.*, 265 U.S. 425, 435 (1924)).

[33] *See Art Midwest Inc. v. Atl. Ltd. P'ship XII*, 742 F.3d 206, 212 (5th Cir. 2014) (holding that failure to file a cross-appeal barred a party on remand from raising claims rejected in first district court proceeding); *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) ("It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.").

Matters are not as clear in Commission proceedings, however.[34] Unlike an Article III appellate court, the Commission may review issues even if neither side files a petition for review.[35] As a matter of practice, however, unless the Division files a petition or cross-petition, the Commission typically will not reverse an initial decision that is favorable to a respondent—it won't "lessen" a respondent's rights—but may review an adverse decision absent a petition from either party if such review will benefit the respondent—it might enlarge a non-petitioning respondent's rights.[36] And no matter which party files a petition for review, the Commission typically will not review those aspects of an initial decision that are favorable to a respondent and that the Division does not challenge.[37]

---

[34] *See Lockert v. U.S. Dep't of Labor*, 867 F.2d 513, 517–18 (9th Cir. 1989) ("There is apparently no authority applying the law of the case doctrine to an administrative proceeding.").

[35] *See* 17 C.F.R. § 201.411(c), (d); *optionsXpress, Inc.*, Exchange Act Release No. 78621, 2016 WL 4413227, at *48 n.201 (Aug. 18, 2016).

[36] *See, e.g.*, *Duane Hamblin Slade*, Investment Advisers Act of 1940 Release No. 4298, 2015 WL 9268719, at *1 (Dec. 21, 2015) ("review[ing] the initial decision for the limited purpose of reviewing and setting aside" two bars imposed in initial decision); *Dian Min Ma*, Exchange Act Release No. 74887, 2015 WL 2088438 (May 6, 2015) (vacating in part, on Commission's own motion, a cease-and-desist order); *Hunter Adams*, Exchange Act Release No. 52859, 2005 WL 3240600 (Nov. 30, 2005) (reviewing on own motion and decreasing disgorgement amounts); *Robert I. Moses*, Exchange Act Release No. 37795, 1996 WL 580130 (Oct. 8, 1996) (reviewing and vacating sanction although neither party sought Commission review).

[37] *See* 17 C.F.R. § 201.411(d); *Donald L. Koch*, Exchange Act Release No. 72179, 2014 WL 1998524, at *3 n.9 (May 16, 2014), *vacated in part on other grounds by Koch v. SEC*, 793 F.3d 147 (D.C. Cir. 2015); *Wheat, First Sec., Inc.*, Exchange Act Release No. 48378, 2003 WL 21990950, at *13 n.65 (Aug. 20, 2003) ("declin[ing]" to consider an issue the Division did not challenge); *Feely & Willcox Asset Mgmt. Corp.*, Exchange Act Release No. 48162, 2003 WL 22680907, at *2 n.8 (July 10, 2003) ("The Division did not appeal this determination, and, consequently, it is not before us on review.... In any event, we are not called upon to resolve the reach of the purported agreement because the Division did not appeal the law judge's finding on the statute of limitations issue."); *Jared Anver Latef*, Exchange Act Release No. 47542, 2003 WL 1344830, at *10 n.40 (Mar. 20, 2003) (holding that, because the Division had not filed a cross-petition, the Commission was "unable" to determine an issue), *pet. denied*, 94 F. App'x 969 (3d Cir. 2004).

The foregoing suggests that when it remanded this proceeding, the Commission did not consider the Sarbanes-Oxley Section 105(c)(7)(B) and Securities Act Section 17(a)(2) charges as live issues. Further, applying *Lucia*'s new hearing remedy in a manner that forces Respondents to defend against the previously dismissed charges not appealed by the Division could raise serious questions about the integrity of these proceedings. *Lucia* fashioned the remedy of a new hearing before a different administrative law judge not only to advance the structural purposes of the Appointments Clause but also to create incentives to raise Appointments Clause challenges.[38] Allowing the Division to revive its claims does nothing to further these aims and may in fact undermine them. Moreover, the Commission's August 22 "order that *respondents* be provided with the opportunity for a new hearing" does not suggest that, if a respondent elects a new hearing, the Division must be allowed to revive claims on which it had previously lost and not appealed.[39]

Given the uncertainty, however, further briefing on these points is appropriate. I direct the Division to submit a supplemental brief by May 8, 2019, addressing whether the Sarbanes-Oxley Section 105(c)(7)(B) and Securities Act Section 17(a)(2) charges are still at issue and if so, *on what authority*. Respondents may file a response by May 22, 2019.[40] I defer ruling on this aspect of Respondents' motion until the conclusion of supplemental briefing.

2. Respondents assert that there is no factual basis for the internal controls charge under Exchange Act Rule 13a-15(c) and that the charge is arbitrary and capricious.[41] They also argue that they never made any false statements and consequently there is no basis for the charge under Securities Act Section 17(a).[42] These conclusory arguments do not present a basis to dismiss.[43]

---

[38] *See* 138 S. Ct. at 2055 n.5.

[39] *Pending Admin. Proc.*, 2018 WL 4003609, at *1 (emphasis added).

[40] Rather than simply stating a preferred conclusion, it would be helpful if the parties survey Commission precedent and explain why that precedent supports the preferred conclusion. Further briefing will be unnecessary, however, if the Division notifies Respondents that it will not pursue the Sarbanes-Oxley Section 105(c)(7)(B) and Securities Act Section 17(a)(2) charges.

[41] Mot. at 1–2.

[42] *Id.* at 4.

Whether or not a factual basis exists for the charges will be determined based on the evidence presented at the hearing.

3. Respondents argue that the statute of limitation bars this action.[44] Because Judge Foelak twice ruled on this argument, Respondents are essentially asking for reconsideration.[45] But they offer no reason for me to reconsider these rulings and I decline to do so.[46] They are free to raise this argument during the hearing and in briefing based on the evidence that is developed.[47]

4. The OIP alleges the following regarding CYIOS's reporting obligations. CYIOS's common stock was registered with the Commission under Exchange Act Section 12(g).[48] Although an issuer with securities registered under Section 12 is required to file annual and quarterly reports, "CYIOS failed to file its 2012 Form 10-K, its 2013 Forms 10-Q and 10-K, and its first quarter 2014 Form 10-Q."[49] In May 2014, CYIOS filed a Form 15-12g, which

---

[43] *See* 17 C.F.R. § 201.250(a) (requiring acceptance of "all of the non-movant's factual allegations as true").

[44] Mot. at 2–3; *see* 28 U.S.C. § 2462.

[45] *See Anderson*, 2018 SEC LEXIS 3150, at *4; *Anderson*, 2018 SEC LEXIS 2894, at *7.

[46] *Cf. KPMG Peat Marwick LLP*, Exchange Act Release No. 44050, 2001 WL 223378, at *1 n.7 (Mar. 8, 2001) (noting that "settled principles of federal court practice establish … that a 'motion for reconsideration should not be used as a vehicle to … reiterate arguments previously made'" (quoting *Z.K. Marine, Inc. v. M/V Archigetis*, 80 F. Supp. 1561, 1563 (S.D. Fla. 1992))).

[47] In making their statute-of-limitations argument, Respondents argue that the Commission has violated their Sixth Amendment right "to face [their] accuser … a computer algorithm dubbed 'RoboCop' which [they] were denied questions about in the prior proceeding." Mot. at 3. But the Sixth Amendment applies, by its terms, only "[i]n … criminal prosecutions." U.S. Const. amend. VI; *see Kevin Hall, CPA*, Exchange Act Release No. 61162, 2009 WL 4809215, at *21 n.90 (Dec. 14, 2009). In any event, Respondents will have the opportunity to present evidence, to refute the Division's evidence, and to call or cross-examine witnesses. I will decide this proceeding based on the evidence presented, without giving any presumptive weight to how the prior hearing was conducted.

[48] OIP ¶ 3.

[49] *Id.* ¶ 11.

terminated the registration of its common stock.[50] Finally, Carnahan was responsible for CYIOS's omissions.[51]

Respondents contend that they were not required to file periodic reports because they meet the requirements of Exchange Act Rule 12h-3.[52] Subsection (a) of Rule 12h-3 gives an issuer meeting the requirements in subsection (b) the opportunity to suspend its reporting obligations by filing a Form 15. But in order to meet the requirements of subsection (b), an issuer seeking to suspend its reporting obligations must be current in its periodic reports.[53] And taking the allegations in the OIP as true for purposes of this order, CYIOS was not current when it filed its Form 15.

Respondents also argue that they did not commit fraud in relation to CYIOS's failure to comply with its filing obligations.[54] But scienter, which encompasses an "intent to deceive, manipulate, or defraud,"[55] is not an element of a charge under Exchange Act Section 13(a) or Rules 13a-1 and 13a-13.[56]

5. Respondents' remaining arguments merit little discussion. They present factual assertions related to alleged interactions with Commission employees in 2014 and 2015.[57] Even assuming their factual assertions are accurate, they are not relevant because, for purposes of this order, I must accept the OIP's factual assertions as true[58] and assertions in motions or briefs are not evidence.[59]

---

50 *Id.*; *see* 17 C.F.R. § 240.12g-4(a).

51 OIP ¶ 11.

52 Mot. at 4; *see* 17 C.F.R. § 240.12h-3.

53 *See* 17 C.F.R. § 240.12h-3(a).

54 Mot. at 4.

55 *Aaron v. SEC*, 446 U.S. 680, 686 n.5 (1980) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976)).

56 *Gateway Int'l Holdings, Inc.*, Exchange Act Release No. 53907, 2006 WL 1506286, at *5 n.28 (May 31, 2006).

57 Mot. at 1–2, 5–6.

58 17 C.F.R. § 201.250(a). For Respondents' benefit, they should note that the requirement that I accept the OIP's factual assertions as true applies in

(continued…)

Respondents argue that by filing what they contend are "arbitrary and capricious statements and claims," the Commission has denied them due process under the Fifth Amendment.[60] But the Due Process Clause requires "notice and an opportunity to be heard."[61] And the OIP and the hearing at which the Division and Respondents will have the opportunity to present evidence will together meet this requirement. The allegations in the OIP are merely contentions that the Division will have the chance to attempt to prove and Respondents will have the chance to attempt to refute. Rather than establishing a due process violation, the OIP's description of the allegations shows that the requisites of due process are being met.

Finally, Respondents argue that the fact that the Commission failed to issue a final decision between February 2016, when it granted their petition for review, and November 30, 2017, when it remanded for reconsideration and ratification, is evidence that Rule of Practice 411(f) applies.[62] But Respondents present nothing to support their speculation that the Commission could not reach agreement on the disposition of their case.

For the reasons stated, I defer ruling on whether the charges under Sarbanes-Oxley Section 105(c)(7)(B) and Securities Act Section 17(a)(2) are

---

the context of motions under Rule 250 and will not apply to my adjudication of this proceeding based on the evidence presented at the hearing.

[59] *See Jupiter v. Ashcroft*, 396 F.3d 487, 491 (1st Cir. 2005); *Keith L. Mohn*, Exchange Act Release No. 42144, 1999 WL 1036827, at *4 n.16 (Nov. 16, 1999).

[60] Mot. at 6.

[61] *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 48 (1993); *see* U.S. Const. amend. V; *Jonathan Feins*, Exchange Act Release No. 41943, 1999 WL 770236, at *7 (Sept. 29, 1999) ("Administrative due process is satisfied where the party against whom the proceeding is brought understands the issues and is afforded a full opportunity to meet the charges during the course of the proceeding.").

[62] Mot. at 6–7. Rule 411(f) provides that if "a majority of participating Commissioners do not agree to a disposition on the merits, the initial decision shall be of no effect, and an order will be issued in accordance with this result." 17 C.F.R. § 201.411(f).

pending, subject to further briefing. The remainder of Respondents' motion is denied.[63]

James E. Grimes
Administrative Law Judge

[63] Because Respondents largely repeat in their current motion the arguments presented in their November 16, 2018, motion to dismiss that was not previously adjudicated, the November motion is denied for the reasons stated in this order.