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

Administrative Proceedings Rulings
Release No. 6650 / August 6, 2019

Administrative Proceeding
File No. 3-16386

In the Matter of

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

Order Drawing Adverse Inferences and Admitting Exhibits

During the hearing in this matter, the Division of Enforcement called Respondent Timothy W. Carnahan to testify.[1] After Carnahan said that he intended to invoke his Fifth Amendment privilege against self-incrimination and refuse to answer questions, I explained to him that in the event he persisted in refusing to answer questions, I could draw an adverse inference based on his refusal.[2] I also explained that I would decide whether to do so based on the parties' briefing on the issue.[3] Following my explanation, Carnahan invoked his Fifth Amendment privilege as to every question Division counsel asked, including questions related to his education and whether he heard the testimony of another witness.[4]

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1 Tr. 69.

2 Tr. 69–75. Carnahan stated that he intended to invoke as to Respondent CYIOS Corporation, as well, apparently as its sole principal. Tr. 74. But CYIOS enjoys no privilege against self-incrimination as it is a corporation, not a sole proprietorship. *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 288–289 (1968); *see also Braswell v. United States*, 487 U.S. 99, 104 (1988). So Carnahan's attempt to invoke on CYIOS's behalf was ineffective.

3 Tr. 75.

4 Tr. 76–100.

After Carnahan testified, I directed the Division to file a motion addressing whether I should draw an adverse inference based on Carnahan's refusal to testify.[5] I also stated that I would base the decision whether to admit Division exhibits 35, 39, 40, and 41—which the Division sought to introduce through its examination of Carnahan—on my determination whether to draw an adverse inference.[6] The Division timely filed its motion; Carnahan did not file an opposition.

Discussion

If a respondent in a Commission administrative proceeding invokes his Fifth Amendment right against self-incrimination and refuses to answer questions, the presiding administrative law judge may exercise discretion to decide whether it is appropriate to draw an adverse inference based on that invocation.[7] The same rule applies in district court.[8] As the Supreme Court has recognized, "[s]ilence is often evidence of the most persuasive character."[9]

In deciding whether to draw an adverse inference in Commission administrative proceedings, an administrative law judge must consider "the nature of the proceeding, how and when the privilege was invoked, and the

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[5] Tr. 95–96, 141–43.

[6] Tr. 136.

[7] *Guy P. Riordan*, Securities Act of 1933 Release No. 9085, 2009 WL 4731397, at *16 (Dec. 11, 2009), *pet. denied*, 627 F.3d 1230 (D.C. Cir. 2010), *abrogated on other grounds by Kokesh v. SEC*, 137 S. Ct. 1635 (2017). A respondent's invocation, standing alone, is not a sufficient basis to determine liability or impose sanctions. *Baxter v. Palmigiano*, 425 U.S. 308, 317 (1976); *see Lefkowitz v. Cunningham*, 431 U.S. 801, 808 n.5 (1977). It can, however, be considered among other factors in reaching a decision on liability and sanctions. *See Lefkowitz*, 431 U.S. at 808 n.5; *Baxter*, 425 U.S. at 319; *see also Daniel R. Lehl*, Securities Act Release No. 8102, 2002 WL 1315552, at *8 n.33 (May 17, 2002) ("A trier of fact in a civil proceeding may draw adverse inferences from a respondent's refusal to testify. Accordingly, where appropriate, we draw such inferences." (internal citation omitted)).

[8] *See Daniels v. Pipefitters' Ass'n Local Union No. 597*, 983 F.2d 800, 802 (7th Cir. 1993); *SEC v. Monterosso*, 746 F. Supp. 2d 1253, 1261–62 (S.D. Fla. 2010).

[9] *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153–54 (1923).

potential harm or prejudice to" the Division.[10] And because a respondent may invoke the Fifth Amendment to "hinder" a proceeding, the Commission has cautioned its administrative law judges to "be especially alert to the danger that the litigant might have invoked the privilege primarily to … gain an unfair strategic advantage over opposing parties."[11]

Having observed the Division's examination of Carnahan and considered the Division's submission, I determine that it is appropriate to draw adverse inferences based on Carnahan's refusal to answer the Division's questions, although I reserve decision on whether an adverse inference is appropriate or necessary for each specific question until I review the parties' post-hearing briefs. First, Carnahan invoked the Fifth Amendment privilege as to all questions without regard to the question or whether there was any possible risk that answering the question might tend to incriminate him. He thus refused to answer background questions about his education and foundational questions such as whether he recalled another witness's testimony, remembered that a document had been previously discussed, or could see what was written in a particular document.[12] Invoking as to all questions, especially as to background and general questions, is improper and tends to show that Carnahan did not fear incrimination but was instead invoking strategically.[13]

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[10] *Riordan*, 2009 WL 4731397, at *16 (quoting *SEC v. DiBella*, No. 3:04-CV-1342, 2007 WL 1395105, at *3 (D. Conn. May 8, 2007)).

[11] *Id.* (quoting *DiBella*, 2007 WL 1395105, at *3) (omission in original); *see United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 84 (2d Cir. 1995) ("Since an assertion of the Fifth Amendment is an effective way to hinder discovery and provides a convenient method for obstructing a proceeding, trial courts must be especially alert to the danger that the litigant might have invoked the privilege primarily to abuse, manipulate or gain an unfair strategic advantage over opposing parties.").

[12] Tr. 71, 76–77, 83, 96.

[13] *See King v. Evans*, No. 13-CV-1937, 2015 WL 5316773, at *3 (N.D. Ill. Sept. 11, 2015) ("Evans' blanket invocation of his Fifth Amendment right in response to questions about his education and background, general police policies and procedures, and his financial condition does not appear to be well-founded as truthful answers to those questions would not appear to place him in criminal jeopardy."); *Shakman v. Democratic Org. of Cook Cty.*, 920 F. Supp. 2d 881, 888–90 (N.D. Ill. 2013) (listing unanswered questions and describing a blanket assertion of privilege, even as to innocuous questions as a "blunderbuss approach"); *Med. Assur. Co. v. Weinberger*, No.

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Second, Carnahan testified previously—both during the Division's investigation and in a previous hearing before my predecessor—without invoking his Fifth Amendment privilege. Carnahan's decision to invoke the Fifth Amendment during the hearing, without warning and after not previously invoking, particularly in light of his refusal to answer simple, non-incriminating questions, further suggests that he invoked strategically to hinder the Division.

Third, because he previously testified without invoking, the Division had no reason to suspect he would do so at the hearing. It thus had no reason to believe it would need to call other witnesses in order to admit evidence or offer testimony it expected to present through Carnahan. Carnahan's strategic invocation at the last minute thus unfairly prejudiced his opponent. Not drawing an adverse inference would invite gamesmanship.[14]

The Division's motion is granted. I will draw adverse inferences based on Carnahan's refusal to testify, subject to the Division identifying the specific questions and inferences it seeks in its post-hearing brief.[15] I will consider

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4:06-CV-117, 2012 WL 4050305, at *6 (N.D. Ind. Sept. 12, 2012) ("[T]he blanket claim of privilege, even over routine questions concerning his education and background, was clearly inappropriate absent justification to the Court.").

[14] Carnahan did not explain why he thought his answers might tend to incriminate him. Because many of the questions concerned events in 2010 through 2012, and there is no reason to believe that the allegations pertain to an on-going criminal conspiracy, there is reason think that they could not incriminate him. *See* 18 U.S.C. § 3282 (five-year statute of limitations for non-capital criminal offenses); *Brown v. Walker*, 161 U.S. 591, 598 (1896) ("if a prosecution for a crime, concerning which the witness is interrogated, is barred by the statute of limitations, he is compellable to answer"); *Earp v. Cullen*, 623 F.3d 1065, 1071 (9th Cir. 2010) (holding that a district court erred in accepting a witness's invocation of the Fifth Amendment where all relevant statutes of limitations had expired); *see also Convertino v. U.S. Dep't of Justice*, 795 F.3d 587, 592 (6th Cir. 2015) ("The test for a valid invocation of the Fifth Amendment … is whether the witness has 'reasonable cause to apprehend danger from a direct answer.'" (quoting *Hoffman v. United States*, 341 U.S. 479, 486 (1951)); *In re Corrugated Container Antitrust Litig.*, 662 F.2d 875, 886 (D.C. Cir. 1981) ("The statute of limitations begins to run for an individual defendant involved in a continuing conspiracy from the conclusion of the conspiracy.").

[15] *See United States v. $62,552*, No. 03-10153, 2015 WL 251242, at *8 (D. Mass. Jan. 20, 2015) ("If the Assistant U.S. Attorney wanted the Court to

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relevant inferences along with the other evidence presented during the hearing. Division exhibits 35, 39, 40, and 41 are admitted. The Division sought to introduce these exhibits through Carnahan's testimony and there is sufficient indicia of their reliability and authenticity for admission.[16]

The parties' opening post-hearing briefs are due by September 5, 2019, and responsive post-hearing briefs are due by September 19, 2019, as explained in the post-hearing order.[17]

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James E. Grimes
Administrative Law Judge

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draw an adverse inference, she was under an obligation to present to the Court the specific questions as to which to apply the inference that the answer would be unfavorable to the claimant."); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 622 F. Supp. 2d 890, 895 (N.D. Cal. 2009) ("[A]lthough adverse inferences based on Fifth Amendment invocations are permissible in certain circumstances, plaintiffs there had not made a sufficient foundational showing regarding the specific questions and facts upon which they would like adverse inferences to be drawn.").

[16] *See* 17 C.F.R. § 201.320(a). The Division represents that all exhibits reflect documents from its investigative file, *see* Mot. at 4 (July 23, 2019), and Carnahan signed or emailed three of the exhibits.

[17] *See Anderson*, Admin. Proc. Rulings Release No. 6632, 2019 SEC LEXIS 1782 (ALJ Jul. 18, 2019).