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

Administrative Proceedings Rulings
Release No. 6728 / January 30, 2020

Administrative Proceeding
File No. 3-16386

In the Matter of

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

Order Denying Respondents' Motion for Recusal and Notice Regarding Respondents' Motion to Strike/Dismiss

Respondents CYIOS Corporation and Timothy W. Carnahan have filed a motion for my recusal. As is discussed below, in this circumstance, I have authority to adjudicate Respondents' motion. Exercising that authority, I DENY Respondents' motion.

Respondents have also filed a "motion to strike/dismiss order (initial decision) and dismiss case." Because Respondents filed their motion to dismiss after I issued the initial decision in this proceeding, and it does not allege errors of fact in the initial decision, I lack the authority to adjudicate their motion to dismiss.[1]

Procedural History

The Securities and Exchange Commission instituted this proceeding on February 13, 2015. Among the allegations were those related to misstatements in a Form 10-K—for which Carnahan was allegedly responsible—that CYIOS filed with the Commission on February 26, 2010.[2] This proceeding was initially assigned to Administrative Law Judge Cameron Elliot, who issued an initial

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[1] *See Alchemy Ventures, Inc.*, Securities Exchange Act of 1934 Release No. 70708, 2013 WL 6173809, at *3 & n.25 (Oct. 17, 2013).

[2] Order Instituting Proceedings (OIP) at 4–5.

decision in December 2015.[3] The Commission granted Respondents' petition for review in February 2016.[4] While the proceeding was pending on review, the Commission remanded all pending cases and directed that they each be assigned to a new administrative law judge.[5] The Commission's chief administrative law judge assigned the case to Administrative Law Judge Carol Fox Foelak.[6]

Judge Foelak issued three orders relevant to Respondents' recusal motion. On October 1, 2018, she issued an initial order on reassignment in which she recounted this proceeding's procedural history and directed the parties to submit proposals for how to proceed.[7] After Respondents submitted a motion to certify an appeal—Respondents said they wanted Commission guidance on what charges were pending and against which respondents, and whether the statute of limitations applied—Judge Foelak issued a second order in which she denied Respondents' motion. In her order, she explained what was pending, and that because this proceeding was initiated on February 13, 2015, which was less than five years after CYIOS filed a Form 10-K on February 26, 2010, the five-year statute of limitations found at 28 U.S.C. § 2462 did not bar this proceeding.[8] After Respondents moved to reconsider, Judge Foelak issued another order, again explaining why the statute of limitations did not bar this proceeding.[9]

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

[4] *Timothy W. Carnahan*, Exchange Act Release No. 77038, 2016 WL 401944 (Feb. 2, 2016).

[5] *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 WL 4003609, at *1 (Aug. 22, 2018). The Commission acted following the decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

[6] *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264, at *3 (ALJ Sept. 12, 2018).

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

[8] *See Anderson*, Admin. Proc. Rulings Release No. 6223, 2018 SEC LEXIS 2894 (ALJ Oct. 18, 2018).

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

This proceeding was reassigned to me in March 2019.[10] Between then and the merits hearing, held in July 2019, I issued several orders, including orders (1) deferring ruling in part and denying in part Respondents' motion for a ruling on the pleadings (the deferral order);[11] (2) denying the Division's motion to admit prior testimony and Respondents' renewed motion for a ruling on the pleadings;[12] (3) denying Respondents' motion to vacate a prior order, revoke a subpoena, and dismiss the proceeding (the vacatur denial order);[13] and (4) denying Respondents' motion to certify previous orders for interlocutory review.[14] Relevant to Respondents' current motion, because Respondents had provided no basis to reconsider, I declined in the deferral order to reconsider Judge Foelak's two orders rejecting Respondents' statute-of-limitations argument.[15] For the same reason, I also declined to revisit the issue in the vacatur denial order.[16]

As noted, the merits hearing took place in July 2019. When Division counsel called Respondent Carnahan to testify, Carnahan stated that he planned to invoke his Fifth Amendment right not to incriminate himself and I instructed Carnahan that he would have to invoke it from the witness stand.[17] I then placed Carnahan under oath and Division counsel began his

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

[11] *Anderson*, Admin. Proc. Rulings Release No. 6549, 2019 SEC LEXIS 961 (ALJ Apr. 24, 2019). I ordered additional briefing on whether charges under Sarbanes-Oxley Act Section 105(c)(7)(B) and Securities Act Section 17(a)(2) were "still at issue and if so, on what authority." *Id.* at *16. The Division responded by informing Respondents that it would not pursue these allegations. Div. Supplemental Br. 1–2 (Apr. 30, 2019).

[12] *Anderson*, Admin. Proc. Rulings Release No. 6613, 2019 SEC LEXIS 1482 (ALJ June 24, 2019).

[13] *Anderson*, Admin. Proc. Rulings Release No. 6620, 2019 SEC LEXIS 1622 (ALJ July 2, 2019).

[14] *Anderson*, Admin. Proc. Rulings Release No. 6626, 2019 SEC LEXIS 1724 (ALJ July 11, 2019).

[15] *Anderson*, 2019 SEC LEXIS 961, at *17.

[16] *Anderson*, 2019 SEC LEXIS 1622, at *1–2.

[17] Tr. 69–70.

examination by asking Carnahan to describe his educational background.[18] When Carnahan responded by saying he planned to invoke, I interjected "Based on your educational background?"[19] Carnahan affirmed that he planned to invoke as to "everything."[20]

Division counsel and I then discussed how to handle counsel's questioning of Carnahan. During the discussion, I said to counsel that when a respondent invokes, it is "usually … easier … just to submit the questions" counsel would ask.[21] But "since we don't have that in advance -- we didn't know this was going to happen -- at least I didn't -- you're going to have to ask the questions. And he'll have to invoke."[22] After I explained to Carnahan that his invocation could give rise to an adverse inference, Carnahan invoked as to each question counsel asked.[23] Following the hearing, I ordered briefing on whether I should draw an adverse inference based on Carnahan's invocation of his Fifth Amendment privilege and, following briefing,[24] decided I would draw such an inference "subject to the Division identifying the specific questions and inferences it seeks in its post-hearing brief."[25]

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[18] Tr. 71.

[19] Tr. 72.

[20] Tr. 72.

[21] Tr. 73.

[22] Tr. 73. Because blanket privilege claims are improper, a respondent who chooses to invoke typically must do so on a question-by-question basis. *See Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1265 (9th Cir. 2000); *Nat'l Life Ins. Co. v. Hartford Acc. & Indem. Co.*, 615 F.2d 595, 598–600 (3d Cir. 1980); *see also United States v. Crews*, 856 F.3d 91, 98 (D.C. Cir. 2017) ("Under our precedent, blanket assertions of the privilege against self-incrimination are disfavored").

[23] Tr. 74–99. I told Carnahan that I would decide whether to draw an adverse inference after considering the parties' post-hearing briefing on the issue. Tr. 75.

[24] The Division filed a brief but Respondents did not. *See Anderson*, Admin. Proc. Rulings Release No. 6650, 2019 SEC LEXIS 1955, at *2 (ALJ Aug. 6, 2019).

[25] *Id.* at *8. Because the Division did not later identify "the specific questions and inferences it seeks," I ultimately relied on the adverse inference only in

I issued the initial decision on January 10, 2020.[26] In short order, Respondents filed a motion seeking my recusal and another motion to strike or dismiss the initial decision and the case. Within a few days, they also filed a motion to correct manifest errors in the initial decision.

Discussion

Ordinarily, once an administrative law judge issues an initial decision in a proceeding, he loses authority over the proceeding.[27] Administrative law judges retain authority, however, to adjudicate timely motions to correct manifest errors of fact in an initial decision.[28] Respondents have filed a timely motion to correct manifest errors of fact in the initial decision. As a predicate to adjudicating the motion to correct, I must necessarily decide Respondents' recusal motion; if circumstances dictate that I should recuse, I cannot decide the motion to correct. I therefore determine that in this circumstance, I have authority to decide Respondents' post-decision recusal motion.[29]

There are several problems with Respondents' recusal motion. First, it is largely based on rulings I issued. But an administrative law judge's "'rulings alone' almost 'never constitute a valid basis for a bias [claim].'"[30]

Second, Respondents waited until after I issued the initial decision to file their motion. By statute, however, in order to raise a valid recusal motion a respondent must do so in a timely manner.[31] Most of their claims relate to

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relation to the admission of four Division exhibits. *See id.*; *see also Anderson*, Initial Decision Release No. 1394, 2020 WL 260282, at *3 (ALJ Jan. 10, 2020).

[26] *Anderson*, 2020 WL 260282.

[27] *Alchemy Ventures*, 2013 WL 6173809, at *3 & n.25.

[28] *Id.* at *3 n.25; *see* 17 C.F.R. § 201.111(h).

[29] *See* 17 C.F.R. § 201.111 (providing Commission administrative law judges with "authority to do all things necessary and appropriate to discharge [their] duties").

[30] *See Moshe Marc Cohen*, Securities Act Release No. 10205, 2016 WL 4727517, at *10 (Sept. 9, 2016) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)), *vacated in part on other grounds*, Securities Act Release No. 10661, 2019 WL 2913336 (July 8, 2019).

[31] *See* 5 U.S.C. § 556(b) (requiring "a *timely* and sufficient affidavit of personal bias or other disqualification" in order to raise recusal (emphasis

matters that occurred before I issued the decision, and could have been raised earlier. And even putting the statute aside, strategically filing a recusal motion after an adverse ruling warrants denial of the motion.[32]

Third, Respondents' arguments have no valid factual or legal basis. Respondents first argue that recusal is warranted because, according to them, I did not review their statute-of-limitations argument.[33] Even if this argument were not misleading, which it is because I addressed the argument more than once, Respondents don't explain why it would support recusal. In any event, as I explained to Respondents, Judge Foelak twice rejected their argument.[34] And while I have the authority to reconsider interlocutory orders,[35] Respondents were required to give me a reason to do so.[36] But Respondents simply

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added)); *Marcus v. Dir., Office of Workers' Comp. Programs*, 548 F.2d 1044, 1051 (D.C. Cir. 1976).

[32] *Cf. Summers v. Singletary*, 119 F.3d 917, 921 (11th Cir. 1997) ("Both Summers and his counsel were present when the circumstances underlying petitioner's motion arose. They did not raise the issue until after an adverse decision on the magistrate judge's report and recommendation had been entered. This was too late."); *United States v. Barrett*, 111 F.3d 947, 951 (D.C. Cir. 1997) ("More than one court has recognized the sensible principle that '[a] defendant cannot take his chances with a judge and then, if he thinks that the sentence is too severe, secure a disqualification and a hearing before another judge.'" (quoting *United States v. Owens*, 902 F.2d 1154, 1156 (4th Cir. 1990))); *Drake v. Birmingham Bd. of Educ.*, 476 F. Supp. 2d 1341, 1346 (N.D. Ala. 2007) ("A party may not lie in wait, knowing of facts requiring disqualification … and raise the issue only after the Court's ruling on the merits.").

[33] Mot. at 2.

[34] *See Anderson*, 2019 SEC LEXIS 1622, at *1 n.2; *Anderson*, 2019 SEC LEXIS 961, at *17.

[35] *See* 17 C.F.R. § 201.111.

[36] *See Anderson*, 2019 SEC LEXIS 961, at *17; *cf. Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003) ("where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again" (citation omitted)). Evaluation in Commission proceedings of motions to reconsider is informed by federal practice. *See KPMG Peat Marwick LLP*, Exchange Act Release No. 44050, 2001 WL 223378, at *1 n.7 (Mar. 8, 2001). Motions to reconsider are disfavored because piecemeal litigation is inefficient and unfair. *Id.* District courts have broad discretion in ruling on motions to reconsider interlocutory orders, *SFF-TIR, LLC v.*

restated—repeatedly—previously rejected arguments.[37] And restating a rejected argument is not a basis for reconsideration.[38]

Respondents claim that I expressed anger toward them "during the objection challenge" and had a "private 'eye wink and head shake' of a conversation" with Division counsel when Carnahan invoked his Fifth Amendment privilege.[39] Even if Respondents had explained what they mean by *the objection challenge*, expressions of anger or exasperation—even in cases where an adjudicator actually expresses anger or exasperation—are not a valid basis for recusal.[40]

Stephenson, 264 F. Supp. 3d 1148, 1219 (N.D. Okla. 2017), which tend to be evaluated with reference to the considerations that apply to motions under Federal Rules of Civil Procedure 59 and 60, *see Kirt v. Fashion Bug, Inc. #3252*, 495 F. Supp. 2d 957, 965 (N.D. Iowa 2007).

[37] *Anderson*, 2019 SEC LEXIS 1622, at *1 ("Respondents have made this statute of limitations argument in multiple motions and it has been rejected each time.").

[38] *Cf. Vesely v. Armslist LLC*, 762 F.3d 661, 666 (7th Cir. 2014) ("a Rule 59(e) motion is not to be used to 'rehash' previously rejected arguments"); *Gold Cross EMS, Inc. v. Children's Hosp. of Ala.*, 108 F. Supp. 3d 1376, 1379 (S.D. Ga. 2015) ("it is improper on a motion for reconsideration to ask [a district court] to rethink what it ha[s] already thought through—rightly or wrongly" (internal quotation marks omitted; second alteration in original)), *aff'd*, 648 F. App'x 976 (11th Cir. 2016). As Respondents have repeatedly been told, because this proceeding was instituted on February 13, 2015, and the OIP alleges violations occurring within five years of that date, this proceeding does not run afoul of 28 U.S.C. § 2462. The fact that the hearing took place more than five years after the events at issue is irrelevant. *See* Mot. at 2 ("its 2020, eleven years later at minimum. . . ."); Tr. 132 (arguing that the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) "[c]learly states that no evidence after five years should be permittable"); *see also* Tr. 138–39 (explaining that "[t]he clock stopped on the date that the OIP was issued" and that remand did not restart the clock).

[39] Mot. at 2–3.

[40] *See Liteky v. United States*, 510 U.S. 540, 555–56 (1994); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 620 (4th Cir. 2006) (applying *Liteky* in the administrative context); *Rollins v. Massanari*, 261 F.3d 853, 857–58 (9th Cir. 2001) (same).

As noted above, during the discussion after Carnahan invoked, I said to Division counsel that because:

> *we* don't have that in advance -- *we* didn't know this was going to happen -- *at least I didn't* -- you're going to have to ask the questions. And he'll have to invoke.[41]

Respondents seize on my use of the word *we*, saying it shows that Division counsel and I "talked about this case and premeditated the end result."[42] Suffice it to say, my use of *we* in this context is not evidence of any conversation with the Division, let alone a conversation about how to decide Respondents' case. And the words *at least I didn't* clarify that I was only speaking for myself. Further, whatever Respondents mean by alleging a *private eye wink and head shake of a conversation* or "Secret incognito meeting," their speculation that they "put … together" after reading the initial decision,[43] is also not a basis for recusal.[44]

Next, Respondents appear to believe that recusal is supported by the fact that I directed Division counsel to file a brief supporting his position that I should draw an adverse inference from Carnahan's invocation of his Fifth Amendment privilege.[45] This aspect of Respondents' motion is baffling. My order could only have benefitted Carnahan; instead of immediately drawing an adverse inference, I directed Division counsel to provide his argument in writing and gave Respondents an opportunity to consider and respond to counsel's argument.[46]

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41 Tr. 73 (emphasis added).

42 Mot. at 5.

43 *Id*. at 2–3.

44 *Cf. United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986) ("a judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation").

45 Mot. at 3.

46 Respondents did not take advantage of this opportunity. They filed nothing in response to the Division's argument and thus provided no reason that I should not draw an adverse inference.

Finally, Respondents present an argument about a patent they assert that CYIOS owns for its product, CYIPRO.[47] Respondents fault the Division's expert for not reviewing the alleged patent and add that they have repeatedly "stated that they use … CYIPRO to support the compliance of the securities exchange rules, procedures processes and any relating facet."[48] They note that in questioning the Division's expert, Carnahan asserted that CYIPRO is a software product "businesses can use to fully support SEC compliance."[49] Based on these assertions, Respondents say "So, again any person can see from [the] above under oath testimony that CYIPRO's product was used for but not only the internal controls of CYIOS."[50] From the above, Respondents argue that when I ruled against them, I "turned, twisted and neglected … the facts presented" and exhibited "bias [by] ignoring them altogether."[51]

In making this argument, Respondents proceed as if they presented evidence and Carnahan testified, neither of which happened. Respondents presented no evidence and when Carnahan was called to give testimony, he invoked his Fifth Amendment privilege as to every question. So Respondents failed to present any evidence that CYIOS owns a patent, let alone what the allegedly patented product does, what they have repeatedly said about it, or how it is relevant to the Division's allegations.[52] And as I explained in the initial decision, the questions Carnahan asked of the Division's expert and statements he made while questioning the expert are not evidence.[53] Carnahan cannot simultaneously use the Fifth Amendment to prevent his opponent from obtaining his testimony while at the same time try to rely on unsworn statements he made while questioning a witness.[54]

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47 Mot. at 3–4.

48 *Id*.

49 *Id*. at 4.

50 *Id*.

51 *Id*.

52 *See Anderson*, 2020 WL 260282, at *6 & n.74. Respondents also failed to file a post-hearing brief.

53 *Id*. at *6 n.74.

54 *Cf. SEC v. Riel*, 282 F. Supp. 3d 499, 518 (N.D.N.Y. 2017) ("Having knowingly made th[e] decision" to invoke his Fifth Amendment privilege, "Riel cannot now rely on unverified, self-serving statements as a sword to resist summary judgment, especially where [he] claimed the Fifth Amendment's

Respondents' recusal motion is DENIED. I cannot adjudicate their motion to strike or dismiss the initial decision and dismiss the case. I will issue a separate order regarding Respondents' motion to correct manifest errors of fact.

James E. Grimes
Administrative Law Judge

protections as a shield to avoid submitting [himself] to questioning on the substantive issues addressed by the pleadings." (internal quotation marks omitted; alterations in original)).