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

Administrative Proceedings Rulings
Release No. 6729 / January 31, 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 to Correct

I issued an initial decision with respect to Respondents CYIOS Corporation and Timothy W. Carnahan on January 10, 2020.[1] On January 17, 2020, Respondents submitted a motion to correct manifest errors of fact in the initial decision. Because Respondents have not identified any such errors, their motion is DENIED.

Discussion

A "properly filed" motion to correct manifest error in an initial decision must be filed within ten days of the initial decision and demonstrate a "patent misstatement of fact in the initial decision."[2] A *patent* misstatement is a misstatement that is obvious or apparent.[3] Such motions may not "contest the substantive merits of [an] initial decision."[4] Further, given that an initial

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1 *See Traci J. Anderson*, Initial Decision Release No. 1394, 2020 WL 260282 (ALJ Jan. 10, 2020).

2 17 C.F.R. § 201.111(h).

3 *See Patent*, Black's Law Dictionary (11th ed. 2019).

4 Adoption of Amendments to the Rules of Practice and Related Provisions and Delegations of Authority of the Commission, 70 Fed. Reg. 72,566, 72,567 (Dec. 5, 2005).

decision must be based on the evidence "presented on the record,"[5] a motion to correct must show that a finding in an initial decision is contrary to evidence presented and in the record. It follows that a motion to correct a manifest error is not an opportunity to offer evidence not presented during the merits hearing.[6]

Respondents' motion is timely, so the question is whether they have identified any patent misstatement of fact. I take Respondents' five assertions in the order Respondents present them. At the outset, however, I note that during the merits hearing, Respondents presented no evidence and when called to testify, Carnahan refused on Fifth Amendment grounds to answer every question he was asked.[7]

1. The initial decision stated that "CYIOS's 2009 Form 10-K [was] filed on *February 26, 2010*, which is *within* the five-year limitations period in 28 U.S.C. § 2462."[8] Respondents argue that the quoted language is inaccurate because (1) they first made the relevant false statement in their 2008 Form 10-K filed in April 2009, and (2) the statute of limitations requires that an action be "commenced within five years from the date when the claim *first accrued*."[9] Respondents maintain that the false statements in their 2009 Form 10-K and later filings were simply a continuation of the same false statement they

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[5] 17 C.F.R. § 201.360(b); *see* 5 U.S.C. § 556(d) ("A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence"); *cf.* 17 C.F.R. § 201.340(b) (directing that "[p]roposed findings of fact must be supported by citations to specific portions of the record").

[6] *Cf. Pagsuberon v. Chicago Tribune Co.*, 168 F. Supp. 2d 893, 895 (N.D. Ill. 2001) (a motion under Federal Rule of Civil Procedure Rule 59(e) concerns "a manifest error of law or fact or newly discovered evidence, but it does not provide an opportunity to 'introduce new evidence or advance arguments that could and should have been presented ... prior to the judgment'" (quoting *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996))).

[7] *See Anderson*, 2020 WL 260282, at *2.

[8] Mot. at 3 (quoting *Anderson*, 2020 WL 260282, at *3) (emphasis added).

[9] Mot. at 3–4; 28 U.S.C. § 2462 (emphasis added).

initially made in their 2008 Form 10-K, which was filed outside the limitations period.[10]

The problem with this argument is that it amounts to a legal argument and is thus not properly part of a motion to correct.[11] And, in any event, the undisputed fact remains that Respondents made the false statement in the 2009 Form 10-K filed on February 26, 2010—they concede this fact in their motion[12]—which was just less than five years before the Commission initiated this proceeding. Issuers are required "to file a separate annual report for [each] fiscal year," and, as a matter of law, each false filing was separately actionable.[13] The fact that Respondents repeated earlier misstatements that fell outside the limitations period did not immunize similar statements they later made during the limitations period.[14]

2. The initial decision contained the conclusion that "CYIOS's statements that management had evaluated the company's internal controls *using the COSO framework* were false."[15] Respondents argue this is a misstatement of fact because they actually said that CYIOS "assessed the effectiveness of [its] internal control over financial reporting … using criteria set forth in the"

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[10] Mot. at 3–4.

[11] *See* 17 C.F.R. § 201.111(h).

[12] Mot. at 4.

[13] *Am. Stellar Energy, Inc.*, Securities Exchange Act of 1934 Release No. 64897, 2011 WL 2783483, at *5 (July 18, 2011).

[14] *See SEC v. Kokesh*, 884 F.3d 979, 985 (10th Cir. 2018) ("To hold that Defendant's misappropriations constituted only one continuing violation would do much more than provide repose for ancient misdeeds; it would confer immunity for ongoing repeated misconduct."); *Birkelbach v. SEC*, 751 F.3d 472, 479 (7th Cir. 2014) (characterizing as "absurd" the idea that by "avoid[ing] detection for five years," a violator could forever immunize later violative conduct, and holding that "any violative conduct that falls within the statute of limitations is independently sanctionable, regardless of whether there was additional violative conduct which occurred before that time"); *see also Figueroa v. D.C. Metro. Police Dep't*, 633 F.3d 1129, 1135 (D.C. Cir. 2011) (explaining that under 29 U.S.C. § 255(a), when "each violation gives rise to a new cause of action, each [violation] begins a new statute of limitations period as to that particular event" (quoting *Knight v. City of Columbus*, 19 F.3d 579, 582 (11th Cir. 1994))).

[15] *Anderson*, 2020 WL 260282, at *7.

COSO Framework.[16] If there is meaningful difference between the initial decision's language and Respondents' preferred version, Respondents don't explain what that difference is.[17] It's also possible Respondents are arguing that they did apply the criteria in the COSO framework, and therefore my factual conclusion to the contrary is wrong. But Respondents present no facts to support their assertion, and in any event, they are precluded from offering new evidence at this stage. This aspect of Respondents' motion is meritless.

3. The initial decision contained the following finding:

> *When asked during his investigative testimony*, however, Carnahan could not explain how he evaluated the effectiveness of CYIOS's internal controls. He testified that: he kept track of the company's revenue and payroll himself; because he wrote the payroll system, "it can't be flawed"; and he was the company's "internal control" and "did the internal controls" in his "mind," so he could not document himself. This testimony—which Carnahan did not dispute, disavow, or attempt to explain during the hearing—established that the periodic filings were the only documentation of CYIOS's internal controls and, as the company's sole director and officer serving in every relevant role, he was his "own quality assurance."[18]

Respondents dispute this finding, arguing that Carnahan was able to explain how he evaluated the effectiveness of CYIOS's internal controls.[19] But Respondents neither argue that Carnahan was able to present an explanation *during his investigative testimony* nor that this part of the initial decision misquotes the cited sources. Instead, they attempt to support their argument with reference to an e-mail exchange with people possessing Commission

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[16] Mot. at 5.

[17] In any event, the initial decision's findings of fact section contains Respondents' preferred version. It contains the finding that in several Forms 10-K and 10-Q, "CYIOS represented that management had … assessed the effectiveness of its internal controls using the criteria set forth in the COSO framework." *Anderson*, 2020 WL 260282, at *4.

[18] *Id.* at *5 (quoting Div. Ex. 2 at 63–69, 72–73, 75) (emphasis added).

[19] Mot. at 6.

e-mail addresses and a separate document of unknown provenance.[20] None of these items have anything to do with whether Carnahan explained during his investigative testimony how he evaluated the effectiveness of CYIOS's internal controls. Additionally, only part of the e-mail exchange was entered into evidence and the document inserted in the motion was not offered into evidence.[21] Respondents failed to present evidence during the merits hearing and cannot rectify that failure now through a motion to correct manifest error. This aspect of Respondents' motion is meritless.

4. The initial decision discusses how "Carnahan did little on cross-examination to discredit [the Division's expert's] testimony, choosing to chiefly focus on whether [the expert] had reviewed CYIOS's patent. Carnahan, however, failed to present any evidence about CYIOS's patent or whether it had one."[22]

Respondents fault this discussion by saying "Google: 'CYIOS CYIPRO Patent' Done!"[23] In saying this, they presumably intend to indicate that CYIOS had a patent. They add that the "problem" is that the Division's expert admitted he did not review CYIOS's CYIPRO patent.[24] Respondents assert that they "stated this in the hearing; yet the ALJ ignored the facts and drafted up an Initial Decision (ID) like a fictional movie director."[25]

Respondents have not identified a misstatement of fact, let alone one that is obvious. As noted, Respondents presented no evidence and Carnahan refused to answer questions.[26] Whether an internet search could now show that CYIOS holds a patent in CYIPRO is irrelevant because Respondents presented no evidence at the hearing, let alone evidence about CYIPRO, what it does, or how it is relevant to the allegations. And although Carnahan made statements about CYIPRO when questioning the Division's expert, Carnahan's unsworn

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20 Mot. at pdf pp. 6–11. Respondents have inserted the document between paginated pages 8 and 9 of their motion but have maintained the original pagination of their motion.

21 *Compare id*. at 6, *with* Div. Ex. 40 at 1.

22 *Anderson*, 2020 WL 260282, at *6.

23 Mot. at 9.

24 *Id*.; *see* Tr. 125.

25 Mot. at 9.

26 *See Anderson*, 2020 WL 260282, at *2.

statements do not constitute evidence.[27] The initial decision, therefore, accurately reported that there was no evidence "about CYIOS's patent or whether it had one."[28]

5. Finally, the initial decision contained the conclusion that: "By failing to make required periodic filings during [the relevant] time, CYIOS violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-13."[29] Respondents fault this conclusion with the unsupported assertion that their failure to timely file a Form 15-12G was merely an "administrative error."[30]

But the language Respondents challenge is in part a conclusion of law, not of fact. Moreover, their claim of administrative error appears nowhere in the record. As I've said, Respondents cannot offer new evidence now, and unsupported assertions like this are not grounds for a finding of manifest error. Indeed, the initial decision contains no mention of Respondents' mindset behind the untimely filing of its Form 15 because Respondents offered no evidence during the merits hearing regarding "administrative error" or otherwise.

Respondents' motion to correct is DENIED. Any petition for review must be filed with the Commission within 21 days from the date of this order.[31]

James E. Grimes
Administrative Law Judge

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[27] *See*, *e.g.*, *United States v. Cudlitz*, 72 F.3d 992, 1002 (1st Cir. 1996); *see also Anderson*, 2020 WL 260282, at *6 n.74.

[28] *Anderson*, 2020 WL 260282, at *6.

[29] *Id.* at *8.

[30] Mot. at 10.

[31] *See* 17 C.F.R. § 201.410(b).