

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10922 / January 25, 2021

SECURITIES EXCHANGE ACT OF 1934
Release No. 90977 / January 25, 2021

Admin. Proc. File No. 3-16386

In the Matter of

TIMOTHY W. CARNAHAN
AND
CYIOS CORPORATION

ORDER DENYING DIVISION'S MOTION FOR SUMMARY AFFIRMANCE, GRANTING
RESPONDENTS' PETITION FOR REVIEW, AND SCHEDULING BRIEFS

On January 10, 2020, an administrative law judge issued an initial decision finding that CYIOS Corporation violated, and Timothy W. Carnahan caused CYIOS to violate, Section 17(a)(3) of the Securities Act of 1933, Section 13(a) of the Securities Exchange Act of 1934, and Exchange Act Rules 13a-1 and 13a-13.¹ The law judge also found that Carnahan violated Exchange Act Rules 13a-14 and 13a-15(c). The law judge imposed cease-and-desist orders against both Respondents; ordered that CYOS disgorge \$37,500, plus prejudgment interest; and ordered that CYIOS and Carnahan pay civil penalties of \$500,000 and \$100,000, respectively.² On January 13, 2020, Respondents filed a motion to dismiss with the law judge. In an order issued on January 30, 2020, the law judge concluded that he lacked jurisdiction to rule on the motion because it was filed after the initial decision was issued and did not allege errors of fact in the initial decision. On January 21, 2020, Respondents filed a motion to correct manifest

¹ *Tracy J. Anderson, CPA*, Initial Decision Release No. 1394, 2020 WL 260282 (Jan. 10, 2020). A prior initial decision dismissed the proceeding as to Respondent Tracy J. Anderson, CPA. *Tracy J. Anderson, CPA*, Initial Decision Release No.930, 2015 WL 9297356 at *1, *24 (Dec. 21, 2015). That decision has become the final decision of the Commission. *Tracy J. Anderson, CPA*, Securities Act Release No. 10032, 2016 WL 9990696, at *1 (Feb 2, 2016).

² *Tracy J. Anderson, CPA*, 2020 WL 260282, at *9–13.

errors in the initial decision, and the law judge denied the motion on January 31, 2020.³ On February 24, 2020, Carnahan filed a petition for review of the law judge’s initial decision on behalf of himself and CYIOS.⁴ The Division filed an opposition on March 3, 2020, in which it requested that the Commission “reject [Respondents’ petition for review] and affirm the initial decision.” Because the Rules of Practice do not provide for the filing of oppositions to petitions for review,⁵ we construe the Division’s filing as a motion for summary affirmance.

Under Commission Rule of Practice 411(e)(2), summary affirmance may be granted if “no issue raised in the initial decision warrants consideration by the Commission of further oral

³ See Rule of Practice 111(h), 17 C.F.R. § 201.111(h) (providing that the “powers of the hearing officer include” ruling upon “a motion to correct a manifest error of fact in the initial decision”).

⁴ On February 3, 2020, Jonathan D. Leinwand, an attorney purporting to represent CYIOS, also filed with the Commission a petition for review of the initial decision. That petition asserted that on August 30, 2019, “Mr. David Greene entered into an Asset Purchase Agreement with CYIOS and Mr. Carnahan,” in which Carnahan sold CYIOS to Greene. The petition appended as an exhibit a document with the heading “Asset Purchase Agreement,” which the petition cited as support for the assertion that Carnahan sold CYIOS to Greene. But that document was not authenticated with an appropriate declaration, and Carnahan directly challenges its authenticity. On February 10, 2020, Carnahan, proceeding pro se on behalf of himself and CYIOS, filed a motion to strike the February 3 petition on the ground that he had not sold the company and that Leinwand did not represent CYIOS. Carnahan renewed his motion to strike on February 20, 2020. In a sworn affidavit attached to his renewed motion to strike, Carnahan stated that he “did not execute or otherwise have knowledge of” the Asset Purchase Agreement, and that his signature on the document was forged. Leinwand did not respond to Carnahan’s motions to strike the February 3 petition for review. And the Division submitted a filing that stated “[c]ounsel for the Division called Leinwand . . . and left a message asking for more explanation of these matters,” and that “Leinwand has not responded.” Commission Rule of Practice 410(a) establishes the standards under which petitions for review of a hearing officer’s initial decision may be filed with the Commission. 17 C.F.R. § 201.410(a). Such petitions may be filed by “any party, and any other person who would have been entitled to judicial review of the decision . . . if the Commission itself had made the decision.” *Id.* Here, there is no admissible evidence in the record establishing that David Greene is a party or person aggrieved by the initial decision, or that he is authorized to seek judicial review of the initial decision on behalf of CYIOS. Under these circumstances, it is appropriate to deny the petition for review that Leinwand filed. *Cf. Am. Elec. Power Co.*, Release No. 35-27982, 2005 WL 5555058, at *1 (June 13, 2005) (denying petition for review filed by an organization that was “not a party to the proceedings”). In light of our disposition of the February 3 petition, we deny Carnahan’s motions to strike it as moot.

⁵ See *Rules of Practice*, Exchange Act Release No. 48832, 2003 WL 22827684, at *13 (Nov. 23, 2003) (eliminating the procedure for filing oppositions to petitions for review “given that the Commission has long had a policy of granting petitions for review, believing that there is a benefit to Commission review when a party takes exception to a decision”).

or written argument.”⁶ The rule provides for denial of summary affirmance “upon a reasonable showing that a prejudicial error was committed in the conduct of the proceeding or that the decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review.”⁷ We have previously observed that “[s]ummary affirmance is rare, given that generally we have an interest in articulating our views on important matters of public interest and the parties have a right to full consideration of those matters.”⁸

Based on our preliminary review of the record and the parties’ submissions, we conclude that “our consideration of the record and parties’ arguments would benefit from the normal appellate process rather than summary affirmance.”⁹ We therefore deny the Division’s motion and grant Respondents’ petition for review.¹⁰ Our denial should not be construed as suggesting any view as to the outcome of this case.

Respondents’ other filings raise no issues requiring our consideration at this time. On July 8, 2019, Respondents filed an “Expedited Petition to the Commission for an Interlocutory Review.” The law judge construed this submission as a motion for certification of four previous orders for interlocutory review—dated October 18, 2018; April 24, 2019; June 24, 2019; and July 2, 2019—under Commission Rule of Practice 400(c)(2).¹¹ On July 11, 2019, the law judge denied the motion.¹² Although Respondents had styled the petition as one made to the Commission, Respondents have also described the 2019 petition as “a motion for an interlocutory review to James E. Grimes, Administrative Law Judge . . .” We conclude that the law judge properly disposed of that petition, and to the extent that Respondents wish to seek the Commission’s review of those rulings by the law judge, they may raise their arguments during their appeal of the initial decision. Similarly, Carnahan’s motion to dismiss filed on January 13, 2020, raises no issue requiring our separate consideration. To the extent that Respondents seek

⁶ 17 C.F.R. § 201.411(e)(2).

⁷ *Id.*

⁸ *James A Winkelmann*, Securities Act Release No. 10657, 2019 WL 2775908, at *3 (July 2, 2019) (quotations and citations omitted).

⁹ *See id.* at *4.

¹⁰ *See id.* at *3; *see also David F. Bandimere*, Exchange Act Release No. 71333, 2014 WL 198175, at *3 (Jan. 16, 2014) (denying motion for summary affirmance and granting petition for review where “the submission of briefs, with discussion of relevant parts of the record and analysis of the issues, w[ould] aid . . . in reaching a decision in this case”).

¹¹ *See* 17 C.F.R. § 201.400(c)(2) (stating that a hearing officer shall not certify a ruling to the Commission for interlocutory review unless the hearing officer is of the opinion that the ruling “involves a controlling question of law as to which there is substantial ground for difference of opinion” and “immediate review of the order may materially advance the completion of the proceeding”).

¹² *Traci J. Anderson*, Admin. Proc. Rulings Release No. 6626, at 1–2 (July 11, 2019), available at <https://www.sec.gov/alj/aljorders/2019/ap-6626.pdf>.

to pursue the arguments asserted in that motion, the Commission's ordinary appellate review process will provide Respondents an adequate forum to present and develop the arguments.

* * *

In light of our determination to deny the Division's motion for summary affirmance, we grant Respondents' petition for review and schedule the filing of briefs.

Accordingly, IT IS ORDERED that the motion for summary affirmance filed by the Division of Enforcement is denied; and it is further

ORDERED, pursuant to Rule of Practice 411,¹³ that the petition for review filed by Timothy W. Carnahan and CYIOS Corporation is granted, and that, pursuant to Rule 411(d),¹⁴ the Commission will determine what sanctions, if any, are appropriate in this matter; and it is further

ORDERED, pursuant to Rule of Practice 450(a),¹⁵ that Respondents shall file an opening brief by February 24, 2021; the Division shall file a brief in response to Respondents' opening brief by March 26, 2021; and Respondents may file any reply brief by April 9, 2021.¹⁶

Pursuant to Rule 180(c) of the Rules of Practice,¹⁷ failure to file a brief in support of the petition for review may result in dismissal of this review proceeding as to that party.

By the Commission.

Vanessa A. Countryman
Secretary

¹³ 17 C.F.R. § 201.411.

¹⁴ 17 C.F.R. § 201.411(d).

¹⁵ 17 C.F.R. § 201.450(a).

¹⁶ As provided by Rule 450(a), no briefs in addition to those specified in this schedule may be filed without leave of the Commission. Attention is called to Rule of Practice 450(b) and (c), 17 C.F.R. § 201.450(b) and (c), with respect to content and length limitations, and Rules of Practice 150 - 153, 17 C.F.R. § 201.150 - 153, with respect to form and service, as well as the Commission's March 18, 2020 order providing instructions regarding the electronic filing and service of papers in appeals of initial decisions. *See In re: Pending Administrative Proceedings*, Exchange Act Release No. 88415, <https://www.sec.gov/litigation/opinions/2020/33-10767.pdf>.

¹⁷ 17 C.F.R. § 201.180(c).