

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

Administrative Proceedings Rulings
Release No. 6681 / September 19, 2019

Administrative Proceeding
File No. 3-17950

In the Matter of
David Pruitt, CPA

**Order Granting in Part
Request for Official Notice and
Granting in Part Respondent's
Motion in Limine**

After the Division of Enforcement filed a request that I take official notice of twelve items, Respondent David Pruitt filed a motion in limine asking me to bar the admission of evidence related to two settled administrative proceedings and an investigation conducted by L3 Technologies, Inc. The Division's request is granted in part and denied in part without prejudice. Pruitt's motion is granted in part (without prejudice to the Division) and deferred in part until the upcoming prehearing conference.

Background

The allegations in the order instituting proceedings (OIP) concern the alleged improper recognition of revenue by a subsidiary of L3 Technologies, Inc. Pruitt allegedly played a pivotal role in the revenue recognition.

In its request, the Division asks that I take notice of nine periodic reports L3 filed with the Securities and Exchange Commission.¹ For the first two periodic reports it mentions, the Division states that it is requesting official notice to establish that during 2013 and 2014, L3 was a Delaware corporation with a principal place of business in New York that was registered with the Commission and had common stock traded on the New

¹ Request at 1–3.

York Stock Exchange.² The Division does not explain in its request its reasons for requesting official notice of the other seven periodic reports. The Division also asks that I take notice of two orders instituting settled proceedings, one involving L3 and one involving Mark Wentlent, the president of L3's subsidiary.³ Finally, the Division asks that I take notice of a description on a government website of the web-based system that vendors use to submit invoices to the Department of Defense.⁴

In his motion, Pruitt opposes the admission of conclusions about L3's internal investigation that are contained in some of the periodic reports of which the Division requests that I take official notice.⁵ He argues that L3's investigation was flawed and that evidence about it is irrelevant and immaterial.⁶ Pruitt also argues that considering the reports would allow the Division to present unreliable evidence, hearsay, and inappropriate opinion testimony about the internal investigation.⁷ He further contends that the Division should not be permitted to meet its burden through evidence that L3 revised its financial reports.⁸ Finally, Pruitt opposes consideration of the settled proceedings, arguing that the Division should not be permitted to prove its case by showing that others involved in the circumstances underlying this proceedings settled their cases.⁹

The Division opposes Pruitt's motion, arguing as a general matter that a public company's restatement of revenue and related Commission filings are

² *Id.* at 1–2. Because the parties have already stipulated to these facts, this part of the request is moot. *See* Joint Stipulations as to Facts and Law at 1 (August 30, 2019).

³ Request at 4; *see Mark Wentlent*, Securities Exchange Act of 1934 Release No. 80547, 2017 WL 1539856 (Apr. 28, 2017); *L3 Techs., Inc.*, Exchange Act Release No. 79772, 2017 WL 104604 (Jan. 11, 2017).

⁴ Request at 4.

⁵ Mot. at 1, 5–10.

⁶ *Id.* at 6–7.

⁷ *Id.*

⁸ *Id.* at 9–10.

⁹ *Id.* at 10–11.

relevant and trustworthy.¹⁰ As to the settled orders, the Division distinguishes the cases on which Pruitt relies and asserts that I can determine the relevance of the orders.¹¹

Discussion

Official notice in Commission proceedings is governed by Rule of Practice 323, which permits the taking of official notice of any material fact that could be judicially noticed under Federal Rule of Evidence 201.¹² It also permits taking notice of “any matter in the public official records of the Commission,” including periodic reports.¹³ But “[b]ecause the effect of judicial notice is to deprive a party of an opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence,”¹⁴ “[a] high degree of indisputability is the essential prerequisite” of judicial notice.¹⁵ Taking notice of a Commission filing therefore simply establishes the fact of the filing and the fact that the statements in it were made; it does not establish the truth of the filing’s contents.¹⁶ If the facts reported in a Commission filing are in

¹⁰ Opp’n at 5–6. The Division also lists several “highly relevant facts” in L3’s restated reports. *Id.* at 2–4.

¹¹ *Id.* at 8–10.

¹² 17 C.F.R. § 201.323.

¹³ *Id.*; see *Am. Stellar Energy, Inc.*, Exchange Act Release No. 64897, 2011 WL 2783483, at *6 n.27 (July 18, 2011); see also *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 354 n.5 (2d Cir. 2010) (holding that the court could take judicial notice of Commission filings); *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006) (holding that it was proper to take judicial notice of Commission filings).

¹⁴ *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1151 (9th Cir. 2005) (quoting *Wright v. Brooke Grp. Ltd.*, 114 F. Supp. 2d 797, 816 (N.D. Iowa 2000)).

¹⁵ Fed. R. Evid. 201, advisory committee note.

¹⁶ See *Morgan Stanley*, 592 F.3d at 355 n.5; *Benak ex rel. All. Premier Growth Fund v. All. Capital Mgmt. L.P.*, 435 F.3d 396, 401 n.15 (3d Cir. 2006); *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996).

dispute, the filing should not be noticed for the purpose of establishing those facts.¹⁷

Pruitt lodges no objection to the Division's request that I take official notice of information contained on a Department of Defense website that explains Wide Area Workflow, now known as iRAPT.¹⁸ Courts "routinely take judicial notice of information contained on ... federal government websites."¹⁹ This aspect of the Division's request is granted.

As to Pruitt's objection to consideration of two related, settled proceedings, both settlement orders contain the disclaimer that "[t]he findings ... made" in the orders "are not binding on any other person or entity in this or any other proceeding."²⁰ This is consistent with Commission policy that its settlement orders do not constitute precedent.²¹ Pruitt's objection to the consideration of these orders is sustained without prejudice to the Division demonstrating that the orders are relevant for some purpose other than establishing the findings made in the orders.

This leaves seven periodic reports—the request as to the first two periodic reports is, as noted, moot—and Pruitt's objection to the admission of any evidence about L3's investigation. I will defer ruling on these issues pending additional discussion about them with parties during the prehearing conference on September 27, 2019. I note that the OIP alleges that L3 filed

¹⁷ See *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1354 (7th Cir. 1995) ("In order for a fact to be judicially noticed, indisputability is a prerequisite. Given that there was considerable argument over the significance of the 10-K form, the judge properly found that its contents were subject to dispute."); see also *Lovelace*, 78 F.3d at 1018 (adopting rule that public documents filed with the Commission may be considered "only for the purpose of determining what statements the documents contain, not to prove the truth of the documents' contents").

¹⁸ Request at 4; Defense Logistics Agency, DLA iRAPT, <https://www.dla.mil/HQ/InformationOperations/WAWF/>.

¹⁹ *United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017).

²⁰ *Wentlent*, 2017 WL 1539856, at *1 n.1; *L3 Techs.*, 2017 WL 104604, at *1 n.1.

²¹ *Rodney R. Schoemann*, Securities Act Release No. 9076, 2009 WL 3413043, at *13 n.55 (Oct. 23, 2009) ("[S]ettlements can be reached for any number of reasons . . . and . . . are not precedent."), *aff'd*, 398 F. App'x 603 (D.C. Cir. 2010).

amended periodic reports,²² and Pruitt does not contest the appropriateness of taking official notice of the existence of the periodic reports, which are official Commission records. On the other hand, official notice alone does not allow me to consider L3's periodic reports for the purpose of proving the truth of the statements or assertions in the filings. The mere fact that certain statements appear in L3's reports does not necessarily mean that those statements are accurate or true or should be given any weight. And it is not fully clear for what purpose the Division seeks to introduce the reports.

The Division's request is denied in part and granted in part. Pruitt's motion is granted in part and deferred in part.

James E. Grimes
Administrative Law Judge

²² OIP at 11.