UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 86107 / June 14, 2019

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 4050 / June 14, 2019

ADMINISTRATIVE PROCEEDING
File No. 3-19201

In the Matter of **DAVID VOGEL, CPA** **Respondent.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against David Vogel ("Vogel" or "Respondent").

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over him and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds[1] that:

Summary

1. As discussed below, these proceedings arise out of the Respondent's role in preparing contracts designed to allow KIT Digital, Inc. ("KIT Digital") to improperly recognize revenue for the year ended December 31, 2011. As a result, KIT Digital improperly recognized $4.8 million in revenue for the fourth quarter of 2011, as well as understated its net loss before income taxes. Without this material overstatement of revenue, KIT Digital would not have met either its own revenue guidance or analysts' expectations.

Respondent

2. **Vogel**, age 55, was KIT Digital's senior vice president for finance, reporting directly to KIT Digital's chief financial officer from March 2010 through March 2012. Vogel received a bachelor's degree in mathematics from Hobart and William Smith Colleges in 1987, and an MBA degree from Fairleigh Dickinson University in 1993. Vogel has been a certified public accountant licensed in New Jersey since 1992. He currently resides in Randolph, New Jersey.

Relevant Entity

3. **KIT Digital, Inc.** ("KIT Digital") was a public Delaware corporation with principal places of business in New York City, Dubai UAE, and Prague, Czech Republic. KIT Digital was formerly known as ROO Group, and changed its name to KIT Digital in May 2008. As KIT Digital, the company traded on the OTC Bulletin Board until August 2009, when the company became listed on NASDAQ under the symbol KITD.[2] On April 25, 2013, Piksel, Inc. (successor entity to KIT Digital) filed a voluntary petition for reorganization under chapter 11 of the United States Bankruptcy Code.

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[1] The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

[2] On January 11, 2013, NASDAQ filed a Form 25 to delist KIT Digital's common stock and to deregister the stock under Section 12(b) of the Exchange Act. On October 4, 2013, Piksel (successor entity to KIT Digital) filed a Form 15 to delist KITD common stock under Section 12(g) of the Exchange Act.

The Transaction At Issue

4. In late December 2011, KIT Digital acquired a private company, Corporation X, which offered a "cloud-based video delivery platform", *i.e.* a method by which companies could stream video over the Internet. The deal team for KIT Digital included, among others, KIT Digital's chief financial officer ("CFO"). At the time of its negotiations with KIT Digital, Corporation X had a contract to create and deliver a software product for two subsidiaries of a Mexican corporate conglomerate ("Customer A" and "Customer B"). By the time of the acquisition, Corporation X had not completely delivered the fully functional software product to Customers A and B.

5. In early December 2011, prior to the closing of KIT Digital's acquisition of Corporation X, KIT Digital's CFO directed Vogel to create contracts between KIT Digital and Customers A and B and other documents that would provide a basis for KIT Digital to recognize revenue by year-end from those customers. As part of that effort, the CFO emailed Vogel a list of factors that these contracts would encompass. As Vogel should have recognized, the facts and circumstances did not allow for revenue recognition consistent with Generally Accepted Accounting Principles ("GAAP"), and the newly created documentation did not alter that conclusion.

6. Over the following weeks, at the direction of and in consultation with KIT Digital's CFO, Vogel, in concert with others at Corporation X, drafted purportedly new contracts with Customers A and B. Vogel separated what had been one contract for Customers A and B into two contracts for each customer: (1) a software "license agreement" and (2) one or more "services" agreements that referenced future services KIT Digital was to provide for Customers A and B in connection with the software license. The "license agreements" made no references to the necessity for any future software development or launch dates, nor did the two agreements reference one another in any way. The "services" agreements called for KIT Digital to provide maintenance and support, but also to develop the software functionality referenced in the license agreement. Most of the monetary consideration was put into the license agreements, while the services agreements provided for "negative" consideration—rather than earning money for delivering on the services, the contracts provided for penalties that would reduce the up-front consideration paid for the license should KIT Digital fail to deliver the software functionality by specific deadlines.

7. Under accounting principles applicable to software, KIT Digital could only have recognized the license fee from Customers A and B as revenue in December 2011 if the software did not need significant development or modification and met other general revenue recognition criteria. If software is sold that does require significant development, then the arrangement should apply contract accounting, which would require KIT Digital to either recognize revenue ratably, as work was completed (the percentage-of-completion method), or recognize full revenue upon total completion of the contract (the completed-contract method), depending on the circumstances.[3] Rather than altering the application of these accounting principles, the separate license and service agreements served only to hide the true nature of what KIT Digital was contracting for, and thus provide false justification for KIT Digital's revenue recognition. With the separate contracts, KIT Digital pretended – based on the "license agreement" – that it had fully delivered the "KIT Platform" product, without any need for development or modification, by the end of December 2011, inappropriately misapplying the foregoing accounting principles to immediately recognize the substantial license fees as revenue -- $2.5 million and $2.3 million, respectively, for Customer A and B. The actual development work that remained to be completed after 2011 was hidden in the "services" agreements, which by its terms provided for only relatively minor maintenance and support fees, together with "penalties" for failure to complete the listed services by certain deadlines that amounted approximately to the license fees.

8. In late December 2011, as the closing of KIT Digital's acquisition of Corporation X approached, Customers A and B, at Corporation X's request, terminated their contracts with Corporation X. KIT Digital and Customers A and B entered into the contracts drafted by Vogel, at the direction of the CFO, on December 30, 2011.

9. KIT Digital delivered no product to Customers A and B in 2011. Nevertheless, KIT Digital recognized the $4.8 million in "license fees" as revenue in the fourth quarter of 2011. This overstated revenue was reported on KIT Digital's Form 10-K for the year ended December 31, 2011, making that filing materially inaccurate. The misstatement also resulted in understated liabilities and overstated stockholders' equity on KIT Digital's year-end balance sheet.

10. Given his background and expertise as an accountant, Vogel should have known that the new contracts he had created did not justify the $4.8 million in revenue that KIT Digital recognized from the contracts with Customers A and B.

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[3] Accounting Standards Codification ("ASC") 985-605-25-2 states: "If an arrangement to deliver software or a software system, either alone or together with other products or services, requires significant production, modification, or customization of software, the entire arrangement shall be accounted for in conformity with Subtopic 605-35, using the relevant guidance in paragraphs 985-605-25-88 through 25-107: on applying contract accounting to certain arrangements involving software." ASC 605-35 is entitled Construction-Type and Production-Type Contracts and ASC 605-35-25-1 says, "the basic accounting policy decision is the choice between two generally accepted methods: the percentage-of-completion method including units of delivery and the completed-contract method." The determination of which of the two methods is preferable is based on a careful evaluation of the circumstances because the two methods should not be acceptable alternatives for the same circumstances."

11. Also as a result of the conduct described above, KIT Digital violated Section 13(a) of the Exchange Act and Rules 13a-1 and 12b-20 thereunder, which require every issuer of a security registered pursuant to Section 12 of the Exchange Act file with the Commission information, documents, and annual reports as the Commission may require, and mandate that periodic reports contain such further material information as may be necessary to make the required statements not misleading.

12. As a result of the conduct described above, KIT Digital violated Section 13(b)(2)(A) of the Exchange Act, which requires reporting companies to make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect their transactions and dispositions of their assets.

13. As a result of the conduct described above, KIT Digital also violated Section 13(b)(2)(B) of the Exchange Act, which require all reporting companies to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles.

14. Rule 13b2-1 of the Exchange Act provides that no person shall falsify or cause to be falsified any book, record, or account subject to Section 13(b)(2)(A).

15. As a result of the conduct described above, Vogel violated Rule 13b2-1 of the Exchange Act, and caused violations of Sections 13(a) and 13(b)(2)(A) and (B) of the Exchange Act, and Rules 13a-1, 13b2-1, and 12b-20 thereunder.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondent Vogel's Offer.

Accordingly, it is hereby ORDERED that**:**

A. Pursuant to Section 21C of the Exchange Act, Respondent Vogel cease and desist from committing or causing any violations and any future violations of Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, and 13b2-1 thereunder.

B. Respondent shall pay civil penalties of $15,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). Payment shall be made over three years in the following installments:

$1,500 within 21 days of the entry of this order;

$300 per quarter for the first year following the entry of this order;

$1,300 per quarter for the second year following the entry of this order; and

$1,775 per quarter for the third year following the entry of this order.

Payments shall be applied first to post order interest, which accrues pursuant to 31 U.S.C. § 3717. Prior to making the final payment set forth herein, Respondent shall contact the staff of the Commission for the amount due. If Respondent fails to make any payment by the date agreed and/or in the amount agreed according to the schedule set forth above, all outstanding payments under this Order, including post-order interest, minus any payments made, shall become due and payable immediately at the discretion of the staff of the Commission without further application to the Commission.

Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying David Vogel as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Sanjay Wadhwa, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, 200 Vesey Street, New York, New York 10281.

C. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, he shall not argue that he is entitled to, nor shall he benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that he shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty

imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondent, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondent under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Vanessa A. Countryman
Acting Secretary