UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17950

In the Matter of,

David Pruitt, CPA

Respondent.

RESPONDENT DAVID PRUITT'S MOTION TO THE COMMISSION TO AMEND THE ORDER INSTITUTING PROCEEDINGS BASED UPON NEWLY DISCOVERED MATTERS OF FACT AND TO STAY THIS PROCEEDING PENDING THE COMMISSION'S DECISION

Based upon newly discovered evidence and pursuant to Rule 200(d)(1) of the Securities and Exchange Commission's ("SEC" or the "Commission") Rules of Practice, Respondent David N. Pruitt, through his undersigned counsel, respectfully submits this motion to the Commission to amend the Order Instituting Proceedings ("OIP") and to stay these proceedings pending the Commission's decision. A Memorandum of Points and Authorities and the Affidavit of Jimmy Fokas are also submitted in support of the motion.

Dated: June 11, 2018
New York, New York

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT DAVID PRUITT'S MOTION TO THE COMMISSION TO AMEND THE ORDER INSTITUTING PROCEEDINGS BASED UPON NEWLY DISCOVERED MATTERS OF FACT AND TO STAY THIS PROCEEDING PENDING THE COMMISSION'S DECISION

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Based upon uncontroverted newly discovered evidence and pursuant to Rule 200(d)(1) of the Rules of Practice of the Securities and Exchange Commission ("SEC" or the "Commission"), Respondent David N. Pruitt ("Mr. Pruitt"), through his undersigned counsel, respectfully submits this memorandum of points and authorities in support of his motion to the Commission to amend the Order Instituting Proceedings ("OIP") and to stay these proceedings pending the Commission's decision.[1] The Affidavit of Jimmy Fokas ("Fokas Aff.") is submitted in support of the motion.

PRELIMINARY STATEMENT

Mr. Pruitt, a former Lieutenant Colonel in the U.S. Army with over 23 years of unblemished service to his country, makes this motion to amend the OIP and for a stay because multiple material and highly prejudicial factual allegations in the OIP are now known to the Division of Enforcement (the "Division") to be demonstrably and conclusively false and misleading. In its current form, the OIP alleges a factual scenario where a rogue high-level corporate officer covertly manufactures sham invoices on his own to boost year-end revenues and pocket an undeserved bonus.[2] The newly discovered facts set forth in uncontested documents and sworn testimony from neutral, informed and disinterested witnesses, conclusively establishes that the key events alleged in the OIP are false and without basis. The new facts, now

[1] Although Mr. Pruitt continues to contest all of the allegations of the OIP, this motion is narrowly focused upon certain factual allegations that have been proven to the Division to be false by uncontroverted new evidence. The filing of this motion in no way reflects any concession by Mr. Pruitt regarding allegations that are not addressed in the motion.

[2] At the time of the filing of the OIP, the Division issued a press release that stated "Pruitt circumvented critical accounting safeguards so improper revenue could be recorded to reach an internal target that enabled management to receive bonuses." SEC Press Release No. 2017-86, Executives Charged in Connection with Accounting Failures at Government Contractor, https://www.sec.gov/news/press-release/2017-86 (Apr. 28, 2017).

known to both the Respondent and the Division, make clear that the invoices and related revenue in this case, were generated and recognized at the direction of Mr. Pruitt's supervisor - the Chief Financial Officer - multiple reporting levels above Respondent. The invoices were generated in response to a specific request from the customer and were not created to achieve a bonus target for Mr. Pruitt and other management. In sum, it is now established that certain highly prejudicial and case-critical allegations in the OIP have no basis in fact. These allegations cannot in good faith be legally or ethically included in a charging document that serves as the basis for the prosecution of this proceeding. Moreover, because these allegations are known to be false by the Division, they are unfairly prejudicial and must be stricken from the OIP.

Respondent has provided the Division with evidence of these new matters of fact in the form of three sworn affidavits from two former and one current employee of the issuer as well as documentary records of the issuer. Recognizing the dramatic impact the new facts have on its case, the Division appropriately took the highly unusual step of seeking a stay of discovery in the middle of these proceedings to verify the evidence through a targeted deposition and other means. In a prior filing in this proceeding, the Division has recognized that some of the newly discovered evidence, particularly the affidavit of a key senior management witness, "will significantly impact the preparation for and conduct of the hearing scheduled for July 2018, and may impact whether a hearing is even necessary."[3] Now that the Division has admitted that these new facts "dramatically alter[] the factual record" the Commission must amend the OIP to remove the false and unfairly prejudicial allegations.

[3] Memorandum in Support of Joint Motion for a Limited Stay of Discovery, *In the Matter of David Pruitt, CPA*, Admin. Proc. File No. 3-17950, at 1 (Apr. 3, 2018).

Had the Commission known the newly discovered facts at the time it issued the OIP, it may very well have decided not to bring this "broken windows" enforcement action premised on a microscopically small books and records inaccuracy amounting to 14/100th of one percent (0.14%) of the issuer's total revenues.

The Commission should order the Division to amend the OIP and strike the false allegations. The law requires that the Commission not allow this proceeding to continue based on an OIP that contains allegations now known to be materially false. The Commission should also, in the interests of justice and fairness, stay these proceedings until an amended OIP has been issued. As a matter of fundamental fairness, the Commission must not allow Mr. Pruitt to suffer the significant prejudice of defending against factual allegations that are false. Mr. Pruitt should not be forced to expend resources defending against false allegations that the Division knows it cannot prove and that violate the Commission's own pleading standards. Mr. Pruitt is entitled to fair notice of the actual allegations against him so that he has an opportunity to focus his defense on the facts that are genuinely at issue. A short stay will remedy any prejudice Mr. Pruitt will face from continuing to litigate on this flawed OIP.

STATEMENT OF FACTS

On April 28, 2017, the Commission issued the OIP against Mr. Pruitt, the former Vice President of Finance for the Army Sustainment Division ("ASD") a small Alabama-based subsidiary of L3 Technologies, Inc. ("L3"), a large United States government defense contractor. The OIP alleges that, in December 2013, Mr. Pruitt on his own initiative instructed a subordinate to manufacture fictitious invoices related to services provided pursuant to an aircraft maintenance contract with the U.S. Army known as the C-12 Contract and withhold delivery of those invoices to the U.S. Army.

"Respondent's Scheme" as the Division has labeled it, was purportedly "facilitated by his deceitful emails not only to L3's corporate office but also to its external auditor" in an effort to "unlawfully recognize $17.9 million in revenue, which triggered a $62,100 bonus for Respondent."[4] The Division claims that L3 improperly recognized $17.9 million in revenue or a grand total of 14/100th of one percent (0.14%) of L3's annual revenues. The OIP charges Mr. Pruitt with: (1) causing L3's violations of Section 13(b)(2)(A) of the Securities Exchange Act of 1934 (the "Exchange Act"); (2) willfully violating Section 13(b)(5) of the Exchange Act; and (3) willfully violating Rule 13b2-1 of the Exchange Act.

The new facts established by neutral and disinterested witnesses and clear and convincing contemporaneous documents irrefutably establish that the Division's original account of key events alleged in the OIP have no factual basis. Contrary to the OIP, Mr. Pruitt was in fact acting at the direction and with the knowledge of his managerial and accounting superiors, in reliance upon guidance from L3's legal counsel, and in response to a specific request from the U.S. Army for invoices. Moreover, new testimony establishes that the recognition of revenue from the invoices did not "trigger" the award of a bonus and could not have been the motive for Mr. Pruitt's conduct. These new facts, fully disclosed to, and confirmed by the Division, require that the OIP be amended to remove the untrue and unfairly prejudicial allegations.

The invoices generated under L3's so-called "Revenue Recovery Initiative" —an initiative to invoice for services provided to the U.S. Army in prior contract periods not previously billed— were neither a "sham" nor "false," and Mr. Pruitt did not conceal them from anyone at L3. In fact, Mr. Pruitt acted at the direction of his accounting supervisor, Timothy Keenan. Mr. Keenan was

[4] Memorandum of Law in Opposition to Respondent's Motion for a Ruling on the Pleadings, *In the Matter of David Pruitt, CPA*, Admin. Proc. File No. 3-17950, at 1 (July 21, 2017).

the former Senior Vice President of Finance, Chief Financial Officer of L3's Aerospace Systems segment and resided multiple reporting levels above Mr. Pruitt. Mr. Keenan testified that he "believed at the time that it was appropriate to invoice for the revenue recovery items."[5] Mr. Keenan also made clear that "[a]ll of the work that was identified as part of the Revenue Recovery Initiative were services that [Mr. Keenan] and others had been told, and in good faith believed, had actually been performed for the U.S. Army by L3 pursuant to the C-12 Contract."[6] [redacted].[7]

The new facts show that at no point did Mr. Pruitt act in a rogue fashion without direction from his superiors or hide his activities from L3. While he nominally held the title of VP of Finance of ASD, he was never an officer of L3, ASD was not officially recognized as an L3 corporate "division," and in reality he had negligible decision-making and no policy-making authority. Out of a company of 38,000 employees, only two reported to Mr. Pruitt. ASD was a small part of the company, "multiple levels below L3 Corporate" in the organization chart.[8] Indeed, ASD employees were discouraged from even "contacting L3 Corporate to ask questions about accounting treatment or provide information to L3 Corporate accounting personnel directly."[9]

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[5] Fokas Aff. Ex. A ¶ 10; Fokas Aff. Ex. B at 124:19-125:14.
[6] Fokas Aff. Ex. A ¶ 8; Fokas Aff. Ex. B at 106:3-23.
[7] Fokas Aff. Ex. C ¶¶ 3-4.
[8] Fokas Aff. Ex. A ¶ 5.
[9] *Id.*; Fokas Aff. Ex. B at 81:5-82:23.

Moreover, Mr. Keenan testified that "Mr. Pruitt did not have authority to determine the accounting treatment to be applied to [revenue recovery] items on his own and he consulted superiors in the finance groups and legal counsel regarding the proper treatment to be applied."[10] In December 2013, Mr. Keenan, who was the CFO and his supervisor, specifically directed him to invoice certain revenue recovery items on the understanding that revenue would be recognized once the invoices were issued.[11] Mr. Keenan "did not believe at the time that issuing invoices and recognizing revenue was improper"[12] or that "Mr. Pruitt withheld any information about the generation of the invoices from [him]."[13]

Mr. Pruitt and his superiors understood that these invoices would be presented directly to the U.S. Army.[14] As documented in a contemporaneous email with the U.S. Army, the U.S. Army itself requested L3 to submit invoices for the revenue recovery items. The U.S. Army specifically sought to avoid the use of the formal dispute resolution mechanisms under the C-12 Contract and relevant federal contracting regulations in order to resolve and pay revenue recovery items collaboratively and as quickly as possible. In an email following an early December 2013 meeting with the U.S. Army, the C-12 Contract Manager for L3, Richard Schmidt, noted that the "intent is to resolve every one of the disputes outside of the REA/Claim process [i.e. the formal dispute resolution mechanisms of the contract]. [The Army Contracting Officer] stated that the government was offended by our use of the term 'REA' . . . ."[15]

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[10] Fokas Aff. Ex. A ¶ 9; Fokas Aff. Ex. B at 115:9-116:14.
[11] Fokas Aff. Ex. A ¶ 10; Fokas Aff. Ex. B at 120:19-121:23, 128:13-129:12.
[12] Fokas Aff. Ex. A ¶ 11; Fokas Aff. Ex. B at 145:23-146:5.
[13] Fokas Aff. Ex. A ¶ 11; Fokas Aff. Ex. B at 146:6-24.
[14] Fokas Aff. Ex. A ¶ 13.
[15] Fokas Aff. Ex. D; OIP ¶ 19.

In a sworn affidavit, Roderick Hynes, the former L3 Senior Program Manager for the C-12 Contract and a retired Lieutenant Colonel in the U.S. Army, confirmed that on or about December 18, 2013, he participated in a meeting that included the program management of both the U.S. Army and L3 for the C-12 Contract. At this meeting, "the Army stated that if L3 believed it was owed compensation for services not previously billed, then L3 should submit invoices and supporting documentation to the Army for review."[16] On December 30, 2013, the U.S. Army confirmed to Mr. Hynes what it had stated on December 18th—more than a week before the invoices were generated—that it did not see the revenue recovery items as "disputes," and that "[a]s discussed, recommend L3 submit ***invoices***/billing/justification of payment thru [sic] the appropriate channels."[17] The U.S. Army again directed ASD to send invoices to the government and not to file a formal claim because "the first step is to invoice the Government, then a claim will follow if the invoice is denied."[18] On January 17, 2014, the Army Contracting Officer confirmed the process that had been agreed to: invoices would be submitted directly to her, with supporting documentation, instead of being submitted through the electronic system for submitting invoices to the government.[19]

The fact that invoices were generated but not immediately delivered to the U.S. Army was outside of Mr. Pruitt's control since he was not responsible for their delivery. Mr. Keenan confirmed in his sworn affidavit and deposition testimony that Mr. Kenneth Lassus, the General Counsel of ASD, was the primary point of contact between L3 and the U.S. Army and was going to lead discussions with the U.S. Army regarding the Revenue Recovery Initiative.[20] The invoices

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[16] Fokas Aff. Ex. E ¶ 12.
[17] Fokas Aff. Ex. E ¶ 13 & Attachment A (emphasis added); *see* OIP ¶ 30.
[18] Fokas Aff. Ex. F; OIP ¶ 30.
[19] OIP ¶¶ 33-34.
[20] Fokas Aff. Ex. A ¶ 12; Fokas Aff. Ex. B at 169:8-170:9.

generated as part of the Revenue Recovery Initiative along with supporting documentation were expected to be presented directly to the U.S. Army by Mr. Lassus.[21] Mr. Hynes similarly confirmed that he and his team, responsible for compiling and analyzing the supporting documentation that would eventually be presented to the U.S. Army with the invoices, worked closely with Mr. Lassus.[22]

If there were any discrepancies in L3's books and records, as alleged by the Division, they were simply not the result of Mr. Pruitt allegedly acting as a rogue officer generating sham invoices. Mr. Pruitt was following directions he received from his supervisor who "did not believe at the time that issuing invoices and recognizing revenue was improper."[23] Rather,"[i]t was not until January 2014 after communications with L3 Corporate that [Mr. Keenan] learned ASD could only invoice for work performed during option year 3 [of the C-12 Contract]."[24] As Mr. Keenan stated in his sworn affidavit and confirmed to the Division at his deposition, "[i]t is probable that I did not make it as clear as I should have to Mr. Pruitt that he should reverse the invoices generated in late December for work performed during the prior option years."[25]

Finally, the new facts now known to the Division show that revenues recognized from the invoices simply did not trigger or entitle Mr. Pruitt to a bonus. Rather, ASD employees, including Mr. Pruitt, received year-end bonuses in 2013 as a result of cost and expense adjustments made by L3's senior management independent of the invoices at issue here. According to sworn statements of Mr. Keenan later confirmed during the Division's deposition of him, Mr. Pruitt was not involved

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[21] Fokas Aff. Ex. A ¶ 13; Fokas Aff. Ex. B at 170:10-171:20.
[22] Fokas Aff. Ex. E ¶ 10.
[23] Fokas Aff. Ex. A ¶ 11.
[24] *Id.*; Fokas Aff. Ex. B at 146:25-147:21. The C-12 Contract had a five-year term with the partial initial year referred to as a "base year" and each subsequent twelve-month period referred to as an "option year." *See* OIP ¶ 7.
[25] Fokas Aff. Ex. A ¶ 11; Fokas Aff. Ex. B at 152:22-154:20, 257:4-21.

in these discussions, nor could he have known in advance what, if any, adjustments senior management might make to ASD's financial results that would determine bonus eligibility.[26] Contrary to the false allegations in the OIP, Mr. Keenan made clear that "[i]t is not accurate for anyone to say that in December 2013, the issuance of invoices by Mr. Pruitt solely caused ASD to reach the 75% bonus threshold."[27] It is particularly egregious to allow the OIP's allegations on this point to stand as their sole purpose is to construct a financial motive for Mr. Pruitt's alleged conduct where none exists.

On May 2, 2018, trial counsel for the Division deposed Mr. Keenan at length to test the factual assertions he swore to in his affidavit. During thorough questioning by members of the Division, Mr. Keenan confirmed each and every statement made in his affidavit.

ARGUMENT

I. RESPONDENT MEETS THE LIBERAL STANDARD FOR AMENDMENT TO THE OIP

Pursuant to SEC Rule of Practice 200(d)(1), "[u]pon motion by a party, the Commission may, at any time, amend an order instituting proceedings to include new matters of fact or law." As the Commission explained in the 1995 amendments to its Rules of Practice, "amendment of orders instituting proceeding should be freely granted, subject only to the consideration that other parties should not be surprised, nor their rights prejudiced." SEC Rule of Practice 200 cmt. (d), 60 Fed. Reg. 32,738, 32,757, 1995 WL 370829 (June 23, 1995) (quoting *Carl L. Shipley*, Admin. Proc. File No. 3-3836, SEC Release No. 419, Exchange Act Release No. 34-10870, 1974 WL 161761 (June 21, 1974) ("*Shipley*")). "Where amendments to an order instituting proceedings are intended to correct an error, to conform the order to the evidence or to take into account

[26] Fokas Aff. Ex. A ¶ 15; Fokas Aff. Ex. B at 176:19-178:24.
[27] Fokas Aff. Ex. A ¶ 16; Fokas Aff. Ex. B at 178:25-179:18.

subsequent developments which should be considered in disposing of the proceeding, and the amendments are within the scope of the original order, either a hearing officer or the Commission has authority to amend the order." *Id.*

This liberal standard has been confirmed and applied in several cases by the Commission. *See Shipley*, 1974 WL 161761, at *4 ("Our general policy with respect to such motions is liberal. Where the purpose is merely to correct an error in pleading, to conform the pleadings to the proof, or to take into account subsequent developments which should be considered in disposing of the proceeding, amendment should be freely granted, subject only to the consideration that other parties should not be surprised nor should their rights be prejudiced." (footnotes omitted)); *Robert David Beauchene*, Admin. Proc. File No. 3-14351, SEC Release No. 68974, Exchange Act Release No. 34-68974, 2013 WL 661619, at *2, Order (Feb. 25, 2013); *Charles K. Seavey*, Admin. Proc. File No. 3-10336, SEC Release No. 1925A, 2001 WL 228030, at *2, Order (Mar. 9, 2001).

Respondent meets the liberal standard for amendment to the OIP. The Division cannot credibly claim prejudice or surprise because Respondent's counsel has previously disclosed all the new facts contained in this motion to the Division, highlighted them in memoranda of law, and presented and explained them in detail to members of the Division who also deposed Mr. Keenan. The Rules of Practice authorizes the Commission to grant the precise relief Respondent seeks here in order "*to conform the order to the evidence or to take into account subsequent developments which should be considered in disposing of the proceeding.*" SEC Rule of Practice 200 cmt. (d), 1995 WL 370829. The Division has already conceded that the new evidence, including the affidavit of Mr. Keenan in particular, "dramatically alters the factual record, will significantly impact the preparation for and conduct of the hearing scheduled for July 2018, and

may impact whether a hearing is even necessary."[28] The Division now must also concede that it cannot continue to rely on an OIP that contains false factual allegations.

II. THE DIVISION MUST HAVE A GOOD FAITH BASIS TO CONTINUE TO RELY ON THE ALLEGATIONS IN THE OIP

The Division has an obligation in every filing that to the best of its knowledge, information, and belief, formed after reasonable inquiry, the filing is well grounded in fact and is warranted by existing law. *See* SEC Rule of Practice 153(b)(1)(ii). This standard mirrors Rule 11(b)(3) of the Federal Rules of Civil Procedure which requires a good faith basis for allegations in pleadings. *See* Fed. R. Civ. P. 11(b)(3) ("By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney . . . certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . .").

While the Division was unaware that the OIP contained materially false or unsupportable allegations when it was filed, the Division cannot maintain this action under the current OIP without violating the mandates of Rule of Practice 153(b) and its related legal and ethical obligations. The allegations that must be amended simply do not comply with those standards because they are no longer grounded in fact. Indeed, the Model Rules of Professional Conduct dictate that a lawyer shall not knowingly fail to correct a false statement of material fact or offer evidence that the lawyer knows to be false. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3. In

[28] Memorandum in Support of Joint Motion for a Limited Stay of Discovery, *In the Matter of David Pruitt, CPA*, Admin. Proc. File No. 3-17950, at 1 (Apr. 3, 2018).

addition, New York's Rules of Professional Conduct[29] specifically forbid a lawyer from "stat[ing] or allud[ing] to any matter that . . . will not be supported by admissible evidence." *See* N.Y. RULES OF PROF'L CONDUCT r. 3.4(d)(1). The Division now knows that numerous key allegations in the OIP are without factual foundation and will be impossible to prove at a hearing. Accordingly, the Division is duty-bound to amend or strike them. Moreover, it is fundamental that the Division and its members may exercise delegated enforcement discretion only when they have reasonable cause in law and fact to do so. This is an obligation of not merely moral or legal but also constitutional dimension, and it requires among other things that the Division have in good faith a substantial basis in fact and law for its allegations. The new matters of fact, of the Division is now aware, set forth herein require that any OIP allegation or theme made false as a result, be amended or stricken accordingly.

III. ALLEGATIONS IN THE OIP THAT HAVE NO BASIS IN FACT MUST BE STRICKEN OR AMENDED

A. The Allegation that Mr. Pruitt Acted Without the Approval and Direction of His Accounting Supervisor, Timothy Keenan, the Aerospace Systems CFO is Now Known to be False.

The Division alleged in the OIP that Mr. Pruitt did not have authorization from his superiors to invoice the revenue recovery items. The OIP includes the following allegation regarding Mr. Keenan's directive to Mr. Pruitt to invoice:

> **OIP ¶ 21**: Pruitt and the Aerospace Systems CFO [Timothy Keenan] had a telephone call on or about Friday, December 20, 2013. Pruitt claims they

[29] New York's Rules of Professional Conduct are applicable here because it is the forum in which the Division is appearing in the proceeding. *See* Securities and Exchange Commission Division of Enforcement, Enforcement Manual at 1.4.4 (Nov. 28, 2017) (noting that the ethical standard that must be considered includes "the Rules of Professional Responsibility of the state in which the attorney is licensed to practice law, and the Rules of Professional Responsibility of the state in which the attorney is appearing on behalf of the Commission before a tribunal or otherwise engaging in such other behavior as may be considered the practice of law under that state bar's ethical and disciplinary rules").

> discussed a one-page list of the revenue recovery claims that he purportedly emailed the Aerospace Systems CFO prior to the call. Pruitt claims that he and the Aerospace Systems CFO went down the list and the Aerospace Systems CFO instructed Pruitt which items to invoice and which to accrue. The Aerospace Systems CFO denies giving Pruitt blanket authority to invoice for the claims, but does recall a conversation in which he told Pruitt that he could invoice for work performed during option year 3 (i.e., 2013).

The factual record no longer provides any basis for this allegation. Mr. Keenan, as CFO and Mr. Pruitt's supervisor, stated unequivocally in his affidavit and during his deposition by the Division under oath that "during one telephone call [he] direct[ed] Mr. Pruitt to invoice most of the revenue recovery items and accrue for two others."[30] Mr. Keenan testified that his direction to invoice included invoicing for option years 1 and 2 of the C-12 Contract, not just option year 3.[31] Mr. Keenan also testified that "Mr. Pruitt did not have authority to determine the accounting treatment to be applied to [the revenue recovery] items on his own and [Mr. Pruitt] consulted superiors in the finance groups and legal counsel regarding the proper treatment to be applied."[32] Mr. Pruitt acted solely at Mr. Keenan's direction and generated invoices for the revenue recovery items, including for items in option years 1 and 2.

Critically, Mr. Keenan testified that as the CFO he "did not believe at the time that issuing invoices and recognizing revenue was improper."[33] It was not until later in January 2014, after the generation of the invoices, that he learned that ASD could only invoice for work performed during option year 3, something he then did not clearly communicate to Mr. Pruitt.[34] In light of Mr. Keenan's sworn affidavit, and his deposition testimony in which he confirmed all

[30] Fokas Aff. Ex. A ¶ 10; Fokas Aff. Ex. B at 120:19-121:23, 128:13-129:12.
[31] Fokas Aff. Ex. B at 120:19-121:23, 128:13-129:12.
[32] Fokas Aff. Ex. A ¶ 9; Fokas Aff. Ex. B at 115:9-116:14.
[33] Fokas Aff. Ex. A ¶ 11; Fokas Aff. Ex. B at 145:23-146:5.
[34] Fokas Aff. Ex. A ¶ 11; Fokas Aff. Ex. B at 146:25-147:21, 152:22-154:20, 257:4-21.

of the statements made in his affidavit, paragraph 21 of the OIP is demonstrably and materially false and must be stricken.

B. The Allegation that the U.S. Army Did Not Request Invoices from L3 is Now Known to be False.

The Division alleges in the OIP that the U.S. Army was not prepared to accept invoices in an effort to demonstrate that it was unreasonable for Mr. Pruitt to generate them. Yet multiple uncontroverted sources—including a sworn affidavit from Roderick Hynes, the former L3 Senior Program Manager—confirm that the Army did request invoices, was in fact prepared to accept them and ultimately paid a substantial portion of the work invoiced. The OIP, however, falsely alleges the following:

> **OIP ¶ 30**: The Controller's office requested through the Aerospace Systems CFO that ASD obtain a letter from the U.S. Army indicating that ASD had permission to bill for the $3.2 million Option Year 3 claims. In connection with seeking this letter, Pruitt received from the C-12 Contract Manager two separate email chains from late December and early January, neither of which Pruitt had been copied on previously, discussing whether L3 should invoice for all of the revenue recovery items (i.e., not just the $3.2 million). Both email chains suggest that the U.S. Army intended for L3 to send invoices that would be paid if justified or denied. In one of the email chains, the C-12 Contract Manager specifically asks, "[j]ust to be clear . . . .are you telling me to invoice (bill) the government for what we believe we are owed to start the conversation? Or are you telling me to file a claim? I see those as two different actions." The response was, "I think the first step is to invoice the Government, then a claim will follow if the invoice is denied." Neither email chain mentioned invoicing in L3's SAP system but withholding the invoice from the U.S. Army.
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> **OIP ¶ 36**: The modified e-mail that Pruitt and the President of ASD procured from the Army Contracting Officer is deceptive, however, because it gave L3 Corporate and L3's auditor the impression that ASD had permission to invoice the U.S. Army for unresolved claims, when that was not actually the case. Pruitt knew, based on his prior conversations with the General Counsel of ASD, as well as the Army Contracting Officer's original e-mail, that the U.S. Army was not prepared to accept invoices.

In contrast, the U.S. Army specifically requested invoices in two emails, which are selectively quoted in paragraph 30 of the OIP above. First, on December 30, 2013, Lieutenant

Colonel Jonathan Frasier, the U.S. Army's Program Manager for the C-12 Contract, wrote: "As discussed on 18 Dec in our PM meeting, I believe the stated disputes fall into two categories . . . . Of the latter category, the government does not see these as disputes. As discussed, recommend L3 submit ***invoices***/billing/justification of payment thru [sic] the appropriate channels."[35] On January 6, 2014, Brian Sabourin, another Army program manager, confirmed that "the first step is to invoice the Government."[36] Notably, the December 18 meeting with the Army took place more than a week prior to generation of the invoices at issue.

Mr. Hynes testified in his sworn affidavit that at the meeting he participated in on or about December 18, which included personnel from the U.S. Army and L3, "the Army stated that if L3 believed it was owed compensation for services not previously billed, then L3 should submit invoices and supporting documentation to the Army for review."[37] This sworn testimony stands on its own, but is independently corroborated by Lieutenant Colonel Frasier referencing the December 18 meeting in his email and also recommending L3 submit invoices.[38] [redacted] [39] Any allegation to the contrary in the OIP is now false, unsupported by the record and should be stricken. Not only did the U.S. Army stand ready

[35] Fokas Aff. Ex. E ¶ 13 & Attachment A (emphasis added).
[36] Fokas Aff. Ex. F.
[37] Fokas Aff. Ex. E ¶ 12.
[38] Fokas Aff. Ex. E ¶ 13 & Attachment A.
[39] Fokas Aff. Ex. C ¶ 4

waiting for the invoices—it specifically requested them on at least *three separate occasions* and ultimately paid for a substantial portion of the invoiced work.[40]

C. The Allegation That Mr. Pruitt Was Motivated by a Potential Year-End Bonus is Now Known to be False.

The OIP alleges that Mr. Pruitt's motive for generating the invoices at issue and causing the related revenue to be recognized was to help ASD reach 75% of its Annual Operating Plan so he could get a year-end bonus. The OIP states:

> **OIP ¶ 27**: ASD, with the revenue from the invoices, met the required 75% of their plan to make bonuses. Pruitt received a bonus of $62,100 on a base salary of [redacted] attributable to ASD achieving 75% of plan. This bonus was later rescinded by L3.

This allegation is now without any factual basis. Mr. Keenan testified that since ASD was not going to meet 75% of its Annual Operating Plan for the year, "several adjustments were made after the close of the year that shifted certain costs and expenses . . . for the purpose of calculating the management incentive bonus."[41] Without these adjustments, ASD would have fallen far short of the 75% threshold even with the revenue from the invoices at issue. As Mr. Keenan confirmed, "Mr. Pruitt was not involved in these discussions, nor could he have known in advance what, if any, adjustments would be made to ASD's financial results."[42] Mr. Keenan makes clear that "[i]t is not accurate for anyone to say that in December 2013, the issuance of invoices by Mr. Pruitt solely caused ASD to reach the 75% bonus threshold."[43] As Mr. Pruitt did not know about these

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[40] Specifically, the amount alleged to be prematurely recognized is $17.9 million, or 14/100th of one percent (0.14%) of the issuer's total annual revenue. [redacted]

[41] Fokas Aff. Ex. A ¶ 15.

[42] Fokas Aff. Ex. A ¶ 15; Fokas Aff. Ex. B at 176:19-178:24.

[43] Fokas Aff. Ex. A ¶ 16; Fokas Aff. Ex. B at 178:25-179:18.

adjustments in advance, it was not possible for him to know what impact, if any, the invoices at issue would have on ASD making plan and him receiving a bonus. The allegation regarding Mr. Pruitt's motive is false and should be stricken in its entirety.

IV. RESPONDENT WILL FACE SIGNIFICANT PREJUDICE IF THE OIP IS NOT AMENDED

Mr. Pruitt will face significant prejudice should the Division continue to rely on the allegations set forth above. Mr. Pruitt should not be forced to expend limited resources to prepare a defense against unfairly prejudicial allegations that lack factual basis.

The false and misleading allegations in the OIP have already prejudiced Mr. Pruitt in several ways. First, they have denied him a fair opportunity for the Administrative Law Judge ("ALJ") to properly consider his motion for a ruling on the pleadings as the ALJ was required by law to consider the unfairly prejudicial and false allegations as true. Second, they have significantly misled both the Division's and Respondent's expert witnesses and resulted in expert reports that wastefully addressed the false allegations at significant expense to both parties. Finally, the allegations which falsely presented Mr. Pruitt as nefarious, greedy and intentionally corrupt, may have caused the Commission to improvidently authorize this unprecedentedly small "broken windows" case against an individual with a spotless record of integrity and service to this country. If the Commission had the benefit of the newly discovered facts that the Division has confirmed – and had Respondent's counsel had the opportunity to advocate these new facts in a Wells Submission –it is highly likely that this action would not have been authorized.

In addition, the Division is not prejudiced by this motion as it is duty bound to prosecute a matter only upon known provable facts. The Commission should order the Division to amend the OIP immediately so that Mr. Pruitt has fair notice of the allegations against him, and is provided with a fair opportunity to prepare his defense.

V. THE COMMISSION SHOULD STAY THESE PROCEEDINGS PENDING ITS DECISION

While this motion is pending, the interests of fairness and justice require that these proceedings be temporarily stayed. The parties will soon be engaging in additional discovery including expert discovery, fact depositions, and dispositive motion practice. Mr. Pruitt should not be forced to take discovery and prepare dispositive motions while the false allegations against him make it impossible to know which to prepare for and which to ignore. A short stay while the Commission considers this motion and if granted, while the Division amends the OIP, will remedy any prejudice Mr. Pruitt faces from continuing to litigate against false allegations. Striking them will streamline the factual disputes that remain, leading to a more efficient and inexpensive pre-hearing discovery process as well as paring the issues to be decided on a motion for summary disposition and at the hearing.

CONCLUSION

Mr. Pruitt stands accused of acts in the OIP that can no longer legally, ethically, or morally be advanced against him. For this reason, and those set forth above, the Commission should grant Mr. Pruitt's motion to amend the OIP and to stay these proceedings pending the Commission's review of the instant motion and if granted, while the Division amends the OIP.

Dated: June 11, 2018
New York, New York

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RULE 154(c) CERTIFICATION

Pursuant to Rule 154(c) of the Commission's Rules of Practice, I hereby certify that this memorandum of law contains 6008 words, exclusive of the Table of Contents and Table of Authorities.

Jimmy Fokas