

**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING
File No. 3-17950**

In the Matter of,

David Pruitt, CPA

Respondent.

**REPLY MEMORANDUM IN FURTHER 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**

The Division of Enforcement's ("Division") opposition spells out the precise reasons why an amended Order Instituting Proceedings ("OIP") is necessary. The Division, fully cognizant that the OIP no longer reflects reality, puts forth an opposition that is rife with new facts, new theories and a narrative that cannot be found in the plain text of the existing OIP. The Division attempts to explain away the false allegations in the OIP by broadly labeling them "factual disputes" as if that would insulate the Division from its obligations to put forth allegations, in good faith, that are well grounded in fact and warranted by existing law. Even if there are factual disputes between the parties, the Division has an obligation to issue an OIP that complies with Rule 200 of the Rules of Practice and an ethical duty to correct false statements of fact. Respondent's motion seeks an amended OIP so he is on notice of the allegations against him and not for the Commission to resolve any factual issues, as the Division contends.

As prehearing discovery continues to expose false allegations against Mr. Pruitt, the Division should not be permitted to resort to the factual and legal contortions found in the opposition to justify the dramatic shift in its narrative or to salvage its fatally flawed case. The Division conducted an almost three year investigation prior to filing this action and has had more than enough time to get its facts straight. It should not hide the ball at the eleventh hour, now that it knows that the case it brought is no longer supported by the evidence. Mr. Pruitt is entitled to notice so he has an opportunity to focus his defense on the facts that have a good faith basis and are genuinely at issue.

The Commission should decide this motion, stay these proceedings and order the Division to amend the OIP.¹

¹ Although the Commission has stayed all pending administrative proceedings in light of the Supreme Court's decision in *Lucia v. S.E.C.*, No. 17-130, 2018 WL 3057893 (U.S. June 21,

ARGUMENT

I. THE DIVISION HAS PUT FORTH ENTIRELY NEW ALLEGATIONS OF FACT AND THEORIES OF LIABILITY THAT GO FAR BEYOND THE SCOPE OF THE OIP.

The OIP must be amended not only because it contains false allegations but it also does not accurately reflect the case articulated by the Division, for the first time, in its opposition. The OIP alleges that Mr. Pruitt, acting on his own, instructed a subordinate to manufacture fictitious invoices related to services provided to the U.S. Army and withhold delivery of those invoices in order to obtain a year-end bonus. The Division's new narrative, found nowhere in the OIP, alleges that Mr. Pruitt was a principal accounting officer for ASD with final authority to determine accounting treatment. He allegedly deceived his accounting supervisor, Timothy Keenan, to authorize the generation of the invoices and the recognition of revenue. This was done in order to obtain a bonus even though Mr. Pruitt knew at the time the revenue was recognized that ASD would be millions of dollars short of the bonus target.² This revised narrative cannot be found in the OIP because it is a drastic departure from the original allegations and is precisely why an amended OIP is needed.

A. The Division Alleges for the First Time that Mr. Pruitt Deceived his Accounting Supervisor

In order to overcome the exculpatory statements of Mr. Keenan, the Division now alleges and implies, for the first time in its opposition, that Mr. Pruitt may have deceived Mr. Keenan in

2018), this reply is submitted in an abundance of caution. *See Order, In re Pending Administrative Proceedings*, Release No. 83495 (June 21, 2018).

² *See* Division of Enforcement's Memorandum in Opposition to Respondent's Motion to the Commission to Amend the Order Instituting Proceedings, *In the Matter of David Pruitt, CPA*, Admin. Proc. File No. 3-17950, (Jun. 18, 2018) ("Opp.") at 2, 6-7 & 10-11.

order to obtain approval to invoice and recognize revenue. According to the Division, Mr. Keenan's recent testimony "raises substantial issues of fact as to *what Pruitt told Keenan*."³ This fanciful claim cannot be found in the OIP because it directly contradicts the existing false allegation in the OIP that Mr. Keenan did not authorize the issuance of the invoices.⁴ In support of this last minute accusation, the Division now offers a string of one and two-word quotes for the proposition that Mr. Keenan "instructed Pruitt to invoice for all three option years based on Pruitt having told him that the customer would 'accept' 'valid invoices' and in fact 'pay' for them."⁵ While the Division is free to pursue this specious scenario if it can be maintained in good faith, this is precisely the type of "subsequent fact" that should be added to an amended OIP.⁶ Mr. Pruitt should not be forced to guess at the allegations or wait for the hearing to determine what he must defend against. In addition to providing required notice to the Respondent, an amended OIP also affords Mr. Pruitt the opportunity to challenge the sufficiency of these new allegations by seeking a ruling on the pleadings pursuant to Rule 250(a) of the Rules of Practice.

B. The Division Alleges for the First Time that Mr. Pruitt Was a Principal Accounting Officer with Final Authority on Accounting Decisions

The Division's opposition for the first time bestows the lofty title of "principal accounting officer" on Mr. Pruitt to falsely portray him as the final decision-maker on accounting treatment

³ Opp. at 6.

⁴ Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice and Notice of Hearing, *In the Matter of David Pruitt, CPA*, Admin. Proc. File No. 3-17950, (Apr. 28, 2017) ("OIP.") at ¶ 21.

⁵ Id.

⁶ Opp. at 6.

for ASD.⁷ The opposition goes further and alleges that Mr. Pruitt was “*the* L3 employee who was responsible to ensure that L3’s revenue recognition policy was followed.”⁸ This allegation is directly contradicted by Mr. Keenan who made clear that Mr. Pruitt “did not have authority to determine the accounting treatment to be applied to [the Revenue Recovery] items on his own.”⁹ Notwithstanding this clear and uncontested evidence, the Division now claims that “even if Keenan had directed Pruitt to generate invoices, Pruitt should not have followed” the directions of his accounting supervisor.¹⁰ If the Division believes it has a good faith basis for these new allegations, the OIP must be amended to include them.

C. The Division Advances a Revised and Implausible Theory regarding Mr. Pruitt’s Purported Motive

The Division continues to cling to the allegation that Mr. Pruitt was motivated to generate the invoices at issue so that he could receive a bonus.¹¹ The Division’s revised theory now claims that Mr. Pruitt was motivated by a bonus, even though he knew at the time the revenue was recognized that ASD would still fall millions of dollars short of what was required to trigger that bonus.¹² Mr. Keenan made clear in his affidavit that the bonus threshold was reached only after financial adjustments were made, well after the invoices were generated.¹³ Mr. Pruitt had no

⁷ See Opp. at 2. The Division is also well-aware that ASD was not a division of L3 during the relevant period, nor did it have its own accounting function. The Division also fails to explain how a low-level vice president had final decision making authority over all accounting issues.

⁸ Opp. at 7 (emphasis added).

⁹ See Affidavit of Jimmy Fokas 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, *In the Matter of David Pruitt, CPA*, Admin. Proc. File No. 3-17950, (Jun. 11, 2018) (“Fokas Aff.”) at Ex.A ¶ 9.

¹⁰ Opp. at 7.

¹¹ Opp. at 10-11.

¹² See Id.

¹³ Fokas Aff. at Ex.A ¶ 15-16.

involvement with these adjustments or advanced knowledge of them.¹⁴ At the time the invoices were generated on December 27, 2013, and at year-end, four days later, there is no question that ASD was millions of dollars short of its bonus target and the revenue from the invoices did not change this fact. Although the Division calls this illogical,¹⁵ the only thing that defies logic is its continued insistence on these false allegations. They must be stricken and if the Division believes it has a good faith basis for the implausible theory now advanced in its opposition, it should be included in an amended OIP.

The Divisions purported “cosmetic correction” amounts to nothing more than a concession that key allegations are no longer viable, and these new theories of liability are completely outside of the scope of the current OIP.¹⁶ The OIP is required to “set forth the factual and legal basis” for the charges brought against Mr. Pruitt so he has notice and the ability to defend against them. *See* 17 C.F.R. §§ 201.200(b)(3). The Division cannot be permitted to stray from the OIP without providing notice to Respondent in the form of an amendment that includes these new allegations.

II. THE COMMISSION IS THE APPROPRIATE BODY TO DECIDE THIS MOTION.

Rule 200(d)(1) of the Rules of Practice mandate that the Commission is the appropriate body to decide this motion. Rule 200 specifically precludes the Administrative Law Judge (“ALJ”) from considering amendments that go outside the scope of the original OIP. As set forth above, the new facts and legal theories espoused by the Division in its opposition go far beyond the scope of the OIP and this motion cannot properly be directed to the ALJ for decision. The Commission

¹⁴ Id.

¹⁵ Opp. at 10.

¹⁶ Opp. at 1.

must determine whether these new allegations, as well as the false allegations identified in Respondent's moving brief, require an amendment.

III. THE COMMISSION SHOULD STAY THESE PROCEEDINGS PENDING ITS DECISION

The Division does not contest in its opposition that the interests of fairness and justice require that these proceedings be temporarily stayed. Mr. Pruitt is entitled to fair notice of the actual allegations against him so that he has an opportunity to focus his defense and prehearing discovery on the facts that are genuinely at issue. He will suffer unfair prejudice should he be made to litigate on a flawed OIP that contains demonstrably false allegations. Moreover, the allegations against Mr. Pruitt should not be a moving target and the Division's constantly shifting narrative should be set forth once and for all in an amended charging document. A short stay while the Commission considers this motion and if granted, while the Division amends the OIP, will remedy any prejudice Mr. Pruitt will face from continuing to litigate against false and shifting allegations.¹⁷ Respondent respectfully requests that the Commission hear oral argument on this motion in light of the serious issues raised herein.


¹⁷ In the event the current stay is lifted, Respondent requests that this proceeding continue to be stayed until this motion has been decided.

CONCLUSION

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 21, 2018
New York, New York

By: _____


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