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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-17950

In the Matter of

David Pruitt, CPA,

Respondent.

DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENT'S MOTION FOR ADDITIONAL DEPOSITIONS

The Division of Enforcement ("Division") respectfully submits this Memorandum of Law in Opposition to Respondent David Pruitt, CPA's ("Pruitt" or "Respondent") Motion for Additional Depositions ("Motion"). Respondent requests permission to take the depositions of two additional fact witnesses beyond the three he is entitled to depose under Rule 233(a)(1) of the SEC's Rules of Practice. Unstated is the fact that Respondent also seeks to depose the Division's expert witness, meaning that Respondent wishes to take a total of six depositions. Respondent's Motion should be denied on the grounds that (1) he fails to articulate a compelling need for three additional depositions, and (2) depositions of expert witnesses are counted against the three that Respondent is afforded, as of right, under the SEC's Rules of Practice.

I. Respondent Fails to Demonstrate a Compelling Need for Additional Depositions

Respondent's Motion is governed by Rule 233, which permits additional depositions only in those exceptional circumstances where a party can demonstrate a "compelling need." Rule 233(a)(3)(ii); *see also* Rule 232(e)(3) (the Court "shall quash or modify" a deposition notice that fails to satisfy Rule 233(a)'s requirements). Rule 233(a)(3)(ii)(C) further requires a party

seeking additional depositions to explain "why the deposition of each witness and proposed additional witness is necessary for the moving side's arguments, claims, or defenses." And under Rule 233(a)(3)(ii)(D), the depositions may not be unreasonably cumulative or duplicative. In the Adopting Release to the 2016 Amendments to the Commission's Rules of Practice, the Commission noted that some cases "may present unique issues or challenges that warrant affording the parties additional opportunities to conduct prehearing depositions," but added that it expected such circumstances will "rarely be present." Adopting Release, Rel. No. 34-78319, at *20.

The instant matter is not one that presents "unique challenges that warrant affording the parties additional opportunities to conduct prehearing discovery." *Id.* at *88. Respondent is accused of causing books and records violations at his former employer, L3 Technologies, Inc. ("L3"), by causing the Army Sustainment Division of L3 to improperly recognize $17.9 million in revenue in 2013 and Q1 2014. He is further alleged to have knowingly falsified L3's books, records and accounts, and knowingly circumvented L3's system of internal accounting controls. Although there are multiple witnesses who are expected to testify at the hearing, it is a rare case where three or fewer witnesses would be called to testify in a contested proceeding, so Rule 233 certainly does not contemplate that every witness appearing at a hearing will be deposed in advance.

Respondent fails to demonstrate a compelling need for three additional depositions because he has already been provided all of the prior statements of witnesses designated on the Division's preliminary fact witness list that are currently in the possession of the Division. This includes the transcript of testimony of Kenneth Lassus, who is designated for one of the Respondent's three depositions as of right, and witness interview notes from Alex Cummins,

Karen Fletcher, Tim Keenan, and Richard Schmidt, the four remaining fact witnesses identified by Respondent as proposed deponents. In addition, the Division has produced to Respondent 85,000 documents collected during the two-year investigation, and transcripts and exhibits from each of the four witnesses who testified in the investigation.[1] This information, as well as the detailed allegations of the OIP, lay bare the Divisions allegations. There is no mystery as to what each witness will testify to during the hearing. Indeed, as a justification for limiting the number of depositions afforded to respondents, the Commission has noted that in Administrative Proceedings, the Division produces its investigative file to the Respondent, including "non-privileged documents gathered by the Division, transcripts of investigative testimony, and disclosure of material, exculpatory facts (*Brady* material)—that provide significant guidance to respondents in determining the most important witnesses to depose."[2] *Id.* at *19. Such productions have already been made to Respondent in this matter.

To the extent Respondent wishes to speak with potential witnesses, he—as well as the Division—may interview them. But Respondent has given no indication that he has attempted to do so, or that any potential witnesses have refused to speak with him, which might be argued as a compelling need to take additional depositions. In short, Respondent's only argument seems to be that because more than three witnesses will be called at the hearing to testify about his

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[1] Respondent continuously, and misleadingly, suggests that the Division conducted a "three year investigation." *See, e.g.,* Motion at 1; Respondent's Memorandum of Law In Support of its Motion for a More Definite Statement at 3; Memorandum of Points and Authorities in Support of Respondent David Pruitt's Motion To Compel the Division of Enforcement to Comply with the Court's June 23, 2017 Order at 3. In truth, the investigation commenced in August 2014, and Pruitt was issued a Wells Notice in September 2016. Thereafter, the Division refrained from commencing this action for six months to allow Pruitt's current counsel time to get up to speed on this matter, and to discuss a possible resolution. When it became apparent that the parties could not reach a resolution, the Division commenced the instant proceeding in April 2017—approximately two and one-half years after the investigation commenced.

[2] Respondent makes much of the fact that for four of his proposed deposition witnesses, the Division produced notes of interviews rather than verbatim transcripts of testimony. (Motion at 2-3.) However, investigative witnesses often sit for interviews, rather than testimony, and the Division is not aware of any authority which suggests that the existence of interview notes, rather than testimony transcripts, inures in favor of allowing a respondent additional depositions.

wrongdoing, he should be permitted to depose six witnesses. That argument could be carbon-copied to any administrative proceeding and presents no compelling need here.

II. The Three Depositions Afforded Respondent Under Rule 233(a)(1) Covers Both Fact Witnesses and Expert Witnesses

Although not stated explicitly in his Motion, Respondent has informed the Division that he will also seek to depose the Division's expert witness.[3] Rule 233(a)(1) makes no distinction between fact witnesses and expert witnesses. The text simply states, "[i]f a proceeding involves a single respondent, the respondent may file written notices to depose no more than *three persons*, and the Division of Enforcement may file written notices to depose no more than *three persons*." Rule 233(a)(1) (emphasis added). In the Adopting Release for the 2016 Amendments to the Commission's Rules of Practice, the Commission indicated that a "commenter suggested that the three- and five- deposition limits proposed by the Commission should be limited to fact witnesses, and not include experts." Adopting Release, at *17. However, the Commission declined to adopt this suggestion, a point recently cited by this Court in a decision holding that expert witnesses count against the limit under Rule 233(a). *See In the Matter of Adrian D. Beamish, CPA*, Admin. Proc. File No. 3-17651, Admin. Proc. Ruling Release No. 4581, 2017 SEC LEXIS 368, at *6 n. 1, Order (ALJ Feb. 3, 2017) ("The parties are informed that I *will* count expert depositions against Rule 233(a)'s deposition limit. There is no textual basis for excluding them from the count, and the Commission did not modify the rule pursuant to a commenter's suggestion "that the three- and five- deposition limits . . . be limited to fact witnesses, and not include experts.") (internal citations omitted). The Division respectfully

[3] Respondent's Motion makes this argument implicitly by citing a November 23, 2016 decision from *RD Legal Capital, LLC,* Admin. Proc. File No. 3-17342, for the proposition that expert witness depositions do not count against the maximum number of depositions provided in Rule 233. (Motion at 2, fn. 3.) Respondent, however, fails to mention that a separate ruling from *In the Matter of Adrian D. Beamish, CPA*, Admin. Proc. File No. 3-17651, dated February 3, 2017, held that expert depositions *do* count against the maximum number. *In the Matter of Adrian D. Beamish, CPA*, Admin. Proc. File No. 3-17651, Admin. Proc. Ruling Release No. 4581, 2017 SEC LEXIS 368, at *6, Order (ALJ Feb. 3, 2017).

submits that the contrary holding in *RD Legal Capital, LLC*, which did not count the expert witness deposition against the number of depositions allotted to the respondent, is inconsistent with the plain text of Rule 233(a). *See RD Legal Capital, LLC*, Admin. Proc. File No. 3-17342, Admin. Proc. Ruling Release No. 4387, 2016 SEC LEXIS 4373, at *5, Order (ALJ Nov. 23, 2016) ("[i]n view of the Commission's failure to specify that depositions of experts count toward the limit, it is concluded that they do not.").

Accordingly, whether the Respondent is afforded three or five depositions, the Division submits that that number should include any planned deposition of the Division's expert witness.

Conclusion

Based on the foregoing, the Division respectfully requests that the Court deny Respondent's Motion.

Dated: October 12, 2017
New York, New York

DIVISION OF ENFORCEMENT

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I served the Division of Enforcement's October 12, 2017 Opposition to Respondent's Motion for Additional Depositions by mailing a copy of the same via e-mail, on this 12th day of October 2017, to Respondent:

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