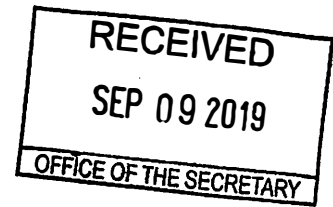


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**UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION**

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

In the Matter of

David Pruitt, CPA

Respondent.

**DIVISION OF ENFORCEMENT'S
MEMORANDUM IN OPPOSITION TO MOTION TO PRECLUDE
THE DIVISION OF ENFORCEMENT FROM OBJECTING
TO RESPONDENT'S EXHIBIT LIST**

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September 6, 2019

The Division of Enforcement (“Division”) respectfully submits this memorandum of law in opposition to Respondent David Pruitt’s motion to preclude the Division from objecting to Respondent’s exhibit list. On August 16, 2019, Respondent submitted a 195-page list identifying 1,758 exhibits identified solely with a “Beg Bates/Document” – no date, no description, no additional detail whatsoever for the vast majority of documents that had not already been introduced during the ten depositions in the case (“Pruitt’s Exhibit List”).¹ By contrast, the Division submitted on the same date a list identifying 547 exhibits – one-third less than Respondent proposed – and provided a date, brief description and complete bates range (“Division’s Exhibit List”). On August 23, 2019, the Division reserved the right to object to Pruitt’s Exhibit List (as well as the thirty-two proffered witnesses identified by Respondent), noting that Respondent failed to provide “information *at all*, other than bates numbers, for the majority of the 1,758 proffered exhibits.”²

Rather than provide any additional information to make Pruitt’s Exhibit List more useful to the Division or the Court, Respondent filed this motion seeking the extraordinary relief of precluding the Division from objecting to any of their 1,758 exhibits so that these voluminous documents could be made a part of the record. Respondent essentially seeks to move by fiat all 1,758 exhibits into the record in this case without any assessment as to their relevance or whether any of the exhibits proffered may cause undue delay, waste of time or needlessly present cumulative evidence. This would usurp the role of the Court to control the record at the hearing and prevent the Court from having an efficient hearing.

¹ Respondent noticed and took five of the fact depositions in the case pursuant to the Court’s Order dated October 16, 2017, which granted Respondent’s motion to take two additional fact depositions.

² Respondent also objected to the Division’s Exhibit List. The Court, pursuant to an Order issued September 3, 2019, ordered the parties to “meet and confer to see if some of the issues can be narrowed or resolved entirely.” Respondent’s present motion reiterates certain of his objections to the Division’s witness list. This memorandum does not address those issues or arguments, about which the parties will meet and confer.

Respondent offers no support for the draconian remedy he seeks. The Court should reject Respondent's motion and direct Respondent to provide additional detail that would make Pruitt's Exhibit List useful and efficient for both the Division and the Court to make evidentiary assessments and permit the parties to meet and confer regarding objections.

ARGUMENT

I. The Division Simply Seeks Sufficiently Detailed Information to Make Pruitt's Voluminous Exhibit List Useful to the Division and the Court.

Respondent states repeatedly in his motion that the Division seeks his trial strategy, but that is simply not the case. Here, the sheer number of proffered exhibits by Pruitt (1,758) makes any assessment of relevance – or whether such proffered exhibits are needlessly cumulative – essentially impossible, and certainly requires additional information be provided such as, at a minimum, date, sender and recipients of the documents and a brief description, as the Division provided in the Division's Exhibit List. While Respondent makes much of the fact that he was able to assert objections with specificity to the Division's proposed exhibits, the comparison is not apt because the Division designated one-third the number of exhibits that Pruitt designated and provide more detail about them.³

Moreover, although Respondent's motion seeks to preclude the Division from objecting only to the exhibits on Pruitt's Exhibit List versus the thirty-two witnesses he has identified on his Witness List, it is clear that the two issues are related. As to witnesses, SEC Rule of Practice 222(a)(4) provides that "on his or her own motion, or at the request of a party" a hearing officer may request as to witnesses a "brief summary of their expected testimony." In this single-respondent administrative hearing, Pruitt's designation of 32 witnesses for his defense on its face

³ While Respondent states that the Division's own exhibit list contains thousands of documents, this is only when the four "summary" or large exhibits are included, to which Respondent has objected and about which the parties will meet and confer.

seems needlessly excessive. The Division respectfully requests that the Court order Respondent to provide a brief summary of the expected testimony for the witnesses not also identified on the Division's list. Such information is essential to assess the relevance of or whether testimony would be unnecessarily duplicative. As the Division noted in its letter dated August 23, 2019, "[t]o the extent any proffered witnesses would be called to attest to Respondent's character, such testimony would not be admissible." Yet, it appears to the Division that up to seven of the 32 proposed witnesses Pruitt plans to call are "character witnesses" from his time in the U.S. Army.

Respondent's motion also states there is no requirement that he divulge his trial strategy (and to this the Division agrees), but it does not follow that he need not explain why he intends to offer the documents and witness testimony at the hearing. When Respondent's proposed exhibits are presented at the hearing, only this Court has the authority to ensure that relevant evidence is received and can rule on the admissibility of evidence. SEC Rule of Practice 111(c). Respondent's request to preclude the Division from making any objections to Pruitt's Exhibit List would interfere with the Court's gatekeeper function and deprive it of important considerations as to admissibility.

II. Respondent Provides No Authority for the Extraordinary Relief Sought.

Respondent incorrectly relies on *Smith v. Café Asia*, No. 07-0621 (RWR/JMF), 2011 WL 5108489 (D.D.C. Oct. 27, 2011), *In re Fundamental Long Term Care., Inc.* 515 B.R. 857 (Bankr. M.D. Fla. 2014), and *Lynch v. Alabama*, No. 08-S-450NE, 2010 WL 11562094 (N.D. Ala. Aug. 16, 2010), in support of his motion for the extraordinary relief of precluding the Division from objecting at any later point of this proceeding. None of the cases support Pruitt's argument.

Smith involved allegations of sexual harassment and discrimination brought by a former employee against his employer. *Smith v. Café Asia*, 598 F.Supp.2d 45, 46-47, (RWR) (D.D.C. Feb. 20, 2009). At issue in that case was defendants' filing objections, on the eve of a pretrial conference, to only seven of plaintiff's proposed trial exhibits. *Smith*, 2011 WL 5108489 at * 1. The scheduling order in that case had required the parties to meet three weeks in advance of the pretrial conference and prepare a joint pretrial statement, and the Court specifically stated, "[t]hat is one of the reasons the parties were required to actually meet, so that they could identify each other's exhibits and try to work out in advance any objections to them." *Id.* at *1. Defendants in that case had two weeks to consider the seven proposed exhibits, and were to have filed objections in a joint pretrial statement two weeks prior to the pretrial conference, but made no objection at that time. *Id.* The facts bear no resemblance to the situation here, where Respondents identified over 1,758 exhibits, the Division had only one week to review them, the parties have had no opportunity to meet and confer concerning Pruitt's Exhibit List and three weeks' remain before the final prehearing conference to be held on September 27, 2019.

Fundamental Long Term Care and *Lynch* are similarly inapposite. *Fundamental Long Term Care* was a bankruptcy proceeding involving a pretrial order that provided over two weeks for the party to consider the proposed exhibits at issue and specifically provided that any exhibits that were not objected to by the required deadline would be admitted at the outset of the trial. *In re Fundamental Long Term Care, Inc.*, 515 B.R. at 859. *Lynch* involved defendants' failure to file any objections to some 700 exhibits (less than half the number here) within the fourteen days allotted by the scheduling order at issue. 2010 WL 11562096, at *2 fn. 4. The sub-context of that case involved a defendant who had acted "disingenuously" in prior pleadings and had sought to suspend the deadline by a 7:31 p.m. motion on the due date, about which the Court stated,

“Defendants apparently presumed the court would grant them the relief they requested, but that was neither a wise nor a safe assumption.” *Id.* at *2, *6. Nothing resembles that type of conduct here, where the Division timely filed a response reserving its right to object to the 1,758 exhibits proffered by Respondent and ample time exists for the parties to meet and confer about objections.

CONCLUSION

For the reasons described above, the Division respectfully requests that the Court deny Respondent’s motion to preclude the Division from objecting to Pruitt’s Exhibit List, but instead order that Respondent provide additional detail to Pruitt’s Exhibit List and a brief summary of the expected testimony for those of Pruitt’s 32 proposed witnesses not also identified on the Division’s list so the parties can productively meet and confer in advance of the final exchange of premarked exhibits and final witness lists on September 25, 2019, as they will already be doing in connection with Respondent’s objections to the Division’s Exhibit List.

Dated: September 6, 2019
New York, NY

DIVISION OF ENFORCEMENT

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