

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 FOR ADDITIONAL DEPOSITIONS

Pursuant to Rule 233 of the Securities and Exchange Commission's ("SEC" or the "Commission") Rules of Practice, Respondent David N. Pruitt ("Mr. Pruitt"), through his undersigned counsel, respectfully submits this motion for leave to take additional depositions (the "Motion").

PRELIMINARY STATEMENT

Rule 233 of the Commission's Rules of Practice requires the movant to demonstrate "compelling need" to justify the taking of two additional depositions. Beyond the requirements of Rule 233, which are addressed in detail below, basic notions of fairness and due process weigh heavily in favor of granting this limited additional discovery. The Division of Enforcement (the "Division") has had the benefit of three years of investigation with the virtually unfettered ability to compel testimony and the production of documents without the significant time constraints imposed by the Rules of Practice. During the investigation, the Division participated in the interviews, proffers, and testimony of more than 20 individuals. Mr. Pruitt has not had the same access. Since June 1, 2017, the date the Division's investigative file was made available, Mr. Pruitt has had to wade through 85,000 documents without the benefit of a meaningful index, engage in significant pre-hearing motion practice, take discovery, and prepare for trial. An important piece of preparing his defense is availing himself of the very limited discovery afforded by the Rules of Practice. The Division has identified 20 witnesses that it may seek to call at the hearing to prove its case, including the five individuals identified in this Motion. While the two additional depositions requested in this Motion will not be sufficient to close the significant gap between the Division's ability to develop its case and Mr. Pruitt's, they are nonetheless necessary to the preparation of his defense.

LEGAL STANDARD

Pursuant to Rule 233(a)(3), either party may file a motion seeking leave to notice up to two additional depositions beyond the three permitted pursuant to paragraph (a)(1) for a proceeding involving a single respondent.¹ A motion under Rule 233(a)(3) will not be granted unless the moving side demonstrates a compelling need² for the additional depositions by: (1) identifying the witnesses the movant plans to depose as of right and by leave of court; (2) describing the role of the witnesses; (3) describing the matters concerning which each witness is expected to be questioned and why the depositions are necessary for the movant's arguments, claims, or defenses; and (4) demonstrating that the additional depositions will not be unreasonably cumulative or duplicative. Rule 233(a)(3)(ii)(A)-(D).

ARGUMENT

I. MR. PRUITT SHOULD BE PERMITTED TO TAKE TWO ADDITIONAL DEPOSITIONS

Each of the five witnesses identified in this Motion is critical to Mr. Pruitt's defense based on the numerous allegations attributed to them in the Order Instituting Proceedings ("OIP").³ These five individuals were all closely involved in the events and circumstances that

¹ The additional depositions must also satisfy the standard in Rule 232(e). *See* Rule 233(a)(3)(ii).

² The Commission has not elaborated on what constitutes "compelling need" beyond what is specified in Rule 233(a)(3)(ii)(A)-(D), but has emphasized that the additional depositions should not "undermin[e] the goal of providing a prompt and efficient forum" or "compromise[e] the hearing schedule." *RD Legal Capital, LLC*, Admin. Proc. File No. 3-17342, Admin. Proc. Rulings Release No. 4499, 2017 SEC LEXIS 11, at *2, Order (ALJ Jan. 4, 2017) (quoting Amendments to the Commission's Rules of Practice, 81 Fed. Reg. 50212, 50217 (July 29, 2016)). Demonstrating compelling need should not require Mr. Pruitt to disclose his trial strategy.

³ This Court has held that the deposition of expert witnesses do not count against the maximum number of depositions provided in Rule 233. *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) ("In view of the Commission's failure to specify that depositions of experts count toward the limit, it is concluded that they do not. Deposing the opposing party's expert

gave rise to the allegations in the OIP and have information necessary to Mr. Pruitt's defense of these charges. Moreover, the Division chose not to take investigative testimony of four of the five individuals identified herein, thereby denying Mr. Pruitt the benefit of a verbatim record. Mr. Pruitt should not be forced to wait until the hearing in this matter to question or cross-examine these individuals.

A. Depositions as of Right Under Rule 233(a)(1)

1. Alex Cummins (identified in the OIP as the C-12 Business Manager)

Mr. Cummins is the subordinate Mr. Pruitt allegedly directed to generate the 69 invoices and withhold delivery from the U.S. Army.⁴ The Division also alleges that Mr. Cummins raised concerns with the propriety of generating the invoices and recognizing the associated revenue.⁵ Mr. Cummins will be questioned regarding the analyses he performed on Army Sustainment Division's ("ASD") books to identify the work in progress ("WIP") balance,⁶ his role in the generation of the 69 invoices, and the purported concerns he raised regarding the revenue recognition process at year-end 2013, among other topics. Mr. Cummins' deposition is necessary for Mr. Pruitt's defense because of his direct involvement in generating the invoices at issue, certain statements he attributes to Mr. Pruitt, and the concerns he raised regarding the invoices. Additionally, the SEC did not take Mr. Cummins' testimony during its investigation and there is no certified verbatim record of the information he provided to the SEC or any other law enforcement agency. Mr. Cummins' testimony will not be unreasonably cumulative or

witnesses is a developmental step from the practice of interviewing them. Further, to require depositions of experts to count against the limit would invite gamesmanship.").

⁴ OIP ¶ 2.

⁵ *Id.* ¶ 24.

⁶ *Id.* ¶ 9.

duplicative because he was the only individual allegedly instructed to generate the 69 invoices and is the only individual identified in this Motion that worked subordinate to Mr. Pruitt at L3.

2. Karen Fletcher (identified in the OIP as the Army Contracting Officer)

Ms. Fletcher was one of the primary representatives of the U.S. Army involved in the Revenue Recovery Initiative, meeting and coordinating with employees of L3.⁷ The Division alleges that Mr. Pruitt represented to L3's auditors that he had coordinated with Ms. Fletcher and she requested that certain 2013 invoices be directed to her before being submitted into the Wide Area Work Flow ("WAWF").⁸ Ms. Fletcher will be questioned about the revenue recovery items presented to the U.S. Army by L3, L3's meetings with the U.S. Army, and her understanding of the process for handling the revenue recovery items, among other topics. Ms. Fletcher's deposition is necessary for Mr. Pruitt's defense because she is the only individual identified in this Motion that is a representative of the U.S. Army and has critical knowledge regarding the process agreed to for handling the revenue recovery items. Ms. Fletcher's deposition will not be unreasonably cumulative or duplicative because she is the only individual who can and will be asked to testify from the U.S. Army's perspective.

3. Kenneth Lassus (identified in the OIP as the General Counsel of ASD)

Mr. Lassus was requested to find clauses in the C-12 Contract that entitled ASD to payment for the work performed but not billed to the U.S. Army, eventually known as "legal entitlement."⁹ Mr. Lassus was asked to estimate, based on the contract's history, how much the U.S. Army would pay and these estimates formed the basis for the amounts invoiced to the U.S. Army.¹⁰ Mr. Lassus was also L3's primary negotiator with the U.S. Army and involved in many

⁷ See *id.* ¶ 33.

⁸ *Id.* ¶ 31.

⁹ *Id.* ¶¶ 12–13.

¹⁰ *Id.* ¶¶ 13–14.

meetings and communications regarding the revenue recovery items and their payment by the U.S. Army.¹¹ Mr. Lassus will be questioned regarding the legal entitlement estimates he prepared, his interactions with representatives of the U.S. Army, and his interactions with Mr. Pruitt, among other topics. Mr. Lassus's deposition is necessary for Mr. Pruitt's defense because he has firsthand knowledge of the estimates that formed the basis for legal entitlement and communications with the Army for payment.¹² Mr. Lassus's deposition will not be unreasonably cumulative or duplicative because as General Counsel of ASD, he has knowledge of interactions with the U.S. Army and the legal basis for billing the revenue recovery items.

B. Additional Depositions Under Rule 233(a)(3)

1. Timothy Keenan (identified in the OIP as the Aerospace Systems CFO)

Mr. Keenan was involved in communications regarding the accounting treatment for the revenue recovery items including decisions regarding whether to accrue or invoice certain items.¹³ The Division alleges that on December 20, 2013, Mr. Pruitt and Mr. Keenan had a telephone call during which they discussed a list of the revenue recovery items and Mr. Keenan instructed Mr. Pruitt which items to invoice and which to accrue.¹⁴ Mr. Keenan will be questioned about his involvement in the Revenue Recovery Initiative, to what extent the decisions made at ASD at year-end 2013 received corporate approval, and if he and others at the group and corporate levels were aware of the invoices at issue, among other topics. Mr. Keenan's deposition is necessary for Mr. Pruitt's defense because he can testify regarding what was known at the corporate level and whether he approved the recognition of revenue for the

¹¹ *Id.* ¶¶ 19, 33–35.

¹² Although the Division took Mr. Lassus's testimony during its investigation, the scope of the questioning did not include areas of inquiry relevant to Mr. Pruitt's defense to these charges.

¹³ *Id.* ¶¶ 13, 15.

¹⁴ *Id.* ¶ 21.

work performed but not billed by the end of 2013. Mr. Keenan's deposition will not be unreasonably cumulative or duplicative because he offers a unique perspective as the most senior accounting employee with contemporaneous knowledge of the key events at issue.

2. Richard Schmidt (identified in the OIP as the C-12 Contract Manager)

Mr. Schmidt is alleged to have identified the approximately \$50.6 million in work performed by L3 under the C-12 Contract that was not billed to the U.S. Army.¹⁵ Mr. Schmidt was personally involved in meetings with the U.S. Army that took place in November and December 2013¹⁶ and was included on email communications regarding the recognition of the revenue at issue at year-end 2013.¹⁷ Mr. Schmidt also relayed concerns to Mr. Pruitt regarding "invoice directives" and subsequently wrote a report to L3's ethics office.¹⁸ Mr. Schmidt will be deposed on his role in the Revenue Recovery Initiative, his communications with the U.S. Army, and the concerns he raised to L3's ethics office, among other topics. Mr. Schmidt's deposition is necessary for Mr. Pruitt's defense because he is one of the primary sources of many allegations in the OIP and because he raised concerns regarding Mr. Pruitt's alleged conduct. His deposition will not be unreasonably cumulative or duplicative because of the unique supervisory role he played regarding the C-12 Contract and because of knowledge he has regarding communications with the U.S. Army about the revenue recovery items.

CONCLUSION

For the reasons set forth herein, the Court should grant Mr. Pruitt's Motion for Additional Depositions. If the Court should deny the Motion, Mr. Pruitt respectfully reserves the right to modify the list of individuals he seeks to depose as of right under Rule 233(a)(1). The parties

¹⁵ *Id.* ¶ 10.


¹⁶ *Id.* ¶ 19.

¹⁷ *Id.* ¶ 22.

¹⁸ *Id.* ¶¶ 25-26.

have conferred and the Division has informed counsel that it intends to oppose this Motion. Mr. Pruitt respectfully requests oral argument to supplement the information provided herein.

Dated: October 4, 2017
New York, New York

By: 

John J. Carney
Jimmy Fokas
Margaret E. Hirce
Bari R. Nadworny
BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, New York 10111
Telephone: 212.589.4200
Facsimile: 212.589.4201

Attorneys for Respondent David Pruitt