UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 85171 / February 21, 2019

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 4023 / February 21, 2019

Admin. Proc. File No. 3-17950

In the Matter of

DAVID PRUITT, CPA

ORDER DENYING MOTION TO AMEND THE ORDER INSTITUTING PROCEEDINGS

David Pruitt, CPA, the former Vice President of Finance at the Army Sustainment Division ("ASD") of L3 Technologies, Inc., requests that we amend the order instituting proceedings ("OIP") in this matter.[1] The OIP alleges that Pruitt caused L3 to violate Section 13(b)(2)(A) of the Securities Exchange Act of 1934, which requires that an issuer maintain accurate books, records and accounts, and willfully violated Exchange Act Section 13(b)(5) and Rule 13b2-1, which prohibit a person from knowingly circumventing or failing to implement a system of internal accounting controls or knowingly falsifying any required book, record, or account of an issuer. According to Pruitt, evidence contradicts three of the OIP's factual allegations. The Division of Enforcement opposes Pruitt's request. We deny the motion.

I. Background

The OIP alleges that Pruitt ordered subordinates to generate, but not submit, invoices for an L3 client, the U.S. Army, thus causing L3 to improperly recognize revenue. The OIP further alleges that Pruitt misled L3's accounting staff and auditor that the invoices had been submitted.

Pruitt claims that "key events in the OIP are false and without basis." First, paragraph 21 of the OIP alleges that Pruitt acted without the permission of his supervisors to invoice items as part of L3's contract with the Army. Pruitt claims that testimony and affidavits from Timothy Keenan, Pruitt's former accounting supervisor, to the effect that Keenan directed Pruitt to prepare the invoices at issue and that Pruitt lacked the authority to determine the appropriate accounting treatment disprove this allegation. Second, paragraph 27 of the OIP alleges that Pruitt's motive for generating the improper invoices was to help ASD reach its revenue goals so that he could obtain a bonus. According to Pruitt, Keenan's testimony that revenue recognition did not trigger bonuses and that Pruitt was not involved in subsequent discussions regarding adjustments senior management made to ASD's financial results that determined bonus

[1] Exchange Act Release No. 80548, 2017 WL 1539857 (Apr. 28, 2017).

eligibility contradicts this allegation. Third, paragraphs 30 and 36 of the OIP allege that the Army was not prepared to accept the invoices at issue and that it was therefore unreasonable for Pruitt to prepare them. Pruitt claims that an affidavit from Roderick Hynes, a former L3 Senior Program Manager, stating that the Army did request invoices, was prepared to accept them, and paid for a substantial portion of the work invoiced undermines this allegation.

The Division responds that the allegations in paragraph 21 that Pruitt acted without his supervisor's approval remain in dispute because earlier statements Keenan made supported the allegation; the Division states that Keenan "is subject to being impeached at trial and it is the providence of the finder of fact at trial . . . to determine which of Keenan's versions is factual."[2] The Division also argues that the allegation in paragraph 27 that Pruitt was motivated by the possibility of receiving a bonus is in dispute because the relevant time is when the invoices were created "and not some later time when adjustments may have been made by others to achieve" the requisite bonus threshold. According to the Division, Keenan also "said that the issuance of the invoices 'certainly' played a part in reaching the bonus threshold . . . ." The Division argues further that the allegations in paragraphs 30 and 36 of the OIP that the Army was not prepared to accept the invoices at issue are in dispute based on the testimony of Karen Fletcher, the relevant Army contracting officer, who testified that it was premature to submit the invoices.

II. Analysis

Rule of Practice 200(d)(1) provides that the Commission may amend an OIP to include new matters of fact or law at any time, and Rule 200(d)(2) provides that prior to the filing of an initial decision the administrative law judge presiding over the hearing may amend an OIP to include new matters of fact or law that are within the scope of the original OIP.[3] The Division states that the claims in Pruitt's motion concern facts that "are within the scope of the original OIP and are so specific to the facts that will be disputed at the hearing" that the presiding administrative law judge "is better situated to make the initial determination regarding the content of the OIP." We agree with the Division that the issues Pruitt's motion raises are best addressed by the administrative law judge at this stage in the proceeding.

We have applied Rule 200(d)(1) repeatedly to grant requested amendments that incorporate subsequent developments in the case or correct clear errors—particularly when the parties agree. As Pruitt notes, our practice has been to freely grant such requests subject to the consideration that other parties not be surprised or prejudiced by the amendment.[4] For example,

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[2] The Division does not oppose amending paragraph 21 to read that Keenan "denied" and "did recall" as opposed to the current version that says Keenan "denies" and does recall."

[3] 17 C.F.R. § 201.200(d).

[4] *See Carl L. Shipley*, Exchange Act Release No. 10870, 1974 WL 161761, at *4 (June 21, 1974) ("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 be not surprised nor should their rights be prejudiced."); *see also Rules of Practice*, Exchange Act Release No. 35833, 1995 WL 370829, at * (June 23, 1995) (comment (d) to Rule 200) (citing *Shipley* and reiterating the standards therein).

we have granted motions to amend an OIP to clarify relevant corporate relationships and the proper names of parties,[5] and to reflect the results of subsequent related criminal proceedings.[6] But Pruitt cites no precedent—and we are unaware of any—where we have deleted allegations based merely on a respondent's disputed claim that they are not supported by the evidence. And we have denied a motion to amend where a party opposed the motion on the ground that the motion was "based on incomplete facts" and we determined that the record in the case "require[d] further development."[7] We make that same determination here.

As we have stated, an "OIP does not establish facts, it alleges them."[8] In the case of an OIP that sets the matter down for a hearing before an administrative law judge, the hearing before the administrative law judge is normally the proper forum for the Division to try to establish the basis for the allegations in the OIP and for a respondent to challenge them. Here, the parties disagree about critical circumstances related to the allegations at issue. Given those differences, and consistent with our rules and longstanding practice, the evidence regarding those allegations can best be developed and assessed by the law judge in the first instance. As we have made clear in other contexts, we are reluctant to "interfere[] with the orderly hearing process."[9] Courts have shown similar reluctance to resolve disputes that are better handled, in the first instance, by the trier of fact, reflecting a "particular wariness about forcing appellate courts to prematurely untangle 'factual controversies . . . that, before trial, may seem nebulous.'"[10]

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[5] *See, e.g.*, *Siming Yang*, Exchange Act Release No. 73637, 2014 WL 6477195 (Nov. 19, 2014) (granting Division's unopposed motion to amend OIP to include a subsidiary and add a statutory basis for the proceedings); *Birman Managed Care, Inc.*, Exchange Act Release No. 59074, 2008 WL 5169503 (Dec. 10, 2008) (granting joint motion to amend OIP to remove a company that was not in fact a successor entity); *IFG Network Secs., Inc.*, Exchange Act Release No. 50008, 2004 WL 1563011 (July 13, 2004) (granting joint motion to amend OIP to dismiss party that no longer existed and that received none of the commissions the Division sought to disgorge); *Steven Wise*, Exchange Act Release No. 48850, 2003 WL 22827675 (Nov. 26, 2003) (granting Division's unopposed motion to amend OIP to correct identifying information).

[6] *See, e.g.*, *James S. Tagliaferri*, Exchange Act Release No. 31804, 2015 WL 5139389 (Sept. 2, 2015) (granting motion to amend OIP to add respondent's criminal conviction); *Daniel J. Gallagher*, Exchange Act Release No. 70305, 2013 WL 4716026 (Sept. 3, 2013) (same); *Robert David Beauchene*, Exchange Act Release No. 68974, 2013 WL 661619 (Feb. 25, 2013) (same).

[7] *Laminaire Corp. (n/k/a Cavico Corp.)*, Exchange Act Release No. 56685, 2007 WL 3085021 (Oct. 22, 2007).

[8] *Tagliaferri*, 2015 WL 5139389, at *2.

[9] *Eric David Wanger*, Exchange Act Release No. 66678, 2012 WL 1037682, at *2 (Mar. 29, 2012); s*ee also, e.g.*, *Gary L. McDuff*, Exchange Act Release No. 78066, 2016 WL 3254513 (June 14, 2016) (denying interlocutory review on the basis of the Commission's preference for a single petition for review after the full development of a record).

[10] *Barham v. Ramsey*, 434 F.3d 565, 577 (D.C. Cir. 2006) (quoting *Johnson v. Jones*, 515 U.S. 304, 316-17 (1995)); *see also Johnson*, 515 U.S. at 317 (noting that interlocutory appeals (continued. . . .)

Pruitt argues that he "should not be forced to expend limited resources to prepare a defense against unfairly prejudicial allegations that lack factual basis." We fail to see how his situation differs from that of the typical respondent who disputes the allegations made in the OIP. To the extent a respondent believes it is entitled to a ruling as a matter of law and that there are no disputes of material fact, Rule of Practice 250 authorizes dispositive motions.[11]

Although we have determined to deny Pruitt's request under Rule of Practice 200(d)(1), he may renew it before the law judge pursuant to Rule 200(d)(2).[12] Pruitt claims that the Division "espoused . . . new facts and legal theories" in its opposition brief and that as a result "this motion cannot properly be directed to the ALJ for decision." But the only motion before us is Pruitt's, and that motion, which seeks to delete allegations from the OIP, is clearly within the scope of the OIP and, therefore, subject to the law judge's authority under Rule 200(d)(2).

Pruitt also moves to stay the proceeding during our consideration of his motion to amend. We deny that request as moot in light of our denial of the request to amend the OIP. We also deny Pruitt's request for oral argument because we have not determined that, pursuant to Rule of Practice 451(a), "the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument."[13]

Accordingly, IT IS ORDERED that David Pruitt's motion to amend the Order Instituting Proceedings is denied; and it is further ORDERED that Pruitt's request to stay these proceedings is denied; and it is further ORDERED that Pruitt's request for oral argument is denied.

By the Commission.

Brent J. Fields
Secretary

(. . . .continued)
force appellate panels "to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision").

11 17 C.F.R. § 201.250.

12 The parties may stipulate as to any amendments to the OIP that they agree should be made as part of any renewed motion before the law judge pursuant to Rule 200(d)(2). *See supra* note 2. We do not intend to suggest any view as to the outcome of any motion to amend the OIP directed to the law judge or to the merits of this proceeding generally.

13 17 C.F.R. § 201.451(a) (setting forth the standard for granting oral argument).