

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 6571/May 10, 2019

ADMINISTRATIVE PROCEEDING  
File No. 3-16293

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In the Matter of	:	
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LAURIE BEBO and	:	ORDER
JOHN BUONO, CPA	:	

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The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings (OIP), pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission’s Rules of Practice, on December 3, 2014. Only Respondent Laurie Bebo remains in the proceeding.<sup>1</sup> Under consideration is her Motion for Summary Disposition for Constitutional Violations, filed March 1, 2019, and responsive filings.

On October 2, 2015, an Initial Decision imposed various sanctions on Bebo. *Laurie Bebo*, Initial Decision Release No. 893, 2015 SEC LEXIS 4045 (A.L.J. Elliot). Bebo filed a petition for review. Eventually, on August 22, 2018, in light of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Commission ordered a new hearing in each pending proceeding, including this one, before an administrative law judge (ALJ) who had not previously participated in the proceeding, unless the parties expressly agreed to alternative procedures. *Pending Admin. Proc.*, Securities Act of 1933 Release No. 10536, 2018 SEC LEXIS 2058, at \*2-3 (August 22 Order). Accordingly, the proceeding was reassigned to the undersigned. *Pending Admin. Proc.*, Admin. Proc. Rulings Release No. 5955, 2018 SEC LEXIS 2264 (C.A.L.J. Sept. 12, 2018).

The sanctions authorized in the OIP include sanctions that the Commission can also pursue by bringing suit in federal court: civil penalties and an officer and director bar. These sanctions were first authorized in administrative proceedings as to non-registrants, such as Bebo, by Section 929P(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010,<sup>2</sup> which became effective on

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<sup>1</sup> See *Laurie Bebo*, Exchange Act Release No. 74177, 2015 SEC LEXIS 347 (Jan. 29, 2015) (settlement order as to John Buono, CPA).

<sup>2</sup> The OIP also authorizes a cease-and-desist order, which Bebo describes as the functional equivalent of an injunction, and disgorgement. These two sanctions were authorized as to “any person” by the Securities Enforcement Remedies and Penny Stock Reform Act of 1990. See Section 21C(a), (e) of the Exchange Act.

July 22, 2010. Some of the conduct alleged in the OIP occurred after July 22, 2010 – the conduct was alleged to have occurred from 2009 to early 2012.

Bebo argues that Section 929P(a) is facially unconstitutional as violating respondents' rights to equal protection and due process as it deprives them of the right to a jury trial<sup>3</sup> and other substantive and procedural protections afforded by the Federal Rules of Civil Procedure and Federal Rules of Evidence. In the alternative, she challenges it as applied to her in this proceeding.<sup>4</sup> Bebo maintains that in her case the Commission presumably concluded that it would be advantageous to deprive her of these things, while in other cases the Commission will decide to bring cases against non-registrants in federal court, having concluded that the defendant will be unsympathetic to a jury or that the Commission would be advantaged by the federal rules. Bebo also argues that the proceeding is unconstitutional in that the statutory tenure protection for ALJs violates Article II of the Constitution and, also, that, post-*Lucia*, the Commission was required to initiate a new proceeding, which would be time-barred by the applicable statute of limitations.

#### *Due Process/Equal Protection*

As an initial matter, the undersigned lacks the authority to declare unconstitutional a statute that Congress has directed the Commission to enforce. *William J. Haberman*, Exchange Act Release No. 40673, 1998 SEC LEXIS 2466, at \*10 n.14 (Nov. 12, 1998), *aff'd*, 205 F.3d 1345 (8th Cir. 2000). Bebo argues that not having an opportunity for a hearing before a jury violates the Seventh Amendment right to jury trial and denies her due process and equal protection. However, it is well established that the lack of jury trials in administrative proceedings does not violate the Seventh Amendment. *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977); *see also Curtis v. Loether*, 415 U.S. 189, 194-95 (1974) (noting that the Seventh Amendment is generally inapplicable in administrative proceedings where jury trials would be incompatible with the whole concept of administrative adjudication); *Taggart v. GMAC Mortg., LLC*, No. 12-cv-415, 2012 WL 5929000, at \*4 (E.D. Pa. Nov. 26, 2012) (observing rule from *Curtis v. Loether*); *Vladlen "Larry" Vindman*, Securities Act Release No. 8679, 2006 SEC LEXIS 862, at

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<sup>3</sup> Disgorgement and injunctive relief (which Bebo likens to cease-and-desist) are equitable remedies that are not triable by a jury. *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), which held that disgorgement is a "penalty" within the meaning of 28 U.S.C. § 2462 and thus subject to the five year statute of limitations is inapposite. Courts that have considered the issue have ruled that *Kokesh* designates disgorgement as a penalty only within the meaning of 28 U.S.C. § 2462 and not as a penalty in all contexts. *See United States v. Meyer*, No. 18-cv-60704, 2019 U.S. Dist. LEXIS 48148, at \*3-7 (S.D. Fla. Mar. 21, 2019); *SEC v. Ahmed*, 343 F. Supp. 3d 16, 26-27 (D. Conn. Sept. 6, 2018); *SEC v. Camarco*, 17-cv-2027, 2018 U.S. Dist. LEXIS 212816, at \*3-5 (D. Colo. Dec. 18, 2018); *SEC v. Mapp*, No. 17-cv-3285, 2018 U.S. Dist. LEXIS 125352, at \*17-18 (E.D. Tex. July 25, 2018); *United States v. RaPower-3, LLC*, 294 F. Supp. 3d 1238, 1240-42 (D. Utah Mar. 7, 2018), *confirmed*, 2018 U.S. Dist. LEXIS 58090, at \*2 & n.8 (D. Utah Mar. 13, 2018); *SEC v. Brooks*, No. 07-cv-61526, 2017 U.S. Dist. LEXIS 122377, at \*21-24 (S.D. Fla. Aug. 3, 2017).

<sup>4</sup> The instant motion addresses only Bebo's facial challenge and disclaims a class-of-one equal protection claim in that context. Motion at 1 n.1, 11 n.8.

\*44 n.60 (Apr. 14, 2006) (citing *Atlas Roofing Co.*, 430 U.S. at 450). Further, the undersigned is aware of no precedent suggesting that a due process or equal protection claim can be established based on an agency's choice to bring enforcement proceedings in an administrative forum that lacks juries, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence rather than in a judicial forum. The Commission has ruled that "the fact that the Federal Rules of Civil Procedure and the Federal Rules of Evidence do not apply in administrative proceedings is not a violation of due process." *Charles L. Hill, Jr.*, Exchange Act Release No. 79459, 2016 SEC LEXIS 4491, at \*12 (Dec. 2, 2016).

Insofar as Bebo argues that a respondent is disadvantaged because the Commission does not use the federal rules in its administrative proceedings, "[c]ourts have consistently held that agencies need not observe all the rules and formalities applicable to courtroom proceedings, and that agencies should be free to fashion their own rules of procedure." *Id.* at 13 (internal quotation marks omitted); *see also Opp Cotton Mills, Inc. v. Adm'r of Wage & Hour Div. of Dep't of Labor*, 312 U.S. 126, 155 (1941) ("[I]t has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed.")

Finally, Bebo has failed to establish that Section 929P(a) discriminates against any identifiable group or lacks a rational basis. *See Heller v. Doe*, 509 U.S. 312, 319-20 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

#### *Tenure Protection*

The Commission has rejected the tenure protection argument that Bebo makes. *See optionsXpress, Inc.*, Securities Act Release No. 10125, 2016 SEC LEXIS 2900, at \*180-89 (Aug. 18, 2016), *abrogated in part on other grounds by Lucia*, 138 S. Ct. 2044. To date, no federal court has addressed Bebo's tenure protection argument, *see Lucia*, 138 S. Ct. at 2050 n.1, let alone agreed with it. The undersigned understands that Bebo is making the argument to preserve it for appeal, in the event of an unfavorable disposition of this proceeding.

#### *Statute of Limitations*

The five year statute of limitations provided in 28 U.S.C. § 2462 applies to this proceeding. The OIP alleges conduct from 2009 through early 2012. Thus, a proceeding initiated after early 2017 based on those allegations would be time-barred. Bebo argues that the then-constitutional infirmity of the Commission's ALJs means that the OIP never instituted valid proceedings and was itself a nullity. Thus, she argues, the proceeding, now before the undersigned, must be dismissed as having been commenced, if at all, more than five years after the conduct at issue. The undersigned declines to dismiss the proceeding on this basis, which goes beyond *Lucia*. The *Lucia* petitioner requested the Court to order the proceeding against Lucia be dismissed;<sup>5</sup> instead the Court ordered

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<sup>5</sup> *See* Pet. Br. at 49-57; Reply Br. at 23 (asking the Court to order the Commission to dismiss the order instituting proceedings against Lucia); Pet. Br. at 43-49; Reply Br. at 22 (arguing that at a "bare minimum" a new hearing before a constitutionally appointed adjudicator other than the original ALJ was required).

that “the ‘appropriate’ remedy for an adjudication tainted with an appointments violation is a new ‘hearing before a properly appointed’ official” other than the originally presiding ALJ. *Lucia*, 138 S. Ct. at 2055. Further, the OIPs that commenced the *Lucia* proceeding and this proceeding were adopted by the *Commission* not the ALJs to whom the proceedings were subsequently assigned.<sup>6</sup> There can be no question that the Commission was authorized to adopt the OIP that instituted this proceeding. *See* Exchange Act Sections 4C and 21C.

IT IS ORDERED that Laurie Bebo’s Motion for Summary Disposition IS DENIED.

/S/ Carol Fox Foelak  
Carol Fox Foelak  
Administrative Law Judge

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<sup>6</sup> Bebo’s argument that the OIP was a nullity because the Commission’s ALJs were, at that time, unconstitutionally appointed overlooks this. Also, the OIP does not assign the proceeding to any specific (unconstitutionally appointed) ALJ. The case could have been ultimately assigned to an ALJ who was constitutionally appointed, including an ALJ borrowed from another U.S. Government department.