

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

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 2384 / March 6, 2015

ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of

LAURIE BEBO and
JOHN BUONO, CPA

ORDER ON MOTIONS TO QUASH
SUBPOENAS

The Securities and Exchange Commission (Commission) commenced this proceeding on December 3, 2014, with an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) pursuant to Securities Exchange Act of 1934 (Exchange Act) Sections 4C and 21C and Commission Rule of Practice 102(e).¹ The hearing in this proceeding is set to commence on April 20, 2015, in Milwaukee, Wisconsin.

On January 23, 2015, I signed two subpoenas duces tecum directed to (1) third party Assisted Living Concepts, LLC (ALC) (ALC Subpoena), Respondent Laurie Bebo's (Bebo's) former employer, containing twenty-one categories of requested documents (ALC Requests), and (2) third party Milbank, Tweed, Hadley & McCloy LLP (Milbank) (Milbank Subpoena), the law firm that ALC retained to conduct an internal investigation of the facts underlying this proceeding, containing fifteen categories of requested documents (Milbank Requests). On February 5, 2015, I signed another subpoena duces tecum directed to ALC (Supplemental Subpoena).

On February 20, 2015, ALC filed a Motion to Quash the ALC Subpoena and the Supplemental Subpoena (ALC Motion), to which were attached nine exhibits (ALC Exs. 1-9), and Milbank filed a Motion to Quash the Milbank Subpoena (Milbank Motion), to which were attached nine exhibits (Milbank Exs. A-I). On March 2, 2015, Bebo filed a Response to the ALC Motion (ALC Response) and a Response to the Milbank Motion (Milbank Response). Briefing on both the ALC Motion and the Milbank Motion is therefore complete. *See* 17 C.F.R. § 201.232(e)(1).

¹ The proceeding has ended as to Respondent John Buono, CPA. *Laurie Bebo*, Exchange Act Release No. 74177, 2015 SEC LEXIS 347 (Jan. 29, 2015).

ALC Subpoena

I commend Bebo and ALC for conferring and reaching agreement on some aspects of the ALC Motion. ALC Response at 2-4. In particular, Bebo has agreed to accept affidavits in lieu of production of documents responsive to ALC Requests 2 and 3. *Id.* at 3. Bebo has also agreed to an extension until March 16, 2015, for ALC to produce all responsive documents. *Id.* The extension is reasonable and will be granted.

Bebo and ALC did not reach agreement on four categories of requested documents, however: (1) hard copies of board materials provided to Bebo (ALC Request 26); (2) documents relating to the internal investigation (ALC Requests 18-20); (3) certain emails between Milbank and ALC's Board of Directors (ALC Request 25); and (4) Bebo's telephone records (Supplemental Subpoena).

ALC Request 26

ALC contends that it produced copies (although not necessarily hard copies) of the requested board materials in early 2014, bearing Bates numbers indicating that they were also produced to the Commission. ALC Motion at 13 & ALC Ex. 7. It has also identified the relevant Bates ranges within a production of approximately 105,000 pages. ALC Ex. 7. Bebo does not dispute this, but instead complains that some materials are missing, and that the Bates ranges should more specifically identify the exact materials she seeks. ALC Response at 4-5. I disagree. It is burdensome for Bebo to search through 105,000 pages to find exactly what she wants, but not unduly so. Also, Bebo offers no reason to reject ALC's representation that it has produced the requested documents in an electronic form that allows her to make use of them.

ALC Requests 18-20

ALC previously produced to the Commission "[a]ll documents relating to any internal investigation regarding the conduct of Laurie Bebo or John Buono or regarding any information provided to Ventas." ALC Motion at 7 (quoting ALC Ex. 2 at 10 of 25). The Division, in turn, represented that it has produced to Bebo all documents it received from ALC. ALC Ex. 1 at 2 of 8. Although the Division did not represent that it had produced documents responsive to ALC Requests 18-20, the Commission's request was quite broad, and certainly broad enough to encompass ALC Requests 18-20. *See id.* at 3 of 8. Notwithstanding the Division's representation, it stands to reason that Bebo already has the documents sought in ALC Requests 18-20.

ALC Request 25

Bebo seeks "over 5,400 email communications" between Milbank and ALC's former Directors. ALC Motion at 10. Not surprisingly, Milbank has asserted attorney-client privilege over the requested emails. Milbank Motion at 14. Although Bebo advances several potentially meritorious arguments in opposition to the privilege assertion, including waiver, the emails are communications between a law firm and its clients, and the likelihood that they are privileged is both high and obvious. *See* Milbank Response at 17-21. Moreover, I previously noted that "the

relevance of these materials is unclear.” *Laurie Bebo*, Admin. Proc. Rulings Release No. 2247, 2015 SEC LEXIS 265, at *7 (Jan. 23, 2015). In particular, it is not clear how many of the emails pertain specifically to the internal investigation, and Bebo herself has offered evidence that many of them likely pertain to other matters. *See* ALC Ex. 6 at Ex. A. On balance, the prudent course of action is to require Bebo to seek privilege waivers from the individual Board members before compelling ALC (or Milbank) to produce the emails.

Supplemental Subpoena

The Supplemental Subpoena seeks a very limited set of telephone records that may corroborate Bebo’s contention that she spoke with certain people on certain dates. ALC Response at 11. Such documents are relevant and so narrow in scope that it should not be unduly burdensome for ALC to produce them. I note that ALC’s compliance date for both the ALC Subpoena and the Supplemental Subpoena is now March 16, 2015. *See* ALC Motion at 16.

Milbank Subpoena

Milbank Requests 1-6

Bebo seeks six categories of documents pertaining to the files she maintained while employed at ALC. Milbank Motion, Ex. A at 4-5. ALC Requests 2 and 3 are virtually identical to Milbank Requests 2 and 3, and as noted, Bebo has agreed to accept affidavits in lieu of production of documents responsive to ALC Requests 2 and 3. ALC Response at 3. ALC otherwise agreed to produce documents responsive to ALC Requests 1, 4, 5, and 6, which are virtually identical to Milbank Requests 1, 4, 5, and 6.

Milbank asserts that production of the documents would disclose privileged information and attorney work product. Milbank Motion at 12-13. Their status need not be established definitively at this point, however, because ALC is expected to produce the bulk of responsive documents itself. ALC Response at 3. To the extent Milbank has responsive documents that are not duplicative of ALC’s, a reasonable first step is to require Milbank to submit an affidavit responsive to Milbank Requests 2 and 3, as Bebo and ALC agreed as to ALC Requests 2 and 3. ALC Response at 3. Accordingly, Milbank need not respond to Milbank Requests 1, 4, 5, or 6, but it shall respond to Milbank Requests 2 and 3 by a “chain of custody” affidavit. If Milbank contends that any aspect of such a chain of custody affidavit would disclose privileged information or attorney work product, it should so state with as much particularity as is practicable.

Milbank Requests 7-15

Bebo seeks nine categories of documents pertaining generally to Milbank’s internal investigation of ALC. Milbank Motion, Ex. A at 6-8. Some of these documents may be privileged; for example, Request 11 seeks materials related to any conclusions of the internal investigation that were “present[ed] to the ALC board,” which might include presentations to individual Board members in their individual capacity. *Id.*, Ex. A at 7. As to some such documents, though, the privilege has apparently been waived; for example, if any requested

documents are communications in 2012 between Milbank and ALC officers relating to disclosures regarding the internal investigation, attorney client privilege has apparently been waived. *Id.*, Ex. G at Ex. 1. Similarly, some of the requested documents may be attorney work product; for example, Requests 12 and 13 seek “notes” made by Milbank personnel during two conference calls with, among other persons, ALC’s outside auditor. *Id.*, Ex. A at 7. As to some such attorney work product, though, any protections may have been waived; for example, the disclosure of final summaries of witness interviews, if disclosed to the Commission, may have waived attorney work product protection over the final summaries, but not over draft summaries. *See SEC v. Berry*, No. C07-04431 RMW (HRL), 2011 WL 825742, at *6 (N.D. Cal. Mar. 7, 2011).

In short, whether any particular responsive document is covered by privilege or the attorney work product doctrine depends on the specific circumstances of each document. But Milbank has identified only general circumstances, not specific circumstances, and it is impossible on this record to rule in favor of Milbank, even on a request-by-request basis. Because Milbank bears the burden of proving entitlement to the protection it asserts, and because it asserts protection over a large number of responsive documents, it should respond the old-fashioned way: production of everything it can produce, plus a privilege log. *See Favors v. Cuomo*, 285 F.R.D. 187, 221 (E.D.N.Y. 2012); *BDO China Dahua CPA Co., Ltd.*, Exchange Act Release No. 74217, 2014 WL 7777230, at *19 (Feb. 6, 2014) (describing the “custom and practice” of privilege logs); Milbank Motion at 11 (asserting that documents not already produced to the Commission “are protected from disclosure”). However, Milbank need not produce anything already produced to the Commission.

Order

It is ordered that ALC’s Motion to Quash or Modify is GRANTED IN PART. ALC need not produce documents responsive to Requests 18-20, 25, and 26, and its compliance date is otherwise extended to March 16, 2015.

It is further ordered that Milbank’s Motion to Quash is GRANTED IN PART. Milbank need not produce documents responsive to Requests 1-6, except that it shall respond to Requests 2 and 3 in affidavit or declaration form.

Cameron Elliot
Administrative Law Judge