

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

ADMINISTRATIVE PROCEEDINGS RULINGS  
Release No. 6595/June 5, 2019

ADMINISTRATIVE PROCEEDING  
File No. 3-16293

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

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The Securities and Exchange Commission instituted this proceeding with an Order Instituting Proceedings, 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>

A subpoena directed to non-party Milbank, Tweed, Hadley & McCloy LLP (n/k/a Milbank LLP) was issued on February 7, 2019, at Respondent's request. Under consideration are Milbank's March 8, 2019, motion to quash; Respondent's March 27, 2019, opposition;<sup>2</sup> Milbank's April 11, 2019, motion for leave to file a reply; and Respondent's April 19, 2019, opposition.<sup>3</sup>

Milbank argues that the documents sought by the subpoena are irrelevant and that they are subject to work product protection and attorney client privilege. Bebo argues that the documents sought are relevant in that they could lead to the discovery of admissible evidence of facts at issue and could be used to evaluate witness credibility. Bebo also argues that the client has waived attorney client privilege as to the documents and that work product protection has been waived as well. Bebo also argues that work product protection does not apply in that the

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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 motion and opposition were timely filed. *Laurie Bebo*, Admin. Proc. Rulings Release No. 6468, 2019 SEC LEXIS 217 (A.L.J. Feb. 21, 2019).

<sup>3</sup> Milbank filed a motion for leave to file a reply to Bebo's opposition, which Bebo opposed. Milbank's motion will be denied as not contemplated by the Commission's rule regarding subpoenas, 17 C.F.R. § 201.232, and unnecessary in this instance.

internal investigation was not conducted in anticipation of litigation but rather to determine whether the client's financial statements were correct or needed to be modified.

### *Background*

The conduct alleged in the OIP occurred from 2009 through early 2012, when Bebo was CEO of Assisted Living Concepts, Inc. (ALC), which was a publicly traded assisted living and senior residence provider. The OIP alleges that ALC leased eight of its facilities from Ventas, Inc., and that Bebo knew, or was reckless in not knowing, that ALC misrepresented in its Forms 10-K and 10-Q that it was in compliance with occupancy and financial covenants in its lease with Ventas.

The following is consistent with the background described by both Respondent and Milbank: Milbank was retained in May 2012 as outside counsel to the audit committee of ALC's board of directors, and, after Bebo left ALC, to the board as a whole in connection with ALC's internal investigation of the events at issue. The internal investigation resulted from a May 2, 2012, "whistleblower" letter to ALC from an employee, leading ALC to contact Milbank on May 3 and asking it to conduct an internal investigation. Milbank also represented the company, beginning in June 2012, and its individual directors, in 2013, in connection with an SEC investigation. On June 13, 2012, ALC received a document preservation notice from the SEC, and on August 2, 2012, the SEC advised ALC that it had opened a formal investigation and served its first subpoena for production of documents.<sup>4</sup> Milbank also represented the company and the individual directors in civil litigation related to the events at issue, including Bebo's litigation against ALC, starting with an arbitration Bebo commenced in June 2012 concerning her termination, and a shareholder class action filed in August 2012 against ALC and Bebo.

Milbank's ALC engagements ended in November 2013, and ALC obtained different counsel. When Milbank's representation concluded, it provided successor counsel with documents in its possession relating to its prior engagements.

### *Privilege*

Attorney client privilege applies to a communication between client and counsel that was intended to be, and was in fact, kept confidential and made for the purpose of obtaining or providing legal advice. *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996). The work product doctrine<sup>5</sup> provides that a party may obtain discovery of documents

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<sup>4</sup> There is no indication that Milbank's internal investigation was an outsourced government investigation like that described in *United States v. Connolly*, No. 16-cr-370, 2019 WL 2120523 (S.D.N.Y. May 2, 2019).

<sup>5</sup> The work product doctrine, articulated in *Hickman v. Taylor*, 329 U.S. 495 (1947) and codified in Federal Rule of Civil Procedure 26(b)(3), is applied in Commission administrative proceedings. See *Clarke T. Blizzard*, Investment Advisers Act Release No. 2030, 2002 SEC LEXIS 3408, at \*11-12 & n.17 (Apr. 23, 2002).

prepared in anticipation of litigation only on a showing that the party has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Any disclosure must protect against disclosure of the mental impressions, conclusions, opinions, and legal theories of an attorney representing a party. *See United States v. Deloitte LLP*, 610 F.3d 129, 135-36 (D.C. Cir. 2010); *see also* Fed. R. Civ. P. 26(b)(3). As a general rule, a party waives attorney client privilege when disclosing a privileged communication to a third party and waive work product protection when sharing protected materials with an adversary or a conduit to an adversary.

### *The Subpoena*

The items sought to be produced are:

(1) documents identified on a previously provided Milbank privilege log as Items 1-59, 61, 63, 66, 121, 123, 127, 129, 145, and 150-51. Items 1-6, 9-24, 34-39, 42-43, 45-46, 50, 52, 57, 59, are handwritten notes, and Item 53 are typed notes, of Milbank attorneys, dated from May through September 2012. The foregoing notes are of interviews of witnesses conducted in the internal investigation. Items 7-8, 25-33, 40-41, 44, 47-49, 51, 54, 56 are memoranda of Milbank attorneys copied to other Milbank attorneys, dated from May through September 2012 and concerning the witness interviews. Items 55 and 58 are Milbank attorney talking points for September 2012 presentations to the audit committee and the board, respectively. Items 61, 63, 66, 121, 129, 145 are attachments to emails, dated in October and November 2012, between or among Milbank attorneys and ALC seeking Milbank's legal advice concerning drafts of the ALC-Grant Thornton November 6, 2012, management representation letter regarding the internal investigation. A Grant Thornton person is the author of the attachments, which are drafts or revisions of the letter. Items 150-51 are handwritten notes of Milbank attorneys of a December 17, 2012, telephone conference with Grant Thornton regarding the internal investigation.

(2) documents related to a telephone conference on or about February 15, 2013, among personnel from Milbank; personnel from Grant Thornton, ALC's auditor; and two members of ALC's audit committee "including but not limited to any notes reflecting the telephone conference and any materials prepared or utilized to convey information during the telephone conference or referred to during the telephone conference."

As the above description of the documents sought suggests, they may be largely comprised of "mental impressions, conclusions, opinions, and legal theories" (opinion).

### *Ruling*

Concerning work product, the argument that documents related to the internal investigation were not prepared in anticipation of litigation is unconvincing. It was predictable that litigation would follow the whistleblower letter, and indeed it followed rapidly. However, assuming, for the sake of argument, that neither attorney client privilege nor work product protection were waived, Bebo has made a showing that warrants production of the documents sought redacted of opinion. Insofar as the documents contain facts that Bebo could not otherwise

obtain,<sup>6</sup> they may lead to discoverable evidence, and may be used to impeach witness testimony or refresh recollection. Even if both attorney client privilege and work product protection were waived, Milbank's "mental impressions, conclusions, opinions, and legal theories" can have no relevance to the issues to be decided by the undersigned.

With reference to (2), documents related to the February 15, 2013, telephone conference, the privilege log includes, at Exhibit B, a Grant Thornton memorandum dated February 26, 2013, titled "Adequacy of the scope of the whistleblower investigation," that refers to the February 15, 2013, call and lists participants from Milbank, Grant Thornton, and ALC. Milbank represents that it did not reference or rely on any privileged or work product documents in discussions with Grant Thornton and does not have any record of Milbank attorney notes taken during the teleconference. It appears that Milbank represents that it does not have any material responsive to this request. It should, however, either confirm this or produce the material redacted of opinion.

Finally, Milbank requests that, "[d]ue to the sensitive of the Motion, . . . it be maintained under seal and not made publicly available" without providing a further explanation. However, the Commission's administrative proceedings are presumed to be public, pursuant to 17 C.F.R. §§ 201.301, .322(b), and the general nature of the motion and exhibits does not appear to warrant confidential treatment. The motion and exhibits will continue to be held under seal temporarily, and Milbank may file an explanation by June 19, 2019, as to why they should be afforded confidential treatment.

IT IS SO ORDERED.

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

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<sup>6</sup> It is noted that the Division of Enforcement represented, in a January 21, 2015, filing that "pursuant to Rule 230(a), it previously produced to Bebo all documents that it received from ALC, Ventas, Milbank Tweed, and Quarles & Brady in the course of its investigation."