UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of

LAURIE BEBO, and
JOHN BUONO, CPA,

Respondents.

THE DIVISION OF ENFORCEMENT'S BRIEF IN OPPOSITION TO RESPONDENT LAURIE BEBO'S APPEAL OF THE INITIAL DECISION

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I. INTRODUCTION

Respondent Laurie Bebo perpetrated a brazen fraud while the CEO of a public company, Assisted Living Concepts, Inc. ("ALC"). Bebo's scheme concealed that ALC was failing, by wide margins, occupancy and revenue covenants contained in ALC's lease with its landlord, Ventas, Inc. ("Ventas"). Despite the covenant failures, for three years Bebo falsely represented in ALC's Commission filings that ALC met the covenants.

Bebo knew that ALC's covenant compliance was closely monitored by Ventas, ALC's board, and ALC's auditors. Rather than admit ALC's noncompliance, Bebo devised a scheme to include fake occupants in the covenant calculations that ALC provided to Ventas each quarter. Without Ventas's agreement or knowledge, Bebo started including a limited number of employees who actually stayed at the Ventas facilities, and only for the days the employees actually stayed there. But as the facilities' true occupancy and revenue declined, and actual employee stays were no longer sufficient, Bebo's fraud intensified. She began including large numbers of fake occupants without regard to whether they stayed at the facilities or were even ALC employees.

The mechanics of Bebo's scheme are not in dispute. Despite warnings from her CFO, John Buono, that they could face prison unless the inclusion of employees was "real," Bebo chose fake occupants who spent little or no time at the Ventas facilities. Bebo's fake occupants included her relatives and friends, the parents and siblings of a subordinate, former employees, and even a seven-year-old boy. As for the actual employees Bebo selected, many never stayed at or even visited the Ventas facilities. Bebo listed fake residents as "occupants" of multiple facilities simultaneously, for months, quarters and, in some cases, years on end. Even when

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Bebo selected employees who had actually stayed at the facilities, she included those employees for periods far greater than their actual stays.

At the height of her scheme, Bebo used more than 100 fake residents to mask ALC's covenant failures. She also directed ALC to violate GAAP by recording revenue associated with the fake residents on ALC's financial statements for the Ventas facilities. Bebo's scheme so discomforted the ALC accounting personnel who performed the covenant calculations that each accountant either voiced their concerns to Bebo, or quit ALC to escape being wrapped up in Bebo's scheme.

Bebo's three-year deception proves her scienter. From early 2009, and continuing through Ventas's April 2012 lawsuit against ALC, Bebo took various measures to prevent Ventas from learning the truth. As a result, Ventas and ALC's investors had no knowledge of ALC's significant covenant failures or inclusion of fake occupants in the calculations.

Bebo likewise concealed her fraud from ALC's board and attorneys. Five board members and three ALC attorneys consistently testified that, prior to March 2012, they were unaware ALC was including employees in the covenant calculations. Moreover, no witness other than Bebo testified that the board or attorneys knew ALC was including: (1) Bebo's friends and family; (2) non-employees; (3) large numbers of employees; (4) employees at multiple properties; or (5) employees who did not travel to the properties.

Bebo also lied to ALC's auditor, Grant Thornton ("GT"), by telling its audit partners that Ventas had agreed to the inclusion of employees. Bebo selected the list of "employees" knowing GT wanted audit evidence to support ALC's covenant practices, but never told GT the list contained fake occupants.

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ALC would never publicly disclose the egregious details of Bebo's fraud, namely her rampant inclusion of fake occupants. But even its limited disclosures caused substantial harm to ALC and its investors. When ALC vaguely announced an investigation into ALC's covenant practices – following the board's receipt of whistleblower allegations – ALC's stock price declined considerably. And when ALC finally disclosed the mere inclusion of employees (but not fake occupants) to Ventas, ALC was forced to acquire the Ventas facilities for $34 million over fair value, which GT found to be "damages" as a result of the occupancy failures Bebo concealed.

The Administrative Law Judge ("ALJ") observed "overwhelming evidence of wrongdoing," and correctly determined that Bebo engaged in an egregious fraud. The ALJ also assessed witness credibility, by comparing Bebo's story to the conflicting accounts of every other important witness, and concluded that Bebo's version of the events cannot be believed. Indeed, no document exists corroborating Bebo's unrealistic story of what was disclosed to, or approved by, Ventas, the attorneys, the board, and GT. And every percipient witness refuted Bebo's story of an agreement with Ventas and full disclosure of ALC's covenant practices. Bebo's lack of credibility is also shown by at least 30 instances of her being impeached at trial.

Bebo's brief fails to even acknowledge her pervasive use of fake occupants or that so many witnesses refuted her story. Instead, her defense hinges on an event study that critically lacks reference to an adequate corrective disclosure on which to gauge stock price movement.

Bebo also fails to recognize that the Commission has already sanctioned Buono for his role in Bebo's scheme and GT's audit partners for failing to stop it. *See John Buono, CPA*, Exchange Act Rel. 74177 (Jan. 29, 2015); *Melissa Koeppel, CPA and Jeffrey Robinson, CPA*, Exchange Act Rel. 76537 (Dec. 2, 2015). Bebo offers no reason why these less culpable

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individuals should be heavily sanctioned for their smaller roles in a scheme Bebo masterminded, while Bebo goes unpunished.

Accordingly, the Commission should affirm the ALJ and find Bebo liable for the violations alleged in the OIP. The Commission should also impose the substantial sanctions necessary to protect investors, hold Bebo accountable, and deter other public company executives from engaging in fraud.

II. PROCEDURAL POSTURE

This case was originally tried in 2015. Following a remand in the wake of *Lucia v. SEC*, Bebo and the Division agreed on procedures to resolve the case without a full do-over of the evidentiary hearing. Per the parties' agreement, the new ALJ would issue an initial decision based on a *de novo* review of the original record compiled by Judge Elliot. (AP Release No. 6412, Attachment A, ¶1 (Dec. 18, 2018)). The parties agreed: "all evidence previously admitted would remain admitted for the purpose of [the new ALJ's] review and the parties would continue to be able to make arguments about the weight or relevance of such evidence." (*Id.*, ¶4). The new ALJ would not be bound by Judge Elliot's credibility determinations and observations of witness demeanor, but could "make any credibility determinations about witnesses that [the ALJ] finds appropriate based on other aspects of the record, such as common sense, valid impeachment, corroboration by other evidence/witnesses, etc." (*Id.,* ¶2).

The parties also agreed Bebo could seek new discovery and the ALJ would conduct a supplemental evidentiary hearing. (*Id.*, ¶3). After discovery, Bebo waived her right to a hearing. Instead, Bebo agreed the original post-hearing briefs "will serve as the briefs [the ALJ] will consider when preparing her initial decision." (AP Release No. 6642, Attachment A, ¶¶4-5 (July

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24, 2019)).[1] At Bebo's request, the Division agreed the ALJ could consider – for impeachment or corroboration purposes – witness interview memoranda prepared by Milbank law firm attorneys during their investigation of whistleblower allegations against Bebo. (*Id.*, ¶¶3, 5).

Judge Patil was ultimately assigned to preside, and issued the Initial Decision ("I.D.") from which Bebo appeals. Initial Decision Rel. 1401 (Aug. 13, 2020). The Commission now decides this appeal *de novo*, performing an "independent review of the record." *John Thomas Capital Mgmt.*, Exchange Act Rel. 89755, 2020 SEC LEXIS 4057, *2 (Sept. 4, 2020); *Robare Grp., Ltd. v. SEC*, 922 F.3d 468, 473 (D.C. Cir. 2019).

III. THE RECORD SHOWS BEBO MASTERMINDED AN EGREGIOUS FRAUD

A. Bebo Strongly Supported ALC's "Material Definitive" Lease with Ventas

Ventas owned eight assisted living facilities in four southeastern states (the "Ventas facilities"). (Ex. 1). During 2007, ALC and Ventas negotiated ALC leasing the Ventas facilities and acquiring the operations of the facilities' prior operator, CaraVita. (*Id.*; Tr. 167:23-168:3).

Certain lease provisions were potentially onerous to ALC. These included financial covenants (the "Covenants"), which required ALC to maintain at least:

- 65% quarterly occupancy at each individual Ventas facility;
- 75% trailing twelve-month occupancy and a 0.8 trailing twelve-month "coverage ratio" at each facility;
- 82% trailing twelve-month occupancy and a 1.0 trailing twelve-month "coverage ratio" for the eight-facility portfolio.

[1] Bebo also withdrew previously-excluded reports of two of her expert witnesses, who the Division would have cross-examined at the hearing. (AP Release No. 6642, Attachment A, ¶2).

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(Ex. 142, § 8.2.5). "Coverage ratio" was defined as each facility's cash flow for an applicable period (generally, resident rental income) divided by ALC's rent payments to Ventas for that facility. (Ex. 142, p. B-5).

ALC could face severe consequences for failing the Covenants. If ALC violated *any* of the Covenants, Ventas could: (1) terminate the lease; (2) evict ALC from all eight facilities; and (3) require ALC to pay the unpaid rent for the entire portfolio for the lease's remaining term (through March 2015). (Ex. 142, §§ 17.1.2, 17.2, 17.3, 17.4).

The lease required ALC to demonstrate compliance with the Covenants each quarter. After each quarter's end, ALC was required to provide Ventas: (1) financial statements for each facility and the portfolio, prepared in accordance with GAAP; and (2) schedules documenting compliance with the Covenants. (Ex. 142, §§ 25.3, 25.4; Ex. 142, Ex. D). Ventas required ALC to provide GAAP-compliant financial statements because otherwise Ventas could not rely on ALC's information. (Tr. 896:7-25; Ex. 142, §§ 25.1, 25.2, 25.3, 25.4). The lease also required an ALC executive – in practice, Buono – to certify the accuracy of ALC's quarterly financial information. (Ex. 142, §§ 25.3, 25.4; Ex. 142, Ex. D; Tr. 2323:10-2324:23; Exs. 32-45).

Bebo participated in the negotiations with Ventas, and understood the Covenants. (Tr. 1777:4-20, 1781:21-1782:1). Bebo knew Ventas would not negotiate the Covenants, and that Ventas had told ALC regarding the lease, that ALC could either "take it or leave it." (Tr. 552:3-8, 1299:4-20, 1777:16-20; Ex. 1572). Before ALC decided to enter the lease, Buono warned Bebo of his concerns about the Covenants. (Tr. 2313:7-2314:1). Buono also warned Bebo:

> "Working with Ventas and in particular Joe Solari has been difficult. He approaches these negotiations with the premise that they will not 'give away' anything they had with you…I have trouble believing that our relationship with Ventas will be anything but adversarial…"

(Ex. 140).

Still, Bebo strongly supported the Ventas lease, and recommended the lease to ALC's board. (Tr. 548:12-20, 1354:5-14, 1778:11-25, 2803:11-13, 2936:20-2937:3, 3885:20-3886:1). Despite Bebo's enthusiasm, ALC's general counsel, Eric Fonstad, and two directors, Alan Bell and Derek Buntain, advocated against the lease for reasons including the Covenants. (Tr. 550:1-552:2; 1298:13-1299:3, 1299:15-1300:12, 1355:5-1357:1, 1779:20-1780:19, 2320:9-24, 2804:1-8, 3900:13-3901:11). In response to these concerns, Bebo assured the board ALC could meet the Covenants. (Tr. 551:5-20, 1781:3-16, 2640:14-2641:16, 2804:9-2805:4). Bebo's assurances convinced the board, except Bell and Buntain, to vote to enter the lease. (Tr. 552:12-553:6, 1356:12-1357:1, 2805:5-10). After reviewing the entire lease, Bebo signed it on ALC's behalf. (Tr. 1781:17-1782:1; Ex. 142).

ALC and its securities counsel considered the lease material to investors. To that end, on January 7, 2008, ALC filed a Form 8-K announcing the "Material Definitive" Ventas lease. (Ex. 1). The Form 8-K specifically disclosed the Covenants and the consequences if ALC failed to comply. (*Id.*, p. 2).

Thereafter, through year-end 2011, ALC's Forms 10-K and 10-Q each represented that ALC was "in compliance" with the Covenants. (Ex. 2, p. 30; Ex. 3, p. 38; Ex. 4, p. 42; Ex. 5, p. 45; Ex. 6, p. 34; Ex. 7, p. 36; Ex. 8, p. 38; Ex. 9, p. 45; Ex. 10, p. 32; Ex. 11, p. 36; Ex. 12, pp. 36-37; Ex. 13, p. 43). Those filings also disclosed the amount of unpaid rent ALC could be required to pay Ventas if it failed the Covenants, and represented that a covenant failure could have a ***"material adverse impact"*** on ALC's operations. (*Id.*) (emphasis added). Rather than being "boilerplate," as Bebo suggests (Br., 3-4), ALC's disclosures about the materiality of a Covenant default changed each quarter, as the amount of unpaid rent owed to Ventas decreased from $25 million in early 2008 to $16 million in early 2012. (*Id.*).

Bebo claims she lacked motive to engage in fraud. But Bebo was responsible for the lease. Bebo advocated for it, assured the board she could meet the Covenants, and continually told the board ALC was in compliance. If ALC suffered the consequences of a default, Bebo would have been blamed. These facts provide a natural motive for Bebo's scheme.

B. Ventas Closely Scrutinized ALC's Covenant Compliance.

Bebo argues that Ventas did not care about the Covenants. But three Ventas employees – Solari, Tim Doman, and Joy Butora – testified the Covenants were important to Ventas. These witnesses testified Ventas closely monitored ALC's compliance, and considered occupancy and coverage ratio to be key metrics of its properties' performance. (Tr. 191:8-192:25, 195:24-196:5, 404:17-405:1, 894:7-895:25). Ventas considered, and communicated to Bebo, that occupancy and coverage ratio were indicators of whether the facilities were performing well enough to ensure ALC could make its rent payments. (Tr. 178:16-24, 401:4-15, 908:16-909:8; Ex. 190, p. 3; Ex. 198). These witnesses also testified Ventas knew it would eventually need to find a new tenant to operate the facilities, and future tenants would pay higher rents for better occupied facilities. (Tr. 175:22-176:13, 381:24-382:19, 961:6-962:3). Ventas also communicated to Bebo and Buono that Ventas wanted to preserve the value of its properties while ALC operated them. (Tr. 2326:11-2327:12; Ex. 198). Ventas thus regularly scrutinized ALC's quarterly Covenant information. (Tr. 191:8-197:15, 894:7-895:25, 897:1-898:25; Exs. 46-60, 147).

Ventas further monitored the facilities by holding quarterly calls or meetings with Bebo and Buono, periodically visiting the facilities, and asking detailed questions about occupancy and revenues. (Tr. 197:16-208:5, 899:1-908:15, 910:2-932:4, 2324:24-2326:2; Exs. 144, 147, 207, 208, 215, 217, 240, 241, 279, 300, 301). Given the Covenants' importance, Ventas was prepared

to evict ALC in the event of noncompliance and replace ALC with another tenant. (Tr. 185:18-187:6, 438:25-440:2; Ex. 258, p. 2).

Despite the overwhelming evidence of the Covenants' importance to Ventas, Bebo tries to establish Ventas's ambivalence by claiming Ventas did nothing after ALC received a 2009 Alabama regulatory notice, which implicated other covenants in the lease. (Br. 37). But Ventas did act, by issuing a Notice of Default, and ALC resolved the dispute only by curing the regulatory issues. (Exs. 1169, 2032, 2034). The situation, Ventas issuing a Notice of Default and ALC taking corrective action, repeated itself in early 2010. (Ex. 1231; Tr. 372:19-376:10). Thus, in real time, Bebo knew Ventas would not sit idly in the event of covenant defaults.

But the best evidence of Bebo's belief, that Ventas considered the Covenants important and was prepared to exercise its contractual remedies, are the elaborate measures Bebo employed to hide ALC's Covenant failures from Ventas. Indeed, while Bebo chose to disclose ALC's *regulatory* defaults to Ventas, she admittedly never told Ventas that ALC would breach the Covenants without using fake occupants. (Tr. 1920:11-17).[2]

C. Bebo and ALC Considered Covenant Compliance Important.

Belying Bebo's claim that the Covenants were immaterial, Bebo and ALC's accounting department regularly reviewed and monitored occupancy and coverage ratios at the Ventas facilities for Covenant compliance. (Tr. 838:14-22, 1839:5-13, 2321:3-20, 2327:20-2328:5; Ex.

[2] Bebo disingenuously cites to ambiguous portions of Doman's testimony, claiming that Ventas knowingly allowed ALC to breach the Covenants. (Br. 38). Doman testified that he learned ALC breached the Covenants sometime between 2008 and 2012, but then specified that he learned this only after Bebo asked for a release following Ventas's 2012 lawsuit. (Tr. 281:12-282:1). Moreover, unlike the defaults relating to Ventas's *regulatory* covenants, zero documentary evidence exists that ALC ever disclosed to Ventas that it breached the *financial* Covenants at issue here.

150). Bebo knew that occupancy was trending downward throughout 2008, which presented a serious problem in meeting the trailing twelve-month Covenants, because ALC was losing its strongest quarters as time progressed. (Tr. 750:9-22, 1849:13-23, 1859:22-1860:16, 3958:5-3959:25; Ex. 160; Ex. 3252, p. 3).

By August 2008, Bebo contemplated ALC purchasing the Ventas facilities to avoid the ramifications of missing the Covenants. (Tr. 1840:4-1841:22; Ex. 3015). This alone shows Bebo's belief that Ventas cared about the Covenants.

Confirming the significant attention Bebo and ALC paid to the Covenants, Bebo testified that ALC's board and its chairman, Hennigar, considered it important to know whether ALC was complying with the Covenants. (Tr. 1785:14-1786:21, 1834:9-25). For this reason, and because of the concerns raised by Bell and Buntain during the lease negotiations, ALC's board required quarterly reports on ALC's Covenant compliance. (Tr. 557:7-11, 576:24-578:6, 1357:5-14, 1785:18-1786:2, 2321:21-2322:2, 2807:21-2808:6; Ex. 98, p. 5; Ex. 150). At each board meeting, Bebo and Buono reported, orally and via PowerPoint, that ALC was meeting the Covenants. (Tr. 1837:9-22; *see*, *e.g.*, Ex. 81, pp. 53-54; Ex. 82, pp. 5, 48; Ex. 86, pp. 27, 46).

In August 2008, the directors questioned Bebo about the Ventas facilities' declining occupancy and the implications of a Covenant failure. (Ex. 150). In response, Bebo approved a memo describing ALC's occupancy issues and stating: "breach of any of the [Covenants] would entitle Ventas to terminate the Lease … and require payment of the present value of unpaid future rental amounts." (*Id.*; Tr. 2811:8-2812:15).

In November 2008, Bebo addressed the board's concerns about the Ventas facilities' declining occupancy. (Tr. 559:1-560:2; Ex. 97, p. 4). Bebo told the board she would improve occupancy by sending a "taskforce" of ALC employees, who worked elsewhere, to temporarily

work at the Ventas facilities to improve sales and operations. (Tr. 559:1-560:2, 2328:12-2330:4, 2812:16-2813:3, 2939:2-9, 3070:22-3074:17, 4725:6-4726:19; Ex. 97, p. 4; Ex. 150, p. 4; Ex. 567). Bebo never said the taskforce's purpose was to treat its members as "occupants" for Covenant compliance. (Tr. 560:3-9, 2645:3-25, 2813:21-25).

Bell then instructed Buono to try renegotiating the Covenants' requirements with Ventas, leading Buono to research Ventas modifying or waiving the Covenants in exchange for ALC accelerating its lease payments. (Tr. 2330:5-2331:20, 3045:11-25; Ex. 152). On November 18, Buono recommended that Bebo seek a suspension of the Covenants, and Bebo planned to discuss Buono's proposal with Ventas's CEO at an upcoming meeting. (Tr. 1851:5-1853:13, 1855:3-1856:9; Ex. 156). But at the meeting, Bebo decided not to raise the Covenants, and afterwards Buono complained to Bebo that she had dodged the issue. (Tr. 1856:10-22, 1858:4-1859:9, 2333:20-2334:11).

By the December 2008 board meeting, Bebo, Buono, and Robin Herbner, an ALC accountant who prepared occupancy projections, believed ALC would soon breach the Covenants. (Tr. 754:2-13, 2334:12-2335:15; Ex. 548). But when asked by Hennigar at that meeting, Bebo reported ALC would meet the Covenants as of year-end. (Tr. 1861:12-1862:5; Ex. 98, p. 5).

Following the meeting, Buono again asked Bebo to negotiate Covenant relief with Ventas. (Tr. 2336:12-2337:3; Ex. 164). Buono soon learned another Ventas tenant would be purchasing properties it rented from Ventas for an inflated price. (Tr. 2337:4-2339:5). Buono believed the high price was a penalty for the Ventas tenant's "covenant issues," and alerted Bebo to his concerns in emails titled: "Yuck." (Tr. 1864:1-13, 2337:4-2339:5; Exs. 165, 166).

D. Bebo's Scheme to Include Fake Occupants in the Covenant Calculations

Bebo admits that by January 2009 – as ALC's Covenant challenges at the Ventas facilities accelerated – she devised the idea of including employees in the Covenant calculations. (Tr. 1865:8-24, 1866:11-14, 1900:24-1901:3, 2339:6-21, 3046:10-3047:3; Ex. 172). Bebo's idea originated with her discovery that a legacy employee of CaraVita (the facilities' prior operator) was actually leasing a unit and living at a Ventas facility. (Tr. 1882:18-1883:2, 3993:24-3994:9). Bebo now claims it was a "handful" of employees, and that she believed Ventas knew CaraVita had included these employees in its own Covenant calculations. (Br., 5-6). But Bebo testified differently: that she lacked knowledge whether CaraVita had included any employees in its Covenant calculations. (Tr. 1886:14-1887:15).

At the time, ALC required low-level employees who travelled to its properties, including certain "taskforce" members, to overnight there instead of a hotel. (Tr. 1874:18-1877:7, 1878:22-1879:1). Bebo sought the advice of ALC's general counsel, Fonstad, on whether the lease permitted ALC to rent rooms to those employees and include them in the Covenant calculations. (Tr. 1307:14-1308:6, 1888:22-1890:18, 2339:16-2340:8, 3994:23-3995:16). Fonstad understood a limited number of taskforce employees travelled to the Ventas facilities in an effort to improve operations, and believed Bebo's proposal was restricted to employees who actually stayed at the facilities. (Tr. 1305:25-1307:9, 1308:10-1309:17, 1314:8-16, 1316:24-1317:10). Fonstad's understanding, that only employees who actually "stayed at the facility during their visit" could be eligible for inclusion in the calculations, is confirmed by the excerpt of his Milbank interview Bebo cites. (Br., 12 (citing Jt. Supp. Ex. 1, MB_BEBO_0000080)).

After learning Bebo would be discussing her proposal with Ventas, Fonstad prepared a January 19, 2009 email containing his legal advice. (Tr. 1309:18-1310:11; Ex. 1152). Fonstad

advised that Bebo's proposal could be permissible, ***but only if Ventas agreed to it in writing***.[3] (Tr. 1319:18-1320:5; Ex. 1152). Bebo admits Fonstad advised her Ventas's agreement was necessary to include employees in the Covenant calculations.[4] (Tr. 1895:12-17).

Consistent with his advice, Fonstad attached a draft letter to Ventas, in the event Ventas agreed to the proposal. (Ex. 1152, p. 2). Fonstad's draft letter *expressly disclosed that ALC would include employees in the Covenant calculations* and that ALC would include only a limited number at any given time. (*Id.*) Fonstad, who believed a signature was required to document Ventas's acceptance, concluded his letter with a request that Ventas confirm its agreement and included a blank signature block for Ventas to sign. (*Id.*; Tr. 1319:18-1320:5).

E. The January 20, 2009 Call and Bebo's February 4, 2009 Email

On January 20, 2009, Bebo and Buono spoke telephonically with Solari. (Tr. 413:23-414:1, 2342:17-2343:14). Solari's responsibilities at Ventas dealt with acquisitions, rather than the management of Ventas's properties. (Tr. 399:8-20, 408:19-409:2). Solari lacked the authority to modify the terms of ALC's lease without the approval of Ventas's CEO. (Tr. 409:25-410:12).

Bebo concedes that Solari was unaware the Covenants would be discussed on the call. (Tr. 1901:8-1902:6). Before the call, Buono emailed Bebo, describing which Ventas facilities were most in danger of missing the Covenants and noting that for Q4 2008, *which had already ended*, ALC had violated Covenants at one Ventas facility. (Tr. 1900:6-23; Ex. 174, p. 2).

[3] The lease could be modified only by a writing signed by authorized representatives of both parties, and all "notices, demands, requests, consents, approvals and other communications" under the lease were to be in writing with a copy to Ventas's general counsel. (Ex. 142, § 42.6).

[4] Bebo's admission and Fonstad's advice disprove Bebo's claim that "no one believed Ventas had to approve" the inclusion of employees. (Br., 39).

According to Solari, they discussed two topics on the call: (1) ALC subleasing units to a hospice provider; and (2) whether ALC corporate employees travelling to the facilities could overnight there instead of at hotels. (Tr. 414:2-12). Solari did not agree to any of Bebo's proposals. (Tr. 415:15-18). Solari did not recall any discussion of the Covenants, but was emphatic he did not agree that ALC could include employees in the Covenant calculations. (Tr. 416:8-15). Solari is confident of this because he never would have agreed to such a proposal – an "outlandish request" that would "circumvent the integrity of the financial covenants" – and because he lacked the authority to do so. (Tr. 416:8-417:10, 422:21-423:12).[5]

Solari is similarly confident he never agreed ALC could include in the Covenant calculations: (1) employees who did not actually visit the properties; (2) employees who had a "reason to go" to the properties; (3) large numbers of employees; (4) employees simultaneously included at multiple properties; or (5) family or friends of ALC personnel. (Tr. 418:4-421:5). Solari unambiguously denied Bebo's version of the call. (Tr. 423:13-426:6). While Bebo challenges Solari's credibility, she cannot explain why he would lie. Indeed, Solari faced no liability and had no incentive to appease his former employer given that Ventas fired him in April 2009. (Tr. 399:23-400:12).[6]

[5] Bebo argues this testimony was impermissible. (Br., 39-40). But Solari's testimony, as to what he would or would not have agreed, allowed Solari to explain why he had such conviction in his testimony. Such trial testimony is routinely allowed. *See, e.g.*, *U.S. v. Orr*, 692 F.3d 1079, 1095-97 (10th Cir. 2012) (investors properly asked whether they would have invested had they known certain information); *U.S. v. Dukes*, 242 Fed. App'x. 37, 45-46 (4th Cir. 2007) (same).

[6] Bebo's "support" for her claim Solari does not recall the January 20 call (Br., 9) comes not from Solari, but from GT's Robinson's notes of his discussion with a Milbank lawyer, who himself spoke with a Ventas attorney (and not Solari). (Ex. 1879; Tr. 3476:18-3480:25). Robinson's notes reflect at least three levels of hearsay, and do not refute Solari's testimony, which was itself corroborated by Buono.

Corroborating Solari, Buono testified that Bebo discussed the potential hospice sublease and a proposal to have ALC employees stay at the Ventas facilities. (Tr. 2344:8-17). Buono confirmed no Covenants were discussed, and that Solari did not agree to anything. (Tr. 2344:18-2345:5).

Bebo offered a starkly different story. According to Bebo, Solari agreed that ALC, at Bebo's discretion, could include an unlimited number of employees and others in the Covenant calculations who had a "reason to go" to the facilities, even if: (1) those employees did not stay at the facilities; (2) ALC did not disclose the number of such employees to Ventas; and (3) ALC, instead of the employees, "paid" rent for the units. (Tr. 1904:22-1907:13, 1907:14-18, 1908:12-23, 1912:7-1913:16, 4005:2-5).

Bebo concedes she spent more time discussing the hospice sublease proposal than the issue of employees leasing rooms. (Tr. 1914:6-18). She also concedes she *never* told Solari that: (1) ALC would fail any Covenants without including employees; (2) no cash would change hands for the employee-leased rooms; (3) ALC would treat a room as occupied for an entire month even if the employee stayed there for only one night or never stayed there at all; (4) most of the rooms ALC would include in the calculations would never be occupied; (5) Bebo's friends would be included in the calculations; and (6) the same employee could be included at multiple facilities simultaneously. (Tr. 1903:7-12, 1920:11-1923:3, 4007:19-4008:4).[7]

Buono and Fonstad both denied Bebo's story of what transpired immediately after the call. Bebo testified that Buono and Fonstad confirmed Solari had agreed ALC could meet the

[7] Bebo claims Buono testified falsely in refuting her story, but cannot explain his motivation. Indeed, if Solari truly agreed to everything that Bebo claims, Buono's self-interest would have been to testify to that effect. Doing so would have certainly hindered the Division's case against both him and Bebo.

Covenants by including an unlimited number of employees who had a "reason to go" to the facilities, even if the employees never travelled there. (Tr. 1924:14-1925:16, 1926:16-1927:11, 1928:22-1929:17). Bebo also testified Fonstad orally retracted his written advice from the day before, that Ventas's written confirmation was required for ALC to implement any agreement. (Tr. 1929:18-22).[8]

Refuting Bebo, Fonstad and Buono deny that Bebo discussed Solari's purported agreement with Fonstad, or that Fonstad otherwise approved any practice following the January 20 call. (Tr. 1507:24-1511:17, 1518:10-1519:6, 2347:17-20, 2380:21-2381:4).[9] The ALJ scrutinized this purported encounter, and found Bebo's testimony, that Fonstad approved any practices following the call with Solari, not credible. (I.D., 33-36).

On January 27, Buono prepared a draft email to Solari summarizing the January 20 call. (Tr. 2467:15-2470:9, 2756:22-2758:18; Ex. 179). On February 4, after editing Buono's draft, Bebo sent Solari the final version of the email. (Tr. 1931:14-1932:3, 1934:12-1935:12, 2354:1-5, 2949:7-2950:7, 2987:12-2992:23; Exs. 184, 1320, 1320A). Contrary to her own account of the call, but corroborating Buono's and Solari's testimony, ***Bebo's email does not mention any covenants***. (Ex. 184). Instead, the first four paragraphs address ALC's proposed hospice sublease. (*Id.*). The fifth paragraph merely states: "we are also confirming our notification of our rental of rooms to employees…" (*Id.*). Thus, Bebo ignored the advice she received from

[8] Bebo goes so far as claiming Fonstad later approved a seven-year-old boy's inclusion in the Covenant calculations, which Fonstad denied and conflicted with Bebo's investigative testimony. (Tr. 1318:17-20, 2050:8-12; 2194:3-24).

[9] Much of Bebo's support for what happened following the January 20 call comes from her best friend and subordinate, Bucholtz. (Br. 10). But Bucholtz's trial testimony directly contradicts her earlier account to Milbank. Indeed, Bucholtz told Milbank she was unaware that ALC was including employees in the Covenant calculations and did not know whether Ventas ever agreed to the practice. (Jt. Supp. Ex. 1, MB_BEBO_0000046).

Fonstad, to: (1) disclose in writing ALC's intent to include employees in the Covenant calculations, and (2) obtain Ventas's written approval. (Ex. 1152).

Ventas never responded to Bebo's proposals. Bebo agreed that, prior to April 2012, ALC never informed Ventas of ALC's inclusion of employees in the Covenant calculations. (Tr. 428:25-429:5, 1918:3-1919:11, 2022:6-2023:13, 2345:6-2347:19). Bebo contends Ventas's silence confirmed its agreement that ALC could include in the calculations (both occupancy and coverage ratio) an unlimited number of employees who never stayed at the facilities, as long as those employees had a "reason to go." (Tr. 1936:13-1938:18, 1938:23-1941:8, 1942:9-13, 1948:7-16). Bebo also claims Ventas agreed that Bebo, in her sole discretion, could decide whether a person had a "reason to go," even if that person was not an ALC employee. (Tr. 1942:24-1943:16, 1944:15-1945:10). Because of her extremely broad definition of who ALC could include, Bebo considered Ventas's purported agreement tantamount to a waiver of the Covenants. (Tr. 1945:11-1946:4).

F. The ALJ Thoroughly Scrutinized Bebo's Account of the January 20 Call, and Found it Not Credible.

Recognizing Bebo's account of the January 20 call differed sharply from the testimony of the other witnesses, the ALJ scrutinized the evidence surrounding the call. (I.D., 32-36). That analysis revealed "several" compelling reasons why Bebo's account was not credible. (*Id.*).

The ALJ's first reason for not crediting Bebo was because Bebo's version of the call was completely inconsistent with the email she later sent Ventas summarizing the call (*which does not reference the Covenants*). (I.D., 33 ("If Bebo had really obtained a sweeping agreement from Solari allowing anyone who had a reason to go to the facilities to be included in the covenants, surely she would have memorialized it.")). Next, the ALJ observed that Bebo's testimony directly conflicted with the earlier account she provided to Milbank during its

investigation: *that she did not discuss with Solari the inclusion of employees in the Covenant calculations*. (*Id.*). Finally, the ALJ determined that Buono and Solari's testimony was compelling and consistent with the other evidence. (*Id.*, 33-35). The ALJ evaluated the same arguments Bebo now repeats about Buono and Solari's testimony, finding them "unpersuasive" and "lack[ing] support." (*Id.*, 34).

While Bebo touts Buono's testimony that *Buono* thought the only reason for employees to rent rooms was to meet the Covenants, the ALJ correctly observed that Ventas did not share this understanding. (*Id.*). Rather, as Bebo admits, she told Solari that ALC was seeking Ventas's permission for ALC employees who travelled to the properties with job duties to stay there overnight. (Tr. 1905:12-1907:13, 1920:14-17, 4003:6-16). The ALJ also rejected Bebo's arguments by noting that even if Buono *acted* like he believed an agreement with Ventas existed: "that does not mean he actually believed one existed; he may have acted as he did for any number of reasons, including out of fear that he would be fired if he did not follow Bebo's directions." (I.D., 34).

The ALJ also considered, and rejected, Bebo's accusation that Fonstad perjured himself when he testified (a) he did not recall participating in the January 20 call, and (b) did not approve any agreement with Ventas. (I.D., 35-36). Fonstad's testimony is supported by the fact he routinely took notes of important conversations (including other calls with Ventas), but that no notes existed of the January 20 call. (*Id.*; Ex. 197). Nor did Fonstad memorialize any agreement with Ventas. Even assuming Fonstad was on the call, that would not absolve Bebo. There was no discussion of the Covenants on the call, nor were the Covenants mentioned in the emails Fonstad received which purported to summarize the call. (Ex. 1171). Therefore, Bebo could not have relied on Fonstad's alleged advice or participation in the discussions.

G. Bebo's Attempt to Obtain Covenant Relief from Ventas in February 2009 Demonstrates She Did Not Believe an Agreement Existed.

The ALJ's determination, that Bebo knew Ventas never agreed to include employees in the Covenant calculations, is confirmed by Bebo's attempts to negotiate Covenant relief with Ventas *after* her call with Solari. Despite the agreement Bebo claimed was reached on January 20, the next month Bebo and Buono discussed with Solari a proposal for ALC to purchase two Ventas properties in New Mexico *in exchange for Ventas waiving Covenants*. (Tr. 429:15-431:19; Ex. 188, p. 2). On February 19, Bebo followed-up by proposing to revise the Covenants such that the only one remaining would be a slightly reduced portfolio-wide coverage ratio Covenant. (Ex. 190, p. 3). Bebo's email acknowledged the Covenant's importance to Ventas: "we have tried to address your concerns that the properties be managed to adequately support lease payments." (*Id.*).

On February 21, Buono drafted a proposal for ALC's board's consideration, seeking a waiver of all Covenants (except for the reduced portfolio-wide coverage ratio Covenant) in exchange for ALC purchasing the New Mexico properties. (Tr. 1950:18-1951:15, 2358:10-2359:15; Ex. 193). Buono, who believed a deal had been reached, emailed Bucholtz about his and Bebo's recent call with Ventas: "subject to board approval, we have reached an understanding on covenant compliance…The bad news is you will now own 2 buildings in New Mexico." (Tr. 2360:13-2361:1; Ex. 192). Then, at the February 23 board meeting, Bebo reported that ALC may seek Covenant relief from Ventas in exchange for purchasing the New Mexico properties. (Tr. 562:11-563:19, 1980:12-1981:8, 2815:1-2816:2; Ex. 100, pp. 2-3).

Despite the contemporaneous emails and minutes showing that Bebo proposed obtaining Covenant relief by purchasing the New Mexico properties, Bebo claims that at the February 23 meeting the board approved the practice of including in the Covenant calculations "people with a

reason to go." (Tr. 1970:19-1971:23). Bebo also testified that before the board meeting, she told Rhinelander, in the presence of Herbner, that Ventas had agreed to include employees in the Covenant calculations. (Tr. 1959:1-1965:5). Bebo claims that Rhinelander then spoke with Hennigar, before telling the group Hennigar had approved the practice. (Tr. 1965:6-1966:20).

Herbner, Rhinelander, and Hennigar denied Bebo's story. (Tr. 841:14-842:17, 2823:14-2824:12; Ex. 492A, 55:21-56:6, 59:1-5). Even accepting Bebo's story as true, Rhinelander and Hennigar did not authorize Bebo's scheme, because Bebo had not yet determined to include large numbers of employees, or employees who did not stay at the properties. (Tr. 1989:2-1990:7). Moreover, crediting Bebo's claims, that she told Rhinelander and Hennigar that Ventas agreed to include employees, would merely prove she lied to them.

Five directors – Bell, Buntain, Hennigar, Rhinelander, and Roadman – refute Bebo. These directors testified the inclusion of employees in the Covenant calculations did not come up at the February 23, 2009 meeting, and that the board never approved the practice. (Tr. 563:24-564:6, 567:4-23, 1363:10-25, 2646:15-2648:8, 2816:3-14, 2824:13-22; Ex. 492A, 55:21-56:6). Fonstad, who attended the February 23 board meeting, similarly testified that the inclusion of employees in the Covenant calculations was never discussed at any board meeting he attended. (Tr. 1522:4-1524:2; Exs. 99, 100). Buono likewise testified the board did not approve the inclusion of employees. (Tr. 2761:19-23). Further, the February 23 meeting minutes make no reference to including employees in the Covenant calculations, let alone board approval of the practice. (Exs. 99, 100).

After the board meeting, Ventas countered ALC's New Mexico proposal by demanding ALC purchase the properties at an increased price, along with ALC purchasing Peachtree, a poorly performing Ventas facility. (Tr. 224:6-225:11; Ex. 196). But Ventas would only

temporarily waive the individual facility coverage ratio Covenants, and would not waive the portfolio-wide coverage ratio Covenant. (Tr. 225:19-226:13, 435:4-436:12; Exs. 194, 196). This caused Buono to send Bebo an email titled "OMG," writing of Ventas's counterproposal: "Hope you['re] sitting down." (Ex. 195).

On February 25, 2009, Bebo, Buono, and Fonstad discussed the counterproposal with Ventas. (Tr. 1514:15-1516:6; Ex. 197). Fonstad's contemporaneous notes reflect that Ventas's Doman told Bebo that Ventas "take[s] covenant violations very seriously." (Tr. 1516:10-19; Ex. 197). ALC did not accept Ventas's costly counterproposal, the deal was never consummated, and ALC never obtained Covenant relief. (Tr. 436:13-438:10, 2360:13-2361:9; Ex. 198). Given Bebo's knowledge that Ventas *required substantial consideration to suspend only a single Covenant*, she could not have truly believed that Ventas, only one month earlier, agreed to effectively waive all Covenants for nothing in return.

In April 2009, Ventas laid off Solari during a companywide reduction in force. (Tr. 399:23-400:12, 460:15-461:1). Thereafter, Bebo admittedly never spoke with anyone at Ventas about the use of employees in the Covenant calculations. (Tr. 4074:6-9).

H. Bebo Directs ALC to Include Employees in the Covenant Calculations

Following the January 20 call with Solari, Bebo ordered Buono to include ALC employees – and their attendant revenue – in the Covenant calculations. (Tr. 2347:21-2348:3, 2351:13-19). Buono acquiesced, but cautioned Bebo the practice "had to be something real" and that ALC could only include "employees that were staying at the properties." (Tr. 2348:4-12). Buono's understanding, that Bebo would only include employees who actually stayed at the facilities, is confirmed contemporaneously by an email he wrote in Q1 2009. (Ex. 203). Buono's email asked Bebo to identify for the calculations "employees *staying* at the house,"

employees "*living at* our residences" and employees "that *were at*" buildings. (*Id.* (emphasis added); Tr. 2361:10-2364:11).

Bebo also ordered Buono to provide Ventas with Covenant calculations that included the employees and their associated revenue, but *not* inform Ventas of the employees' inclusion. (Tr. 2348:22-2349:8, 4669:21-4670:5). Buono followed Bebo's directives, despite Ventas never agreeing, because Buono feared Bebo would fire him if he disobeyed. (Tr. 2348:13-21).

I. ALC's Process for Including Employees in the Covenant Calculations

The mechanics of Bebo's scheme, including Bebo's central role in the process, are not in legitimate dispute.

1. ALC's Historical Practices

ALC's longstanding methodology for calculating occupancy, for all of its senior-living facilities, was to divide the number of occupied units by the number of available units at each facility. (Tr. 515:24-516:7, 519:13-25, 830:11-19, 2315:5-8, 3116:17-3118:4). ALC never used any alternative methodology. (Tr. 4545:9-4546:5). Aside from Bebo, the other witnesses agreed ALC never *contemplated* calculating occupancy at the Ventas facilities using a different method. (*See, e.g.*, Tr. 1304:24-1305:20, 1521:18-1522:3, 2314:14-2315:8, 2813:4-20). Bebo concedes she never asked anyone to perform the calculations using an alternative methodology, and never discussed the idea with ALC's board or auditors. (Tr. 1868:8-18, 1872:7-21).

Yet Bebo has argued that her story about Ventas's agreement must be true, because otherwise she would have simply met the Covenants by altering the methodology for calculating compliance. But if Bebo truly believed ALC could appropriately meet the Covenants by changing methodologies, she would not have needed to seek Ventas's approval to include employees, let alone engage in her elaborate scheme.

Bebo acknowledges that changing ALC's *occupancy* methodology would not have impacted the *coverage ratio* calculation. (Tr. 1870:16-1871:1, 1873:20-1874:4; *see also,* Tr. 2315:9-20). Buono, a CPA, testified that using an alternative methodology – such as allocating expenses in a different manner – would not have impacted ALC's coverage ratio calculations. (Tr. 2315:21-2317:3). Buono also testified he never discussed with Bebo meeting the coverage ratio Covenants by allocating expenses differently, and that doing so would deviate from GAAP and the Ventas lease. (Tr. 4684:11-24, 4685:11-4686:1).

2. The "Occupancy Recons" and the "Great Concern" They Caused to ALC Accounting Personnel

Each quarter, ALC sent Ventas materials documenting its compliance with the Covenants. (Tr. 749:4-9; Exs. 32-45). Before her maternity leave in August 2009, ALC accountant Herbner prepared the quarterly Covenant calculations and certification materials for Ventas. (Tr. 511:13-14, 519:4-12, 749:20-750:8). Bebo knew that ALC prepared the Covenant calculations after the quarter had ended. (Tr. 1987:21-1988:11, 2349:23-2350:13).

ALC began including employees in the Q4 2008 calculations. (Tr. 754:14-25). This was *before* the February 2009 meeting where Bebo claims the board approved the practice.[10] (Tr. 1974:25-1976:2, 1976:16-1977:4). For Q4 2008, ALC only included employees who actually stayed overnight at the Ventas facilities. (Tr. 756:13-757:20, 1989:2-9). After the quarter ended, Bebo told Herbner which employees stayed at the Ventas facilities, and for what days. (*Id.*; Tr. 798:10-802:18, 2944:18-2946:20, 2993:6-25). Herbner performed her calculations on an "Occupancy Recon" spreadsheet, which was never shared with Ventas. (Tr. 791:2-793:16; Exs. 17-31A).

[10] Bebo acknowledges that at the February 2009 board meeting, when she reported ALC meeting the Covenants for Q4 2008, she did not disclose that ALC could only do so by including employees. (Tr. 1974:4-15).

Herbner calculated the revenue associated with the employees and reported it to assistant-controller Anthony Ferreri, who posted journal entries to record the revenue on ALC's general ledger. (Tr. 757:21-758:7, 803:5-804:7, 807:23-808:6). Bebo determined the daily rate used for calculating revenue associated with the added employees. (Tr. 806:19-22, 824:7-12). After Ferreri posted the journal entries, Herbner included the fake employee "revenue" in the financial materials sent to Ventas. (Tr. 808:19-809:14).

Bebo admitted giving Herbner a directive similar to her instruction to Buono: do not tell Ventas about the employees. (Tr. 2088:11-2089:25). Thus, Bebo understood Ventas could not discern that ALC's quarterly Covenant calculations included employees. (Tr. 2087:12-2088:10).

Herbner again performed the calculations for Q1 and Q2 2009. (Tr. 811:2-20, 815:14-816:10, 827:23-828:3). Unlike Q4 2008, Herbner no longer received documentation showing the days employees actually stayed at the Ventas facilities. (Tr. 817:6-17). Instead, Bebo directed that each employee be considered an occupant *for the entire quarter*. (Tr. 813:6-814:7; 989:8-990:13, 2352:3-12). Herbner determined the number of employees by calculating the shortfall in occupied units and revenue needed to meet the Covenants, and then asking Bebo for the employees' names. (Tr. 816:13-817:2, 826:2-7).

Bebo knew that, beginning in Q1 2009, ALC included employees who did not visit or stay at the Ventas facilities. (Tr. 1989:10-1990:7). Bebo never asked Herbner to verify that the employees were appropriately listed or had actually stayed at the facilities. (Tr. 820:25-821:21, 828:15-829:8).

In evaluating Bebo's defense – that ALC's attorneys, auditors, board and disclosure committee knew the details of her scheme (Br. 11-17) – it is critical that Bebo's alleged disclosure to these constituencies occurred at the very outset, during the Q4 2008 calculations.

At this early stage, ALC only included employees who actually stayed at the Ventas facilities and only for the periods of their actual stays. At this time, Bebo could not have revealed the egregious aspects of her scheme that she would not implement until later in 2009.

Herbner became uncomfortable when Bebo directed her to include Bebo's parents (using Bebo's *mother's maiden name*) and a former employee's ex-husband. (Tr. 817:18-818:15, 852:24-853:11). Herbner felt "great concern," believing Ventas had no reason to agree to the practice. (Tr. 818:16-819:4). Herbner was also concerned Bebo selected employees who did not stay at the Ventas facilities and the same employees at multiple properties simultaneously, because Herbner was told Ventas agreed only actual employee stays could be included. (Tr. 819:5-820:14, 843:5-11).

After Q2 2009, Herbner took maternity leave. Upon returning, Herbner gave notice she had found employment elsewhere. (Tr. 845:11-846:6). Herbner quit because of her discomfort with the Covenant calculations and her worry that ALC "was constantly pushing the edges of regulators." (Tr. 844:24-845:6, 882:8-14).

Before her leave, Herbner trained Sean Schelfout to perform the calculations, use the Occupancy Recons to "backfill" the necessary number of employees to meet the Covenants, and to later obtain their names from Bebo. (Tr. 846:7-12, 965:24-966:3, 970:9-971:7, 973:20-975:19, 976:3-977:2, 982:12-984:10; Ex. 141; Ex. 383). Schelfout held the backfilling assignment through year-end 2010. (Tr. 971:4-20, 978:9-979:2, 1017:14-19). After determining the number of needed employees, Schelfout prepared an Occupancy Recon with placeholders for the employee names – such as "E3," "E4," and "E5." (Tr. 988:19-990:6, 998:8-999:3; Ex. 230; Ex. 236; Ex. 387). Bebo then determined the names. (Tr. 999:4-1001:5, 1009:12-1010:19; Ex. 167, pp. 11-14; Ex. 237).

While training Schelfout, Herbner shared her concerns. (Tr. 846:7-847:21, 984:11-23). Schelfout worried the practice was illegitimate, and began looking for new employment. (Tr. 979:3-23, 985:11-15, 1063:2-16). His concerns intensified after realizing Bebo selected employees who were not staying at the facilities and people who were not ALC employees. (Tr. 980:10-982:11, 997:17-998:3). Schelfout feared being fired if he confronted Bebo and Buono, or disclosed the truth to Ventas. (Tr. 984:24-987:14, 1027:16-1028:2). Schelfout quit ALC after receiving his first job offer. (Tr. 985:20-25, 1030:25-1031:14).

Before leaving, Schelfout trained Daniel Grochowski to perform the calculations. (Tr. 1029:17-1030:7, 1091:23-1095:6). Grochowski received the same instruction Bebo gave to Buono and Herbner: don't tell Ventas about the employees. (Tr. 1095:7-1096:16, 1207:12-16).

In January 2011, Grochowski began performing the calculations. (Tr. 1090:21-1091:5). Grochowski was uncomfortable because the process required "fudging numbers," "inflating revenue," "lying to Ventas," and "creating false financial statements." (Tr. 1097:10-1098:25, 1099:1-1101:12). Grochowski feared he faced legal liability. (Tr. 1104:17-1105:5).

Grochowski performed the calculations for three quarters, but refused to engage in backfilling, considering it "manipulation." (Tr. 1096:25-1097:24, 1105:6-10). Instead, Grochowski informed Buono how much actual occupancy had changed over the past month, and Buono would calculate how many employees to add or subtract. (Tr. 1109:10-17, 1110:11-21). Bebo continued to decide the employees' names. (Tr. 1113:3-1114:12, 1126:4-18, 1128:18-1131:18; Ex. 302).

By November 2011, Grochowski and Ferreri feared their CPA licenses were at risk, and complained to Buono. (Tr. 1151:24-1152:17, 2375:23-2376:6). Afterwards, Bebo summoned Grochowski. (Tr. 1152:18-1153:6). Grochowski told Bebo he was uncomfortable and no longer

wanted to perform the calculations. (Tr. 1153:12-20, 2376:1-21, 4191:7-19). Grochowski told Bebo the inclusion of employees violated GAAP and complained about the inclusion of non-employees. (Tr. 1153:25-1155:18). Bebo tried to mollify Grochowski by showing him her February 4, 2009 email to Solari, but the email only validated Grochowski's concerns. (Tr. 1157:10-1161:14).

When Grochowski wouldn't acquiesce, Bebo allowed him to stop performing the calculations. (Tr. 1161:24-1162:20). Bebo then assigned Buono, a public company CFO, the rote task of performing the calculations. (Tr. 1162:21-1163:1, 2376:12-2377:3, 2377:19-2378:16).

3. The Journal Entries and the 997 Account

Ferreri supervised ALC's journal entries, the mechanism for recording accounting adjustments to ALC's general ledger and, ultimately, its financial statements. (Tr. 1221:25-1222:8, 1223:12-1225:2). The employee-related journal entries recorded revenue on the accounts of the eight Ventas facilities, and recorded a corresponding amount of "negative revenue" in a corporate-level revenue account known as the "997 account." (Tr. 1225:10-24; Exs. 378-425, 427-450). Because the two transactions offset, ALC's consolidated financial statements were not impacted. (Tr. 1230:22-1231:6, 1240:4-1241:1, 1244:22-1245:20). Thus, the fake revenue ALC reported to Ventas was not reported in ALC's Commission filings. (Tr. 2771:17-2772:4).

Ferreri became anxious because these journal entries were unusual and "definitely not consistent with GAAP." (Tr. 1227:16-1228:8, 1243:24-1244:7). In his 25-year accounting career, Ferreri had never seen an arrangement involving offsetting positive and negative revenue; the typical situation was revenue and offsetting expense. (Tr. 1221:4-1222:14, 1228:11-21, 1253:6-1254:5, 1261:17-22).

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Because of his discomfort, Ferreri requested either Bebo or Buono sign the employee revenue journal entries, even though they never signed any other journal entries. (Tr. 1246:6-1248:14). To get Bebo and Buono to sign the entries, Ferreri used the cover story that the Sarbanes-Oxley Act mandated their sign-off. (Tr. 1248:1-8).

After Grochowski confronted Bebo, Bebo requested that Ferrari continue recording the journal entries. (Tr. 1256:7-19). Ferreri acquiesced, because Bebo assured him the process was "proper and correct," and Ferreri feared termination for not obeying. (Tr. 1260:14-1261:16).

Ferreri's assessment, that recording the employee revenue violated GAAP, was shared by the Division's expert, John Barron. Barron opined that recording this revenue on the Ventas facilities' financial statements, which the lease required to be GAAP-compliant, violated GAAP's revenue recognition criteria contained in FASB Concepts Statement 5. (Ex. 377, pp. 27-29). Recording such revenue was improper because no cash changed hands; the Ventas facilities never had a claim to cash; and no evidence existed of an agreement, between ALC and the Ventas facilities, setting forth the terms allowing the facilities to record the revenue. (*Id.*, p. 28). Bebo offered no evidence that recording revenues associated with the employees satisfied GAAP, and the ALJ properly credited Barron's testimony. (I.D., 71).

4. Bebo's Central Role

Bebo understood the process ALC accountants used to determine the number of employees and the associated revenue needed to meet the Covenants. (Tr. 1996:25-1997:18, 1998:4-1999:21, 2354:14-2355:21, 2374:19-2375:19; Ex. 304). Along with ordering the employees' inclusion, Bebo selected the identities of the employees and other non-residents included in the calculations. (Tr. 2350:19-25).[11]

[11] Bebo claims she did not always select the names, but concedes she typically did. (Tr. 1994:5-15, 1999:22-2000:12). No other witness testified that anyone but Bebo selected the names.

Bebo testified that each quarter, after ALC accountants provided her the number of employees needed to meet the Covenants, she supplied the names. (Tr. 4076:20-4077:17). Bebo understood the list of names went to GT as audit evidence, along with ALC's Covenant calculation materials. (Tr. 2699:15-2700:6, 4070:19-4073:7, 4124:3-23; Ex. 203). Buono and his staff did not perform a substantive review of the names. (Tr. 2352:20-2353:7). Bebo never instructed Buono to do so. (Tr. 2017:14-2018:2, 4559:23-4560:4).

The fake occupants Bebo selected for the Covenant calculations included:

- Her husband, Nick Welter, who was never an ALC employee. (Tr. 2006:24-2007:11; Ex. 167, p. 11). Bebo included Welter at multiple facilities simultaneously. (Tr. 2010:11-2011:15; Ex. 167, p. 13).

- Her parents, using Bebo's mother's maiden name. (Tr. 2007:15-2008:8; Ex. 167, p. 12).

- Welter's friend, Kevin Schweer, who was never an ALC employee yet was included simultaneously at multiple properties. (Tr. 2011:9-2012:18; Ex. 167, pp. 12-14).

- Her friend and subordinate, Bucholtz, who Bebo included at four facilities simultaneously. (Tr. 2013:25-2014:22; Ex. 167, pp. 11-13).

- Bucholtz's parents, siblings, and seven-year-old nephew. (Tr. 2046:1-2047:13, 2049:4-13, 2050:13-21; Ex. 237, pp. 5 and 7).

- Jared Houck, Bebo's subordinate who never stayed at the Ventas facilities. Bebo reviewed Houck's expense reports showing he stayed at hotels and not the facilities, yet simultaneously included Houck at five facilities. (Tr. 1465:5-13, 1468:14-1469:1, 1470:19-1471:2, 1500:3-9; Ex. 21, pp. 6-8; Ex. 22, pp. 6-8).

- Many other ALC employees who provided declarations affirming they never stayed at the Ventas facilities. (Exs. 451-454, 462, 466, 468, 470, 471, 473).[12]

- Tim Cromer, a non-employee who was married to an ALC employee who was separately included at multiple facilities. (Tr. 2053:9-2055:10; Ex. 256, pp. 6-7).

[12] Bebo does not dispute the veracity of these declarations, which were properly admitted per Rule of Practice 235(a)(5). Bebo never attempted to compel the declarants' cross-examination.

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- Former employees, future hires who had not yet started working, and full-time employees of the Ventas facilities (who lived nearby and had no reason to overnight there). (Ex. 552A, Tr. 2249:2-2264:19).

- Large numbers of employees who were simultaneously included at multiple properties. Starting in Q3 2009, Bebo listed an average of 18.5 employees at multiple properties each quarter. (Ex. 552A, Tr. 2224:4-2239:19).

Besides selecting the names, Bebo signed journal entries recording the employees' "revenue." (Tr. 2055:13-2056:21, 2059:10-2060:11, 2061:11-2062:1, 2068:20-2069:21; Ex. 427; Ex. 433, p. 4; Ex. 447, p. 1; Ex. 449, p. 1). Bebo knew these journal entries recorded the employee revenue and that the 997 account cancelled out the revenue from ALC's consolidated financial statements. (Tr. 2031:6-14, 2061:21-2062:1, 2065:17-2066:9, 2067:10-2068:11, 2771:17-2772:19, 4129:15-4130:16, 4133:14-4134:9, 4137:16-4138:2, 4585:15-4587:1).

Bebo understood ALC never actually reserved or "set aside" rooms for the employees who did not stay at the Ventas facilities. Indeed, Bebo testified the facilities' on-site staff did not know rooms were being reserved for employee use, or that non-resident rooms were being included in the Covenant calculations. (Tr. 2071:16-2072:4). Moreover, the notion of setting aside or reserving rooms conflicts with ALC's practice of *waiting until the end of each quarter* to determine the number of rooms to include in the calculations.

5. Bebo Needed Large Numbers of Fake Occupants to Mask ALC's Covenant Failures.

Throughout 2009 and into 2010, the Ventas facilities' actual occupancy continued to decline. (Ex. 377, ¶¶81-82). The following chart, depicting actual trailing twelve-month occupancy, shows that without the inclusion of "employees" ALC experienced multiple Covenant failures at each facility (75% minimum occupancy) and for the portfolio (82% minimum).

Trailing 12-Month Occupancy Percentages that Failed Covenant Thresholds
2009 through 2011

	Winterville Retirement	Greenwood Gardens	Highland Terrace	Peachtree Estates	Tara Plantation	The Inn at Seneca	CaraVita Village	Sanctuary at North star	Portfolio Total
Q1'09	74.7	-	-	71.6	-	-	-	-	**-**
Q2'09	68.7	-	-	71.3	-	-	-	-	**80.4**
Q3'09	62.8	-	-	70.5	-	-	-	-	**76.9**
Q4'09	56.5	74.1	74.4	70	71.2	-	73.9	72.1	**72.3**
Q1'10	55.7	72.2	66.1	68.5	65.7	-	71.1	71.1	**68.9**
Q2'10	59.8	71	61.7	65.5	62.6	67	69.6	71.4	**66.9**
Q3'10	68.5	71.2	64.1	64.6	63.4	59.8	68.6	-	**67.5**
Q4'10	-	72	71.2	64.2	64.4	63.6	66.8	-	**69.5**
Q1'11	-	71.1	-	66.7	63.7	65.9	64.9	-	**70.4**
Q2'11	-	70.9	-	70	66.2	69.2	62.1	-	**71.1**
Q3'11	70	72.4	-	74.1	68.2	-	59.4	-	**71.4**
Q4'11	59.5	-	-	-	72.2	-	56.9	-	**71**

(Ex. 377, ¶ 82).

Even if ALC had reduced the denominator in the calculations by 10%, as Bebo claims would have been permissible, ALC still would have violated the occupancy Covenants more than 40 times. (Tr. 4568:25-4569:14; Ex. 583A). Without including employees, ALC would also have repeatedly failed the 65% quarterly occupancy Covenant at each facility (Ex. 377, ¶¶81), and, as seen below, the coverage ratio covenants for four facilities (0.8 minimum ratio) and the portfolio (1.0 minimum).

Trailing 12-Month Coverage Ratios that Failed Covenants

	Winterville Retirement	Highland Terrace	Peachtree Estates	Tara Plantation	Portfolio Total
Q1'09	0.69	-	0.7	-	-
Q2'09	0.58	-	0.77	-	-
Q3'09	0.49	-	-	-	-
Q4'09	0.39	0.76	-	-	0.97
Q1'10	0.32	0.57	-	0.65	0.86
Q2'10	0.3	0.33	-	0.59	0.77
Q3'10	0.38	0.32	-	0.59	0.77
Q4'10	0.49	0.55	-	0.59	0.84
Q1'11	0.61	0.66	-	0.55	0.89
Q2'11	0.62	-	-	0.53	0.93
Q3'11	0.49	-	-	0.51	0.92
Q4'11	0.37	-	-	0.57	0.91

(Ex. 377, ¶ 84)

To mask these substantial Covenant shortfalls, ALC included large numbers of non-residents (both employees and non-employees) in the calculations. (Tr. 2767:2-5). By the end of 2009, ALC included over 100 non-residents *for every day of the quarter*, and large numbers were included through year-end 2011. (Ex. 377, ¶80). Bebo was aware of the large numbers of non-residents she selected for the Covenant calculations, which are shown below. (Tr. 2051:17-2052:4).

Non-Residents Included in Covenant Calculations

2009 through 2011

	Winterville Retirement	Greenwood Gardens	Highland Terrace	Peachtree Estates	Tara Plantation	The Inn at Seneca	CaraVita Village	Sanctuary at North star	Portfolio Total
Q1'09	10	1	-	10	-	-	3	-	**24**
Q2'09	10.15	1.02	-	10.15	-	-	3.05	-	**24.37**
Q3'09	10	5.32	8.32	10	11	3.26	7.33	8.32	**63.53**
Q4'09	14	12	10	12	14	15	12	14	**103**
Q1'10	14	11	10	12	14	15	12	14	**102**
Q2'10	10.35	11	10	12	14	15	12.99	11.67	**97.01**
Q3'10	4	6	7.35	12	10	11	15	4	**69.35**
Q4'10	4	6	3	12	12	7.67	16.33	-	**61**
Q1'11	4	5.34	1.03	9.69	12.03	9	22	-	**63.10**
Q2'11	9	5	0.67	8	10.66	8.33	34	-	**75.66**
Q3'11	14.96	5	-	8	12.35	4.67	38.30	-	**83.28**
Q4'11	21	5	-	8	11	4	43	-	**92**

(Ex. 377, ¶ 80)

In late 2009, Buono learned that ALC needed far more employees to meet the Covenants. (Tr. 2364:13-21). Buono again cautioned Bebo the practice had to be "real," and continually repeated this warning. (Tr. 2365:8-21). On multiple occasions Buono expressed concern to Bebo that Ventas could sue him, that he feared going to prison, and that he did not "look good in stripes." (*Id.*).[13] In response, Bebo assured Buono the program was legitimate, and that ALC would never fail the Covenants because it had large numbers of employees it could send to the properties. (Tr. 2366:1-15).

Despite her assurances, Bebo selected large numbers of fake occupants who did not stay at the facilities during the periods they were included in the Covenant calculations. (Tr. 2249:4-2264:19; Ex. 552A). Over the course of the scheme, such individuals conservatively constituted

[13] Bebo admits Buono told her "I don't look good in stripes." (Tr. 4126:4-17).

well over half of the "employees" Bebo included. (*Id.*). As Milbank would later determine after Bebo's scheme was exposed: "there were rarely more than three ALC employees who actually travelled to the Ventas-leased facilities in any month, and those employees remained only for a few days." (Ex. 365, p. 25).

J. Bebo's "Employee Leasing" Terminology is Misleading.

ALC never actually leased rooms to its employees. Yet Bebo insists on using the misleading and imprecise terminology "employee leasing" to describe her scheme of including phantom occupants in the Covenant calculations. The Commission should reject this "spin," because the terminology encompasses several practices, ranging from valid to highly fraudulent.

At one end of the spectrum, "employee leasing" could mean the legitimate practice ALC initially implemented to address declining occupancy at the Ventas facilities: Bebo's decision, in late 2008, to send a temporary taskforce of ALC corporate employees to the Ventas facilities to improve sales and operations. (Tr. 559:1-560:2, 2328:12-2330:4, 2812:16-2813:3, 2939:2-9, 3070:22-3074:17, 4725:6-4726:19; Ex. 97, p. 4; Ex. 150, p. 4; Ex. 567). While this initial version of "employee leasing" was seemingly benign, at the onset Bebo was unsure whether ALC employees could even *stay* at the Ventas facilities, given the restrictive terms of the Ventas lease. (Tr. 1307:14-1308:6, 1888:22-1890:18, 2339:16-2340:8, 3994:23-3995:16). To address those uncertainties, Fonstad's email prior to Bebo's January 20 call with Solari specifically analyzed whether the lease even allowed ALC employees to rent rooms at the facilities. (Ex. 1152).

Moving down the spectrum, "employee leasing" can also refer to the practice of including in the calculations the actual stays of the small number of employees who truly traveled to the Ventas facilities. This is what Bebo proposed to Fonstad before the January 20 call with Solari, a proposal Fonstad said was permissible only with Ventas' written permission.

(Tr. 1305:25-1307:9, 1308:10-1309:17, 1314:8-16, 1316:24-1317:10; Ex. 1152). Despite never obtaining a written agreement, Bebo misleadingly told GT that Ventas had agreed to this version of "employee leasing": including in the Covenant calculations *actual stays* by ALC employees. (Tr. 2137:13-2138:20, 2150:4-18, 2150:25-2151:15, 2151:22-2154:16; 3366:5-17, 3401:24-3402:15, 3498:15-3499:6, 3495:25-3496:13, 3497:20-3498:9).

At the far end of the "employee leasing" spectrum is the highly fraudulent practice Bebo utilized as her scheme progressed (and never disclosed to ALC's attorneys, auditors, board, or investors): including large numbers of employees and other fake residents who did not stay at the Ventas facilities during the period Bebo listed them as "occupants."

Given that the imprecise term "employee leasing" can refer to various practices Bebo employed – ranging from the seemingly harmless genesis of her scheme to its fraudulent outcome – the ALJ appropriately sustained vagueness objections to the term's use. Notably, nearly every instance where Bebo claims to have disclosed ALC's Covenant practices – to attorneys, auditors, or the board – occurred in early 2009, before Bebo began including fake residents in the calculations. Thus, Bebo's arguments, that she fully disclosed her "employee leasing" practices, fail. And, to the extent Bebo used the term "employee leasing" during the relevant time period, she did so to conceal ALC's true Covenant practices.

K. ALC's False and Misleading Commission Filings

Bebo signed ALC's Forms 10-K, and certified that ALC's Forms 10-K and 10-Q contained no material misstatements or omissions. (Tr. 1767:6-1768:10; Exs. 2-13). Bebo conceded having responsibility to ensure those filings were accurate. (Tr. 1767:6-1768:10, 3845:17-20).

ALC's 2009, 2010, and 2011 Forms 10-K and 10-Q falsely represented ALC was "in compliance" with the Covenants. (Ex. 2, p. 30; Ex. 3, p. 38; Ex. 4, p. 42; Ex. 5, p. 45; Ex. 6, p. 34; Ex. 7, p. 36; Ex. 8, p. 38; Ex. 9, p. 45; Ex. 10, p. 32; Ex. 11, p. 36; Ex. 12, pp. 36-37; Ex. 13, p. 43). Bebo knew ALC's filings both contained this representation and stated that a Covenant default could have a "material adverse impact" on ALC. (*Id.*; Tr. 1770:2-6, 1771:13-18).

Belying Bebo's argument that these disclosures were "boilerplate," the Division of Corporation Finance inquired about ALC's Covenant disclosures in a July 2011 comment letter. (Ex. 295). In response, ALC's 2011 Form 10-K and Q2 and Q3 Forms 10-Q added the following false and misleading representation: "ALC does not believe that there is a reasonably likely degree of risk of breach of the [Covenants.]" (Tr. 1772:7-17; Ex. 11, p. 36; Ex. 12, pp. 36-37; Ex. 13, p. 43).

L. Bebo's Deception Towards Ventas Proves Her Scienter.

Bebo took various actions to conceal her scheme from Ventas. Bebo's deception shows she knew Ventas never agreed to ALC's Covenant practices. And it shows she knew her conduct was wrong.

For instance, during quarterly discussions with ALC, Ventas asked about changes in occupancy and coverage ratio. (Tr. 227:18-237:9, 2101:10-2102:11, 2366:16-23; Exs. 207, 208, 280). Bebo responded with fictitious explanations, never revealing the changes actually were caused by adding or subtracting employees. (Tr. 2366:16-2367:15, 2369:14-2371:12). She likewise directed Buono to answer Ventas's questions without disclosing the inclusion of employees. (Tr. 2367:16-2368:13).

Similarly, in July 2009, Ventas asked Herbner to explain "significant" occupancy increases at five facilities. (Ex. 211). Bebo dictated to Herbner phony reasons to give Ventas for

the occupancy increases – none of which involved the true reason, the inclusion of employees – and Herbner forwarded Bebo's answers to Ventas. (Tr. 835:18-838:22, 839:9-840:10, 2090:22-2092:12; Ex. 212).

Bebo also tried preventing Ventas from ascertaining occupancy during Ventas's onsite facility inspections. Bebo and Buono always accompanied the visiting Ventas personnel, and Bebo prohibited onsite employees from speaking with Ventas. (Tr. 2368:14-2369:3). Bebo also prevented Ventas from visiting during meal times, because Ventas would realize the number of residents in the dining room conflicted with ALC's reported occupancy figures. (Tr. 2369:4-13). Bebo further instructed Houck to remove the placards containing the names of residents which hung outside the residents' rooms. (Tr. 1475:11-25, 4154:18-4155:1). This prevented Ventas from counting the number of occupied rooms.

Bebo later tried preventing Ventas from visiting the facilities altogether. On December 11, 2010, Bebo directed that Ventas could not visit the facilities for the rest of the year after one facility's occupancy had fallen to 61%. (Ex. 262; Tr. 2099:3-2100:11).[14]

In 2011, ALC was exploring a sale of the company and prepared a "data room" for potential buyers, *one of which was Ventas*, to review due diligence materials. (Tr. 2114:9-14, 2116:6-8, 2371:15-2372:16, 2828:18-2830:15). The data room contained ALC's true occupancy figures for all of its properties, including the Ventas facilities. (Ex. 287). Bebo was afraid Ventas would discover that actual occupancy was lower than what ALC reported in the quarterly certifications. (Tr. 2120:9-2121:22, 2122:21-2123:8, 2126:9-2127:1; Ex. 292). For this reason, Bebo prohibited Ventas from accessing the occupancy information made available to the other

[14] Bebo made similar efforts to limit GT from conducting its own visits to the Ventas facilities. (Tr. 2093:15-2098:19; Exs. 220, 223)

due diligence participants. (Tr. 2116:9-2117:23, 2829:22-2831:15; Exs. 287, 292).

During the due diligence process, Buono cautioned Bebo that ALC's potential buyers would discover the negative revenue in the 997 account, and ask Ventas about it. (Tr. 2372:21-2373:16). If that occurred, Bebo believed Ventas would not credit her "agreement" with Solari. (Tr. 2128:13-2131:10, 2132:13-2134:8). To avoid potential purchasers contacting Ventas, Bebo believed ALC would need to acquire the Ventas facilities before being sold. (Tr. 2373:23-2374:1, 2835:2-2836:24).

Even after ALC's board eventually discovered limited aspects of Bebo's scheme in March 2012, Bebo advocated against disclosing her Covenant practices to Ventas. (Ex. 568, p. 4; Ex. 570; Tr. 4721:6-4723:10). As a result of Bebo's deception, Ventas remained unaware that ALC included employees in the Covenant calculations. (Tr. 215:10-216:14; 237:17-22).

M. Bebo's Deception Towards ALC's Board Further Evidences Her Scienter

Contrary to her arguments (Br. 16-17), Bebo's concealment of her scheme from ALC's directors both demonstrates her scienter and precludes her from claiming good-faith reliance.

1. Bebo Concealed Her Scheme

Five directors testified they were unaware ALC used employees in the Covenant calculations until the March 6, 2012 Compensation/Nomination/Governance ("CNG") committee meeting. (Tr. 564:7-565:14, 567:4-571:15, 1360:13-1361:23, 1455:6-10, 2592:16-2593:18, 2645:11-2646:11, 2648:22-2651:7, 2816:15-2822:13; Ex. 492A at 53:20-56:19). Other witnesses who regularly attended board meetings – Fonstad, internal auditor David Hokeness, and attorney Mary Zak – also testified the inclusion of employees in the Covenant calculations was not brought to the board's attention before March 2012. (Tr. 1523:2-6, 3134:21-3135:11, 4339:10-4340:16, 4344:6-4345:22).

Corroborating these witnesses' testimony, the minutes of ALC's board and audit committee meetings, and the materials distributed to the directors, do not mention the use of employees in the Covenant calculations or Ventas's agreement to such a practice. (Exs. 74-90, 92-120).[15] Even Buono testified that, before March 2012, there was only a single reference to employees being included in the Covenant calculations made at a board meeting (by Buono, not Bebo, in August 2011), and that no details or specifics were given about the practice. (Tr. 2382:12-2383:19, 2384:25-2388:3, 4631:7-4632:20).[16]

Bebo's argument that GT disclosed ALC's Covenant practices at audit committee meetings is refuted by the minutes of those meetings, GT's agendas and reports contained in the board materials, and the testimony of every ALC witness, save Bebo, who attended those meetings. (Exs. 74-90, 92-120). And, in April 2012, when Bebo's scheme was unraveling, GT could not find evidence it had disclosed ALC's use of employees to the board. (Exs. 1774, 1774A p. 4). Specifically, in GT's after-the-fact attempt to ascertain its disclosures to the board, the only document GT could find referenced the "Caravita covenants" and "Minimum average

[15] In certain quarters, the board members received meeting books which, if scrutinized carefully in their entirety, could show a discrepancy between actual occupancy and the occupancy reported to Ventas. These materials presented by management at board meetings (which exceeded 100 pages) never referenced a discrepancy existing or that the discrepancy was due to the inclusion of employees. (*See, e.g.*, Exs. 81, 82). The directors testified that no one brought to their attention any inconsistencies in board materials, and if any discrepancy existed, it was management's responsibility to alert the board. (Tr. 742:9-21, 1370:12-1371:6, 2642:8-2643:8).

[16] Buono testified August 2011 was the first such reference made at any board meeting. (Tr. 2382:12-16). At minimum, crediting this testimony means the board was unaware of any aspect of Bebo's scheme for the first 2.5 years of its existence. Buono also explained why inconsistencies may exist between his previous statements, that the board was aware of limited aspects of ALC's Covenant practices, and his hearing testimony that the board was unaware of Bebo's scheme: Buono's earlier statements resulted from false information Bebo gave him, namely that she had disclosed ALC's Covenant practices to the board. Buono did not realize Bebo lied to him until he reviewed, after receiving a Wells notice, the investigative testimony of the directors. (Tr. 2754:22-2755:4; 2784:14-2785:7).

occupancy," but never mentioned ALC's use of employees. (*Id.*).

In sharp contrast to this overwhelming documentary and testimonial evidence, Bebo testified that by late 2009, she had disclosed the minutia of her scheme. Bebo claimed she told the board at its November 2009 meeting:

- Ventas agreed ALC could include in the Covenant calculations an unlimited number of employees, so long as they had a "reason to go;"
- ALC was including large numbers of employees, non-employees, people who did not visit the Ventas properties, and employees at multiple properties simultaneously; and
- ALC's accounting practices, including the cancellation of revenue through the 997 account.

(Tr. 2023:18-2024:25, 2025:11-2026:15, 2027:11-2028:10, 2030:7-23, 2031:1-14).

Still, Bebo concedes she *never* told the board: (1) ALC would fail the Covenants without including employees, (2) ALC included her family and friends, or (3) ALC was including large numbers of employees who did not visit the Ventas facilities. (Tr. 2035:11-25). This lack of disclosure dooms any reliance defense.

The board was also unaware that, before its August 2011 meeting, management had prepared an alternative response to the Division of Corporation Finance's comment letter. (Tr. 571:16-574:21, 1448:17-1449:19, 2833:22-2834:23; Exs. 294, 295). The version of ALC's response that the board discussed and ALC provided to the Commission stated ALC did not believe there was a reasonably likely degree of risk of breach of the Covenants. (Tr. 571:16-574:21, 2599:21-2602:12, 2832:12-2834:1; Ex. 295). Yet the alternative letter, which management did not disseminate, reached the exact opposite conclusion. (Tr. 571:16-574:21, 2651:8-2652:3; Ex. 294). Management never shared the alternative letter with the board, GT, or ALC's securities counsel, Quarles & Brady ("Quarles"). (Tr. 2109:6-19; 2110:20-2112:7).

Bebo testified that at the August 2011 audit committee meeting, she again provided the board (and GT) with all the details about ALC's Covenant practices. (Tr. 2167:13-2170:12, 4702:19-4703:12). But Bebo was impeached with her investigative testimony: that she did not discuss the inclusion of employees with the board between November 2009 and March 2012. (Tr. 2040:20-2042:15). Five directors, as well as Buono, Zak, and Hokeness, denied Bebo discussed ALC's use of employees during this meeting. (Tr. 567:4-571:15, 1363:10-1366:16, 2382:12-2383:19, 2384:25-2388:3, 2645:11-2646:11, 2648:22-2651:7, 2825:2-2827:17, 3134:21-3135:11, 4339:10-4340:16, 4344:6-4345:22; Ex. 492A). Corroborating their testimony, the minutes and board books for the August 2011 meeting, as well as Zak's handwritten meeting notes, contain no reference to employees being included in the Covenant calculations. (Exs. 86, 115, 116, 118).

2. As Her Scheme Unravels, Bebo's Deception Continues

The board first began learning details of Bebo's deception at the March 6, 2012 CNG committee meeting. (Tr. 579:6-18, 1373:8-12, 2385:13-2387:22, 2836:25-2838:6; Ex. 492A at 53:20-56:19). Before the meeting, Buono informed Hennigar that a due diligence participant had discovered and inquired about the 997 account. (Tr. 579:19-580:25). Hennigar then asked Buono to explain to the CNG committee the 997 account and its role in the Covenant calculations. (Tr. 581:1-18, 2388:4-2389:5). Buono's explanations left the board members "surprised," "shocked," "dumbfounded," "confused," and "furious." (Tr. 1373:25-1374:2, 2389:6-9, 2613:1-13, 2652:10-2653:1, 2837:18-2838:1). In delivering the news, Buono appeared frightened, as if he thought he would be fired immediately. (Tr. 582:17-583:5, 1373:20-24).

The CNG committee then confronted Bebo with Buono's revelations. (Tr. 583:6-11). Bebo testified the committee appeared unaware of employees being included in the Covenant calculations. (Tr. 2196:8-2198:16, 4436:20-4437:11). While Bebo admitted to the committee her use of employees, she failed to reveal key aspects of the practice, such as ALC's inclusion of: (1) employees who did not stay at the properties; (2) her friends and family members; and (3) employees at multiple properties. (Tr. 583:9-587:5, 1376:6-1377:7). Bebo would never disclose to the board these facets of her scheme. (Tr. 586:6-587:5, 1376:6-1377:7, 2389:10-14, 2653:2-12, 2839:16-2840:21).

The board then tasked Bell, an attorney, with investigating ALC's Covenant practices. (Tr. 544:15-545:9, 589:6-14, 2598:2-2599:4, 2841:16-19). Bell advised that ALC inform its potential purchasers of the 997 account containing $2 million of negative revenue. (Tr. 589:19-594:9; Ex. 322). Bebo tried to prevent the disclosure. (Tr. 595:6-597:21, 2207:12-25, 2209:4-22; Exs. 325, 326). Upon learning this, Bell wrote Rhinelander: "I think very risky with no upside…ALC has been too cute by a 1/2 and better to end." (Ex. 326). Rhinelander overruled Bebo, and ALC made Bell's recommended disclosure. (Tr. 597:22-598:3).

Bell then tried to determine the Ventas facilities' actual occupancy figures, and asked Bebo for the calculations without the inclusion of employees. (Tr. 598:4-599:1, Ex. 328). When Bebo pushed back, Bell forwarded her email to Hennigar, writing: "More of the same – unbelievable!" (Tr. 598:4-601:6; Ex. 328).

The ALJ thoroughly evaluated Bebo's claims she disclosed the details of her scheme to the board, finding that Bebo's testimony was not credible. (I.D., 50 ("Bebo's position stands in sharp contrast to the documentary evidence, the testimony of every other percipient witness, and, in some cases, her own testimony.")).

N. Even Partial Disclosure of Bebo's Scheme Caused Significant Losses.

Due to regulatory issues unrelated to the Covenants, by April 4, 2012, ALC had received license revocation notices for three Ventas facilities. (Ex. 333). Bell prepared a memo discussing the impact of both the licensure issues and ALC's Covenant practices on ALC's potential sale, writing: "Highly unlikely that Feb. 4/09 Bebo email re employees is a legal basis for inclusion of employees to meet [the Covenants]" and "[Buono's] compliance certificate re patient revenue [to Ventas] is clearly wrong." (*Id.*, p. 3; Tr. 602:14-605:23).

On April 26, Ventas sued ALC for breach of the lease's regulatory covenants resulting from the license revocation notices. *Ventas Reality, L.P. v. ALC CVMA, LLC*, No. 1:12-cv-3107 (N.D. Ill.). Over Bebo's objection, the directors insisted that any settlement contain a specific release regarding the inclusion of employees in the Covenant calculations. (Tr. 611:15-613:22, 2846:3-2848:4; Ex. 351). On April 27, Bebo emailed Ventas a proposed settlement containing a release relating to ALC "renting rooms … to certain of its employees and including those employees in certificates and covenant calculations…." (Ex. 350, p. 3). Bebo's email stated: "I have purposefully left the dollar amount blank [and am] letting you know that the other items are important to our agreement in principle...." (Ex. 350). This is how Ventas first learned ALC had been including employees in the Covenant calculations. (Tr. 246:7-247:18).

On May 2, 2012, the directors (other than Bebo) received a whistleblower letter from Grochowski, who feared the board did not know the details of Bebo's scheme. (Tr. 613:23-614:25, 1163:2-1164:23, 1167:11-1168:11; Exs. 352, 353). Grochowski described Bebo's list of employee names as a "sham," and disclosed that ALC was including in the calculations: (1) the same employees at multiple properties simultaneously; (2) employees who did not travel to the facilities; and (c) non-employees such as Bebo's relatives and friends. (Ex. 353). This

information was previously unknown to the board. (Tr. 605:24-606:14, 614:20-616:17, 1384:1-20, 2653:13-2654:4, 2848:5-2849:1).

The next day, the board retained Milbank to investigate. (Tr. 616:18-617:2, 1384:21-1385:8, 2613:18-23, 2849:2-5). On May 4, ALC disclosed in a Form 8-K that it retained counsel to investigate "irregularities" in the Ventas lease. (Tr. 3640:8-12; Ex. 14). That day, ALC's stock price dropped from $19.17 to $16.80, which Bebo's expert witness conceded was a "significant abnormal decline." (Tr. 3637:5-3638:4).

On May 3 and 4, 2012, Bebo, wrote a letter expressing her concerns that the board would not speak with her.[17] (Tr. 2227:15-2228:3, 4519:13-4522:6; Ex. 354). Bebo's letter acknowledged: "we are off-side on the covenants [and] are facing a material financial impact." (Tr. 2229:3-12; Ex. 354, p. 2).

On May 9, Ventas wrote ALC alleging that ALC had engaged in fraud by "treating units leased to employees as bona fide rentals by third parties." (Ex. 356). In its lawsuit, Ventas moved for expedited discovery, in part because ALC had not provided details about the lease "irregularities" disclosed in its Form 8-K, which *Ventas understood to involve the occupancy Covenants*. (Tr. 384:8-386:6; Ex. 357).

After Ventas's fraud allegations, ALC's directors believed the situation was "going from bad to worse," which "put more pressure" on ALC to settle with Ventas. (Tr. 617:3-618:10). ALC's board quickly authorized the purchase of the eight Ventas facilities (and four others) for up to $100 million, with the offer predicated on Ventas's "unconditional" release "of all its possible claims against [ALC]." (Tr. 618:11-619:13; Ex. 123, p. 2).

[17] Bebo was unaware the board was in the process of retaining Milbank. (Tr. 1427:15-1428:1, 4519:13-4522:6).

ALC ultimately paid $100 million to settle Ventas's lawsuit and purchase the twelve facilities, even though independent appraisals only valued the facilities at $62.8 million. (Ex. 544, pp. 27, 29). Thus, in its Q2 2012 financial statements, ALC suffered a $37.2 million expense for "lease termination and settlement" and also wrote off an $8.96 million intangible asset associated with the Ventas lease. (*Id.*, p. 11). This resulted in ALC sustaining a $25 million loss in what otherwise would have been a profitable quarter. (Tr. 4683:22-4684:6).

Various directors agreed that ALC bought the properties for significantly more than market value. Bell and Buntain testified ALC overpaid by at least $20 million. (Tr. 620:2-621:4, 1385:13-1386:20). Roadman testified the settlement contained a "penalty" component. (Tr. 2636:8-2637:2, 2657:15-24). ALC paid so much because not resolving its disputes with Ventas, including using employees in the Covenant calculations, would jeopardize the sale of ALC. (Tr. 621:5-11, 1386:17-23, 1390:1-8).

GT confirmed ALC paid more than market value to acquire the Ventas facilities, and did so because it breached the *occupancy* Covenants. GT's analysis concluded:

> ALC was put into a position of being forced to acquire the properties above market, which doesn't indicate true fair value between market participants in normal circumstances. ALC was essentially paying not only the lease termination fee, but also for damages as a result of occupancy rates falling significantly below required covenant occupancy rates.

(Ex. 3369, pp. 7-8).

O. Milbank's Limited Investigation Did Not Exonerate Bebo.

The ALJ correctly determined that Milbank's limited investigation findings do not exonerate Bebo. (I.D., 79-80). Indeed, Milbank's investigation was inconclusive because Milbank did not interview several important witnesses – particularly Solari, any Ventas or GT personnel, and certain directors. (Tr. 626:24-627:18, 2654:10-12; Ex. 558, pp. 1, 6; Ex. 1873, p. 4; I.D. at 79 ("[GT and Millbank were similarly kept in the dark about some of ALC's practices

or did not interview key witnesses.")).

The Division contends that Milbank's *after-the-fact* investigation findings are irrelevant to these proceedings. Even so, Milbank made various findings which discredited Bebo's version of the events, including:

- No documents were lost or erased. (Tr. 627:19-628:7; Ex. 558, p. 1). This finding rebuts Bebo's self-serving assertion that she took verbatim notes of her call with Solari that mysteriously disappeared once her scheme unraveled.

- Fonstad advised Bebo that ALC could not enter into the "employee arrangement" unless Ventas sent a "written confirmation agreement." (Ex. 558, p. 4; Tr. 633:14-634:1).

- "Bebo did not tell Solari that the employee leasing arrangement would be used for purposes of covenant compliance or that ALC was close to violating the covenant." (Tr. 636:12-17; Ex. 558, p. 6). Milbank made this determination based on its interviews of Bebo and Buono, the only participants on the call it interviewed.

- Neither the board nor Ventas received the list of employee names included in the calculations. (Ex. 558, p. 6).

- "The board never knew the employees were needed for purposes of compliance with the [Covenants]…The board believed the number of employees were small." (*Id.*, p. 7, ¶¶nn, oo).

- Bebo denied GT's request to speak with Ventas. (*Id.*, p. 8, ¶vv.)

While Milbank's investigation was still in its early stages, ALC fired Bebo. (Tr. 621:12-623:10, 1385:9-12). Bebo stresses that Milbank did not recommend any corrective action when its investigation ended. But ALC had already fired Bebo, so ALC's most logical corrective action was no longer necessary. (Tr. 745:19-746:2, 2655:4-10).

P. The Milbank Memoranda Do Not Support Bebo's Story.

Bebo places significant emphasis on Milbank's interview memoranda, claiming they support her version of the events. Bebo is wrong.

Milbank's witness interviews were not transcribed or taken under oath. And the subsequent memoranda, based on handwritten notes, are comprised of multiple levels of hearsay.

(I.D., 16-17). This makes them less reliable than the witnesses' trial testimony. *See, e.g. Marshall v. Precision Pipeline LLC,* 2015 U.S. Dist. LEXIS 4820, *27 (W.D. Wisc. Jan 14, 2015) ("even if Marshall's notes were admissible, notes of her attorney based on those same notes are not admissible under any exception to the hearsay rule."); *Crawford v. Jackson*, 323 F.3d 123, 129 (D.C. Cir. 2003) (police reports are "less reliable to the extent that they are unsworn…or contain multiple layers of hearsay.") (citations omitted); *U.S. v. Lloyd*, 566 F.3d 341, 345 (3d Cir. 2009) ("out-of-court statements…containing multiple layers of hearsay…have been recognized as unreliable.") (citations omitted).[18]

An example of the memoranda's unreliability is Bebo's citation to Buono's Milbank interview, reflecting that Bebo informed Solari that CaraVita had "used employee leases in its covenant calculations and that ALC intended to do the same thing." (Br., 8 (citing Jt. Supp. Ex. 1, MB_BEBO_0000060)). Yet the same paragraph of the memorandum notes that Buono didn't know whether CaraVita had included employees in its calculations. (*Id.*). That same paragraph also documents that Buono did not recall anyone telling Solari that CaraVita had "counted employees in its occupancy calculations" or that ALC would use employees to meet the Covenants. (*Id.*). Corroborating these latter statements, Milbank's account of Buono's follow-up interview states that Buono did not recall Bebo telling Solari that ALC "intended to use the employee leases for occupancy Covenant purposes." (*Id.*, MB_BEBO_0000064). While Bebo could have subpoenaed the Milbank attorneys who conducted the interviews to clarify any discrepancies, she chose not to.

[18] Bebo complains that this case being brought administratively violates the Constitution. Bebo tries to have it both ways: insisting that the Commission consider hearsay materials inadmissible in federal court.

In any event, the Division thoroughly analyzed the memoranda in its prior briefing. (Supp. Post-Hearing Br. (Sept. 27, 2019), pp. 23-31; Supp. Post-Hearing Response (Nov. 1, 2019), pp. 22-34). The Division detailed how Milbank's account of Bebo's interview differs sharply from her trial testimony, supporting the conclusion that Bebo was not credible. (*Id.*). Conversely, Milbank's accounts of its interviews of the other key witnesses are consistent with those witnesses' trial testimony. (*Id.*). Specifically, the memoranda corroborate multiple witnesses' testimony about their lack of knowledge of Bebo's scheme. (*Id.*). After the ALJ scrutinized Bebo's references to the Milbank memoranda and considered their weight, he found they offer Bebo no defense. (I.D., at 16-19, 34-35, 41).

Q. All of the Relevant Witnesses Refute Bebo.

Bebo contends that Ventas agreed to the inclusion of employees in the Covenant calculations and that she fully disclosed the practice to various attorneys, auditors, and ALC's board. No documentary evidence supports Bebo, and each percipient witness refuted Bebo's version of the events.

Solari and Buono denied Bebo's claim that Ventas ever approved using employees in the Covenant calculations, on the January 20, 2009 call or otherwise. (Tr. 423:13-426:6, 2344:18-2345:5).

ALC's in-house lawyers, Fonstad and Zak, and outside securities counsel, Quarles attorney Davidson, each testified they never approved, or learned about, the inclusion of employees in the Covenant calculations before March 2012. (Tr. 1507:24-1512:17, 2292:4-2295:16, 4339:10-4340:16, 4344:6-4345:22). In fact, Bebo utterly disregarded the one attorney she consulted – Fonstad – who expressly advised her to disclose her proposal to include employees and to obtain Ventas's signed approval. (Ex. 1152). Buono likewise testified that no

attorney ever approved the inclusion of employees in the Covenant calculations. (Tr. 2380:7-2381:4). Bebo admitted she never discussed the issue with Zak or Quarles. (Tr. 2184:15-2185:17, 2187:16-2189:9, 2192:8-2193:1).

Similarly, the eleven witnesses who attended board meetings – Bell, Buono, Buntain, Fonstad, Hennigar, Hokeness, Koeppel, Rhinelander, Roadman, Robinson and Zak – each dispute Bebo's account that Bebo disclosed to the board ALC's inclusion of employees in the Covenant calculations. (Tr. 567:4-571:15, 1363:10-1366:16, 1523:2-6, 2382:12-2383:19, 2384:25-2388:3, 2645:11-2646:11, 2648:22-2651:7, 2825:2-2827:17, 3134:21-3135:11, 3329:18-3330:11, 3366:5-3368:17, 3430:11-3431:6, 3496:4-3497:24, 4339:10-4340:16, 4344:6-4345:22; Ex. 492A). These witnesses also refute Bebo's claim that she, or anyone, told the board the numbers of employees being included, that ALC was including employees who did not stay at the Ventas facilities, or that the applicable criteria for the employees' inclusion was whether they had a "reason to go." (*Id.*).

Various accountant witnesses similarly dispute Bebo. Herbner denied Bebo's story that before the February 2009 board meeting, Bebo discussed with Rhinelander (in Herbner's presence) the inclusion of employees in the Covenant calculations. (Tr. 841:14-842:17). Hokeness refuted Bebo by testifying he never distributed a draft memo about ALC's use of employees (Ex. 1129) to anyone. (Tr. 3052:5-11, 3122:22-3123:3).[19] Ferreri rebutted Bebo's claims that (1) Ferreri assured her he was comfortable with the journal entries and (2) Bebo told him the applicable criteria was whether employees had a "reason to go." (Tr. 1258:12-1259:3). And GT's Robinson and Trouba denied Bebo's claim that she told GT that ALC included

[19] Fonstad and Buono likewise testified they never received Hokeness's draft memo. (Tr. 1512:8-14, 2358:4-9). Bebo nevertheless claims Fonstad "likely" received it. (Br., 13).

employees who did not actually stay at the Ventas facilities. (Tr. 2168:3-14, 3401:24-3402:15, 3495:25-3496:13, 3591:15-24).

Even Bebo's best friend, Bucholtz, testified Bebo would "twist the truth" and had "lied to get what she wanted." (Tr. 3016:3-3017:23).

Bucholtz's assessment of Bebo's credibility proved accurate. Bebo was impeached on material issues approximately 35 times at trial. (Tr. 1782:23-1784:8, 1840:18-1841:22, 1850:17-1853:13, 1858:4-1859:9, 1875:20-1877:7, 1904:22-1906:15, 1909:9- 1911:8, 1912:20-1914:5, 1917:5-1919:11, 1939:24-1941:8, 1945:11-1946:4, 1955:18-1957:22, 1981:23-1983:5, 1984:8-1986:1, 1995:21-1997:19, 1998:11-1999:21, 2017:14-2018:4, 2029:19- 2030:23, 2040:5-2042:14, 2088:11-2089:25, 2120:9-2121:22, 2121:23-2123:8, 2126:1-25, 2127:16-2131:12, 2139:7-2140:8, 2152:9-2153:7, 2160:13-2161:22, 2168:22-2169:18, 2184:15- 2187:9, 2187:16-2189:13, 2192:8-2193:1, 2194:3-24, 2222:6-2223:21, 2229:3-2231:3, 4692:5-4693:17).

After reviewing the record and the above inconsistencies in Bebo's testimony, the ALJ correctly concluded that Bebo's testimony "often lacked credibility." (I.D. at 19).[20]

IV. BEBO'S SECURITIES LAWS VIOLATIONS

The ALJ correctly determined that Bebo committed the violations charged in the OIP.

A. Bebo's Fraudulent Misstatements

Exchange Act Section 10(b) and Rule 10b-5(b) prohibit, in connection with the purchase or sale of securities, material misstatements and omissions. A misstatement is material if a reasonable investor would consider it important in making an investment decision. *Basic Inc. v.*

[20] Another basis to evaluate Bebo's credibility is from her evasiveness on the witness stand throughout cross-examination. *John Thomas*, 2020 SEC LEXIS 4057, *19. While Bebo gave detailed responses to her own lawyers' questions, she frequently refused to provide basic answers to simple and direct questions from the Division. (*See, e.g.*, Tr. 1775:13-1776:5)

Levinson, 485 U.S. 224, 231-32 (1988). Knowing or reckless conduct establishes the requisite scienter. *SEC v. Jakubowski*, 150 F.3d 675, 681 (7th Cir. 1998).

Bebo signed and/or certified ALC's Forms 10-K and 10-Q, which she knew falsely represented that ALC was in compliance with the Covenants. ALC's 2011 Form 10-K, and Q2 and Q3 Forms 10-Q, also falsely represented: "ALC does not believe that there is a reasonably likely degree of risk of breach of the [Covenants]." These statements were false and misleading because ALC's actual occupancy and coverage ratios were far below the Covenant requirements.

Bebo claims these statements are mere "opinions" and not actionable. (Br., 33-35). But a federal court, *in a securities fraud case against Bebo*, found these precise statements to be actionable while rejecting the same arguments Bebo raises here. *Pension Trust Fund v. Assisted Living Concepts, Inc.*, 2013 U.S. Dist. LEXIS 87568, *24-27, *45-46 (E.D. Wis. June 21, 2013) (complaint sufficiently alleged "that ALC and Bebo provided false statements when they stated that ALC was in compliance with [the Ventas] Lease"). Earlier decisions likewise hold that misstatements of compliance with contractual covenants are actionable. *See, e.g.*, *DVI, Inc. Sec. Litig.*, 2010 U.S. Dist. LEXIS 92768, *16-17 (E.D. Pa. Sept. 3, 2010); *Williams Sec. Litig.*, 339 F. Supp. 2d 1206, 1229 (N.D. Okla. 2003); *Aviva Ptnrs. LLC v. Exide Techs.*, 2007 U.S. Dist. LEXIS 17347, *6-7, *56-57 (D.N.J. Mar. 13, 2007).

The ALJ correctly determined that ALC's statements that it was "in compliance" with the Covenants – rather than statements that ALC "believed" it was in compliance – were statements of fact as opposed to statements of opinion. (I.D., 92-93 (citing *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175 (2015)). The ALJ applied *Omnicare*'s guidance to analyze ALC's representations about the Covenants, one of which is a statement of fact while the other is an opinion:

Statement of Fact	Statement of Opinion
"…failure to meet certain operating and occupancy covenants in the [Ventas lease] could give [Ventas] the right to accelerate the lease obligations and terminate our right to operate all or some of those properties. *We were in compliance* with all such covenants as of December 31, 2011…"	"Based upon current and reasonably foreseeable events and conditions, *ALC does not believe* that there is a reasonably likely degree of risk of breach of the [Ventas] covenants."

(Ex. 13, p. 43 (emphasis added); I.D., 92-93).

Even if both statements above are treated as opinions, they are actionable because Bebo did not believe them to be true. *Omnicare*, 575 U.S at 184-86; (I.D., 93). They would also be actionable because they contain material omissions of facts that "conflict with what a reasonable investor would take from the statement itself." *Omnicare* at 189. By concealing that ALC's Covenant compliance depended on the use of large numbers of fake residents, Bebo gave investors the false impression that actual occupancy and coverage ratio met the Covenants. This critical omission renders the above statements actionable, either as statements of fact or opinion. (I.D., 94-96); *see also Abramson v. NewLink Genetics Corp.*, 965 F.3d 165, 177 (2d Cir. 2020) ("When omitted contrary facts substantially undermine the conclusion a reasonable investor would reach from a statement of opinion, that statement is misleading and actionable.").[21]

Bebo relies heavily on *Williams v. Globus Med., Inc.*, 869 F.3d 235 (3d Cir. 2017). But *Globus* hurts, rather than helps, Bebo. *Globus* involved a company not disclosing it had terminated its relationship with a key distributor. The actionable statement was a hypothetical risk disclosure that loss of any of its distributors could adversely affect Globus's sales. *Id.* at

[21] *Abramson* makes clear that pre-*Omnicare* decisions requiring a defendant's subjective belief of an opinions' falsity (such as those cited by Bebo (Br., 34)), are no longer good law. 965 F.3d at 175-76.

242. *Globus* held that this statement could not sustain a securities fraud charge because, at the time of the Commission filings, Globus's sales had not been harmed. *Id.* at 243.

In reaching this decision, the court reiterated: "Once a company has chosen to speak on an issue—even an issue it had no independent obligation to address—it cannot omit material facts related to that issue so as to make its disclosure misleading." *Globus* at 241. This proposition dooms Bebo. Once ALC told investors it was complying with the Covenants, ALC could not conceal that its compliance hinged on Bebo's scheme to include large numbers of fake occupants.

While *Globus* involved hypothetical risks that had not materialized at the time of the company's Commission filings, Bebo's representations were false when she made them. Contrary to ALC's Commission filings, ALC was violating the Covenants, and by wide margins. And the reason ALC had not suffered adverse consequences at the time of its filings is because Bebo engaged in an elaborate fraud to conceal ALC's noncompliance from Ventas. Thus, Bebo's case is not analogous to the "materialization of risk" issues presented in *Globus*, and the decision offers her no defense.

Bebo's reliance on *Zaluski v. United Am. Healthcare Corp.*, 527 F.3d 564 (6th Cir. 2008), is similarly misplaced. *Zaluski* was based "entirely on Defendants' failure to disclose" the breach of a contract. *Zaluski* at 571. Unlike Bebo's case, the analysis was not whether there had been a false statement, but whether the company had a duty to disclose certain information. *Id.* at 572. *Zaluski* further held that "once a company chooses to speak, it must 'provide complete and non-misleading information with respect to subjects on which [it] undertakes to speak.'" *Id.* (citations omitted). Per *Zaluski,* once ALC chose to speak about its Covenant

compliance, ALC could not hide that it could only meet the Covenants by including large numbers of fake occupants.[22]

Another case Bebo cites, *In re Plains All Am. Pipeline, L.P.*, 245 F. Supp. 3d 870 (S.D. Tex. 2017), provides no defense. *Plains* involved a pipeline company's statements that it was in "substantial compliance" with various regulations. *Id.* at 903. *Plains* found the statements to be nonactionable because "a reasonable investor would not understand the company's high-level, general statements that it was operating in substantial compliance with regulatory requirements as implicitly assuring absolute compliance…" *Id.* at 909. Unlike the general statements in *Plains*, ALC's statements of compliance were specific and referred to the occupancy and coverage ratio Covenants in the Ventas lease, as well as the precise financial consequences of non-compliance. (*See, e.g.*, Ex. 9, pp. 45, 71). And, no reasonable investor could ascertain that ALC's "compliance" was possible only by virtue of Bebo's scheme.

B. Bebo's False Statements Were Material.

Bebo premises her materiality argument on her expert's event study. But as Bebo concedes, stock price movement is only "one indicator" among various measures that can establish materiality. (Ex. 373, p. 30); *see also, Basic*, 485 U.S. at 236 (rejecting "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality"); *No. 84 Empl'r-Teamster Joint Council v. Am. W. Holding Corp.*, 320 F.3d 920, 934 (9th Cir. 2003) (stock drop not required to establish materiality); *U.S. v. Bilzerian*, 926 F.2d 1285, 1298 (2d Cir. 1991) (same); *SEC v. Monterosso*,

[22] Bebo reliance on *Gallagher v. Abbott Labs.*, 269 F.3d 806 (7th Cir. 2001), similarly fails. *Gallagher* involved a 10-K that was accurate when filed, but allegedly required correction due to events that transpired shortly thereafter. *Id.* at 810. The issuer was not required to amend its disclosure until its next periodic report. *Id*. Unlike *Gallagher*, ALC's statements of Covenant compliance were false when ALC made them.

768 F. Supp. 2d 1244, 1265 and n.19 (S.D. Fla. 2011) (same), *aff'd* 756 F.3d 1326 (11th Cir. 2014); *SEC v. RPM Int'l, Inc.*, 282 F. Supp. 3d, 1, 24 (D.D.C. 2017) (despite "no appreciable impact on RPM's stock price," the Commission could prove materiality through effect on company's net income); *In re Petrobras Sec. Litig.*, 862 F.3d 250, 277-79 (2d Cir. 2017) (rejecting argument that event studies are required in issuer disclosure cases).

1. Factors Beyond Market Reaction Support Materiality.

Staff Accounting Bulletin ("SAB") 99 recognizes that materiality may be determined using both quantitative – in terms of impact to the financial statements – and qualitative measures. Courts routinely employee SAB 99's guidance when assessing materiality. *See, e.g.*, *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 163 (2d Cir. 2000) (SAB 99 provides "persuasive guidance for evaluating the materiality of an alleged misrepresentation."); *Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 759 (7th Cir. 2007) (citing SAB 99 and observing 5% impact-to-financial-statements as a "rule-of-thumb approach to what is 'material'").

The Division's expert, Barron, applied SAB 99 and offered unrebutted testimony that a Covenant default would have been material to ALC, even if ALC could not, *ex ante*, quantify a default's potential effect. (Ex. 377, ¶¶60-77). Indeed, ALC chose to disclose to investors in each of its periodic filings that a Covenant default "could have a material adverse impact on our operations." (Exs. 1-13). These filings also disclosed the amount of unpaid rent that ALC could owe resulting from a default, between $16.7 and $26.8 million. (*See, e.g.*, Ex. 2, p. 30, Ex. 13, p. 43). Moreover, when ALC bought the Ventas facilities to settle Ventas's lawsuit, ALC paid $34 million over fair value and, per GAAP, wrote off an $8.9 million intangible asset associated with the Ventas lease. (Ex. 16, pp. 3, 6). These amounts demonstrate the materiality of the

Covenants because the figures greatly exceeded SAB 99's 5% of net income threshold, which never exceeded $1.73 million for ALC. (Ex. 377, ¶¶64-65).

Bebo claims ALC's decision to settle Ventas's lawsuit had nothing to do with the Covenants. However, after reviewing ALC's May 4 Form 8-K, which *Ventas understood to reference ALC's occupancy calculations*, Ventas accused ALC of fraud related to the Covenants and filed a motion for expedited discovery regarding the lease "irregularities" disclosed in the 8-K. (Tr. 386:3-6; Exs. 356, 357). ALC quickly settled the lawsuit, with undisputedly material results, before Ventas had the opportunity to take discovery, assert claims vis-à-vis the Covenants, or learn the details of Bebo's scheme. (Ex. 16).

Bell and Buntain testified that ALC paid so much because of the inclusion of employees in the Covenant calculations. (Tr. 618:24-621:11, 1386:17-23, 1390:1-8). GT confirmed that ALC paid "damages as a result of occupancy rates falling significantly below required covenant occupancy rates." (Ex. 3369, pp. 7-8).

The materiality of ALC's Covenant compliance is also demonstrated by the significant attention that ALC's management and board paid to the Covenants. *Media Gen., Inc. v. Tomlin*, 387 F.3d 865, 870 (D.C. Cir. 2004) (executive's testimony regarding omitted information's importance "certainly suggests that reasonable investors could have concluded that the [withheld information was] material."); *SEC v. Mayhew*, 121 F.3d 44, 52 (2d Cir. 1997) ("[A] major factor in determining whether information was material is the importance attached to it by those who knew about it."). At *every board meeting*, management discussed ALC's Covenant compliance. And ALC's directors, all of whom were ALC shareholders, repeatedly asked about the subject. (*See, e.g.*, Ex. 95, pp. 4-5; Ex. 100, p. 2; Ex. 104, pp. 2-3). Moreover, Buntain testified Covenant compliance was important to him as *an ALC investor,* and that he had discussions with Hennigar

(ALC's largest *shareholder*) about the effect of non-compliance on ALC's stock price. (Tr. 1357:22-1358:17, 1359:6-15).[23]

Further refuting Bebo's materiality arguments, the Division of Corporation Finance considered ALC's Covenant disclosures important enough to inquire about them in July 2011. ALC modified its disclosures in response. Conceding materiality, Bebo admitted that a potential investor in ALC would want to know whether a valid agreement with Ventas existed to meet the Covenants using employees. (Tr. 2134:17-2136:23). She also recognized in her May 3, 2012 handwritten letter: "we are off-side on the covenants [and] are facing a material financial impact." (Tr. 2229:3-12; Ex. 354, p. 2).[24]

2. ALC's Stock Price Movement Supports Materiality.

Bebo's expert acknowledged that the $2.37 stock price drop following ALC's May 4, 2012 disclosure of the investigation into "irregularities" in the Ventas lease was a "significant abnormal decline." (Tr. 3637:5-3638:4; Ex. 14). While Bebo claims the stock drop resulted from the disclosure of Ventas's lawsuit, that lawsuit was publicly filed on April 26, and the market had more than a week to factor the lawsuit's impact into ALC's stock price. (Tr. 3650:2-3651:15; Ex. 14). Thus, the only "new" information in the May 4 Form 8-K was ALC's disclosure it had retained counsel to investigate "irregularities" in the Ventas lease, a reference to Milbank's investigation. (Tr. 386:3-6; Ex. 14).

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[23] While Bebo claims ALC's Covenant disclosures were unimportant to investors, she called no investor or analyst to testify to this effect. Moreover, "the Division need not establish materiality through investor testimony." *Alexandre Clug*, Exchange Act Rel. 90385, 2020 SEC LEXIS 4853, *28 (Nov. 9, 2020).

[24] Bebo argues that Quarles not advising changes to ALC's Covenant disclosures in April 2012 shows that the disclosures were immaterial. (Br., 14-15, n.10). But Bebo did not disclose to Quarles the details of her scheme, including her use of phony occupants.

Even if the market had not considered Ventas's lawsuit prior to ALC's May 4 Form 8-K, the subsequent stock price drop still establishes materiality. In that case, the price drop demonstrates investors' reaction to Ventas seeking remedies for a covenant default. As Bebo admits, the remedies available to Ventas in the event of the *regulatory* covenant defaults over which Ventas sued were identical to those Ventas could seek for *financial* Covenant defaults. (Tr. 2230:19-2231:3).

Bebo's arguments (Br. 19-21) about the lack of stock price reaction to ALC's May 14 Form 8-K also fail. As the ALJ observed, the May 14 filing – disclosing Ventas's allegations that ALC "submitted fraudulent information by treating units leased to employees as bona fide rentals by third parties" – "did not inform investors of ALC's actual practices" and "failed to fully disclose Bebo's fraud." (I.D., 99).[25] ALC did not actually "lease" rooms to employees, and only met the Covenants by Bebo's pervasive use of fake occupants. The ALJ thus correctly recognized that the May 14 8-K made no disclosure of the egregious specifics of how ALC "satisfied" the Covenants or Bebo's central role masterminding the scheme. (*Id.*, at 99, 105).[26]

Indeed, Bebo's event study argument fails for the simple reason that ALC never made a sufficient "corrective disclosure" from which to gauge market reaction. That information only became public after the OIP was issued, long after ALC had been acquired by a private firm and

[25] Another explanation for a lack of price drop following ALC's May 14 8-K is the market already anticipating Ventas's allegations of fraud based on ALC's earlier disclosure of "irregularities" in the Ventas lease (which did cause a significant decline in ALC's stock price).

[26] The ALJ likewise was correct in determining that investors would have considered Bebo's central role in the fraud an important omitted fact. (I.D., 97-98). Consistent with the "management integrity" cases cited by the ALJ (*id.*), Bebo personally falsified ALC journal entries and other financial records, and misrepresented ALC's compliance with a material contract. Under these circumstances, Bebo's argument that the ALJ's analysis "effectively eliminates the materiality element" (Br., 21) is misplaced.

stopped making public disclosures. Even Bebo recognizes that a proper corrective disclosure must reveal the "fraudulent nature" of the practices at issue. (Br., 20). ALC made no such disclosure.

C. Bebo Violated Rules 10b-5(a) and (c).

The ALJ correctly determined that, beyond the false representations in ALC's Commission filings, Bebo engaged in a fraudulent scheme that violated Exchange Act Rules 10b-5(a) and (c). (I.D., 86-91). Dispositive of the issue, Bebo's repeated false statements in ALC's public filings are sufficient to establish Bebo's liability under Rules 10b-5(a) and (c). *Lorenzo v. SEC*, 139 S. Ct. 1094, 1101-03 (2019); *SEC v. SeeThruEquity, LLC*, 2019 U.S. Dist. LEXIS 71997, *12-13 (S.D.N.Y. Apr. 26, 2019) (allegations that "defendants repeatedly made false or misleading statements" supported Rule 10b5-(a) and (c) liability).

Beyond her false statements, Bebo engaged in "manipulative or deceptive act[s] as part of a scheme to defraud," namely by orchestrating the scheme to hide ALC's Covenant defaults from Ventas and investors by using fake occupants. *Robert W. Armstrong, III,* 58 S.E.C. 542, 558-59 (June 24, 2005) (fraudulent scheme where executive provided false information to his company and directed his staff's improper accounting entries).

Bebo played the leading role in the scheme by ordering the inclusion of employees in the calculations and selecting the employees' names. Bebo concealed key aspects of ALC's Covenant practices from Ventas and ALC's board, attorneys, and auditors. And Bebo's scheme involved the falsification of the quarterly financial information ALC sent to Ventas and concealed from investors that ALC was breaching the Covenants. *See, e.g., Monterosso*, 756 F.3d at 1334-36 (falsification of financial records violates Rules 10b5-(a) and (c)); *SEC v. Familant*, 910 F. Supp. 2d 83, 86-88, 93-97 (D.D.C. 2012) (same); *In re Parmalat Sec. Litig.*,

376 F. Supp. 2d 472, 504 (S.D.N.Y. 2005) (banks could be liable under Rules 10b5-(a) and (c) for engaging in transactions that lacked economic substance).

Bebo claims her fraud did not occur in connection with the purchase or sale of securities. But she ignores that the "'in connection with' requirement is meant to be read broadly" and that the requirement "can be satisfied by statements made in public filings with the Commission." *S.W. Hatfield*, Exchange Act Rel. 73763, 2014 SEC LEXIS 4691, *31 and n.41 (Dec. 5, 2014) (collecting cases); *see also SEC v. Winemaster*, 2021 U.S. Dist. LEXIS 58750, **84-85 (N.D. Ill. Mar. 29, 2021) (rejecting similar "in connection with" argument asserted by Bebo).

The ALJ likewise found the "in connection with" requirement was met based on ALC's relationship with Ventas. (I.D., 90). The ALJ correctly observed that, beyond the investors who relied on ALC's public filings, Bebo's scheme was directed at Ventas, which became a potential purchaser of ALC stock once ALC put itself up for sale and allowed Ventas to participate in due diligence. (*Id.*).

D. Bebo Acted with Scienter.

Bebo's scienter is shown by her repeated deceptive acts to conceal ALC's Covenant failures and use of fake residents. She knew ALC's Commission filings falsely represented ALC's Covenant compliance to investors. She ordered that ALC not inform Ventas of the employees used in ALC's Covenant calculations. She gave false answers to Ventas about the reasons for changes in ALC's reported occupancy. She took measures to prevent Ventas from determining the number of actual occupants during its site visits. Even as the scheme began to unravel, she continued to hide key details from Ventas and ALC's board, attorneys and auditors. And, she engaged in this conduct despite the concerns raised by multiple ALC accountants, including her CFO's warning that they could go to prison if the included employees were not

"real." As the ALJ succinctly observed in finding "ample evidence" of Bebo's scienter:

> Bebo's actions in directing and participating in the occupancy reconciliation scheme establish that she acted with scienter…She knew all of the important details of the scheme, she ignored multiple warning signs that the scheme was illegal, and she concealed the scheme from Ventas and the public.

(I.D., 81-82)

E. Bebo's Reliance Defenses Fail.

Bebo contends she lacked scienter because she relied in good faith on ALC's attorneys, auditors, board, and disclosure committee. But Bebo cannot meet the elements for any such defense. To assert reliance on counsel, Bebo must show she: "(1) made a complete disclosure to counsel; (2) requested counsel's advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied in good faith on that advice." *Zacharias v. SEC*, 569 F.3d 458, 467 (D.C. Cir. 2009) (citation omitted).[27]

Bebo did not rely on counsel because she did not disclose her conduct to, or follow the advice of, any attorney. Bebo now claims the only attorney she relied on was Fonstad. (Br. 43-45). Dooming the requirement of full disclosure, Bebo concedes she never disclosed to Fonstad, or any attorney, that ALC would fail the Covenants without using employees or that ALC was including non-employees in the Covenant calculations. (Tr. 2193:5-2195:5). And, since Bebo knew Ventas never agreed to allow employees in the Covenant calculations, any advice by Fonstad (or anyone else) that such conduct was permissible would have been "objectively

[27] Bebo's "reliance on auditors" defense contains identical requirements of full disclosure and confirmation that the contemplated conduct is appropriate. *See, e.g.*, *SEC v. Yuen*, 2006 U.S. Dist. LEXIS 33938, *110-113 (C.D. Cal. Mar. 16, 2006), *aff'd*, 2008 U.S. App. LEXIS 7606 (9th Cir. Apr. 1, 2008); *Rockies Fund, Inc.*, AP File No. 3-9615, 2007 SEC LEXIS 1954, *10-11, n.14 (Aug. 31, 2007).

unreasonable" to rely on. *Robare*, 922 F.3d at 478 (reliance defense unavailable if purported advice was objectively unreasonable).

Beyond Bebo's self-serving testimony, the only evidence of Bebo seeking Fonstad's advice was her general inquiry, before her call with Solari, whether ALC could include in the Covenant calculations the limited number of employees who actually stayed at the Ventas facilities. (Ex. 1152). Bebo never disclosed to Fonstad, or received his advice about, key details of her scheme. Bebo never apprised Fonstad that she included: (a) large number of employees, (b) employees who did not stay at the Ventas facilities, or (c) employees at multiple properties simultaneously. Critically, all of Bebo's claimed disclosures and interactions with Fonstad (Br. 43-45) occurred in January and February 2009, when ALC was including only *actual* employee stays and *before* Bebo began using large numbers of fake occupants.

Bebo also did not rely on Fonstad because she failed to follow his express advice. *Malouf v. SEC*, 933 F.3d 1248, 1262 (10th Cir. 2019) (no reliance when respondent failed to follow consultant's advice). Fonstad advised Bebo to send a letter to Ventas that: (a) proposed including employees in the Covenant calculations, (b) set a limit on the number of employees, and (c) requested Ventas's signature to document any agreement. (Ex. 1152). Bebo disregarded all this advice.

Bebo similarly cannot establish any reliance-on-auditor defense because she concealed material facts from GT. Bebo *lied* to Koeppel and Robinson, the only GT personnel Bebo interacted with, by telling them Ventas had agreed to include employees in the Covenant calculations.[28] (Tr. 2137:13-2138:20, 3366:5-17, 3495:25-3496:13).

[28] For the same reason, Bebo cannot assert reliance on ALC's accounting staff, all of whom were told that Ventas had agreed to the inclusion of employees. Moreover, ALC's highest-ranking

Bebo admittedly never told Koeppel, who supervised GT's 2009 and 2010 audits, that the calculations included fake occupants such as: (a) employees who did not visit the Ventas properties; (b) non-employees; or (c) Bebo's friends and family. (Tr. 2150:4-18, 2150:25-2151:15, 2151:22-2154:16). Thus, Bebo admits she did not disclose these key facts to GT for the first two years of her scheme.

Bebo testified that, before March 2012, her only discussions with Robinson (who replaced Koeppel in 2011) about the inclusion of employees took place at two audit committee meetings in 2011. (2159:10-2161:1, 2163:7-20, 3382:6-11). This conflicted with her investigative testimony, where she claimed only one such discussion occurred. (Tr. 2161:2-19). Robinson testified Bebo never told him that ALC included Bebo's friends and family members, or employees who did not stay at the Ventas facilities. (Tr. 3401:24-3402:15, 3498:15-3499:6, 3495:25-3496:13). Bebo also concealed from Robinson that ALC's Covenant practices amounted to simply figuring out the occupancy shortfall, *after the quarter had ended*, and adding the needed employees. (Tr. 3497:20-3498:9).

Thus, as the ALJ correctly observed:

> [GT's] lack of objection to the covenant calculations was based on the incorrect information Bebo provided. In fact, there was no written agreement with Ventas, various family members and other nonemployees who did not stay at the facilities were counted in the calculations without [GT's] knowledge, and the names were selected after each quarter ended to back-fill vacancies in an attempt to falsely demonstrate compliance. Bebo did not inform the auditors of these central aspects of her scheme, so she cannot rely on their so-called agreement with the covenant calculations as a defense.

(I.D., 84).[29]

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accountant, Buono, repeatedly warned Bebo about ALC's Covenant practices, and Grochowski later confronted Bebo with his own concerns.

[29] Bebo cites several features of her scheme she contends GT knew about. (Br. 15). Critically, Bebo does not claim that *she* knew GT had this awareness.

Nor did Bebo rely on ALC's disclosure committee which, according to Bebo, learned of ALC's Covenant practices in February 2009. (Br. 13-14). But in February 2009, ALC was only including the limited number of employees who actually stayed at the Ventas facilities. The disclosure committee members – other than Buono (who the Commission also charged) – never learned the egregious details of the scheme Bebo would later implement.

Beyond its lack of awareness of Bebo's scheme, no evidence exists that the committee advised Bebo that ALC's use of employees was appropriate. Bebo never attended disclosure committee meetings, and admits not knowing whether the committee even discussed the topic. (Ex. 502, at 1139:20-21). Moreover, four of the five witnesses who attended committee meetings – Buono, Fonstad, Lucey, and Zak – had no recollection of ALC's inclusion of employees being discussed. (Tr. 1619:5-20, 2389:14-22, 3730:13-25, 4380:14-4381:16). The fifth witness, Hokeness, testified that the committee was never given any specifics about ALC's Covenant practices, such as the number of employees included or the inclusion of employees beyond the length of their actual stays.[30] (Tr. 3133:19-3134:15).

Corroborating these witnesses' testimony, the disclosure committee meeting minutes do not mention the inclusion of employees in the Covenant calculations and, in the case of the 2009 minutes, instead refer generally to "adjustments" and "clarifications as to census." (Exs. 124-127). Beginning in February 2010, the minutes merely state: "Per J. Buono – lease covenants have all been achieved." (Exs. 128-136).

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[30] Lucey's Milbank interview memorandum contains a general reference to Buono mentioning "employee leases" once, at a 2009 disclosure committee meeting. (Joint Supp. Ex. 1, MB_BEBO_0000053). Lucey also told Milbank he believed Ventas *agreed* to ALC's Covenant practices. (*Id.*). Hokeness similarly testified he had been told Ventas agreed to ALC's use of employees. (Tr. 3081:12-19, 3100:14-19).

Bebo also cannot claim reliance on ALC's board, because she lied to the board while concealing her scheme. Each quarter, Bebo lied by telling the board that ALC was meeting the Covenants while hiding ALC's widespread inclusion of fake occupants.

Even accepting Bebo's claims that she was acting at the direction of the board, Rhinelander or Hennigar, which the directors each deny, she would still be liable. *Armstrong*, 58 S.E.C. at 563 ("Courts have repeatedly affirmed that someone who participates in a fraudulent scheme by following his superior's instructions to carry out fraudulent acts can be liable") (citations omitted); *see also U.S. v. Hill*, 643 F.3d 807, 864-865 (11th Cir. 2011) (defendant's "contention that he was simply following [superior's] orders … is no defense"). The ALJ similarly observed, in roundly rejecting Bebo's efforts to blame others:

> regardless of what any of these people knew about the extent of her scheme, Bebo certainly knew what she was doing; she carried out and directed the entire plan to falsify the covenant calculations. She cannot deflect blame to others for her own intentional fraud.

(I.D., 85-86).

F. Bebo Caused Violations of the Exchange Act's Reporting Provisions and Violated Rule 13a-14.

An issuer violates Exchange Act Section 13(a) and Rules 12b-20, 13a-1, and 13a-13 by filing materially false or misleading reports or omitting material information. *Armstrong*, 58 S.E.C. at 567-568. ALC violated these provisions by filing Forms 10-K and 10-Q containing false and misleading statements about its compliance with the Covenants. Bebo caused ALC's violations by signing and/or certifying ALC's filings and directing her fraudulent scheme.[31]

[31] Causing liability is proven when: (1) a primary violation occurred, (2) respondent's conduct was a cause of the violation, and (3) respondent knew, or should have known, that her conduct would contribute to the violation. *Robert Fuller*, 56 S.E.C. 976, 984 (Aug. 25, 2003). Negligence establishes causing liability for primary violations not requiring scienter. *KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1175-76 (Jan. 19, 2001).

By certifying ALC's fraudulent filings, Bebo also violated Exchange Act Rule 13a-14. While Bebo claims a Rule 13a-14 charge is nonactionable, the Commission holds otherwise. *Alexandre Clug*, 2020 SEC LEXIS 4853, *49-50 (citing *SEC v. Jensen*, 835 F.3d 1100, 1113 (9th Cir. 2016)).

G. Bebo Violated, and Caused Violations of, the Exchange Act's Books and Records and Internal Controls Provisions.

Exchange Act Section 13(b)(2)(A) requires issuers to "make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions … of the issuer." *SEC v. BankAtlantic Bancorp*, 2012 U.S. Dist. LEXIS 73891, *70-71 (S.D. Fla. May 29, 2012). Section 13(b)(2)(B) requires issuers to "implement and maintain internal accounting controls." *McConville v. SEC*, 465 F.3d 780, 790 (7th Cir. 2006). "Examples of internal controls include manual or automated review of records to check for completeness, accuracy and authenticity; a method to record transactions completely and accurately; and reconciliation of accounting entries to detect errors." *Id*. Exchange Act Section 13(b)(5) and Rule 13b2-1 prohibit any person from circumventing or failing to implement a system of internal controls or falsifying any book, record or account. Only Section 13(b)(5) requires scienter. *Rita McConville*, 58 S.E.C. 596, 622 (June 30, 2005); *McConville v. SEC*, 465 F.3d at 789.

ALC's records reflecting the Ventas facilities' occupancy and revenue were not merely inaccurate, they were intentionally falsified. ALC's journal entries, including the ones Bebo signed, improperly recorded revenue associated with the fake occupants in the accounts of the Ventas facilities. (Ex. 377, pp. 27-29). Similarly, the financial information ALC provided to Ventas each quarter – which purported to comply with GAAP – included both the fake occupants and the revenues associated with their phantom stays. These falsified records were created at the direction of Bebo, who admitted understanding the mechanics of the 997 account and how the

fake revenue reported to Ventas was eliminated from ALC's consolidated financial statements. (Tr. 2771:17-2772:19, 4585:15-4587:1).

Bebo also failed to establish sufficient internal controls, which allowed the falsified transactions to be recorded in ALC's general ledger. (Tr. 1739:11-1744:5; Ex. 377, pp. 29-32). Bebo's internal controls defense incorrectly argues that her fraud had no impact on ALC's financial statements. To the contrary, the notes to the financial statements in ALC's Forms 10-K state that, for the year at issue, ALC "was in compliance" with the Covenants.[32] (Ex. 5, p. F-25; Ex. 9, p. F-26; Ex. 13, p. F-24). As Barron explained, no control existed to ensure that: (a) this statement was accurate given ALC's inclusion of employees; (b) Ventas had agreed to the use of employees needed for ALC's Covenant compliance; or (c) the employees were appropriately included based on some applicable criteria. (Ex. 377, ¶¶98-99). Bebo offered no contrary expert testimony. Further, the ALJ wisely rejected Bebo's argument that the very instrumentality of her fraud – the 997 account – was itself a sufficient internal control. (I.D., 77).

Given her general understanding of ALC's Covenant accounting, her directives that ALC treat empty rooms as occupied and record revenue associated with the fake occupants, and her signing of journal entries authorizing those transactions, Bebo committed, and caused ALC's, books and records and internal controls violations.

H. Bebo Violated Exchange Act Rule 13b2-2.

Exchange Act Rule 13b2-2 prohibits a CEO from making false statements, or omitting material information, to an auditor in connection with an audit. Scienter is not required. *SEC v. Das*, 723 F.3d 943, 954 (8th Cir. 2013).

[32] ALC represented: "The accompanying notes are an integral part of these consolidated financial statements." (Ex. 5, p. F-6; Ex. 9, p. F-6; Ex. 13, p. F-6).

Each quarter, Bebo signed representation letters to GT, in which she falsely represented that ALC "complied with all aspects of contractual agreements that would have a material effect on the financial statements in the event of a noncompliance." (Exs. 61-73). Buono and Robinson testified this representation applied to the Ventas lease.[33] (Tr. 2379:6-2380:3, 3412:11-3413:9). Given the unauthorized inclusion of fake occupants in the Covenant calculations, Bebo's representation was false and omitted material information. *See Rita McConville*, 58 S.E.C. at 625 (auditor representation letter containing false representations violated Rule 13b2-2).

Besides the false representation letters, each quarter Bebo provided GT with lists of employees and other non-residents, and their fictitious length of stays at the facilities. (Tr. 3324:5-25, 3342:3-5, 3373:17-23, 3401:24-3402:15). Bebo admits she selected the employees' names, which she knew went to GT as audit evidence. (Tr. 2058:20-2059:9, 2056:13-21, 2060:4-11; Ex. 203). Bebo also lied by telling Koeppel and Robinson that Ventas agreed to include employees in the Covenant calculations. (Tr. 3322:7-3323:5, 3328:8-24, 3366:5-3368:24, 3491:24-3492:20, 3495:25-3496:21).

Bebo thus violated Rule 13b2-2.

V. THE COMMISSION SHOULD IMPOSE SANCTIONS IN THE PUBLIC INTEREST.

A. The Relevant Factors Support Sanctions.

The ALJ correctly applied the *Steadman* factors in determining that strong sanctions against Bebo serve the public interest. (I.D., 113-16 (citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979))). In terms of Bebo's egregious conduct, the ALJ was unequivocal:

[33] This testimony further establishes the materiality of ALC's Covenant disclosures.

> When ALC could not meet the [Covenants], Bebo orchestrated a fictitious process to deceive Ventas, and others, to create the false impression that ALC in fact met those requirements…Bebo personally selected names of…faux occupants [that] falsely boosted occupancy numbers and associated revenue reported to Ventas. Bebo not only orchestrated the fraud, but actively participated: She falsified ALC's records by including names of faux occupants, reported false information to Ventas, misled ALC's external auditors, misled ALC's board, made misstatements through ALC's periodic reports, and caused various violations by ALC.

(I.D., 113-14).

The ALJ's finding that Bebo acted with a high degree of scienter – evidenced by her deception towards Ventas and ALC's board, auditors, and attorneys – was equally explicit and well-reasoned. (*Id.*, 81-82, 114).

While Bebo's scienter and egregious conduct are sufficient to impose significant sanctions, other *Steadman* factors also weigh against her. Bebo's conduct spanned over three years. She has neither offered assurances against future violations nor acknowledged the wrongful nature of her conduct. To the contrary, she does not believe she did anything wrong. (Tr. 4127:12-25). Moreover, sanctioning Bebo will achieve the Commission's goal of deterring corporate fraud. *Schield Mgmt. Co*., 58 S.E.C. 1197, 1217 (Jan. 31, 2006).

Additionally, given the egregiousness of Bebo's fraud, her scienter, and Bebo engineering her scheme from the highest-possible corporate position, the factors outlined in *SEC v. Bankosky*, 716 F.3d 45, 48-49 (2d Cir. 2013), provide ample support for the imposition of a permanent officer-and-director bar. Bebo's conduct also justifies a cease-and-desist order, which may be issued upon "evidence showing that a respondent violated the law once." *KPMG*, 54 S.E.C. at 1185, 1191.

B. Bebo's Conduct Merits, at Minimum, the Civil Penalties Imposed by the ALJ.

Bebo's fraud easily meets the requirements for the imposition of multiple third-tier penalties. *See* Exchange Act Sections 21B(b)(3), 21(c). Bebo's misconduct involved fraud,

deceit, manipulation, and the deliberate disregard of regulatory requirements and her responsibilities as a public company CEO. Bebo was also unjustly enriched, receiving bonuses in excess of $1.1 million over the course of her scheme. (Stipulations, Apr. 15, 2015, ¶¶13-15; I.D., 122-23). Various board members who were responsible for determining Bebo's bonus testified that they would not have awarded Bebo a discretionary bonus had they known of her fraudulent scheme. (Tr. 653:22-655:1, 2659:11-23, 2850:5-2851:3).[34]

Bebo created both a risk of substantial loss to ALC and its investors and, in fact, caused substantial losses. When ALC disclosed the investigation into the "irregularities" caused by Bebo, ALC's stock price dropped 12.36%. (Tr. 3637:5-3638:4, 3640:8-12; Ex. 14). When Ventas later learned of ALC's inclusion of employees, ALC settled Ventas's lawsuit by purchasing the Ventas facilities for $34 million in excess of their appraised value. GT confirmed the considerable overpayment constituted "damages" for the occupancy Covenant failures Bebo concealed from Ventas. (Ex. 3369, pp. 7-8). As the ALJ recognized, ALC paid Milbank $1 million to investigate the whistleblower allegations of Bebo's fraud. (I.D., 128 (citing Tr. 671)).[35] ALC later paid an additional $12 million when it settled with investors who sued it and Bebo for the false statements in ALC's filings. *Pension Trust Fund v. ALC*, No. 12-C-884-JPS, Docket No. 70-1 (E.D. Wis. Sept. 6, 2013). Had the full scope of Bebo's fraud been known to Ventas or investors prior to ALC's 2013 acquisition by another firm, the losses incurred could have been much greater.

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[34] Strong penalties would be appropriate even without a finding of unjust enrichment. *See*, *e.g.*, *Anthony Fields, CPA*, AP File No. 3-14684, 2015 SEC LEXIS 662, *11, *103-106 (Feb. 20, 2015); *SEC v. Miller*, 744 F. Supp. 2d 1325, 1343-46 (N.D. Ga. 2010).

[35] Bebo claims that costs of investigating *allegations* of fraud cannot support the imposition of penalties. (Br., 51). But the whistleblower allegations against Bebo, which necessitated the investigation, ultimately proved accurate.

Here, a multi-million dollar penalty is well-justified and consistent with other litigated financial fraud cases against CEOs. *See*, *e.g.*, *SEC v. Razmilovic*, 738 F.3d 14, 38 (2d Cir. 2013) ($20.8 million penalty), *SEC v. Musk*, No. 18-cv-8865, Docket No. 14 (S.D.N.Y. Oct. 16, 2018) ($20 million penalty); *SEC v. Life Partners Holdings, Inc.*, 2018 U.S. Dist. LEXIS 198333, *16-17 (W.D. Tex. Sept. 28, 2018) ($3.55 million penalty); *SEC v. E-Smart Techs., Inc.*, 2016 U.S. Dist. LEXIS 4664, *26-29 (D.D.C. Jan. 14, 2016) ($2 million penalty); *SEC v. Mahabub*, 411 F. Supp. 3d 1163, 1175 (D. Colo. 2019) ($1.28 million penalty).

The ALJ's approach of formulating Bebo's penalty on the number of her distinct violations is also well-established. *SEC v. Huff*, 758 F. Supp. 2d 1288, 1366 (S.D. Fla. 2010), *aff'd*, 455 Fed. App'x. 882 (11th Cir. 2012); *SEC v. Colonial Inv. Mgmt. LLC*, 381 Fed. App'x. 27, 32 (2d Cir. 2010); *Francis Lorenzo*, AP File No. 3-15211, 2015 SEC LEXIS 1650, *60 (Apr. 29, 2015). Under this precedent, the ALJ's $1.05 million penalty, consisting of two third-tier and 30 second-tier penalties, was justified. Exercising his discretion, the ALJ recognized this methodology could have resulted in far higher penalties. (I.D., 131). Doing so would have been entirely appropriate, given the egregiousness of Bebo's fraud and the need to deter other highly compensated CEOs.

VI. BEBO'S CONSTITUTIONAL CHALLENGES FAIL

Bebo asserts a slew of constitutional defenses, including an attack the OIP's validity. Each argument fails.

A. Bebo's Broad Attacks on the Administrative Forum Lack Merit.

Bebo asserts (Br., 58-62) that Dodd-Frank Act Section 929P(a) is unconstitutional because it permits the Commission to deprive her of a jury trial, and argues further that the removal protections for ALJs violate Article II of the Constitution. The Commission recently

rejected such arguments. *John Thomas*, 2020 SEC LEXIS 4057, **59-69. Bebo offers no basis for the Commission to revisit its decisions.[36]

B. The Proceeding Provided Due Process.

Bebo's due process arguments similarly lack merit. First, Bebo does not allege any violation of the Commission's Rules of Practice. Thus, to the extent Bebo argues that application of the Commission's Rules (rather than the federal rules) rendered the proceeding unfair, her argument fails. The Federal Rules of Evidence and Civil Procedure do not apply in Commission administrative proceedings. *Ralph Calabro*, AP File No. 3-15015, 2015 SEC LEXIS 2175, *46 n.66 (May 29, 2015). Any suggestion that this fact renders an administrative proceeding unfair has been consistently rejected. *See, e.g.*, *Otto v. SEC*, 253 F.3d 960, 966 (7th Cir. 2001).

Bebo's specific examples of purportedly unfair treatment (Br., 65-66) are not due process violations. She first complains of being unable to cross-examine or call certain witnesses. Regarding potential witnesses in Canada and beyond the subpoena power of a district court (Hennigar and Ng), Bebo has not shown that a district court would have been able to secure their testimony.[37] Moreover, she never even *attempted* to obtain their testimony in the post-*Lucia* proceedings. As for the witnesses who submitted declarations, Bebo could have compelled their cross-examination via subpoena, but chose not to. As for the Ventas subpoenas, the original and post-*Lucia* ALJs properly found the subpoenas to be overbroad and seeking irrelevant

[36] To the extent not addressed in *John Thomas* or discussed herein, the ALJs correctly rejected Bebo's constitutional arguments in the Initial Decision and in earlier denying her summary disposition.

[37] Bebo ignores that her attorneys took Hennigar's deposition, in a related matter, and questioned him about ALC's Covenant practices. (Ex. 492A).

material. AP Rel. 2247 (Jan. 23, 2015); AP Rel. 2410 (Mar. 11, 2015); AP Rel. 6607 (June 14, 2019). And, when both ALJs invited Bebo to submit more narrowly-tailored subpoenas to Ventas, Bebo declined the opportunities. *Id.*

Bebo also complains about the manner in which the Division interacted with witnesses, yet she fails to establish any due process violation. *See, e.g.*, *U.S. v. Lieberman*, 608 F.2d 889, 897-99 (1st Cir. 1979) (allegedly "suggestive remarks" made to witnesses off-the-record did not violate due process); *U.S. v. Lee*, 815 F.2d 971, 974 (4th Cir. 1987) ("prepar[ing]…the witness for maximum dramatic effect" not improper).

Bebo objects that the Commission applies a preponderance-of-the-evidence standard, yet demands her case be tried through civil litigation where that burden of proof is universally applied.

C. The OIP is Valid.

Finally, Bebo's challenges to the OIP likewise fail. First, the OIP did "not assign the proceeding to any specific (unconstitutionally appointed) ALJ." Order Denying Mot. Summary Disposition, AP Rel. 6571 (May 10, 2019). Rather, the original ALJ was only assigned via subsequent order. AP Rel. 2086 (Dec. 3, 2014). Moreover, Bebo cannot rely on cases in which the government served a notice that omitted information it was specifically obligated by statute to include. Here, the OIP contained all the information the Commission is required to include under 15 U.S.C. 78u-3(b) and Rule 200(b). Insofar as Bebo is arguing that a remand for a new hearing does not remedy an Appointments Clause violation and that *Lucia* required instead that the proceedings be dismissed, the D.C. Circuit properly rejected that argument. Order, *Harding Advisory LLC v. SEC*, 2018 U.S. App. LEXIS (Sept. 19, 2018).

VII. CONCLUSION

For the foregoing reasons, the Division respectfully requests that the Commission find Bebo liable for the charges alleged in the OIP and impose substantial sanctions against her in the public interest.

Dated: April 26, 2021

Respectfully submitted,

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Rule 450(d) Certification

The undersigned counsel for the Division of Enforcement hereby certifies pursuant to Rule 450(d) that this brief is 20,748 words, exclusive of the tables of contents and authorities, which complies with Rule 450(c) and the Commission's January 25, 2021 Order Granting Petition for Review and Scheduling Briefs.

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of **LAURIE BEBO, and** **JOHN BUONO, CPA,** **Respondents.**

CERTIFICATE OF SERVICE

Benjamin J. Hanauer, an attorney, certifies that on April 26, 2021, he caused a true and correct copy of the foregoing The Division of Enforcement's Brief in Opposition to Respondent Laurie Bebo's Appeal of the Initial Decision to be served on the following by email:

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