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.

RESPONDENT LAURIE BEBO'S REPLY BRIEF IN SUPPORT OF HER APPEAL TO THE COMMISSION

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INTRODUCTION

In its brief in opposition (cited as "Opp. __"), the Division repeats the same pre-determined narrative and "facts" it has set forth in numerous prior briefs, many of which Bebo has previously demonstrated are inaccurate, outright false, or misleading. This becomes ever more glaring in light of the ALJ's initial decision (cited as "Dec. __"). Although the ALJ erroneously found violations and imposed penalties—Bebo demonstrated the numerous factual and legal errors in her opening brief (cited as "Br. __")—the ALJ rejected many of the Division's factual assertions and legal arguments, in particular with respect to materiality. Contrary to the Division's position below and in its opposition brief, the ALJ made the following findings adverse to the Division (among others):

- A financial covenant default was unlikely to result in any significant financial consequences, and the public knew this. (Dec. 24-25, 100-02.) Thus, "the Division has failed to prove by a preponderance of the evidence that a reasonable investor would have considered these other potential costs, alone, to be quantitatively material [and] this factor weights against quantitative materiality." (Dec. 102.)

- "[M]ost of the individual directors knew as early as 2009 about the inclusion of a few actual employee occupants in the covenant calculations." (Dec. 51.)

- ALC director testimony about the purported importance they placed on covenant compliance was largely irrelevant to materiality. (Dec. 103 & n.19.)

- Ventas' 2012 lawsuit had nothing to do financial covenant allegations, (Dec. 24, 55-58), and "the Division has failed to show that the Ventas lawsuit and resulting settlement supports a materiality finding" (Dec. 101).

- The Division failed to establish any harm to ALC resulting from the settlement of the lawsuit. (Dec. 59-60.)

- Bebo's notes from May 3-4, 2012 were unlikely to relate in any way to the financial covenants. (Dec. 56.)

- The company's May 4 disclosure of an investigation into lease "irregularities" was irrelevant to the materiality analysis, based on the reasoning of Bebo's expert, Smith. (Dec. 64, 04-05.)

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- ALC's settlement of a civil class action and a federal court order denying a motion to dismiss that action has no bearing here. (Dec. 105-06.)

The Division did not file a cross petition to review or overturn these findings—it merely ignores them. The Division's arguments should therefore be deemed waived. *In re BDO China Dahua CPA Co., Ltd.*, Release No. 72134, 2014 WL 1871077, at *6 & n.15 (May 9, 2014); Rule 411(d). But even if they are considered, the Division's arguments contradicting these findings are meritless.

This follows the Division's pattern below by ignoring or obfuscating any facts (now including ALJ findings) that do not fit the narrative surrounding that theory. The ALJ had the unenviable task of attempting to pierce through these distorting statements about the record. As set forth in Bebo's opening brief, she respectfully submits that the ALJ failed in this regard. In contrast to the Division's wholesale failure to acknowledge the ALJ findings adverse to its position—much less explain why they are wrong—Bebo has demonstrated how the ALJ erred on key factual and legal issues.

However, the word limitations on this briefing, the size of the record in these proceedings, and the sheer number of Division misstatements of the record preclude the ability to rebut each one. Respondent must trust, however, that the Commission will take the time to review the entire record, including Respondent's post-hearing briefs that cite with particularity the inaccuracies of the Division's narrative.[1]

Presumably the reason the Division resorts to these tactics is it never conformed a legal theory to the facts, and attempted to prove a breach of contract case rather than securities fraud.

[1] Further, due to space limitations, Bebo is unable to address the additional, independent reasons the Division failed to establish the non-fraud violations, and Bebo therefore rests on the arguments set forth in her opening brief in this regard and also with respect to her procedural due process claims.

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As a result, one gaping hole in the Division's case is materiality. Nothing submitted by the Division at the hearing or in briefing fills that hole.

Further, the Division ignores facts related to ALC's deliberative process that led to the opinion in its Commission filings that it was in compliance with "certain operating and occupancy covenants." Literally more than a dozen people between 2009 and early 2013, who had roles in evaluating or approving ALC's periodic filings and the challenged statement at issue here, were aware of the basic fact that ALC was meeting the financial covenants through the use of rooms that the Company paid for employees to use. This included people internal at ALC (including its disclosure committee), at GT, at Quarles & Brady, and at Milbank. *None of them ever suggested that ALC needed to disclose the manner in which it was meeting the lease covenants or its disclosure misrepresented compliance.*

In addition to many other evidentiary voids to support a theory of liability, this case has substantial constitutional infirmities, both facially—affecting the permissibility of these proceedings in their totality—and procedurally. The Commission has the opportunity and the obligation to review these facts anew, and demonstrate that respondents can receive a fair trial in the administrative process. For the reasons set forth herein and in Bebo's opening brief, the Initial Decision should be reversed.

ARGUMENT

I. The Division's Response Brief Provides No Support For A Finding Of Materiality.

A. Analysis of market reactions to corrective disclosures is the best evidence of materiality.

As set forth in Bebo's opening brief (at 19-21) and as the ALJ concluded, "the market is the most accurate and unbiased measure of whether reasonable investors found the information to be material." (Dec. 104-05, citing cases.)

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Disagreeing with the ALJ—but without explaining why the court got it wrong—the Division would relegate event study expert testimony to a minor indicator of materiality. The Division provides a string cite to the same cases it presented to the ALJ (Opp. 54-55), all of which are inapposite and were appropriately rejected by the court. Those cases involved decisions on a motion to dismiss, where *evidence* of materiality was not even at issue and therefore event studies were not in play, s*ee No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Co.*, 320 F.3d 920, 934 (9th Cir. 2003*); SEC v. RPM Int'l, Inc.*, 282 F.Supp.3d 1, 24 (D.D.C. 2017); or massive financial misstatements not at issue here, s*ee SEC v. Monterosso*, 768 F.Supp.2d 1244, 1263-64 (S.D. Fla. 2011), or did not involve public company disclosures at all, *see United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991).

Instead, consistent with the ALJ's view of the importance of event studies, many courts have found them dispositive, granting summary judgment motions or otherwise finding *as a matter of law* that event studies demonstrate immateriality despite claims that other factors could support a finding of materiality.[2] (Dec. 104, collecting cases; *see also In re Barclays Bank PLC Sec. Litig.*, 756 F. App'x 41, 47-48 (2d Cir. 2018); *Akerman v. Oryx Commc'ns, Inc.*, 810 F.2d 336, 343 (2d Cir. 1987).) This is because "[u]sually price (or facts that influence price) is all that matters to securities transactions" even though Section 10(b) and Rule 10b-5 do not "foreclose" the possibility that investors will deem information that does not affect the price of a security to be material, *SEC v. Jakubowski*, 150 F.3d 675, 681 (7th Cir. 1998).

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[2] Moreover, the Division continues to utilize event studies to prove materiality in other cases. *SEC v. Aly*, 2018 WL 1581986, at *15 (S.D.N.Y. Mar. 27, 2018); *SEC v. ITT Educ. Servs., Inc.*, 311 F.Supp.3d 977, 992-93 (S.D. Ind. 2018).

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B. The Division's attempts to negate Smith's event study analysis is legally foreclosed.

In its opposition, the Division seems to endorse Smith's expertise, credibility and event study methodology, but attempts to twist the conclusion of his study by focusing on the wrong date. The Division speculates, without any expert support, that May 4, 2012—rather than May 14th—is the appropriate day to measure market reaction to ALC's disclosure of new information.

The Division's focus on May 4th is flawed under the circumstances. On May 3, 2012, just before the market closed, ALC issued a one-line press release that it would delay its Q1 2012 earnings announcement and conference call with analysts. (Exs. 2081, 2186 at 18.) This course was opposed by Bebo because it potentially misled investors about the reason for the earnings delay; she felt it would be interpreted that news of ALC's sale would soon follow.[3] (Tr. 2720-21, 4486-87.) ALC's stock shot up 8.31% in the last seven minutes of trading on May 3rd. (Dec. 104; Exs. 2186 at 18 n.59, 2130; Tr. 4495.) As Bebo warned the board, investors did in fact misinterpret the postponement as positive news.

The following morning, ALC instead disclosed negative news: (1) the earnings release postponement was not due to an impending sale of the company; (2) the Ventas lawsuit; and (3) ALC's Board had decided "to investigate possible irregularities in connection with the Company's lease with Ventas." (Ex. 2075.) The Division contends that either the second or third component of the May 4th disclosure caused the ALC share price decline on May 4th. (Opp. 57-58.) As the ALJ found (Dec. 104-05), this lacks merit.

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[3] The Division also continues to misleadingly quote notes Bebo took on May 3-4 reflecting these concerns, in a failed attempt to bolster its materiality case. (Opp. 44.) They do not, for the reasons the ALJ found. (Dec. 56.) The attempt to conflate license revocation-related defaults with financial covenant defaults is an improper "bait and switch" (Tr. 3662-63), as discussed in more detail, *infra*, Section I.B.2.

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1. The Division's lawyers are precluded from providing speculative argument that is the domain of expert testimony.

First, Bebo's expert, Smith, provided his analysis of the various factors comprising the share price decline on May 4th (none of which relate to financial covenant allegations). Smith explained the "big bump" in ALC's share price on May 3rd occurred because "when the company announced that they were suspending their earnings announcement … the market believed this to be really good news" of an anticipated sale or merger announcement. (Tr. 3639-40.) Thus, Smith concluded, based on his extensive research in this area, that most, if not all, of the decline on May 4th, was the result of over-shoot:

> [M]y experience with the literature on how stock price reactions -- or how stock prices move around merger rumors is that once the likelihood of a merger declines, the stock price will decline further.
>
> So a lot of the -- a substantial part of the stock price movement we see on May 4th is because of the disappointment in what investors thought was going to happen the day before sent stock prices up eight percent; didn't transpire.

(Tr. 3640-41; *see also* Tr. 3644 (stating price likely declined substantially more than it had increased the day before simply because the anticipated merger did not materialize).) Consequently, Smith concluded there was no basis to believe that either the disclosure of the Ventas lawsuit or the disclosure of the internal investigation (or even a combination of the two) caused any statistically significant decline in ALC's share price. (*See* Tr. 3647-48.)

However, in the end, this is largely irrelevant. Smith testified that "disentangling the other pieces is hard," and he did not do that because none of those pieces told investors any information about ALC meeting the financial covenants through the use of employees. (Tr. 3644.) This was clearly disclosed for the first time on May 14th. (*Id.*)

The Division's lawyers' efforts to purportedly disentangle these factors is legally impermissible. In *United States v. Schiff*, 538 F.Supp.2d 818 (D.N.J. 2008), *aff'd* 602 F.3d 152

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(3d Cir. 2010), the court confronted this same argument from the government in a criminal securities fraud case, and appropriately rejected it. There the government initially sought to admit evidence of a stock drop to support its materiality argument without any expert testimony. 538 F.Supp.2d at 834. The district court rejected this because it was "concerned that without an expert analysis of why a stock price dropped, the jury might improperly speculate that the stock price drop was a result of the criminal conduct charged in the case rather than other potential explanatory factors where multiple adverse events coincided temporally." *Id.* In requiring the government to provide an expert to assess different negative factors disclosed at the same time, the court held that "the reason for the use of expert testimony in this context is clear: the formulas for calculating the reaction of the market to specific disclosures are complicated and not common sense observations that could be left to the jury." *Id.* at 835.

The same reasoning applies to a fact-finder and the Division in this case. As in *Schiff*, their flawed analysis and parsing of the stock drop on May 4th was an improper, speculative attempt to act as experts without any qualifying knowledge, experience or training. This was particularly improper because Smith provided detailed expert testimony that contradicts their positions.

2. The Division's attempt to conflate regulatory and financial covenant defaults in connection with the Ventas lawsuit is improper.

As to the lawsuit, the Division employs a bait-and-switch approach in stating remedies under the Ventas lease were the same for regulatory covenant defaults and financial covenant defaults. Covenant defaults caused by regulator actions to revoke ALC's licenses could prevent new resident admissions or the ability of the facility to operate entirely. (Tr. 351, 953.) As the ALJ concluded, "The violations that Ventas pursued in its lawsuit were ones that posed 'existential' threats to its facilities—that is, threats that would cause them to shut down. *See*

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Tr. 3658, 3662. Thus, the Division has failed to show that the Ventas lawsuit and resulting settlement supports a materiality finding." (Dec. 101.)

Conversely, the evidence established that the consequences for breaching the financial covenants would be limited or non-existent. (Dec. 24-25.) ALC presented no possibility for non-payment of rent, and it would be risky for Ventas to try and replace ALC in the middle of a significant recession. (Tr. 304, 310-12, 3567-69, 3574; Ex. 3322 at 1; Ex. 295 at 5.) Thus, no one, including ALC's auditors, was concerned that Ventas would invoke the lease remedies as a result of a financial covenant default. (*Id.*) Indeed, Smith testified that his extensive research in this area demonstrated that lessors and lenders "rarely pursue a remedy as harsh as acceleration, bankruptcy, foreclosure, [or] seizure of properties." (Tr. 3634-35.) Relying on this, and other evidence, the ALJ concluded that "by no later than August 2011 it was more likely than not that the marketplace would have known that the adverse consequences referenced in the lease were unlikely" to occur for any financial covenant breach. (Dec. 24-25.)

Accordingly, the Division's attempt to conflate the two types of defaults is unfounded and improper. But more importantly, *the Ventas lawsuit had nothing to do with allegations of financial covenant violations in any event*. The Division's assertion in its opposition to the contrary, or that Ventas understood the "irregularities" referenced in the May 4 press release to relate to financial covenant violations based on the lawsuit (Opp. 56), is false.[4] And it was expressly rejected by the ALJ: "Ventas amended its complaint to include most of its new allegations of default in its lawsuit against ALC, *but did not include claims regarding the financial covenant violations*, *see* Ex. 1194 at 1–3; Tr. 3661–62, and though it sought discovery

[4] In fact, the very document the Division cites, Exhibit 357, contradicts its statement in the brief. That exhibit, a Ventas pleading, states "Ventas fears that the 'irregularities' are related to deficiencies in Defendants' operation of the assisted living and/or independent care facilities *and the care for the residents therein*."

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on other issues, *did not request information on the extent and nature of ALC's financial covenant noncompliance before it settled the litigation*." (Dec. 101 (emphasis added).)

3. As a matter of law, the statement regarding an investigation into lease "irregularities" cannot constitute a corrective disclosure.

The disclosure of an internal investigation—particularly where, as here, the disclosure of the investigation did not tie it in any way to financial covenant allegations—does not constitute a corrective or curative disclosure for purposes of evaluating share price movement for an event study. (Br. 6, 11.) Here, the ALJ appropriately rejected the Division's argument, stating "[t]he Division hangs its disclosure-event argument on this May 4 disclosure … [b]ut the disclosure of possible irregularities did not reveal the existence of the occupancy reconciliation scheme or the misrepresented compliance with the Ventas covenants." (Dec. 104-05.) And, the court found, "because the disclosure provided no indication, even in Ventas's view, that it was related to the financial covenants, I do not find that the market's reaction [on May 4] establishes materiality." (*Id.*)

Put simply, there was no *public* indication that the May 4th disclosure of an investigation into "irregularities" in connection with the lease related to financial covenant allegations in any way, which is a legal requirement for it to be a relevant corrective disclosure. *See Schiff*, 538 F.Supp.2d at 835, 836.[5]

4. There is no legal basis for the argument that the May 14 disclosure of financial covenant allegations was insufficiently corrective.

As demonstrated in Bebo's opening brief, a corrective disclosure is one that "reveal[s] to the market *in some sense* the fraudulent nature of the practices about which a plaintiff complains." (Br. 20 (quoting *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 473 (4th Cir.

[5] Furthermore, it is undisputed that the stock analysts covering the ALC stock for investors and the industry press all tied the "irregularities" to the patient care and safety issues alleged in the Ventas lawsuit. (Tr. 3645-47.)

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2011); citing *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 n.4 (2d Cir. 2005) (to be corrective the disclosure must reveal the falsity of the prior representations)).) Neither the Division nor the ALJ cite to any authority for the proposition that a disclosure must set forth every aspect of the alleged misconduct all at one time to be "corrective." Such a requirement simply does not exist under the law, or event studies could almost never be employed. However, they almost always are used because a "corrective disclosure," as a legal proposition, is not so narrowly defined.

C. The Division's other materiality evidence is weak, and fails to overcome Smith's event study analysis.

Because the market-based analysis establishes the charged misstatements were not material, the Division asserts it met its burden of proving materiality based on other "factors." (Opp. 55.) Of course, one other factor that courts often consider probative of materiality—perhaps second only to the evaluation of share price reaction through event studies—is testimony from other market participants, such as analysts covering the stock. *See Flannery v. SEC*, 810 F.3d 1, 9-10 (1st Cir. 2015); *SEC v. Ustian*, 229 F.Supp.3d 739, 761-62 (N.D. Ill. 2017). However, this type of evidence is *totally missing* from the Division's case. And Smith's review of the analyst and press publications showed no importance was ascribed to the financial covenants or disclosure of the Ventas allegation of fraudulent covenant reporting. (Ex. 2186 at 14, 19-21; Tr. 3645-47.)

The Division's other purported "evidence" related to materiality is simply insufficient to meet its burden in light of the highly probative evidence provided by Smith, his expert analysis, and the lack of any evidence presented by the Division regarding what a reasonable investor in the market considered material.

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1. This case does not involve any accounting misstatements, and so the Division's reliance on SAB 99 and auditing expert opinion has no probative value.

Neither the Division nor the ALJ have identified any case where accounting standards on materiality were applied to a case that did not involve accounting misstatements or GAAP violations. (Opp. 55; Dec. 97-98.) Yet the Division and its expert concede that ALC's financial statements were not misstated and complied with GAAP. (Tr. 1629, 1634.) And the Division fails to respond at all to Bebo's well-developed argument for why "qualitative" materiality more generally does not apply and would improperly convert any corporate misconduct into actionable securities fraud. (Br. 21-24.)

The Division's reliance on its auditing expert, Barron, is similarly misplaced. It was established at trial through cross-examination that Barron's opinion rested upon the assumption that every event of default would automatically result in a worst-case scenario under the lease (Tr. 1670)—a patently false proposition, as explained by the Division's own witness from Quarles & Brady (Tr. 2298-99), among other evidence (*see* Dec. 24-25).

It is well-established that an expert can base his opinion on underlying facts or assumptions he did not find on his own *only if competent evidence is also presented to prove the truth of those underlying assumptions*. *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 615 (7th Cir. 2002); *Target Mkt. Publ'g, Inc. v. ADVO, Inc.,* 136 F.3d 1139, 1144-45 (7th Cir. 1998). That did not happen here.

2. The Division's assertion about the supposed importance ALC's board attributed to the financial covenants is based on distortions of the record and was rejected by the ALJ.

Next, the Division asserts it is significant that ALC management provided a statement in board materials affirming compliance with the covenants and that the Board members, who were also shareholders, purportedly inquired about covenant compliance. (Opp. 56-57.) The mere

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fact that lease covenants may have been discussed at Board meetings does not support a finding of materiality, and the caselaw cited in the Division's response provides no support for such a claim.[6] Moreover, it would prove too much, as it would necessarily support the conclusion that any information contained in a management powerpoint presentation or discussed during board meetings, no matter how trivial, would be material.[7] If the Commission adopted this position, it would force companies to bury shareholders in an avalanche of trivial information.

Furthermore, the fact management included one slide of a presentation that consisted generally of over eighty slides does not support a finding of materiality (*see, e.g.,* Exs. 81 at 54, 86 at 46), but just the opposite. And far from board members "repeatedly ask[ing] about the subject" (Opp. 54), the Division refers to only three meetings of the nearly dozen that occurred during the relevant time period.

Indeed, members of the audit committee shockingly testified that they never reviewed the detailed financial information about the Ventas facilities contained in the facility-by-facility information that ALC management provided prior to Board meetings. (Tr. 1369, 2566, 2820-21.) The board packages contained two sets of numbers for the Ventas facilities so the Board could easily compare those facilities performance to the other ALC properties and the relative performance of the properties with and without the room rentals related to employees. (Tr. 3141; Ex. 2117 at 2; Ex. 293 at 17; Ex. 293A; Ex.81 at 23-26, 54; Ex. 86 at 63-66, 83.) The credibility of the board member testimony elicited by the Division is suspect, particularly given

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[6] The case principally relied upon by the Division, *SEC v. Mayhew*, 121 F.3d 44 (2d Cir. 1997), is an insider trading case and stands for the unremarkable proposition that an inference may be drawn that non-public information possessed by the defendant was material if he bought or sold stock based on it.

[7] The Division's reliance on the mere fact that the lease was disclosed initially or that there was a disclosure about occupancy covenants in ALC's periodic filings is similarly meritless because any statement in a periodic filing would necessarily be deemed material. *SEC v. Reyes*, 491 F.Supp.2d 906, 912 n.6 (N.D. Cal. 2007). ("If a misrepresentation is deemed material simply because it is a misrepresentation, then the law's materiality requirement is altogether meaningless.").

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the new information contained in the Milbank interview memoranda confirming that audit committee members reviewed and analyzed the separate numbers, and GT provided the board detailed analysis of the financial performance (without employees) of the Ventas facilities. (Jt. Supp. Ex. 1, MB_BEBO_60-61, 66-67.)

Finally, the Division continues making the desperate and unsupportable claim that materiality is supported by Buntain's testimony that compliance with financial covenants was "important to him as *an ALC investor*." (Opp. 56.) As with the Division's arguments regarding Smith's event study, the ALJ rejected the notion that any weight should be provided to Buntain's testimony or other insider's purported views of the importance of covenant compliance. (Dec. 103 & n.19.) The Division again provides no explanation for why the ALJ was wrong in this regard.

And there can be no doubt the Division's position is meritless. As established at the hearing, the Division procured, and Buntain provided, a false declaration stating he had exercised stock options and would have wanted to know more information about ALC's compliance with the lease covenants when he did so. (Tr. 1437-40.) He admitted at trial that he never exercised those options, a fact available to the Division by reviewing Form-4s previously filed by Buntain with the Commission itself. (*Id.*) The Division's continued reliance on Buntain's supposed belief that financial covenant compliance was "important to him as an ALC investor" (which is inextricably tied to his false testimony that he actually made an investment decision to exercise options), should be repudiated.

3. The Division's continued reliance on ALC's purchase of the Ventas facilities is unsupported by the facts, and was rejected by the ALJ.

The Division also asserts that a finding of materiality is supported by ALC's purchase of the Ventas properties in June 2012. (Opp. 44-45, 55.) The Division's argument that ALC

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overpaid as a result of the financial covenant violations tied to the Ventas lawsuit is founded upon multiple layers of false logic and disingenuous citation to the record. The ALJ properly rejected the contention. (Dec. 59-60.) For example, he concluded the Ventas lawsuit "never involved financial covenant allegations." The ALJ appropriately rejected the Division's primary reliance on an out-of-context quotation of a GT memorandum ("it was a mistake and is without basis"), and chastised the Division's reliance on an internal ALC document where the author "admitted that he mistakenly believed that it was an issue in Ventas's lawsuit. Tr. 3742." (*Id.*)

In addition, the Division relies upon the testimony of two ALC directors, Bell and Buntain, about their belief that, at the time, ALC was paying $20-$24 million over market value for the properties because of Ventas' May 9th letter about employee occupancy. (Opp. 45.) However, the directors' testimony is contradicted by the minutes of the board meeting where the purchase of the properties was approved. Those board minutes *specifically reflect the board's conclusion that ALC was paying market value*. (Ex. 123.) And four days before the May 15th board meeting, Bell told ALC's auditors that the financial covenant allegations related to employee-leasing were "posturing" and that Ventas' "[s]tatements are false and misleading." (Tr. 3459-60; Ex. 1880 at 4.) The Division's argument contradicts its position on numerous other issues, such as where it contends that Bebo and GT must be lying about board knowledge of employee-leasing because the board minutes do not specifically confirm their discussions with the board. Or where the Division contends Bebo must be lying about the Solari Call because the Solari Email does not contain additional detail or specific reference to covenant calculations. Here the minutes *flatly contradict* the board members' testimony.

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It is troubling that the Division continues to make misleading statements regarding the record, even after they have been rejected by the court, all without attempting to demonstrate how or why the ALJ erred.

II. The Division Does Not Attempt To Defend The ALJ's Novel Application Of "Scheme" Liability.

In her opening brief, Bebo demonstrated that the ALJ employed an application of scheme liability unheard of in the law prior to the initial decision, and contrary to Supreme Court precedent, by (a) applying a subjective materiality standard and (b) concluding that a purported scheme directed at a contractual counterparty and competitor could satisfy the "in connection with" requirement of Section 10(b). As to the first point, the Division essentially confesses the ALJ erred, as it makes no attempt to defend the ALJ's adoption of a subjective materiality standard. But even worse, the Division implies that there is no materiality standard at all for the imposition of scheme liability. As to the second point, the Division fails to provide any viable explanation for how the purported scheme directed at Ventas was in connection with the purchase or sale of securities. Rather, it erects a straw man, and argues that the "in connection with" requirement can be satisfied by material misstatements in periodic filings with the Commission. If that is the case, then scheme liability adds nothing here. And the Division's case rises—and falls—on the failure to prove that ALC's Commission filings contained a material misstatement.

A. The Division Must Prove Objective Materiality.

The Division begins its discussion of scheme liability by asserting that misstatements made in Commission filings can premise liability under Rule 10b-5(a) and (c). Bebo does not dispute this point (although, as noted, it then adds nothing beyond the elements of Rule 10b-5(b)). Bebo's position, which the Division does not address in its response, is that the

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misstatements must be *material*.[8] Whether disclosed in public filings or communicated to investors some other way, these statements or the scheme itself must misrepresent or omit an objectively material fact about the company.

The Division's implicit conclusion—that even immaterial statements can support scheme liability—is not only contrary to authority, but also logically untenable in light of *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019). In *Lorenzo*, the Supreme Court held that a party could be primarily liable under subsections (a) and (c) for a misstatement where they were not the "maker" of it, if they participated in a scheme to disseminate it. As Bebo's opening brief explains, scheme liability does not apply to Bebo because, unlike the defendant in *Lorenzo*, she *was* the "maker" of the alleged misstatements at issue. (Br. 25.) The Division does not address this argument in its response, and so it concedes the point.

However, the Division's argument suggests that the maker of a misstatement faces *additional* liability under (a) and (c), only without the materiality requirement that would apply under (b). This outcome would create a backdoor to liability based solely on irrelevant and insignificant statements, and the express materiality requirement of Rule 10b-5(b) would lose all meaning. It should therefore be rejected.

B. Any purported schemed directed at Ventas, a counter-party and market competitor, is not "in connection with" the purchase or sale of securities.

Other than noting, as Bebo's opening brief did, that the "in connection with" requirement is construed broadly and flexibly, the Division provides no justification for the ALJ's application of scheme liability to the purported deception of Ventas. As a result, the Division should be deemed to have waived or conceded the point that the "in connection with" element cannot be

[8] The very cases the Division cites in its response to Bebo's scheme liability argument confirm this. *See SEC v. Familant*, 910 F.Supp.2d 83, 97 (D.D.C. 2012); *SEC v. Monterosso*, 756 F.3d 1326, 1333-34 (11th Cir. 2014). The Commission's own decisions are in accord. *In re Robert W. Armstrong, III*, 58 S.E.C. 542, 558-59 n.39 (June 24, 2005).

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interpreted so loosely as to include conduct that is neither directed towards investors, nor intended to influence them.

Indeed, each case cited by the Division in opposition involved alleged schemes that had the specific purpose and effect of providing a materially misleading financial picture of a company to the investing public. *SEC v. Winemaster*, 2021 WL 1172773, at *13 (N.D. Ill. Mar. 29, 2021) (the court found defendant—who was not a maker of the statement—knew, or could have anticipated, that the misstated revenue numbers he produced would eventually reach investors); *In re S.W. Hatfield*, Rel. Nos. 3602, 73763, 2014 WL 68550921 (Dec. 5, 2014) (audit reports incorporated into public company filings).

The Division mischaracterizes *Winemaster* as rejecting a "similar 'in connection with' argument" to the one asserted by Bebo. (Opp. 60.) But *Winemaster* only supports Bebo's argument, which is that the "in connection with" requirement is met when the purpose of a scheme is to influence investors. Unlike the defendant in *Winemaster*, Bebo knew that the employee-leasing arrangement would *not* lead to any materially misstated financial information being provided to the market. On the contrary, she took steps to ensure that the transactions recorded for purposes of covenant compliance did not result in inaccurate financial reporting to investors. Consequently, where the scheme in *Winemaster* led to an overstated revenue of $25 million, ALC's financial reports never misstated the company's revenue, profitability, occupancy, or any other financial metric at any point during the relevant time period.

Here, Bebo's actions were directed towards Ventas not as a prospective purchaser of ALC stock, but as a contractual counter-party and competitor. To apply scheme liability to these actions would improperly expand its scope into normal business operations with no impact on the purchase or sale of securities. And even if Ventas were, for a brief moment in time, a

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potential acquirer of ALC, nothing warrants the expansion of scheme liability to police mergers and acquisitions between public companies and competitors. Such issues and disputes are properly left to litigation amongst those companies, here Ventas and ALC. Courts have avoided this expansion in the past by finding liability only for schemes that were actually aimed at misstating the company's value *to the investing public*.[9] This was plainly not the case for Bebo, whose goal was to uphold the terms of the lease covenants, not to mislead market participants about the value of ALC.

III. The ALJ's Finding That ALC's Disclosures Contained A Misstatement Of Fact Was Erroneous As A Matter Of Law.

A. The *Omnicare* standard applies to all of the challenged statements.

In Bebo's opening brief, she cited three cases where courts have applied *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015), to statements involving matters of judgment that *were not* prefaced by signaling language, such as "we believe." (Br. 34.) The Division continues to assert that not all of the statements fall within *Omnicare*, but cites no cases and sets forth no reasoning to oppose Bebo's arguments.

B. *Omnicare's* omission test does not apply, but if it did, there was no actionable omission.

The Division also attempts to invoke the *Omnicare* omissions test with respect to establishing the falsity of ALC's opinion. This fails for two reasons. First, the *Omnicare* "omissions" holding does not apply to fraud claims. The claim at issue there involved a strict liability standard, which was crucial to the Supreme Court's reasoning in adopting the omissions theory of liability for opinions; but it is incompatible with a claim requiring proof of scienter.

[9] The cases cited by the Division confirm this as well. (Opp. 60.) Each case involved alleged schemes that had the specific purpose and effect of providing a materially misleading financial picture of a company to the investing public.

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Omnicare, 135 S. Ct. at 1330-31 & n.11; *Nakkhumpun v. Taylor*, 782 F.3d 1142, 1159 (10th Cir. 2015).

Second, invoking the omission test fails on the merits even if it did apply. As set forth in Bebo's opening brief, cases like *Zaluski v. United American Healthcare Corp.*, 527 F.3d 564 (6th Cir. 2008) and *Williams v. Globus Medical, Inc.*, 869 F.3d 235, 243 (3d Cir. 2017) confirm there was no duty to disclose how ALC was meeting the covenants (or even that it wasn't). Under *Globus*, ALC was entitled to opine it was in compliance unless and until it began to realize the adverse effects on the business contained in the disclosure. Under *Zaluski*, it was entitled to affirm compliance because it had a reasonable defense to any asserted breach of a contract.

The Division attempts to distinguish *Globus* by claiming it involved a "hypothetical risk disclosure" while this one does not. (Opp. 52-53.) But that is not true. The disclosures here and in *Globus* are nearly identical. Globus stated its financial results "could be adversely affected" if it lost any key distributors, and at the same time failed to disclose that it had in-fact lost a key distributor. Similarly, here ALC disclosed its *future* liquidity *could* be adversely affected if it breached the lease, while not disclosing it was only in compliance through employee-leasing.

As to *Zaluski*, which is on point and cited to rebut the Division's omission theory, the Division attempts to distinguish it by claiming this case involves misrepresentations: "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." (Opp. 53.) This, of course, is exactly Bebo's point—just as in *Zaluski*, there was no duty for ALC to disclose and therefore no omission of material fact.

IV. The Division Has Failed To Prove Subjective Falsity.

Under *Omnicare*, if a company asserts a legal compliance opinion, "however irrationally," no securities fraud liability will result as long as it is subjectively believed and

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based on "some meaningful inquiry" rather than "mere intuition." *Tongue v. Sanofi*, 816 F.3d 199, 210 (2d Cir. 2016); *see also Nakkhumpun*, 782 F.3d at 1159. Specific statements to others recognizing the falsity of the stated opinion or conduct—such as the sale of stock—that would be inconsistent with the stated opinion may establish subjective falsity, but general assertions of wrongdoing, of "an overarching fraudulent scheme or corrupt environment," or "sharp [business] practices" will not suffice. *In re Credit Suisse First Bos. Corp.*, 431 F.3d 36, 49-50 (1st Cir. 2005), *overruled on other grounds by Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007); *see also Podany v. Robertson Stephens, Inc.*, 318 F.Supp.2d 146, 154-55 (S.D.N.Y. 2004)

In this case, Bebo consistently expressed to others that ALC had an agreement with Ventas for ALC to pay for apartments for people with a reason to go there, and include those rentals in the covenant calculations. She consistently explained to internal accounting staff, to the board members, to GT, and others that the basis by which ALC was meeting the covenants was through employee-leasing pursuant to the Solari Call and Email. When Buono supposedly raised concerns about the practice (testimony which is of questionable veracity), he testified that Bebo never expressed concern about the validity of the agreement and whether ALC's actions were consistent with it.[10] (Tr. 2366.) When Grochowski directly questioned the nature of the agreement in November 2011, Bebo again explained her sincere belief that ALC was in compliance with the lease covenants on this basis. (Tr. 1155-57, 1161-62.)

At most, the Division has established that ALC and Bebo, in their interactions with Ventas, acted with ordinary advocacy in business practices between two sophisticated companies

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[10] The Division's brief falsely states "Bebo admits Buono told her 'I don't look good in stripes.'" (Opp. 33) Rather, she stated in the testimony cited by the Division that "I can't tell you a time that I can specifically remember that comment" and that he never made a comment like this "related to the names on the list," but she did recall him making typical Buono colorful statements to prod her into getting him names on a timely basis so he could provide his reporting to GT. (Tr. 4126.)

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and competitors. ALC obtained a very favorable and flexible agreement in meeting the lease covenants, one that was defensible in litigation if necessary (as Quarles & Brady and Milbank later opined) based on the Solari Call and Email. ALC had no obligation to revisit the agreement with its competitor and contractual counter-party. As in the *Credit Suisse* decision, establishing sharp business practice is insufficient to demonstrate subjective falsity.

Other reasons ALC's compliance opinion was reasonable and subjectively believed are:

<u>The evidence shows there was an agreement.</u>

In her opening brief, Bebo posed a number of unanswered questions (Br. 39) regarding the ALJ's and Division's theory that, on the Solari Call, Bebo only discussed "whether ALC corporate employees travelling to the facilities could overnight there instead of at hotels" (Opp. 14). Those unanswered questions render this theory implausible. In opposition, the Division has no answer to any of these questions, because its theory cannot be squared with the truth of what happened.

The Division also focuses upon the Solari Email omitting specific reference to the covenant calculations. However, Buono confirmed that covenant calculations were discussed on the Solari Call. (Jt. Supp. Ex. 1, at MB_BEBO_0000060, 64.) Even at trial he testified he thought in 2009 they reached an agreement with Ventas to include employee-related rooms in the covenant calculations, because "why else would we do it?" (Tr. 2496.) And the confirmation of "rentals" in the Solari Email is far more consistent with discussion on the Solari Call extending beyond a mere request for permission for employees to stay at the facilities (and therefore indisputably more consistent with Bebo's version of the call).

Taking contradictory positions, the Division's case is built on the flawed assertion that Ventas could not possibly discern that ALC's reference in writing to "room rentals related to

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employees" would be included in the covenant calculations, despite its contrary claim that Ventas "scrutinized" everything ALC did.

<u>Fonstad's approval of the challenged disclosure.</u>

Another critical fact in this case is whether Fonstad was a participant in the Solari Call. The fact that he was on the call informs the significance of Fonstad's subsequent involvement and *undisputed approval* of ALC's affirmation of compliance in its periodic filings only days after Bebo forwarded Fonstad the Solari Email and Ventas' response.

The Division repeatedly asserts that "every percipient witness" disputes some specific occurrence about which Bebo testified (even if those witnesses do not dispute Bebo but simply do not recall the occurrence). However, with respect to the key fact of whether Fonstad participated in the Solari Call, every percipient witness to testify about *this fact*, except Fonstad, places him as a silent participant on the call in Bebo's office. This includes Bebo, Buono (in his sworn investigative testimony), and two other witnesses. (Tr. 2343, 2939-41, 2951, 3217-18.) Even Fonstad was equivocal, basing his testimony solely on the fact that he had not been shown any of his notes of the call, which lacks credibility. (*See* Br. at 41 n.15.)

Moreover, Fonstad's role in preparing the Solari Email with Buono in the days following the conversation; receiving, printing, and maintaining in his personal files the Solari Email and Ventas' response; and chairing the disclosure committee—*with no record memorializing that Bebo had apparently disregarded his advice in its entirety (or so the Division claims)*—is all consistent with Bebo's view of the facts.

Of course, Bebo did not disregard Fonstad's advice, but rather relied on it. Buono confirmed to Milbank that in discussions about the Solari Email, "Fonstad did not express any

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reservations regarding the quality of the notice as reflected in [it]." (Jt. Supp. Ex. 1, at MB_BEBO_0000065.)

<u>New Mexico negotiations do not show lack of an agreement, but confirm Bebo's belief.</u>

In opposition, the Division again stretches the truth and the record beyond the breaking point by contending it was established that on February 17, 2009 Bebo and Buono proposed that Ventas would waive both the occupancy and coverage ratio covenants in connection with ALC's purchase of two other Ventas properties in New Mexico. The internal Ventas email cited by the Division does not say this, and is double-hearsay. In the email, Solari states they "hinted at eliminating the covenants entirely." (Ex. 188.) Solari's testimony about the email was equivocal. When asked what he was trying to convey, he said "*[m]y understanding*"—not his recollection—"would be occupancy and coverage." (Tr. 430.) Given Solari's inability to recall any details about any pertinent conversation, including the most important phone call in this case, and his inaccurate recollection of other matters (Tr. 413, 446-51, 456-59), his purported recollection of this call is not credible.

Moreover, contrary to this unreliable evidence, the documentary evidence and testimony from multiple witnesses at the hearing about this issue confirmed that ALC was seeking relief only from the coverage covenants because Bebo believed there *was an agreement to count units related to employees* but there was still a chance that ALC could fail the coverage covenants despite the agreement. (Exs. 190, 1349, 3380; Tr. 354-55, 432, 2359-60, 2500, 2504-05, 4053-55.) Indeed, on February 19th, ALC specifically excluded modifying the occupancy covenants in a written proposal to Ventas (Ex. 190), which belies the notion that Bebo sought occupancy covenant relief two days earlier. Why would they first talk about

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modifying/eliminating all financial covenants, but then only propose modifications to the coverage ratio covenants?

The Occupancy Reconciliation Spreadsheets.

The Division continues with the false narrative that the occupancy reconciliations were designed to reflect the specific number of days that a particular individual occupied a room at a facility. But even ALC's finance staff and its outside auditor, Grant Thornton, knew this was not their purpose. (Tr. 1097-98, 1179-80, 3912-13; Exs. 1696 at 4; 1685 at 5.)

Moreover, the Division's suggestion that ALC initially recorded revenue based only on the number of days stayed at a facility (Opp. 23-24, 35) is false. The first time employee-related rooms were included in the covenant calculations, ALC paid for those units for entire monthly periods with respect to four of the five units that were utilized for employees, *not* just the actual days stayed there.[11] (Ex. 17 at 5.) This was consistent with how ALC calculated occupancy and payment for units at the rest of the company—it counted them for full months and did not track the presence of individuals in the units. (Tr. 512-13, 1482-83, 2414, 4105-06.)

Bebo acknowledged at the hearing that, in hindsight, the processes and procedures for maintaining the internal lists were not as robust as they should have been. Checks and balances between her and the financial office within ALC failed to catch mistakes of employees or family members that should not have been on the lists. (Tr. 4099-4102.) Not a lot of time was spent on the internal process, but this was a very small part of ALC's business. But it is a different matter entirely to imply, as the Division does, that there was little employee travel to the Ventas facilities.

[11] For example, Sue Martin reportedly stayed at one facility for about two weeks in October, three weeks in November, and one week in December 2008. (Ex. 182.) However, ALC paid for a unit for those entire months. (Ex. 17 at 5.) Similarly, another employee, Pamela Ondercin, stayed 13 days over two months in the quarter, but ALC paid for the unite for the entire months. (Exs. 17 at 5; Ex. 180.)

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Although it was not possible to reconstruct the travel entirely (in part because Bebo specifically chose the "reason to go" standard to discuss with Solari), an analysis of expense reports demonstrate travel was significant. (Ex. 3507.) That data indicates the following number of rooms would be needed to accommodate the number of employees traveling to the Ventas facilities each quarter:[12]

2009		Number of Rooms Needed
Q1		53
Q2		59
Q3		88
Q4		78
2010		
Q1		41
Q2		57
Q3		18
Q4		18
2011		
Q1		27
Q2		34
Q3		25
Q4		45

(*See* Ex. 3507; *see also* Tr. 4116-20; Exs. 2099, 2103, 2104.)

Moreover, the extensive focus on certain names on the list militates against a finding of fraud rather than supporting it. One trying to commit fraud with respect to the lists of individuals on the occupancy reconciliations that were reviewed by multiple employees internally and by the company's external auditors would not put their parents or husband on the list. They would not

[12] This is based on employees traveling to one or more of the Ventas facilities during the quarter. Some employees are included at multiple facilities because the expense reports confirm they visited multiple facilities during the quarter, and so would need rooms to stay at each one.

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list other couples related to other employees, as Bebo did, if they were trying to legitimize a fraudulent practice. These names would stick out like a sore thumb to any third-party reviewing the lists. And Bebo knew they would be reviewed by GT and others in the finance department responsible for financial reporting.

The Disclosure Committee.

The Division contends that the disclosure committee meeting minutes "refer generally to 'adjustments' and 'clarifications as to census,'" implying that the inclusion of employees in the covenant calculations were not discussed. (Opp. 64.) This is false.[13] The 2009 meeting minutes specifically state "correspondence between ALC and Ventas has occurred whereby the *covenant calculations* have been clarified as to census." (*See, e.g.,* Ex. 124 at 3.) "Census" was a term synonymous with "occupancy" at ALC, and the minutes-drafter testified he was referring to the inclusion of employees in the financial covenant calculations. (Tr. 3089-90; *see also* 3699-3700.)

Critically, Fonstad approved the disclosure at issue days after he chaired a February 2009 disclosure committee meeting (to review Q4 2008 disclosures) where Buono told the committee ALC "was using employee leases to meet occupancy covenants." (Jt. Supp. Ex. 1, at MB_BEBO_0000053.) Thus, Fonstad was aware at that time and at the time he approved ALC's lease disclosure, that ALC had conducted the covenant calculations *on a look-back basis*. He raised no concerns about this.

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[13] The Division's assertion that Bebo purportedly admits not knowing whether the disclosure committee even discussed the topic is similarly bogus. (Opp. 64.) In the cited testimony, Bebo simply stated she did not know what documentation was provided to the disclosure committee because she was not there, but she understood employee-leasing was discussed in committee meetings. (Ex. 502 at 1139.) She testified similarly at trial. (Tr. 4175.)

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V. The Division's Heavy Reliance On Bebo's Purported Deception Of Ventas Is Unfounded And Of Marginal Significance To Whether She Intended To Deceive Investors.

The Division's lead-off argument with respect to scienter is the fact that Bebo did not actively revisit the agreement with Ventas after the Solari Call and Email. (Opp. 36-37.) Even if true, this demonstrates nothing with respect to Bebo's mental state with regard to investors. Even the main case the Division relies upon (improperly, per the ALJ (Dec. 105)) found arguing that "a misrepresentation to a third party [Ventas] constitutes a misrepresentation to shareholders" is "simply untenable." *Pension Tr. Fund for Operating Eng'rs v. Assisted Living Concepts, Inc.*, 2013 WL 3154116, *13 (E.D. Wis. June 21, 2013).

Ventas was a competitor, and from early 2008 sought highly sensitive information about ALC's operations so it could use that information in highly public calls with Ventas' own investors. (Tr. 355-58; Exs. 1996, 1995, 1549.) Thus, from the beginning of the relationship, ALC wanted to generally provide Ventas as little information about ALC as possible. (*See* Exs. 1254, 1118; Tr. 2742, 4146-47.) ALC's practice was to give general, standard answers to Ventas' questions to avoid competitive harm, focusing on high-level marketing/operational developments that would not include sensitive information. (Tr. 4146-48.)

This is not to say that Bebo and ALC did not subsequently revisit the employee-leasing arrangement with Ventas because they felt it would be divulging competitive information. But it reflects the lens through which Bebo viewed the subsequent interactions with Ventas in the quarterly meetings and calls.

The Division focuses on communications between ALC and Ventas in July 2009. (Opp. 36-37.) In an email, a Ventas analyst asks ALC's Herbner for some "color" about increases in occupancy at a number of facilities from the fourth quarter of 2008 to the first quarter of 2009. (Ex. 212.) Although the changes in occupancy from quarter-to-quarter were impacted

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significantly by the number of rooms that ALC allocated at those facilities for use by employees, ALC responded by providing general information about sales personnel changes, performance plans and other information consistent with ALC's typical answers to such questions. (*Id.*; Tr. 4150-52.) Consistent with Ventas simply requesting additional "color," it accepted ALC's answers without further inquiry. Herbner confirmed the information provided to Ventas in response to the inquiry was truthful, but incomplete by not mentioning units related to employees. (Tr. 839-40.)

Moreover, regarding this particular communication, ALC had just months before conducted the Solari Call and sent the Solari Email which Bebo observed going to three other employees in Ventas' asset management division. (Tr. 4151-52.) Thus, ALC reasonably concluded that Ventas knew there were employees included in the counts and, *as Buono testified* (Tr. 4656; Ex. 2117 at 2), Solari indicated he did not want them separately reported. (*Id.*)

The Division also asserts Bebo tried to limit Ventas' inspections of the leased facilities. (Opp. 37.) The fact ALC required Bebo or Buono to accompany Ventas on site visits is irrelevant because it was undisputed this was a requirement for Ventas visits from the beginning of the relationship in 2008. (*See* Tr. 832-33, 4147-48; Ex. 1389.) It had nothing to do with preventing Ventas from "ascertaining occupancy," as suggested by the Division. Moreover, Bebo imposed the same requirement for other outsiders visiting other ALC facilities. (Tr. 4142-43.)

The notion Bebo tried to prevent Ventas from visiting facilities during meal times, which is based solely on testimony from Buono, is contradicted by contemporaneous documentary evidence. (*See* Ex. 1389, 1505; Tr. 200.) Moreover, the whole argument is irrelevant since

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Ventas acknowledged it never attempted to even ascertain occupancy during any of its site visits. (Tr. 946-47.)

Finally, the Division relies on another false assertion that Bebo instructed Houck to remove name placards outside rooms so that Ventas could not count the number of occupied rooms. (Opp. 37.) But Houck testified that he could not recall whether removing name placards at one of the facilities on one occasion actually coincided with a site visit by Ventas or even whether it occurred prior to or after ALC began utilizing rooms for employees in the covenant calculations. (Tr. 1476.) The Division's constant stretching of the truth indicates a fundamental unreliability of its case and evidence.[14]

VI. The Sanctions Imposed By The ALJ Were Excessive, Contrary To the Law, And Unsupported By The Evidence.

With respect to sanctions, the Division largely repeats the erroneous reasoning of the ALJ. Thus, Bebo largely relies on her opening brief in this regard. The Division's only "new" arguments are wrong as well.

The Division tries to justify the draconian penalty imposed by the ALJ by claiming that "a multi-million dollar penalty is well-justified and consistent with other litigated financial fraud cases against CEOs." (Opp. 66.) In other words, according to the Division, all "financial fraud" cases against CEOs can be treated the same.

However, the Division cannot lump together all "financial fraud" cases (whatever that term may mean) or all cases involving CEOs. Every case is different, regardless of the nature of

[14] The Division's reliance upon Bebo's purported attempt to hide employee-leasing from potential buyers of ALC is similarly divorced from the facts. Bebo deferred to ALC's Vice Chairman, Rhinelander, to decide whether to give financial and occupancy information to Ventas. The emails cited by the Division both specifically state Rhinelander had the final decision about whether to disclose the occupancy data being provided to the bidders generally, and specifically with respect to Ventas. (Exs. 284, 292.) Further, Rhinelander agreed he was the ultimate decision-maker about whether to disclose the information, and he made the decision to withhold it. (Tr. 2905, 2911, 2914.) Notably, Ventas was also the only potential bidder that was a direct competitor with ALC. (Tr. 2116-17.)

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the Division's allegations or the position the respondent occupied within his or her company; that is why the law requires a case-by-case analysis of whether sanctions are appropriate, based on established criteria. And the cases cited by the Division are distinguishable from the facts of this case. Unlike the present case, the penalties ordered in those cases were based primarily on the fact that the defendants realized sizeable financial gains as a direct result of their misconduct; the penalty was tied to the size of the disgorgement imposed. *See SEC v. Razmilovic*, 738 F.3d 14 (2d Cir. 2013) (penalty based on half the maximum digorgeable gain *of over $41 million*); *SEC v. Life Partners Holdings, Inc.*, 71 F.Supp.3d 615 (W.D. Tex. 2014) (SEC requested disgorgement of $500 million and third-tier penalties between $67.9 million and $1.5 billion); *SEC v. E-Smart Techs., Inc.*, 2016 WL 183503 (D.D.C. Jan. 14, 2016) ($2 million penalty based on half the amount of disgorgable gains to the Defendant). Here, the ALJ found that, at most, Bebo could be deemed to have been unjustly enriched by a mere $55,000 over the course of three years.[15] (Dec. 122.) Thus, applying the reasoning of the Division's cases, she should have only been subject to a penalty of $27,500.

Nonetheless, the Division also claims the ALJ's calculation of penalties based on the "number of distinct violations" is well-established. (Opp. 71.) The Division is wrong. None of the cases it cites supports the proposition that identical representations resulting from a single course of conduct should be punished multiple times over. In *SEC v. Huff*, 758 F.Supp.2d 1288 (S.D. Fla. 2010), for instance, the court calculated its $600,000 penalty (a small percentage of the over $10 million disgorgement ordered) based on the number of public filings containing misrepresentations. But there each filing contained multiple different misrepresentations. Thus the court penalized the multiple distinct representations, not multiple penalties for the repetition

[15] The ALJ also appropriately rejected the Division's claimed losses tied to the violations alleged, except for the money spent by ALC on the Milbank investigation (Dec. 128), which Bebo addressed in her opening brief.

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of a single misrepresentation. The court dedicated a significant portion of its 75-page opinion to analyzing the multiple, different misrepresentations in the various public filings at issue in the case. *See id.* at 1326-1336.

The other cases cited by the Division are equally unavailing. *See SEC v. Colonial Inv. Mgmt. LLC*, 381 Fed. Appx. 27 (2d Cir. 2010) (penalties calculated based on 18 distinct trades facilitated by defendant); *In re Francis V. Lorenzo*, Release No. 74836, 2015 WL 1927763 (Apr. 29, 2015) (ordering respondent to pay $15,000 penalty based on two separate, and different, misleading emails sent to prospective investors).

VII. The Division Does Not Address Bebo's Argument That Dodd-Frank Section 929P(a) Is Facially Unconstitutional.

In her opening appeal brief, Bebo explains that Section 929P(a) of the Dodd-Frank Act is unconstitutional on its face, as it allows the SEC to impose the same remedies in administrative proceedings as in federal court, where the respondents right to a jury trial is guaranteed. The Division did not respond to this challenge, except with the perfunctory and inaccurate claim that the Commission had recently rejected the same arguments in *In re John Thomas Capital Mgmt. LLC,* Release No. 89775, 2020 WL 5291417 (Sept. 4, 2020). It did not.[16]

In *John Thomas*, the respondent argued that the mere fact that Respondents are not granted the right to a jury trial in administrative proceedings resulted in Dodd-Frank violating the Seventh Amendment. In rejecting this argument, the Commission relied on decisions issued decades before Dodd-Frank was enacted, and did not resolve the specific attack that Bebo has raised against Section 929P(a). Namely, that it violates due process and equal protection

[16] Bebo recognizes that the decision in *John Thomas* did reject a similar claim that Commission ALJs are subject to multiple layers of for-cause removal protections in violation of Article II of the Constitution. She respectfully disagrees with that determination and submits that the recent dissent in *Fleming v. USDA*, 2021 WL 560743, *15-25 (D.C. Cir. Feb. 16, 2021), persuasively explains why.

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guarantees by allowing the SEC to seek remedies in administrative proceedings functionally identical to the ones it can obtain in federal district court.

In stating that Section 929P(a) is unconstitutional on its face, Bebo does not argue that public rights can never be adjudicated through an administrative proceeding. Bebo argues that it is unconstitutional to permit coextensive remedies in federal court and administrative settings, such that the prosecutor necessarily utilizes a citizen's own constitutional rights against her by, for example, concluding she would be favorably viewed by a jury and therefore deciding to pursue the same charges for the same remedies in an administrative setting. The fact that the statutory regime now permits this weighing, and punishment of a citizen for possessing a Seventh Amendment right by the Constitution is improper.

The Commission did not address this type of facial challenge to the constitutionality of this statutory scheme (unheard of in the administrative state)—on the basis of either due process or equal protection—when it rejected the respondent's arguments in *John Thomas*. The proceedings remain unconstitutional for these and the other reasons set forth in Bebo's opening brief.

VIII. This Case Must Be Dismissed Because The Initial OIP Was Legally Invalid.

In opposing Bebo's brief in support of appeal, the Division does not dispute that the remedy for an invalid OIP is dismissal, or that a new OIP would be time-barred. Instead, the Division maintains that the 2014 OIP *was* valid, but provides no legitimate explanation for how it could be so.

First, the Division suggests that the OIP was valid because it "did not assign the proceeding to any specific (unconstitutionally appointed) ALJ." (Opp. at 73.) This nuance is not dispositive because *none* of the ALJs employed by the SEC were constitutionally appointed at the time the OIP was issued. No assigned ALJ would have been a legitimate officer to preside

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over the hearing, but the OIP specifically gave notice the matter would proceed before a Commission ALJ. Following the Court's *Lucia* decision, the Division cannot restore validity to its OIP simply because it did not specify which unconstitutionally appointed ALJ would hear the case.

Next, the Division asserts, without explanation, that Bebo cannot rely on cases where a notice was invalid because of information it omitted, rather than a deficiency in the information it contained. This argument creates a distinction without a difference. The current OIP ordered Bebo to appear before a non-existent officer (from a Constitutional perspective), and the cases relied on by Bebo establish that an invalid notice—whether due to omission of required information or affirmative error—do not institute valid proceedings.

Finally, the Division's invocation of an unpublished remand order after *Lucia* provides no support to its position. (Opp. 73.) Neither that court nor the *Lucia* Court was presented with the issue of the legal validity of an OIP. Consequently, because the proper remedy for a constitutionally deficient OIP was to issue a new one, and because the Division has not done so and the statute of limitations has long past, this case must be dismissed.

Dated: May 24, 2021

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

Pursuant to Commission Rule of Practice Rule 450(d), I hereby certify that the Respondent's Reply Brief In Support Of Her Appeal To The Commission complies with the length limitation set forth in Commission Rule of Practice 450(c) and the Commission's January 25, 2021 Order. According to the Word Count function of Microsoft Word, this brief contains 10,467 words, exclusive of the table of contents, table of authorities, cover page/caption, signature block, and this certification.

Dated: May 24, 2021

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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**

Ryan S. Stippich of Reinhart Boerner Van Deuren s.c. certifies that on May 24, 2021, he caused a true and correct copy of Respondent Laurie Bebo's Reply Brief in Support of Her Appeal to the Commission to be served on the following by e-mail:

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