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 TO THE DIVISION OF ENFORCEMENT'S POST-HEARING BRIEF

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Respondent Laurie A. Bebo, by and through her counsel, Reinhart Boerner Van Deuren s.c., hereby respectfully submits this Reply to the Division of Enforcement's Post-Hearing Brief and requests that the Court conclude that the claims set forth in the December 3, 2014 Order Instituting Proceedings ("OIP") filed by the Securities and Exchange Commission's ("SEC's" or the "Commission's") Division of Enforcement (the "Division") be dismissed in their entirety.

INTRODUCTION

The Division's Post-Hearing Brief accentuates rather than dispels the fundamental legal and factual flaws in its case. Reading the first thirty-nine pages of "facts" in the Division's brief, one could scarcely tell that this is a securities fraud case involving alleged disclosure fraud. Indeed, a discussion of ALC's Commission filings is limited to three short paragraphs. The remainder is spent attempting, and failing, to prove a breach of contract action that ALC's counter-party—Ventas—never asserted. And the great weight of the evidence at the hearing further demonstrated that, by its inaction with respect to covenant violations, Ventas never would have invoked the remedies under the Lease for a financial covenant default.

The Division's failure to discuss or deal with the undisputed facts related to ALC's deliberative process with respect to the opinion asserted in its Commission filings that it was in compliance with "certain operating and occupancy covenants" is telling of its inability to meet the burden of proving a securities fraud claim here. That is because it is undisputed that dozens of people between 2009 and 2012, 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, at Grant Thornton, 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.*

Given the Division's position that the employee leasing arrangement was inherently impermissible and had to be disclosed, this basic fact dooms the Division's claim, particularly when the applicable legal standard requires it to prove not only that the challenged opinion was not just objectively wrong, but *unreasonable*. The reasonableness of ALC's disclosure is confirmed by Ms. Bebo's expert, the SEC's former Director of Corporate Finance, that additional disclosures about the manner in which ALC was meeting the covenants was not required. The Division never mentions Mr. Martin's opinion in its brief.

Moreover, the Division has utterly failed to address its inability to prove materiality. Again, the basic facts established at the hearing were that ALC's investors did not think it was important to know about how ALC was meeting the Lease covenants. The Division has no answer for Professor Smith's well-founded and unrebutted opinion that demonstrates this conclusively. Instead, the Division effectively acknowledges the appropriateness of his analysis but stakes out a position unsupported by any evidence—that the share price decline on May 4, 2012 was related in any way to disclosure of financial covenant allegations. The Division's scienter claim fares no better, as it is premised upon applying an improper standard and more unsupported assertions and false narratives.

To remedy the obvious deficiencies in its case, the Division continues to resort to mischaracterizations of the evidence and the record. Reasonable parties may differ about the significance and meaning of evidence, and such advocacy is a core component of the adversarial process. Fundamental to the Respondent's objection to the government's prosecution and, most recently, its Post-Hearing Brief is the Division's mischaracterization of material evidence,

omission of evidence, reliance on "half-truths," and even statements that are contradicted by the Division's own evidence and witnesses.

This is not proper advocacy and it is an impermissible tactic for any party to employ. But it is especially troubling when it is advanced by the government—an institution particularly duty-bound to the integrity of the evidence it proffers and the arguments it makes. (*See* Respondent Laurie Bebo's Post-Hearing Brief at 6, n.4.)[1] Abandoning these principles in a zeal to "win," Respondent has been forced to devote inordinate resources to simply identify and correct the Division's misstated "facts." For example, the Appendix and portions of this Brief alone required over fifty pages devoted entirely to providing record cites disproving the government's claimed "impeachment" of Ms. Bebo.

As set forth below and with greater detail, the Division's Post-Hearing Brief willfully ignores the evidence that undermines its case as well as the void of evidence that prevents it from meeting its burden of proof. Likewise, the Division has not established, as a matter of law, any violation of securities laws. Finally, should this Court somehow find liability for any violation, the Division's requested remedies contravene the legal standards and record evidence presented.

I. The Division of Enforcement's Post-Hearing Brief Willfully Ignores All of The Evidence That Undermines Its Case.

Notably absent from the Division's campaign to paint Ms. Bebo as a liar and a fraudster are the inconvenient facts that corroborate her testimony and support her defense. The Division's Post-Hearing Brief does not discuss Grant Thornton's presentations to the Audit Committee regarding the inclusion of employees in the covenant calculations in 2009-2011, Milbank's investigation and conclusions regarding the employee leasing program, Mr. Solari's inability to

[1] Ms. Bebo's initial Post-Hearing Brief will be cited throughout as "Resp't Br. at __." The Division of Enforcement's Post-Hearing Brief will be cited throughout as "Div. Br. at __." Citations to the record and other defined terms utilized in the same manner as in Ms. Bebo's Post-Hearing Brief.

recall the substance of his important call with Ms. Bebo, Ventas' lack of action in response to "learning" about the inclusion of employees in the covenant calculations, or even the existence of ALC's Disclosure Committee or how the company evaluated (and approved) its disclosures. The Division's inability to explain or otherwise address all of that evidence reveals the inherent weakness of its case.

A. The Division does not even mention ALC's disclosure process, including the existence of ALC's Disclosure Committee, or explain how a fraud claim can exist when dozens of others, inside and outside of ALC, knew the Lease covenants were met using the employee leasing program and never recommended ALC change its disclosure.

In a case in which the Division pursues charges of *disclosure fraud*, it is baffling when its post-hearing brief never once mentions the existence of a disclosure committee or the process by which the company prepared and evaluated its disclosures. But, here, because ALC's Disclosure Committee not only knew about the inclusion of employees in the covenant calculations, but repeatedly approved the disclosure related to it (as did all other relevant parties), this evidence does not support the Division's theory of the case, so it has simply been ignored.

The Division has not addressed who prepared the "boilerplate" statements at issue here, why they were prepared, or the relative importance (or lack thereof) of the statement in ALC's financial reporting process. (Smith, Tr. 3631 (describing the statement at issue here, based on his extensive research, as "boilerplate language that's in a lot of 10-Ks of firms that have financial covenants").) That is no doubt because the alleged false statement was specifically reviewed and approved by Mr. Fonstad in the days immediately following the agreement with Ventas approving the use of room rentals related to employees in the covenant calculations. And it was reviewed and approved by many other senior executives with critical roles in ALC's financial reporting process—including the CFO, director of financial reporting, and internal

auditor—all with knowledge of all of the pertinent facts of ALC's covenant compliance practices.

As noted in Ms. Bebo's Post-Hearing Brief, ALC had "extensive" policies and procedures for meeting its financial and SEC reporting obligations besides the Disclosure Committee. (Ex. 1655; Lucey, Tr. 3684-93.) Within those procedures, the Disclosure Committee's function was to assist ALC in its disclosure obligations to investors. (Ex. 1919, p. 3; Fonstad, Tr. 1567-68.) Specifically, the Disclosure Committee was tasked with identifying and reviewing potential disclosure matters and making recommendations to the senior officers, like Ms. Bebo, who were not members of the Committee. (Ex. 1919, p. 3; Fonstad, Tr. 1567-68; Buono, Tr. 2445.)

ALC's Disclosure Committee—chaired by Eric Fonstad and Mary Zak Kowalczyk, consecutively—was not only aware of the employee leasing program, but reviewed and approved the disclosures related to compliance with the Ventas Lease covenants on a regular basis. The Disclosure Committee knew about the employee leasing program from the outset. On February 13, 2009—only eight days after Ms. Bebo forwarded to Mr. Fonstad a copy of her e-mail to Mr. Solari and his response—the ALC Disclosure Committee met to discuss the disclosures in ALC's 2008 annual report on Form 10-K. (Ex. 124.) During that meeting, the minutes indicate Mr. Buono reported that "Ventas lease covenants continue to be monitored and correspondence between ALC and Ventas has occurred whereby the covenant calculations have been clarified as to census." (Ex. 124, p. 3.) At every subsequent meeting in 2009 following the February 13, 2009 meeting described above, the Disclosure Committee discussed this same topic in connection with the disclosure in ALC's SEC filings regarding compliance with the Lease, and

that same or similar language was included in the minutes. (*See* Resp't Br. at 119 (citing exhibits).)

It does not matter that, in 2015, most of the witnesses cannot recall what was said at those meetings regarding the inclusion of employees in the covenant calculations. Notwithstanding Mr. Buono's convenient lack of memory on this topic (*see, e.g.,* Buono, Tr. 2389), Mr. Lucey does recall the inclusion of employees in the covenant calculations being discussed at the Disclosure Committee meetings, by Mr. Buono no less:

Q	When you learned -- you said that -- from Mr. Schelfout that employees would be included in the covenant calculations, what did you do with this information, if anything?
A	I didn't really do anything with the information.
Q	Did you raise it at a disclosure committee meeting?
A	I believe the -- we got into disclosure committee meetings, and the topic may have come up, but there was -- there was also the understanding -- or John Buono said that there was an agreement that said that that was allowed with Ventas and that it wasn't an issue.
Q	So you don't specifically remember raising this as an issue at a disclosure committee meeting.
A	I did not. I did not raise it as an issue, or not that -- I don't recall.
Q	Can you bring up 526, page 31, 2 through 17. If you could read this and let me know when you're done, please.
A	Yes, that makes sense. It would have come up in a -- come up in the disclosure committee meeting.
Q	So just to make sure the record is clear, after you heard this from Mr. Schelfout, does this refresh your recollection that you raised it at a disclosure committee meeting?
	MR. TANDY: Objection to the word "it." What does she mean by "it"?
	MS. NAEGER: Let me clarify.
	JUDGE ELLIOT: Overruled. Overruled.
	THE WITNESS: Can you repeat the question?
	BY MS. NAEGER:
Q	Does this refresh your recollection that after Mr. Schelfout brought to your attention that employees were being included in the covenant calculations, that you raised it at a disclosure committee meeting?
A	Yes, I don't -- I don't recall it specifically, but it would have come up in a disclosure committee meeting.

(Lucey, Tr. 3699-3700.) And the truth is, no one has any other rational explanation for what that language—"correspondence between ALC and Ventas has occurred whereby the covenant calculations have been clarified as to census"—could possibly mean or refer to, if not the Solari email and the agreement reached with Ventas. In fact, Mr. Hokeness, who drafted the minutes, testified that he was referring to the inclusion of employees in the occupancy covenant calculations when he wrote "the covenant calculations have been clarified as to census." (Hokeness, Tr. 3089-90.) And as Mr. Buono candidly admits, why else would ALC have discussed the matter with Ventas in the first place if not for the purpose of compliance with the covenants? (*See* Buono, Tr. 2492-96.)

But the vetting of the disclosures did not end with the Disclosure Committee, or with one repeated conversation about the employee leasing program. In addition to review, analysis and comment by the Disclosure Committee, which included ALC's in-house counsel, ALC also provided copies of the draft filings to its external auditors, Grant Thornton, for review and comment. (Koeppel, Tr. 3359-60.) And the disclosure at issue was vetted yet again in late 2011 after ALC received a comment letter from the SEC. No one—not the Disclosure Committee, the Audit Committee, ALC's attorneys, nor ALC's auditors—suggested a different disclosure at any point during that time. (*See, e.g.,* Lucey, Tr. 3711; Koeppel, Tr. 3359-60; *see* Resp't Br. at 120 (citing testimony).) Of course, as outlined elsewhere in this Brief and in Ms. Bebo's Post-Hearing Brief, each of these groups of people was told that ALC was including employees in the covenant calculations.

And although the Division disputes whether Ms. Bebo discussed the employee leasing practice with lawyers at Quarles & Brady in connection with the comment letter response, it is undisputed that in April 2012 securities counsel and litigation counsel at Quarles & Brady were

provided information (again) about the material facts surrounding ALC's use of employee leasing to meet the Lease covenants. This included, for example, the fact that ALC was including rooms for "70 to 90 employee/staff/other" in the occupancy covenants and revenue derived from those rooms through intercompany transfers in the coverage ratio covenants. (Resp't Br. at 149-50 (citing evidence); Lucey, Tr. 3719-21; Ex. 3683.) There is no evidence that Quarles & Brady recommended that ALC modify its disclosures to include an explanation about how it was meeting the occupancy and coverage ratio covenants.[2] Indeed, draft press releases about the Ventas lawsuit and 10-Qs prepared with Quarles' assistance in early May (prior to the whistleblower letter) contained no additional disclosures with respect to how ALC was meeting the financial covenants. (*Id.*; *see also* Exs. 1070, 1070A, p. 2 (May 1, 2012 Quarles 8-K draft stating: "The Notices or the failure by the Company to meet certain covenants in the Ventas Lease with regard to occupancy and financial thresholds could result in Ventas invoking remedies available to it under the Ventas Lease...").)

Similarly, as discussed in more detail below, lawyers at Milbank conducted an extensive investigation of the issues this Court is reviewing—whether disclosures in ALC's periodic filings were mis-stated with respect to compliance with the financial covenants. (*See infra* at 12-14; Resp't Br. at 158-61.) Milbank concluded that ALC's filings were not mis-stated because the determination it was in compliance with the covenants through the understanding reached with Mr. Solari on the phone and confirmed through the February 4 e-mail was reasonable. (*Id.*) Milbank reported its findings to Grant Thornton, who reached the same conclusion, given it issued a clean opinion on ALC's internal controls for 2012 and did not recommend any re-statement of ALC's financials. (*Id.*)

[2] They did want to confirm that the employee-related occupancy and intercompany revenue reported to Ventas was excluded from the statistics in the 10-Q, which Mr. Lucey confirmed. (Resp't Br. at 149-50 (citing evidence); Lucey, Tr. 3719-21; Ex. 3683.)

In a case where the operative standard is not whether ALC was correct in reaching its judgment that it was in compliance (though it was correct), but is whether that judgment was *reasonable*, this evidence—all of which is ignored by the Division—is highly probative and should dispose of the Division's fraud claim. *See MHC Mutual Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P.*, 761 F.3d 1109, 1118 (dismissing complaint because there is "no authority suggesting that an issuer's opinion about the market prospects for securities held by a company lacks a reasonable basis when multiple and independent expert analysts who study the company's portfolio reach the same view").

B. The Division ignores the fact that Grant Thornton's engagement partners discussed the inclusion of employees in the covenant calculations with the Audit Committee in 2009, 2010, and 2011.

The evidence the Division will never be able to reconcile with its flawed theory that the Board did not know about the employee leasing program until March 2012—and therefore chooses to ignore—is the testimony of Jeff Robinson and Melissa Koeppel. In 2009, 2010, and 2011, the Grant Thornton engagement partners discussed the fact that ALC was including employees in the covenant calculations with the Audit Committee while the other Board members were present. No one was surprised. (*See* Resp't Br. at 123-26 (citing testimony).) Mr. Robinson also informed the Board that ALC would fail the covenants without the inclusion of the employees. (*Id.* at 125.) And Mr. Buono even corroborated the fact that Mr. Robinson discussed the use of employees in the covenant calculations:

Q	Do you recall Grant Thornton discussing employee occupants in covenant calculations at board meetings?
A	I recall Jeff Robinson saying that we were using employees and it would be better if we had bona fide residents. Those were the words he used.

(Buono, Tr. 2778.)[3]

Instead, the Division asserts that Ms. Koeppel and Mr. Robinson "dispute [Ms.] Bebo's account that [Ms.] Bebo disclosed to the board that ALC was including employees in the covenant calculations." (Div. Br. at 44.) This statement is troubling for at least two reasons: (1) it is false; and (2) it ignores the fact that Ms. Koeppel and Mr. Robinson themselves discussed the issue with the Board, during the Audit Committee meetings. Nowhere in the testimony cited by the Division—3329:18-3330:11, 3366:5-3368:17, 3430:11-3431:6, 3496:4-3497:24—does either witness dispute that Ms. Bebo disclosed to the Board that ALC was including employees in the covenant calculations. The testimony cited by the Division does not mention anything about what Ms. Bebo did or did not present to the Board. And, in fact, the cited testimony shows that Ms. Koeppel and Mr. Robinson did have discussions with the Board on this topic. In attempting to shore up a false statement, the Division included a citation to some of the very testimony it otherwise ignores:

Q	Prior to March 2012, what, if any, discussions did you have with the board about ALC including employees in the covenant calculations?
A	Are you asking about conversations with the board as a whole?
Q	Yeah, let's -- let's talk about just, yeah, at board meetings -- board or audit committee meetings.
A	So we actually had a conversation with the audit committee during the

[3] The Division's attempt to "rehabilitate" Mr. Buono, and get him back on board with their theory of the case, was nonsensical and demonstrates, yet again, how the Division was more interested in having Mr. Buono stay on script than having his testimony be credible or make sense:

> BY MR. HANAUER:
> Q And do you remember making a statement about what Mr. Robinson said to the board about something along the lines of not making any money off employees?
> A Yes.
> Q When he made that statement, did he say anything about the covenant calculations?
> A No.

(Buono, Tr. 2784.) Mr. Buono did not say that Mr. Robinson said ALC was not making any money off employees. In response to a question about "*employee occupants in covenant calculations*," Mr. Buono testified that Mr. Robinson said ALC was "*using* employees and it would be better if we had bona fide residents." The meaning of Mr. Buono's testimony was clear, and the Division's leading suggestion to Mr. Buono that the covenant calculations were not discussed is beyond the pale.

	closing of the first quarter review of 2011 regarding the existence of the practice of utilizing employees to fulfill the covenant calculations with those leases. That was an audit committee meeting. There were other members of the board that were in attendance at that audit committee meeting, as frequently happened.
Q	Do you know whether all of the other board members were in attendance?
A	I don't remember if all of them were in attendance.
Q	And what -- what do you remember about that discussion with the audit committee?
A	What I remember about the conversation was that we -- again, as I mentioned, we did inform them that the company was utilizing these -- you know, the employee count for purposes of meeting the covenants and that it was our understanding that this was in accordance with an agreement that management had with Ventas.

(Robinson, Tr. 3430-31.) And the very next questions and answers in Mr. Robinson's testimony—which the Division did not cite—indicate that the Board did not ask any questions or appear surprised to hear about the utilization of employees to fulfill the covenant calculations:

Q	At that time, did any of the board members ask you any questions about that?
A	Not to my recollection.
Q	What, if any, impression did you get with respect to whether they knew about this subject matter already?
A	The impression -- the impression I received in that meeting was that there didn't seem to be any surprises when we told them that. So it confirmed my belief that they had been previously informed by our -- that they had been informed by our previous audit teams on this topic.

(Robinson, Tr. 3431.) Ms. Koeppel said the same thing in the two questions and answers immediately following the testimony cited by the Division:

Q	And did you get any questions from the board members about that?
A	No.
Q	What do you recall, if anything, about their reaction to your presentation about this issue?
A	You know, that they were engaged in the conversation. You know, their body language didn't express any surprise. In talking with them across the table, they seemed to kind of acknowledge it, and then we moved on to other subjects.

(Koeppel, Tr. 3330.) This testimony is far from disputing the fact that Ms. Bebo disclosed the matter to the Board. To the contrary, it suggests that the Board was well aware of the practice before Grant Thornton mentioned it because Ms. Bebo discussed it in detail with the Board, as she testified at the hearing.

C. The Division fails to acknowledge Milbank's investigation and conclusions that the use of employees in the covenant calculations was not concealed from the Board and Ventas could not deny that an agreement was reached.

Despite the considerable evidence to the contrary, the Division continues to insist that ALC's Board did not learn that employees were being included in the covenant calculations until March 2012. In doing so, the Division ignores considerable evidence undermining its theory, including the fact the Board hired Milbank to conduct an internal investigation into the employee leasing program, which concluded the opposite. That is, Milbank quickly reached the conclusion that allegations that it was concealed from the Board were incorrect. (*See* Ex. 3460, p. 2 (Grant Thornton notes of call with Milbank: "Based on their initial discussions, they believe the consideration that this practice was concealed from the Board is incorrect."); *see also* Robinson, Tr. 3461-62 (confirming Milbank relayed that conclusion).)

And upon completing its investigation, Milbank came to a number of conclusions that are in stark contrast to the picture that the Division is trying to paint of a clueless Board and an impossible story of an agreement with Ventas:

- "No one including those spoken to at Ventas could testify that the Bebo employee leasing inclusion was not accurate." (Robinson, Tr. 3482; Ex. 1879, p. 5 (Milbank's conclusions reported to Grant Thornton).)
- Milbank informed Grant Thornton that the integrity of the CEO and CFO, among others, was not in question, and Milbank was not in a position to conclude that any representations made in the past were false. (Ex. 1918, p. 2; Ex. 3455, p. 2.)
- "S[enior] management open [and] transparent to auditors on this topic -- which units were set aside for which employees. Both Bebo [and] Buono were open [and]

forthcoming on the documentation suggests no ill intent by management." (Ex. 1879, p. 6.)

- "Milbank was not able to conclude that the Company was not in compliance with the lease." (Ex. 1873, p. 6.)
- "Not able to conclude that the modification had not happened. [Therefore] not able to conclude compliance certificates were not in accordance with what Ventas had agreed to." (Ex. 1879, p. 11.)
- "Milbank's investigation did not lead to any internal punishments." (Ex. 1873, p. 6.)

Significantly, Milbank knew that employees were not necessarily using the rooms that were paid for by ALC when it reached these conclusions. (*See* Ex. 1879, p. 7.) ("It is clear that rooms set aside were not used by 'ees in many instances. Were able to ascertain that T&E records of 'ees were not on premises. However, ALC leased at arms-length prices units for potential employee use.")

And if Mr. Bell's notes are to be given any credibility, it should be for the statements that show that Milbank concluded the Board was aware of employee leasing well before March 2012: "In April or May 2011 at an Audit Committee meeting, GT raised the issue of the leasing to employees at the Cara Vita facilities but did not raise it as an issue or a matter of concern at that time. The Board thought the number was small." (Ex. 558, p. 8.) As noted in Ms. Bebo's Post-Hearing Brief, the Board knew of the inclusion of employees in the covenant calculations much earlier (*see* Resp't Br. at 120-132), and Mr. Bell's own notes of Milbank's investigative report to the Board undermine his and any other Board member's testimony claiming that they knew nothing of it until March 2012.[4] (*Cf.* Div. Br. at 35-37.)

It is not surprising, then, that the Division has chosen to ignore the Milbank investigation in its attempts to destroy Ms. Bebo's credibility and portray her as master-minding a great fraud.

[4] Mr. Bell's notes also confirm that in 2012, Mr. Solari told Milbank that he "didn't have any recollection of the Bebo conversation" on January 20, 2009, and Milbank concluded it was reasonable to believe Ventas would agree to this flexible arrangement given the turbulent economic times of the Great Recession. (Ex. 558, pp. 5-6.)

Because it is not possible to reconcile the Division's claims that no member of the Board was aware that ALC was including employees in the covenant calculations before March 2012 (and that there was no agreement with Ventas at all) with the conclusions reached by Milbank after its investigation in 2012, when all of the witnesses' memories were presumably "fresher" than they are in 2015. Importantly, the Milbank review confirms the reasonableness of Ms. Bebo's view that ALC was in compliance with the Lease covenants, negating any inference of falsity and scienter.

D. In attempting to try a breach of contract case as Ventas' proxy, the Division fails to acknowledge that Ventas itself never pursued litigation related to the occupancy covenants or attempted to remove ALC from the properties.

In attempting to try a breach of contract case to prove up its allegations of disclosure fraud, the Division again fails to acknowledge relevant and material evidence—Ventas itself never pursued, and never would have pursued, any action based upon the asserted breach of the occupancy covenant. As noted in Ms. Bebo's Post-Hearing Brief, on April 26, 2012, a few weeks after receiving several notices that state regulators were taking actions against the licenses of two CaraVita Facilities, Ventas filed a lawsuit against ALC in federal district court asserting a breach of the Lease due to the regulatory issues. (Resp't Br. at 147; Ex. 2075.) In April and May, ALC and Ventas began discussing a potential negotiated resolution of the disputed event of default and the lawsuit. After some internal debate, on April 27, ALC sent a settlement proposal including specific language for a release with respect to the use of rentals to employees in the covenant calculations. (Exs. 1535, 1535A, p. 2.)

On May 9, 2012 Ventas sent another default notice to ALC asserting a host of new alleged breaches of the Lease. (Ex. 355; Doman, Tr. 347-50.) A number of the allegations related to the licensing issues and a fire at one of the Facilities. (*Id.*) Ventas also asserted, however, that ALC "may have failed to comply" with the occupancy and coverage ratio

covenants when it submitted "fraudulent information" including employees as bona fide third party rentals. (Ex. 355, p. 5.) But when it filed a motion to amend its complaint against ALC the very next day, there was no allegation to be found related to the occupancy and coverage ratio covenants. (*See* Ex. 1194 (first amended complaint); Ex. 2076, p. 2 (ALC's 8-K describing the letter and amended complaint allegations); Div. Br. at 18 n.5.)

The absence of these allegations in Ventas' amended complaint is not surprising for a number of reasons. First, the evidence demonstrates that Ventas never took action with any of its lessees where the sole issue was tripping the financial covenants and there was no concern about collecting rent payments. Mr. Doman could not recall a single time, over the course of the entire period from 2009-2012, when Ventas defaulted *any* lessee on the sole basis of a breach of occupancy or coverage ratio covenant. (Doman, Tr. 380.) In fact, prior to 2012, despite believing that ALC tripped the occupancy covenant even earlier in the relationship, Ventas never tried to remove ALC from the Facilities. (*See* Doman, Tr. 265-67, 281.) Instead, in response, Ventas took no formal action to assert remedies under the Lease; it simply monitored the situation. (Doman, Tr. 282.)[5]

This is not surprising given the fact that ALC was paying its rent under the Lease (Doman, Tr. 304), ALC had good credit support (Doman, Tr. 310), it would be risky for Ventas to replace tenants (Doman, Tr. 311-12), and no one, including ALC's auditors, was concerned that Ventas would remove ALC from the Facilities. (*See* Trouba, Tr. 3567-68 (occupancy and coverage ratio covenants not high risk; none of clients have had lender take property); 3569 (potential remedies and disclosure of same in 10-K did not change view on risk; "it would be

[5] Milbank even concluded after its investigation that the "[p]revious lessee was a small operator and so Ventas was concerned over their revenue stream so lease included provisions assuring Ventas that previous lessee could make lease payments. The lease was assumed by ALC, with whom the lessor was not so concerned over ability to pay." (Ex. 1879, pp. 10-11.)

fairly typical for a company to disclose whatever remedies might be out there"); 3574 ("My experience is that the owner of the property typically does not want to kick out or take over the property. It's in their, typically, their best interest to -- as long as the company's paying, the tendency is to work it out"); Ex. 3322, p. 1 (internal Grant Thornton email correspondence; "Please note these are merely operating leases, so not a huge impact as the risk of Caravita [sic] moving ALC out as an operating entity appears unlikely."); Ex. 295, p. 5 (ALC's response to SEC comment letter indicates "in the unlikely event of a breach, the consequences would be less severe than those disclosed"); Bebo, Tr. 4283-84; Smith, Tr. 3634-35 ("My expert opinion does include my knowledge of what happens following covenant violations. I've done a lot of research on that" and lessors or lenders "rarely pursue a remedy as harsh as acceleration, bankruptcy, foreclosure, seizure of properties.").)

Second, as Milbank concluded in its 2012 investigation, Ventas could not deny that it had agreed to ALC's employee leasing program when questioned by Milbank around the same time. (Robinson, Tr. 3482; Ex. 1879, p. 5.) If Ventas believed, and had evidence to support its belief, that ALC had breached the Lease by including employees in the covenant calculations, it could have included those allegations of breach in its amended complaint. But Ventas never pursued a breach of contract action against ALC on the basis of the occupancy covenants.

Nonetheless, the Division tries to rewrite history here, and tells the story as if Ventas sued ALC on the basis of the occupancy covenants, not the licensing issues, leading ALC to purchase the CaraVita Facilities for $100 million. (*See* Div. Br. at 42.)[6] That is not what

[6] The Division also relies on an unsupported interpretation of a December 2008 e-mail from Mr. Buono to Ms. Bebo with the subject of "Yuck." (*See* Div. Br. at 10.) The Division claims this e-mail relates to Mr. Buono learning "that another assisted living company which leased facilities from Ventas would be purchasing those properties from Ventas for a very high price. Buono believed the reason the lessor [sic] company was paying such a high price was because it ran into 'covenant issues' with Ventas..." (*Id.* at 10.) The Division does not cite any evidence indicating whether the lessee company was actually paying a high price because of a covenant breach. And, in fact, it is not

happened, as the documentary evidence makes clear. And we know now that if anything motivated the purchase, it was the flexibility ownership afforded with respect to licensing, avoiding regulatory pitfalls, and building expansions to the well-performing properties. (Resp't Br. at 152-56.) Notwithstanding the reality of the situation, and the lack of action by Ventas (as predicted by ALC and Ms. Bebo), the Division is attempting to try an alleged breach of contract case now, when Ventas chose not to do so then, and is taking an even larger leap converting that breach of contract case into a claim of securities fraud.

II. Instead of Developing a Theory Based on the Actual Facts of the Case and the Evidence Elicited at the Hearing, the Division Continues to Pursue Its Predetermined Narrative, Supporting Its Case with "Facts" that Do Not Exist.

As it did in its Pre-hearing Brief and in the OIP, the Division continues to pursue its predetermined narrative, instead of dealing directly with the evidence that exists. And because the Division now has the benefit of knowing the full scope of the evidence and testimony admitted at the hearing, its single-minded adherence to this predetermined narrative is particularly troubling. The Division resorts to bold statements, without regard to their ultimate veracity, and using evidence out of context in an attempt to mold the facts around its theory of the case.

In doing so, the Division also advances theories that are inconsistent and illogical. For example, the Division asserts that ALC's Board of Directors was particularly concerned about compliance with the Lease covenants, yet was unaware that ALC began including employees to satisfy the covenant calculations. How could this same Board become comfortable with ALC's covenant compliance in 2009, without, as the Division represents, any concrete explanation of the increase in occupancy at the Facilities during the worst real estate recession in recent history?

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true. (Bebo, Tr. 1863-64.) Instead, the Court heard testimony that Mr. Buono did not have background or knowledge on these properties and his view on the purchase of these properties changed. (*Id.*)

The Division would have the Court believe that Board members were at once "hypersensitive" to the issue, and also totally disengaged, going so far as to put forth the incredible testimony that members of the Audit Committee of a public company never reviewed the detailed financial information about ALC provided to Board members in advance of the Board meetings.

The Division fails to explain this paradox; notably absent from the Division's theory is any explanation for why these Board members who "cared about ALC's compliance with the covenants," who allegedly discussed "the effect non-compliance would have on ALC's stock price," and who "repeatedly inquired at board meetings about ALC's compliance with the financial covenants" could have reasonably believed ALC would meet the covenants during the Great Recession without the employee leasing program. (*See* Div. Br. at 13, 49.) The more logical conclusion, based on the Division's own theory of the facts, is that the Board initially was concerned about failing the Ventas Lease covenants and then became less concerned after they agreed that ALC should participate in the employee leasing program. This is particularly true given the testimony of Ms. Bucholtz and others that poor occupancy at, and financial performance of, the CaraVita Facilities was a repeated item of discussion at Board meetings. (*See* Bucholtz, Tr. 2956-57.) The reality is that no evidence exists of alternative explanations for meeting the financial covenants and the Board did not express any concern for several years, because they knew that the employee leasing program was in effect.

Similarly, according to the Division, Ventas was both on high-alert for a covenant breach in February 2009, but also would not have been able to determine from the February 4, 2009 e-mail that ALC would be including rentals related to employees in the covenant calculations. Nor is there any explanation for the Division's inconsistent positions with respect to Mr. Buono's testimony about the agreement with Mr. Solari, as described in more detail below. (*See infra*

Section III.B.3.) On the one hand the Division asserts, through Mr. Buono, that there was no agreement, and on the other hand the Division asserts Mr. Buono purportedly expressed concern about whether ALC was *complying* with the agreement.

These inconsistent and contradictory theories and constant loose play with, and in some instances misrepresentations about, the factual record permeate and undermine the reliability of the Division's entire case. The Court must reject the Division's attempts to use "facts" that do not exist and others that do, but only when taken out of context. The Division must establish its case on the basis of facts and evidence that actually exist, not the "facts" the Division would like to exist to fit its predetermined narrative.

A. Much like its Pre-Hearing Brief, the Division's Post-Hearing Brief fills its predetermined narrative with broad assertions lacking evidentiary support.

The Division makes several broad claims using the same or similar language as was used in the Division's Pre-hearing Brief or the OIP that are unsupported by the evidence actually elicited at the hearing. For example, the Division maintains that Ventas did not agree to the employee leasing practice, and that Ventas, ALC's Board, and ALC's attorneys did not know about the inclusion of employees in the covenant calculations until early 2012. (*See* Div. Br. at 1, 2, 3, 12, 16, 35, 36, 37, 38, 40, 41, 43, 45, 50, 54.) To do so, the Division makes several broad, unsupported statements, such as:

- **"Indeed, no document exists corroborating Bebo's story of what was disclosed to, or approved by, Ventas, the attorneys, the board, and the auditors. And her story of an agreement with Ventas and full disclosure of ALC's covenant practices was refuted by every percipient witness who testified.** . . . Simply put, Bebo lied to Ventas, lied to ALC's board, lied to Grant Thornton, and lied to the Court." (*Id.* at 3 (emphasis added).)
- "The heart of Bebo's defense is her claim 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. **Notably, there is no documentary**

evidence to support Bebo. And more importantly, each of the percipient witnesses refuted Bebo's version of the events." (*Id.* at 43 (emphasis added).)[7]

- "Further, every percipient witness other than Bebo testified Bebo concealed key aspects of ALC's covenant calculation practices from Ventas and ALC's board, attorneys, and auditors." (*Id.* at 50 (emphasis added).)

- **"[E]ach of the eleven witnesses other than Bebo who attended board meetings -- Bell, Buono, Buntain, Fonstad, Hennigar, Hokeness, Koeppel, Rhinelander, Roadman, Robinson and Zak -- all dispute Bebo's account that Bebo disclosed to the board that ALC was including employees in the covenant calculations.** These eleven witnesses further refute Bebo's claim that she, or anyone, told the board the numbers of employees being included in the calculations, that ALC was including employees who did not stay at the Ventas facilities, and that the applicable criteria for employees' inclusion was whether they had a 'reason to go.'"(*Id.* at 45 (emphasis added).)[8]

To make these statements the Division has ignored or misconstrued evidence in the record to suits its needs, or used clever wording to make damning claims that ring hollow.

In anticipation of the Division maintaining these positions in its Post-Hearing Brief, Ms. Bebo addressed many of these statements in her own Post-Hearing Brief. (*See, e.g.,* Resp't Br. at 8-26.) As made clear there, contrary to the Division's assertions here, there are many

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[7] The Division's decision to fit the evidence into its predetermined narrative, without regard to what testimony was actually elicited at the hearing, is evidenced by the similarity between the statements that the Division made before and after the hearing. (Div. Br. at 19 ("The heart of Bebo's defense is her self-serving claim 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. *Notably, there is no documentary evidence to support Bebo. And more importantly, each of the percipient witnesses will testify that Bebo is not telling the truth."*) (emphasis added); *see also id.* at 2 ("Beyond Bebo's story not making any sense, not a single percipient witness or document will corroborate Bebo's alibis. To the Contrary, the three individuals Bebo claims were witnesses to her purported agreement with Ventas will all deny that an agreement existed to include *any* employees in the covenant calculations"; "Again no document exists corroborating Bebo's account of what she disclosed to, or was approved by, Ventas, the attorneys, the board, and auditors.") (emphasis added).)

[8] Notwithstanding the lack of support for the assertions here about Ms. Koeppel and Mr. Robinson (*see supra* pp. 10-12), to make this statement the Division also ignores other testimony from these very same witnesses that undermines the credibility of the testimony cited by the Division. For example, Mr. Buono testified about a meeting he attended with Ms. Bebo, during which Mr. Rhinelander gave them approval to pursue the employee leasing program. (Buono, Tr. 2393-96.) And Mr. Buntain testified that "they" (meaning management, including Ms. Bebo) "justified their use of employees" while discussing ALC's proposed response to the SEC comment letter at the Board meeting. (Resp't Br. at 127-28; Buntain, Tr. 1452-54.) This is yet another example of how the Division has overstated its case.

documents and "percipient" witnesses supporting Ms. Bebo's defense. (*See id.*) In the chart on pages 8 through 26 alone, Ms. Bebo's Post-Hearing Brief, has cited at least:

- 42 different pieces of testimony, from witnesses other than Ms. Bebo, to support her claims that (1) the employee leasing agreement existed between ALC and Ventas, (2) that Ventas, the Board, auditors, and ALC's internal counsel were knowledgeable of the practice, including many, if not all, of its details; and (3) these parties approved the practice, as well as
- 55 exhibits—documents that the Division contends do not exist or support Ms. Bebo's defense.

In light of this, the Division's argument must be that there is no support for Ms. Bebo's position because no single piece of evidence clearly and comprehensively shows that ALC had an agreement with Ventas that was widely known and implemented. Of course, the Division's theory of the case is not neatly tied up in one single piece of evidence either.

What the Division's broad statements fail to account for is the considerable evidence, viewed individually or collectively, that directly supports Ms. Bebo's testimony that there was an agreement with Ventas and that the manner by which ALC was meeting the covenants was well-known both inside and outside of ALC:

- Mr. Solari has no memory of the key telephone conference on January 20, 2009 and cannot dispute Ms. Bebo's detailed memory of the call. He received the confirming e-mail and admits neither he nor Ventas ever expressed concern, objected, or otherwise responded to the e-mail confirming the agreement. (Resp't Br.at 76-81.)
- Mr. Buono, ALC's CFO, participated on the call and from 2009 until the Division told Mr. Buono that Ms. Bebo had "thrown him under the bus," understood that Ventas had agreed to the employee leasing arrangement, reassured others inside and outside of ALC about the nature and sufficiency of the agreement, represented to auditors after Ms. Bebo left ALC that the employee leasing arrangement did not involve "irregularities" much less fraud, and otherwise took no actions contrary to his belief that an agreement existed. (*See, e.g., infra* pp. 63-64; Resp't Br. at 104-105, 161 (citing evidence).)
- Every percipient witness to testify about the call with Mr. Solari confirmed that ALC's general counsel, Mr. Fonstad, was present in Ms. Bebo's office for it, including Mr. Buono (through impeachment of prior statements), Ms. Bebo, Ms. Bucholtz, and Ms. Zaffke. (*Id.* at 75.)

- Ms. Bebo's February 4, 2009 e-mail exists confirming the employee leasing discussion occurred, which was reviewed by several Ventas executives, none of whom ever raised a concern or objection to the disclosure of ALC's room rentals related to employees. (*Id.* at 84-91.)

- Mr. Fonstad, who participated on the call, helped draft the follow up e-mail to Ventas confirming the agreement, told Mr. Buono that employee leasing was okay or kosher, chaired quarterly disclosure committee meetings where the employee leasing arrangement was repeatedly discussed, and continued to be involved in approving ALC's disclosure about the Ventas Lease. (*Id.* at 83-84, 118-20.)

- Grant Thornton was aware of the employee leasing program and the engagement partners testified that they informed the Board about the employee leasing program, specifically telling the Board that employees were included in the covenant calculations. (*Id.* at 123-26, 133-34.) Additionally, Grant Thornton knew that occupancy reconciliation reports were not meant to track the length of individuals' actual overnight stays at the properties, since they were receiving lists of occupants where individuals were listed as staying at multiple properties at the same time. (*Id.* at 103-08.)

- The Board knew about employee leasing arrangement as evidenced by e-mails, John Buono's testimony, Grant Thornton's testimony, and the Board members' testimony. (Resp't Br. at 120-32.)

- Although it is disputed whether Quarles & Brady knew pertinent facts about the employee leasing arrangement with Ventas prior to 2012, it is undisputed that Quarles & Brady knew in April 2012 that ALC was meeting the financial covenants through the use of 70-90 units that ALC paid for through intercompany transfers for employees to stay at the Facilities. At that time, Quarles *did not* recommend that ALC modify its disclosure regarding how it was meeting the financial covenants. (*Id.* at 149-50.)

- At no point did Ventas add a claim with regard to employee leasing to its already filed lawsuit, despite knowing that the practice occurred. (*Id.* at 147-49.)

- Milbank, a reputable law firm, spent a significant amount of time investigating the employee leasing issue and concluded that: (1) Milbank was "not able to determine that units for employee use to calculate minimum occupancy was done without the knowledge and approval of Ventas" (Robinson, Tr. 3479; Ex. 1879, p. 3); (2) "the consideration that this practice was concealed from the Board is incorrect" (Ex. 3460, p. 2; Robinson, Tr. 3461-62); and (3) Solari and Ventas could not refute the existence of an agreement. (Robinson, Tr. 3480; Ex. 1879, p. 4 ("Ventas' counsel reached out to Solari. . . . He was unable to deny the Bebo representation of his approval."); Robinson, Tr. 3482; Ex. 1879 ("February 4th, 2009 e-mails could lead to ALC leases -- employees for use. However, ALC leased from lessor for use by potential employees when traveling to the unit. Employees were not actually at the premises, but potentially could have been at the premises.").)

- The Division presented no logical theory of what Ms. Bebo's motive would be to risk her livelihood by committing securities fraud. (Resp't Br. at 206-07.)

In sum, the Division can only make these broad statements based on its deliberate disregard of the evidence actually presented at the hearing. The Division has no explanation for any of these facts that contradict its predetermined narrative, many of them undisputed. But the inaccuracies in the Division's Post-Hearing Brief do not stop at these general statements; the Division's Post-Hearing Brief repeatedly misstates the record and evidence presented.

B. Despite evidence to the contrary, the Division sticks to its predetermined narrative, asserting "facts" that do not exist or lack critical context.

The Division's theory of the case depends in large part on there being no agreement between Ventas and ALC regarding the rental of rooms for employees, and all of the relevant parties being unaware of ALC's inclusion of employees in the covenant calculations. Because these "facts" are so crucial to the Division's case, it continues to assert them, in a series of unsupported or incomplete statements.

1. The existence of an agreement with Ventas regarding the employee leasing program.

In its attempt to disprove that any agreement existed between ALC and Ventas regarding the inclusion of employees in the covenant calculations, the Division does not acknowledge the true nature of ALC's general counsel's participation at the inception of the employee leasing program and misconstrues what really happened on and after the January 20, 2009 phone call with Mr. Solari. The Division outlines the "facts" only as they fit its predetermined narrative.

False Narrative	Explanation
"Solari's responsibilities at Ventas dealt with Acquisitions as opposed to Management of Ventas's properties, which was the responsibility of the asset	Mr. Solari was principally responsible on Ventas' part for negotiating the terms of the Lease with ALC, so he certainly had authority to modify the terms of the Lease. At a minimum he had apparent authority. Moreover, Mr. Solari acknowledged that even after the Lease was

False Narrative	Explanation
management group. Solari lacked authority to modify the terms of the ALC lease without the approval of Ventas's CEO." (Div. Br. at 12.)	executed, he served as ALC's "relationship officer," and acknowledged he was ALC's point of contact at Ventas for anything that might come up relating to important asset management issues. (Resp't Br. at 68.)
"On January 27, 2009, Buono prepared an initial draft of an email to Solari." (Div. Br. at 14.)	The Division conveniently left out the fact that Mr. Fonstad assisted Mr. Buono with drafting this e-mail before it was sent to Ms. Bebo. (Buono, Tr. 2756-57.)
"Without Ventas's agreement or knowledge, ALC started including in the covenant calculations a limited number of employees who actually stayed at the Ventas facilities, and only for the days the employees actually stayed there." (Div. Br. at 1.)	The Division makes multiple misstatements with this assertion. First, Ventas was aware of ALC's use of employees because Ms. Bebo, Mr. Fonstad, Mr. Buono, and Mr. Solari already came to an understanding about this issue during the January 20, 2009 phone call (Resp't Br. at 76-82.) Second, ALC was not including individuals only for the days the employees were actually staying there. Actually, consistent with how ALC calculated occupancy and payment for its units company wide, ALC was paying for apartments for entire monthly periods with respect to four of the units that were utilized for employee use. (Ex. 17, p. 5; *see also* Ex. 182; Ex. 180.) This company policy was also affirmed by Mr. Buono in his proffer session with the Division: Ex. 50 Email from JB to Bebo re support for occupancy (5/5/2009) Regarding email at bottom of page, JB said that Bebo told him those employees had been at both buildings when JB questioned her. At this point in time, JB assumed that employees were staying where Bebo said they were and that the employees in question had gone to those properties sometime during the month. [*Our review of travel documents confirm they were* ***not****.]* ALC's policy was that any tenant leasing a room was held to a 30 day lease. Employees were treated the same. JB's understanding from talking with Bebo was that an employee could be listed at multiple properties in a month and be on the books of both properties. JB said he and Bebo had a conversation early in this process that that the employee stays "had to be real" and that it couldn't just be names thrown in.

False Narrative	Explanation
	(Ex. 2122, p. 2-3 (Division's notes from Mr. Buono's proffer session in March 2014).)
"Bebo's interpretation is at odds with Buono's and Solari's accounts of the January 20 call and her February 4 email's summary of the call, but ignores the advice she received from Fonstad: that it was necessary to disclose in writing ALC's intent to include employees in the covenant calculations and to obtain Ventas's written approval." (Div. Br. at 15; *see also id.* at 44, 50.).	Although Mr. Fonstad sent initial legal advice in an e-mail to ALC's management (Ex. 1152), it is clear that was not his final advice on the matter. In fact, Mr. Fonstad—a witness to the call—assisted Mr. Buono with drafting the follow up e-mail, over a week after his initial e-mail, that Ms. Bebo eventually sent to Mr. Solari. (Buono, Tr. 2756-57.) Moroever, Ms. Bebo provided Mr. Fonstad the final e-mail to Ventas and Ventas' response back to her. He printed those e-mails and put them in his paper copy file related to the Ventas Lease. (Resp't Br. at 91-92.) He never advised that the e-mail was insufficient to memorialize the understanding of ambiguous Lease terms.
"Buono likewise testified that Fonstad, Zak, and Quarles never approved the inclusion of employees in the covenant calculations." (Div. Br. at 44.)	Mr. Buono testified on the last day of the hearing that he informed the Division that Mr. Fonstad approved the employee leasing program. Mr. Buono was asked, "Isn't it true that during your conversations with Mr. Fonstad, at some point you received advice from him that ALC rental of rooms to employees or individuals for use in the covenant calculations was allowed, or as I believe you called it, 'kosher.'"? (Buono, Tr. 4651-52.). After Mr. Buono's recollection was refreshed with his investigative testimony, Mr. Buono replied, "*I have no doubt -- I believe I would have said that.*" (Buono, Tr. 4652-53 (emphasis added).)
"[Bebo] 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 . . ." (Div. Br. at 13.)	The Division falsely states that Ms. Bebo never informed Solari that ALC would fail any covenants without including employees. Ms. Bebo testified that she had a conversation with Mr. Solari after the January 20, 2009, call where she informed Mr. Solari that ALC was "under water with the lease," which indicates that ALC would fail the covenants without employees. (Bebo, Tr. 1917-20; *see also* Bebo, Tr. 4060-61.) Not only did the Division know of Ms. Bebo's statement, it cited to this area of Ms. Bebo's testimony to support its false assertion. In fact, Ms. Bebo clarified that she made the underwater statement after she was asked if she had additional conversations after January 20, 2009, about employee leasing. She answered yes, because of the underwater statement to Solari; and the Division

False Narrative	Explanation
	"impeached" her with her prior statement that she did *not recall* additional conversations. (Bebo, Tr. 1917-20). Finally, to the extent the Division is only referencing Ms. Bebo's statements during the January 20, 2009, conversation, then the Division intentionally omitted a later statement by Ms. Bebo with regard to this issue.
"Buono testified consistently with Solari. . . . Buono confirmed no covenants were discussed, and that Solari did not agree to anything." (Div. Br. at 13.) The Division made additional statements that Solari and Buono confirmed that Solari did not agree to the employee leasing program. (*Id.* at 12-13, 43.)	Solari's professed belief (speculation) that no agreement about employee leasing was reached and his canned response to this effect is contradicted by his prior statements relayed to Milbank, which the Division chooses to ignore. (Robinson, Tr. 3480; Ex. 1879, p. 4 ("Ventas' counsel reached out to Joe Solari, a Ventas liaison to ALC, terminated in 4/2009 due to downsizing after he received the February 4th, 2009 e-mail on employee leasing arrangements. This was the person who had the reported arrangement. He was unable to deny the Bebo representation of his approval.").) Additionally, the next section of this brief addresses the absurdity of the Division's statements that Buono confirmed that Solari did not agree to employee leasing.
"Ventas never responded to this proposal [the February 4, 2009 e-mail to Joe Solari], and Bebo agreed that prior to April 2012, ALC did not inform Ventas that ALC was including employees in the covenant calculations. According to Bebo, Ventas's silence confirmed its agreement that ALC could include in the calculations...." (Div. Br. at 14 (citation omitted).)	The Division chooses not to acknowledge or explain the implications of the undisputed fact that Ms. Bebo's e-mail was reviewed by several Ventas executives and officials. (Ex. 1343.) Also, the Division ignored Ms. Bebo's comment to Mr. Solari that ALC was underwater and that it did not help that ALC was paying for rooms (Bebo, Tr. 1917-20; *see also* Bebo, Tr. 4060-61), which is not refuted by the any of the Division's citations to the record. (*See* Div. Br. at 14).
"Solari and Buono participated on the January 20, 2009 call during which Bebo claims Ventas approved the use of employees in the covenant calculations. Both witnesses denied Solari ever agreed to the practice, on that call or otherwise." (Div. Br. at 43.)	The Division repeatedly downplays the fact that Mr. Fonstad also participated on the call. Indeed, four witnesses place Mr. Fonstad in the room for the call that day. (*See* Buono, Tr. 2343, 2781-82 (Mr. Buono testified that although he previously testified during his investigative testimony that Mr. Fonstad was on the call with Ventas, he could not currently recall whether Mr. Fonstad was present; on cross-examination, he testified "[n]o matter what you do or say, I'm not going to remember if Eric was in that room."); Bucholtz, Tr. 2939-40; Zaffke, Tr. 3217-18; Bebo, Tr. 4001-4002.)

False Narrative	Explanation
	The Division's own proffer notes with Mr. Buono also indicate that, months after his investigative testimony, he again placed Mr. Fonstad in the room: Ex. 501 Email from Eric Fonstad to Laurie Bebo **(1/19/2009)** JB said that Eric was asked what ALC needed to do to get an agreement on employee occupants at the Ventas properties. **Bebo talked with Joe Solari the next day.** It was very informal. **JB was with Bebo on the call and Eric was in the room during the call.** Bebo told Joe that ALC wanted to rent to employees consistent with the arrangement the prior lessor had but it would be less formal. JB said that Bebo heard "what she wanted to hear" from Joe. Joe never asked how many employees would be leasing and there was no conversation regarding a cap on employee leases. There was no focus on whether employees were renting or whether rooms were rented for employees. Eric never expressed any discomfort with JB about the employee leasing arrangement. (Ex. 2122, p. 2 (Division's notes from Mr. Buono's proffer session in March 2014) (emphasis added).)
"Despite the agreement Bebo claimed was reached on their January 20 call, on February 17, 2009, Bebo and Buono discussed with Solari a new proposal for ALC to purchase two Ventas properties in New Mexico in exchange for Ventas waiving both occupancy and coverage ratio covenants. On February 19, Bebo followed up with Solari with an offer to purchase the two properties in exchange for revising the lease such that the only remaining covenant would be a portfolio-wide coverage ratio covenant that would be reduced from 1 to 0.9." (Div. Br. at 15 (citing Ex. 190).)	The Division misrepresents the February 19 e-mail. The Division's characterization of the e-mail is contradicted by its own witnesses, Mr. Doman and Mr. Solari. Each testified that the e-mail did not request a waiver or elimination of the occupancy covenants and only addressed modifications to the coverage ratio covenants. (Doman, Tr. 354-55 (discussing Ex. 3380 (identical to Ex. 190)) and agreeing Ms. Bebo was not requesting any relief with respect to the occupancy covenant); Solari, Tr. 432 (discussing Ex. 190 on direct examination and stating the e-mail was proposing that ALC "purchase the two NM properties *in exchange for getting relief on the coverage covenants as described in this e-mail.*") (emphasis added).) Further, the Division presented no evidence from Mr. Solari about the conversation contained in his February 17 e-mail that contains hearsay within hearsay (the Division presumably did not ask him about it) because he likely has no memory of the call, as he has no

False Narrative	Explanation
	memory of any other discussions with ALC at this time. Ms. Bebo directly testified that she never proposed modifying the occupancy covenant in discussions with Ventas related to the New Mexico properties. (Bebo, Tr. 1979-80, 4053-56.) Mr. Buono confirmed the same understanding that ALC was not seeking relief from the occupancy covenant because Ms. Bebo believed that would be satisfied by the employee leasing agreement. (Buono, Tr. 2359-60 ("I believe we proposed this scenario without any of the occupancy coverage requests -- waiver requests."); Buono, Tr. 2500, 2504-05, (discussing Ex. 1349).)

2. Knowledge of the inclusion of employees in the covenant calculations.

Another key, yet unsupported, element of the Division's theory of the case is that Ms. Bebo not only concocted a scheme to include employees in the covenant calculations, but also concealed it from ALC's attorneys, auditors, and the Board. Notwithstanding all of evidence to the contrary, even elicited from the Division's own witnesses, the Division persists in its single-minded pursuit of this false narrative.

(a) The Board was aware of the inclusion of employees in the covenant calculations.

One of the most remarkable positions taken by the Division is its insistence that the Board was unaware of the inclusion of employees in the covenant calculations until March 2012. The Division's own witnesses have proven that to be false. (*See* Resp't Br. at 120-29 (citing evidence).) Nonetheless, the Division insists on maintaining this false narrative, and "doubles down" on this assertion by claiming not only that the Board did not know of the inclusion of employees before March 2012, but that each member of the Board was "emphatic" regarding his lack of knowledge prior to March 2012. (*See, e.g.*, Div. Br. at 2-3.)

Although members of the Board may have tried to be emphatic on direct examination, when going off-script on cross-examination two of the three Board members that the Division called to testify stated that the Board did discuss how ALC was using rooms related to employees in the covenant calculations prior to 2012: Mr. Buntain and Mr. Rhinelander.

Mr. Buntain testified that employee leasing was discussed when the Board considered ALC's proposed response to the SEC comment letter, *i.e.*, at the August 2011 Board meeting. (*See* Resp't Br. at 127-29 (citing evidence).) According to Mr. Buntain, management discussed its explanation about its comfort levels with the CaraVita covenants. (Resp't Br. at 127-28 (citing Buntain, Tr. 1452-54).) Specifically, Mr. Buntain testified "[t]hey justified their use of the employees" and "[w]ell, the memo to Mr. Solari by Ms. Bebo said something. When she didn't hear anything back, she took that as an approval." (*Id.*) Mr. Buntain was asked if management "justified the reasons for being in compliance by referencing the agreement with Ventas regarding the use of employees for covenant calculations" and he replied, "[w]ell, that's one of the ways they justified it, yes." (*Id.*)[9]

Moreover, it is well-established by circumstantial evidence that Mr. Buntain's instruction for management to add a "cushion" into the covenant calculations by adding more employees occurred during the third quarter of 2009 Board meeting. (*See* Resp't Br. at 120-23.)[10] Even the

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[9] The Division's attempt to rehabilitate Mr. Buntain on the timing of these comments also failed. (*See* Resp't Br. at 128-29, n.34.)

[10] Indeed, although Mr. Buono could not recall when this comment was made during his hearing testimony, the Division's own notes reflect that Mr. Buono previously stated that it was made during the third quarter 2009:

> *Regarding ALC00000049 (Audit Committee Meeting for 11/6/2009:* JB said that he gave a Powerpoint presentation at this meeting where he had a column describing the covenant requirements and another column containing the occupancy at the properties. JB said that at that meeting, Buntain suggested that ALC include additional employees as occupants of the properties because it appeared as if ALC was close to missing the covenant requirements. JB said Buntain also said that: "we should have a cushion in there." Bebo replied to Buntain that she knew of additional employees that stayed at the properties but didn't include them in the covenant calculations because they were not necessary to meet the covenant requirements.

(Ex. 2117, p. 6 (Division's notes from Mr. Buono's proffer session in November 2013).)

Division's own witness, Mr. Rhinelander, testified that "[t]here was some reference, I believe, in the fall [2011] before [the March 6, 2012 CNG committee meeting], a comment made by Derek Buntain . . .there was a comment made by Derek, something to the effect of, well we should fill all the facilities up with employees." (Rhinelander, Tr. 2816-17.)

The Division's specific reliance on board members who *testified* "emphatically" that they had no knowledge before March 2012 also cannot cover up the fact that it is undisputed that Ms. Ng, chair of ALC's Audit Committee, was aware that ALC was utilizing (in the Ventas covenant calculations) apartments for which it paid for employees to use. (Resp't Br. at 125-26 (citing evidence).)

With these statements in its brief, the Division attempts to minimize the Board's knowledge of employee leasing, but in doing so ignores an abundance of other testimony that indicates that the Board was aware of the employee leasing program and even agreed to it. For example, as noted elsewhere in this brief and in Respondent's Post-Hearing Brief, Mr. Buono corroborated Ms. Bebo's testimony that after discussing the possibility of using employee leasing, Mr. Rhinelander went into a board room and received confirmation to proceed with the program. (Resp't Br. at 11, 97-99 (citing evidence).) Mr. Robinson and Ms. Koeppel both testified that they discussed employee leasing with the Board on several occasions. (Resp't Br. at 123-26 (citing evidence).) Mr. Buono testified that employee leasing was discussed at multiple Board meetings and that other board members indicated that they knew the program existed prior to the 2012 CNG committee meeting. (*See infra* Section III.B.4. (citing evidence).)

But it is not just the testimony elicited at trial that renders the Division's assertions inaccurate and unreliable. The Division's *own* notes from its proffer sessions with Mr. Buono, *a Division witness*, also call into question the Division's insistence on the maintaining the false

narrative that the Board was unaware of the inclusion of employees in the covenant calculations before March 2012:

Passage from the Division's Proffer Notes with John Buono[11]	**Citation**
JB said that the BOD was 7 or 8 directors. JB said the directors who knew about the inclusion of employee occupants in the covenant calculations were Rhinelander ("he knew exactly what was going on"), Hennigar (because Rhinelander and Hennigar spoke frequently), Malen Ng (who had discussed the topic with Melissa Koeppel and JB), Derek Buntain (who as described below asked Bebo and Buono to add additional employees into the covenant calculations to make it appear that ALC was not as close to missing the covenants) and Alan Bell. JB said he doesn't know if Chip Roadman, Jesse Brotz or Mike Spector knew about the inclusion of employee occupants in the covenant calculations.	(Ex. 2117, pp. 1-2 (Division's notes from the Mr. Buono's proffer session in November 2013) (emphasis added).)
At the end of 2008, JB said that he and Bebo had a discussion about how to address ALC's likely inability to meet the Caravita financial covenants in the upcoming quarters and discussed two possibilities. The first was to include employee occupants in the covenant calculations and continue meeting the covenants as a result. In this regard, he said that he and Bebo both reviewed the Caravita lease in detail and concluded that the lease was silent as to whether ALC could include employee occupants in the covenant calculations. The second option was to reopen the negotiations with Ventas regarding the covenants and "take our medicine." JB said that that same day, Bebo talked to Rhinelander and described the two options. JB said that Rhinelander had a discussion with the BOD and then told Bebo that the BOD preferred including employee occupants in the covenant calculations.	(Ex. 2117, p. 1.)
Ex. 40 Caravita portfolio covenants (2/12/2009) JB said that Mel Rhinelander decided what went into the Board meeting package. JB said that Mel probably decided this wasn't needed because Bebo and Mel had already decided on what to do. Bebo, Robin Herbner, Mel and JB were in this meeting together. JB said he told Robin to "remember this" decision.	(Ex. 2122, p. 2 (Division's notes from Mr. Buono's proffer session in March 2014) (emphasis added).)
JB explained that ALC management in its board packages provided the Caravita occupancy numbers both with and without the inclusion of employee occupants because the BOD: (1) asked that information about compliance with the Caravita covenants be presented in board materials as it was provided to Ventas; and (2) wanted to know occupancy information regarding the Caravita properties without the inclusion of employee occupants so that it could sensibly compare the performance of the Caravita properties to other ALC properties.	(Ex. 2117, p. 2.)

[11] Ms. Bebo objected to the admission of the entirety of the Division's proffer notes and memoranda. But because the Court admitted the exhibits in full, and they have bearing on the weight of the Division's assertions and the testimony of its witnesses, Ms. Bebo has cited to them, without waiving her objection.

Passage from the Division's Proffer Notes with John Buono[11]	Citation
ALC 92021 Email from Buono to Malen Ng re occupancy percentage changes (11/5/2009) JB doesn't recall Melissa commenting on the covenant discussion. JB said he thinks that Melissa would have made the Board or Malen aware that GT knew about the covenant issues and asked for comment. JB said that Eric never saw the occupancy recon, number of people or occupancy certification. JB said he's not aware that Bebo told Eric about the increase in employee stays. JB said that nobody told the Board specifically how many employees were being added.	(Ex. 2122, p. 5 (emphasis added).)
Regarding ALC00000049 (Audit Committee Meeting for 11/6/2009: JB said that he gave a Powerpoint presentation at this meeting where he had a column describing the covenant requirements and another column containing the occupancy at the properties. JB said that at that meeting, Buntain suggested that ALC include additional employees as occupants of the properties because it appeared as if ALC was close to missing the covenant requirements. JB said Buntain also said that: "we should have a cushion in there." Bebo replied to Buntain that she knew of additional employees that stayed at the properties but didn't include them in the covenant calculations because they were not necessary to meet the covenant requirements.	(Ex. 2117, p. 6.)
ALC00000095 Audit Committee minutes (5/2/2011) JB said he had no part in Henselin's discussion of proposed changes to accounting for leases (pg. 4). JB said that Jeff Robinson did discuss that it would be better if there were actually paying customers at the properties. JB said that Mel and Alan knew long before this about the employee adds. JB also thinks that Melissa talked about the employee adds at an audit meeting too.	(Ex. 2122, p. 7 (emphasis added).)
Ex. 331 and Ex. 491 Response to SEC Comment letter JB said that this issue was discussed at the Board meeting in Toronto in August. People present were JB, Bebo, Alan, Mel, Malen and maybe David and Derek. JB said that Alan was lead. JB said that the Board was convinced by Bebo that occupancy wouldn't fail. JB recalls that Bebo told the Board that ALC was good on the employee leasing, that we would have enough going forward to keep it going. JB said he doesn't recall discussing the amount of employees involved. He recalls the conversation was more along the lines of do we have enough employees and are we confident that the [employee leasing program] will continue. NEED TO TALK WITH SCOTT ABOUT THIS ENTRY.	(Ex. 2122, p. 8 (emphasis added).)
Regarding the March 6, 2012 CNG meeting: Subsequently, Derek Buntain came to JB's office and requested an in person meeting with him in a conference room. Hennigar, Alan Bell and Mike Spector also attended the meeting. JB said that Buntain referred to the memo and asked JB for additional explanation. JB said that after he started discussing the proposal, the others in the meeting "looked at him as if he had four heads" and asked when ALC had begun including employee occupants in the covenant calculations. JB said the other people in the meeting, despite knowing that employee occupants had been included in the covenant calculations, feigned ignorance and suggested that they never knew as such. JB said that he was bewildered because the inclusion of employee occupants in the covenant calculations had been discussed in board meetings including by Grant Thornton. JB said he asked himself: "has everyone got amnesia?" After the discussion, the directors dismissed JB from the room and told him not to talk to Bebo. A short time later, they met with Bebo. JB said that he was upset after the meeting and subsequently spoke to Ng. JB said that he told Ng that it appeared that the directors were suffering from amnesia regarding the inclusion of employee occupants in the covenant calculations and that Ng responded: "we knew about the employee leasing plan."	(Ex. 2117, pp. 4-5.)

Despite all of the contradictory testimony, and the indications from its own interviews that the employee leasing program was not concealed from the Board, the Division sticks to its predetermined narrative:

False Narrative	Explanation
"Even Buono testified that, prior to March 2012, there was only a single reference to employees being included in the covenant calculations made a board meeting (by Buono, not Bebo, in August 2011), and that no details or specifics were given regarding the practice." (Div. Br. at 36.)	First, contrary to the Division's assertion, Mr. Buono made statements about employee leasing being discussed at two different Board meetings. One statement dealt with Mr. Buntain's comment about adding a cushion of employees to ALC's calculations. Mr. Buono also testified that employee leasing was discussed at the August 2011 Board meeting. (Buono, Tr. 4628-33.) And to be clear that it was two different meetings, Mr. Buono testified that he believed Mr. Buntain "was aware that [employees] were being used in the calculations, based on his comment made at the -- at a *different* board meeting." (Buono, Tr. 4628-34 (emphasis added).)
"Buono likewise testified the board did not approve the inclusion of employees in the covenant calculations." (Div. Br. at 16.)	As discussed elsewhere in this brief, the Division's statement ignores an abundance of evidence indicating that Mr. Buono believed the Board approved the program. (*See* Resp't Br. at 8-26, 97-99.)
"On April 4, 2012, Bell sent the other directors an e-mail informing them that ALC had recently received license revocation notices for three of the Ventas facilities. Bell attached a memo to his email in which he wrote: 'Highly unlikely that Feb. 4/09 Bebo email re employees is a legal basis for inclusion of the employees to meet their residence occupancy/income covenants in the leases'. . . . When Bebo received Bell's memo, she asked him to withdraw these two conclusions, but Bell refused." (PHB, p. 40.)	The Division's Post-Hearing Brief fails to account for others who disagreed with Mr. Bell's memo. For example, Mr. Buono also disagreed with the memo (Buono Tr. 2717-18.; Ex. 1156A (Buono's draft resignation letter discussing certain actions and inactions by the Board, and more specifically, mentioning that "On May 2, 2012 I requested via email that the Board clarify its position involving inconsistencies in a written document by a member of the Board and past practices conducted by the Board."); Zak Kowalczyk, Tr. 4392-93 (Buono disagreed); *see also* Robinson, Tr. 3449-50 (Mr. Robinson was surprised by tenor of Bell memo).) In fact, Mr. Buono asked Mr. Bell to retract this memo, which Mr. Bell would not do. (Buono, Tr. 2427.) Mr. Buono only ultimately signed the 10-Q because he "believed at the time that all of the directors did not share Alan's opinion based on the conversation with them." (Buono, Tr. 2427-28.)
"Despite her uncorroborated account	Mr. Buntain's "cushion" comment demonstrates the

False Narrative	Explanation
of what she told the board, Bebo concedes she never told the board ALC would fail the covenants without including employees . . ." (Div. Br. at 37.)	Board knew this based on what Ms. Bebo told them, corroborating her testimony. (*See* Resp't Br. at 120-23 (citing evidence).) In addition, Grant Thornton told the Board/Audit Committee that ALC would fail the covenants without including employees. (Robinson, Tr. 3514.)
"While Bebo admitted to the committee [at the March 6, 2012 CNG committee meeting] that ALC was using employees in the calculations, she failed to reveal key aspects of the practice, such as ALC's inclusion of: (1) employees who were not staying at the properties; (2) her friends and family members; and (3) employees at multiple properties during the same time period. Indeed, Bebo would never disclose to the board any of these facets of her scheme." (Div. Br. at 38).	Putting aside all the evidence that corroborates Ms. Bebo's account of fully informing Board members on numerous occasions, other evidence shows that, in 2012, the Board was made aware of several of these details. (Ex. 329, pp. 14-16). For example, Mr. Buono e-mailed Mr. Bell, with Ms. Bebo cc'd, lists of employees that included Ms. Bebo's family members (who they knew) and individuals staying at multiple properties at the same time—thus making it impossible to conclude that employees were actually living or staying at these properties. (*Id.*)

(b) Ms. Bebo did not seek to conceal the employee leasing program from others, including Grant Thornton and Ventas.

Not only does the Division insist that the Board was unaware of the employee leasing program, but it continues to maintain, despite evidence to the contrary, that Ms. Bebo sought to conceal ALC's inclusion of employees in the covenant calculations as well. But the Division's assertions of concealment lack context and lack support in the record.

False Narrative	Explanation
"Moreover, Bebo's representation letter in connection with Grant Thornton's audit of ALC's 2011 financial statements represented that Bebo had no knowledge of any	Mr. Grochowski testified that when he discussed his concerns about the covenant calculations with Ms. Bebo, he did not allege that anyone was committing fraud. (Grochowski, Tr. 1190-91).[12]

[12] Page 21 of the Respondent's Post-Hearing Brief cites this material as "Grochowski, Tr. 119-91" when it should be "Grochowski, Tr. 1190-91," as it is in this brief.

False Narrative	Explanation
allegations of fraud or suspected fraud by any ALC employee. Bebo either knew, or should have known, that this statement was false and misleading, given that Grochowski had earlier confronted Bebo with concerns that the inclusion of employees in the Ventas covenant calculations was inappropriate." (Div. Br. at 54.)	
"Bebo also claims various attorneys either approved or knew about nearly every aspect of her conduct in connection with ALC's covenant calculation practices. ALC's in-house lawyers, Fonstad and Zak, and Quarles attorney Bruce Davidson, each testified that they never approved, or were made aware of, the inclusion of employees in the covenant calculations prior to March 2012." (Div. Br. at 44; *see also id.* at 36.)	The Division's statement is misleading in several respects. As has already been mentioned, Mr. Fonstad approved this process. (Buono, Tr. 4651-53.) Also, there is substantial evidence that Ms. Zak was aware of the inclusion of employees in the covenant calculations. (*See* Resp't Br. at 18-20.)
"Bebo made similar efforts to limit Grant Thornton from conducting its own periodic visits of the Ventas facilities. Specifically, in October 2009, when Bebo learned Grant Thornton wanted to visit certain Ventas facilities in the course of its audit, Bebo directed her staff that Grant Thornton could not visit the Ventas facilities for the remainder of 2009." (PHB, p. 34) *See* page 4164	The Court can draw no inference of deception because ALC and Ms. Bebo did not resist Grant Thornton visiting the CaraVita Facilities the following year, while the employee leasing program was still occurring to the same extent. (Bebo, Tr. 2095; Koeppel, Tr. 3338-40.) And the undisputed evidence shows the reason ALC resisted these visits in 2009 was to prevent additional operational disruption at the facilities. Ms. Bebo testified that she spoke to Ms. Koeppel with regard to "the fact that there were so many challenges going on in the southeast and that [ALC] would like to have some time to calm those things down or get things back on track and they could go in the future. . . ." (Bebo, Tr. 2098; *see also* Koeppel, Tr. 3338-39.) Ms. Bebo's explanation is corroborated by the Division's 2014 notes from its proffer meeting with Mr. Buono, which state: Ex. 143 (10/6/2009) and Ex. 146 2009 Auditor Site Visit (10/9/2009) JB said that Bebo didn't want GT to visit any of

False Narrative	Explanation
	the properties. JB told her that ALC had to let them visit as they had a duty as part of the audit. JB said that Hokeness was in on these conversations. *JB said that Bebo told him that she didn't want GT disrupting the staff at any of ALC's properties.* JB said that Hokeness talked with GT and asked them not to make a visit, and GT said "okay" and didn't go. (Ex. 2122, p. 4 (Division's notes from Mr. Buono's proffer session in March 2014) (emphasis added).)
"Bebo also told Buono that Ventas could not conduct the site visits during meal times, because Ventas would realize the number of residents in the dining room was inconsistent with ALC's reported occupancy figures." (Div. Br. at 34.)	Documents and testimony from Ventas personnel demonstrate Ms. Bebo was willing to permit visits during mealtimes and that Ventas never even attempted to conduct head counts on site visits. (*See* Ex. 1389 (August 2009 e-mail chain where Ms. Bebo confirms that Ventas' CEO can visit a CaraVita property between 12:00 p.m. to 5:00 p.m.); Ex. 1505 (e-mail chain indicating that Ms. Bebo suggested Ventas visiting at 9 a.m., for a visit that would likely last into lunchtime); Doman, Tr. 200 (average time for a site visit varies, "but in general, [Ventas] like[s] to spend at least a couple hours on each property"); *see also* (Butora, Tr. 946-47 (Ventas employee testified that Ventas did not count heads or check rooms for occupants during site visits nor did Ventas intend to do these things).)
"Likewise, Bebo admitted instructing Jared Houck, who oversaw the operations of the Ventas facilities, to remove the placards containing the names of residents which hung outside of the residents' rooms at one facility. This prevented Ventas from counting the number of occupied rooms." (Div. Br. at 34.)	Again, the Division attempts to overstate this event, without any factual support. Mr. Houck, the only Division witness to testify about this, never tied the issue of removing nametags to a Ventas site visit. (*See* Houck, Tr. 1476, 1496.) That he did is simply a fabrication by the Division. And as noted above, Ventas did not count the number of occupied rooms when it visited. Ms. Bebo's uncontradicted testimony was that removal of the nametags at one of the CaraVita Facilities was unrelated to a Ventas visit. It also occurred at another ALC facility, and related to resident medical privacy concerns. (Bebo, Tr. 4154-56.)
"Bebo also directed Buono not to inform Ventas that employees were being included in the covenant calculations, and to provide Ventas	The Division consistently emphasizes an alleged directive that Ms. Bebo gave not to disclose ALC's use of employees, but, in turn, wholly ignores Mr. Buono's testimony and prior statements that precisely track

False Narrative	Explanation
with calculations that included the employees and their associated revenue." (Div. Br. at 18.) "Bebo gave Herbner a directive similar to the one she gave Buono: do not disclose to Ventas ALC's use of employees in the covenant calculations." (Div. Br. at 20.)	Ms. Bebo's testimony. Mr. Buono stated that Ventas did not want information to be broken out. The Division's 2013 proffer notes with Mr. Buono state: JB suggested that ALC provided the quarterly covenant information to Ventas in the form that Ventas had requested and that the number of employee occupants included in the covenant calculations was not provided as part of the quarterly covenant information because "Ventas did not want the detail." (Ex. 2117, p. 2 (Division's notes from Mr. Buono's proffer session in November 2013) (emphasis added).) At the hearing Mr. Buono clarified that "what I meant by that was they didn't want to know -- we didn't want to break out what was employees and what was non-employees. . . They only wanted it in their form, and we gave it to them in their form. I don't recall what exactly I was referring to when I said, 'They did not want the detail.' They didn't want a lot of detail." (Buono Tr. 4656.) Mr. Buono's statements are consistent with Ms. Bebo's testimony that she and Mr. Buono explained to Ms. Herbner how Mr. Solari told them on the phone call that Ventas did not want rentals related to employees separately broken out. (Bebo, Tr. 2087-90.) And when asked point-blank at the hearing why she did not tell Ventas that ALC was including employees in the covenant calculations, Ms. Herbner said, "they [Ventas] didn't ask" and she was told it was an approved process. (Herbner, Tr. 832-33.)[13] Ms. Bebo was only seeking to adhere to Ventas' form, a desire that Ventas indicated to ALC and a desire that was known to John Buono. The Division's spin of Ventas' wishes should be disregarded.
With regard to the sale of ALC, "[f]or this reason, Bebo instructed ALC's investment bank to prohibit	This statement is wholly unsupported by the record, including the specific e-mails upon which the Division relies. (Resp't Br. at 139-41.) Ms. Bebo did not instruct

[13] Ms. Herbner also acknowledged that Ms. Bebo never instructed her to withhold information from ALC's auditors. (Herbner, Tr. 873.) Similarly, Mr. Schelfout testified he was never instructed not to discuss the employee leasing arrangement with Ventas, Grant Thornton, or the Board. (Schelfout, Tr. 1072-73.)

False Narrative	Explanation
Ventas from accessing the occupancy materials made available to the other due diligence participants." (Div. Br. at 34-35.)	the investment bank; she left the final decision to Mel Rhinelander, head of ALC's Special Committee. (*See* Ex. 3714 (Ms. Bebo's e-mail to Citibank, which stated "Mel and I had an opportunity to talk earlier and we agreed that it is our preference not to send the facility listing with occupancy numbers in this early round if we don't have to . . . Mel and I do not want the individual facility listing and occupancy sent to Ventas at this time. *This is something Mel may choose to do in the future if we get further down a particular path.*") (emphasis added); Ex. 292 (the e-mail the Division cites, where Ms. Bebo states, "[t]his is the attachment that lists the individual facilities and their respective occupancy. Please maintain this separately and *do not release it to Ventas without Mel's specific permission.*") (emphasis added). Mr. Rhinelander acknowledged, as Ms. Bebo's e-mails to Citibank state, that he was the ultimate decision-maker with respect to whether Ventas or any other bidder could have access to occupancy information in the data room. (Rhinelander, Tr. 2905, 2911, 2914.) Also, the Division omitted Mr. Buono's statements to the Division during proffer sessions that again support Ms. Bebo's testimony and are contrary to the Division's mischaracterizations of the record: > On the marketing of ALC: JB said he worked with Mel to decide what would be in the data room and who had access. JB said he and Mel had a conversation on whether to give the investment bankers the occupancy figures. Ventas was not given access to the data room. JB said that the employee leases in the Ventas entities, 997 revenue, were in the data room. JB said that Bebo expressed concern about giving any competitors access to the data room, and Ventas was one of the competitors. (Ex. 2122, p. 8 (Division's notes from Mr. Buono's proffer session in March 2014).)
"Over Bebo's objection, the directors insisted that any settlement with Ventas contain a specific release relating to the inclusion of	The Division ignores the fact that both internal counsel and external counsel agreed with Ms. Bebo's decision to omit this language. A Quarles & Brady letter addressed to Ms. Bebo stating: "You asked us to review a proposed

False Narrative	Explanation
employees in the covenant calculations." (Div. Br. at 40; *see also* Div. Br. at 35 discussing Bell's letter with regard to this issue)	letter to Ventas Properties conveying certain proposals regarding the various Ventas facilities. Included in the proposed letter is a sentence stating that ALC 'has placed employees in the facilities to meet the occupancy thresholds.' *In our view, this language should be deleted from the letter for the reasons discussed below.*" (Exs. 1068, 1068A (emphasis added).); *see also* Zak-Kowalczyk, Tr. 4390-91 (in-house counsel for ALC reviewed the letter and agreed with Quarles' advice to remove this language).)
"Bebo's [May 3/4 notes set forth in Ex. 354] acknowledged: 'we are off-side on the covenants and we are facing a material financial impact.'" (Div. Br. at 42; *see also* Div. Br. at 49 n.24.)	Through its quotation of the notes, the Division conflates the default and Ventas lawsuit based on the licensing revocation issues with a default under the financial covenants. The only testimony on this issue establishes that the notes refer to the lawsuit and license revocation problems, which ALC's outside counsel determined were insurmountable in the litigation. (Bebo, Tr. 2229; Ex. 1051; *see also* Appendix.) As Ms. Bebo's expert explained, conflating the two types of defaults for purposes of assessing the potential financial impact on a company is "a bait and switch." (Smith, Tr. 3662-63.) He explained that this thinking is "empirically incorrect" and "we do have substantial evidence that in the wake of a financial covenant violation, lenders do not pursue remedies like acceleration, forcing into bankruptcy, foreclosing." (*Id.* at 3661; *see also id.* at 3634-35.)

3. The employee leasing process.

In the Division's version of events, Ms. Bebo manipulated employees, including Mr. Buono, to advance the employee leasing "scheme." But to make that argument, you have to ignore the transparent process that Mr. Buono's staff performed on a monthly and quarterly basis, with little involvement by Ms. Bebo. You would have to ignore the fact that Mr. Buono or his staff did check, remove, and add names on the lists, as Ms. Bebo believed. You would have to ignore the fact that Mr. Buono himself testified that the manner in which the revenue related to

the employees was recorded got to the same result required under GAAP. And because the Division wants to make this argument, it ignores this evidence and sticks to its predetermined narrative.

False Narrative	Explanation
ALC's accounting staff calculated the number of employee-related rooms and revenue after the quarter ended in all instances: "Herbner also performed the covenant calculations for the first and second quarters of 2009, again doing so after the quarter had ended" (Div. Br. at 20), and "[t]he process always took place after the end of the quarter at issue, and Bebo understood this to be the case" (Div. Br. at 20, n.8.).	In the middle of 2009, ALC accounting staff conducted monthly calculations and allocated corporate rooms and corporate revenue on a monthly basis. Indeed, the *monthly* journal entries establish this. Moreover, Division witness, Mr. Schelfout, testified: Q And ALC booked revenue at the CaraVita facilities based on journal entries that included revenue for rooms designated for employee use? A Yes. Q ALC booked revenue for employee rooms even if Mr. Buono or someone else had not yet provided the identity of the individual who would be deemed the occupant? A Yes. The revenue entry was performed monthly. (Schelfout, Tr. 1041-42; *see also* Tr. 974-75.) Ms. Herbner also testified that the accounting staff changed from conducting the calculations on a quarterly basis to a monthly basis. (Herbner, Tr. 831-32.) There is no indication that this change was made with Ms. Bebo's input or involvement. Consequently, the calculations and corporate set-asides were done on a monthly basis, although Ms. Bebo participated in providing names after the end of the quarter. (*Id.*)
"Buono and his staff did not perform a substantive review of the list of names or otherwise review the list for accuracy." (Div. Br. at 27-28.)	The Division's statement is not only contradicted by documentary evidence in which Mr. Buono stated that he wanted to review the lists, it is also rebutted by the Division's own brief. In an April 29, 2011 e-mail, Mr. Buono stated to Ms. Bebo: "We need to do the Cara Vita Allocation (*I want to review names*)." (Ex. 1473 (emphasis added).) The Division stated in its brief: "On occasion, Grochowski crossed out the names of employees who no longer worked at ALC, knowing that this made Bebo's job more difficult because she would have to come up with substitute employees. (Tr. 1124:8-1125:24)." (Div.

False Narrative	Explanation
	Br. at 24.) The fact that Mr. Grochowski would on occasion cross out names of former employees directly supports Ms. Bebo's testimony that she believed the lists were being reviewed, since she saw names were being crossed out. (*See* Bebo, Tr. 4091-95, 4123-25.) Mr. Buono also acknowledged he removed names and indicated that names should be replaced, as indicated in his proffer notes: ALC00177131 (7/31/2011) - JB said he wrote the word "replace" and "add 2 or 3." JB said he knew Kristen Cherry and she left July 1, 2011. JB said he looked more closely at list than the earlier ones. (Ex. 2122, p. 9, March 2014 proffer session.) *Regarding ALC00115165*: JB said that the list of employee occupants included in the covenant calculations "got sloppy." JB said he didn't focus on the names of the employees Bebo supplied. JB said that Bebo always provided the names of employee occupants to be added into the *covenant calculations but that names were sometimes removed from the list without consulting with Bebo*. JB said that Bebo each quarter was provided with and approved of the final list of names of employee occupants that were included in the covenant calculations. (Ex. 2117, p. 3, November 2013 proffer session, (emphasis added).) Finally, Jason Dengel's credible testimony about a meeting between Mr. Buono and Ms. Bebo confirms the accuracy of Ms. Bebo's testimony and Mr. Buono's prior statements. During this meeting, Mr. Buono stated he believed the list being discussed was "correct and current," and it was stated that the list was meant to represent people with a reason to go, and was "supposed to be audited by our internal accounting department." (Resp't Br. at 105 (citing Dengel, Tr. 3912-13).)
"Bebo then determined the names of the employees to be included in the calculations." (Div. Br. at 24; *see also id.* at 27, n.4 ("Bebo claims she did not always select the names, but	The Division ignores the evidence, documentary and otherwise, that others at ALC added and removed names from the occupancy reconciliations. (Ex. 1374 (May 5, 2009 e-mail from Mr. Buono to Ms. Bebo, where he wrote: "We needed 7 more names for Winterville. *We*

False Narrative	Explanation
concedes she typically did. No other witnesses testified that anyone but Bebo selected the names."), 50.)	*have filled in* 4 with regional or above people (Io, Paula, Jared, and KB).") (emphasis added); Ex. 2122, pp. 2, 5 (the Division's proffer notes state: "JB said he probably didn't go back to Bebo to get a name for one person. *He said he probably added the person himself.* JB said he might have asked Mark (Mark Hall?) if he was at both places."), Ex. 2122, p. 6 ("JB said he probably moved one or two employees on his own. . ."); *see also* Buono Tr. 2775-76, 4661-62; Ex. 2117, p. 3.)
"After receiving Grant Thornton's inquiry, Buono sent Bebo an email asking her for a list of names to provide to Grant Thornton because Bebo was the person at ALC who knew which employees were staying at the facilities. In that email, Buono referenced: 'employees *staying* at the house' and 'employees *living* at our residences' and employees 'that were at' buildings." (Div. Br. at 18.)	In that same e-mail, Mr. Buono stated he and his staff "filled in 4 [rooms] with regional or above people (Io, Paula, Jared, and KB)." He also wrote: "As you know, these four are doubled up which really did not overly concern you since they were at both buildings . . .." (Ex. 203). Obviously, Mr. Buono's decision to include employees who were doubled-up precludes any argument that Mr. Buono thought these individuals were staying, living, or otherwise at both properties for the full times they were listed.
The employee lists contained "Her parents, who Bebo listed under her mother's maiden name." (Div. Br. at 28.)	Ms. Bebo did not list her parents under her maiden name. Rather, in an e-mail to Mr. Buono and Ms. Herbner, she wrote: "Also, you can put my mom and dad in at Peach Tree -- Gale and Bill Bebo." (Ex. 1378.) Ms. Herbner listed Ms. Bebo's parents under her mother's maiden name. (Herbner, Tr. 852-54.) In her investigative testimony, Ms. Herbner could not recall why Ms. Bebo's parents were listed with her mother's maiden name. (Herbner, Tr. 853-54.) After meeting with the Division following her investigative testimony, her testimony changed. (*Id.*) At the hearing she recalled a conversation with Ms. Bebo prior to the e-mail where Ms. Bebo told her to use Peremsky. (*Id.* at 852-53.) This makes no sense in light of the e-mail, and either way the e-mail demonstrates Ms. Bebo was comfortable with having her parents listed under her own last name.
"[I]ndividuals [that did not stay at the CaraVita Facilities] conservatively constituted well over half of the 'employees' Bebo included in the calculations." (Div.	The Division relies upon its "summary" exhibit 552A and testimony describing the same, but that exhibit does not support this statement. First, it is based on the false premise that the occupancy reconciliations were intended to record actual nights stayed at the CaraVita Facilities. This is incorrect. (Rep't Br. at 103-06.) One of the

False Narrative	Explanation
Br. at 32.)	largest categories of employees being "excluded" are those being listed at multiple facilities. Of course it would be common for employees to travel to or stay at multiple facilities when visiting the CaraVita Facilities located in the Southeast region (*See* Ex. 3507), and need rooms at multiple facilities during the same quarter. Second, another large category of "excluded" employees is based on those that were purportedly outside their period of employment. This is flawed as well, because (a) ALC's employment data was in accurate. (Natarajan, Tr. 504-05 (claiming the data was only 80 to 85 percent accurate); Renardo, Tr. 2270-73 (explaining Ex. 552A differs from 552 because she had been shown e-mails sent by employees that ALC's data indicated were not employed at the time); and (b) new employees with similar job duties and responsibilities would presumably take the place of those who left ALC's employ. Those same duties and responsibilities would give them reason to travel to the CaraVita Facilities. Ms. Bebo does not have the data to determine travel by ALC employees not included on the occupancy reconciliations. In the end, this category reflects only there were mistakes made at ALC with maintaining the lists from quarter-to-quarter immaterial to the calculations. Combined, these two categories constitute approximately half of the excluded employees. Finally, as the Court recognized at the hearing in a question to the Division's lawyer: [The Court] I'm not entirely clear on what the significance of this exhibit is.... Let's suppose that I accept Ms. Bebo's testimony that the understanding with Ventas was that pretty much anybody with a reason to go to the facilities could be counted in the covenant calculations. If that's the case, then it doesn't really matter how many employees were disallowed [because they did not stay]; would you agree with me? [Counsel]: This analysis was as to employees staying at facilities. (Tr. 2274.)
"Once Herbner resigned, Schelfout	The Division disregarded the fact that Mr. Schelfout

False Narrative	Explanation
began looking for a new job due to his discomfort." (Div. Br. at 22.)	testified that he began looking for a new job in 2008, prior to the time the employee leasing program was adopted at ALC. (Schelfout, Tr. 1062.) Also, the Division disregards Mr. Buono's prior statements contained in the proffer notes, which state: End of 2010 JB said that the reason that Sean gave him for leaving ALC was that he just couldn't work with some people around here (Sean didn't include JB in that). JB doesn't recall telling Sean to "CYA." (Ex. 2122, p. 6, March 2014 Division proffer notes.) There is no evidence that Ms. Herbner or Mr. Schelfout ever indicated to Ms. Bebo they were leaving ALC because of this issue or raised any concerns about it to Ms. Bebo.
After Ms. Bebo allowed Mr. Grochowski to stop performing employee leasing actions, the Division wrote "Bebo then assigned Buono to perform the calculations himself, and thereafter Buono was responsible for preparing the Occupancy Recons." (Div. Br. at 25.)	The Division's attempt to characterize Ms. Bebo as assigning Mr. Buono the employee leasing responsibilities is false. Mr. Buono simply assumed these responsibilities. (Grochowski, Tr. 1162 ("John said, no hard feelings, just more work for me"; "John Buono was going to do the calculations himself.") Mr. Buono also testified that those duties fell to him. (Buono, Tr. 2376-77 ("I then, being the only person who probably could take it from there, took over the calculation process.") Finally, the Division's 2014 proffer notes indicate: "JB said he also told Bebo he would do Dan's Job." (Ex. 2122, p. 9.)
"None of this was disclosed to Ventas, which caused great discomfort to the ALC accounting personnel who performed the covenant calculations. Indeed, each of these accounting witnesses either directly confronted Bebo with their concerns, or quit working at ALC so they would no longer be involved in the process." (Div. Br. at 2)	The Division attempts to create the inference that several individuals confronted Ms. Bebo about employee leasing and ultimately quit because of the practice; however, such an inference is not supported by the record or is rejected by Mr. Buono. Only Mr. Grochowski directly confronted Ms. Bebo, and he never alleged anyone at ALC was committing fraud. (Grochowski, Tr. 1191.) Based on the conversation with Mr. Grochowski, Ms. Bebo understood that Mr. Ferreri was uncomfortable with the journal entry process, but when she discussed the matter with him he indicated he was fine with the process as long as Mr. Buono or Ms. Bebo signed off on the journal entries. (Bebo, Tr. 4189-90; Ferreri, Tr. 1255-56 (did not testify he directly raised concerns with

False Narrative	Explanation
	Ms. Bebo).) Additionally, Mr. Buono confirmed that no one knew that employees left because of their dissatisfaction with employee leasing (Buono, Tr. 2746 (Ms. Herbner did "not mention ... to [him] that one of her reasons for leaving was that she was uncomfortable with the CaraVita lease covenant calculations"); Buono, Tr. 2775 (neither Ms. Herbner nor Mr. Schelfout came to Mr. Buono to say they were uncomfortable with employee leasing); Ex. 2117, p. 3; Ex. 2122, p. 6 (Division's notes of Mr. Buono proffer, which state "JB said that the reason Sean gave him for leaving ALC was that he just couldn't work with some people around [ALC].").)
"Following the [November 2011] meeting, Bebo awarded Grochowski a $35,000 'stay-on' bonus. Only two other ALC employees received 'stay-on' bonuses, and each received $8,000." (Div. Br. at 25.)	The CNG committee was responsible for awarding the bonuses to try and retain key personnel during the process of selling ALC, not Ms. Bebo. (Bebo, Tr. 3841-42; 4192-93.) Ms. Bebo and Mr. Rhinelander sought retention or "stay-on" bonuses for approximately 100 employees. (Bebo, Tr. 3841-42.) Consequently, Ms. Bebo did not "award" the bonus, although she certainly agreed with it and helped obtain the bonus for Mr. Grochowski. (Bebo, Tr. 4192-93.) Not only is the Division's statement inaccurate, but Ms. Bebo's treatment of Mr. Grochowski contradicts the Division's other false narrative and molded testimony from the other ALC accounting personnel to the effect that they never expressed any concerns to Ms. Bebo for fear of reprisals.
"Bebo admits Buono made the 'I don't look good in stripes" comment in connection with the inclusion of employees in the covenant calculations." (Div. Br. at 31.)	The Division's statement is a perfect example of the gamesmanship that has no place in this action. Ms. Bebo *actually testified* that she could not recall a specific time that Mr. Buono used that type of sarcastic language, but did recall that he may have made that type of comment in "prodding" her to quickly provide names to him so that he could, in turn, provide them to Grant Thornton. (Bebo, Tr. 4126) She specifically testified he never made a comment like this "*related to the names on the list . . .*"
"Bebo offered no evidence (expert testimony or otherwise) to show that recording revenues associated with	The Division ignores Mr. Buono's responses *to the Court's own questions* about GAAP compliance. Mr. Buono directly contradicted the key finding of the

False Narrative	Explanation
the included employees was consistent with GAAP." (Div. Br. at 27.)	Division's expert with respect to his opinion about GAAP compliance. He testified that using negative revenue was simply a shortcut that was not improper under GAAP. (Buono, Tr. 2771-72.)

4. The sale of ALC and the valuation of the CaraVita Facilities.

The Division has been forced to find a material harm where none exists, and tries to use events surrounding the sale of the company to suggest that not even Ms. Bebo believed in the agreement. But because Ms. Bebo maintained then, as she does now, that the agreement and the employee leasing program were legitimate, the Division has stuck to its predetermined narrative by citing facts out of context, without regard to their completeness, to suit its needs.

False Narrative	Explanation
"Bebo herself believed that neither ALC's buyer nor Ventas would credit her purported agreement with Solari." (Div. Br. at 35.)	The Division again mischaracterizes Ms. Bebo's testimony and cites the record in a highly selective fashion. Any reasonable review of the record demonstrates that Ms. Bebo consistently testified that she and others at ALC believed the February 4 e-mail to Ventas and Ventas' multiple responses was sufficient evidence of an agreement. It would certainly be defensible if Ventas later questioned the practice, particularly considering the participants in the call (except for Mr. Fonstad) still worked for ALC. Ms. Bebo's concern was not that a buyer would not recognize the legitimacy of the employee leasing agreement or the Solari e-mail; Ms. Bebo testified that a buyer may not have the same comfort level as ALC since Ms. Bebo and Mr. Buono would not be around after it purchased ALC. (Bebo, Tr. 2127-28.) The Division intentionally omitted from the citation in its brief Ms. Bebo's testimony restating this and also confirming that two bidders did recognize the agreement -- citing testimony on both sides of the following passage: Q Okay. And at the time, you were unsure whether a buyer of ALC would recognize the inclusion of employees in the covenant

False Narrative	Explanation
	calculations because that agreement wasn't spelled out in the Ventas lease. A. No. As I said before, no, that's not correct. I happen to know that the two final bidders that we had gone over all this with, explained these things to, did recognize it. An in fact, as I -- you know, as I had thought, that they recognized it as a reasonable practice, but also realized that, again, some of these players, as you've read into the record already, these players that can testify to the call and the discussions with Solari, et cetera, may not be there. And so given that, then the new buyer is perhaps going to be interested in coming to some agreed-upon terms with Ventas, just as we did. (Bebo, Tr. 2131-32.) Moreover, there is a stark difference between not recognizing the agreement as the Division claims and a buyer, who wants no loose ends, recognizing that not having the participants to the call—where the understanding was reached—may create additional risk for the buyer.
"Bell advised that ALC inform its potential purchasers of the $2 million of negative revenue recorded in the 997 account. Bebo responded by advocating that ALC not make such a disclosure. . . Rhinelander overruled Bebo, and made Bell's recommended disclosure." (Div. Br. at 39.)	This was addressed in Respondent's Post-Hearing Brief at pages 25-26. Contrary to the Division's assertion, management actually *included* more specific language about employee leasing to be disclosed and Mr. Bell made the decision to remove it. (Exs., 1594, 1594A, 325.)
"ALC ultimately paid $100 million to settle the litigation and purchase the facilities (and four others), even though independent appraisals only valued the purchased facilities at $62.8 million." (Div. Br. at 42.)	The Board concluded that the purchase price was within market value and Ventas concluded that the buildings were worth what ALC paid Ventas. (Doman, Tr. 366; Ex. 1093, p. 2.) It was in ALC's interest to obtain the lowest appraisals as possible, which it did. (Resp't Br. at 152-56.)
"Various witnesses testified ALC purchased the properties for significantly more than fair value."	For this statement, the Division relies on the improper "valuation" testimony of two ALC directors who have no valuation expertise and provided no basis for their

False Narrative	Explanation
(Div. Br. at 43.)	conclusions that ALC paid more than market value. Moreover, the Division's statement, and Mr. Bell's testimony upon which it relies, is contrary to the Board minutes discussed above, *which Mr. Bell himself prepared.* (Ex. 1093, p. 4.)[14]

III. In Contrast to the Consistent Testimony of Ms. Bebo, Many of the Division's Witnesses Lack Credibility.

As outlined in Ms. Bebo's Post-Hearing Brief, the testimony of the Division's own witnesses often does not support its case. But when it does, the witnesses also often suffer from a lack of credibility. (*See, e.g.*, Resp't Br. at 244, n.71; Buntain, Tr. 1437-40 (Mr. Buntain admits signing false declaration); Zak-Kowalczyk, Tr. 4374-76 (ALC counsel; on direct testified not involved at all in preparation of SEC comment letter response; when confronted with email attaching revisions on cross-examination, admits she edited response); *compare* Doman, Tr. 384-86 (motion for expedited discovery related to occupancy calculations) *with* Ex. 357 (motion for expedited discovery refers to license-related issues, including patient care).) And other times, the Division's witnesses contradict each other. (*Compare* Bell, Tr. 573-74 (alternative comment letter response never discussed with Board) *with* Buono, Tr. 2693-94, 2383-84 (alternative comment letter response discussed with Board).)[15]

[14] The Division also cites a Grant Thornton memorandum that simply incorporates ALC's internal draft memorandum with respect to the accounting for the acquisition of the CaraVita Facilities and four other properties from Ventas. (Ex. 3369, pp. 3-6.) However, the author of the underlying memorandum, Mr. Lucey, acknowledged that he was mistaken with respect to believing that the lawsuit had anything to do with the financial covenant allegations. (Lucey, Tr. 3742 ("Q: So asking the question again, did Ventas -- are you aware of any allegations that Ventas made in a lawsuit against ALC relating to the inclusion of employees in the covenant calculations? A: I guess I kind of was assuming that was part of it, but now that you reminded me, I understand that it was -- it was the licensing -- the loss of licenses and so forth.").) This is the same mistaken assumption included in his accounting memorandum (Ex. 3369, p. 3) and simply repeated by Grant Thornton's part of the memorandum.

[15] In its brief, the Division implies that the alternative response to the comment letter was not discussed with the Board—"The version of the response letter which ALC filed with the Commission, and was discussed at the board meeting.... However, the alternative version of the letter, which was not disseminated outside of management...." (Div. Br. at 37.) But the Division's own witness—Mr. Buono—contradicts this assertion; he testified on more than

At yet other times, the Division's witnesses' memories got better (for the Division) with time and their testimony was well rehearsed. (*See, e.g.,* Buono, Tr. 2782; Solari, Tr. 416-23 (same answer repeated nearly verbatim ten times); Resp't Br. at 246 (citing testimony).) While Ms. Bebo's testimony remained consistent throughout the fourteen days of combined investigative and hearing testimony, the Division's star witness—John Buono—admittedly changed his story throughout the course of this case.

And other witnesses—including Eric Fonstad, ALC's former general counsel—simply failed to recall just about anything other than scripted answers to the Division's questions. (*See, e.g.,* Resp't Br. at 2, 91-95.) As a striking example, Mr. Fonstad could not remember ALC's TIPS system, or anything about what was discussed in any of ALC's Disclosure Committee meetings that he chaired. Although each of the other four witnesses to the call with Mr. Solari on January 20, 2009 confirmed that Mr. Fonstad was a participant in the call (*see* Bucholtz, Tr. 2939-40 (Ms. Bebo, Mr. Buono, and Mr. Fonstad in Ms. Bebo's office for call with Mr. Solari); Bebo, Tr. 1902; Buono, Tr. 2782 (conceding that he said that Mr. Fonstad was on the call; incredibly maintaining that he now cannot remember if he was there or not); Zaffke, Tr. 3217-18), Mr. Fonstad claims he did not participate in the call with Mr. Solari because he does not remember it. But he does not remember much of anything about his time at ALC, and Mr. Buono confirmed that Mr. Fonstad did not demonstrate having a good memory in the latter stages of his career at ALC (*i.e.* 2009 and 2010). (Buono, Tr. 4666.)

Ms. Bebo's consistency, and the Division witnesses' inconsistency and inability to "recall" much of anything, are telling measures of their credibility that should be given the requisite consideration by the Court.

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one occasion that the alternative was in fact discussed, even if not physically distributed. (Buono, Tr. 2693-94, 2383-84.)

A. Laurie Bebo.

The Division's depiction of Ms. Bebo's credibility in its Post-Hearing Brief is unsupportable. Many instances of the Division's supposed "impeachment" were facially improper and did not constitute impeachment at all. Moreover, in most other instances when the supposed impeachment is considered in the context of the investigative testimony transcripts—context the Division knowingly and improperly excluded—it establishes that Ms. Bebo was not impeached at all. Set forth below are the particularly egregious examples when the Division has mischaracterized the record in its failed attempt to impeach Ms. Bebo. An analysis of the Division's asserted instances of impeachment is attached as the Appendix to this Brief. Given that the Division compelled Ms. Bebo to provide approximately fourty-two hours of testimony in the investigation and had access to two days of testimony in her arbitration proceeding, the fact that the Division had to stretch the record beyond the breaking-point in order to try and impeach her establishes just how consistent and credible she was.[16]

1. Many instances of the Division's "impeachment" were improper and did not constitute impeachment at all.

Attorneys, especially government attorneys, have a duty of candor to the court to not create false impressions and to be factually accurate. (Resp't Br. at 6, n.4.) The Respondent was mindful throughout the hearing of its obligation and tried to make sure there were no misrepresentations to the Court or the Division. For example, during a break, Ms. Bebo informed her counsel that he may have mistakenly created the impression that Dr. Roadman received an e-mail because it was sent to an "_ALC Directors" e-mail list, when, in fact, that list of recipients did not include Dr. Roadman. (Roadman, Tr. 2576-77 (discussing Ex. 2126),

[16] The Division's desperation is revealed by its further tactic of attacking Ms. Bebo's credibility based on some banter she had with a flight attendant during a lengthy airplane delay out on the tarmac. This attempted use of trashy extrinsic evidence of a supposed instance of untruthfulness of a witness would be prohibited by Rule 608(b) of the Federal Rules of Evidence because of the senseless and unreliable side-show that it creates.

2609-11.) After the break, Respondent's attorney clarified the record for Dr. Roadman, the Court and the Division. (Roadman, Tr. 2609-11 (Respondent's counsel stated, "I want to go back to Exhibit 2126 briefly. I just want to clarify one thing. Ms. Bebo advised me during the break that the notation of ALC directors in the 'to' line may not have reflected a list of this e-mail going to all ALC directors, as I think I -- as we had discussed and maybe was implied by my questioning. So I wanted to clarify that and ask you whether that changes your testimony at all, in terms of whether or not you occasionally received the type of reports that is attached in the subsequent pages of 2126. [Dr. Roadman:] I'm not sure I understand your clarification. It looks like I'm on this e-mail. You don't know whether I'm in that list? [Repondent's counsel:] Yes. Ms. Bebo clarified for me that she does not believe that the list 'ALC directors' refers to the board of directors, but refers to some other director level at the company.").)

Unfortunately, the Division's statements in its Post-Hearing Brief about Ms. Bebo's credibility and, more specifically, her impeachment at the hearing, suggest that the Division may not have been as diligent with its obligations to the Court. Many examples of the Division's "impeachment" were not impeachment because the Division took Ms. Bebo's testimony out of context, ignored Ms. Bebo's clarifying testimony in the immediate vicinity of the investigative testimony transcript, gave false impressions or, more generally, presented incomplete pictures of the evidence.

Also, the Division attempted to impeach Ms. Bebo because she used phrases that were employed interchangeably throughout her investigative testimony (*e.g.*, employee leasing, rental of rooms to employees with a reason to go, rental of apartments for individuals, etc.). Ms. Bebo understood these terms to be synonymous, as did the Division when her investigative testimony took place, and did not expect the Division to parse the terms at the hearing. (*See* Ex. 500,

p. 846 (the Division stated to Ms. Bebo, "But this whole practice that we've been talking about today where you put in lists of employees or other folks who you believe had a reason to stay at the CaraVita properties, that was, that, I'm just going to call it *employee lease*, you understand that") (emphasis added).) Ms. Bebo made this point clear at the hearing when she testified.

> Again, I'll repeat that I have been asked these same questions over and over again. For purposes of, I'm sure, partially efficiency, when we were having our discourse in the offices - - in the SEC offices with either you or Mr. Tandy, I did not try to correct him every time he used the wrong language.

(Bebo, Tr. 1913.) Thus, the Division's attempt to impugn Ms. Bebo's credibility based on her use of one term that is synonymous with another was not impeachment and erroneously inflated the number of times Ms. Bebo was "impeached" at the hearing.

Some examples of the Division's attempted impeachment are especially egregious and, when given the proper context, they actually bolster Ms. Bebo's credibility:

Division's Purported Impeachment - First Example:

Q	You never told Mr. Rhinelander that employees were being listed as occupants of multiple properties for the purposes of the Ventas covenant calculations at the same time.
A	During the third quarter 2009 board meeting, we had a discussion about some of the different situations that create flexibility for us with regard to the use of the ALC paid-for apartments. And I believe that during that time frame, as well as in 2011, I believe that that's the August of 2011 board meeting when we talk about the -- we talk about the SEC comment letter. I also discuss some more of the specifics about the practices to make people comfortable with the high confidence level we have of being able to meet the occupancy and financial covenants within the Ventas lease.
Q	And Mr. Rhinelander was at those board meetings?
A	I have to think about that for just one second. Yes, he's at both of those board meetings.
Q	Okay. And do you see how on Exhibit 496 we start off on page 177, line 18 with a question about Mr. Rhinelander?
A	I do see that.
Q	Okay. And could you go down to 178? It's going to be the very next line after what's on the screen, lines ten through 14. And so I was asking you questions about Mr. Rhinelander -- or Scott was, and the question was,

	"Did you ever tell him that multiple people were staying, multiple ALC -- well, ALC employees were being listed as occupants of multiple properties in connection with the CaraVita calculations? Answer: I don't believe so." You were asked that question, and you gave that answer under oath?
A	I did, and I would like to explain that. I believe Mr. Tandy's question that starts back with my recollecting around 20 to 50 calls -- or pardon me, 20 to 50 communications with Mr. Rhinelander is to exclude board meetings.

(Bebo, Tr. 1984-86.)

Why the Division's Impeachment was Improper - First Example

The Division's impeachment was improper because the Division previously asked Ms. Bebo to exclude certain events from her answer during the investigative testimony and then "impeached" her when she properly referenced the excluded discussions at the hearing. During the hearing, Ms. Bebo was asked whether she told Mr. Rhinelander that employees were being listed at multiple properties and she testified about two Board meetings, which Mr. Rhinelander attended, where more specifics about the employee leasing practices were discussed. Then the Division attempted to impeach Ms. Bebo with her investigative testimony that she did not believe she told Mr. Rhinelander about this practice. Ms. Bebo's answer to the Division's faulty impeachment at the hearing is noteworthy:

Q	You were asked that question, and you gave that answer under oath?
A	I did, and I would like to explain that. I believe Mr. Tandy's question that starts back with my recollecting around 20 to 50 calls -- or pardon me, 20 to 50 communications with Mr. Rhinelander is to exclude board meetings. I could be off on that slightly, but at this point, that's my recollection of this whole line of questioning with regard to the discussions with Mr. Rhinelander.

(Bebo, Tr. 1985-86.)

Ms. Bebo was exactly right. On page 158 of her investigative testimony, about 17 pages prior to the Division's cited testimony, the following testimony occurred:

Q	BY MR. TANDY: Without going into all 50 conversations or approximately 20 to 50 conversations, do you remember any other of the conversations with Mr. Rhinelander specifically?
A	There's a couple of conversations that I do remember specifically. There is a conversation, *am I supposed to exclude board meetings*?
Q	*Yes.*
A	Okay. Okay, generally, I guess I speak with Mr. Rhinelander a lot, from 2009 to 2011. Even before that, but we're talking about 2009 here together. So, I speak with him a lot. I can only tell you that generic, generally, you know, I give him updates on things. So--
Q	On what types of things do you give him updates with regards to the CaraVita covenant --
A	Yeah, you --
Q	Not your entire job.
A	You know, just like, like what the count was for employees or if we were using employees what the trend was or if the building was not using employees. Just, I think it would, it would be directly and indirectly related to the financial performance of the -- and then we get to, we get to 2011, and then I can remember more specific things.

(Ex. 496, p. 158 (emphasis added).)

Also, after a lengthy discussion about other conversations with Mel Rhinelander, but just before the investigative testimony cited by the Division, the Division asked Ms. Bebo "[s]o, are there any other specific conversations with Mel Rhinelander, *outside of the context of board meetings*, about the CaraVita covenants?" (Ex. 496, p. 171 (emphasis added).) Again, the Division instructed Ms. Bebo to exclude Board meetings from her answer just before the line of questioning the Division cited to "impeach" Ms. Bebo. Thus, it is not surprising that Ms. Bebo's answer during the investigative testimony excludes the Board meetings that Ms. Bebo testified about at the hearing.

Ms. Bebo's hearing testimony about Mr. Rhinelander being at Board meetings where employee leasing was discussed was consistent with her prior investigative testimony, because

the investigative testimony the Division cites to impeach her was given by Ms. Bebo *with the explicit instruction to exclude Board meetings*. If anything, Ms. Bebo's credibility is bolstered by the Division's attempted impeachment, because her hearing testimony was accurate and she was able to point out the Division's error simultaneously.

Division's Purported Impeachment - Second Example:

Q	Right. So at that board meeting, he mentioned the fact that ALC was paying for apartments at the CaraVita facilities.
A	Yes, he did.
Q	And he said ALC is not making any money off that practice; right?
A	Correct, yes.
Q	And that was the only conversation where you were present and Mr. Robinson was present prior to March 2012 where the employee stays were discussed.
A	No, that's not correct, because they were discussed at the August board meeting for 2011 with the comment letter.
Q	Okay. Exhibit 496, please. Page 126, lines 6 through 15. And this was on the first time you -- this transcript's from the first time you testified with the division?
A	I believe that's correct.
Q	You were asked, "Question: Jeff Robinson, so far, I think we're at again through March 2012, we're at one audit committee meeting where he raised -- where he discussed employee stays in the calculation of the Ventas covenants. Any other times that you were either present where he discussed the topic or you had one-on-one or just a conversation with him on the topic? Answer: Up until March 2012? Question: Up until March 2012. Answer: Not that I recall." You were asked those questions, and you gave those answers?
A	That's correct. This is part of our discussion during my SEC testimony. I also believe that I did testify that there was discussion during the SEC comment letter.

(Bebo, Tr. 2160-2161.)

Why the Division's Impeachment was Improper - Second Example:

The Division's impeachment was improper because Ms. Bebo gave self-corrective testimony on this very issue later in her investigative testimony, which is consistent with her hearing testimony. Approximately 900 pages after the Division's cited investigative testimony, Ms. Bebo was asked "Okay. And then for Jeff Robinson, prior to March, 2012, I want you to put March, 2012 and before it off to the side. Prior to March, 2012, you were only present for one conversation where Robinson was present and the employee leasing was discussed and that was an Audit Committee meeting in 2011?" (Ex. 501, p. 1035.) Ms. Bebo replied, "[n]o, there are two meetings and I testified prior, I believe, that I was trying to recollect information and what happened around the SEC comment letter. *And so, I would want to clarify that it's two meetings with Mr. Robinson before March 2012*." (Ex. 501, p. 1035.) Ms. Bebo also clarified that both of Mr. Robinson's presentations were at audit committee meetings (Ex. 501, p. 1035). Thus, Ms. Bebo's hearing testimony was not inconsistent with her complete investigative testimony.

Division's Purported Impeachment - Third Example:

Q	Okay. And after the third quarter of 2009, that would be the last time the inclusion of employees in the covenant calculations would be discussed at a board or audit committee meeting until March of 2012.
A	That's not correct.
Q	Okay. Can we please pull up Exhibit 489. And so we're going to need to start at page 200, line 21 and go through 202, line 14... I'm sorry -- 497 ... 201, 11 through 202, 13.... "Question: So then when was the next board meeting that the employee stays in connection with the CaraVita covenant calculations was discussed? Answer: That's where Derek brought up that point about I felt we can use employees. Why don't we have a bigger cushion there? And we discussed that, you know, in greater detail. And -- and then at some point, we began to pick up the cushion a little bit. Question: In response to Mr. Buntain's comment at the board meeting? Answer: And the collective board direction. I mean -- Question: No one on the board disagreed, or did they all affirmatively

Bebo's Totals	*16*	*2,807*	*87*
Comparison			
Buono's Totals	*4*	*702*	*18.5*
Doman's Totals	*3*	*452*	*12*
Fonstad's Totals	*2*	*186*	*6.5*
Buntain's Totals	*.5*	*109*	*3*
Zak-Kowalczyk's Totals	*2.5*	*372*	*15*
Total for 5 of the Division's witnesses	12	1,821	55

Ms. Bebo's testimony has been incredibly consistent considering the vast amount of testimony she has given with regard to this matter. Additionally, Ms. Bebo was consistent during the forty-two hours of compelled investigative testimony, which involved ambiguous and convoluted questions, illogical hypotheticals, and random revisits to the same subjects on multiple days, months apart. For example, a little over one hour into Ms. Bebo's forty-two hours of testimony, after discussing Ms. Bebo's background and the background of ALC's Board members, the Division peppered Ms. Bebo with random names unconnected to any context and asked whether she knew them. (Bebo, Tr. 4103-04 (Ms. Bebo testified about why she did not recall Carter Silvani and stated, "As far as -- as far as that name and why I didn't recall that name, obviously, we're going through a list of different names, right, from all of the different quarters, and I didn't have access to look at other things from around that time frame or other e-mails. That's something I got very recently."); *see also* Ex. 496, pp. 46-71.) Based on all the facts and circumstances, the totality of the record shows Ms. Bebo's testimony has been highly consistent throughout these proceedings. Ms. Bebo was not impeached in any meaningful was as demonstrated above and in the Appendix. This is particularly true in light of the sheer volume of

sworn testimony that has been consistent, and the ambiguous investigative record created by the Division, when it used key terms inconsistently (*i.e.*, employee leasing) and involved multiple directives to set aside certain facts when giving her answer.

B. John Buono.

The Division's efforts to change its portrayal of Mr. Buono—from a cunning fraudster in the OIP to a background actor with ongoing concerns whose warnings were not heeded—is telling. Neither of those characterizations is accurate because there was no fraud here. But the Division's attempts to steer Mr. Buono's story on paper echoes its efforts to steer Mr. Buono's testimony in real life. Perhaps Mr. Buono just told the Division what it wanted to hear. But when he did not, the Division ignores those concessions and other testimony that support Ms. Bebo's defense.

1. John Buono in the OIP vs. John Buono in the Division's Post-Hearing Brief.

In the OIP, the Division painted Mr. Buono in the same light that it attempts to paint Ms. Bebo—as a cunning fraudster, manipulating employees and concealing facts from the Board and ALC's auditors. According to the OIP, he was a willing participant in the alleged scheme. (*See, e.g.*, OIP, ¶¶ 2-6, 25, 26, 28, 36-37.) But the Division is now painting him as a pawn in Ms. Bebo's fraud, who feared for his job, and was merely an intermediary in the employee leasing process. (*See, e.g.*, Buono, Tr. 2349-53 ("I was sort of the intermediary.").) Even the Division does not believe in the different versions of Mr. Buono that they have painted, and neither should the Court. As highlighted elsewhere in this brief and in Ms. Bebo's Post-Hearing Brief, Mr. Buono was not a background participant and did not fear for his job, nor was he a cunning fraudster; to the contrary, Mr. Buono's actions show that he believed he and Ms. Bebo

reached a legitimate agreement with Ventas (they did), and threatened to resign if the Board changed its tune and disagreed.

The one version of Mr. Buono that the Division fails to portray is the one that aligns with what really happened—that is, the Mr. Buono who participated in the call with Mr. Solari (Buono, Tr. 2343), believed a flexible agreement had been reached (*see, e.g.,* Exs. 1822-23 (sharing Solari email with Grant Thornton); Ex. 124, p. 3; Lucey, Tr. 3699-700 (disclosure committee discussion)), worked with ALC's general counsel to draft an email to Ventas memorializing the same (Buono, Tr. 2756-57; Exs. 1319, 1320, 1320A), met with the Vice Chairman of the Board along with Ms. Bebo and Ms. Herbner to get authorization to implement the employee leasing program (Buono, Tr. 2393-96), directed his staff to handle the covenant calculations and the associated revenue given this new agreement (Buono, Tr. 2771-72), signed officer certificates verifying the calculations supplied to Ventas (Exs. 32-45), discussed the matter with the Disclosure Committee (*see, e.g.,* Ex. 124, p. 3; Lucey, Tr. 3699-700), raised no concerns about the veracity of the company's disclosures related to the Ventas lease (Buono, Tr. 2409), responded to questions from Grant Thornton about the agreement and supplied information as requested (*see, e.g.,* Exs. 1822, 1822A, 1823), facilitated the collection of names for the lists of employees and others (*see, e.g.,* Ex. 1374), signed management representation letters (Exs. 61-72), discussed the employee leasing program (and the basis for management's comfort level with meeting the covenant calculations) with the Board (Buono, Tr. 4631-34, 2382-83; Exs. 1048, 2122, p. 8), was surprised (and irritated) by the Board's feigned lack of awareness of the inclusion of employees in the covenant calculations in March 2012 (*see, e.g.,* Ex. 2101 (after meeting with CNG Committee, sends email to Ms. Bebo saying only "I hate everyone"); Buono, Tr. 4638-41; Buono, Tr. 2391-92; Ex. 2117, pp. 4-5), refused to sign the

auditor's representation letter or sign off on the financial statements in April 2012 if the Board disagreed with his belief in the validity of the agreement (and his corresponding certifications), in light of Mr. Bell's memo (Buono, Tr. 2423-28), and continued in his role as Chief Financial Officer, signing off on management representation letters to Grant Thornton indicating that the employee leasing practice did not involve "irregularities" much less fraud, well after Ms. Bebo left the company (Exs. 1627, 1628, 1895A); and affirmed the propriety of the practice during his interviews with Milbank (otherwise Milbank could not have reached the conclusions that it reached). That is not the John Buono the Division wants the Court to see, but that is the John Buono that existed before the Division spent over forty-five hours with him molding his testimony for trial.

2. Mr. Buono tried to help the Division, and undermined his own credibility.

When Mr. Buono tried to help the Division, his testimony became inconsistent, unbelievable, or plainly incredible. As noted above, in sticking to the Division's theory of the case, Mr. Buono took the inconsistent and unbelievable position that there was no agreement reached with Mr. Solari regarding the inclusion of employees in the covenant calculations, but at the same time, maintained that he believed the employee leasing program had to be "real." (Buono, Tr. 2347-48.) He said his view on the existence of an agreement evolved because the Division pointed out to him that the February 4 follow up email, which Mr. Buono drafted with Mr. Fonstad, did not explicitly reference the covenant calculations. (Buono, Tr. 2495-96; 2756-57.) But in the next breath, he asked the rhetorical question—why bring it up if not for the purpose of satisfying the covenant calculations? (Buono, Tr. 2495-96.) Exactly.

And it was not just the big picture issues that tripped up Mr. Buono. He also testified to drafting documents he did not draft, and not receiving documents he later claimed to receive, because the Division's counsel misspoke and asked the wrong question from the rehearsed script:

Q	Can you go to Exhibit 152, please. And I'll ask you to go to the memo on the second page. And can you just blow up the first half of the memo, please. There you go. Did you draft that memorandum?
A	Yes.
Q	And in the third paragraph of the memo, it says, ALC is contemplating an arrangement with Ventas whereby scheduled lease payments will be accelerated, perhaps three years, and prepaid. In exchange, ALC would receive a modification or waiver of certain lease covenants. What caused you to draft a memo about that proposal?
A	Something that Alan Bell said to me after the board meeting. He said you guys, before you're out of compliance with the covenants, should go down to Ventas and discuss ways to modify it, and he suggested that prepaying rent would be possibly a way to get modifications.
Q	And so I believe I may have misspoken. You didn't draft that memorandum, did you?
A	Oh, no, I did not. That was from David.
Q	But you received it?
A	I'm sorry. I'm thinking of the wrong memo.
Q	You never received this memorandum?
A	I never received this memorandum, no.
Q	Pardon me?
A	Give me a second, please.
Q	Right.
A.	Yes.
Q	I believe I misspoke and I asked if you drafted it.
A	Yes. I did not draft it. I received it from Dave Hokeness.
Q	And to what extent do you know if Ms. Bebo was aware of this proposal?
A	I believe she was.

(Buono, Tr. 2330-31.) Mr. Buono was conditioned and ready to help.

Mr. Buono also testified that he could not and would not recall Mr. Fonstad taking part in the January 20 phone call with Mr. Solari, despite the fact that he previously stated that Mr. Fonstad was on the call:

Q	Now, would it help you -- your recollection if I told you that approximately four months after your testimony, you told the SEC that Mr. Fonstad was present during that call?
A	I've told you that I told him. I agree that I told him, but I just do not recall.
Q	That does not refresh your recollection?
A	No matter what you do or say, I'm not going to remember if Eric was in that room.

(Buono, Tr. 2782.) In the end, Mr. Buono (and the Division) would rather have the Court believe that Mr. Buono's memory got better (for the Division) over time than for his testimony to be credible.

3. The Division has used Mr. Buono's newfound memories to advance inconsistent theories.

The Division is also quick to use Mr. Buono to try and condemn Ms. Bebo's actions with regard to the employee leasing agreement with Ventas and, at the same time, use him to deny that any agreement existed. The Division alleges that after Ms. Bebo purportedly gave the directive to use employees in the covenant calculations, Mr. Buono "cautioned Bebo that the practice 'had to be something real' and that ALC could only include 'employees that were staying at the properties.'" (Div. Br. at 17.) However, in the same Post-Hearing Brief, the Division cited Mr. Buono to support its argument that there was no agreement at all. (Div. Br. at 13.) There either was an agreement about employee leasing or there was no agreement and what Mr. Buono allegedly told Ms. Bebo about it "being real" makes no sense.

But the evidence shows that there was an agreement—Mr. Buono's testimony is clear on that issue—and that Mr. Buono's understanding of the agreement is consistent with Ms. Bebo's. That is, Mr. Buono was aware of the lists, cannot feign ignorance of the names included, and even selected names for the lists. (*See, e.g.*, Ex. 1347.) He failed to document any concern about employee leasing, and he did not resign as result of the practice or his involvement with

employee leasing.[17] (Buono, Tr. 2409, 2718.) Thus, Mr. Buono's awareness of the lists and his failure to object to such practices, in addition to his actions, prove that Mr. Buono understood the employee leasing agreement between ALC and Ventas to include the following:

- Mr. Buono understood the agreement to include individuals for use in the covenant calculations. (Buono, Tr. 2495-96.)

- Mr. Buono knew and agreed that individuals could stay at multiple properties at the same time, since he included people at multiple properties and was aware that the lists contained several individuals at multiple properties. (Ex. 1347.) Consequently, Mr. Buono knew that these individuals were not living or staying at the properties when they were listed there.

- Mr. Buono was also aware of and presumably agreed with the inclusion of family members, friends, and W-2 employees (*i.e.*, Kevin Schweer). (*See* Ex. 2117, p. 3.)

- Mr. Buono had to have been aware of the inclusion of individuals who did not travel to the CaraVita facilities. Some of the individuals included on the list were people who he worked with at the home office and, thus, he knew that these individuals were not actually traveling to the properties. (Ex. 2117, p. 6.)

- Buono's decision to add certain individuals on May 5, 2009, strongly suggests that he understood the agreement to incorporate people "who had a reason to go" to the properties, because he included four employees (regional or above) who would have had a reason to visit the properties and he did not indicate that they traveled to the properties. (Ex. 203.)

The Division's inability or unwillingness to choose one theory (no agreement) over the other (Buono was concerned about compliance with the agreement) is not surprising given that neither is supported by the evidence.

[17] It is hard to believe, as the Division contends, that Mr. Buono was scared of going to prison and being sued because of the employee leasing practice when he took no actions to document any concerns with the process or any instances where he thought the process "wasn't real." Nor did he take any other steps to try and have his purported concerns addressed. Instead, he engaged in a practice for about three years that he allegedly thought could send him to prison. What is more telling about his belief in the legitimacy of the employee leasing program is the fact that Mr. Buono did document his concerns about false filings and signing management representation letters when Mr. Bell's memorandum was issued and stood by his convictions asking Mr. Bell to retract the conclusions reached in his memorandum. (Buono, Tr. 2423-26; Exs. 1081, 1081A.) Thus, the Division's failure to produce any evidence of Mr. Buono raising actual objections to the practice, when Mr. Buono was clearly willing to express concerns, indicates that he was never really concerned about the legitimacy of the practice or being liable for his actions.

4. When Mr. Buono did not attempt to rewrite his story, he was credible, and his testimony was ignored by the Division.

Mr. Buono was remarkably constant on one particular topic—the Board's knowledge and approval of the employee leasing program. This, of course, is at odds with the Division's theory of the case, so it is largely ignored. Instead, the Division repeatedly asserts that the Board was unaware of the employee leasing program until March 2012, despite considerable testimony and evidence from multiple sources—including Mr. Buono on direct examination—proving otherwise. (*See* Resp't Br. at 120-32 (citing evidence).)

Mr. Buono testified that employee leasing was discussed at the August 2011 Board meeting in Toronto, when ALC's response to the comment letter was discussed. (Buono, Tr. 4631-33; *see also* Buono, Tr. 2382-83 (on direct examination by the Division).) Although his memory of the specifics of the conversation was not great, he maintained that members of the Board understood and were aware of use of employees in the covenant calculations:

Q	Well, then please explain. What directors do you feel did understand that?
A	That employees were used in the calculations?
Q	Yes, sir.
A	I would think that Mr. Rhinelander would have understood that.
Q	How about Ms. Ng?
A	Don't know if she knew they were using the covenant calculations. I mean, logically, one would say, why do an employee leasing program if you weren't going to use it for a covenant calculation, but that's my logic, not theirs.
Q	Sure. How about Mr. Hennigar?
A	I don't know what Mr. Hennigar knew anymore.
Q	And how about Mr. Buntain?
A	Mr. Buntain, I think, was aware that they were being used in the calculations, based on his comment made at the -- at a different board meeting.
Q	So you believe he was aware, based on his comments?
A	Based on his comment, yes.

(Buono, Tr. 4633-34.)[18] He told the Division something similar during its investigation:

> Ex. 331 and Ex. 491 Response to SEC Comment letter
>
> JB said that this issue was discussed at the Board meeting in Toronto in August. People present were JB, Bebo, Alan, Mel, Malen and maybe David and Derek. JB said that Alan was lead. JB said that the Board was convinced by Bebo that occupancy wouldn't fail. JB recalls that Bebo told the Board that ALC was good on the employee leasing, that we would have enough going forward to keep it going. JB said he doesn't recall discussing the amount of employees involved. He recalls the conversation was more along the lines of do we have enough employees and are we confident that the [employee leasing program] will continue. NEED TO TALK WITH SCOTT ABOUT THIS ENTRY.

(Ex. 2122, p. 8) And as outlined in Ms. Bebo's Post-Hearing Brief, Mr. Buono consistently maintained that Mr. Buntain knew about the inclusion of employees in the covenant calculations based on comments made during a previous Board meeting. (*See* Buono, Tr. 2392-93, 4633-34; *see also* Resp't Br. at 121.)

Despite waffling on whether he believed Ms. Ng was aware of the inclusion of employees in the covenant calculations earlier in his testimony, Mr. Buono at other times testified (and told the SEC during his proffer session) that after the March 2012 CNG meeting, he was upset and told Ms. Ng that it appeared that the Board members were suffering from amnesia regarding the inclusion of employee occupants in the covenant calculations, to which she responded that they knew about the employee leasing program. (Buono, Tr. 4638-40; Buono, Tr. 2391-92; Ex. 2117, p. 5.)

Mr. Buono also testified that Ms. Ng discussed the issue of employees being included in the covenant calculations with Grant Thornton and himself back in 2009. (Buono, Tr. 2417-18, 2523-24.) Indeed, on November 5, 2009, Mr. Buono sent email correspondence to Ms. Ng

[18] Despite insisting that "even" Mr. Buono testified that "there was only a single reference to employees being included in the covenant calculations" at a Board meeting prior to March 2012 (Div. Br. at 36), on cross-examination, Mr. Buono identified at least one other Board meeting at which the topic was discussed. (Buono, Tr. 4633-34 (after noting discussion during August 2011 Board meeting, testified that Mr. Buntain was aware of the inclusion "based on his comment made at ... a different board meeting"); 2392-93 ("JUDGE ELLIOT: Do you remember what he said? THE WITNESS: His comment was to the effect that if we're adding employees to the calculation, why don't we add more because the covenants that we presented at that meeting were close to the -- close to the edge of failing. JUDGE ELLIOT: And do you remember when that board meeting was? THE WITNESS: I do not.").)

substantiating those conversations. (Ex. 1115 (November 5, 2009 email correspondence between Mr. Buono and Ms. Ng).) And at the Audit Committee meeting for the third quarter of 2009, one day later, Mr. Buono "presented specific information regarding compliance with the CaraVita covenants. The members of the Committee discussed this information." (Ex. 1179, p. 3 (November 6, 2009 Audit Committee minutes).) The description of the discussion makes sense, as that was the same meeting at which Mr. Buntain commented on the employee leasing program as well. (*See* Resp't Br. at 120-23.)

Of all Mr. Buono's testimony ignored by the Division, another notable omission is the fact that Mr. Buono confirms not only that Mr. Rhinelander was consulted at the outset of the employee leasing program, but that he approved of the plan to include employees in the covenant calculations and instructed management to implement the program. (Buono, Tr. 2393-96; *see also* Resp't Br. at 98-99.)

Of course, each of these facts is largely, if not completely, ignored in the Division's Post-Hearing Brief.

IV. The Division Has Failed To Establish Any Violation Of The Securities Laws.

A. The Division's Post-Hearing Brief sets forth no cognizable legal theory to support its securities fraud claim.

The Division's "legal analysis" in support of its securities fraud claim against Ms. Bebo is limited to a mere three pages of its brief, and it fails to set forth any cognizable claim under the applicable case law. First, the Division fails to acknowledge the appropriate legal standard that it must meet for demonstrating an actionable opinion or judgment. Second, the Division's "evidence" of materiality is woefully inadequate, and the Division's one-sentence attempt to deal with Professor Smith's opinion which dooms their claims is baseless for all of the reasons explained by Professor Smith at trial. Third, the Division's resort to a general assertion of

"scheme" liability cannot save its claims. And, fourth, the Division fails to demonstrate *scienter*, particularly the highest level of *scienter* necessary to establish fraud claims based on opinions and forward-looking statements.

1. The Division concedes that the challenged statements are statements of opinion rather than statements of fact, but fails to address the appropriate legal standard for evaluating its claims.

The Division effectively concedes, as it must, that the two challenged statements in ALC's Form 10-Qs and 10-Ks are statements of opinion and judgment. Those two statements are: (1) that ALC was in compliance with "certain operating and occupancy covenants" in the Lease as of the end of each time period covered by the particular filing;[19] and (2) that ALC "believe[d]" there was no reasonably likely degree of risk of breach of the same (unstated) operating and occupancy covenants in the Lease "[b]ased upon current and reasonably foreseeable events and conditions."[20] (Ex. 2187, pp. 10-11.)

However, the Division fails to acknowledge the appropriate and well-established legal standard for evaluating these types of alleged misstatements. The Division is required to prove both that the stated opinion was unreasonable and that Ms. Bebo (and ALC) did not subjectively believe the professed opinion. The Division has made no attempt to argue that ALC's opinion and belief was *unreasonable*—only that it was incorrect.[21] For the reasons stated in Ms. Bebo's opening brief, ALC's statement that it was in compliance with certain operating and occupancy covenants was eminently reasonable based on all of the facts and circumstances known at the

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[19] ALC never specifically stated an opinion that it was in compliance with the coverage ratio covenants or the "financial covenants" in general. The Division's brief improperly substitutes the phrase "financial covenants" for the language actually utilized by ALC in its periodic filings. (Div. Br. at 47.)

[20] Just because the first statement is not prefaced by "we believe" or similar language does not mean that it does not constitute an opinion. (*See* Resp't Br. at 179-80; *see also MHC*, 761 F.3d at 1120 (stating "it's equally true that statements not preceded by the word 'opinion' can nevertheless represent opinions rather than facts").)

[21] And that analysis is limited to one sentence: "These statements were false and misleading because actual occupancy and coverage ratio at the Ventas facilities was far below the covenant thresholds." (Div. Br. at 47.)

time. (Resp't Br. at 180-94; *see also MHC*, 761 F.3d at 1118 ("we are left to infer only that some genuinely independent experts in the field shared the company's views and others did not. And that much serves only to confirm rather than undermine the conclusion that the company's opinion had a reasonable (if not universally shared) basis for the opinion it expressed.").) And as set forth in Ms. Bebo's opening brief (at pages 194-207) and below, she genuinely and in good faith believed that ALC's affirmation of compliance was appropriate under the circumstances.

2. *Omnicare's* omission test does not apply, but if it did, Ms. Bebo has demonstrated that there was no omission and no duty to disclose the manner in which ALC was meeting the covenants.

In a footnote, the Division attempts to invoke the *Omnicare* omissions test with respect to establishing the falsity of ALC's opinion that it was in compliance with the Lease covenants. (Div. Br. at 47 n.22 (citing *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015)).) This fails for two reasons. First, the *Omnicare* "omissions" holding does not apply to fraud claims. Indeed, the Supreme Court reasoned that the strict liability statute in Section 11 of the Securities Act of 1933 at issue in that case results in a different analysis than cases where the plaintiff must prove *scienter*.[22] For example, in response to Justice Scalia's concurring opinion, in which he argued that liability for omissions from opinions under Section 11 should be limited to speakers who subjectively intended to deceive, the Court wrote:

> [W]e think Justice Scalia's reliance on the common law's requirement of an intent to deceive is inconsistent with § 11's standard of liability. As we understand him, Justice Scalia would limit liability for omissions under § 11 cases in which a speaker 'subjectively intend[s] the deception' arising from the omission, on the ground the common law did the same... But § 11 discards the common law's intent requirement, making omissions unlawful--regardless of the issuer's state of mind--so long as they render statements misleading.

[22] "[A] Section 10(b) plaintiff carries a heavier burden than a Section 11 plaintiff. Most significantly, he must prove that the defendant acted with scienter, *i.e.* with intent to deceive, manipulate, or defraud." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382-83 (1983).

Omnicare, 135 S. Ct. at 1331 n.11 (citation omitted).

Similarly, the Court clarified in its omissions holding that "Section 11 is, of course, 'not coextensive with common-law doctrines of fraud'; in particular, it establishes 'a stringent standard of liability,' not dependent on proof of intent to defraud." *Id.* at 1330 n.9 (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381, 388-89 (1983)).

Justice Scalia's concurrence also underscored that Justice Kagan's opinion for the Court "justified" its objective "omissions" test by Section 11's absence of the *scienter* requirement. *Id.* at 1337. In other words, the *Omnicare* Court's "omissions" test depended on the strict liability nature of the Section 11 claim at issue and was not intended to apply to claims that require scienter, such as the Section 10(b) claim at issue here. This is confirmed by the Tenth Circuit's decision applying *Omnicare* in the 10(b) context which applied the pre-existing subjective belief and objective reasonableness standard. (Resp't Br. at 178.)

The second reason that the Division incorrectly relies on the *Omnicare* "omission" holding is because, even if it did apply, the Division's argument fails on the merits. As set forth in detail in Ms. Bebo's Pre-Hearing Brief and Post-Hearing Brief, cases like *Zaluski v. United American Healthcare Corp.*, 527 F.3d 564 (6th Cir. 2008), where a company has a reasonable defense to an asserted breach of a contract or to assertions of non-compliance with laws or regulations, there is no actionable claim under the securities laws where the issuer asserts it is in compliance with such laws or contract. (Resp't Br. at 185-94.) Despite Ms. Bebo's citation of these cases in her Pre-Hearing Brief, the Division made no attempt to address or distinguish them in its Post-Hearing Brief.

Moreover, the facts demonstrate there was no duty to disclose that ALC was meeting the Lease covenants through the employee leasing arrangement with Ventas. This is established by

Mr. Martin's uncontradicted expert testimony in this regard, and the fact that over a *dozen* people at ALC, Grant Thornton, Quarles & Brady, and Milbank all were aware that ALC was meeting the Lease covenants through the use of rooms that ALC paid for employees to use and *no one ever indicated that this information should be disclosed in ALC's periodic filings with the Commission*.

3. The few cases cited by the Division in its "legal analysis" provide no support for its fraud claim.

The cases relied upon by the Division also provide no support for the conclusion that its fraud claim is actionable here. The Division did not cite a single case where liability was imposed for a statement affirming compliance with lease covenants, and not a single case relied upon by the Division involves the circumstances here—where the entire case is premised upon the sole allegation that a single statement affirming compliance with lease or debt covenants was false or misleading, particularly where the lease or debt agreement would have no impact on the ability of the company to continue operating.

The weakness of the Division's position is highlighted by its attempt to rely on an Eastern District of Wisconsin decision *denying a motion to dismiss* in the private securities litigation against ALC and Ms. Bebo. (Div. Br. at 48 (citing *Pension Tr. Fund for Operating Eng'rs v. Assisted Living Concepts, Inc.*, 2013 WL 3154116 (E.D. Wis. June 21, 2013)).) On a motion to dismiss all of the allegations are assumed to be true, and here, the allegations of the OIP have not been proven.

Most importantly, however, the court's decision in *Pension Trust Fund* did not even address the issue of ALC meeting the Lease covenants through the use of the employee leasing practice. There is no mention at all about the use of rooms for employees to meet the covenant calculations. The only reference to occupancy reporting to Ventas is the allegation that "ALC

allegedly would temporarily house residents for whom it lacked the capacity to treat and rent rooms to third parties in order to temporarily inflate their occupancy rate." *Pension Tr. Fund*, 2013 WL 3154116, at *3. And the court rejected the tactic of converting allegations of misrepresentations to Ventas into a claim that the same proves a misrepresentation to ALC shareholders: "In essence, the Pension Trust is attempting to argue that a misrepresentation to a third party [Ventas] constitutes a misrepresentation to shareholders. That position is simply untenable." *Id.* at *13.

Rather, the focus of the complaint and the court's decision was on the allegations that ALC was not in compliance with the Lease because of the regulatory violations and resident care issues that manifested in 2012. That case involved a host of allegations unrelated to the issues presented for this court's review, including allegations that ALC misrepresented that its strategy to move from Medicaid payers to all private-pay residents was working, that its staffing levels were adequate at its facilities, and that ALC falsely reported occupancy data for the entire company in its Commission filings.

Finally, the *Pension Trust Fund* case did not address the appropriate standard for pleading and proving a Section 10(b) claim premised upon an opinion, perhaps because that issue was not raised, given the host of other allegations unrelated to assertions of lease compliance that were included in the case. For the above reasons, the *Pension Fund Trust* case is inapposite, and the Division's back-door attempt at asserting issue preclusion should be rejected.[23]

[23] Another sign of the Division's desperation is its citation to the settlement of the lawsuit, and inference that the settlement supports a finding of liability or the merit of its fraud claim. (Div. Br. at 48 n.23.) As recognized by Federal Rule of Evidence 408, it is improper to infer that settlement or offers of settlement prove the validity of a disputed claim. In fact, such settlement expressly denies liability.

The other cases cited by the Division also provide no support for its claim here. Like *Pension Trust Fund*, each of them involves a court denying a defense motion to dismiss in a private securities case where the allegations are presumed to be true. For example, in the *Aviva Partners* case, another unpublished district court case, allegations about a company's false statement of its "ability to comply with loan covenants" is lumped in with a host of other allegations about how the company provided a false portrayal of the company's overall economic condition by overstating its inventory and other financial information provided to investors. *Aviva Partners, LLC v. Exide Techs.*, 2007 WL 789083, at *16 (D.N.J. Mar. 13, 2007). In discussing whether the plaintiffs pled false or misleading statements of fact, the court summed up the allegations as follows: "Plaintiffs here have essentially alleged that during the class period, 'defendants overstated [defendant's] inventory and net income and understated [defendant's] net losses while also misrepresenting that Exide's reorganization in bankruptcy had positioned it for growth, profitability and the creation of longterm value for its shareholders.'" *Id.* The court never directly discussed the validity of the loan covenant allegations, and there is no analysis of the same. *Id.*; *see also In re Suprema Specialties, Inc. Sec. Litig.*, 334 F. Supp. 2d 637, 647, 650-51 (D.N.J. 2004) (describing allegations of improper revenue recognition through "round trip" transactions, misrepresentations about the nature of the company's product, and false financial statements, but making only one-line reference to alleged misstatements about "compliance with loan covenants"; the court never assessed or analyzed those allegations).[24]

Similarly, reference to compliance with debt agreements in the *Williams* and *DVI* cases were small parts of cases involving complaints that principally involved allegations that management at those companies concealed a "liquidity crisis" and the ability of the company to

[24] Contrary to the Division's argument, the court in *Suprema Specialties* actually dismissed plaintiff's complaint. 334 F. Supp. 2d at 661.

even operate from a cash flow perspective. The *Williams* case involved a telecommunications company that had teetered on bankruptcy and touted its financial strength after emerging from a debt restructuring. However, the defendants concealed from investors that the company was "severely undercapitalized" from its inception, was "over-leveraged," and failed to record appropriate reserves on its financial statements, in addition to being "continuously near default on its bank covenants (or was actually in default) because of its deficient balance sheet and operating performance." *In re Williams Sec. Litig.*, 339 F. Supp. 2d 1206, 1215-16 (N.D. Okla. 2003). Reference to debt covenants was thrown in with the principal claim that investors were deceived about the financial strength and working capitalization of the company. *Id.* at 1230.

The *DVI* case involved an equipment finance company whose life-blood was based on its ability to access capital to fund loans. As in *Williams*, allegations that the company misrepresented its compliance with the credit facility that allowed it to stay in business were included in the broader allegations that the company failed to have appropriate loan loss reserves and concealed a "liquidity crisis" that put the company on the verge of bankruptcy. *In re DVI, Inc. Sec. Litig.*, 2010 WL 3522086, at *1, *8 (E.D. Pa. Sept. 3, 2010). Indeed, the court described the gravamen of the allegations against the defendants this way: they "were involved in a scheme of misrepresentations and omissions designed to artificially inflate the price of DVI's securities and conceal deceptive accounting and lending practices." *Id.* The court denied defendants' motion for summary judgment.

None of these cases is anything like this one, which involves an allegation that a single statement of opinion in ALC's periodic filings about compliance with an immaterial lease governing a small number of ALC's facilities was false. Unlike the cases relied upon by the

Division, ALC's periodic filings indisputably contained accurate and appropriate financial information about the company which complied with GAAP.

Unlike the cases relied upon by Ms. Bebo, which deal with cases focusing solely upon asserted compliance with laws or contracts and assess the nuanced legal issues implicated by securities fraud claims premised on alleged false opinions of non-compliance, none of the cases cited by the Division contain any analysis of the particular issue presented here. For these reasons they have no persuasive value.

4. The Division presented no credible evidence to support a finding of materiality.

The Division's argument with respect to materiality relies on a host of incredible evidence and strained inferences. For its lead argument, the Division contends that a finding of materiality is supported by the simple fact that ALC included the statements in its Commission filings and also stated that breach of the Lease covenants *could* have a material adverse impact. (Div. Br. at 48-49.) This is tantamount to saying that *any* disclosure is material because it is included in a periodic filing. This should be rejected for the circular reasoning that it is.

Second, the Division relies on its audit expert John Barron. For the reasons stated in Ms. Bebo's opening brief, on cross-examination it was established that Mr. Barron's opinions were unreliable and did not support any finding of materiality. (Resp't Br. at 163-67.)

The principal reason that it is unreliable is because it relies on the false assumption that every event of default would necessarily result in the imposition of the worst-case scenario of acceleration of all future rent and termination of the Lease. Indeed, as a legal proposition, the Division's failure to establish the critical assumption upon which Mr. Barron relied—that an event of default would necessarily result in imposition of the acceleration of rent and write-off of the lease intangible—should cause this Court to disregard his materiality opinion entirely.

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) (affirming exclusion of expert opinion on expected revenues using unrealistic assumptions); *Fail-Safe, L.L.C. v. A.O. Smith Corp.*, 744 F. Supp. 2d 870, 891 (E.D. Wis. 2010) (excluding expert testimony of future damages because expert relied on assumptions "without providing any explanation for such an assumption other than general platitudes about the strength of [the company]."); *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 810 (N.D. Ill. 2005).

Thus, for example, in the *Target Market Publishing* case, the plaintiff attempted to prove damages through an expert that made a number of assumptions with respect to how plaintiff's business would have successfully achieved market penetration and additional profits but for the defendants' conduct. 136 F.3d at 1143-44. The court concluded that a number of those assumptions were unsupported by other evidence in the case, and therefore affirmed the district court's decision to disregard the expert's opinion. *Id.* In affirming the rejection of the expert's opinion, the court reasoned that the opinion was "based upon assumptions that do not legitimately support the conclusion." *Id.* at 1144; *see also Victory Records, Inc. v. Virgin Records Am., Inc.*, 2011 WL 382743, at *2 (N.D. Ill. Feb. 3, 2011) (stating "when an expert premises his opinions on an assumption, the assumption must be reliable" and striking expert opinion based on unsupported assumptions) (citations omitted).

Third, the Division's attempts to rely on ALC's alleged payment for the CaraVita Facilities for a price in excess of the appraised value does not support the assertion of

materiality. For the reasons stated in Ms. Bebo's opening brief (at pages 152-56), the great weight of the evidence demonstrates that any losses recorded by ALC were not related to anything having to do with the employee leasing arrangement. Indeed, the evidence establishes that this was a highly favorable transaction for ALC, that it added approximately $2.40 of value per share to the company, and ALC's stock price went up in response to the announcement that it had purchased the CaraVita Facilities for $100 million and would be recording the one-time write-offs. (*Id.* (citing evidence).)

Fourth, the Division makes the desperate and unsupportable claim that "ALC investors and potential investors considered ALC's compliance with the Ventas covenants to be important." (Div. Br. at 49.) Of course, the Division presented no evidence from any public investors in ALC to support this assertion. Instead, it relies on the arbitration testimony of ALC's controlling shareholder, David Hennigar, and the testimony of another director and member of the audit committee, Derek Buntain. (*Id.*)

Putting aside the facially meritless contention that corporate insiders could stand in as a proxy for a public, reasonable investor (they cannot),[25] the credible evidence demonstrates that both Mr. Hennigar and Mr. Buntain did know that ALC was meeting the Lease covenants by including rooms for employees in the covenant calculations. Furthermore, it was established at the hearing that Mr. Buntain provided a false declaration where he swore under penalty of perjury that he had exercised stock options and would have wanted to know more information about ALC's compliance with the Lease covenants in connection with the exercise of those options. (*See* Resp't Br. at 244 n.71; Buntain, Tr. 1437-40.) He admitted at trial that he never

[25] *See* Tom C.W. Lin, *Reasonable Investor(s)*, 95 B. U. L. Rev. 461, 466-68 (2015) (summarizing literature with respect to the current understanding of a "reasonable investor" and concluding that "the reasonable investor, the central character of financial regulation, is frequently envisioned as a rational human being of average wealth and ordinary financial sophistication that invests passively for the long term."). That does not describe an insider.

exercised those options. (*Id.*) The Division's continued reliance on Mr. Buntain's supposed desire to "know whether ALC was in compliance with the covenants because that information was important to him as an investor" (which was tied to his false testimony that he actually made an investment decision to exercise options) should be rejected. (*See* Div. Br. at 49.)

5. Professor Smith's unrebutted report and testimony is the best evidence on the issue of materiality, and conclusively establishes that the alleged misstatements were not material.

In its Post-Hearing Brief, the Division seems to endorse the expertise, credibility and event study methodology of Ms. Bebo's financial economist, Professor David Smith, but attempts to twist the conclusion of his study that there was an abnormal price decline on May 4, 2012. The Division contends this demonstrates materiality because ALC disclosed "the investigation into 'irregularities' in the lease on that day. (Div. Br. at 49-50.) As explained by Professor Smith at trial, there is no basis for the Division's assertion. The unsupported statement by the Division's counsel in a post-hearing brief cannot trump the uncontradicted and reliable testimony of Professor Smith.

On May 3, 2012, approximately ten minutes before the market closed, ALC put out a one line press release that it would delay its Q1 2012 earnings announcement and conference call with analysts. (Exs. 2081; 2186, p. 16.) ALC's stock shot up 8.31% in the last seven minutes of trading on May 3 because it was well-established in the market that ALC was trying to sell the company. (Ex. 2186, p. 16 n.59; 2130 (January 4, 2012 e-mail from CEO of Washington assisted living company stating "news around town is ALC is going to dispose all of their assisted living assets across the country"; Bebo, Tr. 4495.) The following morning, ALC disclosed (a) the fact that it had not postponed its earnings release because there was good news about the sale of the company; (b) the Ventas lawsuit related to alleged defaults for regulatory

violations; and (c) that ALC's Board had decided "to investigate possible irregularities in connection with the Company's lease with Ventas. (Ex. 2075 (May 4, 2012 Form 8-K).)

The Division extensively cross-examined Professor Smith with respect to the May 4 disclosure and share price decline, and Professor Smith reliably and persuasively explained why that disclosure does not support the Division's materiality argument. First, Professor Smith explained that most of the decline on May 4 was due to the correction of the market's perception that good news about a sale of the company was going to be released:

Q	And you opined -- turning to the next page, Byron, that there were essentially two factors that caused this stock price drop [on May 4th]; is that right?
A	Yes.
Q	One, which you talk about in the first three or four paragraphs here, was the delay in releasing the Q1 2012 earnings late in the day on May 3rd; is that right?
A	That's correct.
Q	And then the other factor you said drove the stock price decline was the actual content of the Form 8-K itself that was filed; is that right?
A	It's the -- well, it's the information that investors get from the content of that lawsuit, yes.
Q	And that 8-K and the information the investors got from that 8-K included this disclosure revealed the Ventas lawsuit, as well as ALC disclosing its internal investigation into irregularities with the Ventas lease; is that right?
A	Yes.
Q	And to support that, you even cited, going to the next page, page 17, in paragraph 58, you cite The Senior Care Investor newsletter that made reference to that 8-K; is that right?
A	Yes.
Q	And that Senior Care Investor Newsletter basically stated that the delay in the earnings release and the subsequent negative disclosure of the lawsuit and the internal investigation was not expected by investors and caused that stock price drop.
A	Yeah, and let's be careful that we have to set this up based on our understanding of what happened on May 3rd and what happened to the stock price on May 3rd. So to judge the magnitude of the fall on May 4th, we first have recognize that there is a big bump in the stock price on May 3rd in the last seven minutes of the trading day following the disclosure of -- following the fact

	that -- following the announcement by ALC that they are going to suspend their earnings announcement. So what happened at the end of the day on May 3rd was when the company announced that they were suspending their earnings announcement, the market understood that they were -- the reason they were suspending is because they had news, and the market believed this to be really good news. The stock price shot up by eight percent in a matter of minutes. We can see -- in fact, if we want to turn to Exhibit 8, we can see it very starkly, the stock price doesn't move at all, and then it shoots up. And so when the -- right before the market opened the next day, 9:27 a.m. when the 8-K comes out with the news about the Ventas lawsuit, investors find out it wasn't good news, and so the stock price dropped back down. And this is -- the Senior Care Investor quote actually highlights that. It says, Investors were not expecting negative news, they were expecting positive news, and sent the shares down by 15 percent. And Senior Care Investors, they're speculating, because I think they've already seen there's a decent amount of evidence out there that there's a merger -- or a strong potential that ALC would be acquired, and there were interested bidders out there, and now what Senior Care Investor is saying in that quote is it would seem highly unlikely that a buyer for the company will step forward at this point. That's significant, Mr. Stockwell, for two reasons. One, first, a big part of the observed drop you see on May 4th is just the fact that what investors were expecting on May 3rd didn't happen, didn't transpire. Stock price drops back down at least to the level it was before the announcement occurred, which was I think around $17.70. And then Senior Care Investors is saying now that this lawsuit has come out, there's even less of a chance of there being a merger, and my 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.

(Smith, Tr. 3638-41.)

Next, Professor Smith explained why, from a public (*i.e.*, reasonable) investor point of view, the May 4 disclosure provided no new information correcting investors' prior understanding with respect to how ALC was meeting the Ventas Lease covenants:

Q	And you're aware that that reference to investigating possible irregularities in connection with the company's lease with Ventas is a reference to the financial covenant allegations?
A	There's no public disclosure that connects that statement of possible irregularities with the company's lease to the financial covenant allegations. There's no -- certainly it's not in the 8-K. If you look at the press analysis, you look at the analyst reports that follow this, everybody that's looking at that sentence is not making any connection to anything having to do with financial covenants. And if anything, they make the natural connection that the investigation into the lease irregularities have to do with the allegations and the alleged breaches under the Ventas lawsuit. There's nothing here that says, hey, financial covenant allegations. Nothing.
Q	You are aware that is what that's a reference to?
A	I've had the -- you know, the luxury of, you know, knowing what -- seeing that there was a whistleblower letter behind the scenes that may have prompted this investigation. I don't know for sure that that's the prompting, but the more important point is from an investor's perspective, that -- those irregularities probably have to do with the -- an investigation into the -- the pieces of the Ventas lawsuit.
Q	But you don't know that, right? You don't know that for sure?
A	All I can do is look at every press report, look at every analyst's report, look at the disclosures by the companies themselves including Ventas, who has never disclosed at any filing alleging there was a financial covenant allegation, that there was a financial covenant allegation particularly that there was a link between the financial covenant allegations and this investigation. The natural way -- and also the analysts that commented on this tied the investigation to the Ventas lawsuit.
Q	And you actually never talked to an investor to see if they tied that internal investigation to the Ventas lawsuit or to a separate issue that dealt with irregularities in the Ventas lease, did you?
A	I did not, but I just went on the fairly relatively copious information that came out discussing this disclosure by analysts and by the press, and

	nobody makes that connection.

(Smith, Tr. 3645-47.)

In addition, even Ventas did not think that the disclosure of irregularities pertaining to the Lease had anything to do with the financial covenants, and the Division's statement to the contrary at page 42 of its brief is false. The Division relies on a motion for expedited discovery that Ventas filed on May 15, 2012 in the lawsuit for the proposition that "Ventas understood [the irregularities] to involve the occupancy covenants." (Div. Br. at 42 (citing Ex. 357).) However, the motion for expedited discovery confirms the opposite of the Division's statement and tracks Professor Smith's testimony:

> To this day, ALC has failed to provide Ventas with any details regarding the scope or subject matter of this investigation or the irregularities concerning the Ventas Lease. Because of the increasing reports of ALC's mismanagement of the facilities, *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.*

(Ex. 357, p. 3 (emphasis added).)

The pleading never mentions the financial covenants or ALC's reporting obligations more generally under the Lease. Based on Exhibit 357, it is clear that Ventas believed the May 4 "opaque disclosures" (*Id.* at p. 1) did not relate to covenant calculations, but to the under-staffing, problems with resident care and safety, a fire at a facility, and other operational issues that were described in Ventas' complaint.[26] (*See* Ex. 1194, p. 2 (Ventas' amended complaint alleging that "notices identify numerous deficiencies with the respective ALC Entity's operations which are jeopardizing the health, safety, and welfare of the residents...").)

[26] The Division also simultaneously impeaches its own witness, Mr. Doman, by eliciting testimony from him on re-direct (and citing it in its Post-Hearing Brief) that the purpose of the motion seeking expedited discovery was to find out more about the use of employees in the covenant calculations. (Div. Br. at 42 citing Doman, Tr. 386.) As there is no indication of the same in the pleading, Mr. Doman testified falsely at trial.

Finally, the Division posed a hypothetical to Professor Smith, who explained, in response to that hypothetical, why May 4 is irrelevant and May 14, when there was no statistically significant share price decline, was the appropriate date for this case:

Q	And you agree, based on your analysis, that if this 8-K had disclosed the financial covenant allegations, that that would have been a factor in the stock price drop.
A	So the nice thing is I don't have to engage in that hypothetical because there's another day when they actually do disclose the financial covenant allegations and there isn't a negative -- there is not a stock price drop.
Q	Well, let me ask the question again. If this 8-K had disclosed the financial covenant allegations, that would have been a factor in the stock price drop from May 3rd to May 4th?
A	My answer is no because we now know that -- so the problem with distinct -- between separating these three -- four -- if you think about it, two factors. First, the big return, and if not, return dropped below where the price level was the day before they suspended the earnings and shot the stock price up eight percent, one factor. The second factor is the Ventas lawsuit, but contained in the Ventas lawsuit is lots of information about how they're -- how ALC was mismanaging these residential facilities, all right? And then there's the discussion about the internal investigation. I cannot separate how much -- I can give you a very good guess of how big the impact was, the stock price going back down to where it was the day before. That seems pretty reasonable and probably would have dropped further because the likelihood of a merger has declined. Disentangling the other pieces is hard but I don't have to do that because the hypothetical you're asking about was not the facts. The facts were the disclosure -- the financial covenant allegations occurred on May 14th. There were other disclosures on May 14th as well, but the stock price did not move on that date. So I can sort of say -- take the whole idea of the financial covenant allegations, their impact on stock prices off the table because they weren't part of that May 4th disclosure.

(Smith, Tr. 3643-44.)

Put simply, for the reasons explained by Professor Smith, there is no basis to conclude that any investor could or did interpret the May 4 disclosure of the investigation into "irregularities" with respect to the Ventas Lease as having anything to do with financial covenant allegations. *See also Meyer v. Greene*, 710 F.3d 1189, 1201 (11th Cir. 2013) (holding that disclosure of an investigation is generally not a corrective disclosure because "[t]he announcement of an investigation reveals just that — an investigation — and nothing more"); *In re Almost Family, Inc. Sec. Litig.*, 2012 WL 443461, at *13 (W.D. Ky. Feb. 10, 2012) ("Numerous federal district courts have held that a disclosure of an investigation, absent an actual revelation of fraud, is not a corrective disclosure.") (collecting cases).

6. The Division's resort to so-called "scheme" liability cannot save its fraud claim.

Realizing that it has no evidence to support a finding of a material misstatement in ALC's Commission filings, the Division attempts to back-fill its claim with the general assertion of a fraudulent "scheme" unrelated to the purchase or sale of securities. (Div. Br. at 50.) Indeed, the alleged scheme, as summarized on page 50 of the Division's Post-Hearing Brief, focuses almost exclusively on alleged (but untrue) deceptive behavior toward Ventas. As demonstrated below, scheme liability cannot save the Division's case from the total absence of any evidence to support the conclusion that ALC's periodic filings were materially misstated and the affirmative evidence of over a dozen other individuals inside and outside of ALC that had a role in the disclosure process who both knew about ALC's use of unit rentals for employees to satisfy the covenant calculations and never suggested that ALC's disclosure needed to be modified in any way.

There is no basis in the law to support the Division's invocation of "scheme" liability in a way that converts Rule 10b-5 into a rule proscribing general corporate fraud or breach of fiduciary duty that does not specifically result in a fraudulent misstatement to investors.

"Scheme" liability under Rule 10b-5(a) and (c) *does not* generally prohibit sending misleading e-mails or even preparing internal "sham transactions" *unless* the intended result of those actions was to misstate the company's financial statements or other disclosures *to investors*.[27] This is made clear in the Commission's robust analysis of scheme liability in *In re John P. Flannery*, Release No. 3981, 2014 WL 7145625 (Dec. 15, 2014), the case principally relied upon by the Division. (Div. Br. at 46.) There, the Commission acknowledged that scheme liability expands the reach of securities fraud to those actors that participate in preparing a false statement to investors or participated in the preparation of internal financial statements or fraudulent accounting that resulted in a company's misstated financial statements, even if those persons did not themselves make the false or misleading statements to investors. *Id.* at *12. In sum, the Commission stated: "those who engage in such conduct are independently liable for their own deceptive acts, *even if a material misstatement by another person creates the nexus between the scheme and the securities market*." *Id.* (emphasis added) (citation omitted).

This is highlighted by the case relied upon by the Division, *In re Robert W. Armstrong*, Release No. 2264, 2005 WL 1498425 (June 24, 2005). In that case, the Commission found that the controller, Armstrong, for a subsidiary of a public company could be liable under Rule 10b-5 even though he had no involvement in the actual preparation of the parent company's periodic filings because he "participated in a scheme to manipulate [the parent's] reported earnings to achieve predetermined targets. The scheme involved improperly recording excess earnings as

[27] Nor does Section 10(b) or Rule 10b-5 generally prohibit sending false or misleading e-mails, as the Division suggests in its Post-Hearing Brief at pages 46-47. The case the Division cites for this unfounded proposition is *In re Francis V. Lorenzo*, Release No. 9762, 2015 WL 1927763, at *1-2 (Apr. 29, 2015). There, Lorenzo was employed at a registered broker-dealer who was part of a boiler room operation that used high-pressure tactics to get retail investors to purchase securities. Lorenzo was trying to raise money for one of the firm's only clients by selling its debt securities. In that process, he sent a number of e-mails to retail investors that he knew contained several false representations about the offering, which he acknowledged at trial. Not surprisingly, the Commission concluded that misrepresentations made in e-mails sent directly to investors that intended to induce those investors to purchase a debt security constituted a violation of Section 10(b) and Rule 10b-5. *Id. Lorenzo* provides no support to the Division's claims here.

reserves and later using the excess reserves to bolster earnings, thereby creating the false impression that Grace had a steady, consistent growth in income over a period of several years." *Id.* at *1. Armstrong was instructed by the parent company's CFO to not book revenue in excess of the parent company's revenue and profit targets that they had reported to investors because the company would not get "credit" for those additional revenues and profits. *Id.* at *4. Armstrong followed his superior's instructions and prepared the false accounting in order to manipulate and mis-state the parent company's financial statements and manage its earnings from quarter to quarter. *Id.* at *4-5. Consequently, because Armstrong did not directly "make" or even directly prepare the false or misleading statements provided to investors, he was charged with "scheme" liability for furthering the scheme the purpose and result of which was the materially false financial statements provided to investors. *Id.* at *6-7.

Here, the Division resorts to "scheme" liability as a failed attempt to cover its deficiencies in proving the falsity and materiality of the alleged misstatements. Assuming a material false statement could be established, scheme liability could theoretically support claims against others at ALC that participated in the accounting for the employee leasing arrangements, such as Ms. Herbner, Mr. Schelfout, Mr. Ferreri, or Mr. Grochowski, but it has no bearing upon Ms. Bebo's liability. Consequently, the Division's case ultimately rises, and falls, on the allegations that the asserted opinion and belief that ALC was in compliance with the Lease covenants was false or misleading.

7. The Division failed to prove Ms.Bebo was reckless with respect to ALC's disclosures, much less that she did not subjectively believe the company was in compliance with the Lease.

In Ms. Bebo's Post-Hearing Brief, and in the factual rebuttal set forth above, she demonstrated that there is insufficient evidence to support the conclusion that she acted with extreme recklessness toward investors, much less acted with actual knowledge that ALC was

making material misrepresentations to investors about the company's compliance with the Ventas Lease covenants as required under the applicable case law. Ms. Bebo will not repeat all of those reasons why the Division's case is factually deficient here.

However, there is *no evidence* to support the conclusion that Ms. Bebo did not subjectively believe ALC's stated opinions that it was in compliance with the Lease covenants and that ALC believed it would remain in compliance for the foreseeable future. Courts have found that, to demonstrate subjective disbelief, the plaintiff must demonstrate that the defendant made specific statements to others questioning or disavowing the stated opinion or conduct, such as the sale of stock, that would be inconsistent with the stated opinion. *See Podany v. Robertson Stephens, Inc.*, 318 F. Supp. 2d 146, 154-55 (S.D.N.Y. 2004*); In re Credit Suisse First Bos. Corp.*, 431 F.3d 36, 46–47 (1st Cir. 2005), *overruled on other grounds by Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

Generalized allegations with respect to conflicts of interest, wrongdoing, or even an allegation of "an overarching fraudulent scheme or corrupt environment" will not suffice to establish subjective falsity. *Credit Suisse*, 431 F.3d at 49. Rather the evidence must relate to the speaker's subjective disbelief as to the particular statements at issue. *Id.* Evidence of a "sharp [business] practice" is insufficient to establish subjective falsity. *Id.* In dismissing a complaint involving alleged false analyst opinions, the court in *Podany* stated that plaintiffs can "point to no inconsistent statements or actions by defendants from which a factfinder could infer that the published opinions were not truly held." *Podany*, 318 F. Supp. 2d at 155.

This case is no different. There are many factual issues in dispute in this case, but what is not in dispute is the fact that Ms. Bebo was consistent in her expressions to others that ALC had an agreement with Ventas for ALC to pay for apartments for people with a reason to go to those

2012, it would have required ALC to re-state its financial statements and disclosures for the relevant time period.

Nor can the Division's claim be founded upon the occupancy reconciliation spreadsheets provided to Grant Thornton that included the lists of names. Those documents are clear on their face that they were not meant to convey the actual days and stays of employees and other non-residents at the CaraVita Facilities. At the time, Grant Thornton recognized that there were a number of employees that were included for entire quarters, or even years, at multiple facilities. (*See, e.g.*, Exs. 17-31 (CaraVita covenant calculations).) Grant Thornton understood those employees were not living at multiple facilities, but rather the rooms were set aside or made available for those employees to visit the particular facilities during the month or quarter in question. (*See* Robinson, Tr. 3401-3404.) And Grant Thornton also knew that units were being made available by ALC for non-employees, such as contractors or others that would have reason to assist in the operations of the facilities.[28] (*Id.*) Each quarter, Grant Thornton reviewed the journal entries flowing through the 997 Account, and knew the manner in which ALC was handling the internal accounting treatment. (*See, e.g.*, Resp't Br. at 135-37 (citing evidence).)

Finally, a claim under Rule 13b2-2 requires a showing of scienter, such as intent to deceive or extreme recklessness. *See SEC v. Todd*, 642 F.3d 1207, 1220 (9th Cir. 2011); *SEC v. Espuelas*, 905 F. Supp. 2d 507, 525-26 (S.D.N.Y. 2012). There is no evidence in the record establishing that Ms. Bebo intended to deceive Grant Thornton. (*See, e.g.*, Koeppel, Tr. 3360-61.) Ms. Bebo had little direct communication with Grant Thornton about the

[28] Nor can a Rule 13b2-2 violation be premised on those few instances where employees on the lists were no longer employed by ALC or because GT did not know the identity of each of the non-employees contained on the lists. This is because the Rule requires the statement to be *materially* false or misleading. Given the small number of instances and the fact that these were or could have been easily checked by GT (they possessed the full roster of ALC employees) (Ex. 3271 (shows Grant Thornton had access to payroll and JR data) it was simply immaterial as a matter of law.

employee leasing arrangement with Ventas, outside of her initial conversation with Melissa Koeppel and being present at the Board meetings where Grant Thornton presented on the subject. (*See, e.g.*, Koeppel, Tr. 3326.) Indeed, her openness with the auditors was one of the reasons that Milbank concluded there had been no wrongdoing on the part of management. In their words, her openness "suggests no ill intent by management." (Robinson, Tr. 3483-84; Ex. 1879, p. 6.)

C. The Division has failed to establish that Ms. Bebo violated the Exchange Act's books and records and internal controls provisions.

The Division argues that Ms. Bebo violated Sections 13(b)(2)(A), 13(b)(2)(B), and 13(b)(5) of the Exchange Act, because, through her alleged fraudulent scheme, she caused ALC's journal entries to the 997 Account and quarterly compliance certification documents provided to Ventas to be inaccurate and intentionally falsified, and because Ms. Bebo failed to establish sufficient internal controls that allowed these falsified transactions to be recorded in ALC's general ledger. (Div. Br. at 52-53.) However, consistent with the other claims in this case, the Division has failed to demonstrate that Ms. Bebo caused violations of the books and records and internal control provisions of the Act.

As stated in Ms. Bebo's Post-Hearing Brief, she did not instruct ALC's accounting staff to intentionally record false information in the journal entries or the quarterly compliance certification documents; all of the transactions relating to employee leasing that the accounting staff recorded in these records were based on criteria that Ms. Bebo and Mr. Solari agreed upon during their January 20, 2009 telephone conversation. (*See* Resp't Br. at 99-111 (citing evidence).) As such, neither the journal entries nor the compliance documents were false in any material way in violation of section 13(b)(2)(A). Further, Ms. Bebo properly relied upon Mr. Buono and ALC's accounting staff to maintain the quarterly employee lists that provided

support for the journal entries and compliance certification documents, so any inaccuracies in these records were minor and cannot be seen as unreasonable conduct on the part of Ms. Bebo. *See United States v. Reyes*, 577 F.3d 1069, 1080 (9th Cir. 2009) (stating that "insignificant or technical infractions or inadvertent conduct" should not give rise violations under the books and records provision); *see also* SEC Release Notice No. 17500, 1981 WL 36385 (Jan. 29, 1981) ("[I]nadvertent recordkeeping mistakes will not give rise to Commission enforcement proceedings....").

Moreover, because ALC had sufficient internal controls in place to safeguard against intercompany revenue associated with employee leasing affecting ALC's public reporting, Ms. Bebo did not cause a violation of Section 13(b)(2)(B). ALC's accounting department, supervised by Mr. Buono and Mr. Levonovich, established a process by which the revenue related to ALC's rental of units for employees and other residents at the various CaraVita Facilities would be recorded at the facility level and then eliminated in consolidation. (*See* Resp't Br. at 99-101 (citing evidence).) This was referred to as the 997 Account. Contrary to any claims by the Division, the 997 Account served as an effective internal controls measure, because revenue relating to employee leasing never affected the accuracy of the Company's financial statements, and ALC's financials were always GAAP compliant (and the Division has never asserted otherwise). In fact, Grant Thornton even signed off on ALC's internal accounting controls at 2012 year end after learning that ALC booked revenue not only for employees who went to the CaraVita Facilities, but also for those who had a reason to go, but did not *actually* go. (Ex. 2183; *see also* Barron, Tr. 1722.)

Lastly, for the reasons set forth in Ms. Bebo's Post-Hearing Brief, the Division has not demonstrated that Ms. Bebo acted recklessly or with scienter with respect to the employee leasing practice. Consequently, Ms. Bebo did cause violations of section 13(b)(5).

V. The Division has failed to establish that its requested remedies are available or appropriate here.

In addition to being unable to establish any violation of the securities laws, the Division likewise has failed to establish that its requested remedies are available, appropriate, or warranted in this case.

A. Disgorgement is not appropriate because Ms. Bebo did not obtain any "ill-gotten gains."

As explained in Ms. Bebo's initial Post-Hearing Brief, it is well-established that disgorgement is improper and must not be ordered where the Division fails to establish that the amounts it seeks to disgorge were "causally related" to the "fraud" it alleges. *See SEC v. Better Life Club of Am., Inc.*, 995 F. Supp. 167, 179 (D.D.C. 1998) ("Because disgorgement is so specifically aimed at ill-gotten profits, it is only to be exercised over property 'causally related to the wrongdoing.'") That is because disgorgement is a remedial measure, not a punitive one. *See, e.g. SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("disgorgement may not be used punitively").

The burden of establishing that funds sought to be disgorged are causally related to the alleged securities violation falls squarely on the Division. *See First City*, 890 F.2d at 1232. Any failure by the Division to prove the *existence* of ill-gotten gains causally related to Ms. Bebo's conduct is fatal to its request for disgorgement. *See, e.g., SEC v. Jones*, 476 F. Supp. 2d 374, 386 (S.D.N.Y. 2007) (denying request for disgorgement where "the Commission [was] unable to set forth any evidence of specific profits subject to disgorgement"); *SEC v. Resnick*, 604 F. Supp. 2d 773, 783 (D. Md. 2009) (denying disgorgement where evidence failed to demonstrate that

defendant's salary was causally related to unlawful conduct); *SEC v. Cohen*, 2007 WL 1192438, at *21 (E.D. Mo. Apr. 19, 2007) (denying request for disgorgement where SEC had "not shown that defendant obtained any ill-gotten gains or unjust enrichment from his actions"). Here, the Division has not shown—and cannot show—that Ms. Bebo obtained any ill-gotten gains from the "fraud" the Division alleges she perpetrated, and its request for disgorgement of any funds must be rejected for this reason alone.

The Division does not even attempt to show that Ms. Bebo profited as a direct result of any securities violation. Rather, the Division merely argues that the entire amount of Ms. Bebo's base salary and bonuses from 2009 through 2011 should be disgorged on the theory that earlier discovery of her alleged misconduct would have resulted in her termination, thereby rendering any compensation she received the product of her "fraud." (Div. Br. at 57.) As explained in Ms. Bebo's opening brief, however, this theory is not supported by the law or the facts.

The Division can point to no evidence showing that any compensation Ms. Bebo received was specifically tied to her alleged misconduct in connection with the Ventas lease covenant calculations. That is because Ms. Bebo's compensation was not tied to the Ventas Lease or covenant compliance, and there is no evidence that the employee leasing practice inflated her compensation in any way. The best the Division can do is point to the testimony of certain members of ALC's Compensation Committee and Board of Directors, who testified years after the fact that they *personally* would not have voted to award Ms. Bebo a bonus if they had been aware of her conduct at the time. (Div. Br. at 57 (citing Tr. 653:22-655:1; 2659:11-23; 2850:5-2851:3).) But that is a far cry from establishing that the compensation Ms. Bebo did receive was the product of a fraud; courts have rejected similar theories time and time again,

holding that compensation not contingent on any measure associated with the alleged securities fraud is not "ill-gotten" and therefore cannot be subject to disgorgement.

In *SEC v. Resnick*, for instance, the SEC sought to disgorge the defendant's entire bonuses and salary after he was found "to have participated in a fraudulent scheme to inflate and overstate the financial results" of his company. 604 F. Supp. 2d at 776. The court ordered disgorgement of only the bonuses, however, because they were directly based on the company's inflated earnings. *Id.* at 783. The court ruled that disgorgement of the defendant's annual salary, on the other hand, was not appropriate, because it was "ordinarily" paid each year without regard to the company's earnings. *Id.* It explained that it was "reasonable to assume that [the defendant] performed various functions of value to the company other than the fraudulent activities which inflated earnings." *Id.* As a result, the salary was not "causally linked to his unlawful conduct," and therefore was not subject to disgorgement. *Id.*

Unlike the bonuses at issue in *Resnick*, Ms. Bebo's bonuses were in no way related to the misconduct attributed to her by the Division, and there is no evidence to suggest that they were. And as in *Resnick*, Ms. Bebo's annual base salary was not dependent on the performance of the company or any aspect of its business, including the CaraVita properties covered by the Ventas lease. The Division's attempt to attribute Ms. Bebo's receipt of any compensation to her involvement with ALC's employee leasing practices is, at best, a tortured attempt to manufacture some causal link between the alleged misconduct and the amounts the Division seeks to disgorge. This is not enough to sustain the Division's burden. *See SEC v. Todd*, 2007 WL 1574756, at *18 (S.D. Cal. May 30, 2007) ("The SEC's position that Defendants should give up their salaries for the time at issue is untenable—it is basically a statement that because of several business decisions or errors, nothing else they did during that period matters. This is

punitive."); *SEC v. Cohen*, 2007 WL 1192438, at *21 ("The SEC has not shown that defendant obtained any ill-gotten gains or unjust enrichment from his actions of falsifying the books and records concerning the [subject] transactions. Furthermore, the Court is not persuaded that defendant benefited through bonuses, salary, or stock sales from such insignificant and immaterial acceleration of revenues.")

The cases the Division relies on do not support its contrary position that disgorgement of Ms. Bebo's entire base salary and bonuses is appropriate. In *SEC v. Black*, 2009 WL 1181480 (N.D. Ill. Apr. 30, 2009), the SEC sought disgorgement of management fees paid to the defendant following his various securities violations on the theory that the defendant would have been promptly discharged had his violations been disclosed earlier. The *Black* court ruled that by showing that the defendant was terminated within two months of the eventual discovery of his misconduct, the SEC had satisfied its initial burden of demonstrating a "reasonable approximation of profits causally connected to the violation." *Id.* at *3. Thus, the burden shifted to the defendant to show that earlier discovery of his violations would not have resulted in his immediate termination. But because Black was unable to point to any evidence contradicting the SEC's claims, the court found that disgorgement of the management fees he received was appropriate. *Id.*

Unlike in *Black*, here the Division can present no meaningful evidence to support itsspeculation that Ms. Bebo could have (or would have) been promptly terminated if her alleged misconduct was discovered earlier. Unlike in *Black*, where the SEC could point to a termination within two months of discovery of the conduct at issue, the Division can point to no such evidence in this case. Rather, the best the Division can do is cite to the testimony of select Board and Compensation Committee members who claim, long after the fact, that they would not have

voted to give Ms. Bebo bonuses and perhaps would have supported her immediate termination. Of course, as explained in Ms. Bebo's Post-Hearing Brief, such claims cannot withstand serious scrutiny in this case, particularly when Mr. Buono was not only *not* terminated upon discovery of the employee leasing practices, but was actually provided salary increases and bonuses. (*See* Resp't Br. at 206 (citing evidence).) Unlike in *Black,* when compared to the actual facts of this case, the Division's blanket assertions of causal effect cannot satisfy its burden of establishing that disgorgement of any amount is appropriate. Indeed, this Court has previously rejected the Division's reliance on *Black* in support of similar requests for disgorgement of compensation not directly related to the alleged wrongdoing. *In the Matter of Timbervest, LLC*, Initial Decision Release No. 658, 2014 WL 4090371 (Aug. 20, 2014) (this Court denied Division's request for disgorgement of management fees received subsequent to securities violations because record did not allow Court to infer that that respondent would have been terminated earlier, despite the fact the termination occurred within four months after disclosure of wrongdoing; Division did not even attempt "to differentiate between legitimate fees and ill-gotten fees" and as a result failed to carry its burden of proving ill-gotten gains).

The decision in *SEC v. Conaway*, 2009 WL 902063 (E.D. Mich. Mar. 31, 2009), is equally unavailing. There, the defendants, former officers of Kmart, moved for summary judgment on the SEC's request for disgorgement of salary and other benefits they received after their alleged securities violations on the grounds that none of their compensation was "causally connected" to the alleged fraud. *Id.* at *19. In response, the SEC argued that it was premature to address the disgorgement issue without the benefit of further discovery, and presented an affidavit from a member of Kmart's board which asserted that had he been aware of certain misleading information the defendants provided the board he would have recommended that the

board "take punitive or disciplinary action against them." *Id.* The Court found the proffered affidavit (which made generalized assertions much like the testimony the Division cites here) "somewhat thin," but ruled that it created a genuine issue of material fact on the SEC's entitlement to disgorgement sufficient to withstand summary judgment.

The *Conaway* court did not rule, as the Division suggests, that disgorgement of salary and compensation under the circumstances of this case is appropriate. Instead, it found only that disgorgement *may* be warranted if, for example, the evidence presented at trial showed Kmart would have been forced into bankruptcy but for the securities violations, thereby shortening defendants' tenure with the company, and it denied the defendants' motion for summary judgment on that basis. *Id.* at 20. Notably, the "somewhat thin" allegations presented in *Conaway* to overcome summary judgment ultimately were not enough to justify disgorgement of those amounts after trial. *See SEC v. Conaway*, 695 F. Supp. 2d 534, 565 (E.D. Mich. 2010) (ordering disgorgement of only a retention loan paid to Defendant, which unlike a salary earned for past services, was "not money to which the defendant would have been entitled irrespective of his fraud").

The equally thin allegations in this case are likewise insufficient to sustain the Division's request for disgorgement after trial. The Division has not established—and cannot establish—that the amounts it seeks to disgorge were in any way related to the misconduct it attributes to Ms. Bebo, much less carry its burden of establishing the causal connection necessary to justify disgorgement of "ill-gotten gains." For these reasons and the reasons discussed in Ms. Bebo's initial Post-Hearing Brief, the Division's request for disgorgement should be denied.

B. Monetary penalties are not warranted in this case.

As discussed in Ms. Bebo's Post-Hearing Brief, there is no basis for imposing any monetary penalties in this case, much less the significant third-tier penalties the Division seeks.

Indeed, as explained previously, such drastic penalties are only available when the Division has proven that the offense "involved fraud, deceit, manipulation or deliberate or reckless disregard of a regulatory requirement" *and* caused "substantial losses or created significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the [offense]." 15 U.S.C. § 78u-2(b)(3); 17 C.F.R. § 201.1004. The Division cannot satisfy its burden in this case.

As discussed above, Ms. Bebo's conduct did not constitute fraud, deceit, manipulation or deliberate or reckless disregard of the SEC's regulatory requirements or her responsibilities as CEO of a public company. Despite the Division's conclusory allegations to the contrary, the actual evidence presented in this case shows that Ms. Bebo genuinely and reasonably believed that the employee leasing practices implemented by ALC were appropriate and in compliance with the terms of its lease with Ventas. Even if the Court disagrees with Ms. Bebo's view of the lease requirements, there is no evidence that her conduct was the product of anything other than a sincere belief in the propriety of those practices and a genuine desire to protect the interests of her company during an economic downturn. This alone precludes the imposition of third-tier (or even second-tier) penalties.

Nor can the Division demonstrate that Ms. Bebo's alleged violations caused or even risked substantial losses to investors, as required to support its request for third-tier sanctions. Here, the Division falls back on its faulty premise that ALC's settlement of the underlying Ventas lawsuit by way of purchasing the Ventas facilities constituted a "substantial loss" sufficient to support the drastic sanctions the Division seeks. As explained previously, however, this argument fails for a number of reasons. For one thing, there is ample evidence that the price paid by ALC for the Ventas facilities was market value, and consistent with discussions between

ALC and Ventas which predated the Ventas suit or the covenant violations at the center of it. And there is likewise ample evidence that ALC's accounting for the transaction was based on intentionally conservative appraisals. In fact, far from supporting the Division's claims of "substantial loss" to ALC shareholders, the evidence demonstrates that the purchase of the CaraVita properties from Ventas actually increased ALC's value and resulted in an increase in share prices. (*See* Resp't Br. at 156.)

Moreover, even if the Division was correct that the purchase of the CaraVita properties was at an inflated value, there is no evidence that such an overpayment was in any way attributable to any consideration of the covenant requirements, much less the Division's allegations of securities violations. Indeed, the employee occupancy calculations were at best an afterthought in the underlying Ventas litigation, and the evidence demonstrates that the settlement decision was not driven by allegations concerning the treatment of employee leasing.

The Division's similar claim that ALC's $12 million settlement of a related securities class action lawsuit constituted a substantial loss to investors sufficient to support third-tier sanctions fairs no better. For one thing, the settlement of a lawsuit is not an admission of liability, so the fact that ALC chose to settle the class action does not mean that the suit had any merit and does not indicate that the underlying conduct at issue in the case exposed anyone, including shareholders, to any risk of loss or liability. Indeed, it is for that very reason that evidence of settlement agreements or negotiations are ordinarily inadmissible in our courts. *See* Fed. R. Evid. 408.

And more fundamentally, the existence of a class action premised on the same allegations raised by the Division in its enforcement proceedings (or even a settlement of such a class action) cannot constitute the "substantial loss" necessary to support third-tier sanctions. The

inevitable result of the Division's contrary stance is that any violation or alleged violation involving allegations of misrepresentations in public filings would merit third-tier monetary sanctions, because the very fact that allegations are raised by the SEC (whether meritorious or not) creates a risk that shareholders will piggyback on those allegations and bring their own derivative action. In effect, then, it is the nature of the allegations raised against Ms. Bebo that creates the risk of loss, regardless of whether her conduct ever directly caused or risked any loss (substantial or otherwise) in the first place. This type of ipso facto reasoning would render the requirement that the Division show such losses to justify third-tier sanctions irrelevant and does not satisfy well-established principles of statutory interpretation. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"); *Asiana Airlines v. FAA*, 134 F.3d 393, 398 (D.C. Cir. 1998) (holding that a statutory interpretation that renders a section of statute meaningless is impermissible). For these reasons, the Division has failed to show a substantial loss or risk of substantial loss directly caused by the conduct it attributes to Ms. Bebo, and third-tier sanctions are unavailable as a result.

And finally, the Division has failed even to attempt to demonstrate that the public interest supports the imposition of sanctions, opting instead to simply recite the public interest factors to be considered by the Court and declare in conclusory fashion that they are met in this case. But the Division's declaration that the public interest supports its position does not negate the ample evidence to the contrary. As explained in Ms. Bebo's Post-Hearing Brief, the conduct at issue here did not involve scienter, there is no evidence that Ms. Bebo gained any financial benefit from it, she has never before been so much as accused of a securities violations, and there is

minimal risk of recurrent violations or any need to deter similar misconduct in the future. Thus, the public interest does not support the imposition of any monetary penalties.

In short, the Division has failed to show that Ms. Bebo's conduct amounted to fraud, deceit or other intentional misconduct or caused or risked any "substantial loss" to others. Nor has it demonstrated with the benefit of actual evidence that the public interest supports its request for monetary sanctions. For these reasons, the Division's request for third-tier (or any) sanctions should be rejected.

C. The Division's request for an officer and director bar should likewise be rejected.

The Division's request for an officer and director bar should be denied for many of the same reasons its request for monetary sanctions should be denied.

In support of its request for such a bar, the Division merely states that Ms. Bebo's "conduct was egregious and involved scienter, and she orchestrated her scheme from the highest-possible corporate position." (Div. Br. at 59.) But again, it is not enough simply to declare that the Division has satisfied its burden of showing that Ms. Bebo is unfit to serve as an officer or director. Without evidence supporting its blanket assertions, the Division is not entitled to a permanent (or any) director and officer bar. And the evidence in this case does not support the Division's position in any case. As discussed above, as well as in Ms. Bebo's Post-Hearing Brief, the evidence does not support any claim that Ms. Bebo knowingly or intentionally violated any securities laws in her role as CEO of ALC, including with respect to the employee leasing practices at issue in this case, and she did not reap any financial gain as a result of the practices. Nor is there any evidence that Ms. Bebo is the kind of "repeat offender" a permanent director and officer bar is intended to address. In fact, it is undisputed that she has never before been so much as accused of a securities violation. Moreover, there is little if any likelihood of recurrence here,

particularly because Ms. Bebo is not in a position to commit any securities violations in the future. And despite what the Division would have the Court believe, the mere fact that Ms. Bebo held "the highest-possible corporate position" at the time of the underlying conduct does not justify a D&O bar.

For these reasons, as discussed more fully in Ms. Bebo's Post-Hearing Brief, there is no basis for any director and officer bar in this case, much less the permanent bar the Division seeks.

D. Ms. Bebo should not be punished for contesting the Division's allegations.

The Division asserts that the Court should impose sanctions against Ms. Bebo because she has not admitted to any wrongdoing, and in fact, "testified that she does not believe she did anything wrong." (Div. Br. at 56.) In effect, the Division is arguing that Ms. Bebo should be punished because she did not immediately roll over and give in when faced with the Division's allegations of misconduct and repeated threats of sanction. This argument flies in the face of the foundational principles supporting our adversarial system of justice, and should be rejected out of hand.

Indeed, numerous courts have rejected this very argument before. *See SEC v. Johnson*, 595 F. Supp. 2d 40, 45 (D.D.C. 2009) ("The SEC also argues that [defendant] has not recognized the wrongful nature of his actions because he testified in a July 2007 deposition that he thinks he did nothing wrong. Needless to say, [defendant] has a right to vigorously contest the SEC's allegations and was not required "to behave like Uriah Heep in order to avoid an injunction."); *SEC v. Ingoldsby*, 1990 WL 120731, at *3 (D. Mass. May 15, 1990) ("Absent a showing of bad faith, the defendant should not be prejudiced for presenting a vigorous defense and requiring the SEC to meet its proper evidentiary burden both at trial and at the injunctive relief stage of the judicial proceedings.")

As in these cases, Ms. Bebo should not be punished merely because she has vigorously contested the Division's allegations against her and maintains her innocence. Anyone accused of such serious offenses and facing the threat of crippling monetary sanctions and penalties should have the right to put the Division to its proof and contest those accusations. The fact that Ms. Bebo maintains her innocence despite the Division's specious allegations should not be used against her. And the fact that the Division seems to argue otherwise demonstrates the folly in the Division's pursuit of Ms. Bebo. Ms. Bebo cannot and should not be punished for exercising her legal rights.

Dated this 28th day of August, 2015.

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APPENDIX

The following chart reflects examples of improper impeachment by the Division that should not be considered in any way to impugn Ms. Bebo's credibility. These are examples in addition to those described in the body of Respondent's Reply Brief.[1]

Division's Purported Impeachment	Why the Division's Impeachment was Improper
Tr. 1904:22-1906:15 **Q Okay. But I just want to make this clear. You told Solari -- well, you and Mr. Solari talked about whether ALC could actually rent apartments to employees.** MR. CAMELI: It's been asked and answered three times. JUDGE ELLIOT: Overruled. This is your last chance, though. THE WITNESS: I will restate that my conversation with Mr. Solari was for ALC to pay for apartments for people that have a reason to go. Inasmuch as that falls into the question you asked me, I'm comfortable with that, but I want to be clear about what I spoke with Solari about. **BY MR. HANAUER: Q Okay. Can we please go to Exhibit 496, page 82, and start with the question on line five, going through line 12.**	The Division's impeachment was improper for several reasons. First, Ms. Bebo's investigative testimony, including portions the Division did not cite, was consistent with her hearing testimony. The Division's principal question in the investigative testimony, which preceded the Division's citation, was "[w]hat was said on this phone call about the financial covenants in the CaraVita lease?" (Ex. 496, p. 81.) Ms. Bebo provided the response that the Division cited. Then when continuing her answer several pages later, after briefly discussing her notes, Ms. Bebo was asked by the Division "Back to the conversation with Joe Solari, you had said that, he said that he didn't care how many people. Did he say anything about whether he cared whether the people actually stayed at the property" and Ms. Bebo replied, "No, he, he, I think I'll tell you more of what I said and he was agreeable to . . . So, I had *indicated that we would have apartments set aside for people who would have reason to go there* . . . We didn't even say they would be people that, that actually would go, but *what the terminology that we talked about was to set aside apartments for people that would have reason to go there*." (Ex. 496, pp.

[1] Not every single instance of purported impeachment is addressed in this appendix. In several cases, the Division focuses on such trivial matters, such as Ms. Bebo not being able to recall the precise manner and steps in which the accounting staff prepared the occupancy reconciliations that were eventually provided to Ms. Bebo so she could identify employees or others with a reason to go to the CaraVita Facilities, and whether she told Mr. Robinson that non-employees like contractors were included in the covenant calculations at the first or second meeting.

Division's Purported Impeachment	Why the Division's Impeachment was Improper
A Not in my book. **Q Not in your book.** **And I can represent to you that this is part of your testimony talking about your conversation with Mr. Solari, but counsel will let me know if I'm off the mark on that. Do you remember giving testimony to the SEC?** A Yes, I do. **Q And do you remember being asked the question he said, "I don't recall or you don't recall?" Well, let me start over. I'm just going to read the transcript. He said. "I don't recall, or you don't recall? Answer: Yeah -- no, no. That was his answer, you know. He -- it was something to the effect of -- you know, I'm not sure. You know, I don't recall. Then we talked about -- we talked about a -- whether -- whether ALC could actually rent apartments to employees. People that were traveling basically -- for us to -- for us to utilize apartments at CaraVita for [itinerant] employees, which Joe was fine with."** **You were asked that question, and you gave that answer?**	86-87 (emphasis added).) Ms. Bebo's full answer during her investigative testimony was consistent with her hearing testimony. In fact, Ms. Bebo provided additional investigative testimony that was consistent with this investigative testimony and her hearing testimony. (Ex. 499, p. 580 (when asked again about this call with Mr. Solari, Ms. Bebo testified "And then asked him, you know, if this is something he's okay with, he said yes, asked him if he was, if he would be okay with us setting aside apartments for employees that would have a reason to go there, to be used like a hotel versus having, you know, any, any outside type expenses. He was, he was fine with that.").) Second, setting aside Ms. Bebo's investigative testimony that used the reason to go language, the Division attempted to improperly impeach Ms. Bebo based on her use of language that was used synonymously (employee leasing, rental of rooms to employees with a reason to go, rental of apartments for individuals, etc.) throughout her investigative testimony. Finally, even Ms. Bebo's answer used by the Division itself clarifies that *ALC* would "utilize apartments at CaraVita for [itinerant] employees, which Joe was fine with." At the hearing Ms. Bebo stated that she discussed with Ventas paying for apartments for people that had a reason to go, which was synonymous with her investigative testimony that the Division used to "impeach" her, where she discussed renting apartments to employees. Ms. Bebo was not inconsistent and was not impeached, as the Division suggested in its Post-Hearing Brief.
Tr. 1909:9-1911:8 **Q Okay. And then you asked Mr. Solari how many rooms could be rented for employee use, and he said he didn't care?**	The Division's attempted impeachment was improper for several reasons. First, the Division's question at the hearing suggested that Ms. Bebo was originally asked during this portion of her investigative testimony about whether, during the January 20, 2009, phone call, she asked Mr. Solari

Division's Purported Impeachment	Why the Division's Impeachment was Improper
A Again, I'll say generally speaking, I think that it went a little bit more like, do you care how many? And he said he didn't care. **Q He didn't care how many apartments ALC paid for for its employees.** A I'm not going to go along with your "for employees" statement, but Mr. Solari agreed that he was not going to place a limit on the number of apartments ALC paid for. **Q Paid for for employees.** A Paid for for people that have a reason to go. **Q Could you please go to Exhibit 496, page 83 and whatever the -- the question that preceded lines 18 through 22.** MR. CAMELI: I think we need more of this, Your Honor. Not just -- go ahead. MR. HANAUER: Okay. Can you pull up the next question and answer, please. **BY MR. HANAUER:** **Q Do you remember giving testimony before the SEC?** A Yes, I do. **Q And you were asked the question,** **"You can say that you don't -- you can say what you said to them based on those notes, but please don't connect the two.** **Answer: Okay. Let's see. Sorry, I'll just review again a little bit.** **Question: Go ahead.** **Answer: So we talk about the fact that there was a CaraVita employee living there. We talk about the**	how many rooms could be rented. In fact, during her investigative testimony, Ms. Bebo was asked about what was said during this phone call more generally and she responded to that broad question. The Division created a false impression as to Ms. Bebo's testimony. Second, the Division attempted to impeach Ms. Bebo with language or terms that were used synonymously during this case. Ms. Bebo's use of "paying for apartments for employees" during her investigative testimony was substantively the same as the people who have a reason to go language Ms. Bebo used at the hearing. As set forth in the discussion of the alleged impeachment immediately preceding this one, in the same dialogue during her investigative testimony about the conversation with Mr. Solari, Ms. Bebo was explicit that "what the terminology that we talked about was to set aside apartments for people that would have a reason to go there." (Ex. 496, p. 87.) Finally, Ms. Bebo gave additional investigative testimony on this issue and used similar language that the she used at the hearing. (Ex. 499, pp. 579-81 (Ms. Bebo was again asked about the January 20, 2009, call and she testified that she "asked [Joe Solari], you know, if this is something he's okay with, and he said yes, asked him if he was, if he would be okay with us setting aside apartments for employees that would have a reason to go there, to be used like a hotel versus having, you know, any, any outside type expenses. . .He, at some point I asked him if he cared how many, how many apartments that, how many apartments we set aside, he said no."; Ms. Bebo repeated the fact that Mr. Solari did not care how many, later on the same page as well).) At the hearing, Ms. Bebo informed the Court and the Division, that the Division was not using her full answer and that her impeachment was improper. At the hearing, she responded to the Division's cited impeachment by stating:

Division's Purported Impeachment	Why the Division's Impeachment was Improper
fact that, is he open to that? He's open to the idea of ALC paying for apartments for employees. He says yes. I ask him, how many? He says he doesn't care." **You were asked those questions, and you gave those answers?** MR. CAMELI: I'm going to object, Your Honor. Improper impeachment. It doesn't go to the question that Mr. Hanauer has asked earlier. JUDGE ELLIOT: Could you -- let me see the -- just take away this blow-up here on the screen. Let me read the rest of it. No. Don't blow anything up. Just let me read the whole thing. Thanks. Overruled.	THE WITNESS: Mr. Hanauer, as you're well aware, I probably have close to 50 hours of testimony with the SEC. I was asked that question probably 30 different times, 30 different ways broken in parts. So as I sit here today and you ask me, is that part of a discourse that I had with Mr. Tandy or yourself, yes, I believe it is. However, that doesn't represent my full and complete answer or other answers that I gave within those 50 hours of testimony. (Bebo, Tr. 1911.)
Tr. 1782:23-1784:8 **Q You understood that as the owner of those properties, Ventas -- Ventas wanted its properties to be performing well.** A No. **Q Could you please pull up Exhibit 498. Page 411, line 23 through 412, line 13. Do you remember testifying before the SEC in the investigation that preceded this lawsuit?** A Yes. **Q Do you remember when you testified, you were under oath?** A Yes. **Q Do you remember being asked the following sequence of events: "It is your testimony that Ventas wanted to increase the performance of the CaraVita**	The Division's impeachment was improper because Ms. Bebo's hearing testimony was not inconsistent with her prior investigative testimony. The question posed to Ms. Bebo at the hearing—whether Ventas wanted its properties to be performing well—was different than the question the Division asked during her investigative testimony. The investigative testimony cited by the Division for impeachment stated that Ventas, as owner of the properties, *would* want the buildings to be performing well, which Ms. Bebo agreed with. This question from the investigative testimony was speculative, as to what an owner *would* want, whereas the question at the hearing was framed as whether Ms. Bebo knew that Ventas wanted its properties to be performing well. Ms. Bebo answered two different questions consistently and was not properly impeached with her prior investigative testimony.

Division's Purported Impeachment	Why the Division's Impeachment was Improper
properties. **"Answer: I don't know.** **"Question: You don't know one way or the other?** **"I mean, I -- I think, generally speaking. They would just be happy with all their properties doing well. So I mean --** **"Question: So they did. They wanted the CaraVita properties to be performing well. That was an interest of theirs.** **"Answer: I -- I don't -- I don't know. I, you know, I mean --** **"Question: It makes sense, right? I mean, they own the properties. They'd want them to be performing well, right?"** **And your answer: "Generally speaking, yes."** **Were you asked those questions, and did you provide those answers?** A Yes.	
Tr. 1912:20-1914:5 **Q And you asked Mr. Solari whether he wanted ALC to identify the number of employees being included in the calculations, and he said that he did not.** A I believe that, generally speaking, that's correct. My recollection more specifically is, I asked him if he wanted this broken out in any way, and he indicated no. **Q And you asked him whether Mr. Solari wanted the number of employees broken out.** A Not employees. I asked Mr. Solari if he would like	Again, the Division improperly attempted to impeach Ms. Bebo with terminology that was used synonymously throughout her investigative testimony. Ms. Bebo's use of "apartments that ALC was paying for" during the hearing and "number of employees" during her investigative testimony was consistent. As stated in her Reply Brief, Ms. Bebo's response to this impeachment states this point precisely: Again, I'll repeat that I have been asked these same questions over and over again. For purposes of, I'm sure, partially efficiency, when we were having our discourse in the offices -- in the SEC offices with either you or Mr. Tandy, I did not try to correct him every time he used the wrong language. However, I

Division's Purported Impeachment	Why the Division's Impeachment was Improper
broken out the apartments that ALC was paying for. **Q Exhibit 500, please. Page 704, lines 15 through 19.** **"Question: So you remember in the January conversation with Solari that you, specifically, asked him whether he wanted the number of employees broken out, and he said no?** **Answer: Correct."** **Am I reading your testimony transcript correctly?** A Again, I'll repeat that I have been asked these same questions over and over again. For purposes of, I'm sure, partially efficiency, when we were having our discourse in the offices -- in the SEC offices with either you or Mr. Tandy, I did not try to correct him every time he used the wrong language. However, I am very clear on the record with you in my testimony that it was for people that have a reason to go. **Q Okay. But just so I'm clear, you were asked that question, and you gave that answer under oath.** A I believe this -- I believe that this is part of the discourse that we had.	am very clear on the record with you in my testimony that it was for people that have a reason to go. Additionally, other parts of Ms. Bebo's investigative testimony indicate how these terms were used. (Ex. 499, pp. 639-46 (Ms. Bebo was discussing the employee leasing lists and the reason to go standard, when she states "that conference call with Joe which I think I said was around January something '09, I asked Joe, you know, do you want them broken out, you know, we were talking about reporting such. And he says no"; a few pages of testimony later, the Division asked Ms. Bebo about the term set aside and she testified, "[h]is understanding that I told him, or should be by way of what I told him is that ALC was going to pay for apartments" and her response to the Division's next question was, "[f]or apartments ALC would pay for, for people that have a reason to go").) Thus, again, there was no inconsistency with Ms. Bebo's hearing testimony.
Tr. 1917:5-1919:11 **Q But following the January 20th, 2000 [sic] call, you never discussed with Mr. Solari the issue of ALC using employees or other non-residents to meet the occupancy and coverage covenant calculations?** A I'm going to say generally speaking, yes, I did. **Q Could you please pull up page 500 -- or Exhibit 500, please, Rick. Page 847.**	The Division's impeachment was improper because Ms. Bebo gave consistent testimony prior to this statement (Ex. 496, p. 96 (after discussing the January 20 call with the Division, Ms. Bebo was asked "So you never had another conversation with Joe Solari about the employee stays after conversation number two?" to which she replied, "About employee stays? I would have had one other conversation with him").) The fact that she could not recall it at that particular moment during her investigative testimony does not reflect poorly on her credibility. Additionally, although the court concluded that Ms. Bebo's

Division's Purported Impeachment	Why the Division's Impeachment was Improper
MR. RICK BELL: Did you say the exhibit number? BY MR. HANAUER: I'm sorry, Exhibit 500, page 847. 847, lines 15 through 22. **BY MR. HANAUER:** **Q And do you remember giving testimony before the SEC?** A I do. **Q And I can represent to you this would have been your fifth day of testimony, does that sound accurate?** A I'm comfortable I had at least five days. **Q Okay. And I'll read the questions and answers. "Okay. Did you have any other discussions with anyone at Ventas on that point after the call with Mr. Solari?** **Answer: On what point?** **Question: That ALC could use employees and other people, non-residents, to meet the occupancy and coverage covenant calculations.** **Answer: I don't recall."** **Were you asked those questions, and did you give those answers?** MR. CAMELI: I'm going to object. Improper impeachment based on the questions and answers given by Mr. Hanauer and Ms. Bebo. JUDGE ELLIOT: Well, do you want to be heard on this? She said she didn't recall before, that she couldn't remember. I'm not sure it's impeaching to point out that before she couldn't remember the answers. MR. HANAUER: In that case, Your Honor, we would just move to have that portion of the transcript admitted into the record as an admission.	testimony was technically inconsistent, the Court questioned the validity of the Division's impeachment. (Hearing, Tr. 1918 (Judge Elliot stated: "Well, do you want to be heard on this? She said she didn't recall before, that she couldn't remember. I'm not sure it's impeaching to point out that before she couldn't remember the answers.").)

Division's Purported Impeachment	Why the Division's Impeachment was Improper
THE WITNESS: Then do I have an opportunity to respond? JUDGE ELLIOT: I'm sorry, hold on. Oh, Mr. Cameli. MR. CAMELI: We object. This is not an admission of anything. I have no idea what he's talking about. JUDGE ELLIOT: Well, it is inconsistent with what she just testified to. It's just that what she testified to before was "I don't recall." So do you oppose the admission of this? MR. CAMELI: Yes -- JUDGE ELLIOT: I'm going to allow it.	
Tr. 1939:24-1941:8 **Q Right. And then I understand you're testifying that you didn't think you were going to do it, but you thought that you could, if you wanted to, lease 560 apartments to employees.** A No. I'll restate that I did not contemplate at the time, not -- I did not contemplate that we would need to do that, but I'm telling you that I had never thought I -- I had not thought it through to that extent. I was comfortable with the fact that --I'm comfortable with the fact that my impression --pardon me. I'm comfortable with the fact that Mr. Solari said on the call that there was no limit. **Q Can you please pull up Exhibit 496, page 129, line 24 through 130, line ten. Now I'll read -- I'll continue from a question.** **"Pursuant to your conversations that you had with Joe Solari, was it your understanding that ALC could lease any number of apartments at CaraVita to ALC**	The Division's impeachment was improper because the question asked at the hearing was different than the question and answer from investigative testimony used to allegedly impeach Ms. Bebo. During Ms. Bebo's investigative testimony, she was asked to opine on a logical conclusion of her understanding of the employee leasing agreement, whereas at the hearing Ms. Bebo was asked whether she thought at the time she could lease up to 560 apartments. The latter question focused on what she actually thought when employee leasing was occurring and the former question related to what would be permissible if she extrapolated based on her understanding of the agreement, which occurred after-the-fact during her investigative testimony. Thus, her hearing testimony that she did not contemplate renting rooms to 560 or more employees was not inconsistent with her prior testimony. Also, Respondent's attorney noted a similar distinction about this issue in Ms. Bebo's investigative testimony. (Ex. 499, pp. 595-96.) Additionally, Ms. Bebo was consistent throughout her investigative testimony that she did not contemplate the extremes of ALC renting all of the CaraVita rooms. (*See* Ex. 499, pp. 595-96 (the Division stated it

Division's Purported Impeachment	Why the Division's Impeachment was Improper
employees? **Answer: Yes, I specifically asked Joe that.** **Question: It could be all the way up to, I think it was 560-something, all 565, 64, whatever, apartments could be leased to ALC employees? Is that -- was that your understanding at the time?** **Answer: Yes, that" --** **Or I'm sorry,** **"Answer: That would be my understanding. He didn't specifically say 564 apartments; but when I asked him, you know, do you care how many? He said no."** **Were you asked those questions in your testimony, and did you give those answers?**	was more interested in Ms. Bebo's knowledge during the employee leasing program and Ms. Bebo replied "[a]t that time, I can't tell you that I thought of every extreme..."); Ex. 501, pp. 995-96 (Ms. Bebo stated that her understanding about the limit of non-residents that ALC could include would follow the definition; when asked about it ranging from 1 to 540, she stated "[w]e honestly, you know, hadn't contemplated 540 or whatever the total number is. So it's a hypothetical. It's not something that I had truly thought about at the time.").)
Tr. 2127:16-2131:12 **Q And one of the reasons that you were interested in ALC buying the properties in advance of ALC's sale was you believed that whoever came in to buy ALC would have difficulty with certain issues related to the Ventas lease.** A First, there's -- there is a particular challenge with the Ventas lease, as far as just the transfer, such that it's my understanding that Ventas -- Ventas' approval is required, basically to complete the sale transaction of ALC, because of a transfer of assets of the Ventas properties and perhaps a change with regard to the guarantor. So that's one issue with regard to the Ventas lease. And another issue with regard to the Ventas lease that we discussed at some point was the fact that John and I may	The Division's attempted impeachment was improper for at least two reasons. Most importantly, Ms. Bebo's hearing testimony was consistent with her investigative testimony. At the hearing, she testified that potential bidders for ALC may want additional assurances about the employee leasing agreement, since Mr. Buono, Mr. Fonstad, Ms. Bebo, and Mr. Solari—the original participants to the call—would all potentially be gone from their respective employers. During her investigative testimony she testified to the same effect, simply using different language. She stated she thought bidders would want additional "comfort" or "coverage," synonymous with "further assurances." Nowhere in the cited investigative testimony did Ms. Bebo state that a bidder would not recognize the employee leasing arrangement. A potential purchaser of ALC wanting more comfort about a potential legal argument if any disputes with Ventas arose after the transaction does not mean that the bidder rejects the existence of an agreement outright, as the

Division's Purported Impeachment	Why the Division's Impeachment was Improper
not be there, and therefore, none of the -- none of the folks -- potentially none of the folks that had been in discussions with Ventas previously would be around and that the potential bidders would want some further assurances from Ventas of the agreed-upon language. **Q And one of the things in particular that you were worried about was that neither ALC's buyer or Ventas would recognize the employee leasing agreement.** A No, that's not correct. **Q Okay. Let's go to Exhibit 502, please, page 1188, line 16 through 1189, line 22. I can represent to you that this is your testimony from the last day you testified before the division staff. You were asked,** **"Question: Hopefully, you still feel that way. Why did you -- why were you hoping that Mr. Rhinelander still felt like he wanted to be getting it, wanted to get a deal done where the Ventas properties were purchased?** **Answer: There's a number of reasons that I felt it was a -- it was the right route to go. One, we've got continued challenges with regard to the regulatory piece. And to buy the buildings allows us to unlicense the properties.** **And additionally, as I think we may have talked about before, is that we have to consider what the requirements are in the lease for the surviving entity, the -- the purchaser of ALC that assumes the Ventas lease, and we have to get the -- and we likely -- and we likely have to get something else for the new buyers to**	Division improperly suggested from its impeachment and manufactured from Ms. Bebo's testimony. Also, the Division improperly created the inference that Ms. Bebo was directly asked about bidders or Ventas recognizing the existence of an agreement during her investigative testimony, when, on the contrary, she was responding to a much different and broader question than she was presented at the hearing. Ms. Bebo's testimony was consistent and this was not impeachment at all.

Division's Purported Impeachment	Why the Division's Impeachment was Improper
be comfortable with the employee lease agreement with Ventas. And -- Question: Why? Answer: Because the surviving entity may not include John and I. Question: May not what? I'm sorry, I didn't hear you. Answer: The surviving entity may not include John and I. Question: But presumably, they would be entitled to do the same thing that you were doing. Answer: That's true, but an outside buyer that then would have none of the players there to have, you know, firsthand knowledge of what the agreement was and the past practice. It would be -- it would be too much risk. A buyer would be -- I don't think would be comfortable doing something like that." And then can you go down from page 190, line 4 through 21. I'm sorry, 1190, line 4 through 21. 1190, 4 through 21. You may just want to go to the question before that. Sorry. And you were asked, "Question: Your understanding. Answer: My thoughts on it, it's not legal advice that I got, but my thoughts on it were that if Ventas says at some point that, no, they don't agree to that, the buyer doesn't have any of the players there that entered into an agreement that sent the e-mail, that participated on the conference call. They don't have	

Division's Purported Impeachment	Why the Division's Impeachment was Improper
anybody else there with firsthand knowledge. It would be a very difficult legal argument for them to make at that point. **Question: At this point, Ventas hasn't said anything for three years about the employee leasing; is that correct?** **Answer: Generally speaking, yes, that's correct.** **Question: So is there something that made you think at the time that there was a possibility that Ventas was going to bring it up in the future after three years?** **Answer: I didn't have any reason to believe they would. But again, think about it, if I was a buyer, I would still want some sort of coverage on that."** **You were asked those questions, and you gave those answers?**	
Tr. 2184:15-2187:9 **Q Right. And you realize that the first day you testified before the commission, you testified that you didn't discuss the employee leasing program with Quarles & Brady.** A I'm not sure which testimony you're referring to, but again, I am comfortable that there was a discussion that I had with the SEC about a conversation that I remembered related to the SEC comment letter and the response for the SEC comment letter. **Q Okay. So let's go to page -- Exhibit 496.Page 110, line 19 through 111, line 3. So you were asked, "Question: So can you identify for me a list of the**	The Division did not impeach Ms. Bebo because her hearing testimony was consistent with her investigative testimony. At the hearing, Ms. Bebo was initially asked generally about her conversations with Quarles & Brady. (Bebo, Tr. 2174 (Q: "And you discussed the inclusion of employees in the covenant calculations with Quarles & Brady"; A: "Generally speaking, that's correct.").) Ms. Bebo testified about discussing employee leasing with Quarles immediately after ALC received the SEC comment letter at the end of July, 2011. (Bebo, Tr. 2178-84.) Also, at one point during the hearing, the Division asked Ms. Bebo, "Okay. So prior to the time of the SEC comment letter, you couldn't have relied on any advice given by Quarles & Brady on the subject of including employees in the covenant calculations," to which Ms. Bebo replied "I did not personally seek an opinion -- a legal opinion

Division's Purported Impeachment	Why the Division's Impeachment was Improper
attorneys that you spoke to about employee stays and the extent to which they could or couldn't be included in the CaraVita covenant calculations? **Answer: I'm sorry, the number of times or the person?** **Question: The identity of the people first, the identity of the attorneys.** **Answer: Eric Fonstad, internal general counsel.** **Question: Anyone else?** **Answer: Not that I recall."** **You were asked those questions, and you gave those answers under oath?** A Again, this is part of our discourse, and this is more specifically about whether I actually got advice or asked for a legal opinion. It was whether I could or couldn't include them specifically, and I would restate that the only person that I had specifically asked whether they could or couldn't be included or specifically asked to provide me a legal opinion on the practice was Mr. Fonstad prior to March of 2012. **Q Okay. That was the first day of your testimony. Let's look at the second day of your testimony. Exhibit 497, page 303, line 2 through 303, line 24. And then the next page, going down to 303, line 24. 303, lines 2 through 24. I'm sorry. There you go. My apologies, Your Honor.** **"Question: So I want to know, just for my purposes, as to what was or wasn't permissible with regard to the employee leasing in connection with the CaraVita financial calculations. Did you consult with any attorneys?**	from Quarles & Brady during that time period that you're mentioning." (Bebo, Tr. 2177.) In fact, she continued to reiterate at the hearing that she did ask for a legal opinion at that time. (*See* Bebo, Tr. 2177-78.) Then, after all of this hearing testimony, the Division attempted to "impeach" Ms. Bebo with investigative testimony that was entirely consistent with her hearing testimony. The Division's attempted impeachment of Ms. Bebo implying that she previously stated that she did not discuss employee leasing with Quarles at all prior to 2012 was an improper mischaracterization of the record. Again, Ms. Bebo had testified at the hearing generally about her conversation with Quarles about employee leasing with regard to the SEC comment letter. The first swath of investigative testimony the Division attempted to use to impeach Ms. Bebo was a line of questioning about which attorneys were consulted about whether the employee leasing program was appropriate (*i.e.*, a legal opinion), not just a general discussion of employee leasing. As Ms. Bebo testified to at the hearing, Quarles was not asked to opine on the permissibility of the employee leasing issue prior to the 2012 reasonableness opinion, which is why she did not mention Quarles in this part of her investigative testimony. Ms. Bebo correctly pointed out this distinction to the Court and the Division, when explaining why the Division's impeachment was improper. The second portion of investigative testimony the Division attempted to use for impeachment was similarly concerned about obtaining a legal opinion and not a general conversation about employee leasing. Even the last question the Division cited used the word "consult," which in the context of the prior questions obviously sought information about which attorneys Ms. Bebo sought legal advice or opinions about the permissibility of the employee leasing arrangement under the Lease. The testimony surrounding the investigative testimony the Division cited makes this apparent:

Division's Purported Impeachment	Why the Division's Impeachment was Improper
Answer: Yes. **Question: Which attorneys did you consult?** **Answer: Mr. Fonstad, Eric Fonstad.** **Question: And did you consult with any other attorneys about the employee -- whether, you know, the issue of employee stays -- let me rephrase.** **Did you consult with any other attorneys about the topic of employee stays in relationship to the CaraVita financial covenant calculations?** **Answer: In 2009?** **Question: Ever.** **Answer: Ever? Oh, yes.** **Question: Okay. Was it before March of 2012, the next time you consulted an attorney?** **Answer: No.** **Question: Okay. It's the reasonableness opinion now was the next time?** **Answer: Yes."**	Page 303 Q I want to turn back now to what's been previously marked as Commission Exhibit 172. And so I want to know, just for my purposes, as to what was or wasn't permissible with regard to the employee leasing in connection with the CaraVita financial calculations. Did you consult with any attorneys? A Yes. Q Which attorneys did you consult? A Mr. Fonstand, Eric Fonstand. Q And did you consult with any other attorneys about the employee, whether, you know, the issue of employee stays; let me rephrase. Did you consult with any other attorneys about the topic of employee stays in the relationship to the CaraVita financial covenant calculations? A In 2009? Q Ever. A Ever. Oh, yes. Q Okay. Was it before March of 2012, the next time you consulted an attorney? A No. Q Okay. It's the reasonableness opinion was the next time? A Yes. Q Okay. And how many times did you speak with

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	Page 304 Eric Fonstand about the employee stays in connection with the CaraVita financial covenant calculations? A Approximately three to five before, approximately three to five before I met with Mel on that February 2009 meeting. Q And how many times after you met with Mel? A Not in a board meeting? Q Not in a board meeting. I mean, I'm assuming he was present for the board meeting discussions, right? A Yeah, he would have been through the end of 2010. Q Okay. So, we know what he heard at the board meeting discussions, assuming he was at those meetings. A Yeah, and he would have participated too with some answers to questions, whatever. Maybe one or two times. Q Did you rely on his advice in determining whether the employee stays were permissible under the terms of the lease in calculating the financial covenant, in doing the financial covenant calculations? A Yes. Q Any other attorneys whose advice you relied on in figuring out or determining what the potential scope of employee stays could be in connection with the CaraVita financial covenant calculations?

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A Are we saying outside of the reasonableness opinion?
Q Again, we're, I'm sorry.
A Okay.
Q Yes, before March 6th, 2012.
A Okay. No.
Q Okay. Not Corals & Brady or anyone therein?
A I don't recall doing that. I had mentioned maybe yesterday or today. I don't know who Eric spoke with.
Q Okay.
A I also don't know, so I don't know if Corals & Brady knows. They may or may not know. I don't know.
Q If possible we'll talk to Eric Fonstand, but we have to go through ALC for that.
A John might have told him, too.
Q In determining whether ALC could use certain employees as occupants at multiple properties, did you rely on any advice of counsel?
A Beside Eric or?
Q Beside Eric.
A Oh, no, not beside Eric.
Q Okay, but you did rely on Eric in connection with that?
A Yes.

As the full excerpt of Ms. Bebo's investigative testimony reflects, the Division was asking about whether she obtained legal advice from Quarles (or other attorneys) about permissibility of employee leasing under the Lease—her answer that she did not obtain legal advice from Quarles prior to 2012 has remained consistent between her investigative testimony and her hearing testimony. However, the Division cannot use the absence of Quarles from Ms. Bebo's investigative testimony about whether she obtained a legal opinion to impeach her hearing testimony

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	that she generally discussed employee leasing with Quarles in connection with whether ALC's Ventas Lease disclosure in Commission filings was proper, after ALC received the SEC comment letter. Again, Ms. Bebo was not impeached by the Division.
Tr. 2187:16-2189:13 And so I stand by my testimony, as far as the discussion with Quarles regarding the SEC comment letter; and as I stated, I did not at that time ask them to opine on the legal opinion regarding the permissibility of employee or ALC paying for apartments. **Q Very good. Page 313, line 3 through 314, line 2. And we're still on Exhibit 497.** **"Question: And I believe the question" --Lines 3 through -- line 3 through page -- lines 3, page -- I'm sorry, I'm just trying to -- page 313, line 3 through 314, line 2.** **"Question: And I believe the question was had you consulted with Quarles & Brady about the disclosure in the 10-K and the 10-Q that was added as of June 30, 2011, that started based upon current and reasonably foreseeable events and conditions, ALC does not believe there's a reasonably likely degree of risk of breach.** **Answer: Yes, we did.** **Question: Okay. ALC did. You didn't personally, but ALC did consult with counsel about that statement.** **Answer: I was -- I was involved in some discussion with outside counsel. I was not involved in all the**	This is not an example of impeachment by the Divisions because Ms. Bebo's hearing testimony was consistent with her investigative testimony and because it is not clear what testimony was being impeached. The immediate question that preceded the Division's purported impeachment was "you were asked those questions and you gave those answers?" which stemmed from the Division's prior faulty attempt at impeaching Ms. Bebo. Ms. Bebo answered: > That's correct that this is part of our discourse, and specifically, as the question begins in the beginning, it says what was or wasn't permissible. > And so I stand by my testimony, as far as the discussion with Quarles regarding the SEC comment letter; and as I stated, I did not at that time ask them to opine on the legal opinion regarding the permissibility of employee or ALC paying for apartments. The hearing testimony before this dealt with whether Quarles gave a legal opinion about employee leasing and a conversation with Ms. Bebo and Quarles prior to drafting a response to the SEC comment letter where employee leasing was discussed. (Bebo, Tr. 2174- 2181, 2183.) At the hearing, the Division also asked Ms. Bebo about whether Quarles & Brady opined about whether ALC's filings were appropriate and Ms. Bebo denied that those conversations took place during the call where employee leasing was discussed because the disclosures had not been

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discussions because I think it was a process. And I'm aware that outside counsel did provide feedback. There were discussions; there were conference calls. A couple of times I was on the call. And my understanding is that the -- the final product includes advice and sign-off from Quarles & Brady. **Question: Was the topic of employee stays ever discussed at any of these conference calls that you were a part of? And I'm just looking for a "yes" or "no" or an "I don't know."** **Answer: Discussed with outside counsel?** **Question: On a conversation where Quarles & Brady was present either on the phone or in person.** **Answer: I don't believe so, while I was on the call."** **You were asked those questions, and you gave that answer under oath?** A Again, this is part of our discourse, and specifically, I have provided similar testimony, as far as the fact that I do recall one conversation that I was a part of with Quarles & Brady.	written yet. (Bebo, Tr. 2181-83.) The Division mistakenly conflated two separate conversations: (1) one conversation with Quarles occurred prior to any drafting of disclosures in response to the Comment letter and where employee leasing was generally discussed; and (2) a different set of conversations after the response to the SEC comment letter was drafted and the specific disclosures to be included in ALC's filings for Q2 2011 that were specifically referenced in the investigative testimony. (Bebo, Tr. 2174-2183.) During the second set of conversations to specifically discuss the draft response letter and disclosure, employee leasing was not specifically discussed while Ms. Bebo was present (the investigative testimony indicates Mr. Buono told her he discussed it with Quarles in one of the conversations she did not attend). The Division's cited impeachment testimony does not impeach Ms. Bebo for several reasons. First, the Division's cited investigative testimony dealt with the second conversation, of which the Division did not elicit details about at the hearing before its impeachment. Second, the little testimony Ms. Bebo gave with regard to this second conversation was consistent with the cited investigative testimony, in that Quarles & Brady worked with ALC about the drafted responses to SEC comment letter and the language for its filings. (Bebo, Tr. 2182.) Thus, nothing about Ms. Bebo's hearing testimony about the first conversation was inconsistent, since she discussed employee leasing with Quarles and did not ask for legal advice about the validity of employee leasing (which is why she did not discuss it initially during her investigative testimony), nor was there anything about her hearing testimony regarding the second conversation that was inconsistent with her investigative testimony. The Division's conflation of these conversations and citation to her investigative testimony misses the mark and does not impugn Ms. Bebo's credibility.
Tr. 2017:14-2018:4	The Division's impeachment was improper because the Division took the

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Q And you never gave Mr. Buono any instruction to review the list of names to make sure all those people on the list were employees. A Ever? **Q Correct.** A That's not correct. **Q Could you please go to Exhibit 499. Page 656, lines one through five.** **At your testimony you were asked,** **"Did you ever give any instructions to John Buono to go through the names on the list to make sure that all of those people were employees?** **Answer: No, I didn't set up any of the --I didn't set up any of the process."** **You were asked that question, and you gave that answer under oath?**	cited impeachment material out of context and failed to account for Ms. Bebo's investigative testimony that was consistent with her hearing testimony. First, the Division at the hearing asked Ms. Bebo if she ever gave Mr. Buono any instruction to make sure the lists were accurate, however, the context of the testimony used for impeachment was dealing with the creation of lists for Grant Thornton in early 2009 and setting up processes to make sure ALC was catching errors. (*See* Ex. 499, pp. 651-56 (the Division asked Ms. Bebo when a process to check names started and she testified, "I, I believe that there's a process from the beginning with, with, with the list or with Grant Thornton et cetera"; on the next page of her investigative testimony, when asked about giving Mr. Buono instructions to go through the lists for accuracy, Ms. Bebo testified, "*No, I didn't set up any of the, I didn't set up any of the process.*").) Despite the Division's broad language in its question, the surrounding testimony and Ms. Bebo's response indicate that the context surrounding the cited testimony dealt with whether Mr. Buono was given instructions in the beginning of the process to check names. The fact that Ms. Bebo did not initially give Mr. Buono any instruction about checking names did not impeach Ms. Bebo's statement that she at some point gave him such an instruction. Further, Ms. Bebo's other investigative testimony about Grant Thornton finding errors and communicating to Mr. Buono that the auditors should not be finding these mistakes supported her hearing testimony. (Ex. 500, p. 865 (Ms. Bebo informed Mr. Buono "the external auditors should not be finding this mistake. This is for us to find."), pp. 870-72 (the Division asked Ms. Bebo "What exactly did you mean when you said the external auditors shouldn't have found the mistake?" and Ms. Bebo replied, "We should find it.").)
Tr. 2222:6-2223:21 **Q Okay. And if Ventas was successful in that lawsuit, there would have been a material financial**	The Division's impeachment was improper because Ms. Bebo's hearing testimony was not inconsistent with her investigative testimony. During her investigative testimony, as the Division cited, Ms. Bebo was asked generally about why it was essential that an 8-k be filed in May of 2012.

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impact on ALC. A I can't speculate to that. **Q Can we go to Exhibit 497, please. One back -- oh, I'm sorry, is it 489, the second day of the arbitration? There we go. Page 299, line 25 through -- well, let's just try to go through in the middle of page 300. So let's start on 299, line 25 through line 20 on the next page.** **Do you remember being deposed in the arbitration?** A Yes, I do. **Q And you were asked,** **"Question: Now, why was it, in your view, essential that that Form 8-K be filed on May 2, 2012?** **Answer: Because outside securities counsel at Quarles & Brady indicated that it should be.** **Question: Anything else?** **Answer: Mine and John's understanding from the outside securities counsel about the situation.** **Question: What situation?** **Answer: A variety of the facts that led up to their reasoning for the 8-K to be filed.** **Question: So what were those facts?** **Answer: On April 26th, with the filing of the lawsuit by Ventas, and them asking for a declaration of default on the master lease, it would provide for a number of different events that would have a material financial impact on ALC, some of which were an approximation of costs for legal fees, which we would have to pay for both Ventas and ALC, as well as the fees for basically a management contract company."** **You were asked those questions and gave those**	Ms. Bebo responded because their outside counsel indicated that it should be filed and because management came to an understanding of the necessity of filing it based on outside counsel. One fact that management came to understand as a result of working with outside counsel was that the Ventas lawsuit could provide for a number of events that would have a material financial impact on ALC. Whatever Ms. Bebo understood as a result of the reasoning of outside counsel as to why an 8-k must be filed was not inconsistent with her hearing testimony that she did not independently know that there would have been a material financial impact.

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answers? A That's correct.	
Tr. 2229:3-2231:3 **Q I'm sorry, that's wrong. I'll try it again. More background. Mike and Ryan have told us, and I have told Mel and David, and Alan talks with Quarles & Brady directly. They all know we need to file the 8-K. They know we are off-side on the covenants and we are facing a material financial impact.** **Did I read that correctly?** A Yes, I believe you did. **Q And it's your testimony that you weren't referring to the occupancy and coverage covenants; you were referring to the regulatory covenants.** A That's correct. **Q And at the time, you understood that being off-side on the regulatory covenants could have a material financial impact to ALC.** A At the time that I wrote this, yes, it was my understanding that we should have filed the 8-K regarding the regulatory piece and the Ventas lawsuit on May 2nd, 2012. **Q Right. And one of the reasons you wanted to file the 8-K is because you understood that being off-side on the regulatory covenants could cause a material financial impact to ALC.** A I believe that's correct. **Q And you also understood at the time that in terms of the material impact to ALC, there was no difference between being in default of the regulatory**	The Division's impeachment was improper because it took Ms. Bebo's investigative testimony out of context in an attempt to impeach Ms. Bebo's hearing testimony. Further, the Division's improper impeachment falsely created the impression that Ms. Bebo believed that all defaults resulted in the same outcome or were handled the same way because Ms. Bebo acknowledged that the same remedies existed under the Lease for different defaults. (*See* Ex. 502, p. 1266-72.) But that is all. Ms. Bebo's later testimony clarifies that she did not believe that all defaults resulted in the same consequences, even though all of the same remedies were available to Ventas under the lease. After Ms. Bebo gave the investigative testimony cited by the Division for impeachment purposes, she provided additional investigative testimony that clarified her beliefs on this issue. She was asked on the very next page of her investigative testimony, whether a default on the occupancy or coverage covenants would lead to different financial results in terms of litigation. (Ex. 502, p. 1268.) Ms. Bebo responded and clarified the record by testifying "[i]t would depend on the litigation because I was going to answer the question before as far as the material, the reason that I say that there's a material financial impact is because of the lawsuit that evolved." (Ex. 502, p. 1268.) She also testified that she did not think there was a covenant issue with regard to employee leasing when she wrote the notes that were being discussed or during her investigative testimony for that matter. (Ex. 502, p. 1268.) Also, later on in the same line of questioning she stated:

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covenants and being in default of the occupancy covenants. A That's not correct. **Q Okay. Can we go, please, to Exhibit 501, page 1267, line 6 through line 9.** MR. RICK BELL: 1266, you said? MR. HANAUER: 1267, lines 6 through 9. MR. CAMELI: Is that 501? MR. RICK BELL: It's 502. MR. HANAUER: Oh, I'm sorry, 502. 1267, lines 6 through 9. BY MR. HANAUER: **Q At the last day of your SEC testimony, you were asked,** **"Question: In terms of the material financial impact, is there a different financial impact falling from different types of defaults on the lease?"** **And your answer was "no." Did I read that correctly?** A That's correct, that is part of our discourse with regard to what is in the lease	23 Q The lawsuit was a result of being offside with 24 the covenants and then the attorney tells you that you're 25 not going to win the lawsuit, I think, I'm paraphrasing Page 1272 1 obviously. And, so it's being offside with the covenants 2 that leads to the lawsuit that leads to the remedies. I 3 mean, I don't understand what the difference is between 4 being offside with the covenants and the lawsuit. 5 They're both going to end up in the same result, same 6 financial impact. 7 A No. I, this is specifically the information 8 that I was getting from, from Quarles about, about when 9 we would have to file the 8K. And, they specifically had 10 talked about the fact that just because Ventas claims a 11 default you don't know what the, you don't, you don't 12 know what the potential impact, if any, will be. I mean, 13 there's, and again, there would be, there are several 14 things for background. 15 One, we had not received a default notice in 16 the past for Ventas even when we had a regulatory issue 17 with a license before on a building but -- 18 Q Now, before you go on. 19 A Okay. 20 Q Can you just tell me why you're using the word 21 big here? I'll leave it at that. 22 A Because -- 23 Q There's a big financial impact, why are you 24 using the word big? 25 A Because the discussions that, that were we're (Ex. 502, pp. 1271-72.) Thus, Ms. Bebo's hearing testimony that, in terms of the material impact to ALC, she did not agree that there was no difference between a covenant versus a regulatory default, was consistent with her investigative testimony. She previously testified that there were potentially different outcomes for different defaults. The Division's characterization of Ms. Bebo's belief about what remedies were available under the Lease did not contradict her hearing testimony that there could

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	be different impacts on ALC based on the type of default.
Tr. 1850:17-1853:13 **Q But in November 2008, you knew you were going to have a meeting with Ms. Cafaro, right?** A At some point, that's correct. I did get a meeting scheduled with Ms. Cafaro. **Q Okay. And going into that meeting, you wanted to determine if Ventas would be willing to negotiate the covenants, right?** A I viewed the meeting with Ms. Cafaro as an opportunity to do some relationship building and to understand the needs of Ventas and their priorities. Certainly I am looking at gauging that information in terms of some opportunity for the future for discussion on covenants. **Q Okay. And one of the things you wanted to accomplish when you met with Ms. Cafaro was to determine if Ventas would be willing to negotiate with regard to the covenants, right?** A No, I'm not comfortable saying that that was something I expected to get out of that first meeting with Ms. Cafaro. **Q Okay. Can you please pull up Exhibit 498, please. Page 433, 19 through 434, 22. Do you remember testifying before the SEC in the investigation?** A I do, yes. **Q Do you remember you were under oath?** A Yes. **Q Okay. So I'm going to read some questions and answers to you.**	The Division's impeachment was improper because Ms. Bebo's hearing testimony was not inconsistent with her prior investigative testimony. At the hearing, the Division's question and the context surrounding it, indicated or at least implied, that the Division was asking Ms. Bebo about whether she was going to broach at the first meeting with Ms. Cafaro whether Ventas would negotiate with respect to the CaraVita covenants, as her initial answer indicated. Ms. Bebo's response at the hearing was that she was trying to understand whether Ventas would negotiate in the future, not necessarily at that meeting. And Ms. Bebo's answer at the hearing, that she did not expect to determine at that meeting if Ventas was willing to negotiate about the covenants, was perfectly consistent with the cited investigative testimony. Ms. Bebo's investigative testimony uses all prospective language like "[i]s there going to be some room here to discuss, you know, covenant, issues?," "try to figure out if there was going to be some room for negotiations," and "kind of prepare myself or what I think I might-- you know, what else could lie ahead." Thus, Ms. Bebo's hearing testimony is not inconsistent with her investigative testimony and, in fact, it was consistent with other parts of her investigative testimony (Ex. 498, pp. 452-54 ("like I said, I'm not going there, I never planned on going there and giving her a proposal. I viewed this as a step in a process that, you know, we'll wait and, you know, we'll see how this goes.").)

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"Question: So let me get, why did you set up the meeting with Ms. Cafaro" -- A I'm sorry, what line are you on? **Q Oh, I'm sorry. 19 through 22 starting on page 433. So let me get, "Why did you set up the meeting with Ms. Cafaro assuming" --** A Wait, wait, wait. Sorry. Oh, all right. I was looking at the bottom. I apologize. **Q So let me get, "Why did you set up the meeting with Ms. Cafaro assuming -- let me ask -- did you -- were you the one that instituted the meeting with Ms. Cafaro?** **Answer: I believe I used my assistant to help me; but yes, I did. Not John. But John came with me. The two of us went together.** **Question: But it was at -- the meeting was held at ALC's request, or had Ventas requested the meeting?** **Answer: No, I requested it. I requested the meeting.** **Question: And what reason?** **Answer: To do a little bit of relationship building and to do a little bit of --the markets were going -- you know, they were trending pretty negative. Markets generally -- I could see some writing on the wall, negativity. The REITs in particular were really having, you know, a problem with their valuations. I wanted to understand. I wanted to see if Ventas would share what are some of the things that they're struggling with. You know, was there anything that they're struggling with that we could help with, and try to figure out if there was going to be some room for negotiations with -- you know, potentially with**	

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regard to the covenants. So I -- you know, I think it's relationship building, understanding what their needs are today. Is there going to be some room here to discuss, you know, covenant issues? Get a feel, I guess, kind of prepare myself for what I think I might -- you know, what else could lie ahead." **Did I read that correctly?** A I believe so. I'm not uncomfortable with my testimony.	
Tr. 1945:11-1946:4 **Q And because Mr. Solari had agreed that there was no limit on the number of people that could be included, you understood that he had waived the occupancy covenant for all intents and purposes.** A No. **Q Page -- Exhibit 496, please. Page 136, line 22 through 137, line five. The question continues, "First of all, do you think Joe Solari understood, pursuant to your conversation, that he was for all intents and purposes waiving the covenant requirements in the CaraVita lease assuming --** **Answer: He realized.** **Question: -- assuming that ALC had more than 564 employees?** **Answer: Sure. Sure. I think that when he realized that, he was waiving the active covenants, yes."**	There are several reasons this is improper impeachment. First, as Respondent's counsel noted during Ms. Bebo's investigative testimony and during the hearing, the Division's initial question during the investigative testimony called for a legal conclusion. (Ex. 496, p. 140; Bebo, Tr. 1946.) Second, Ms. Bebo was asked a different question at the hearing than she was asked during her investigative testimony. During the hearing the Division asked Ms. Bebo what she understood with regard to a potential waiver of the covenants. However, at her investigative testimony, the Division asked Ms. Bebo to speculate as to what Mr. Solari understood with respect to a waiver. Her testimony at the hearing was not impeached by her prior testimony about what Mr. Solari may have understood. Finally, Ms. Bebo testified several times during her hearing testimony that she did not believe the covenants were waived. (Ex. 498, pp. 366 (Q: "Because they waived them?"; A: "No, they didn't, they ultimately didn't but we had conversations about a couple different negotiations related to purchasing the properties, and it came up."), 367 ("I believe that what I had indicated last time, and what I would agree today, is that ultimately they wanted the rent payment. And they appreciated ALC being the guarantor. And that's what they wanted. But they, they did not waive their rights about the covenants. But, at times, we had discussions such that they had indicated they were willing to waive them."); Ex. 499, pp. 640-41; Ex. 500, p. 790 (the Division

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	stated, "I'm wondering if your client knows, because she's testified that they weren't waived..").) The Solari agreement was to clarify vague terms in the agreement; not waiver.
Tr. 2088:11-2089:25 **Q And in fact, you told Robin Herbner not to disclose to Ventas the number of employees included in the covenant calculations.** A That's not correct. **Q Okay. Could we please go to Exhibit 500, page 707, line 3 through 708, line 4.** **And you remember testifying in the SEC investigation?** A Yes, I do. **Q Okay. So I'll read some questions and answers.** **"Question: Did you ever tell anyone not to provide the number of employees being included in the covenant calculations to Ventas?** **Answer: I believe John and I had a discussion with Robin because she was the first person to work on this practice. That I know we told her that Solari didn't want it broken out separately. So there again, I don't know what else is in the package, you know, as far as what their format was, but I do recall John and I explaining the conference call with Solari to Robin. And I do recall, you know, we went through a few of those things that were the parameters basically from the call, and one of those things was they don't want it broken out separately.** **Question: So it wouldn't surprise you if Robin Herbner's understanding was that she wasn't to break**	The Division's impeachment was improper because Ms. Bebo's hearing testimony was not inconsistent with her investigative testimony. Her hearing testimony addressed whether or not she gave a specific directive to a specific individual, Ms. Herbner, not to disclose to Ventas the number of employees included in the covenant calculations. Ms. Bebo's investigative testimony was focused on a much broader issue—ALC's communications with Ventas. In other words, the latter question addressed Ms. Bebo's comments about ALC's general practices regarding providing information to Ventas, whereas the former question presented at the hearing addressed whether Ms. Bebo gave Ms. Herbner a specific directive to conceal employee leasing from Ventas. (*See* Ex. 500, pp. 705 (the investigative testimony prior to the section the Division cited discussed generally what the packages ALC sent to Ventas included and Ms. Bebo commented that she did not believe that Ventas wanted the employees broken out).) Thus, Ms. Bebo's hearing testimony denying giving Ms. Herbner a specific instruction to conceal the amount of employees from Ventas was not inconsistent with Ms. Bebo's investigative testimony.

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out the number of employees in the packages provided to Ventas. **Answer: That wouldn't surprise me if she thought that -- I think she would have thought that from John and I, yes.** **Question: That's consistent with the direction you gave her, correct? Or the direction given to you by Joe Solari, which you then relayed to Robin Herbner, according to your testimony.** **Answer: Yes."** **You were asked those questions, and you gave those answers?**	

The following chart addresses when the Division's impeachment was seemingly proper, but Ms. Bebo's hearing testimony and other context provides a logical explanation that vitiates any negative inference about her otherwise credible testimony:

Division's Purported Impeachment	Context Surrounding Ms. Bebo's Testimony
Tr. 1858:4-1859:9 **Q So I just want to make this really clear. Did the occupancy or coverage ratio covenants come up at the late November meeting with Ms. Cafaro?** A I apologize, Mr. Hanauer. I don't know how else to explain this to you. As far as you're asking me, did financial or occupancy covenants come up? I'm telling you that as I look at Exhibit 156, John Buono has under	The Division was correct in that Ms. Bebo stated during her investigative testimony that she did not recall discussing the covenants with Ms. Cafaro and during the hearing she could not make the same conclusion. The reason for the difference was because Ms. Bebo did not have Exhibit 156 before or during her investigative testimony. During the hearing Ms. Bebo explained that Exhibit 156 lists section 7.2 of the lease (primary intended use) under operating and occupancy covenants and she thought they discussed this section during the Cafaro meeting. (Bebo, Tr. 1856-58.) Thus, based on Exhibit 156, she could not conclude at that point that

Division's Purported Impeachment	Context Surrounding Ms. Bebo's Testimony
Operating and Occupancy Covenants, 7.2, primary intended use. **Q Are you finished?** A Yes. **Q Exhibit 498, please. Page 461, line 22, through 462, line one. And I can represent to you that this question and answer is -- you're discussing your meeting with Ms. Cafaro, but we can take as much time as counsel would like. Do you remember testifying before the SEC?** A Yes. **Q And you were under oath?** A Yes. **Q Do you remember being asked the question, "Did the covenants come up during the meeting at all, the financial and operating covenants, the financial and coverage, the occupancy and coverage covenants? Answer: Not that I recall."** **You were asked that question, and you gave that answer?** A I did without the benefit of looking at Exhibit 156 in front of me.	they had not discussed the covenants. Had she had this document during her investigative testimony, Ms. Bebo would have likely provided the same answer as her hearing testimony.
Tr. 1955:18-1957:22 **Q So you're saying that the first conversation you had with Mr. Rhinelander was a full month in advance of the February 23rd board meeting, correct?** A Approximately, that's correct. **Q Okay. Can we please go to Exhibit 496, page 127, line four through 128, line 13. Rick, we're going to**	The Division was correct that Ms. Bebo previously testified that her first conversation with Mr. Rhinelander about employee leasing was right before the February 2009 Board meeting, however, Ms. Bebo has since recalled from phone records, which she did not have prior access to, that she had a conversation with Mr. Rhinelander on January 21, 2009 about employee leasing. (Bebo, Tr. 1952-53.) Additionally, Ms. Bebo's clarification at the hearing was not inconsistent with the fact that she had several conversations with Mr. Rhinelander about this issue and the fact that Ms. Bebo previously told the Division that she would not be able to

Division's Purported Impeachment	Context Surrounding Ms. Bebo's Testimony
need just -- all the way through 127, four through 128, 13. Okay. Do you remember testifying before the SEC? A I do. **Q And you were asked, "Which board members did you speak with about it" -- and I can represent to you that we're talking about the employees leasing. Okay?** A Okay. **Q "Answer: The first one I spoke with about it was Mel Rhinelander.** **Question: When? How many conversations did you have with him about employee leasing or employee stays and the CaraVita covenant calculations between January 2009 and March 2012?** **Answer: A lot.** **Question: All right. I'll have to go through this. More than ten?** **Answer: Remember, this used to be the breadbox game.** **Question: More than ten?** **Answer: Yes.** **Question: More than 20?** **Answer: Probably.** **Question: So probably less than 50?** **Answer: Yeah. I think that seems like a reasonable range if you want to say 20 to 50.** **Question: Okay.** **Answer: Sure. It seems --** **Question: I don't know that I'll be able to count anyway at any point in the near future.**	give 50 different dates for these conversations. (Ex. 496, p. 128.)

Division's Purported Impeachment	Context Surrounding Ms. Bebo's Testimony
Answer: And I think I can, you know --more -- give you -- you know, perhaps, and I know I won't be able to give you 50 different dates. **Question: I'm not going to go one by one to 50 conversations, which Mark wanted me to do. He just said it, and I'm not going to do it.** **Answer: Okay. The first one I could do.** **Question: So -- okay. Let's start with the first one. When was that? And we'll try and group some of the conversations together.** **Answer: The first one is -- the first one is before the February board meeting in 2009."** **Were you asked those questions, and did you give that answer -- those answers?** THE WITNESS: That is part of our discourse, yes.	
Tr. 4692:5-4693:17 **Q And so just -- we'll get back to those notes in a second of the two meetings. You testified a couple days ago that when you were fired, there were between 200 and 250 notepads in your office?** A I don't believe that I testified that I was fired, and that dismissal has been changed, but when I left my office on May 29, 2012, I believe there were more than 200 notepads, approximately 200 to 250. **Q Byron, can you please pull up Exhibit 497, please. This is your testimony with the SEC during the investigation. Can we please go to page 426, line 18 through 427, line 4. It's going to be the next one,**	Ms. Bebo's hearing testimony stated that she had more note pads than she previously discussed during her investigative testimony. However, as Ms. Bebo stated at the hearing, after her investigative testimony, she measured stacked up notepads and then was able to determine a more accurate number of notepads based on how much space the notepads took up and the amount drawer space that was available (Bebo, Tr. 4693-94.) Additionally, she accounted for some notepads around her office. (Bebo, Tr. 4693-94.) Thus, her estimate increased at the hearing due to her additional investigation into the issue.

Division's Purported Impeachment	Context Surrounding Ms. Bebo's Testimony
Byron. Sorry, Your Honor, for the delay. JUDGE ELLIOT: It's all right. MR. HANAUER: 498, please. There we go, page 426. 426, line 18 through 427, line 4. BY MR. HANAUER: **Q You were asked:** **"Question: I think I've gotten this number from your attorney, but I need to hear it from you. I think it was you estimated about 100 notepads.** **Answer: I think there would be at least 100 notepads.** **Question: At least 100. So do you have any more? Just at least 100, so 100 or more. Any better idea, or just 100 or more?** **Answer: I don't believe there's 200, you know, so --** **Question: So somewhere between 100 and 200?** **Answer: I'll say somewhere between 100 and maybe 150, maybe, something."**	
Tr. 2192:8-2193:1 **Q But you did talk with her about the employee stays and the financial covenants; right?** A She was a part of the discussions that we've talked about that took place at audit or board meetings once she becomes the board secretary after Mr. Fonstad exits. **Q Okay. Exhibit 496, please. Page 116, line 21 through 24. And again, this is the first time you testified before the Division of Enforcement. And you were asked,** **"Question: So did you ever speak with Mary Zak-Kowalczyk about the employee stays, the financial covenants in the CaraVita lease?**	It was well-established at the hearing that the use of rooms for employee stays was discussed in 2011 at a meeting early in the year when Mr. Robinson discussed it with the Board and at the August 2011 Board meeting to discuss the response to the SEC comment letter. It is equally well-established that Ms. Zak-Kowalczyk attended those board meetings in 2011, board meeting of which she has no independent recollection. It is equally clear that the testimony transcript is muddled and unclear with respect to the questions posed to Ms. Bebo in this specific instance, and generally. Here, in context it appears that the Division was asking Ms. Bebo about whether she had specific, direct conversations with Ms. Zak-Kowalczyk during the March 2012 to May 2012 time period, as two questions prior to this question, the Division's lawyer states, "All right, let's jump now to March 2012 through May 2012." Counsel was

Division's Purported Impeachment	Context Surrounding Ms. Bebo's Testimony
Answer: Not that I recall." **You were asked that question, and you gave that answer?** A This is part of our discourse during my SEC testimony, that's correct.	intentionally conveying the next set of questions would all relate to that time period, just as the previous set of questions were intended to relate to the 2009 to March 2012 time period. (Ex. 496, p. 115.) Finally, to the extent that Ms. Bebo remembered additional details in subsequent days of her investigative testimony is not surprising, as she obtained access additional documents and information. (Ex. 499, pp. 577-78; Ex. 502, pp. 1101-04, 1105-08.) And it is undisputed that Ms. Bebo spoke directly with Ms. Zak-Kowalczyk after the March 2012 CNG meeting, as Ms. Zak-Kowalczyk herself established. Finally, Ms. Bebo's hearing testimony that Ms. Zak was present at several Board meetings where employee leasing was discussed was consistent with other parts of Ms. Bebo's investigative testimony.
Tr. 1981:23-1983:5 **Q Okay. Now, in all those calls, you never told Mr. Rhinelander the identity of the employees who were being included in the covenant calculations.** A That's not completely true. I did at one point in time. Just after my parents had visited the CaraVita properties in the first quarter of 2009, I had a conversation with Mr. Rhinelander about my parents' visit and about the fact that I would be including them on the list. **Q Can you please go to Exhibit 496, Rick. Page 177, line 18 through 178, line nine. You were asked in your testimony,** **"Did you ever tell Mr. Rhinelander, I think you said you mentioned to him the number of employees generally speaking each quarter that were included for purposes of the CaraVita covenant calculations?**	Ms. Bebo consistently testified at the hearing and during her investigative testimony that she informed Mel Rhinelander that her parents were on the employee leasing lists, thus making him aware of the identity of certain individuals on the lists; however, she was not always specific on them being employees. (Ex. 497, pp. 209-13.) On the first day of her investigative testimony, Ms. Bebo did not mention her parents in response to the Division's question about telling Mr. Rhinelander about the identity of employees because she did not consider her parents to be employees for purposes of that question (certainly her father was not a w-2 employee). On the next day of investigative testimony, Ms. Bebo clarified that she told Mr. Rhinelander that her parents were being put on the lists for the properties, after the Division asked her if anyone told the Board that non W-2 employees were being used on the lists. (Ex. 497, pp. 209-13 (the Division stated "Okay, do you, did you or anyone else at ALC communicate to the board that certain of the people that were being listed as occupants on the, for purposes of the CaraVita covenant calculations were not actually ALC W-2 employees?...Just so you know, I'm using W-

Division's Purported Impeachment	Context Surrounding Ms. Bebo's Testimony
Am I correct? **Answer: I -- I didn't say that. I don't think I said -- I'd tell -- I would tell him every quarter.** **Question: Okay.** **Answer: But I -- I would have conversations. I talked with him a lot, and so I would have told him about the occupancy. There -- I can certainly recall conversations where I talked about the occupancy, but I wouldn't tell you it was every quarter.** **Question: Okay. Thanks for clarifying. Did you ever tell him the identity of the employees who were being listed as occupants for the CaraVita calculations?** **Answer: No."**	2 employees because of our ... adventure yesterday.").) Thus, Ms. Bebo's hearing testimony was consistent with parts of her investigative testimony that indicated that Mr. Rhinelander knew the identity of individuals on the lists.
Tr. 2120:9-2121:22 **Q And let's go back to the first page of the e-mail, please, Rick. And do you see how you write to Mr. Blake, Please maintain this separately and do not release it to Ventas without Mel's specific permission?** A Correct, that's what it says. **Q And the reason you didn't want Ventas to see this information is because the numbers did not contain the employees that were included in the covenant calculations.** A No. The reason that we didn't want to share this with Ventas at this early stage was because they were the only competitor in the process. And as I said, I deferred to Mel, if he wants to overrule that, but from my perspective, I was always looking at the competitive issues as it related to the Stockton project. **Q Okay. Exhibit 488, please. Page 188, lines 11**	This is the Division's attempt to demonstrate Bebo was trying to hide employee leased units from Ventas. In reality, Bebo was explicit in her arbitration testimony and hearing testimony that she was concerned about revealing competitive information and wanted to be equally transparent during the entire sale process with all bidders. (Bebo, Tr. 4324-27; Ex. 488, p. 192.) Later on in Ms. Bebo's investigative testimony she stated: I don't know that I had this conversation with Mr. Buono, and I had more of a concern on this that we would be needing to put out the information for everybody far too early. If Ventas would rightly have a question, could rightly have a question, they would deserve an explanation, and that explanation would -- as I was understanding from Citibank, you know, was something that we would have to open up to everybody that -- as far as the way the process worked and that. We couldn't give certain bidders or players some information and others not.

Division's Purported Impeachment	Context Surrounding Ms. Bebo's Testimony
through 18. **Do you remember testifying at a deposition in your arbitration with ALC?** A Yes. **Q And that was before you were -- you ever gave testimony to the Division of Enforcement, right?** A Yes, that's correct. **Q And you were asked by a lawyer for ALC, "Question: Now, what was the reason that you and Mel, as you say in this e-mail, did not want the individual facility listing and occupancy sent to Ventas?"** **And then one your lawyers objects. And you answered,** **"Answer: We did not want it sent to Ventas because it did not have the employee lease data in it."** **You were asked that question -- you were asked that question and gave that answer under oath?** A Yes. * * * **Tr. 2121:23-2123:8** **Q And you were concerned that Ventas would see the information contained in the attachment to Exhibit 292, and it would look different than the information you were sending to Ventas -- or ALC was sending to Ventas on a quarterly basis.** A No. At this early part in the process, we did not want the information sent to Ventas because they were the	(Ex. 488, p. 192.) There was never testimony in this case that Ms. Bebo was going to always withhold information about employee leasing from bidders or Ventas, however, there was an issue with timing and making prudent decisions from a work capacity perspective about when to disclose this information to bidders. During this same line of questioning at Ms. Bebo's arbitration testimony the following testimony took place: Q: So your concern was that Ventas would see occupancy data without the employee lease units and what would happen if they saw that? A: Just that if they were part of the process, then we would need to provide everybody with all the appropriate information. We -- we actually didn't want -- We actually didn't want anybody to get the listing of the Ventas facilities specifically without the employee-leased units in it until we could go through the whole explanation. . . [Mel and Laurie] decided that we would wait until we were to the final folks and provide all the -- all the data surrounding the employee lease program and the occupancy and financial data flat without the employee lease, with the employee lease, to go through and explain that to folks. Citi was concerned that we can't give some people some information and -- and not others. So, in other words, if -- if we felt the need that we needed to then go through and explain a number of things to Ventas, Citi was concerned about that process being unique to just Ventas. (Ex. 488, pp. 189-90.) Thus, Ms. Bebo was trying to time the disclosure to occur with other final group bidders. Citibank was concerned about disparate sharing of information among bidders. The Division is disingenuous to imply that she was refusing to provide information, when

Division's Purported Impeachment	Context Surrounding Ms. Bebo's Testimony
only competitor in the process. **Q But you were also concerned that Ventas would see the numbers, and they would look different.** A As you're referring to my arbitration testimony, it doesn't have anything to do specifically with this early time frame that you're asking me with regard to Exhibit 292. So -- **Q I think it does, and on -- when your counsel has a chance to examine you, he can point out if you're talking about a different e-mail, okay?** **Can we please go to page -- the next page of Exhibit 488, lines -- page 189, lines 3 through 15.** **And you were asked at your arbitration,** **"Question: So who was it that you were concerned you would have to make the explanation to, Ventas or Citi?** **Answer: At this point, it was that Ventas would view the percentages, and that would look different than the percentages that they had seen, and we weren't providing the data with the employee lease units in it."** **You were asked that question, and you gave that answer under oath?** A Again, I did provide that answer, and it relates to a different time frame than the initial discussion time frame. * * * **Tr. 2126:1-25**	she was concerned about the timing, efficiency, and transparency for everyone.

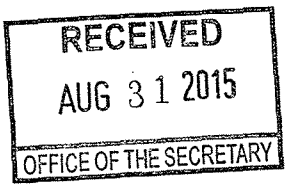
Division's Purported Impeachment	Context Surrounding Ms. Bebo's Testimony
Q Right. But I'm talking about what was in your head back in July 2011. In July 2011, you were concerned that if Ventas saw a different set of numbers, they would want an explanation about why there were differences. A My first concern was that Ventas is one of the four folks that are involved in a process that -- and they're the competitor. **Q Okay. Let's just look at Exhibit 488, page 191, lines 7 through 14. This is from the same day of your deposition in the arbitration. You were asked, "Question: So if you gave them the true resident occupancy figures at this point in time, in July 2011, your concern was they might, for want of a more artistic term, flip out in some fashion, correct?" And you answered, "Answer: They would be -- they would be knowledgeble of a different set of numbers, and so they would want a different explanation with regard to the differences." You were asked that question under oath --were you asked that question, and you gave that answer under oath?**	
Tr. 1875:20-1877:7 **Q But, in fact, they were required to stay at the hotel as long as -- I'm sorry. ALC had a protocol where employees --certain employees would actually be required to stay at the Ventas properties as long as there was an available room there.** A No. The requirement from ALC is that under certain	Citing this "impeachment" demonstrates a distinction of words without a difference. Ms. Bebo's hearing testimony and her arbitration testimony discussed the same protocol about employees staying at properties, however, her hearing testimony discussed the protocol with more specificity. During her arbitration testimony, Ms. Bebo discussed the protocol as being a requirement for individuals to stay at properties. At the hearing, Ms. Bebo clarified that the actual policy focused on whether individuals would be reimbursed for staying at the properties. Moreover,

Division's Purported Impeachment	Context Surrounding Ms. Bebo's Testimony
circumstances, they will not be reimbursed for a hotel. **Q But they weren't required to stay there at the properties?** A There could be reasons why -- there could be reasons why they aren't required to stay at the properties, but there is a protocol as far as a requirement of not -- pardon me. There is a policy about not being reimbursed for a hotel under certain circumstances. **Q Can you please pull up Exhibit 488, page 141, lines four through 11. And do you remember being deposed in the course of a lawsuit between you and ALC?** A Yes. **Q And when you were deposed in that lawsuit, you were under oath.** A Yes. **Q Okay. And at one of those depositions, you were asked, "And wasn't that protocol in place the entire time that you were the chief executive officer and president of ALC?** **Answer: That all employees had to stay at the buildings?** **Question: That an employee that traveled to an ALC facility on business was required to stay at the facility if a room were available at that facility for him.** **Answer: That would be the case for some employees, yes."**	although not technically required, employees would be incented to stay at the properties because they may not be reimbursed for staying at a hotel. Thus, despite the fact that Ms. Bebo's hearing testimony used different terminology, there was absolutely no substantive difference with regard to the protocol being discussed during her investigative or hearing testimony.
Tr. 2029:19-2030:23 **Q Okay. And in one of those situations, you explained that people who actually worked at the**	The Division appears to again attempt to impeach Ms. Bebo based on an inconsequential difference between her investigative testimony and her hearing testimony. During the hearing Ms. Bebo stated that she was comfortable using the language "people who have a responsibility" and

Division's Purported Impeachment	Context Surrounding Ms. Bebo's Testimony
Ventas buildings were being included in the covenant calculations. A I feel comfortable sharing with you that I explained that people who have responsibility for those buildings can be included on the list. **Q People who work at the buildings, they can be included on the list?** A I don't -- I don't feel comfortable with that exact statement. I guess I feel comfortable with people that have a responsibility for the buildings. **Q Okay. Could we please look at Exhibit 502, page 1127, line 24 through 1128, line 9.** **"Question: Did you ever tell an attorney that full-time employees at the CaraVita properties were being included in the covenant calculations?** **Answer: I don't recall specifically using the terminology "full-time employees." I do recall -- I do recall specifically talking about employees being on the list that -- that work at the buildings.** **Question: Okay. Who did you talk to? Which attorneys did you talk to about that?** **Answer: That will include the board meeting approximately for third quarter of 2009."** **Did I accurately read questions and answers from your testimony transcript?**	the Division impeached her with prior investigative testimony where she discussed people who "work" at the buildings. The Division's view is another example of a distinction without difference and is improper to characterize as "impeachment."

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 August 28, 2015, he caused a true and correct copy of Respondent Laurie Bebo's Reply to the Division of Enforcement's Post-Hearing Brief to be served on the following by e-mail and United States mail:

The Honorable Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission
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and by e-mail only to:

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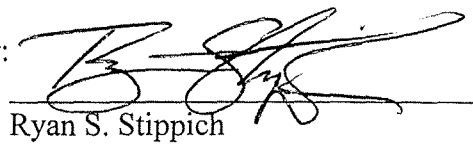
Dated this 28th day of August, 2015.

REINHART BOERNER VAN DEUREN S.C.
Counsel for Respondent Laurie Bebo

By: 

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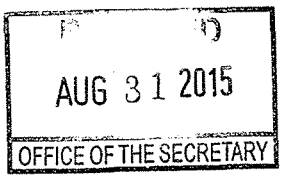

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August 28, 2015

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DELIVERED BY COURIER

Brent J. Fields, Secretary
Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Dear Mr. Fields:

Re: In the Matter of Laurie Bebo and John Buono, CPA, AP File No. 3-16293

I enclose for filing in the above-referenced matter an original and three copies of Respondent Laurie Bebo's Reply to the Division of Enforcement's Post-Hearing Brief and Certificate of Service.

Thank you for your assistance.

Yours very truly,

Ryan S. Stippich

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Encs.

cc The Honorable Cameron Elliot (w/encs.)
Benjamin J. Hanauer, Esq. (w/encs.)
Scott B. Tandy, Esq. (w/encs.)
Daniel J. Hayes, Esq. (w/encs.)
Timothy J. Stockwell, Esq. (w/encs.)
Ms. Jessica Neiterman (w/encs. by e-mail only)