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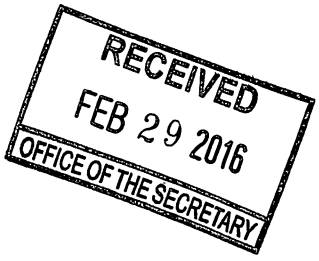

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of

LAURIE BEBO, and
JOHN BUONO, CPA,

Respondents.

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

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I. PRELIMINARY STATEMENT

Respondent Laurie Bebo perpetrated a brazen fraud while the CEO of a public company. Bebo's scheme concealed that ALC was failing, by wide margins, occupancy and coverage ratio covenants contained in ALC's lease with Ventas. Despite the covenant failures, for three years Bebo falsely represented in ALC's Commission filings that ALC was meeting the covenants.

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

Despite warnings from her CFO, John Buono, that they could face prison unless the inclusion of employees was "real," Bebo chose fake occupants who spent little or no time at the Ventas facilities. Bebo's fake occupants included her relatives and friends; the parents, siblings, and seven-year old nephew of Bebo's friend and subordinate, Kathy Bucholtz; and former employees who had been terminated. As for the actual employees Bebo selected, many never stayed at or even visited the Ventas facilities. Bebo listed fake residents as "occupants" of multiple facilities simultaneously, for months, quarters and, in some cases, years on end. Even when Bebo selected employees who had actually stayed at the facilities, she included these employees for periods far greater than their actual stays.

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

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

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

Bebo also lied to Grant Thornton ("GT"), by telling its partners that Ventas had agreed to the inclusion of employees. Bebo selected the list of "employees" knowing GT wanted audit evidence to support ALC's covenant practices, but never told GT the list contained her friends, family members, or employees who did not stay at the Ventas facilities.

Bebo's fraud caused substantial harm to ALC and its investors. When ALC publicly announced an investigation into ALC's covenant practices – after a whistleblower exposed Bebo's scheme – ALC's stock price declined considerably. When ALC finally disclosed the

inclusion of employees to Ventas, ALC was forced to acquire the Ventas facilities for $34 million over fair value, which GT considered to be "damages" as a result of ALC's occupancy failures.

The Law Judge ("ALJ") analyzed the record and correctly determined Bebo engaged in an egregious fraud. The ALJ also assessed witness credibility and concluded that Bebo's version of the events defies reality and should not be believed. 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 Bebo's story of an agreement with Ventas and full disclosure of ALC's covenant practices was refuted by every percipient witness who testified. Bebo couldn't even keep her own story straight, and was impeached at least 25 times.

Bebo went beyond lying under oath and lying to Ventas, ALC's board, and GT. Bebo lied to investors by representing in ALC's Commission filings that ALC was complying with the Ventas covenants. Accordingly, the Commission should affirm the well-reasoned Initial Decision and find Bebo liable for repeatedly violating, and causing violations of, the Exchange Act's antifraud, books and records, internal controls, reporting, and auditor misrepresentation provisions. The Commission should also impose the substantial sanctions necessary to protect investors, hold Bebo accountable, and deter other public company executives from engaging in fraud.

II. STANDARD OF REVIEW

The Commission should affirm the ALJ's findings if the preponderance of the evidence shows that Bebo violated, or caused violations of, the securities laws provisions at issue in the

OIP.[1] *David Bandimere*, AP File No. 3-15124, 2015 SEC LEXIS 4472, *39 (Oct. 19, 2015). While the Commission's review is de novo, *id.*, the Commission gives "considerable weight to the credibility determination of a law judge since it is based on hearing the witnesses' testimony and observing their demeanor." *Ralph Calabro*, AP File No. 3-15015, 2015 SEC LEXIS 2175, *42 (May 29, 2015) (citations omitted). Thus, the Commission disregards credibility determinations only if there is "substantial evidence in the record for doing so." *Donald L. Koch*, AP File No. 3-14355, 2014 SEC LEXIS 1684, *38 n.105 (May 16, 2014) (citations omitted).

III. THE RECORD SUPPORTS THE ALJ'S FINDINGS OF FACT

A. Bebo's Strong Support for ALC's "Material Definitive" Lease With Ventas

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

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

- 65% quarterly occupancy at each individual Ventas facility;
- 75% trailing twelve-month occupancy and a 0.8 trailing twelve-month coverage ratio at each facility;

[1] The Division proves causing liability by establishing: (1) a primary violation occurred, (2) respondent's act or omission was a cause of the violation, and (3) respondent knew, or should have known, that her conduct would contribute to the violation. *Robert M. Fuller*, 56 S.E.C. 976, 984 (Aug. 25, 2003). Negligence may establish causing liability for primary violations lacking a scienter element. *See KPMG Peat Marwick LLP*, 54 S.E.C. 1135, 1175-76 (Jan. 19, 2001).

- 82% trailing twelve-month occupancy and a 1.0 trailing twelve-month coverage ratio for the eight-facility portfolio.

(Ex. 142, § 8.2.5). "Coverage ratio" was defined as each facility's cash flow for an applicable period (generally, resident rental income) divided by ALC's rent payments to Ventas for that facility. (Ex. 142, p. B-5). Bebo participated in the negotiations with Ventas, and understood the financial covenants. (Tr. 1777:4-20, 1781:21-1782:1).

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

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

Bebo knew Ventas was unwilling to negotiate the covenants, and that Ventas had communicated to ALC, in regards to the lease, that ALC could either "take it or leave it." (Tr. 552:3-8, 1299:4-20, 1777:16-20; Ex. 1572). Before ALC decided to enter the lease, Buono

warned Bebo of his concerns about the covenants. (Tr. 2313:7-2314:1). Buono also warned Bebo:

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

(Ex. 140).

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

While Bebo's expert, Martin, opines ALC was not required to disclose the lease, ALC's conduct shows that ALC and its securities counsel considered the lease material to ALC's investors.[2] To that end, on January 7, 2008, ALC filed a Form 8-K announcing the "Material Definitive" Ventas lease. (Ex. 1). The Form 8-K, which described the lease and attached it as an

[2] The ALJ properly afforded no weight to Martin's opinions, which the ALJ correctly determined "are legal conclusions on dispositive matters and are entitled to no weight." (Initial Decision ("I.D."), 48). For the same reason, the ALJ correctly gave no weight to the interpretations of the Ventas lease and opinions on whether it was breached, made by another Bebo expert, Durso. (I.D., 48-49).

exhibit, specifically disclosed the financial covenants and the consequences if ALC failed to comply. (*Id.*, p. 2).

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

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

B. Ventas Closely Scrutinized ALC's Covenant Compliance.

Bebo argues that Ventas did not care about the financial covenants. But three Ventas employees – Solari, Tim Doman, and Joy Butora – testified the covenants were important to Ventas. These witnesses testified Ventas paid close attention to ALC's compliance, and considered occupancy and coverage ratio to be key metrics of its properties' performance. (Tr.

[3] In arguing ALC's disclosures are "boilerplate," Bebo cites ALC's Q3 ***2008*** Form 10-Q. But that filing predates Bebo's fraud and did not include the "material adverse impact" disclosure that ALC would later add to its filings. (Br., 4 (citing Ex. 2123)).

191:8-192:25, 195:24-196:5, 404:17-405:1, 894:7-895:25). These witnesses testified Ventas considered, and communicated to Bebo, that occupancy and coverage ratio were indicators of whether the facilities were performing well enough to ensure ALC could make its rent payments. (Tr. 178:16-24, 401:4-15, 908:16-909:8; Ex. 190, p. 3; Ex. 198). These witnesses also testified Ventas knew it would eventually need to find a new tenant to operate the facilities, and future tenants would pay higher rents for better occupied facilities. (Tr. 175:22-176:13, 381:24-382:19, 961:6-962:3). Ventas also communicated to Bebo and Buono that Ventas wanted to preserve the value of its properties while ALC operated them. (Tr. 2326:11-2327:12; Ex. 198). For these reasons, Ventas scrutinized ALC's covenant information on a quarterly basis. (Tr. 191:8-197:15, 894:7-895:25, 897:1-898:25; Exs. 46-60, 147).

In addition to scrutinizing the covenant calculations, Ventas monitored the facilities' performance by holding quarterly calls or meetings with Bebo and Buono, and periodically visiting the facilities. During these discussions Ventas staff asked detailed questions about occupancy and revenues. (Tr. 197:16-208:5, 899:1-908:15, 910:2-932:4, 2295:23-2297:1; Exs. 144, 147, 207, 208, 215, 217, 240, 241, 279, 300, 301).

Moreover, Ventas was prepared to evict ALC in the event of noncompliance with the covenants and replace ALC with another operating company. (Tr. 185:18-187:6). Solari recognized this and, in 2010, emailed his former colleagues at Ventas and offered to have his current employer replace ALC should Ventas need a new operator for the facilities. (Tr. 438:25-440:2; Ex. 258, p. 2).

Despite the overwhelming evidence of the covenants' importance to Ventas, Bebo attempts to establish Ventas's ambivalence by claiming that Ventas did nothing after ALC received a 2009 Alabama regulatory notice, which implicated other covenants in the lease. (Br.

20-21, n.13; Ex. 2149). Yet Bebo concedes Ventas took action against ALC, by issuing a notice of default, and that Ventas and ALC resolved their dispute after ALC quickly cured the regulatory inquiries. (Br. 20-21, n.13). Thus, in real time, Bebo knew that Ventas would not sit by idly in the event of covenant defaults.[4]

Further demonstrating Bebo's belief, that Ventas considered the financial covenants important and was prepared to exercise its contractual remedies, are the elaborate measures Bebo undertook to hide ALC's covenant failures from Ventas. Indeed, while Bebo chose to disclose ALC's *regulatory* defaults to Ventas, she admittedly never told Ventas that ALC would breach the financial covenants without using employees. (Tr. 1920:11-16).

C. Bebo and ALC Considered Financial Covenant Compliance Important

Belying Bebo's claim that the financial covenants were immaterial, Bebo and ALC's accounting department regularly reviewed and monitored occupancy and coverage ratios at the Ventas facilities for covenant compliance. (Tr. 838:14-22, 1839:5-13, 2321:3-20, 2327:20-2328:5; Ex. 150). Bebo thus knew the Ventas facilities' occupancy was trending downward throughout 2008, which presented a serious problem in meeting the trailing twelve-month financial covenants, because ALC was losing its strongest quarters as time progressed. (Tr. 750:9-22, 1849:13-23, 1859:22-1860:16, 3958:5-3959:25; Ex. 160; Ex. 3252, p. 3).

[4] Bebo disingenuously cites to ambiguous portions of Doman's testimony, claiming that Ventas knowingly allowed ALC to breach the financial covenants. (Br. 21). Doman testified that he learned ALC breached the covenants sometime between 2008 and 2012, but then specified that he learned of the breach only after Bebo asked for a release in the course of Ventas's 2012 lawsuit. (Tr. 281:12-282:1). Moreover, there is zero documentary evidence that ALC ever disclosed to Ventas that it breached the financial covenants.

By August 2008, Bebo contemplated ALC purchasing the Ventas facilities to avoid the ramifications of missing the financial covenants. (Tr. 1840:4-1841:22; Ex. 3015). This alone discredits Bebo's contention that she believed Ventas didn't care about the covenants.

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

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

In November 2008, Bebo addressed the board's concerns about the Ventas facilities' declining occupancy. (Tr. 559:1-560:2; Ex. 97, p. 4). Bebo told the board she would improve occupancy by sending a "taskforce" of ALC employees, who worked elsewhere, to the Ventas facilities to improve sales and operations. (Tr. 559:1-560:2, 2328:12-2330:4, 2812:16-2813:3, 2939:2-9, 3070:22-3074:17, 4725:6-4726:19; Ex. 97, p. 4; Ex. 150, p. 4; Ex. 567). Various

witnesses testified that Bebo never said the taskforce's purpose was to treat its members as "occupants" for covenant compliance. (Tr. 560:3-9, 2645:3-25, 2813:21-25).[5]

Bell then instructed Buono to try obtaining covenant relief from Ventas, leading Buono to research Ventas modifying or waiving the covenants in exchange for ALC accelerating its lease payments. (Tr. 2330:5-2331:20, 3045:11-25; Ex. 152). Buono expected Bebo to propose covenant relief at an upcoming meeting with Ventas's CEO, Debra Cafaro. (Tr. 1850:2-7, 2331:21-2333:5). On November 18, Buono emailed Bebo his recommendation to seek a suspension of the covenants, and Bebo planned to discuss this proposal with Cafaro. (Tr. 1851:5-1853:13, 1855:3-1856:9; Ex. 156). However, at the Cafaro meeting, Bebo decided not to raise the covenants, and afterwards Buono complained to Bebo that she had dodged the issue. (Tr. 1856:10-22, 1858:4-1859:9, 2333:20-2334:11).

By the December 2008 board meeting, Bebo, Buono, and Robin Herbner, an ALC accountant who prepared occupancy projections, believed ALC would breach the covenants in the coming quarters. (Tr. 754:2-13, 2334:12-2335:15; Ex. 548). Nevertheless, at that meeting, in response to a question from Hennigar, Bebo reported ALC would meet the covenants as of the end of the year. (Tr. 1861:12-1862:5; Ex. 98, p. 5).

Following the meeting, Buono again asked Bebo to negotiate covenant relief with Ventas. (Tr. 2336:12-2337:3; Ex. 164). Buono soon learned another Ventas tenant would be purchasing the properties it rented from Ventas for a very high price. (Tr. 2337:4-2339:5). Buono believed

[5] Bebo continues to conflate (a) ALC's practice of sending taskforce or other employees to stay at the Ventas facilities with (b) ALC's inclusion of such employees in the covenant calculations. Despite the critical distinction between the two practices, Bebo insists on referring to both practices as "employee leasing." (Br., 2 n. 2). Thus, the ALJ appropriately sustained vagueness objections to the term's use. It appears that to the extent Bebo's used the term "employee leasing" during the relevant time period, she did so to conceal ALC's true covenant practices.

the tenant was paying so much due to "covenant issues" with Ventas, and alerted Bebo to his concerns in emails titled: "Yuck." (Tr. 1864:1-13, 2337:4-2339:5; Exs. 165, 166).

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

Bebo admits that by January 2009 – as ALC's covenant challenges at the Ventas facilities accelerated – she devised the idea of including employees in the covenant calculations. (Tr. 1865:8-24, 1866:11-14, 1900:24-1901:3, 2339:6-21, 3046:10-3047:3; Ex. 172). Bebo's idea originated with her discovery that a legacy employee of CaraVita (the facilities' prior operator) was leasing a unit and living at a Ventas facility. (Tr. 1882:18-1883:2, 3993:24-3994:9). Bebo now claims it was a "handful" of employees, and that she believed Ventas knew CaraVita had included these employees in its covenant calculations. (Br., 21-22). But Bebo testified differently, namely that she lacked knowledge whether CaraVita had included that employee, or any other employees, in the covenant calculations. (Tr. 1886:14-1887:15).

At the time, ALC required low-level employees who travelled to its properties, including certain "taskforce" members, to spend the night there instead of a hotel. (Tr. 1874:18-1877:7, 1878:22-1879:1). In advance of an upcoming call with Ventas, Bebo sought the advice of ALC's general counsel, Fonstad, on whether the lease permitted ALC to rent rooms to those employees and include them in the covenant calculations. (Tr. 1307:14-1308:6, 1888:22-1890:18, 2339:16-2340:8, 3994:23-3995:16). Fonstad understood a limited number of taskforce employees travelled to the Ventas facilities in an effort to improve operations, and believed Bebo's proposal was restricted to employees who actually stayed at the facilities. (Tr. 1305:25-1307:9, 1308:10-1309:17, 1314:8-16, 1316:24-1317:10).

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

Ex. 1152). Fonstad advised that Bebo's proposal could be permissible, ***but only if Ventas agreed to it in writing***.[6] (Tr. 1319:18-1320:5; Ex. 1152). Even Bebo admits Fonstad advised her Ventas's agreement was necessary to include employees in the covenant calculations.[7] (Tr. 1895:12-17).

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

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

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

Bebo concedes that, going into the call, ALC had not told Solari the covenants would be discussed. (Tr. 1901:8-1902:6). Prior to the call, Buono sent Bebo an email describing which Ventas facilities were most in danger of missing the covenants and noted that for Q4 2008, *which*

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

[7] Bebo's admission and Fonstad's advice bely Bebo's claim that "no one believed Ventas had to approve" the inclusion of employees. (Br., 27).

had already ended, ALC had violated the covenants at one of the facilities. (Tr. 1900:6-23; Ex. 174, p. 2).

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

Solari is similarly confident he never agreed ALC could include in the covenant calculations: (1) employees who did not actually visit the properties; (2) employees who had a "reason to go" to the properties; (3) large numbers of employees; (4) employees to be simultaneously included at multiple properties; or (5) family members or friends of ALC personnel. (Tr. 418:4-421:5). Solari was presented with, and unambiguously denied, Bebo's version of the call. (Tr. 423:13-426:6).

Buono testified consistently with Solari, namely that Bebo discussed with Solari the potential hospice sublease and a proposal to have ALC employees stay at the Ventas facilities.

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[8] Bebo claims this testimony violated due process. But Solari's testimony as to what he would or would not have done or agreed to allowed Solari to state why he had such conviction in his testimony. Such testimony is routinely allowed at trial, and was proper here. *See, e.g., U.S. v. Orr*, 692 F.3d 1079, 1095-97 (10th Cir. 2012) (investors were properly asked whether they would have invested had they known certain information); *U.S. v. Dukes*, 242 Fed. Appx. 37, 45-46 (4th Cir. 2007) (same); *U.S. v. Bush*, 552 F.2d 641, 649-51 (7th Cir. 1975) (witnesses properly testified whether they would have awarded contract to company had they known of defendant's concealed interest in the company).

(Tr. 2344:8-17). Buono confirmed no covenants were discussed, and that Solari did not agree to anything. (Tr. 2344:18-2345:5).

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

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

Buono and Fonstad both denied Bebo's uncorroborated story of what transpired immediately after the call. Bebo testified that, after the call, Buono and Fonstad confirmed Solari had agreed ALC could meet the covenants using an unlimited number of rooms for employees who had a "reason to go" to the Ventas facilities, even if the employees never travelled there. (Tr. 1924:14-1925:16, 1926:16-1927:11, 1928:22-1929:17). Bebo also testified Fonstad orally retracted his written advice from the day before, that Ventas's written

confirmation was required for ALC to engage in such a practice. (Tr. 1929:18-22).[9]

Refuting Bebo, Fonstad and Buono deny that Bebo discussed Solari's purported agreement with Fonstad, or that Fonstad otherwise approved any practice following the January 20, 2009 call. (Tr. 1507:24-1511:17, 1518:10-1519:6, 2318:16-19, 2321:21-2352:4). The ALJ scrutinized this purported encounter, and found Bebo's testimony that Fonstad approved any practices following the call with Solari not credible. (I.D., 28-29).

On January 27, 2009, Buono prepared a draft email to Solari summarizing the January 20 call. (Tr. 2467:15-2470:9, 2756:22-2758:18; Ex. 179). On February 4, after editing Buono's draft, Bebo sent Solari the final version of the email. (Tr. 1931:14-1932:2, 1934:12-1935:12, 2354:1-5, 2949:7-2950:7, 2987:12-2992:23; Exs. 184, 1320, 1320A). Contrary to her own account of the call, but consistent with Buono's and Solari's accounts, Bebo's email does not mention any covenants. (Ex. 184). Instead, the first four paragraphs address ALC's proposed hospice sublease. (*Id.*). The fifth paragraph merely states: "we are also confirming our notification of our rental of rooms to employees..." (*Id.*). Thus, Bebo ignored the advice she received from Fonstad: (1) disclose in writing ALC's intent to include employees in the covenant calculations, and (2) obtain Ventas's written approval. (Ex. 1152).

Ventas never responded to Bebo's proposals, and Bebo agreed that prior to April 2012, ALC never informed Ventas that ALC was including employees in the covenant calculations. (Tr. 428:25-429:5, 1918:3-1919:11, 2022:6-2023:13, 2345:6-2347:20). Bebo contends that Ventas's silence confirmed its agreement that ALC could include in the calculations (both

[9] In an effort to blame Fonstad for her fraud, Bebo testified Fonstad went so far as later approving Bucholtz's seven-year old nephew for the covenant calculations, which Fonstad denied and was inconsistent with Bebo's investigative testimony. (Tr. 1318:17-20, 2050:8-12; 2194:3-24).

occupancy and coverage ratio) an unlimited number of employees who never stayed at the facilities, as long as those employees had a "reason to go." (Tr. 1936:13-1938:18, 1938:23-1941:8, 1942:9-13, 1948:7-16). Bebo also claims Ventas agreed that Bebo, in her sole discretion, could decide whether a person had a "reason to go" to a Ventas facility, even if that person was not an ALC employee. (Tr. 1942:24-1943:16, 1944:15-1945:10). Because of her extremely broad definition of who ALC could include, Bebo considered Ventas's purported agreement to be tantamount to a waiver of the covenants. (Tr. 1945:11-1946:4).

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

Recognizing that Bebo's account of the January 20 call differed sharply with the testimony of the other witnesses, the ALJ carefully evaluated the evidence surrounding the call. (I.D., 20-32). In doing so, the ALJ resoundingly determined that Bebo's account was not credible. (*Id.*).

The ALJ's principal reason for not crediting Bebo was because Bebo's version was "entirely inconsistent with both the documentary evidence and the testimony of the other two percipient witnesses [Solari and Buono]." (I.D., 24). The ALJ determined that Bebo's February 4, 2009 email to Solari was "the most reliable evidence of what the call participants discussed, and any agreements they reached" because the email "documents Bebo's contemporaneous understanding of what had been discussed and agreed to on the call." (I.D., 20 (citing Ex. 184)). The ALJ correctly concluded that the email, *which makes no mention of the covenants*, "[c]ertainly...did not clearly put Ventas on notice that ALC would be including employees in the covenant calculations," and that neither Ventas nor Bebo understood the email to reflect notice

or agreement that ALC would be doing so. (I.D., 21-23).[10]

The ALJ also credited Solari's and Buono's consistent testimony that on the January 20 call, the covenants were not discussed and no agreement was reached. In crediting Solari's testimony, the ALJ observed that Solari "testified matter-of-factly, with good visible and audible demeanor, and he had no clear motive to be biased in favor of either party." (I.D., 29-30). Unlike Bebo, Solari had no motive to provide biased testimony. Solari faces no liability in this matter and had no incentive to appease his former employer given that Ventas fired him in April 2009. (Tr. 399:23-400:12).

The ALJ also credited Buono's account of the call, recognizing that Buono's "inculpatory" testimony about the call bolstered Buono's credibility. (I.D., 30). The ALJ also noted that in testifying about the call, "Buono's demeanor was generally good, he was not notably evasive, and, most importantly, his testimony was generally much more plausible than Bebo's." (*Id.*). Indeed, if Solari truly agreed to everything that Bebo claims, Buono's self-interest would have been to testify to that effect. Doing so would certainly have hindered the Division's case (against both Bebo and Buono).[11]

The ALJ also considered, and rejected, Bebo's accusation that Fonstad perjured himself when he testified he did not recall participating in the January 20 call. (I.D., 29; Tr. 1504:20-1506:1). Fonstad's testimony is supported by the fact he routinely took notes of important

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[10] While Bebo touts Buono's testimony that *Buono* thought the only reason for employees to rent rooms was to meet the covenants, there is no evidence Ventas shared this understanding. Rather, as Bebo admits, she told Solari that ALC was seeking Ventas's permission for ALC employees who travelled to the properties as part of their job duties to stay there overnight. (Tr. 1905:12-1907:13, 1920:14-17, 4003:6-15).

[11] Buono was originally a respondent in these proceedings, and settled to a securities fraud violation and substantial sanctions for his role in Bebo's scheme. *See Laurie Bebo and John Buono, CPA*, Exchange Act Rel. No. 74177 (Jan. 29, 2015).

conversations (including other calls with Ventas), but that no notes existed of a January 20, 2009 call with Solari. (*Id.*; Ex. 197). Even assuming Fonstad was on the call, that would not absolve Bebo. There was no discussion of the covenants on the call, nor were the covenants mentioned in the emails Fonstad received which purported to summarize the call. (Ex. 1171). Therefore, Bebo could not have relied on Fonstad's advice or participation in the discussions, as she claims. (Br., 28).

Besides finding that Bebo's testimony conflicted with her contemporaneous account of the call (her February 4 email) and the consistent testimony of two credible witnesses, the ALJ found two other "significant reasons" for rejecting Bebo's testimony. (I.D., 24). First, the ALJ determined that Bebo's "version of events is inherently implausible, both generally and in its particulars." (*Id.*). The ALJ found: "it is implausible that Bebo would be able to remember the very large number of details she recounted at the hearing, given that six years had passed since the call took place..." (*Id.*). The ALJ also reasoned that key aspects of Bebo's account "just do not ring true," including her claim that Solari effectively agreed to waive the covenants by agreeing to an unlimited number of employees being included. (I.D., 24-25).

The ALJ also discredited Bebo's version of the call because he found that, in general, Bebo was "not a credible witness." (I.D., 25). The ALJ observed: "over the course of approximately five full days of testimony, [Bebo] was successfully impeached over twenty-five times" and, regarding the January 20, 2009 call "specifically, she was successfully impeached three times." (*Id.*). The ALJ also based his credibility determinations on Bebo's "evasiveness and discursiveness throughout the hearing." (I.D., 26). The ALJ further recognized that, in "many instances, the impeachment revealed that [Bebo's] account of important facts had changed over time, which suggests that her account was fabricated." (I.D., 54).

Given the numerous and powerful reasons to discredit her testimony, the ALJ correctly determined that Bebo: "provided *knowingly false testimony* about what was likely the single most important event at issue in this proceeding – the January 20, [2009] call." (I.D., 53) (emphasis added).

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

The ALJ's determination that Bebo knew Ventas never agreed to include employees in the covenant calculations is confirmed by Bebo's conduct in the month following her call with Solari, when Bebo actually tried negotiating covenant relief with Ventas. Despite the agreement Bebo claimed was reached on their January 20 call, on February 17, 2009, Bebo and Buono discussed with Solari a proposal for ALC to purchase two Ventas properties in New Mexico *in exchange for Ventas waiving the occupancy and coverage ratio covenants*. (Tr. 429:15-431:19; Ex. 188, p. 2).[12] On February 19, Bebo followed-up by proposing to revise the covenants such that the only one remaining would be a slightly reduced portfolio-wide coverage ratio covenant. (Ex. 190, p. 3). Bebo's email acknowledged the portfolio-wide covenant's importance to Ventas: "we have tried to address your concerns that the properties be managed to adequately support lease payments." (*Id.*).

On February 21, Buono drafted a proposal for ALC's board's consideration seeking a waiver of the covenants (save for the reduced portfolio-wide coverage ratio covenant) in exchange for purchasing the New Mexico properties. (Tr. 1950:18-1951:15, 2358:10-2359:15; Ex. 193). Buono, who believed a deal had been reached, emailed Bucholtz: "Not sure if Laurie conveyed to you our conversation with Ventas on Friday, but, subject to board approval, we have reached an understanding on covenant compliance... The bad news is you will now own 2

[12] Given that Solari testified that ALC proposed waiving both the occupancy *and* coverage covenants, there is no double-hearsay issue, as Bebo claims. (Br., 40-41).

buildings in New Mexico." (Tr. 2360:13-2361:1; Ex. 192). Similarly, at the February 23 board meeting, Bebo reported that ALC may seek covenant relief from Ventas in exchange for purchasing the two New Mexico properties. (Tr. 562:11-563:19, 1980:12-1981:8, 2815:1-2816:2; Ex. 100, pp. 2-3).

Despite the contemporaneous emails and minutes showing that Bebo proposed to the board obtaining covenant relief by purchasing the New Mexico properties, Bebo claims that at the February 23 meeting the board approved the practice of including in the covenant calculations rooms ALC rented for "people with a reason to go." (Tr. 1970:19-1971:23).

Five directors – Bell, Buntain, Hennigar, Rhinelander, and Roadman – refute Bebo. These directors testified the inclusion of employees in the covenant calculations did not come up at the February 23, 2009 meeting, and that the board never approved the practice. (Tr. 563:24-564:6, 567:4-23, 1363:10-25, 2646:15-2648:8, 2816:3-14, 2824:13-22; Ex. 492A). As to the four directors who testified in person, the ALJ credited their testimony and found they "possessed very believable demeanors." (I.D., 41).[13]

Fonstad, who attended the February 23 board meeting and took the minutes as ALC's secretary, similarly testified that the inclusion of employees in the covenant calculations was never discussed at any board meeting he attended, including the February 23 meeting. (Tr. 1521:22-1524:2; Exs. 99, 100). Buono likewise testified the board did not approve the inclusion

[13]Bebo testified that prior to the board meeting, she told Rhinelander, in the presence of Herbner and Buono, that Ventas had agreed to include employees in the covenant calculations. (Tr. 1959:1-1965:5). Bebo claims that Rhinelander then spoke with Hennigar, before telling the group that Hennigar had approved the practice. (Tr. 1965:6-1966:20). Herbner, Rhinelander, and Hennigar denied Bebo's story. (Tr. 841:14-842:17, 2823:14-2824:12; Ex. 492A). Even accepting Bebo's story as true, Rhinelander and Hennigar did not approve including large numbers of employees who did not stay at the Ventas facilities, because Bebo had not yet determined to include large numbers of employees, or employees who did not stay at the properties. (Tr. 1989:2-1990:7). Moreover, crediting Bebo's claims, that she told Rhinelander and Hennigar that Ventas agreed to include employees, would merely prove she lied to them.

of employees in the covenant calculations. (Tr. 2761:19-23). Further, the February 23 board and audit committee meeting minutes make no reference to including employees in the covenant calculations, let alone board approval of the practice. (Exs. 99, 100).

In the days following the board meeting, Ventas countered ALC's bid to purchase the New Mexico properties by offering that ALC purchase the properties at an increased price, along with ALC purchasing Peachtree, a poorly performing Ventas facility. (Tr. 224:6-225:11; Ex. 196). However, Ventas would only temporarily waive the individual facility coverage ratio covenants, and would not waive the portfolio-wide coverage ratio covenant. (Tr. 225:19-226:13, 435:4-436:12; Exs. 194, 196). This caused Buono to send Bebo an email titled "OMG," writing: "Did you read [Ventas's] counter proposal? Hope you['re] sitting down." (Ex. 195).

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

In April 2009, Ventas laid off Solari as part of a companywide reduction in force. (Tr. 399:23-400:12, 460:15-461:1). Bebo acknowledges that after Solari's termination, she never spoke with anyone at Ventas about the use of employees in the covenant calculations. (Tr. 4074:6-9).

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

Following the January 20 call with Solari, Bebo ordered Buono to include ALC employees – and their attendant revenue – in the covenant calculations. (Tr. 2347:21-2348:3, 2351:13-19). Buono acquiesced, but cautioned Bebo the practice "had to be something real" and that ALC could only include "employees that were staying at the properties." (Tr. 2348:4-12). Buono's understanding that Bebo would only include employees who actually stayed at the facilities is further demonstrated by an email he wrote in Q1 2009 where he asked her to identify for the covenant calculations "employees *staying* at the house," employees "*living at* our residences" and employees "that *were at*" buildings. (Tr. 2361:10-2364:11; Ex. 203 (emphasis added)).

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

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

1. ALC's Historical Practices

Each quarter, ALC sent Ventas materials documenting its compliance with the covenants. (Tr. 749:4-8; Exs. 32-45). Prior to going on maternity leave in August 2009, Herbner prepared the covenant calculations and the quarterly materials for Ventas. (Tr. 511:13-14, 519:4-12, 749:20-750:8).

Bebo claims her story about Ventas's agreement must be true, because otherwise she would have simply met the covenants by altering the methodology for calculating compliance.

However, if Bebo truly believed that ALC could appropriately meet the covenants by changing methodologies, there would have been no need to seek Ventas's approval to include employees, let alone engage in her elaborate scheme.

Furthermore, there is no evidence that Bebo actually considered any alternative methodologies until after she was terminated and the Commission staff had initiated its investigation. Various witnesses testified that ALC's companywide methodology for calculating occupancy was to divide the number of occupied units by the number of available units at each facility. (Tr. 515:24-516:7, 519:13-25, 830:11-19, 2315:5-8, 3116:17-3118:4). Bebo admits ALC never used any alternative methodology for the Ventas covenants. (Tr. 4545:9-4546:5). Aside from Bebo, the other witnesses agreed ALC never *contemplated* calculating occupancy at the Ventas facilities using a different methodology, such as reducing the number of available units or using beds (instead of units) in the numerator. (*See, e.g.*, Tr. 1304:24-1305:20, 1521:18-1522:3, 2314:14-2315:8, 2813:4-20). Even Bebo concedes she never asked anyone to perform the calculations using an alternative methodology, and never discussed the idea with ALC's board or auditors. (Tr. 1868:8-18, 1872:7-21).

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

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

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

Herbner calculated the revenue associated with the employees and reported it to assistant controller Anthony Ferreri, who posted journal entries to record the revenue on ALC's general ledger. (Tr. 757:21-758:7, 803:5-804:7, 807:23-808:7). Bebo determined the daily rate used for calculating revenue associated with the added employees. (Tr. 806:19-22, 824:7-11). After Ferreri posted the journal entries, Herbner included the employee "revenue" in the financial materials sent to Ventas. (Tr. 808:19-809:14).

In her investigative testimony, Bebo admitted giving Herbner a directive similar to the one she gave Buono: do not tell Ventas that ALC used employees in the covenant calculations. (Tr. 2088:11-2089:25). Accordingly, Bebo understood Ventas was unable to discern the inclusion of employees from the quarterly information provided by ALC. (Tr. 2087:12-2088:10).

Herbner again performed the covenant calculations for Q1 and Q2 2009. (Tr. 811:2-20,

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

815:14-816:10, 827:23-828:3).[15] Unlike Q4 2008, Herbner no longer received documentation showing the days, if any, employees stayed at the Ventas facilities. (Tr. 817:6-17). Instead, Bebo directed that each employee be considered an occupant *for the entire quarter*. (Tr. 989:24-990:13, 2352:3-12). Herbner determined the number of employees by calculating the shortfall in occupied units and revenue needed to meet the covenants, and then asking Bebo to select the names of the employees. (Tr. 816:13-817:2, 826:2-7). Bebo knew that, beginning in Q1 2009, ALC included employees who did not visit or stay at the Ventas facilities. (Tr. 1989:10-1990:7). Bebo never asked Herbner to verify that the employees were appropriately listed or had actually stayed at the facilities. (Tr. 820:25-821:21, 828:15-829:8).

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

After Q2 2009, Herbner went on maternity leave, and upon returning gave notice she had found employment elsewhere. (Tr. 845:11-846:6). Herbner was "on the verge of tears" as she testified about quitting due to her discomfort with the covenant calculations and her desire not to "advance at a company that was constantly pushing the edges of regulators." (Tr. 844:24-845:6, 882:8-14; I.D., 11).

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[15] The covenant calculations were prepared after the end of the quarter at issue, and Bebo understood this to be the case. (Tr. 1987:21-1988:11, 2349:23-2350:13)

Prior to her leave, Herbner trained Sean Schelfout to perform the calculations, including using the Occupancy Recons to "backfill" the necessary number of employees and to later obtain the employee names from Bebo. (Tr. 846:7-12, 965:24-966:3, 970:9-971:7, 973:20-975:19, 976:3-977:2, 982:12-984:10; Ex. 141; Ex. 383). Schelfout held the backfilling assignment from Q3 2009 through year-end 2010. (Tr. 971:4-20, 978:9-979:2, 1017:14-19). After determining the number of needed employees, Schelfout sent Bebo or Buono an Occupancy Recon with placeholders for the employee names – such as E3, E4, and E5. (Tr. 988:19-990:4, 998:8-999:3; Ex. 230; Ex. 236; Ex. 387). Bebo then determined the names of the employees. (Tr. 999:4-1001:5, 1009:12-1010:19; Ex. 167, pp. 11-14; Ex. 237).

While training Schelfout, Herbner expressed her concerns to him. (Tr. 846:7-847:21, 984:11-23). Schelfout quickly worried the practice was illegitimate, and began looking for a new job. (Tr. 979:3-23, 985:11-15, 1063:2-16). His concerns intensified when he realized ALC included employees who were not staying at the facilities and people who were not ALC employees. (Tr. 980:10-982:11, 997:17-998:3). Schelfout feared being fired if he confronted Bebo and Buono, or disclosed the use of employees to Ventas. (Tr. 984:24-987:14, 1027:16-1028:2). Schelfout quit ALC after receiving his first job offer, which took more than a year given the scarcity of finance jobs in Milwaukee and the poor state of the economy. (Tr. 985:20-25, 1030:25-1031:14).

Before leaving, Schelfout trained Daniel Grochowski to perform the calculations, including how to "back in" to the necessary number of employees. (Tr. 1029:17-1030:7, 1091:23-1095:6). Schelfout gave Grochowski the same instruction Bebo had given to Buono and Herbner: do not inform Ventas about the employees. (Tr. 1095:7-1096:16, 1207:12-16).

In January 2011, Grochowski began performing the covenant calculations. (Tr. 1090:21-

1091:5). Grochowski was uncomfortable with the entire process, which involved "fudging numbers," "inflating revenue," "lying to Ventas," and "creating false financial statements." (Tr. 1097:10-1098:25, 1099:1-1101:12). Grochowski feared Ventas could sue him personally for his role in the process. (Tr. 1104:17-1105:5).

Grochowski performed the calculations for three quarters, but refused to engage in backfilling, which he considered "manipulation." (Tr. 1096:25-1097:24, 1105:6-10). Instead, Grochowski informed Buono how much actual occupancy had changed over the past month, and Buono would calculate how many employees to add or subtract. (Tr. 1109:10-17, 1110:11-21). Bebo continued to decide the employees' names. (Tr. 1113:3-1114:12, 1126:4-18, 1128:18-1131:18; Ex. 302). On occasion, Grochowski deleted employees who no longer worked at ALC, knowing this made Bebo's job more difficult because she would have to find replacements. (Tr. 1124:8-1125:24).

By November 2011, Grochowski and Ferreri feared their roles in ALC's covenant calculations would jeopardize their CPA licenses, and complained to Buono. (Tr. 1151:24-1152:17, 2375:23-2376:6). Afterwards, Bebo summoned Grochowski. (Tr. 1152:18-1153:6). Grochowski told Bebo he was uncomfortable and no longer wanted to perform the calculations. (Tr. 1153:12-20, 2376:1-21, 4191:7-19). Grochowski further told Bebo the inclusion of employees violated GAAP. (Tr. 1153:25-1155:8). He also pointed out that Bebo's friend, Schweer, was not an employee but was included in the calculations. (Tr. 1155:9-18). Bebo tried to mollify Grochowski by showing him her February 4, 2009 email to Solari, but the email only validated Grochowski's concerns. (Tr. 1157:10-1161:14).

When Grochowski wouldn't acquiesce, Bebo allowed him to stop performing the calculations. (Tr. 1161:24-1162:20). This was the first time Bebo relieved an employee of

duties the employee did not want to perform. (Tr. 2377:4-11). Bebo then assigned Buono to perform the calculations himself, and thereafter Buono prepared the Occupancy Recons. (Tr. 1162:21-1163:1, 2376:12-2377:3, 2377:19-2378:16). Following the meeting, Bebo awarded Grochowski a $35,000 "stay-on" bonus. (Tr. 4193:1-11). Only two other ALC employees received "stay-on" bonuses, and each received only $8,000. (Tr. 4194:3-9, 4729:24-4730:21).

3. The Journal Entries and the 997 Account

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

Ferrari quickly became anxious because these journal entries were unusual and "definitely not consistent with GAAP." (Tr. 1227:16-1228:10, 1243:24-1244:7). In his 25-year accounting career, Ferreri had never seen an arrangement that involved offsetting positive and negative revenue; the typical situation was revenue and offsetting expense. (Tr. 1221:4-1222:14, 1228:11-21, 1253:6-1254:5, 1261:17-22).

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

After Grochowski voiced his concerns, Bebo summoned Ferreri and requested he continue recording the journal entries. (Tr. 1256:7-19). Ferreri acquiesced, because Bebo assured him the process was "proper and correct," and Ferreri feared termination if he didn't obey Bebo. (Tr. 1260:14-1261:16).

Ferreri's assessment that booking the employee revenue violated GAAP was shared by the Division's expert, John Barron. Barron opined that recording this revenue on the financial statements of the Ventas facilities, which the lease required to be GAAP-compliant, violated GAAP's revenue recognition criteria contained in FASB Concepts Statement 5. (Ex. 377, pp. 27-29; I.D., 18). Specifically, Barron testified that recording such revenue was improper because no cash changed hands; the Ventas facilities never had a claim to cash; and no evidence existed of an agreement, between ALC and the Ventas facilities, setting forth the terms allowing the facilities to record the revenue. (Ex. 377, p. 28; I.D., 18). Bebo offered no evidence (expert testimony or otherwise) that recording revenues associated with the employees satisfied GAAP.

4. Bebo's Key Role in the Process

In addition to ordering the employees' inclusion, Bebo determined the identities of the employees and other non-residents included in the covenant calculations. (Tr. 2350:19-25).[16] Bebo testified that she understood the process by which accounting personnel determined the number of employees and the associated revenue needed to meet the covenants. (Tr. 1996:25-1997:18, 1998:4-1999:21, 2354:14-2355:21, 2374:19-2375:19; Ex. 304).

Bebo testified that each quarter, ALC accountants would provide her the number of employees needed to meet the covenants, and she would supply the names. (Tr. 4076:20-4077:17). Bebo also understood the list of names went to GT along with ALC's covenant

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

calculation materials. (Tr. 2699:15-2700:6, 4070:19-4073:7, 4124:3-23). Buono and his staff did not perform a substantive review of the names or otherwise review the list for accuracy. (Tr. 2352:20-2353:7). Bebo never instructed Buono to do so. (Tr. 2017:14-2018:2, 4559:23-4560:4).

Bebo selected for inclusion in the covenant calculations:

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

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

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

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

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

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

- Numerous other ALC employees who provided declarations affirming they never stayed at the Ventas facilities. (Exs. 451, 452, 453, 454, 462, 466, 468, 470, 471, 473).[17]

- Tim Cromer, who was never an ALC employee but was married to an ALC employee who herself was separately included at multiple facilities. (Tr. 2053:9-2055:10; Ex. 256, pp. 6-7).

- Former employees, future hires who had not yet started working, and full-time employees of the Ventas facilities. (Ex. 552A, Tr. 2224:4-2239:19).

- Large numbers of employees who were simultaneously included at multiple properties. Starting in Q3 2009, Bebo listed an average of 18.5 employees at

[17] Bebo does not dispute the veracity of these declarations, which were properly admitted per Rule of Practice 235(a)(5).

multiple properties each quarter. (Ex. 552A, Tr. 2224:4-2239:19).

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

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

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

Throughout 2009 and into 2010, actual occupancy continued to decline at the Ventas facilities. (Ex. 377, ¶¶ 81-82). The following chart, depicting actual trailing twelve-month occupancy, shows that without the inclusion of employees ALC experienced multiple covenant failures at each facility (75% covenant) and the portfolio (82% covenant).[18]

[18] Even if ALC had reduced the denominator in the calculations by 10%, as Bebo now claims is permissible under the lease, ALC still would have violated the occupancy covenants more than 40 times. (Tr. 4568:25-4569:14; Ex. 583A).

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

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

(Ex. 377, ¶ 82).

Without including employees, ALC would also have repeatedly failed the 65% quarterly occupancy covenant at each facility (Ex. 377, ¶¶ 81), and, as seen below, the coverage ratio covenants for four facilities (0.8 covenant) and the portfolio (1.0 covenant).

Trailing 12-Month Coverage Ratios that Failed Covenants

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

(Ex. 377, ¶ 84)

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

Non-Residents Included in Covenant Calculations

2009 through 2011

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

(Ex. 377, ¶ 80)

In Q3 2009, Buono learned that significantly more employees were needed to avoid missing the covenants. (Tr. 2364:13-21). Buono again cautioned Bebo the practice had to be "real," and repeated this warning on an almost quarterly basis. (Tr. 2365:8-15). Also, on multiple occasions Buono expressed concern to Bebo that Ventas could sue him if the officer certificates he signed were not accurate, that he feared going to prison, and that he did not "look good in stripes."[19] (Tr. 2365:8-25). In response, Bebo assured Buono the program was legitimate, and that ALC would never fail the covenants because it had large numbers of employees it could send to the properties. (Tr. 2366:1-15).

Contrary to her assurances, Bebo selected large numbers of employees who did not stay at the Ventas facilities during the periods they were included in the covenant calculations. (Tr.

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

2249:4-2264:19; Ex. 552A). Indeed, over the course of the scheme, such individuals conservatively constituted well over half of the "employees" Bebo included in the calculations. (*Id.*). As ALC would later determine after Bebo's scheme was exposed: "there were rarely more than three ALC employees who actually travelled to the Ventas-leased facilities in any month, and those employees remained only for a few days." (Ex. 365, p. 25; *see also* Division's Post-Hearing Reply Br., p. 22).

J. ALC's False and Misleading Commission Filings

Bebo conceded that, as CEO, she had responsibility to ensure ALC's Commission filings were accurate. (Tr. 1767:6-1768:10, 3845:17-20). To that end, Bebo signed ALC's Forms 10-K and certified that ALC's Forms 10-K and 10-Q did not contain any material misstatements or omissions. (Tr. 1767:6-1768:10; Exs. 2-13).

ALC's 2009, 2010, and 2011 Forms 10-K and 10-Q falsely represented ALC was "in compliance" with the Ventas financial covenants. (Ex. 2, p. 30; Ex. 3, p. 38; Ex. 4, p. 42; Ex. 5, p. 45; Ex. 6, p. 34; Ex. 7, p. 36; Ex. 8, p. 38; Ex. 9, p. 45; Ex. 10, p. 33; Ex. 11, p. 36; Ex. 12, pp. 36-37; Ex. 13, p. 43). Bebo knew ALC's filings both contained this representation and represented that a covenant default could have a "material adverse impact" on ALC. (*Id.*; Tr. 1770:2-6, 1771:13-18). Belying Bebo's argument that the disclosures were "boilerplate," the Division of Corporation Finance inquired about ALC's covenant disclosures in a July 2011 comment letter. (Ex. 295). In response, ALC's 2011 Form 10-K and Q2 and Q3 Forms 10-Q added the following false and misleading representation: "ALC does not believe that there is a reasonably likely degree of risk of breach of the [Ventas financial] covenants." (Tr. 1772:7-17; Ex. 11, p. 36; Ex. 12, pp. 36-37; Ex. 13, p. 43).

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

Bebo took a variety of actions to conceal from Ventas ALC's inclusion of employees in the covenant calculations. Bebo's conduct demonstrates her scienter, and shows she knew Ventas had never agreed to the practice and that she knew her conduct was wrong.

For instance, during its quarterly meetings or calls with ALC, Ventas inquired about changes in occupancy and coverage ratio. (Tr. 227:18-237:9, 2101:10-2102:11, 2366:16-223; Exs. 207, 208, 280). Bebo responded by giving various fictitious reasons for the changes but never told Ventas the changes actually were caused by adding or subtracting employees. (Tr. 2366:16-2367:15, 2369:14-2371:12). For meetings Bebo did not attend, she directed Buono to answer Ventas's questions without disclosing the inclusion of employees. (Tr. 2367:16-2368:13).

Similarly, in July 2009, a Ventas employee emailed Herbner seeking explanations for the "significant increases in occupancy" at five Ventas facilities. (Ex. 211). Bebo admits dictating to Herbner reasons to give Ventas for the occupancy increases – none of which involved the true reason, the inclusion of employees – and Herbner forwarded Bebo's answers to Ventas. (Tr. 835:18-838:22, 839:9-840:10, 2090:22-2092:12; Ex. 212).

Bebo also tried preventing Ventas from ascertaining occupancy during Ventas's periodic inspections of the facilities. Bebo and Buono always accompanied the visiting Ventas personnel, and Bebo refused to allow ALC onsite employees to speak with the Ventas representatives. (Tr. 2368:14-2369:3). Bebo also told Buono that Ventas could not visit during meal times, because Ventas would realize the number of residents in the dining room was inconsistent with ALC's reported occupancy figures. (Tr. 2369:4-13). Likewise, Bebo instructed Houck to remove the placards containing the names of residents which hung outside the residents' rooms at one

facility. (Tr. 1475:11-25, 4154:18-4155:1). This prevented Ventas from counting the number of occupied rooms. In advance of another site visit, Bebo told Bucholtz: "We really need the occupancy numbers to 'pop.'" (Ex. 569).

Bebo later tried preventing Ventas from visiting the facilities altogether. On December 11, 2010, Bebo directed that Ventas could not visit the facilities for the remainder of the year. (Ex. 262). Bebo wrote she was "getting overly concerned" with occupancy at one of the facilities, which had fallen to 61%. (*Id.*; Tr. 2099:3-2100:11).[20]

In 2011, ALC was exploring a sale of the company and prepared a "data room" for potential buyers, one of which was Ventas, to review due diligence materials. (Tr. 2114:9-13, 2116:6-8, 2371:15-2372:16, 2828:18-2830:15). The data room included ALC's true internal occupancy figures for all of its properties, including the Ventas facilities. (Ex. 287). Bebo testified she was afraid Ventas would learn through the data room that actual occupancy was lower than what ALC reported in the quarterly certifications. (Tr. 2120:9-2121:22, 2122:21-2123:8, 2126:9-15; Ex. 292). For this reason, Bebo prohibited Ventas from accessing the occupancy materials made available to the other due diligence participants. (Tr. 2116:9-2117:23, 2829:22-2831:15; Exs. 287, 292).

Buono cautioned Bebo that potential buyers performing due diligence would discover the negative revenue in the 997 account, ask ALC about it, and then contact Ventas. (Tr. 2372:21-2373:16). Bebo admittedly believed neither ALC's buyer nor Ventas would credit her purported agreement with Solari. (Tr. 2128:13-2131:10, 2132:13-2134:8). Bebo and Buono determined that to prevent this, ALC would need to purchase the Ventas facilities. (Tr. 2373:23-2374:1,

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

2835:2-2836:24).

On April 11, 2012, after the board finally learned ALC was including large numbers of employees in the covenant calculations and after ALC received license revocation notices for three Ventas facilities, Bell prepared a draft settlement letter to send to Ventas. (Ex. 568). Bell's draft letter contained the following statement: "As you know, ALC has ... placed employees in the [Ventas] facilities to meet the occupancy thresholds." (*Id.*, p. 4). After receiving Bell's draft letter, Bebo advocated removing the disclosure about the employees, because Bebo believed raising the issue would "create other disagreements" with Ventas. (Ex. 570; Tr. 4721:6-4723:10).

As a result of Bebo's deception, Ventas remained unaware that ALC included employees in the covenant calculations. (Tr. 215:10-216:14; 237:17-22).

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

Contrary to her arguments (Br. 35-39), Bebo's concealment of her scheme from ALC's directors both demonstrates her scienter and precludes her from claiming good-faith reliance.

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

4339:10-4340:16, 4344:6-4345:22).[21]

Consistent with these witnesses' testimony, the minutes of ALC's board and audit committee meetings, and the materials distributed in advance of board meetings, do not mention the use of employees in the covenant calculations or Ventas's agreement to such a practice. (Exs.74-90, 92-120).[22] Even Buono testified that, prior to March 2012, there was only a single reference to employees being included in the covenant calculations made at a board meeting (by Buono, not Bebo, in August 2011), and that no details or specifics were given regarding the practice. (Tr. 2382:12-2383:19, 2384:25-2388:3, 4631:7-4632:20).[23]

In sharp contrast to the documentary evidence and testimony of every other percipient witness, Bebo testified that by late 2009, she had disclosed all the minutia of her scheme. Specifically, Bebo claimed she told the board at its November 2009 meeting:

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[21] Bebo's argument that GT discussed ALC's use of employees in the covenant calculations at audit committee meetings (Br. 36-37) is refuted by the minutes of those meetings, GT's agendas and reports contained in the board materials, and the testimony of every ALC witness, save Bebo, who attended those meetings. (Exs. 74-90, 92-120). Moreover, in April 2012, when Bebo's scheme was unraveling, GT was unable to find evidence that it had disclosed ALC's use of employees to the board. (Exs. 1774, 1774A p. 4; Division's Post-Hearing Reply Br. at 18-19).

[22] In certain quarters, the board members received PowerPoint slides and supporting documents which, if scrutinized carefully in their entirety, could show a discrepancy between actual occupancy and the occupancy reported to Ventas. These materials presented by management at board meetings (which exceeded 100 pages) never referenced a discrepancy existing or that the discrepancy was due to the inclusion of employees. (*See, e.g.,* Exs. 81, 82). The directors testified that no one brought to their attention any inconsistencies in board materials, and if any discrepancy existed, it was management's responsibility to alert the board. (Tr. 742:9-19, 1370:12-1371:3, 2642:8-2643:8).

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

- Ventas agreed that ALC could include in the covenant calculations an unlimited number of employees, so long as they had a "reason to go;"

- ALC was including large numbers of employees, non-employees, people who did not visit the Ventas properties, and employees at multiple properties simultaneously; and

- ALC's accounting practices, including the cancellation of revenue through the 997 account.

(Tr. 2023:18-2024:25, 2025:11-2026:15, 2027:11-2028:10, 2030:7-23, 2031:1-14). The ALJ determined that Bebo's testimony to this effect, which every percipient witness refuted, was not credible. (I.D., 42).

Nevertheless, Bebo concedes she *never* told the board (1) ALC would fail the covenants without including employees, (2) ALC included her family and friends, or (3) ALC was including large numbers of employees who did not visit the Ventas facilities. (Tr. 2035:11-25). The ALJ additionally observed:

> there is literally no evidence – notably, not even testimony from Bebo – that the Board knew prior to March 6, 2012, that: (1) Bebo's selection of employees was unilateral and essentially arbitrary; (2) the number of such employees was determined by backfilling; (3) ALC was not tracking employee stays; or (4) [GT] lacked complete knowledge of the covenant calculation process.

(I.D., 41-42).

The board was also unaware that, in advance of its August 2011 meeting, management had prepared an alternative response to the Division of Corporation Finance's comment letter. (Tr. 571:16-574:21, 1448:17-1449:19, 2833:22-2834:23; Exs. 294, 295). The version of ALC's response that was discussed with the board and filed with the Commission stated ALC did not believe there was a reasonably likely degree of risk of breach of the Ventas covenants. (Tr.

571:16-574:21, 2599:21-2602:12, 2832:12-2834:1; Ex. 295).[24] However, the alternative letter, which management did not disseminate, reached the exact opposite conclusion. (Tr. 571:16-574:21, 2651:8-2652:3; Ex. 294). Bebo concedes the alternative letter was not shared with the board, GT, or ALC's securities counsel, Quarles & Brady ("Quarles"). (Tr. 2109:6-19; 2110:20-2112:7).

Bebo testified that at the August 2011 audit committee meeting, she again provided the board (and GT) with all the details regarding ALC's covenant practices. (Tr. 2167:13-2170:12, 4702:19-4703:12). However, Bebo was impeached with her investigative testimony in which she claimed that, following November 2009, she did not discuss the inclusion of employees with the board until March 2012. (Tr. 2040:20-2042:14). Five directors, as well as Buono, Zak, and Hokeness, denied Bebo discussed ALC's use of employees during this meeting. (Tr. 567:4-571:15, 1363:10-1366:16, 2382:12-2383:19, 2384:25-2388:3, 2645:11-2646:11, 2648:22-2651:7, 2825:2-2827:17, 3134:21-3135:11, 4339:10-4340:16, 4344:6-4345:22; Ex. 492A). These witnesses' testimony is consistent with the minutes and board books for the August 2011 meeting, as well as Zak's handwritten meeting notes, none of which reference employees being included in the covenant calculations. (Exs. 86, 115, 116, 118).

The board first began learning details at the March 6, 2012 CNG committee meeting. (Tr. 579:6-18, 1373:8-12, 2385:13-2387:22, 2836:25-2838:6; Ex. 492A at 53:20-56:19). Before the meeting, Buono disclosed to Hennigar that a due diligence participant had discovered, and questioned Buono about, the 997 account. (Tr. 579:19-580:25). After learning this, Hennigar asked Buono to explain to the CNG committee the 997 account and its role in the Ventas revenue

[24] The Division of Corporation Finance's real-time scrutiny of ALC's covenant disclosures and ALC's resulting amendments further demonstrate that the disclosures were not "boilerplate" and were important to ALC and investors.

calculations. (Tr. 581:1-18, 2388:4-2389:5). The board members were "surprised," "shocked," "dumbfounded," "confused," and "furious" at what Buono told them. (Tr. 1373:25-1374:2, 2389:6-9, 2613:1-13, 2652:10-2653:1, 2837:18-2838:1). In delivering the news, Buono appeared frightened, as if he thought he would be fired immediately. (Tr. 582:17-583:5, 1373:20-24).

The CNG committee then confronted Bebo with Buono's revelations. (Tr. 583:6-11). Bebo testified the committee asked her questions in a manner in which they sounded unaware ALC included employees in the covenant calculations. (Tr. 2171:12-2173:20, 4436:20-4437:11). While Bebo admitted the use of employees, she failed to reveal key aspects of the practice, such as ALC's inclusion of: (1) employees who did not stay at the properties; (2) her friends and family members; and (3) employees at multiple properties. (Tr. 583:9-587:5, 1376:6-1377:7). Indeed, Bebo would never disclose to the board these facets of her scheme. (Tr. 586:6-587:5, 1376:6-1377:7, 2389:10-14, 2653:2-12, 2839:16-2840:21).

Following the March 2012 CNG meeting, the board tasked Bell, an attorney, with investigating ALC's covenant calculation practices. (Tr. 544:15-545:9, 589:6-14, 2598:2-2599:4, 2841:16-19). Bell advised that ALC inform its potential purchasers of the $2 million of negative revenue recorded in the 997 account. (Tr. 589:19-594:9; Ex. 322). In response, Bebo advocated against making such a disclosure. (Tr. 595:6-597:21, 2207:12-25, 2209:4-22; Exs. 325, 326). When Bell learned this, he wrote Rhinelander: "I think very risky with no upside ... ALC has been too cute by a 1/2 and better to end." (Ex. 326). Rhinelander overruled Bebo, and ALC made Bell's recommended disclosure. (Tr. 597:22-598:3).

On March 19, 2012, Bell wanted to know the Ventas facilities' actual occupancy figures so he asked Bebo for the covenant calculations without the inclusion of employees. (Tr. 598:4-

599:1, Ex. 328). When Bebo responded by asking "Why do we want to relook at the calculations and do them a different way?", Bell forwarded her email to Hennigar, writing: "More of the same – unbelievable!" (Tr. 598:4-601:6; Ex. 328).

On April 4, 2012, Bell informed the other directors that ALC received license revocation notices for three Ventas facilities. (Ex. 333). Bell's email attached a memo in which he wrote: "Highly unlikely that Feb. 4/09 Bebo email re employees is a legal basis for inclusion of employees to meet [the financial covenants]" and "[Buono's] compliance certificate re patient revenue is clearly wrong." (*Id.*, p. 3; Tr. 602:14-605:23). Bebo asked Bell to withdraw these two conclusions, but Bell refused. (Tr. 2216:18-2218:2).

M. Bebo's Scheme Unravels, Causing Significant Losses

On April 26, 2012, Ventas sued ALC for breach of the lease's regulatory covenants resulting from the license revocation notices. *Ventas Reality, L.P. v. ALC CVMA, LLC*, No. 1:12-cv-3107 (N.D. Ill.). Over Bebo's objection, the directors insisted that any settlement contain a specific release regarding the inclusion of employees in the covenant calculations. (Tr. 611:15-613:22, 2846:3-2848:4; Ex. 351). On April 27, Bebo emailed Ventas a proposed settlement containing a release relating to ALC "renting rooms ... to certain of its employees and including those employees in certificates and covenant calculations...." (Ex. 350, p. 3). Bebo's email stated: "I have purposefully left the dollar amount blank [and am] letting you know that the other items are important to our agreement in principle...." (Ex. 350). This is how Ventas first learned ALC had been including employees in the covenant calculations. (Tr. 246:7-247:18).

On May 2, 2012, the directors – other than Bebo – received a whistleblower letter from [redacted], who feared the board did not know the details of ALC's covenant practices. (Tr.

613:23-614:25, 1163:2-1164:23, 1167:11-1168:11; Exs. 352, 353). The letter described the list of names Bebo prepared as a "sham," and disclosed that ALC was including in the calculations: (1) the same employees at multiple properties simultaneously; (2) employees who did not travel to the Ventas facilities; and (c) non-employees such as Bebo's relatives and friends. (Ex. 353). This was the first time any of this information had been brought to the directors' attention. (Tr. 605:24-606:14, 614:20-616:17, 1384:1-20, 2653:13-2654:4, 2848:5-2849:1).

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

On May 3 and 4, 2012, Bebo, wrote a letter expressing her concerns that the board would not speak with her.[25] (Tr. 2227:15-2228:3, 4519:13-4522:6; Ex. 354). Bebo's letter acknowledged: "we are off-side on the covenants [and] are facing a material financial impact." (Tr. 2229:3-12; Ex. 354, p. 2).

On May 9, 2012, Ventas wrote ALC alleging that ALC engaged in fraud by "treating units leased to employees as bona fide rentals by third parties," and that doing so constituted an Event of Default. (Ex. 356). In its lawsuit, Ventas moved for expedited discovery, in part because ALC had not provided details regarding the lease "irregularities" disclosed in its Form 8-K, which *Ventas understood to involve the occupancy covenants*. (Tr. 384:8-386:6; Ex. 357).

After receiving Ventas's fraud allegations, ALC's directors believed the situation was

[25] Bebo was unaware the board had received the whistleblower letter and was attempting to retain a law firm. (Tr. 1427:15-1428:1, 4519:13-4522:6).

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

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

Contrary to Bebo's assertion that ALC's board believed $100 million was market value (Br. 15), various witnesses agreed that ALC purchased the properties for significantly more than market value. Bell calculated ALC overpaid by at least $24 million, while Buntain believed ALC overpaid by $20 million. (Tr. 620:2-621:4, 1385:13-1386:20). Roadman testified the settlement contained a "penalty" component. (Tr. 2636:8-2637:2, 2657:15-24). ALC paid so much because not resolving all the disputes with Ventas, including using employees in the covenant calculations, would jeopardize the process of selling ALC. (Tr. 621:5-11, 1386:17-23, 1390:1-8).

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

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

covenant occupancy rates.

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

On May 29, 2012, while Milbank's investigation was still in its early stages, ALC fired Bebo. (Tr. 621:12-623:10, 1385:9-12).[26]

N. Bebo's Story is Refuted by All of the Relevant Witnesses.

Bebo's defense hinges on her contention 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, no documentary evidence supports Bebo, and each of the percipient witnesses refuted Bebo's version of the events.

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

ALC's in-house lawyers, Fonstad and Zak, and outside securities counsel, Quarles attorney Davidson, each testified they never approved, or were made aware of, the inclusion of employees in the covenant calculations prior to March 2012. (Tr. 1507:24-1512:17, 2292:4-2295:16, 4339:10-4340:16, 4344:6-4345:22). In fact, Bebo utterly disregarded the one attorney she consulted – Fonstad – who expressly advised her to disclose to Ventas her proposal to include employees and to obtain Ventas's signed approval. (Ex. 1152). Buono likewise testified that Fonstad, Zak, and Quarles never approved the inclusion of employees in the covenant calculations. (Tr. 2380:7-2381:4). Indeed, Bebo admitted in her investigative testimony she

[26] The ALJ correctly afforded no weight to Milbank's *post-hoc* investigation findings. (I.D., 46-47). Milbank did not exonerate Bebo, and merely concluded it could not disprove Bebo's claim of an agreement with Ventas. (*Id.*; Tr. 643:21-645:3; Ex. 558, p. 10). Milbank's investigation was inconclusive, *inter alia*, because Milbank did not interview several important witnesses – particularly Solari, any Ventas or GT personnel, and certain directors. (Tr. 626:24-627:18, 2654:10-12; Ex. 558, pp. 1, 6; Ex. 1873, p. 4).

never discussed the issue with Zak or any Quarles lawyer. (Tr. 2184:15-2185:17, 2187:16-2189:9, 2192:8-2193:1).

Similarly, the eleven witnesses who attended board meetings – Bell, Buono, Buntain, Fonstad, Hennigar, Hokeness, Koeppel, Rhinelander, Roadman, Robinson and Zak – each dispute Bebo's account that Bebo disclosed to the board ALC's inclusion of employees in the covenant calculations. (Tr. 567:4-571:15, 1363:10-1366:16, 1523:2-6, 2382:12-2383:19, 2384:25-2388:3, 2645:11-2646:11, 2648:22-2651:7, 2825:2-2827:17, 3134:21-3135:11, 3329:18-3330:11, 3366:5-3368:17, 3430:11-3431:6, 3496:4-3497:24, 4339:10-4340:16, 4344:6-4345:22; Ex. 492A). These 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 the employees' inclusion was whether they had a "reason to go." (*Id.*).

Bebo's account is also disputed by various ALC and GT accountant witnesses. Herbner denied Bebo's story that prior to the February 2009 board meeting, Bebo discussed with Rhinelander (in Herbner's presence) the inclusion of employees in the covenant calculations. (Tr. 841:14-842:17). Hokeness corroborated the other witnesses' testimony that the use of employees in the covenant calculations was never discussed at board meetings. (Tr. 3134:21-3135:11).[27] Similarly, Ferreri rebutted Bebo's claims that (1) Ferreri assured her he was comfortable with the journal entries and (2) Bebo told him the applicable criteria was whether employees had a "reason to go." (Tr. 1258:12-1259:3). And GT's Robinson and Trouba denied

[27] Hokeness further refuted Bebo by testifying he never distributed a draft memo about ALC's use of employees (Ex. 1129) to anyone. (Tr. 3052:5-11, 3122:22-3123:1). Both Fonstad and Buono testified they never received Hokeness's memo, in draft form or otherwise. (Tr. 1512:8-11, 2358:4-9).

Bebo's claim that she told GT that ALC included employees who did not actually stay at the Ventas facilities. (Tr. 2168:3-14, 3401:24-3402:15, 3495:25-3496:13, 3591:15-24).

Even Bebo's best friend, Bucholtz, testified Bebo would "twist the truth" and had "lied to get what she wanted." (Tr. 3016:3-3017:23). Bucholtz's assessment of Bebo's credibility proved accurate, as the ALJ determined that Bebo was "successfully impeached over twenty-five times." (I.D., 25, 46).

IV. BEBO'S SECURITIES LAWS VIOLATIONS

A. Bebo's Fraudulent Misstatements

Exchange Act Section 10(b) and Rule 10b-5(b) prohibit, in connection with the purchase or sale of securities, material misstatements and omissions. A misstatement is material if a reasonable investor would consider it important in making an investment decision. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). The scienter element may be established by knowing or reckless conduct. *David Bandimere*, 2015 SEC LEXIS 4472, *58; *SEC v. Jakubowski*, 150 F.3d 675, 681 (7th Cir. 1998).

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

Bebo claims these statements are mere "opinions" and not actionable. (Br., 17-19). But a federal court, in a securities fraud case against her, found these precise statements to be actionable while rejecting the same arguments Bebo raises here. *Pension Trust Fund v. Assisted Living Concepts, Inc.* 2013 U.S. Dist. LEXIS 87568, at *24-27, *45-46 (E.D. Wis. June 21,

2013) (plaintiff "has pled facts sufficient to establish that ALC and Bebo provided false statements when they stated that ALC was in compliance with its Lease with Ventas.").[28]

Moreover, the ALJ correctly determined that ALC's statements that it was "in compliance" with the Ventas covenants – as opposed to statements that ALC "believed" or "thought" it was in compliance – were statements of fact as opposed to statements of opinion. (I.D., 51-53 (citing *Omnicare, Inc. v. Laborers' Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1325-26 (2015)). The ALJ utilized *Omnicare*'s guidance to analyze ALC's representations regarding the Ventas covenants, one of which is a statement of fact while the other is an opinion:

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

(Ex. 13, p. 43 (emphasis added); I.D., 51-53).

[28] *Pension Trust* is supported by earlier decisions holding that a false or misleading statement of compliance with contractual covenants sustains a securities fraud charge. *See, e.g., DVI, Inc. Sec. Litig.*, 2010 U.S. Dist. LEXIS 92768, at *16-17 (E.D. Pa. Sept. 3, 2010) (denying motion to dismiss allegations that Defendant's Forms 10-K "contained material misrepresentations relating to 'DVI's... compliance with its loan covenants.'"); *Williams Sec. Litig.*, 339 F. Supp. 2d 1206, 1229 (N.D. Okla. 2003) ("The Complaint also sufficiently alleges that ... Defendants falsely stated that WCG ... was fully able [to] meet all debt covenants..."); *Aviva Ptnrs. LLC v. Exide Techs.*, 2007 U.S. Dist. LEXIS 17347, at *6-7, *56-57 (D.N.J. Mar. 13, 2007) (statement that issuer "believed it would comply with the financial covenants contained in its Senior Credit Agreement 'for the foreseeable future'" held actionable); *In re Suprema Specialties, Inc. Sec. Litig.*, 334 F. Supp. 2d. 637, 646-47 (D.N.J. 2004) (allowing claim based on misrepresentation regarding compliance with loan covenants).

Even if both statements above are treated as expressions of opinion, they are actionable under *Omnicare* because Bebo did not believe them to be true. 135 S. Ct. at 1326-27. They would also be actionable because they contain material omissions. *Id.* at 1329 ("[I]f a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then [the antifraud provisions create] liability."). By concealing that ALC's covenant compliance was contingent on the use of large numbers of "employees," Bebo gave investors the false impression that actual occupancy and coverage ratio at the Ventas facilities met the covenants. This critical omission renders the above statements actionable, either as statements of fact or opinion.

The ALJ correctly determined that Bebo's reliance on *Zaluski v. United Am. Healthcare Corp.*, 527 F.3d 564 (6th Cir. 2008), is misplaced. Unlike here, the *Zaluski* plaintiffs' claims were based "entirely on Defendants' failure to disclose" the breach of a contract. *Zaluski* at 571. Thus, unlike in Bebo's case, the analysis was not whether there had been a false statement, but whether the company had a duty to disclose certain information. *Id.* at 572.

The ALJ also cited *Zaluski*'s's holding that "once a company chooses to speak," as ALC did when it represented its covenant compliance, "it must provide complete and non-misleading information with respect to subjects on which [it] undertakes to speak." 527 F.3d at 572 (citations omitted). To that end, *Zaluski* cited the court's prior holding, consistent with *Omnicare*, that "once [the issuer] elected to make statements such as the statement regarding... objective data, it was required to qualify that representation with known information undermining (or seemingly undermining) the claim." *Id.* at 573 (quoting *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 673 (6th Cir. 2005)).

Thus, rather than helping Bebo, *Zaluski*, like *Omnicare*, stands for the proposition that once ALC chose to speak about its compliance with the financial covenants, ALC could not hide from investors that it could only meet the covenants by including large numbers of employees and others who never stayed at the Ventas facilities.

B. Bebo's False Statements Were Material

Bebo premises her materiality argument on the event study performed by Smith. But as Bebo concedes, stock price movement is only "one indicator" among various measures that can demonstrate materiality. (Ex. 373, p. 30); *see also, Basic*, 485 U.S. at 236 (rejecting "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality"); *No. 84 Empl'r-Teamster Joint Council v. Am. W. Holding Corp.*, 320 F.3d 920, 934 (9th Cir. 2003) (rejecting assertion that a stock drop is required to establish materiality); *U.S. v. Bilzerian*, 926 F.2d 1285, 1298 (2d Cir. 1991) (same); *SEC v. Monterosso*, 768 F. Supp. 2d 1244, 1265 and n.19 (S.D. Fla. 2011) ("the movement of a company's stock price, or lack thereof, is not dispositive of whether a given statement is material... such a bright-line rule . . would seem to conflict with the 'fact specific' inquiry mandated by *Basic*"), *aff'd* 756 F.3d 1326 (11th Cir. 2014).[29]

Staff Accounting Bulletin ("SAB") 99 recognizes that materiality may be determined using both quantitative – in terms of impact to the financial statements – and qualitative measures, and courts routinely employee SAB 99's guidance when assessing materiality. *See, e.g., Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 163 (2d Cir. 2000) (SAB 99 provides

[29] Bebo's argument regarding "corrective disclosures" (Br. 6, 11) is a red herring that conflates the distinct concepts of materiality and loss causation. Indeed, the cases Bebo cites deal with the concept of corrective disclosures as they relate to loss causation, which is a necessary element in private securities actions but *not* in Commission enforcement actions. *See, e.g., SEC v. Simpson Capital Mgmt, Inc.*, 586 F. Supp. 2d 196, 201 (S.D.N.Y. 2008); *SEC v. Pace*, 173 F. Supp. 2d 30, 33 (D.D.C. 2001).

"persuasive guidance for evaluating the materiality of an alleged misrepresentation."); *Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 759 (7th Cir. 2007) ("securities lawyers often use a 5% [impact to financial statements] as a rule-of-thumb approach to what is 'material'") (citing SAB 99)).

The Division's expert, Barron, applied SAB 99 and offered unrebutted testimony that a default would have been material to ALC's financial statements, even if ALC could not, *ex ante*, quantify a default's potential effect. (Ex. 377, ¶¶ 60-77). Indeed, ALC chose to disclose the financial covenants to investors and determined in each of its periodic filings that a covenant default "could have a material adverse impact on our operations." (Exs. 1-13). These filings also disclosed the amount of unpaid rent that ALC could owe resulting from a default, between $16.7 and $26.8 million. (*See, e.g.*, Ex. 2, p. 30, Ex. 13, p. 43). Moreover, when ALC bought the Ventas facilities to settle Ventas's lawsuit, ALC paid $34 million over fair value and, per GAAP, wrote off an $8.9 million intangible asset associated with the Ventas lease. (Ex. 16, pp. 3, 6). These amounts demonstrate the materiality of the Ventas covenants to ALC because the figures greatly exceeded the 5% of net income threshold provided for by SAB 99, which never exceeded $1.73 million. (Ex. 377, ¶¶ 64-65).

The materiality of ALC's compliance with the financial covenants is further demonstrated by the significant attention that ALC's management and board paid to the covenants. *Media Gen., Inc. v. Tomlin*, 387 F.3d 865, 870 (D.C. Cir. 2004) (executive's testimony that he considered certain withheld information important "certainly suggests that reasonable investors could have concluded that the [withheld information was] material."); *SEC v. Mayhew*, 121 F.3d 44, 52 (2d Cir. 1997) ("[A] major factor in determining whether information was material is the importance attached to it by those who knew about it."). Indeed,

at *every board meeting*, management devoted a section of its PowerPoint presentation to ALC's compliance with the financial covenants. At those meetings, ALC's directors, all of whom were ALC shareholders, repeatedly inquired about ALC's financial covenant compliance. (*See, e.g.*, Ex. 95, pp. 4-5; Ex. 100, p. 2; Ex. 104, pp. 2-3). Moreover, Buntain testified ALC's compliance was important to him as an investor, and that he had discussions with Hennigar about the impact of non-compliance on ALC's stock price. (Tr. 1357:22-1358:17, 1359:6-15).[30]

Further refuting her materiality arguments is Bebo's admission that a potential investor in ALC would want to know whether a valid agreement existed to include employees in the covenant calculations. (Tr. 2134:17-2136:23). She also conceded in her May 3, 2012 handwritten letter: "we are off-side on the covenants [and] are facing a material financial impact." (Tr. 2229:3-12; Ex. 354, p. 2).

Finally, Bebo's expert acknowledged that the $2.37 stock price drop following ALC's May 4, 2012 disclosure of the investigation into "irregularities" in the lease was a "significant abnormal decline." (Tr. 3637:5-3638:4; Ex. 14). While Bebo claims the stock drop resulted from the disclosure of the Ventas lawsuit, that lawsuit was publicly filed on April 26, 2012, and the market had more than a week to factor the lawsuit's impact into ALC's stock price. (Tr. 3650:2-3651:15; Ex. 14). Thus, the only "new" information contained in the May 4 Form 8-K was ALC's disclosure it had retained counsel to investigate "irregularities" in the Ventas lease, a reference to Milbank's investigation. (Tr. 386:3-6; Ex. 14).[31]

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[30] While Bebo claims that ALC's covenant disclosures were unimportant to analysts or investors, she called no analyst or investor to testify to this effect.

[31] Even if the Commission determines the market had not yet considered Ventas's lawsuit prior to ALC's May 4, 2012 Form 8-K, the stock price drop following the 8-K still supports a finding of materiality. In that case, the stock price drop demonstrates investors' reaction to Ventas seeking remedies for a covenant default. As Bebo admits, the remedies available to Ventas in

Bebo also claims ALC's decision to settle the Ventas lawsuit had nothing to do with the occupancy covenants. However, shortly after ALC's May 4 Form 8-K, which *Ventas understood to reference ALC's occupancy calculations*, Ventas accused ALC of fraud related to the occupancy covenants and filed a motion for expedited discovery regarding the lease "irregularities" disclosed in the 8-K. (Tr. 386:3-6; Exs. 356, 357). ALC settled the lawsuit shortly thereafter, on undisputedly material terms, before Ventas had the opportunity to take discovery and assert claims relating to the financial covenants. (Ex. 16). Bell and Buntain testified that ALC paid so much because of the inclusion of employees in the covenant calculations. (Tr. 618:24-621:11, 1386:17-23, 1390:1-8).

C. Bebo's Fraudulent Scheme

The ALJ correctly determined that, beyond the false representations in ALC's Commission filings, Bebo's engaged in a fraudulent scheme in violation of Exchange Act Section 10(b) and Rules 10b-5(a) and (c). (I.D., 64-66). Bebo violated these provisions by "engag[ing] in a manipulative or deceptive act as part of a scheme to defraud," namely by orchestrating the scheme to hide ALC's covenant defaults from Ventas and investors by using employees in the covenant calculations. *Robert W. Armstrong, III,* AP File No. 3-9793, 58 S.E.C. 542, 558 (June 24, 2005) (fraudulent scheme where executive provided false information to his company and directed his staff's improper accounting entries).

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the event of the regulatory covenant defaults over which Ventas sued ALC were identical to the remedies Ventas could seek for financial covenant defaults. (Tr. 2230:19-2231:3). Further, Bebo's arguments regarding the lack of stock price reaction to ALC's May 14 Form 8-K (Br. 8-9), also fail. As the ALJ observed, the May 14 filing "added little to the mix" after the disclosures in ALC's May 4 Form 8-K and Ventas's May 10 amended complaint. (I.D., 62). Also, the May 14 Form 8-K omitted crucial information about Bebo's scheme, namely that ALC had only been able to meet the covenants through the inclusion of large numbers of fake occupants, including Bebo's family and friends.

Bebo played the leading role in the scheme by ordering the inclusion of employees in the calculations and selecting the employees' names. Further, every percipient witness testified Bebo concealed key aspects of ALC's covenant practices from Ventas and ALC's board, attorneys, and auditors. Moreover, Bebo's scheme involved the falsification of the financial information ALC sent to Ventas on a quarterly basis and concealed from investors that ALC was breaching the Ventas covenants. *See, e.g., SEC v. Monterosso*, 756 F.3d 1326, 1334-36 (11th Cir. 2014) (falsification of financial records can establish liability under Rules 10b-5(a) and (c)); *SEC v. Familant*, 910 F. Supp. 2d 83, 86-88, 93-97 (D.D.C. 2012) (same); *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 504 (S.D.N.Y. 2005) (banks could be liable under Rules 10b-5(a) and (c) for engaging in transactions that lacked economic substance); *Armstrong*, 58 S.E.C. at 559.

D. Bebo Acted with Scienter

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

As the ALJ aptly observed in finding that Bebo acted with substantial scienter:

> Indeed, knowing falsehood – that is, scienter – was an essential part of her fraudulent scheme. *She deceived Ventas*, who expected the truth and contracted for it in the Lease. *She deceived the Board*, who specifically asked for truthful reports on the status of covenant compliance. *She deceived [GT]*, the whole point of whose work was to ensure truthtelling in ALC's public filings. She started mischaracterizing the January 20, 2009, call with Solari almost immediately after it occurred. *She misled Quarles and ALC's Board about her scheme in early 2012, even as the scheme unraveled.* During the investigation and her arbitration against ALC, she gave testimony that was often as bewilderingly incredible as her hearing testimony ... And over the course of approximately five days on the witness stand during the hearing, she had the breathtaking audacity to tell, under oath, what largely amounted to a fairy tale. *The simple truth is that Bebo concocted an elaborate fiction, started telling it over six years ago, and has never stopped.*

(I.D., 77) (emphasis added).

The ALJ correctly observed that Bebo had significant motive to engage in her scheme. She was an "enthusiastic advocate" for entering the lease, over and above the objection of ALC's general counsel and two directors, and had promised the board that ALC could meet the covenants. (I.D., 55).

E. Bebo's Reliance Defenses Fail

Bebo contends she lacked scienter because she relied in good faith on ALC's attorneys, auditors, board, and disclosure committee. But Bebo cannot meet the elements for any such defense. For instance, to assert reliance on counsel, Bebo must show she: "(1) made a complete disclosure to counsel; (2) requested counsel's advice as to the legality of the contemplated action; (3) received advice that it was legal; and (4) relied in good faith on that advice." *Zacharias v. SEC*, 569 F.3d 458, 467 (D.C. Cir. 2009) (citation omitted); *see also U.S. v. Van Allen*, 524 F.3d 814, 823 (7th Cir. 2008).[32]

[32] Bebo's "reliance on auditors" defense contains identical requirements of full disclosure and confirmation that the contemplated conduct is appropriate. *See, e.g., SEC v. Yuen*, 2006 U.S. Dist. LEXIS 33938, *110-113 (C.D. Cal. Mar. 16, 2006), *aff'd*, 2008 U.S. App. LEXIS 7606 (9th Cir. Apr. 1, 2008); *SEC v. Johnson* 174 Fed. Appx. 111, 114-15 (3d Cir. 2006); *The Rockies Fund, Inc.*, AP File No. 3-9615, 2007 SEC LEXIS 1954, *10-11, n.14 (Aug. 31, 2007).

Bebo did not rely on counsel because she did not disclose her conduct to, or follow the advice of, any attorney. Bebo now claims the only attorney she relied on was Fonstad. (Br. 32-34). Dooming the requisite element of full disclosure, Bebo concedes she never disclosed to Fonstad, or any attorney, that ALC would fail the covenants without using employees or that ALC was including non-employees in the covenant calculations. (Tr. 2193:5-2195:5).

Moreover, the only evidence (beyond Bebo's self-serving testimony) of Bebo seeking Fonstad's advice was her general inquiry, prior to her call with Solari, whether ALC could include in the covenant calculations the limited number of employees who actually stayed at the Ventas facilities. (Ex. 1152). Bebo never disclosed to Fonstad, or received his advice regarding, key details of her scheme, such as the use of: (a) large number of employees, (b) employees who did not stay at the Ventas facilities, and (c) the simultaneous use of employees at multiple properties.

Bebo additionally did not rely on Fonstad because she failed to follow his express advice. Fonstad advised Bebo to send a letter to Ventas that: (a) proposed including employees in the covenant calculations, (b) set a limit on the number of employees, and (c) requested Ventas's signature to document any agreement. (Ex. 1152). Bebo disregarded all this advice.

Bebo also cannot establish any reliance on auditor defense because she failed to disclose material facts to GT. Bebo *lied* to Koeppel and Robinson, the only GT personnel with whom Bebo testified discussing ALC's inclusion of employees, by telling them Ventas had agreed to include employees in the covenant calculations.[33] (Tr. 2137:13-2138:20, 3366:5-17, 3495:25-3496:13).

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[33] For the same reason, Bebo cannot assert reliance on ALC's accounting staff, all of whom were told the inclusion of employees was premised on an agreement with Ventas. Moreover, ALC's

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

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

Thus, as the ALJ correctly observed: "the pertinent documentary and testimonial evidence is almost entirely consistent, and demonstrates that [GT] did not know the full scope of ALC's covenant calculation process." (I.D., 35).

Nor did Bebo rely on ALC's disclosure committee. No evidence exists that the committee ever advised Bebo that ALC's use of employees was appropriate. Bebo never attended disclosure committee meetings, and admits not knowing whether the committee even discussed the topic. (Ex. 502, at 1139:20-21). Moreover, four of the five witnesses who attended disclosure committee meetings – Buono, Fonstad, Lucey, and Zak – had no recollection

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

of ALC's inclusion of employees ever being discussed. (Tr. 1619:5-20, 2389:14-22, 3740:13-25, 4380:14-4381:3). The fifth disclosure committee witness, Hokeness, testified that the committee was never given any specifics regarding the use of employees in the covenant calculations, such as the number of employees included or the fact that employees who did not stay at the facilities were being used to meet the covenants.[34] (Tr. 3133:19-3134:15). Consistent with these witnesses' testimony, the disclosure committee meeting minutes do not mention the inclusion of employees in the covenant calculations and, in the case of the 2009 minutes, instead refer generally to "adjustments" and "clarifications as to census."[35] (Exs. 124-127).

Bebo also cannot claim reliance on ALC's board, because she lied to the board while concealing her scheme. As discussed above, on a quarterly basis Bebo lied by telling the board that ALC was meeting the covenants while hiding ALC's inclusion of employees. And every percipient witness refuted Bebo's story that she told the board that ALC was including large numbers of employees who did not stay at the Ventas properties.

Even accepting Bebo's claims that she was acting at the direction of the board, Rhinelander or Hennigar, which all board members deny, she would still be liable. As the Commission observes: "Courts have repeatedly affirmed that someone who participates in a fraudulent scheme by following his superior's instructions to carry out fraudulent acts can be liable as a primary violator under Section 10(b) and Rule 10b-5." *Armstrong*, 58 S.E.C. at 563 (citations omitted); *see also U.S. v. Hill*, 643 F.3d 807, 864-865 (11th Cir. 2011) (fraud defendant's "contention that he was simply following [superior's] orders ... is no defense").

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[34] Hokeness additionally testified that he had been told Ventas *agreed* to ALC's use of employees in the covenant calculations. (Tr. 3081:12-19, 3100:14-19).

[35] Beginning with the February 2010 meeting minutes, the minutes merely state: "Per J. Buono – lease covenants have all been achieved." (Exs. 128-136).

Regardless of whom Bebo claims she relied on, any reliance defense is limited to the charges containing a scienter element. This is because a claim of reliance "is simply a means of demonstrating good faith and represents possible evidence of an absence of any intent to defraud." *U.S. v. Peterson*, 101 F.3d 375, 381 (5th Cir. 1996); *see also SEC v. McNamee*, 481 F.3d 451, 455-56 (7th Cir. 2007). Put another way, a reliance defense merely "addresses scienter." *SEC v. Huff*, 758 F. Supp. 2d 1288, 1348 (S.D. Fla. 2010). For this reason, a reliance defense cannot negate the Division's claims that do not have a scienter element. *Erenstein v. SEC*, 316 Fed. Appx. 865, 869-70 (11th Cir. 2008); *SEC v. Verdiramo*, 2011 U.S. Dist. LEXIS 101856, *31 (S.D.N.Y. Sept. 9, 2011); *SEC v. Mut. Benefits Corp.*, 2004 U.S. Dist. LEXIS 23008, *55 (S.D. Fla. Nov. 10, 2004).

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

An issuer violates Exchange Act Section 13(a) and Rules 12b-20, 13a-1, and 13a-13 by filing materially false or misleading reports or omitting material information necessary to render statements in the reports not misleading. *Armstrong*, 58 S.E.C. at 567-568. ALC violated these provisions by filing Forms 10-K and 10-Q containing false and misleading statements regarding its compliance with the Ventas covenants. Bebo caused ALC's violations by signing and/or certifying ALC's filings and directing her fraudulent scheme.

By certifying ALC's false and misleading filings, Bebo also violated Exchange Act Rule 13a-14. While Bebo claims Rule 13a-14 does not provide a cause of action, the Commission holds otherwise. *Dian Min Ma*, AP File No. 3-15544, 2015 SEC LEXIS 1725, *1-3 (May 6, 2015); *see also SEC v. Das*, 2012 U.S. Dist. LEXIS 190311, *2-3 (D. Neb. May 29, 2012), *aff'd*, 723 F.3d 943 (8th Cir. 2013).

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

Exchange Act Section 13(b)(2)(A) requires issuers to "make and keep books, records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions ... of the issuer." *See SEC v. BankAtlantic Bancorp*, 2012 U.S. Dist. LEXIS 73891, *70-71 (S.D. Fla. May 29, 2012). Section 13(b)(2)(B) requires issuers to devise and maintain a system of internal accounting controls sufficient reasonably to assure that transactions are recorded as necessary to permit the preparation of GAAP-conforming financial statements. "Examples of internal controls include manual or automated review of records to check for completeness, accuracy and authenticity; a method to record transactions completely and accurately; and reconciliation of accounting entries to detect errors." *McConville v. SEC*, 465 F.3d 780, 790 (7th Cir. 2006). Exchange Act Section 13(b)(5) and Rule 13b2-1 prohibit any person from circumventing or failing to implement a system of internal controls or falsifying any book, record or account.

A showing of knowledge is required to prove a violation of Section 13(b)(5), but scienter is not necessary to prove liability under Section 13(b)(2)(A) or Rule 13b2-1. *Rita J. McConville*, AP File No. 3-11330, 58 S.E.C. 596, 622 (June 30, 2005); *McConville v. SEC*, 465 F.3d at 789.

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

ALC's consolidated financial statements. (Tr. 2771:17-2772:19, 4585:15-4587:1).

Bebo also failed to establish sufficient internal controls, which allowed the falsified transactions to be recorded in ALC's general ledger. (Tr. 1739:11-1744:5; Ex. 377, pp. 29-32). Bebo rests her internal controls defense on the incorrect claim that her fraud had no impact on ALC's financial statements. To the contrary, the notes to the financial statements in ALC's Forms 10-K state that, for the year at issue, ALC "was in compliance" with the Ventas covenants.[36] (Ex. 5, p. F-25; Ex. 9, p. F-26; Ex. 13, p. F-24). As Barron explained, no control existed to ensure that (a) this statement was accurate in light of ALC's inclusion of employees; (b) Ventas had agreed to the use of employees needed for ALC's covenant compliance; or (c) the employees were appropriately included based on some applicable criteria. (Ex. 377, ¶¶ 98-99). Further, the ALJ correctly rejected Bebo's argument that the very instrumentality of her fraud – the 997 account – was itself a sufficient internal control. (I.D., 68). Even Bebo concedes that ALC's controls relating to its covenant practices "were not as robust as they should have been." (Posthearing Br. at 106).

Given her general understanding of corporate accounting issues and ALC's specific accounting for the covenant calculations, her directives that ALC treat empty rooms as occupied and record revenue associated with the fake occupants, and her signing of journal entries authorizing those transactions, Bebo violated and caused ALC's violations of the Exchange Act's books and records and internal controls provisions.

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

Exchange Act Rule 13b2-2 prohibits a CEO from making false statements, or omitting

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

material information, to an auditor in connection with a public company audit. No showing of scienter is required. *SEC v. Das*, 723 F.3d 943, 954 (8th Cir. 2013).

Each quarter, Bebo signed representation letters to GT, in which she falsely represented that ALC "complied with all aspects of contractual agreements that would have a material effect on the financial statements in the event of a noncompliance." (Exs. 61-73). Buono and Robinson testified this representation applied to the Ventas lease.[37] (Tr. 2379:6-2380:3, 3412:11-3413:9). Given the unauthorized inclusion of employees in the covenant calculations, Bebo's representation was false and omitted material information. *See, Rita McConville*, 58 S.E.C. at 625 (auditor representation letter containing false representations violated Rule 13b2-2).

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

For these reasons, Bebo violated Rule 13b2-2.

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

A. The Relevant Factors Support Sanctions

The ALJ correctly applied the *Steadman* factors in determining that "imposing the greatest possible sanction" against Bebo serves the interests of the investing public. (I.D., 76-77

[37] This testimony further establishes the materiality of ALC's covenant disclosures.

(citing *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979)). In terms of the egregiousness of Bebo's conduct, the ALJ was unequivocal:

> Bebo's scheme involved the abuse of her position as CEO, the co-option of her fellow ALC employees, and the deception of Ventas, [GT], and ALC personnel. She corruptly misused her power and authority to betray the trust reposed in her by her subordinates and by ALC's Board, all to avoid the consequences of violating the financial covenants.

(I.D., 76). As discussed above, the ALJ's finding that Bebo acted with a high degree of scienter – as evidenced by her false testimony and deception towards Ventas and ALC's board, auditors, and attorneys – was equally explicit. (I.D., 77).

While Bebo's scienter and egregious conduct are sufficient to support the imposition of significant sanctions, the other *Steadman* factors also weigh against Bebo. Bebo's conduct spanned over three years. She has neither offered assurances against future violations nor acknowledged the wrongful nature of her conduct. To the contrary, she testified she does not believe she did anything wrong. (Tr. 4127:12-25). She is relatively young and, absent an appropriate sanction, will have opportunities to commit future violations. Moreover, sanctioning Bebo will achieve the Commission's goal of deterring corporate fraud. *Schield Mgmt. Co.*, AP File No. 3-11762, 58 S.E.C. 1197, 1217 (Jan. 31, 2006).

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

B. Bebo's Conduct Merits the Civil Penalty Imposed by the ALJ

Bebo's conduct in this case easily meets the requirements for the imposition of third tier penalties. *See* Exchange Act Sections 21B(b)(3) and 21(c). Bebo's misconduct involved fraud, deceit, manipulation, and the deliberate disregard of regulatory requirements and her responsibilities as a public company CEO.

Bebo created both a substantial risk of loss to ALC and its investors and, in fact, caused substantial losses. The ALJ correctly observed that when ALC disclosed the "'irregularities' caused by Bebo," ALC's stock price dropped 12.36%. (I.D., 79). When Ventas later learned of ALC's inclusion of employees, ALC settled Ventas's lawsuit by purchasing the Ventas facilities for $34 million in excess of their appraised value. GT confirmed the significant overpayment constituted "damages as a result of occupancy rates falling significantly below required covenant occupancy rates." (Ex. 3369, pp. 7-8). ALC paid an additional $12 million when it settled with the investors who sued it and Bebo for the false statements in ALC's filings at issue in these proceedings. *Pension Trust Fund for Operating Eng'rs v. Assisted Living Concepts, Inc.*, No. 12-C-884-JPS, Docket No. 70-1 (E.D. Wis. Sept. 6, 2013). Had the full scope of Bebo's fraud been known to Ventas or investors prior to ALC's 2013 acquisition, the losses incurred could have been much greater.

Here, a multi-million dollar penalty is well-justified and consistent with other litigated financial fraud cases against CEOs. *See, e.g., SEC v. Razmilovic*, 738 F.3d 14, 38 (2d Cir. 2013) ($20.8 million penalty); *SEC v. Life Partners Holdings, Inc.*, 71 F. Supp. 3d 615, 624 (W.D. Tex. 2014) ($6.1 million penalty); *SEC v. E-Smart Techs., Inc.*, 2016 U.S. Dist. LEXIS 4664, *26-29 (D.D.C. Jan. 14, 2016) ($2 million penalty); *SEC v. BankAtlantic Bancorp*, No. 0:12-cv-60082-DPG, Doc. 474 (S.D. Fla. Sept. 24, 2015) ($1.3 million penalty). The Commission should

likewise impose a large penalty against Bebo, to deter similar misconduct by other highly compensated executives.

The ALJ's approach of formulating Bebo's penalty on the number of her distinct violations is also well-established.[38] *SEC v. Huff*, 758 F. Supp. 2d 1288, 1366 (S.D. Fla. 2010), *aff'd*, 455 Fed. Appx. 882 (11th Cir. 2012); *SEC v. Colonial Inv. Mgmt. LLC*, 381 Fed. Appx. 27, 32 (2d Cir. 2010); *Francis V. Lorenzo*, AP File No. 3-15211, 2015 SEC LEXIS 1650, *61 (Apr. 29, 2015). The imposition of penalties without a finding of unjust enrichment was similarly proper. *Anthony Fields, CPA*, AP File No. 3-14684, 2015 SEC LEXIS 662, *11, *103-106 (Feb. 20, 2015); *Lorenzo* at *62-63; *SEC v. Miller*, 744 F. Supp. 2d 1325, 1343-46 (N.D. Ga. 2010).

Bebo now claims an inability to pay a civil penalty, but introduced no evidence to that effect at the hearing. To the contrary, during the period of Bebo's fraud she earned over $3.7 million in compensation from ALC. (Financial Disclosure Statement ("FDS"), App'x. A; Stipulations, Apr. 4, 2015, ¶¶ 13-16).[39] In 2013 and 2014, she received an additional $2.1 million from ALC. (FDS, Appx. A). She lives in a million-dollar home, and claims to have a seven-figure net worth. (FDS).

However, even if Bebo was unable to pay, a substantial civil penalty would still be warranted. *See, e.g., Ronald Bloomfield*, AP File No. 3-13871, 2014 SEC LEXIS 698, *90 n.133 (Feb. 27, 2014) ("the ability to pay may be considered, but it is only one discretionary factor, and may be disregarded where, as here, the conduct is egregious") *SEC v. Harris*, 2012 U.S. Dist.

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[38] The ALJ recognized he could have imposed a greater penalty using this methodology. (I.D., 79).

[39] While the ALJ declined to do so, it is within the Commission's discretion to order the disgorgement of Bebo's bonuses and/or salary. *SEC v. Black*, 2009 U.S. Dist. LEXIS 37309, *5-15 (N.D. Ill. Apr. 30, 2009). Various board members who were responsible for determining Bebo's compensation testified they would not have awarded her a discretionary bonus had they known she was engaged in fraud. (Tr. 653:22-655:1, 2659:11-23, 2850:5-2851:3).

LEXIS 31394, *16 (N.D. Tex. Mar. 7, 2012) ("inability is at most one factor to be considered in imposing a penalty, and the Court may impose a civil penalty even assuming that [defendant] is unable to pay." (citing *SEC v. Warren*, 534 F.3d 1368, 1370 (11th Cir. 2008)).

VI. BEBO'S CONSTIUTIONAL CHALLENGES FAIL

A. Section 929P(a) of the Dodd-Frank Act is Not Unconstitutional.

Bebo claims that Dodd-Frank Act Section 929P(a) is facially invalid for two reasons, neither of which has merit.

First, she argues the statute violates equal protection by authorizing the Commission to choose between bringing an enforcement action in federal court or initiating an administrative proceeding. But Congress's authorization—and the subsequent exercise—of prosecutorial discretion to select a forum does not, standing alone, violate equal protection. *U.S. v. Batchelder*, 442 U.S. 114, 125 (1979). Moreover, prosecutorial decision-making is accorded a strong "presumption of regularity," *Hartman v. Moore*, 547 U.S. 250, 263 (2006), and the Commission may rationally determine that some cases are better resolved through administrative proceedings than in district court.

The cases Bebo cites are not to the contrary. *Baxstrom v. Herold*, 383 U.S. 107 (1966), and *Humphrey v. Cady*, 405 U.S. 504 (1972), establish that it is impermissible to "treat one group . . . arbitrarily worse than another." *Anderson v. Romero*, 72 F.3d 518, 526 (7th Cir. 1995). But Section 929P(a) does not treat any one group worse than another; indeed, it makes no distinction at all among groups.

Second, Bebo argues that Section 929P(a) violates "substantive due process" because it allows the government to "penalize" her hypothetical exercise of a right to jury trial in federal court. That argument also fails. The cases Bebo cites, *Blackledge v. Perry*, 417 U.S. 21 (1974),

and *U.S. v. Jackson*, 390 U.S. 570, 582-83 (1968), confirm that individuals may not be "penalize[d]" for exercising a constitutional right. Here, however, it is unclear what right Bebo believes Section 929P(a) threatens. Administrative respondents do not have a constitutional right to choose the forum in which they are charged, nor do they have a right to a jury trial when the Commission proceeds administratively. *See Atlas Roofing v. OSHA*, 430 U.S. 442, 455 (1977). And, as the ALJ observed, Bebo's claim that the Commission might hypothetically seek to dismiss a district court action and institute administrative proceedings upon the defendant's exercise of her right to a jury trial is purely speculative and, regardless, violates the "presumption of regularity" afforded prosecutorial decision-making. *Hartman*, 547 U.S. at 263.

B. The Appointment and Removal of Commission ALJs is Not Unconstitutional.

Bebo erroneously asserts violations of Article II of the Constitution because the ALJ was not properly appointed and is protected by two layers of for-cause removal. As the Commission found in *David Bandimere*, 2015 SEC LEXIS 4472, *74-86; *Timbervest, LLC,* Investment Advisers Act Release No. 4197, 2015 WL 5472520, at *23-28 (Sept. 17, 2015); and *Raymond J. Lucia Cos.,* Exchange Act Release No. 75837, 2015 WL 5172953, at *21 (Sept. 3, 2015), Commission ALJs are employees, not constitutional officers, and thus are not subject to Article II's requirements.

C. Bebo Has Not Been Denied Procedural Due Process.

Bebo alleges various due process violations, none of which has merit.

Bebo first contends that the selection of the administrative forum was itself unconstitutional, because in that forum she was unable to cross-examine or call certain witnesses, and because the ALJ reviewed testimony and declarations from witnesses who did not appear at the hearing. (Br. 61-64). Critically, she does not allege that any of these actions

violated the Commission's Rules of Practice—only that they deprived her of the ability to mount an effective defense. Thus, to the extent Bebo argues that application of the Commission's Rules (as opposed to the federal rules) rendered the proceeding unfair, her argument fails. It is well settled that the Federal Rules of Evidence and Civil Procedure do not apply in Commission administrative proceedings, *Ralph Calabro*, 2015 SEC LEXIS 2175, at *46 n.66, and any suggestion that this fact renders an administrative proceeding unfair has been consistently rejected by the courts. *See, e.g.*, *Otto v. SEC*, 252 F.3d 960, 966 (7th Cir. 2001) ("it is well established that hearsay evidence is admissible in administrative proceedings").

To the extent Bebo's complaint is that the entire administrative process is constitutionally inadequate, that too fails. As the Commission recently observed, "[s]uch broad attacks on the ... administrative process have been repeatedly rejected by the courts." *Harding Advisory LLC*, Securities Act Release No 9561, 2014 WL 988532, at *8 (Mar. 14, 2014). Courts have correctly recognized that accepting such challenges "would do considerable violence to Congress['s] purposes in establishing" specialized administrative agencies and would "work a revolution in administrative (not to mention constitutional) law." *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1107 (D.C. Cir. 1988).

Bebo's contention that she was afforded insufficient time to prepare for the hearing also fails. When the Commission instituted these proceedings, it determined that a 300-day deadline for the initial decision was appropriate. In so doing, the Commission took into account the "nature, complexity, and urgency of the subject matter, and with due regard for the public interest and the protection of investors." See Rule 360(a)(2). The Commission's application of Rule 360(a) does not violate due process. *See Gregory M. Dearlove*, Exchange Act Release No. 57244, 2008 WL 281105, at *37 (Jan. 31, 2008). Further, although Bebo complains this case is

complex and involved a "massive investigative file," the Commission has explicitly rejected arguments that large or complex case files inherently warrant extraordinary relief. *Id.* at *33-34.

Bebo complains that the ALJ was improperly biased. But ALJs are presumed to be unbiased. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982). This presumption creates a heavy burden to establish bias: "a showing of conflict of interest or some other specific reason for disqualification." *Id.* at 195-96. Bebo must demonstrate, for example, "that the ALJ's behavior, in the context of the whole case, was so extreme as to display clear inability to render fair judgment." *Rollins v. Massanari,* 261 F.3d 853, 858 (9th Cir. 2001) (internal quotation marks omitted).

Here, Bebo claims certain evidentiary rulings benefited the Division and prejudiced her defense. (Br. 63). Although it is always a judge's own prerogative to assess his or her own impartiality, as a legal matter, the ALJ's prior decisions, alone, do not establish bias. *See Liteky v. U.S.*, 510 U.S. 540, 551-556 (1994); *Marcus v. Dir., Office of Workers' Compensation Programs*, 548 F.2d 1044, 1051 (D.C. Cir. 1976). Nevertheless, the established procedure to resolve allegations of bias, which Bebo has not yet chosen to employ, is a motion for recusal under Rule of Practice 111(f). *See* 17 C.F.R. § 201.111(f); *U.S. v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989).

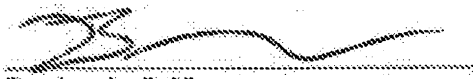
Finally, Bebo complains about the manner in which the Division approached and prepared witnesses, yet she fails to establish any due process violation. *See, e.g., U.S. v. Lieberman*, 608 F.2d 889, 897-99 (1st Cir. 1979) (allegedly "suggestive remarks" made to witnesses off the record did not violate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

VII. CONCLUSION

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

Dated: February 29, 2016

Respectfully submitted,



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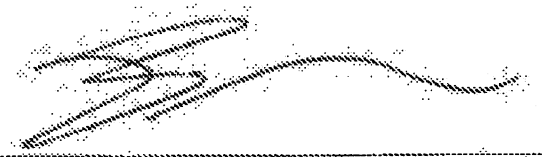
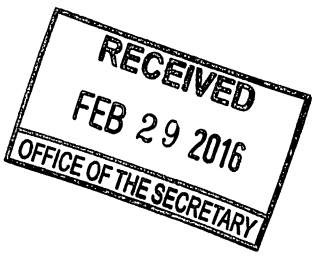
Rule 450(d) Certification

The undersigned counsel for the Division of Enforcement hereby certifies pursuant to Rule 450(d) that this brief is 20,755 words, exclusive of the tables of contents and authorities, which complies with Rule 450(c) and the Commission's December 8, 2015 Order Granting Petition for Review and Scheduling Briefs.



Benjamin J. Hanauer

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of

LAURIE BEBO, and
JOHN BUONO, CPA,

Respondents.

CERTIFICATE OF SERVICE

Benjamin J. Hanauer, an attorney, certifies that on February 29, 2016, he caused a true and correct copy of the foregoing The Division of Enforcement's Brief in Opposition to Respondent Laurie Bebo's Appeal of the Initial Decision to be served on the following by email:

Mark Cameli, Esq.
Reinhart Boerner Van Deuren S.C.
1000 N. Water Street, Suite 1700
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Dated: February 29, 2016

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February 29, 2016

VIA UPS NEXT DAY AIR AND FACSIMILE

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

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

Dear Mr. Fields:

Enclosed for filing in the above-referenced matter please find the original and three copies of *The Division of Enforcement's Brief in Opposition to Respondent Laurie Bebo's Appeal of the Initial Decision* and the related Certificate of Service.

Sincerely,

Benjamin J. Hanauer

Enclosures

Copies to: Mark Cameli, Esq.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
100 F St. NE
Washington, D.C. 20549

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