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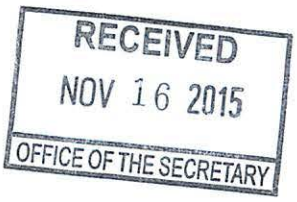
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16293



In the Matter of

LAURIE BEBO, and
JOHN BUONO, CPA

Respondents.

RESPONDENT LAURIE BEBO'S PETITION FOR REVIEW OF THE INITIAL DECISION

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TABLE OF CONTENTS

Pursuant to Commission Rule of Practice 410, Respondent Laurie A. Bebo, by and through her counsel, Reinhart Boerner Van Deuren s.c., hereby respectfully petitions the Securities and Exchange Commission ("SEC" or "Commission") for review of the Initial Decision rendered by Administrative Law Judge Cameron Elliot ("ALJ") on October 2, 2015.[1] Ms. Bebo seeks review under Rule of Practice 411(b)(2) of the numerous prejudicial errors of fact and law identified in this petition, prejudicial errors committed by the ALJ in the conduct of the pre-hearing stage of the proceedings and at the hearing itself, and to remedy facial and as-applied violations of Ms. Bebo's constitutional rights.

In addition, due to the numerous errors of law and fact, the extensive scope of the record, the gravity of the penalties imposed, and the important constitutional questions presented, Ms. Bebo requests that in any order with respect to briefing this appeal the Commission grant relief from the word limits imposed by Rule 450(c). Moroever, post-hearing briefing entailed hundreds of pages, and the Initial Decision in this proceeding itself is more than 46,000 words. Consequently, Ms. Bebo requests that she be permitted to file an opening brief 45,000 words long to properly argue the merits of the factual and legal questions at issue in this case.

INTRODUCTION

In January 2009, at the height of the Great Recession, with her company Assisted Living Concepts, Inc. ("ALC" or the "Company") trending toward a potential default of occupancy and coverage ratio covenants (the "financial covenants") in a lease that covered a mere eight of the approximately 200 assisted living facilities that her company owned or operated (the "Lease" or the "Ventas Lease"), Ms. Bebo acted prudently and in the best interests of the Company and shareholders who she served as President and Chief Executive Officer. Instead of going hat-in-

[1] The Initial Decision is cited in this petition for review as "Dec. at __." Ms. Bebo's post-hearing brief is cited herein as "Resp't Br. at __."

hand to the lease counter-party, Ventas, Inc. ("Ventas"), she thought that Ventas, whose business was also being catastrophically disrupted by the recession (Ventas eliminated 10% of its entire workforce only months later) would be open to a flexible arrangement for compliance with the covenants. In addition, because the Lease itself was ambiguous with respect to calculation of the financial covenants, and because she thought that Ventas may be open to permitting ALC to count units that ALC rented to or for employees to be included in the financial covenant calculations, she decided to explore such a clarification of terms. Before speaking to Ventas about that, however, she sought and obtained the input of ALC's general counsel. Moreover, she had ALC's general counsel act as a silent participant on the phone call to discuss her proposal. ALC's Chief Financial Officer, John Buono, also participated in the call.

Following that phone call, Ms. Bebo sent an e-mail to Ventas confirming ALC's notification it was renting to employees, and that "all rentals related to employees" would be treated as if in the ordinary course of business. Obviously, in the context of the economy and trends in ALC's occupancy and financial performance at the facilities—of which Ventas was keenly aware—ALC intended to count those rentals toward the covenant calculations. She observed that this confirmation was sent to the Ventas executive with whom she spoke on the phone and who was the person in charge of the general business relationship with ALC. She observed that the e-mail also went to the head of Ventas' asset management division, and to two other personnel in Ventas' asset management division responsible for the Lease. None of the various personnel at Ventas objected to the confirmation of ALC's rentals related to employees or asked any questions about it. She made sure that ALC's general counsel, who participated on the phone call with Ventas, received copies of the correspondence sent to Ventas and Ventas' response.

A few days later, Mr. Buono told members of ALC's disclosure committee, which was chaired by the general counsel, that ALC had obtained clarification from Ventas as to who could be included in the "census" for financial covenant calculation purposes and that specific "correspondence" with Ventas had occurred in this regard. This was an explicit reference to the ability of ALC to utilize unit rentals related to employees in the covenant calculations. At other times, he explicitly told the disclosure committee that ALC had not obtained a modification of the Lease, stating no "covenant relief" had been obtained, in addition to discussing the correspondence clarifying that rentals related to employees could be included in the census for covenant calculations. No one on the disclosure committee, including ALC's general counsel, ever raised any concern or objection to Ms. Bebo about ALC publicly affirming compliance with the Lease on this basis, and days after that first disclosure committee meeting ALC's general counsel expressly approved ALC's statement in its filing with the Commission asserting compliance with the Ventas Lease.

Amazingly, these facts with respect to ALC's deliberative process regarding the Company's opinion that it was in compliance with the Ventas Lease are virtually undisputed, and should be dispositive of a securities fraud disclosure case involving opinion statements. The only disputed matter with respect to the basic facts described above, was whether ALC's general counsel was a participant in the phone call with Ventas in late January 2009. The preponderance of the evidence presented at the hearing in this matter clearly established that he was, but the ALJ simply dismissed it as irrelevant, somehow concluding that his participation on the call was "immaterial" because he could not remember what was said. (Dec. at 29.)

Furthermore, it was undisputed that numerous executives and other personnel inside ALC, numerous personnel at ALC's outside auditors, and numerous lawyers at ALC's outside

law firms all knew the basic fact that ALC was paying for units at the leased facilities for employees to use through intercompany transactions, that ALC would not meet the covenants without counting these unit rentals, and that this arrangement was not based on a formal Lease modification. *None* of these people urged a different disclosure in ALC's periodic filings *at any time.*

Although the evidence presented at the hearing established conclusively that everyone involved in preparing or reviewing ALC's representation that it was in compliance with the Ventas Lease covenants possessed knowledge of the *basic and critical fact with respect to how ALC was meeting the covenants*, the ALJ erroneously concluded in the Initial Decision that these securities disclosure-related facts do not matter. Had the ALJ been open to actually finding in favor of Respondent at the outset of this case, he would have found that this basic set of facts dooms the Division's claims, particularly when the applicable legal standard required the Division to prove by a preponderance of the evidence that the challenged compliance opinion was not only incorrect, but *unreasonable.*

But the ALJ improperly dismissed these disclosure-related facts showing that the opinion at issue in this case (described at trial as "boilerplate" language contained in a forward-looking section of its periodic filings) was reasonable and made in good faith. Instead, the ALJ viewed this case as a breach of contract case. Put another way, the ALJ determined whether, in his view and through the lens of hindsight, ALC breached the Lease. If it was a breach, the ALJ's reasoning continues, then ALC misrepresented its compliance in its Commission filings. Thus, the foundation of the Initial Decision is that the Lease required a formal modification in writing and signed by both parties (Dec. at 22, 26, 28, 33), the phone call and e-mail notification to Ventas was insufficient to constitute a formal modification of the Lease, and therefore ALC

misrepresented its compliance in its periodic filings (as opposed to failing to disclose how it was meeting the covenants) with the Commission from 2009 to 2011. That foundation is so weak as a matter of fact and law that the entire Initial Decision should fall.

This tack also marked a stark change of course from the ALJ's position in his pre-hearing decisions and statements at the hearing, and can only be explained by the Division's lack of evidence to support any finding of intent to deceive investors and evidence that investors even cared about the Ventas Lease or ALC's compliance with it. On the third day of the four-week hearing, the ALJ admonished counsel that this case had nothing to do with a breach of contract:

> [Respondent's counsel]: Yes, I am. And, you know, the one thing that I -- I want you to consider is, in many ways, this is a breach of contract.
>
> JUDGE ELLIOT: No, no, I don't want to hear that. No, it is not, it is not, it is not. I do not want to hear this.
>
> I know that you have been litigating this matter, broadly speaking, for years. I know that.
>
> This is not a breach of contract case. I don't want you to treat it like one.
>
> We are here to address one respondent involving securities law charges. That is it. I don't want to hear about how this is a breach of contract case. I've heard your arguments before on that. I'm not persuaded, okay?

(Tr. 543.) Why did the ALJ reverse course? Why does the Initial Decision read like a breach of contract case? Why does the ALJ go so far as to conclude that the interpretation of the Lease and whether ALC breached the Lease is a "dispositive matter" and *sua sponte* strike Ms. Bebo's expert report on the ground that it offered a legal conclusion on this dispositive matter? It is because the Division presented virtually no evidence to support a disclosure case. It presented no evidence with respect to how and why ALC decided to continue asserting the opinion in its Commission filings that it was in compliance with "certain operating and occupancy covenants." This is because, as noted, these facts doom the disclosure fraud violations alleged here.

Worse still, this case involved only a theoretical dispute between ALC and Ventas about a contract that was never material to the operations of ALC or investors' decisions about whether to buy or sell ALC securities. A *potential* dispute about compliance with lease covenants should have been relegated to a matter of resolution between the parties to the contract. Here, in fact, when Ventas sought to amend its complaint filed in litigation against ALC regarding covenant violations entirely unrelated to the subject of this case, it chose not to include the types of alleged covenant violations that form the basis of the Division's liability theory presented at the hearing before the ALJ. No reasonable finder of fact could have concluded otherwise, as there is not a single word about the financial covenants contained in any of the pleadings from the litigation between ALC and Ventas that are part of the record in this matter. The ALJ's conclusion to the contrary is clearly erroneous and reveals a pattern of improperly shifting the burden of proof from the Division to Ms. Bebo throughout these proceedings.

That pattern continued in the ALJ's assessment of materiality. The only expert testimony presented at the hearing established that there was no statistically significant decline in ALC's stock price after it publicly disclosed allegations contained in a letter from Ventas (which Ventas failed to incorporate into the lawsuit) that ALC had "submitted fraudulent information [to Ventas] by treating units leased to employees as bona fide rentals by third parties and, therefore, may not have been in compliance with the minimum occupancy covenant and coverage ratio covenants." (Resp't Br. at 173-74 citing Ex. 2186; 2076; Tr. 1666.) The Division's own expert confirmed that in his own review of the materials in this case this was the first time he observed this allegation by Ventas in any public disclosure. (Tr. 1666.) This was reported publicly for the first time on May 14, 2012. (*Id.*)

Yet, the ALJ ignored the only expert testimony on this subject and attempted to act as an expert for the Division in concluding that May 4, 2012 is the proper corrective disclosure date because ALC disclosed it was commencing an internal investigation into "irregularities" with the Ventas Lease. There is no evidence to support the ALJ's speculation that investors somehow divined that these "irregularities" involved financial covenant violations. Rather, the only evidence presented at the hearing was that investors, such as the stock analysts that covered ALC, concluded that the investigation was related to the patient safety and care issues described in the Ventas lawsuit. The ALJ's conclusion to the contrary was speculative and clearly erroneous as a matter of law and fact.

These are but a few of the major errors in law and fact contained in the Initial Decision. In his Initial Decision, the ALJ found that Ms. Bebo committed the following violations:

- She violated and caused ALC's violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 by misrepresenting in ALC's periodic filings with the Commission that ALC was in compliance with a lease for eight of its over 200 assisted living facilities.
- She caused ALC's violations of Sections 13(a) and Rules 13a-1 and 13a-13 by having the company misrepresent in ALC's periodic filings with the Commission that ALC was in compliance with a lease for eight of its over 200 assisted living facilities.
- She caused ALC's books and records and internal control violations of Section 13(b)(2)(A) and 13(b)(5) of the Exchange Act.
- She violated Section 13(b)(5) and Rule 13b2-1 by circumventing ALC's internal controls and falsifying books and records.
- She violated Rule 13b2-2 by making materially false or misleading statements to ALC's auditors, Grant Thornton.
- She violated Rule 13a-14(a) by providing false officer certifications in connection with the same periodic filings forming the basis for the other violations.

With respect to the material disputed issues of this case, the ALJ's Initial Decision reached erroneous findings, unsupported by the preponderance of the evidence and unsupported

by the law. Consequently, Ms. Bebo takes exception to all of the ALJ's findings regarding disputed issues, including but not limited to his conclusions and all of his findings purportedly supporting his conclusions that:

- ALC's periodic filings with the Commission contained any false or misleading statements of fact.
- Any false or misleading statements of fact were material.
- Ms. Bebo acted with scienter.
- Ms. Bebo did not establish the reliance on advice of counsel or advice of auditor defenses.
- ALC violated the books and records and internal control provisions of Section 13(b)(2)(A) and 13(b)(5) of the Exchange Act, or that Ms. Bebo caused any violations if they occurred.
- Ms. Bebo circumvented ALC's internal controls, caused ALC's internal control violations, or falsified ALC books and records.
- Ms. Bebo made materially false or misleading statements to ALC's auditor, Grant Thornton, in violation of Rule 13b2-2.
- Ms. Bebo provided false certifications in violation of Rule 13a-14(a).
- That Section 929P(A) of Dodd-Frank is constitutional, and does not violate Ms. Bebo's Fifth Amendment rights to due process and equal protection.
- That the use of Commission ALJs to oversee this proceeding does not violate Article II of the United States Constitution.
- That these administrative proceedings and the rulings and conduct of the ALJ did not violate Ms. Bebo's Constitutional rights.
- That the ALJ was impartial and unbiased.
- That various evidentiary and pre-trial or trial rulings identified in Ms. Bebo's post-hearing brief (at 238-70) were not erroneous or prejudicial, or a deprivation of due process.

The only findings that Ms. Bebo does not take exception to are: the finding that corporate insiders do not and cannot provide competent testimony about what "reasonable investors"

would consider material (Dec. at 63), that ALC's employees did not accuse management of fraudulent conduct in 2011 (Dec. at 36), that she did not cause a violation of Rule 12b-20 (Dec. at 67), and that the Division was not legally or factually entitled to the remedy of disgorgement (Dec. at 77-78).

ARGUMENT

I. The ALJ's Erroneous Findings Of Fact.

A. The ALJ ignored undisputed evidence with respect to the effect the Great Recession had on Ventas, ALC, and Ms. Bebo's state of mind.

The ALJ made no attempt to view Ms. Bebo's, ALC's, and Ventas' actions through the lens of reasonableness and without the distorting lens of hindsight. The ALJ's job was not to determine in the first instance whether there was an agreement between ALC and Ventas—in hindsight and based on facts of which Ms. Bebo was not aware at the time (like Ventas' internal operations and unexpressed views). The ALJ's job, under the applicable legal standards, was to determine whether, in context and in light of the information known to Ms. Bebo at the time, ALC had a reasonable basis to assert compliance with the Lease. The question is not whether ALC was right in hindsight, but whether they had a defensible position.

Evident of the ALJ's disregard of this standard, he disregarded undisputed evidence of the context in which the two companies and Ms. Bebo operated in early 2009. Thus, he ignored facts that established that:

- The eight facilities subject to the Lease constituted a very small part of the overall business of both Ventas and ALC. (Resp't Br. at 48-49 (citing evidence).)[2]
- In 2008, ALC and Ventas reached an informal understanding that it was appropriate to calculate occupancy based on the ratio of the number of units occupied to the total available units instead of counting the ratio of residents of

[2] The ALJ's dismissal of the entire context in which the parties operated is revealed in the Initial Decision's statement that ALC's general counsel did not modify his initial advice because he did not prepare a memorandum to his file of "something as momentous as the covenant calculation process eventually implemented." (Dec. at 29.)

the facilities to the number of units as the prior operator had under the same lease. (*Id.* at 50-53 (citing evidence.) This understanding was reached without a formal lease modification. (*See id.* at 51-53 (citing evidence).)

- In 2008, ALC and Ventas disputed how the coverage ratio was to be calculated and resolved that dispute through e-mail exchanges. Again, no formal lease modification was required. (*Id.* at 53-57 (citing evidence).)[3]

- Ventas' business was severely affected by the Great Recession and Ventas told Ms. Bebo and the public at large that its primary goal was to maintain its stream of rental payments. (*See id.* at 57-61 (citing evidence).) Because ALC had a flawless payment history, was indisputably flush with liquidity, and no risk to default on its rent obligations, it was reasonable to believe that Ventas' silence in response to the e-mail confirming ALC's rental of units related to employees was an agreement to count those rentals toward the financial covenants. (*Id.* at 57-61 (citing evidence).)

- This type of informal and flexible approach to covenant compliance was consistent with industry practice during that time period, as established by Ms. Bebo's industry leasing expert (*id.* at 60), whose report was improperly struck *sua sponte* by the ALJ.

In addition, the ALJ ignored the undisputed testimony from various witnesses that it was generally known in the industry, and by Ms. Bebo in particular, that lessors almost never take actions to enforce remedies for financial covenant defaults. (*Id.* at 61-64 (citing evidence); Resp't Post-Hearing Reply Br. at 15-16 (citing evidence).) Ventas witnesses themselves testified that, during the relevant time period, they had never pursued a financial covenant default where there was no risk of the lessee defaulting on rent payments. (*See* Resp't Post-Hearing Reply Br. at 15-16 (citing evidence); Resp't Br. at 61-64 (citing evidence).) Even with respect to ALC, the key Ventas witness testified that he thought ALC defaulted between 2009 and 2012 (prior to the lawsuit) and Ventas just "monitored" the situation until ALC was "out of the woods." (Doman, Tr. 282.) The ALJ ignored this critical evidence.

[3] Similarly, in late 2009, ALC and Ventas resolved an alleged default under the Lease simply through a phone call and an e-mail. (Resp't Br. at 63-64 (citing evidence).) This was the same process for reaching the understanding about counting units related to employees in the covenant calculations.

Instead of acknowledging these undisputed facts,[4] the ALJ applied revisionist history wholly unsupported by the evidence to conclude that Ventas sued ALC for financial covenant violations when it clearly had not. In an attempt to salvage the Division's efforts, and dismiss the critical fact that Ventas would not have pursued a default on any alleged occupancy covenant violation, the Initial Decision not only takes inconsistent positions on the relevance of Ventas' actions and the credibility of the evidence that actually exists, but makes "findings" about what Ventas actually did that are unsupported by any evidence. (*See* Dec. at 37-39.) Respondent takes exception to all such findings, including the following.

For example, the ALJ arbitrarily concluded that "Bebo's contention that Ventas did not 'bring claims against ALC for unit rentals related to employees' is meritless" (Dec. at 39), and that "when Ventas learned that ALC had included employees in the covenant calculations, it moved to amend its pending complaint to add a claim for violation of the Lease's reporting requirements" (Dec. at 38). These findings are simply wrong, and unsupported by the evidence. First, the ALJ employs a "*see*" cite to ALC's May 4, 2012 8-K announcing the lawsuit (Ex. 2075) with its May 14, 2012 8-K announcing the amended complaint (Ex. 2076). The May 14 announcement described a May 9, 2012 default letter ALC received from Ventas that alleged fraudulent reporting of occupancy. The May 9 default letter (Ex. 355) from Ventas contained the following two default allegations:

- "Tenant has submitted fraudulent information to Landlord in respect of Tenant's compliance with Section 8.2.5 of the Lease and Tenant may have failed to comply with Section 8.2.5 of the Lease by failing to maintain required occupancy and

[4] The Initial Decision states that "[n]either Doman nor Bebo could remember any instance where a landlord pursued a default solely for a financial covenant violation, but this is beside the point, because ALC did not merely violate the covenants, it affirmatively misled Ventas." (Dec. at 37.) The ALJ misapprehended the relevance of this evidence and puts the proverbial cart before the horse. This evidence is highly relevant to the basis for Ms. Bebo's belief that Ventas was willing to enter into a flexible arrangement with respect to covenant compliance, and it is why she believed in good faith that Ventas' silence in the face of clear disclosure of rentals related to employees was an indication of an agreement to the same.

coverage ratios. Such fraud has included treating units leased to employees as bona fide rentals by third parties. Such actions constitute Events of Default under Section 17.1.5 of the Lease."

- "As described in our letter dated May 4, 2012, Tenant has not complied with all of its reporting obligations pursuant to Section 25 of the Lease."

In turn, the May 14 announcement clearly treats the employee leasing allegation separate from the allegation that ALC "failed to provide information previously requested by Ventas," (Ex. 2076 at p. 2) in describing the May 9 default notice. And when describing the new allegations of the May 10 amended complaint, the 8-K makes no reference to the inclusion of any allegation from the default notice related to ALC's alleged fraud in treating units leased to employees as bona fide rentals by third parties. (*Id.*) Clearly, if ALC thought that Ventas was making that much more serious allegation in the amended complaint it would have specifically identified the allegation instead of describing only the new allegations in the amended complaint regarding ALC's voluntary surrender of a license and failure to provide proper notifications with respect to a fire at the Florida facility. (*Id.*) Thus, the very evidence upon which the ALJ relies actually demonstrates the fallacy of the Initial Decision's conclusion.

Furthermore, the ALJ's pure speculation is belied by Ventas' May 4 letter describing the basis for its Section 25 reporting allegations. The May 4 letter referenced in Exhibit 355 was not included in the record, in part because the Division had already conceded in its pre-trial brief that the amended complaint *did not* include any allegations relating to violations of the financial covenants and neither party anticipated that the ALJ would make such unreasonable inferences to the contrary. (Div. Pre-Hearing Br. at 18 n. 5.) Accordingly, Ms. Bebo attaches as Exhibit A to this petition as a supplement to the record Ventas' May 4 letter, which identifies the Section 25 reporting violations. *None of them pertain in any way to the financial covenants.*

Thus, in addition to being false as a matter of fact—the Section 25 reporting allegation that is contained in the May 9 letter and repeated in the May 10 amended complaint *did not* bear any relation to financial covenant violations—the ALJ compounded this error by making another speculative leap unsupported by the evidence in an improper attempt to bolster the underlying false premise. The Initial Decision concluded that both Ventas and ALC understood the "claim for failure to comply with the 'reporting obligations under Section 25' ... as a reference to covenant non-compliance." (Dec. at 38.) For that proposition, the Initial Decision again employs a "*see*" reference in citing to Mr. Bell's testimony that the Ventas lawsuit only involved license revocation allegations prior to that time period. (Dec. at 38.) That is true, but it provides no support for the inference made by the ALJ. Mr. Bell's testimony says nothing about whether ALC interpreted the Section 25 allegation in the amended complaint as an opaque reference to alleged violations of the Section 8.2.5 financial covenants. (Bell, Tr. 617-19.) The Initial Decision also cites an ALC internal memorandum about the accounting for the purchase of the Ventas buildings in support of the statement that ALC interpreted that Section 25 allegation to really allege a violation of Section 8.2.5. (Dec. at 38-39.) But Mr. Lucey, the drafter of the memorandum, conceded on cross-examination that he was mistaken about the nature of the lawsuit and acknowledged it pertained to the licensing issues, not the covenant calculations. (Lucey, Tr. 3742.) Finally, the ALJ ignores Quarles & Brady's May 16, 2012 analysis of the litigation and reasons ALC should settle, which focuses entirely on the license revocation allegations and makes no mention whatsoever of the employee leasing. (Ex. 1050.)

And herein lies the misleading tactic of the Division's case and the flawed ALJ findings that flow from it—the Division and ALJ intentionally conflate the serious covenant violations related to the licensing actions taken by State regulators with immaterial financial covenants that

form the basis of the Division's case. The former covenant violations would prevent ALC from even operating the facilities and investors could reasonably conclude that the resident care and safety violations that lead to the violations were systemic throughout ALC.

To support the erroneous conclusion that Ventas interpreted that Section 25 allegation as really involving allegations related to financial covenant violations, the Initial Decision quotes Ventas' request for expedited discovery stating "that ALC 'failed to provide Ventas with any details regarding the scope or subject matter of [the Board's] investigation or the irregularities concerning the Ventas lease.'" (Dec. at 38.) But that does nothing to support the conclusion that the lawsuit was then about financial covenant violations. Rather, Ventas again explicitly stated that it sought discovery about issues that could affect patient safety and well-being and explicitly stated its belief that the irregularities reported by ALC relate to patient care and safety issues. (Resp't Post-Hearing Reply Br. at 85 citing Ex. 357, p. 3.) The only other evidence to infer that these pleadings do not mean what they actually say is Mr. Doman's equivocal and off-hand testimony. (Dec. at 38-39 citing Doman, Tr. 247 ("Q: What did Ventas do after it received this settlement proposal from Ms. Bebo? A I believe we responded with a lawsuit.").) On subsequent questioning, he acknowledged he was mistaken—Ventas had actually already filed its lawsuit prior to that time. (Doman, Tr. 248.)

Because the evidence does not support the conclusion that Ventas sued ALC on the basis of financial covenant violations, as even the Initial Decision acknowledges on some level—"Ventas' proposed amended complaint did not expressly include a claim for violation of the covenants"—the ALJ speculates about what Ventas meant, even though it did not actually allege it, by drawing inferences unsupported by the record. (Dec. at 38.) These unsupported

inferences, viewed in the light most favorable to the Division's weak breach of contract case, cannot be used to support a finding of materiality or securities fraud in this case.

B. The ALJ erroneously concluded it was unreasonable for Ms. Bebo to believe ALC had reached an agreement with Ventas to count ALC's own rentals related to employees in the covenant calculations.

Respondent takes exception to all of the ALJ's erroneous findings of fact related to the ultimate finding that ALC and Ventas did not reach an agreement with regard to employee leasing in February 2009. (*See, e.g.*, Dec. at 5, 20-26.) His numerous erroneous findings can be found in his analysis of, among other things, material events that occurred in late 2008 and early 2009—in particular his findings with respect to the critical January 20, 2009 call (the "Solari call"), the February 4, 2009 Solari e-mail (the "Solari e-mail"), and events later in February—his analysis regarding the individuals' involvement with employee leasing and the significance of their involvement, the credibility of witnesses, including Ms. Bebo, and his evaluation of evidence in the record. (*See, e.g., id.* at 5-6, 20-33, 45-46, 77, 80.)

1. The Initial Decision contains errors of fact about Mr. Solari's authority and his role with ALC.

Respondent takes issue with the ALJ's erroneous findings with regard to Mr. Solari's interactions with ALC, his involvement with employee leasing, and his position at Ventas. (*See, e.g.*, Dec. at 5-6, 21, 24-25, 29-30.) For example, Respondent takes exception to the finding that Mr. Solari lacked authority to modify the Lease or make changes to the covenants, and that he was not cloaked with apparent authority. (*See* Dec. at 5, 24-25, 29-30.) The ALJ's finding failed to account for a multitude of facts that prove Mr. Solari had apparent and actual authority to modify the Lease (putting aside for the moment the Lease was not, and did not need to be, modified). (Resp't Br. at 68, 76 (citing evidence).) For example, it is undisputed that he was the person responsible for negotiating its terms in the first place. Mr. Solari was principally

responsible on Ventas' part for negotiating the terms of the Lease with ALC, so he certainly had authority to modify the terms of the Lease. (Solari, Tr. 400.) At a minimum, he had apparent authority. (Resp't Br. at 68, 76 (citing evidence).) Moreover, Mr. Solari acknowledged that even after the Lease was executed, he served as ALC's "relationship officer," and acknowledged he was ALC's point of contact at Ventas for anything that might come up relating to important asset management issues. (*Id.* at 68) Instead of focusing on Mr. Solari's and Ventas' actions, communications, and instructions toward ALC, which is the appropriate analysis, the ALJ improperly focused on Mr. Solari's position in the company and Mr. Solari's beliefs about what his authority was.

2. The ALJ's findings with regard to the Solari call were erroneous.

Respondent disputes the ALJ's ultimate finding that the parties did not enter into the employee leasing arrangement on the January 20, 2009 Solari call, and that Ms. Bebo's testimony was not credible with respect to this call. (*See, e.g.*, Dec. at 5, 20-26.) The ALJ's findings about this call are contradicted by the greater weight of the evidence in the record, including the testimony of the Division's own witnesses, and his logic with regard to many of his findings is flawed and clearly erroneous.

(a) The ALJ erred when he concluded that Mr. Fonstad did not participate on the Solari call and that his credibility was of little importance.

The ALJ erroneously found that Mr. Buono, Ms. Bebo, and Mr. Solari participated on the Solari call without ALC's General Counsel, Mr. Fonstad, which tainted his entire analysis of whether there was an agreement about employee leasing and, more generally, Ms. Bebo's scienter. (*See* Dec. at 5, 20.) The ALJ's finding that Mr. Fonstad was absent is rebutted by the sworn testimony of four witnesses who place Mr. Fonstad in Ms. Bebo's office during the call. (Resp't Br. at 22-23, 75 (citing evidence); Resp't Post-Hearing Reply Br. at 26-27 (citing

evidence).) Division witness Mr. Buono stated that Mr. Fonstad was present for the Solari call during his investigative testimony; although, he conveniently could not recall that fact at the hearing. (*See* Buono, Tr. 2343, 2781-82.) The Initial Decision also erroneously dismissed Ms. Bucholtz's testimony placing Mr. Fonstad in the room during the call, in part, because she was "evasive," and also because of her relationship with Ms. Bebo. (Dec. at 30; Bucholtz, Tr. 2939-40.) The ALJ's reasoning that Ms. Bucholtz was biased in favor of Ms. Bebo and incredible on this issue is inconsistent with Ms. Bucholtz's willingness to give damaging testimony about Ms. Bebo in other respects. Additionally, the ALJ's findings about Ms. Bucholtz were internally inconsistent.[5] Finally, the ALJ failed to credit Ms. Zaffke's trial testimony placing Mr. Fonstad in the room during the call. (*See* Dec. at 29.) There was no reasoned basis to reject her testimony.

(b) The ALJ's factual conclusions about what was said on the Solari call were erroneous and illogical.

All of the ALJ's factual findings relating to what was said on the January 20, 2009 call were faulty, illogical, and clearly erroneous. The ALJ determined that "[t]he participants discussed two topics: the leasing of units to a hospice company, and *whether certain ALC corporate employees, while traveling to a Facility, could stay in vacant Facility units instead of staying in a hotel.*" (Dec. at 6 (emphasis added).) This finding is rebutted by substantial evidence in the record. The record indicates that ALC had employees staying at facilities *prior to the call*, pursuant to an undisputed company policy and with the knowledge of ALC management. (*See* Resp't Br. at 72, 96 (citing evidence).) Also, ALC did not believe that

[5] On page 27 of the Initial Decision, ALJ Elliot stated, "I do not credit [Bucholtz's] testimony that she, Bebo, Buono, and Fonstad worked together on drafting the February 4, 2009 e-mail"; and then later on the same page inconsistently found, "[h]owever, I credit Bucholtz's hearing testimony that she reviewed a draft of the February 4, 2009, e-mail at Bebo's request, because she plausibly explained that seeing the draft for the first time in years refreshed her recollection." Such self-contradictory findings, which exhibit a desire to reach a preferred outcome, should not stand.

approval from Ventas was necessary for merely having employees stay at the facilities. Thus, having employees stay at the facilities was not unique to Ventas and it would not be a topic of conversation, whereas including the employees in covenant calculations was worth discussing with Ventas. (*See* Resp't Br. at 72.)

The ALJ's conclusion that a topic of the 2009 call was about individuals merely staying in vacant rooms is erroneous and inconsistent with the primary purpose of the call. (Dec. at 8.) The record indicates that a major motive of having the conversation with Ventas was to discuss the inclusion of individuals in covenant calculations. (*See* Resp't Br. at 69-70 (citing evidence); *see* Dec. at 5.) It is undisputed that ALC learned in 2008 or 2009 that employees had been living at Cara Vita facilities and were unintentionally included in the covenant calculations, which was the genesis of the employee leasing program. (*See* Resp't Br. at 69 (citing evidence).) Prior to the call, it is also undisputed that individuals at ALC, including Mr. Fonstad, knew there was going to be a discussion with Ventas about including individuals in covenant calculations. (*See* Dec. at 5 ("Fonstad had participated in discussions about including employees and their relatives in covenant calculations, provided they stayed at Facilities"); Ex. 1046.) Further, in anticipation of the call, Mr. Fonstad prepared a draft template e-mail about the issue and Mr. Buono e-mailed Ms. Bebo about this issue on the day of the call. (Ex. 1046; Ex. 174.) All of these undisputed facts prove that everyone expected Ms. Bebo to discuss renting rooms to employees on the call, rather than discussing a practice that did not need approval from Ventas.

The fault in the Initial Decision's findings is revealed by the undisputed evidence in the record and the questions that his findings leave unanswered. Why would ALC contact Ventas about an established companywide practice that no one believed Ventas had to approve? Why would Ms. Bebo depart from the plan of asking Ventas if ALC could include individuals for use

in the covenant calculations, as the prior owner had? If the call went how the ALJ determined it did, why would Ms. Bebo have prepared the final e-mail so differently and risk challenge from Ventas? Why enter into an "alleged" fraud at this point in time, when she had nothing to gain and everything to lose? Why involve Mr. Buono and Mr. Fonstad on the call if she intended to proceed differently than planned? The Initial Decision leaves all of these basic questions unanswered.

Other factual findings about Mr. Fonstad and the January 20, 2009 Solari call were illogical. For example, the ALJ reached the following conclusions:

> "Thus even if Fonstad should have known what was discussed on the January 20, 2009, call, I conclude that his lack of recollection of the topic was sincere . . ." (Dec. at 29.)
>
> "In any event, his credibility specifically on the issue of what was discussed during the January 20, 2009, call, and the hotly contested question of whether Fonstad participated in the call, is largely immaterial, because Fonstad remembered nothing about it. (*Id.*)

Finding that it did not matter that Mr. Fonstad may have been involved because he could not remember whether he was on the call, and that it was unremarkable that he could not remember a call that he should have, demonstrates the erroneous nature of the ALJ's findings in the Initial Decision. Of course, it matters if ALC's general counsel was involved because, for example, it is material to Ms. Bebo's subjective belief about the appropriateness of the employee leasing agreement and her credibility. And it is critically important given Mr. Fonstad's undisputed involvement in drafting the Solari e-mail (Buono, Tr. 2756-57), chairing disclosure committee meetings discussing the e-mail and phone call (Resp't Br. at 93 (citing evidence)), and specifically approving ALC's affirmation of compliance with the Lease a mere four weeks after the phone call and two weeks after he helped draft the Solari e-mail. (*Id.* at 93-95 (citing evidence).)

(c) The ALJ's reliance on Mr. Solari for the substance of the call was faulty.

Mr. Solari has virtually no recollection of the substance of the 30 minute phone call with him on January 20, 2009. (Solari, Tr. 449-52.) The ALJ erroneously adopted Mr. Solari's limited recollection of the call and what he "would have" done or said in its entirety. (Dec. at 5.) In doing so, the ALJ dismissed the fact that Mr. Solari previously testified under oath that he could not refute Ms. Bebo's account of what had been said on the call, because he credited Mr. Solari's explanation of why he could not contradict Ms. Bebo at that time. (*Id.* at 30.) According to Mr. Solari, he was initially unable to refute Ms. Bebo's account because he had not been told Ms. Bebo's version of the call during his initial investigative testimony. (*Id.*) The ALJ's conclusion and Mr. Solari's explanation are illogical in that Mr. Solari not being able to refute something implies that he had, in fact, been told a set of facts to possibly refute.

The Initial Decision's treatment of Mr. Solari's recollection of the call (or lack thereof) was faulty in other respects as well. Despite crediting Mr. Solari's version of the call, the ALJ also somehow found that Mr. Solari's credibility was of little significance. (Dec. at 29-30.) Also, the ALJ acknowledged that Mr. Solari "principally testified as to what was not said, based largely on his organizational authority and what he thought he would never agree to." (*Id.* at 29.) Thus, like much of his decision, the ALJ improperly relied on an individual's after-the-fact thought process (*i.e.*, "I didn't say that because I didn't have the authority then," and "I wouldn't have said that") as the basis of his findings and not credible testimony from individuals about what was actually said during the call. Finally, the ALJ erroneously found that Mr. Solari had no motive to be biased toward either party. (Dec. at 29-30.) The ALJ did not consider the fact that Mr. Solari (and Ventas, more generally) had an interest in testifying that Ms. Bebo perpetrated

fraud as opposed to him admitting that he entered into an unfavorable agreement shortly after starting to work at Ventas, especially considering he still works in that field.

Respondent also takes issue with the Initial Decision's conclusion that Mr. Solari "agreed to nothing, and he told Ms. Bebo and Mr. Buono to put ALC's proposal in writing." (Dec. at 5; *see also* Dec. at 22.) This finding is contradicted by a different finding that the February 4, 2009 e-mail, is "the most reliable evidence of what the call participants discussed, and any agreements they reached." (*Id.* at 20.) The employee leasing part of the e-mail does not contain any language setting forth a proposal. (Ex. 184.) Instead, the language about employee leasing is framed as a confirmation of ALC's notification of its decision to rent rooms to employees for use in covenant calculations, which was a practice that they had been doing and would continue doing barring objection from Ventas.[6] (*Id.*; *see* Resp't Br. at 72,96 (citing evidence).) Moreover, the ALJ agreed that the employee leasing language could be read as notice that ALC was going to include individuals in the covenant calculations. (Dec. at 20.)

(d) Respondent takes exception with the ALJ's decision to credit Mr. Buono's current version of the Solari call.

The ALJ's factual findings with regard to Mr. Buono's revised recollection of the Solari call were also erroneous. (*See, e.g.*, Dec. at 5-6, 20-22, 30-31.) The ALJ credited Mr. Buono's changed testimony that no agreement was reached with Ventas as a result of the call, despite Mr. Buono being impeached several times throughout his testimony, and went so far as to say Mr. Buono's credibility was bolstered by his impeachment. (*Id.*) According to the Initial Decision, Mr. Buono was bolstered by impeachment because his testimony was exculpatory before he

[6] Parts of the e-mail discussing hospice are clearly phrased as a proposal ("[a]s we discussed, we have initiated an exciting opportunity to partner with a hospice provider to have the hospice provider pay us a fee to use approximately 23 units of the facility for hospice care"), unlike the language about employee leasing ("[i]n addition to the potential hospice lease, we are also confirming our notification of our rental of rooms to employees."). (Ex. 184.)

settled and inculpatory after. (*Id.* at 30.) The ALJ at once found that Mr. Buono repeatedly lied under oath to the Division during the investigation, and yet, paradoxically, still found Mr. Buono to be credible. (*Id.*) Finally, the ALJ failed to appreciate that much of Mr. Buono's exculpatory testimony and other statements were material because they corroborated Ms. Bebo's detailed version of events.

The ALJ's analysis of Mr. Buono's testimony about what was discussed on the call was also unsound. For example, the Initial Decision states:

> Bebo characterizes as "incredible" Buono's testimony that rental payment for employee apartments, and whether Solari was concerned about such payment, was not discussed with Solari. Resp. Br. at 79. Buono consistently testified to that effect, however, and Bebo's attempted impeachment of Buono on this point failed. Tr. 2344-45, 4656-60. In context, Buono's testimony that it was understood, "based on the January 20, 2009 call," that "the apartment at the [Facility] would be paid directly by ALC" referred to Buono's understanding, not to Solari's. Tr. 4656-57; *see* Resp. Br. at 79.

(Dec. at 31.) This excerpt from the Initial Decision supports a conclusion that rental payments for employees was discussed during the phone call, although that was not the ALJ's ultimate conclusion. Even if it is conceded that the ALJ correctly found that Mr. Buono understood "the apartment at the [Facility] would be paid directly by ALC," it was still his understanding "based on the January 20, 2009 call" and presumably what was said on that call. (*Id.*) Accordingly, the ALJ's own findings contradict his ultimate conclusion about the Solari call.

(e) The ALJ improperly credited Mr. Buono's current belief that no agreement existed between ALC and Ventas.

As previously mentioned, much of the ALJ's logic regarding Mr. Buono was faulty. (*See id.* at 5-6, 20-22, 30-32.) The clearest example of the ALJ's incorrect reasoning was his incessant crediting of Mr. Buono's current position that ALC did not have an agreement with Ventas about employee leasing. (*Id.*) Mr. Buono specifically testified that he eventually came to believe, "that maybe this wasn't as good of an agreement as we would have hoped." (Buono, Tr.

4645.) The fact that "Buono changed his mind about what he assumed Ventas understood after learning more about the case" and after he read Mr. Solari's "deposition," does not speak to whether ALC, including Ms. Bebo, understood that it had an agreement with Ventas at the time. (*Id.* at 31.) Findings that rely on Mr. Buono's post-hoc analysis are all erroneous for that fact alone. Moreover, the ALJ illogically credited Mr. Buono's changed opinion, in part, because he relied on the testimony from Mr. Solari's "deposition"; however, the ALJ simultaneously found that it was plausible that Mr. Solari could not remember details about employee leasing when giving investigative testimony. (*Id.* at 24, 29, 31.) By this faulty logic, Mr. Buono changed his testimony based on the testimony of someone who could not remember details of the agreement.

(f) The ALJ's credibility determinations undermined his conclusion that ALC did not enter into an agreement about employee leasing.

The ALJ erroneously evaluated witnesses' credibility throughout the 19-day hearing, which undermined, among other things, his finding that ALC did not have an agreement with Ventas about employee leasing. (*See, e.g.*, 25-31, 45-46, 77, 80.) The basis for these determinations were often inconsistent and illogical. For example, without any basis whatsoever, the ALJ found that witnesses who remember specific details (*i.e.*, Ms. Bebo) were not credible when compared to individuals who had faulty memories (*i.e.* Mr. Solari, Mr. Fonstad, etc.). (Dec. at 24.) Setting aside the fact that some individuals undeniably have better memories than others, the ALJ's reasoning ignored the fact that many of Ms. Bebo's details were corroborated by testimony (*i.e.* Mr. Buono, Mr. Dengel) and other evidence in the record. (*See* Resp't Br. at 105 (citing evidence); Resp't Post-Hearing Reply Br. at 63, 67-70 (citing evidence).) His rejection of Ms. Bebo's credibility on key issues also ignored the vast amount of consistent testimony she has given in numerous proceedings, and the obstacles she was faced during her hearing testimony (it is undisputed that the Division took things out of context when

impeaching Ms. Bebo during the hearing). (Dec. at 46 (the ALJ finding "[h]owever, her prior testimony was taken out of context . . ."); Resp't Post-Hearing Reply Br. at 40-61 (citing evidence).) The ALJ's flawed findings with regard to Mr. Buono's bolstered credibility through impeachment are equally, if not more, egregious and defy the standard principles of witness credibility. (Dec. at 30).

3. The ALJ's factual conclusions with regard to the February 4, 2009 Solari e-mail were erroneous.

The February 4, 2009 e-mail Ms. Bebo sent to Ventas provided confirmation that ALC had been and would be including units related to employees in the Lease financial covenant calculations, as discussed in more detail on the January, 20, 2009 call. (Ex. 184.) Respondent takes exception with the numerous findings related to the Solari e-mail. (*See, e.g.*, Dec. at 6, 20-24, 26-28.) Moreover, ALJ Elliot's critique of what language went into the e-mail was erroneous and, as discussed below, polluted the Initial Decision and his ultimate conclusion that no agreement was reached about employee leasing. (*See, e.g., id.* at 22.)

Among other things, Ms. Bebo disputes the Initial Decision's conclusion that Ms. Bebo did not understand there to be an agreement with Ventas about employee leasing. (*Id.* at 21.) ALJ Elliot's finding with regard to this issue ignored or was contradicted by other findings from his Initial Decision and evidence in the record. For example, ALJ Elliot found that the e-mail was "the most reliable evidence of what the call participants discussed, and any agreements they reached." (*Id.* at 20.) He also found that the e-mail "documents Bebo's contemporaneous understanding of what had been discussed and agreed to on the call." (*Id.*) With regard to the language in the e-mail, he found that the relevant section of the e-mail "contain[s] language arguably consistent with Bebo's testimony, namely, the use of 'rental' and the second sentence in particular . . .." (*Id.* at 20-21.) He also acknowledged Mr. Buono's original belief—the only

belief that is pertinent for this matter—was that "'there would be no other reason to put [employees] in the [facilities] other than to put them in the calculations." (Dec. at 20.) He finally found that, "this language could be read as notice that ALC intended to include employees in covenant calculations." (*Id.*) Yet, despite acknowledging that the e-mail was the best piece of evidence regarding what was discussed by the parties, that it documented Ms. Bebo's contemporaneous understanding, that it contained information consistent with Ms. Bebo's testimony, and that it could be read as notice that ALC intended to include employees in the covenant calculations, the ALJ erroneously disregarded these favorable inferences because, in his view, Ventas did not view the evidence that way, and that Ms. Bebo did not understand it that way either. (*See id.* at 21-24.) The first reason is irrelevant.[7] Both reasons are unfounded.

The Initial Decision's findings about Ms. Bebo's understanding of the legitimacy of the employee leasing program were wrong. The ALJ concluded that Ms. Bebo did not believe that the language in the Solari e-mail provided notice of ALC's intention to include employees in the covenant calculations because: (a) the language Ms. Bebo ultimately "chose" to include in the e-mail; and (b) the difference between Mr. Fonstad's initial draft template e-mail regarding employee leasing and the February 4, 2009 e-mail that was sent to Mr. Solari. (*Id.* at 21-22.) The ALJ arrived at the ultimate conclusion that Ms. Bebo "was consistent with that of someone

[7] Respondent contests the ALJ findings about what Ventas perceived because Ventas' perceptions are irrelevant, especially with regard to Ms. Bebo and ALC's subjective belief about the existence of the employee leasing agreement. Ventas' responses to the Solari e-mail are the most critical evidence stemming from Ventas and they demonstrate that there was no objection to the practice. (Resp't Br. at 85-90 (citing evidence).) In his pre-trial ruling on a motion to quash Ms. Bebo's subpoena to Ventas, the ALJ ruled that evidence of what Ventas would or would not have agreed to in terms of financial covenant reporting was irrelevant unless expressed to Ms. Bebo. *See infra* Sec. VII.H. This was the law of the case and it was error to repeatedly rely on Ventas' subjective views that were unexpressed to Ms. Bebo.

who believed that the [employee leasing issue] remained unresolved" by failing to properly account for actions of individuals (*i.e.*, Mr. Fonstad) and evidence in the record. (Dec. at 24.)

The ALJ nonsensically found that Ms. Bebo did not believe that ALC had an agreement with Ventas about employee leasing because she was not more specific in the e-mail to Mr. Solari and because of the differences between it and Mr. Fonstad's initial draft e-mail. Both of these conclusions ignore the fact that Mr. Buono and Mr. Fonstad wrote the Solari e-mail. The ALJ partially recognized the role of Mr. Buono *and* Mr. Fonstad with regard to drafting this e-mail, but still held Ms. Bebo accountable for the language ALC's CFO and general counsel chose. (*See* Dec. at 21 ("Indeed, Buono testified that the original version of the e-mail, which Buono drafted (possibly with Fonstad's help). . .,") *id.* at 6 ("Buono drafted the body of a letter in Fonstad's presence, and forwarded it to Bebo on January 27, 2009.").) Although the ALJ was correct that Ms. Bebo had ultimate authority over the Solari e-mail because she sent it, she relied on counsel to prepare the e-mail and the ALJ failed to account for the significance of the fact that Mr. Fonstad and Mr. Buono—two participants to the call—drafted it.[8] The ALJ's critique about what language "she used" or could of have used (*i.e.*, Mr. Fonstad's old language) likewise ignored the fact that Mr. Fonstad drafted, or at least was aware of, the language that was eventually used.[9] Additionally, it is immaterial that considerations from Mr. Fonstad's draft e-

[8] It is undisputed that Ms. Bebo made only minimal changes to employee leasing language in the draft Solari e-mail. (*See* Resp't Br. at 83-84.)

[9] The ALJ erroneously found that Ms. Bebo could have been more articulate about including employees in the covenant calculations like she did with the first four paragraphs of the Solari e-mail discussing a hospice proposal. (Dec. at 22.) However, interestingly, the same hospice language the ALJ cites does not reference covenant calculations and no one would seriously contend that ALC would not include the hospice individuals in the covenant calculations. Therefore, by the ALJ's own logic, either both statements (hospice and employee leasing) sufficiently indicate that individuals will be included in the covenant calculations, as he suggests for the hospice language and elsewhere in his decision, or they are both deficient, as he ultimately contends for the employee leasing language. The latter conclusion is internally inconsistent with his other findings and defies common sense.

mail did not end up in the final e-mail because, again, Mr. Fonstad either removed those considerations or was aware that they were removed.[10]

4. The Initial Decision also contains flawed findings of fact about what occurred after the Solari e-mail.

(a) Mr. Fonstad's continued involvement and advice.

The Initial Decision contains a multitude of erroneous factual findings about what took place after the February 4, 2009 Solari e-mail. For example, the ALJ's general conclusion that Mr. Fonstad did not approve the employee leasing program or change any of his advice in light of the Solari call and e-mail was erroneous for several reasons. First, the ALJ reasoned that if Mr. Fonstad was diligent enough to prepare an e-mail analyzing the Lease in connection with the anticipated proposal to Ventas to include units for employees in the covenant calculations, he would have been diligent enough to document "something as momentous as the covenant calculation process eventually implemented." (Dec. at 29.) However, this finding ignores the wealth of evidence showing that the Cara Vita facilities were insignificant to both parties, and thus making it unsurprising that Mr. Fonstad did not document a calculation process.

Second, the ALJ improperly concluded that Mr. Fonstad did not approve the process because the Division's key witness, Mr. Buono, recanted his former sworn testimony that Mr. Fonstad did approve. The ALJ's cursory dismissal of this critical testimony exemplifies his

[10] The ALJ's findings contrasting Mr. Fonstad's initial template with the e-mail to Mr. Solari were erroneous and internally inconsistent in many ways. First, the ALJ's factual findings about Mr. Fonstad's first template e-mail were erroneous and contrary to the terms of the Lease. Second, the ALJ found that there was no oral agreement on the call because the 2009 e-mail did not include a place for Ventas to sign. However, his conclusion that a writing was required by the Lease is wrong based on the terms of the Lease, and it is also contradictory to his finding that Mr. Fonstad suggested "[i]f Ventas agrees to permit employee and relative rentals, the letter we send can be in the nature of a confirmation of our interpretation of the lease. . ." (Dec. at 22.) Actually, in contrast to the ALJ's adverse findings, the difference in language of these documents indicates that Ms. Bebo's version of the call was accurate. Mr. Fonstad's template e-mail discussed a "limited" number of employees that would be used by ALC and that language was removed from the final 2009 e-mail that Fonstad helped draft. (*Compare* Ex. 1046 *with* Ex. 1334.) The absence of this language in the draft Solari e-mail likely means that Mr. Fonstad was prompted to remove the language because the parties discussed the matter and Mr. Solari indicated that he did not care about the number.

flawed and inconsistent findings about witnesses' credibility and the employee leasing agreement.

Third, the ALJ ignored or failed to give proper weight to Mr. Fonstad's substantial involvement with employee leasing after the Solari call and e-mail. For example, Mr. Fonstad:

- Received the Solari e-mail from Ms. Bebo after it was sent to Ventas, reviewed it, and printed it for his records;
- Received Ventas' response to the Solari e-mail, reviewed it, and printed it for his records;
- Attended Disclosure Committee meetings where employee leasing was discussed;
- Attended Board meetings where employee leasing was discussed by ALC management and Grant Thornton;
- Approved ALC's disclosures in light of the employee leasing program. In fact, days after a February 2009 Disclosure Committee meeting where the employee leasing agreement was initially brought before the committee, Mr. Lucey sought Mr. Fonstad's legal advice with respect to the exact disclosure that the Division contends was false or misleading in ALC's 2008 10-K and in every subsequent disclosure. (Ex. 1057.) Ms. Bebo also testified she asked Mr. Fonstad if any disclosures needed to be altered in light of the changing circumstances. Mr. Fonstad acknowledged that he never advised Mr. Lucey or anyone else at ALC to modify its disclosures about the Ventas Lease as a result of the Solari e-mail, or ALC's requests to Ventas for covenant relief. (Fonstad, Tr. 1580-82.)

Mr. Fonstad's continued involvement with employee leasing directly supports the conclusion that he agreed with the practice and it was appropriate to rely on his advice and lack of objection.

(b) The ALJ clearly erred in his findings with respect to Ventas' response to the Solari e-mail.

The Initial Decision concluded that Mr. Solari forwarded the Solari e-mail to Mr. Doman and Mr. Johnson of Ventas later that day, asking Mr. Johnson to follow up with ALC. Mr. Solari also communicated to Ms. Bebo that Mr. Johnson would be following up. (Dec. at 6.) Then the ALJ incorrectly found that Mr. Solari's e-mail to Ms. Bebo about Mr. Johnson following up "was apparently the only follow up to Ms. Bebo's February 4, 2009 e-mail from Ventas, and ALC

personnel never thereafter discussed with Ventas the inclusion of ALC employees in covenant calculations." (*Id.*)

The ALJ's conclusion is false. Mr. Johnson himself responded to ALC about the Solari e-mail and he did not raise any question, comment, concern, or objection to ALC's confirmation of rental of rooms to employees. (Ex. 1343.) This e-mail was of critical importance to Ms. Bebo's subjective belief that Ventas had no objection to the practice. Failing to account for the fact that Ventas' upper management reviewed, responded to, and raised no objection to ALC's rental of rooms was an egregious error that undermined the ALJ's ultimate conclusion that ALC did not have an agreement with Ventas about employee leasing.

(c) The ALJ misconstrued subsequent discussions with Ventas and incorrectly found that Ms. Bebo did not believe ALC reached an agreement with Ventas.

In concluding that Ms. Bebo did not subjectively believe she had reached an agreement with Ventas, the ALJ principally relies on ALC's negotiations with Ventas about the potential purchase of two New Mexico facilities from Ventas in the weeks following the Solari e-mail:

> Nonetheless, Bebo would have had no reason to pursue covenant relief of any kind with Ventas, or to mention it to the Board, if the January 20, 2009, call and February 4, 2009, email had already conclusively resolved the issue. Her February 19, 2009, proposal to Ventas was largely about covenants, suggesting that covenant relief was a higher priority even than purchase price, and further suggesting that Bebo did not believe at the time that the January 20, 2009, call had resolved the issue. In sum, her behavior in February 2009 was consistent with that of someone who believed that the issue remained unresolved.

(Dec. at 23-24.) Like all of the ALJ's findings about the New Mexico negotiations, this finding is riddled with inaccuracies and flawed reasoning. Ms. Bebo takes exception to all of the ALJ's findings on this subject.

For example, the ALJ principally relied on a February 17, 2009 internal Ventas e-mail purporting to relay a conversation Mr. Solari had with Mr. Buono and Ms. Bebo. (Dec. at 22-23

citing Ex. 188.) The e-mail indicated that ALC purportedly hinted at "eliminating the covenants entirely" in connection with the proposed purchase of the New Mexico properties. The Division elicited no testimony about the reported conversation and the e-mail is unreliable double hearsay.[11] The ALJ erred in concluding that the critical piece of evidence about Ms. Bebo's subjective belief was unreliable double hearsay.

Moreover, contrary to this unreliable evidence, the testimony from multiple witnesses at the hearing about this issue clearly indicated that ALC was seeking relief only from the coverage covenants because Ms. Bebo believed there *was an agreement to count units related to employees* but there was still a chance that ALC could fail the coverage covenants despite the agreement. On February 19, 2009, ALC provided a written proposal to Ventas with respect to the New Mexico property acquisition and corresponding relief from the coverage ratio covenants. (Ex. 190.) Every witness to testify about this proposal, including Division witnesses Mr. Buono, Mr. Solari, and Mr. Doman, unambiguously testified that ALC was not requesting relied from the occupancy covenants.[12] Mr. Buono confirmed that ALC did not seek this relief because Ms. Bebo believed that ALC would not fail the occupancy covenant due to the employee

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[11] Another example of the ALJ's inconsistent rulings was his decision to find credible this New Mexico double hearsay about which there was no testimony, but dismiss critical witness statements made to Milbank and reported to Grant Thornton because they were double hearsay. (*See* Dec. at 46 ("That is, the evidence pertaining to the Milbank investigation is all hearsay . . . . After considering the evidence pertaining to the Milbank investigation in light of the standard for evaluating hearsay, I accord no weight to it. . . . The statements by Milbank to Grant Thornton and the Board were oral and unsworn; it is not clear whether the statements by the various ALC interviewees to Milbank were oral and unsworn, but there is no reason to think they were not; and the statements by the interviewees were at least double hearsay.").)

[12] Mr. Doman and Mr. Solari each testified that the February 19, 2009, e-mail from ALC did not request a waiver or elimination of the occupancy covenants and only addressed modifications to the coverage ratio covenants. (Doman, Tr. 354-55 (discussing Ex. 3380 (identical to Ex. 190)) and agreeing Ms. Bebo was not requesting any relief with respect to the occupancy covenant); Solari, Tr. 432 (discussing Ex. 190 on direct examination and stating the 2009 e-mail was proposing that ALC "purchase the two NM facilities in exchange for getting relief on the coverage covenants as described in this e-mail.").) Ms. Bebo directly testified that she never proposed modifying the occupancy covenant in discussions with Ventas related to the New Mexico facilities. (Bebo, Tr. 1979-80, 4053-56.) Mr. Buono confirmed the same understanding that ALC was not seeking relief from the occupancy covenant because Ms. Bebo believed that would be satisfied by the employee leasing agreement. (Buono, Tr. 2359-60; Buono, Tr. 2500, 2504-05 (discussing Ex. 1349).)

leasing agreement. The ALJ's attempt to conflate the two types of covenants in order to conclude that the general issue of covenants had not yet been resolved is improper and warrants review.

Contrary to the ALJ's findings about the New Mexico negotiations, ALC seeking relief from the coverage ratio covenant was consistent with Ms. Bebo believing ALC had an agreement with Ventas about employee leasing. She explained her concerns about scenarios where ALC could still fail the coverage covenant while meeting the occupancy covenant, even though the flexible employee leasing agreement was in place. The ALJ failed to apprehend or consider these potential risks, which were explained by Ms. Bebo. (*Compare* Dec. at 23 (finding that Ms. Bebo did not identify what additional relief would be possible) *with* Bebo, Tr. 4053-4055 (explaining the two previously described scenarios).) Ms. Bebo's actions with regard to the New Mexico facilities, including her interactions with the board, were consistent with having an existing agreement about employee leasing.

The ALJ also erred when concluding that Ms. Bebo's testimony was not consistent with the reason why the New Mexico negotiations fell apart. He found that coverage covenant relief was more important to ALC than purchase price because ALC's proposal to Ventas for the New Mexico facilities did not have a purchase price in it. (Dec. at 23.) However, the parties' disconnect on the purchase price is what caused the deal to be terminated, not the lack of covenant relief. Ventas indicated it would grant covenant relief on the portfolio coverage ratio, but wanted a higher price for the facilities and demanded that ALC buy an additional facility at a price Ms. Bebo knew would not be approved by ALC's chairman. (*See* Bebo, Tr. 1980-81.)[13]

[13] The willingness of Ventas to grant financial covenant relief also bolsters Ms. Bebo's claims that Ventas was not particularly concerned about the financial covenants, and that Ventas would not have pursued the full extent of remedies under the Lease if there was a default on the financial covenants.

ALC's refusal to cave on price for the New Mexico properties demonstrates that they were comfortable with the employee leasing agreement.

(d) The Disclosure Committee's actions support the conclusion that ALC had an agreement with Ventas about employee leasing and that Ms. Bebo's belief that ALC's affirmation of compliance with the Lease was appropriate.

Contrary to the Initial Decision's findings, evidence pertaining to ALC's Disclosure Committee confirms that ALC had an agreement with Ventas about employee leasing and that ALC's and Ms. Bebo's affirmation of compliance with the Lease was reasonable. The ALJ improperly dismissed evidence about the substance of what was discussed at the committee meetings, including language in the Disclosure Committee minutes themselves such as, "'correspondence between ALC and Ventas ... whereby the covenant calculations have been clarified as to census,' or words to that effect." (*See* Dec. at 31.) Although this language clearly established the Solari e-mail and ALC's agreement with Ventas to include employees in the covenant calculations were discussed, the ALJ dismissed it because it was provided to the committee by Mr. Buono and he "now believes that Ventas did not have the understanding he said it did." (*Id.*) Thus, the ALJ acknowledged that inclusion of employees in the covenant calculations based on an agreement reached with Ventas in correspondence (rather than a modification to the Lease) was discussed by Mr. Buono at the committee meeting, but dismissed this because of Mr. Buono's changed belief. But whatever Mr. Buono "now believes" does not change what was discussed at the time of the committee meeting, and should not affect the important impact of Disclosure Committee consideration on the falsity and scienter analysis.[14] The only reasonable inference to be drawn from the evidence related to the Disclosure

[14] The ALJ also continues employing the faulty logic in crediting Mr. Buono's changed belief based on hindsight and review of the investigative record over his genuinely held beliefs *at the time*. The important fact is that Buono, a reasonable individual, like Ms. Bebo, believed that ALC had an agreement with Ventas and told that to the committee.

Committee discussions is that ALC believed it had an agreement with Ventas to allow ALC's inclusion of employees in its covenant calculations and that its disclosure regarding the Lease did not need to be modified in light of this new information.

Moreover, it is telling that the ALJ dismissed the importance of ALC's Disclosure Committee consideration, in a single paragraph, in his assessment of scienter. The ALJ found the Disclosure Committee to be "immaterial" because Ms. Bebo signed the reports and, thus, made her own misrepresentations. (Dec. at 55.) Although the ALJ was correct that the representations were Ms. Bebo's, he ignored the purpose of the committee, which was to assist senior management, including Ms. Bebo, in ensuring that the representations were accurate. Contrary to the ALJ's findings, the Disclosure Committee's knowledge of employee leasing was material to Ms. Bebo's scienter, because she believed the committee was aware of the issue and it did not counsel her to change her disclosure. (*See* Resp't Post-Hearing Reply Br. at 4-7.)[15] Moreover, the ALJ's reasoning has important implications for public companies' use of disclosure committees. Their use and reliance on these committees is a common compliance function, and management at public companies will have to reassess their appropriateness and importance in light of the Initial Decision.

C. Factual errors relating to the employee leasing process.

Ms. Bebo takes exception to the Initial Decision's numerous erroneous factual conclusions about the employee leasing process that took place during her time as ALC's CEO. (Dec. at 6-14, 32-33.) The ALJ's erroneous conclusions were contradicted by the record, ignored evidence in the record, and relied on fallacious logic.

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[15] The ALJ also erroneously concluded that none of the Disclosure Committee members, aside from Mr. Buono, had a complete picture of the employee leasing program. The Initial Decision fails to acknowledge that ALC's general counsel—the chair of the disclosure committee—was well aware of the basic material facts related to the employee leasing agreement. (*See* Resp't Br. at 83-84, 118-20.)

Among other error, several of the ALJ's findings of fact about the employee leasing process are contrary to evidence in the record or overlooked evidence in the record. For example, the ALJ concluded that the process for recording stays between the fourth quarter of 2008 and the first or second quarter of 2009 changed, because he wrongly believed the process in 2008 was based on actual employee stays. (*See* Dec. at 8-10.) Although employees stayed at the facilities for limited time periods (Exs. 177, 180, 182) in the fourth quarter of 2008, ALC paid for the apartments for entire monthly periods with respect to four of the five units that were utilized for employee use. (Ex. 17, p. 5.)[16] This was consistent with how ALC calculated occupancy and payment for units at the rest of the company.

Second, the ALJ also mistakenly concluded that occupancy at both Winterville and Peachtree would have declined in the first quarter of 2009 without rentals related to employees. (Dec. at 10.) The record established that only Winterville, not Peachtree, had declining occupancy without employees during this time period. (Compare Ex. 17 with Ex. 18)

Third, the ALJ reached the erroneous conclusion that other individuals at ALC and at ALC's external auditor, Grant Thornton, did not check names or find instances of somebody who was on the list, but was no longer an employee. The Initial Decision's citation to page 2520 of the record did not support his conclusion or even address the point. Rather, the citation was essentially a block quote from a May 5, 2009, e-mail discussing the origin of the employee leasing process.

There was substantial evidence presented at trial that justified Ms. Bebo's belief that the lists were being reviewed internally and externally. In an April 29, 2011 e-mail, Mr. Buono

[16] For example, Sue Martin reportedly stayed at the Greenwood Gardens facility for two and a half weeks in October, three weeks in November, and one week in December. (Ex. 182.) However, ALC paid for a unit for the entire months of October, November, and December. (Ex. 17, p. 5.) Similarly, Pamela Ondercin reportedly stayed thirteen days at the Peachtree Estates facility in November and December. (Ex. 180.) But ALC paid for a unit for the entire months of November and December. (Ex. 17, p. 5.)

stated to Ms. Bebo: "We need to do the Cara Vita Allocation (I want to review names)." (Ex. 1473.) In fact, the Division stated in its brief: "On occasion, Grochowski crossed out the names of employees who no longer worked at ALC, knowing that this made Bebo's job more difficult because she would have to come up with substitute employees. (Tr. 1124:8-1125:24)." (Division's Post-Hearing Br. at 24.) The fact that Mr. Grochowski would on occasion cross out names of former employees directly supports Ms. Bebo's testimony that she believed the lists were being meaningfully reviewed, since she saw names were being crossed out. (*See* Bebo, Tr. 4091-95, 4123-25.)

Mr. Buono also acknowledged he removed names and indicated that names should be replaced, as indicated in his proffer notes:

> ALC00177131 (7/31/2011) - JB said he wrote the word "replace" and "add 2 or 3." JB said he knew Kristen Cherry and she left July 1, 2011. JB said he looked more closely at list than the earlier ones.

(Ex. 2122, p. 9, March 2014 proffer session.)

> Regarding ALC00115165: JB said that the list of employee occupants included in the covenant calculations "got sloppy." JB said he didn't focus on the names of the employees Bebo supplied. JB said that Bebo always provided the names of employee occupants to be added into the covenant calculations but that names were sometimes removed from the list without consulting with Bebo. JB said that Bebo each quarter was provided with and approved of the final list of names of employee occupants that were included in the covenant calculations.

(Ex. 2117, p. 3, November 2013 proffer session.)

Finally, the ALJ ignored the credible testimony of Jason Dengel, a law enforcement officer with the State of Wisconsin, who testified that he participated in a conversation with Ms. Bebo and Mr. Buono which related to Grant Thorton discovering mistakes on the occupancy reconciliation reports related to employee leasing and provided to Grant Thornton. (Dengel, Tr. p. 3912-13 ("And I had asked what that was all about, and it was pointed out to me that at one point in the past, that that list is supposed to be audited by our internal accounting department,

and some of the names were missed that were no longer employed with ALC, that there were some names on there that were missed and an outside firm had found those names.").)[17]

The ALJ's finding that the employee leasing lists were consistent with an individual trying to commit fraud was also unsound. The ALJ dismissed the inescapable conclusion that a sophisticated individual trying to commit fraud would not put multiple couples, some of which were related (*e.g.*, the several Rodwick couples), or individuals at multiple properties at the same time on the employee leasing lists, by finding that the lists were not "reviewed in any meaningful way." (*See* Dec. at 32-33; Resp't Br. at 108-09.) Aside from the fact that the evidence established that the lists were meaningfully reviewed by a number of people (*see* Resp't Br. at 99-110), the ALJ's conclusion failed to account for the fact that anyone reviewing the lists in even a cursory manner would have seen characteristics that evidence a belief than an agreement existed with Ventas versus a fraudulent scheme or intent. More importantly, it is undisputed that Ms. Bebo thought they were being reviewed by numerous other people inside ALC and at Grant Thornton. No one trying to commit fraud under these circumstances would have prepared the lists in this manner.[18]

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[17] This followed Mr. Dengel's testimony about how that meeting began, demonstrating that both Mr. Buono and Ms. Bebo believed at the time that employees with a "reason to go" to the facilities could be included on the lists: "I was in Ms. Bebo's office going over some questions I had on admission packets, and John Buono came into the room and told Laurie that he needed some names from the list, and I asked the question on what -- what that was, and it was said that these are people that have a reason to go to that particular building, and Ms. Bebo asked John if this list was correct and current, and John had said, yes, it was." (Dengel, Tr. 3912-13.)

[18] Ms. Bebo takes further exception to the ALJ misconstruing her post-hearing brief. The Initial Decision states that "Bebo's slapdash approach to identifying employees to be included in the covenant calculations, which even Bebo characterizes as 'an extremely poor job,' also does not undermine her scienter - quite the opposite, in fact." (Dec. at 55 citing Resp't Br. at 204.) Page 204 of Ms. Bebo's post-hearing brief states, "If Ms. Bebo was trying to commit fraud or deceive the various multiple people that reviewed the lists both internally at ALC and externally at Grant Thornton, she did an extremely poor job of it." Such twisting of words and selective quotation is reflective of an advocate, not an impartial decision-maker.

D. Factual errors relating to the purchase of the Ventas properties in June 2012.

The ALJ's factual findings with regard to the purchase price of the Cara Vita properties and, more generally, materiality, were erroneous and ignored facts in the record. Ms. Bebo takes exception to all related findings. Among other errors, the ALJ ignored important documentary evidence in the record indicating that ALC's decision to approve buying the buildings for 100 million dollars was driven by licensing problems and not the covenant calculations. (*See* Resp't Br. at 152-56.) This included the Board minutes memorializing the basis for ALC's decision to purchase the properties, which the ALJ previously concluded were the most significant evidence in determining Board knowledge and basis for decision-making. (Ex. 1093.) Also, the ALJ erroneously relied on CBRE appraisals for valuations of the Cara Vita properties (all of which were not admitted into evidence) (Dec. at 59), but overlooked credible testimony that ALC had an interest in having appraisals be as low as possible at that time. (Resp't Br. at 152-56.) The fact that the CBRE appraisals were artificially low (and putting aside they were performed long after Ms. Bebo was gone) was confirmed by Exhibit 2088, which is an April 2012 e-mail describing then-recent appraisals of two of the four NHP properties for approximately $4 million more than CBRE *valued all four properties combined.*[19]

The ALJ's reasoning about the purchase of the Cara Vita properties and the materiality argument was also inconsistent with other aspects of his Initial Decision. With regard to the purchase of the Cara Vita facilities, the ALJ relied on testimony about internal events that occurred well after Ms. Bebo's departure; however, in other parts of his decision he found that events after her leaving were irrelevant (*e.g.*, the Millbank investigation, dismissing Quarles & Brady's advice, etc.). For example, the ALJ relied on Grant Thornton's concurrence with ALC's

[19] The performance of the four NHP properties were unaffected by any of the alleged wrong-doing in this case.

accounting determinations about the purchase of the properties (Dec. at 59-60), but did not credit Grant Thornton's determination that ALC's internal controls and financial statements were permissible after the Milbank investigation, which occurred after Ms. Bebo was gone from ALC, through which they learned all of the pertinent details of ALC's internal processes (to the extent Grant Thornton was not aware of them before) (Dec. at 68).

E. The ALJ made erroneous factual findings and conclusions related to the knowledge of the Board and the relevance of Board knowledge.

Because the evidence establishing the Board's knowledge and approval of the employee leasing program undermines a finding of scienter, the ALJ acknowledges it is a "knotty" issue, but then ignores the evidence, treats it inconsistently, or deems it incredible or immaterial. As it does on other topics, the reasoning in the Initial Decision puts more emphasis on evidence and memories that do not exist, than to credible evidence that does. And when documentation does exist—for example, the Board packages containing all of the occupancy data, with and without employees—the ALJ concludes in error that there is too much information, concealed in plain sight. (*See* Dec. at 43-44.) Ms. Bebo takes exception to the Initial Decision's conclusions, and any related findings, that the Board was not aware of the employee leasing program before March 2012, and that the Board's knowledge and approval of ALC's covenant compliance through the inclusion of employees in the calculations does not undermine any finding of scienter. (*See, e.g.*, Dec. at 39-44.)

The ALJ errs in concluding that the Board (as a whole or the Board members individually) was unaware of ALC's inclusion of employees in the covenant calculations, and in concluding that the Board's knowledge does not undermine a finding of scienter. (*See* Dec. at 41-42.) There is significant evidence establishing that the Board was not only aware of, but approved the inclusion of employees in the covenant calculations throughout 2009-2012,

pursuant to the agreement with Ventas, which corroborates Ms. Bebo's reasonable belief that ALC was not breaching the covenants. (*See, e.g.,* Buntain, Tr. 1452-54; Buono, Tr. 2393-96; Koeppel, Tr. 3328-30; Robinson, Tr. 3430-31.) To reach the conclusion that Ms. Bebo failed to inform the Board of the alleged covenant "defaults" (*see* Dec. at 43-44), the ALJ essentially ignores the evidence establishing that the Board was aware of the employee leasing program and how ALC was meeting the covenants. For example, while the Initial Decision "discredits" nearly all of Ms. Bebo's testimony, it does so without acknowledging the corroborating testimony of Mr. Buono and statements he made to the Division during his proffer sessions. (*See, e.g.,* Buono, Tr. 2417-18, 2392-93, 2523-24, 4633-34; Ex. 2122, p. 8.) Respondent takes exception to all findings that the Board was unaware of the employee leasing program or that Ms. Bebo concealed or failed to disclose ALC's reliance on it to meet the covenants. (*See* Dec. at 15, 23, 35, 39-44 (related findings).)

The ALJ also errs in ignoring the credible testimony of two third party witnesses—Grant Thornton's engagement partners Melissa Koeppel and Jeff Robinson—who stated that they discussed the inclusion of employees in the covenant calculations with the Audit Committee, in the presence of the full Board, on multiple occasions from 2009-2011. (*See, e.g.,* Koeppel, Tr. 3328-30; Robinson, Tr. 3430-31.) Without explaining why either witness lacks credibility or would fabricate this testimony (or how it would possibly be in their self-interest to do so), the ALJ simply disregards it because no document explicitly states what they discussed at these meetings. (Dec. at 43.) Respondent takes exception to these findings as well.

Similarly, the ALJ erred in ignoring the compromised credibility of at least two of the former Board members who testified—Derek Buntain and Alan Bell. Derek Buntain admittedly provided a false declaration to the Division for submission in this case, but the Initial Decision

considers that "immaterial." (Dec. at 74.) And while the Initial Decision mistakenly identifies the minutes of the ALC Board meetings as the most reliable evidence of what was discussed at those meetings (Dec. at 43), it at the same time ignores the testimony from ALC's legal counsel describing a situation in which Mr. Bell refused to correct the minutes to reflect what she believed was discussed at a Board meeting, which concerned her.[20] (Zak-Kowalczyk, Tr. 4397.)

Further, the Initial Decision itself acknowledges that Ms. Bebo *did* inform the Board that employees were included in the calculations, and cites documentary evidence proving as much (*see, e.g.,* Dec. at 42 ("I do not credit Ms. Bebo's testimony that she informed the Board of the details ... beyond the fact that employees were included in the covenant calculations, prior to March 6, 2012")), but at the same time concludes the Board as a whole was not aware of the program (*see id.* ("I conclude the Board as a whole did not know prior to March 6, 2012, that employees were included in the covenant calculation process")). These inconsistent findings cannot be reconciled in any rational way.

These errors are significant because the Initial Decision concludes (erroneously) that the mere inclusion of employees in the covenant calculations without a modification of the Lease (without regard to the scope of the program) was a breach of the Lease, rendering any statements made by ALC regarding its compliance with the Lease false. But as it pertains to scienter, because it is hard to explain away the evidence showing the Board was aware of the inclusion of employees in the covenant calculations, the Initial Decision focuses much of its scienter analysis

[20] More problematic, when the Board minutes contradict the Division's case, they no longer matter. For example, the May 2012 Board minutes summarize the Board's decision to purchase the Ventas facilities for up to $100 million dollars. (*See* Ex. 123.) Those Board minutes contain no reference to any concern about the financial covenants or any allegations by Ventas with respect to the same. The Board's deliberation focused on the perceived strength of Ventas' lawsuit related to license revocation and regulatory problems at the facilities. Yet the ALJ ignores this "most reliable evidence" (and the greater weight of additional evidence) in concluding that ALC believed that Ventas had alleged violations of the financial covenants in the lawsuit and was primarily settling the lawsuit because of alleged financial covenant violations. (Dec. at 38-39, 59-60.)

and findings on what was known or disclosed about the *scope* of the program. The inconsistencies in these findings can only be explained by a predetermined conclusion of "guilt," without regard to the evidence admitted at the hearing or its significance.

As noted above, Ms. Bebo takes exception to all of these related findings and conclusions (*see, e.g.*, Dec. at 39-44), including but not limited to the following examples.

First, the ALJ erroneously concluded that: "[A]ll five former Board members whose testimony is in the record denied understanding prior to March 6, 2012 that employees had been included in the covenant calculations, and the four who testified in person possessed very believeable demeanors." (Dec. at 41.) However, the testimony of two of those former Board members prove the opposite—there were discussions with the Board, prior to March 6, 2012, regarding the inclusion of employees in the covenant calculations. Although they may have tried to deny knowledge on direct examination, on cross-examination, two of the Board members testified that the Board did discuss this prior to 2012: Mr. Buntain and Mr. Rhinelander.

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

employees was discussed at the August 2011 Board meeting, although the Initial Decision is willfully blind to this evidence as well. (*See, e.g.,* Dec. at 35-36 (erroneously concluding that although it is "literally true" that Buono confirmed that it was discussed, this "sheds no light on the issue[,]" because Buono "did not remember 'the specifics of talking about it being used in covenant calculations'").) At the August 2011 meeting, the Board discussed the proposed response to the SEC comment letter, regarding ALC's statements about compliance with the Lease covenants. (*See, e.g.,* Ex. 1048 (Mary Zak Kowalczyk's handwritten notes from August 4, 2011 meeting).) The conclusion that "employee leasing" would come up for any purpose other than with respect to covenant calculations cannot be reconciled with any rational understanding of the evidence, regardless of Mr. Buono's failure to remember the exact details of the conversation.

Moreover, it is well-established by circumstantial evidence that Mr. Buntain's instruction for management to add a "cushion" into the covenant calculations by adding more employees occurred during the third quarter of 2009 Board meeting. (*See* Resp't Br. at 120-23 (citing evidence).) Even the Division's own witness, Mr. Rhinelander, testified that "[t]here was some reference, I believe, in the fall [2011] before [the March 6, 2012 CNG committee meeting], a comment made by Derek Buntain . . . there was a comment made by Derek, something to the effect of, well we should fill all the facilities up with employees." (Rhinelander, Tr. 2816-17.) This evidence is ignored in error by the Initial Decision as well, when it states "Rhinelander testified that he did not know that employees were included in the covenant calculations until the evening of March 6, 2012." (Dec. at 40.)

Second, the ALJ erroneously found that "[e]ven assuming that Bebo told the Board before 2012 that employees were included in the covenant calculations, that fact neither

exonerates her nor undermines a finding of scienter." (Dec. at 42.) But this finding is wholly inconsistent with the foundational premise of virtually the entire Initial Decision (which is also in error): that the mere inclusion of employees in the covenant calculations without a modification of the Lease (without regard to the scope of the program) was a breach of the Lease, rendering any statements made by ALC regarding its compliance with the Lease false. As such, the fact that the Board was aware of the inclusion of employees in the covenant calculations prior to 2012 *at all* is critically important and establishes both Ms. Bebo's reasonable belief that inclusion of employees in the covenant calculations was not a breach of the Lease and the fact that she was open with the Board about the basic facts of how ALC was proceeding—even if the Board did not know chapter and verse—is inconsistent with an intent to defraud investors.

Similarly, the ALJ's reasoning that this is an aggravating factor rather than a mitigating factor is similarly dubious. (Dec. at 41-42 (stating "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) Grant Thornton lacked complete knowledge of the covenant calculation process.").) The ALJ's reasoning on this point demonstrates how he drew every inference against Ms. Bebo, even when those inferences were inconsistent and contradictory. The Initial Decision faults Ms. Bebo for bringing the issue of employee leasing to the Board in the first place (Dec. at 23), but at the same time says she did not provide enough details (Dec. at 42), and then faults her again for providing all of the occupancy data to the Board (Dec. at 43-44), concluding that all of these actions support a finding of scienter (Dec. at 44). The Initial Decision goes so far as to suggest that Ms. Bebo should have assumed that the Board would not "even read the entire packet of meeting

materials." (Dec. at 44.) The Initial Decision incentivizes management at public companies to inundate board members with minutiae or to restrict information provided to the Board. But, of course, under the Initial Decision's inconsistent reasoning, it is a no-win situation for Ms. Bebo: the Initial Decision dismisses the detailed information as being "buried" in the Board packages to support an inference of scienter (*see* Dec. at 43-44), but also finds that her failure to tell the Board every single detail also supports an inference of scienter. Ms. Bebo takes exception to all such findings and inferences.

Third, the ALJ concluded in error that "these inconsistencies [in numbers reported to Ventas] were not presented to the other non-ALC constituencies to which Bebo was accountable — specifically, Grant Thornton, Ventas, and ALC's shareholders." (Dec. at 44.) The Initial Decision erroneously describes the two sets of occupancy numbers provided to the Board as "inconsistencies" and suggests that failing to share those numbers with Grant Thornton, Ventas, and ALC's shareholders supports a finding a scienter. (*See* Dec. at 43-44.) But the different numbers were not "inconsistencies." One set was based on a clarified definition of occupancy, including units paid for by ALC, as agreed to by Ventas for purposes of the covenant calculations. The other set did not include those units. (*See, e.g.*, Ex. 81 (November 2009 Board package), Ex. 86 (August 2011 Board package); Buono, Tr. 2755.) Because the former set of numbers was the only set needed to evaluate covenant compliance, there was no need to share the latter numbers with Ventas or ALC's shareholders. And Grant Thornton did have access to that information, as they vetted the calculations reconciling the occupancy numbers with the clarified definition of occupancy.[21] (*See, e.g.*, Ex. 3315 (email from Daniel Grochowski to Stephanie Liebl enclosing covenant calculation speadsheets); Robinson, Tr. 3398.)

[21] Placing Ventas— a contractual counterparty and business competitor—in a category with ALC's shareholders to whom Ms. Bebo owed fiduciary duties represents a fundamental misunderstanding of the case.

Fourth, the ALJ erroneously concluded that "ALC's Board had approved the more optimistic response in August 2011 — without being told that management had drafted a pessimistic response." (Dec. at 15.) The very testimony from Mr. Buono that the Initial Decision cites (Tr. 2384) clearly establishes that the fact that management prepared an alternative response was discussed with the Board and the general nature of the alternative response was also discussed.

Fifth, the ALJ failed to consider the uncontradicted testimony of two Grant Thornton auditors who unambiguously testified that they discussed ALC's inclusion of employees in the covenant calculations with ALC's Board on multiple occasions when he ultimately concluded that "the Board as a whole did not know prior to March 6, 2012, that employees were included in the covenant calculation process." (Dec. at 42.) He found the Grant Thornton witnesses honest and credible in reaching conclusions unfavorable to Ms. Bebo, but then dismissed their testimony entirely when it did not suit the Division's case. But the Initial Decision disregards the testimony of engagement partners Jeff Robinson and Melissa Koeppel simply because there is not a specific document fully memorializing the details of each of their presentations to the Board or conversations with individual Board members, *e.g.*, Malen Ng, the Chair of the Audit Committee. (Dec. at 43.) There is no basis to reject their sworn testimony, nor does the Initial Decision offer one. Instead, it ignores corroborating testimony, including from witnesses other than Ms. Bebo. (*See, e.g.*, Buono, Tr. 2417-18 (during a call he had with Malen Ng, she "mentioned that Mr. Robinson had discussed employee leasing, that we were renting rooms to employees, and that was part of how the covenants were being made").)

Moreover, other testimony from Division witnesses established that the Board was informed by Ms. Bebo, prior to March 6, 2012, that employees were included in the covenant

calculation process, which even the Initial Decision acknowledges. (*See* Dec. at 42.) Mr. Buono confirmed that it was discussed in a full board meeting prior to 2012. (*See, e.g.,* Buono, Tr. 4629-631.) Ms. Koeppel even testified that Mr. Buono confirmed for her that the Board was aware of the practice. (Koeppel, Tr. 3319.) Yet, the Initial Decision makes no mention of any of this evidence. The Initial Decision also ignores the evidence (including the statements made by Mr. Buono to the Division during his proffer sessions) establishing that Ms. Bebo and Mr. Buono met with Melvin Rhinelander (Ms. Bebo's main Board contact) at the outset of the employee leasing program to get approval, and he, in turn, discussed the matter with other members of the Board. (*See* Buono, Tr. 2393-96.)

Sixth, in attempting to dismiss evidence that the Board was well aware of the employee leasing program, the Initial Decision misconstrues the evidence related to the August 2011 Audit Committee meeting in finding that "[a]t the August 4, 2011, audit committee meeting, Buono twice mentioned that 'all covenants under the CaraVita lease with Ventas were met,' and the committee addressed the July 21, 2011, letter from the Division of Corporation Finance, but the covenants were otherwise not discussed." (Dec. at 43.) Covenant compliance was a main focus of the response to the comment letter, and even Mr. Buntain testified that management explained that they were comfortable with ALC's ability to comply with the covenants because of the employee leasing program, as discussed above. (Buntain, Tr. 1452-55; *see also* Exs. 1048, 295, p. 5.) That the specific details of those discussions were not laid out in the minutes does not render Mr. Buntain's (and Mr. Buono's) testimony on the topic meaningless, nor does the Initial Decision provide a rational basis for ignoring it.

Seventh, the ALJ found that "Board-related and sale-related events post-dating the March 6, 2012, CNG committee meeting have little bearing on scienter." (Dec. at 41; *see also* Dec. at

39 ("Nor does the Board's 2012 handling of the Lease's breach, reporting of the breach of the Lease's covenants in periodic filings, or decision not to file a restatement of ALC's financial statements have any relevance, because Bebo had little to do with them.").) This was erroneous in two ways: (a) the ALJ concluded that matters of how ALC accounted for the purchase of the Ventas facilities was critically important, which also occurred long after Ms. Bebo was gone from ALC; and (b) those facts are, on their face, very relevant. The Board's post-March 6, 2012 and post-May 3, 2012 actions are relevant, because they corroborate Ms. Bebo's position that the Board was aware of, and approved, the employee leasing program as well as the statements made and positions taken related to Ventas Lease compliance. Indeed, it is telling that although one Board member did not believe that the February 2009 email was sufficient to support the employee leasing program, others did as is evidenced by their actions.[22] (*See, e.g.,* Buono, Tr. 2427-29.)

There is no reasoned basis to find facts pertaining to matters long after Ms. Bebo left ALC and in which she did not participate highly relevant and reject ALC's and the Board's actions as being irrelevant when those actions demonstrate that ALC's affirmation of compliance with the Ventas Lease was at least reasonable. The only apparent basis was that the former supports the outcome desired by the ALJ.

F. The ALJ erred in his factual findings and conclusions related to the knowledge and actions of Grant Thornton.

Because the evidence establishing that Grant Thornton was comfortable with the fact that ALC was including employees in the covenant calculations—as well as ALC's reliance on the

[22] Further, the Initial Decision suggests that Ms. Bebo was terminated for reasons related to the Ventas occupancy covenants. Not so. (Dec. at 41 (after asserting, in error, that Ms. Bebo mislead the CNG Committee on March 6, 2012, states "[m]ore importantly, the Board essentially took matters out of Bebo's hands ... and ultimately terminated her on May 29, 2012...").) This is especially apparent given the fact that Mr. Buono was not terminated, as acknowledge by the Initial Decision, but instead given raises and bonuses, despite his involvement in all matters related to covenant compliance. (Buono, Tr. 2782-83; Roadman, Tr. 2620.)

February 2009 email—undermines a finding of scienter, the Initial Decision focuses on the details of the employee leasing program it asserts Grant Thornton did not know (despite concluding that the inclusion of employees alone was the problem). But Ms. Bebo was not the main point of contact with Grant Thornton, and as the Initial Decision even acknowledges, she had very few conversations with them. As with its findings related to the Board, the Initial Decision's findings with regard to Grant Thornton are inconsistent, with no rational explanation. (*See, e.g.,* Dec. at 35 (finding Grant Thornton witnesses credible); Dec. at 43 (failing to give any weight to Ms. Koeppel's and Mr. Robinson's testimony that they each discussed inclusion of employees in the covenant calculations with the Audit Committee, on multiple occasions, in the presence of the full Board).) Contrary to the Initial Decision's findings, Ms. Bebo not only did not mislead Grant Thornton about the covenant calculation process (*see, e.g.,* Dec. at 34), but Grant Thornton, with all of the information about the process available to it, signed off on the 2011 audit in 2012.

The Initial Decision errs in concluding otherwise, and Respondent takes exception to all such findings (*see* Dec. at 33-36), including, but not limited to, the following:

1. The basis for Grant Thornton's knowledge.

The Initial Decision erroneously finds that Ms. Bebo was the source of Grant Thornton's—and specifically Ms. Koeppel's—understanding of the employee leasing program: "[Ms. Koeppel's] understanding was generally based on discussions with Bebo." (Dec. at 16.) In fact, Ms. Koeppel had discussions with not only Ms. Bebo, but Mr. Buono and Mr. Hokeness as well. (*See, e.g.,* Koeppel, Tr. 3315-16, 3327.) But because three members of management shared the same general understanding with Grant Thornton, and shifting the focus off of Ms. Bebo's alleged attempts to single-handedly mislead Grant Thornton undermines the Initial Decision's finding of scienter, the evidence is ignored or minimized. (*See* Dec. at 16.) And in a

separate section, the Initial Decision states that "Koeppel's understanding was based at least in part on discussions with Bebo" (Dec. at 34); yet another inconsistency that undermines the Initial Decision's "findings."

2. Grant Thornton's understanding of the form of the agreement.

Similarly, the Initial Decision misconstrues Grant Thornton's understanding of the form of the agreement—suggesting that Ms. Bebo misled Ms. Koeppel about that as well: "According to Koeppel, Bebo told her that there was 'a written agreement between the parties,' which was 'much more important ... than simply a documentation of a conversation." (Dec. at 34.) When asked whether she ever had an understanding that a formal modification of the Lease had taken place, Ms. Koeppel testified "[n]ot in the traditional sense that there was a written amendment to the lease, but that the written communication between the two parties provided, in [her] mind, clarification of the covenant calculation." (Koeppel, Tr. 3317.) The agreement between the parties was a clarification of the Lease, not simply documentation of a conversation, despite the Initial Decision's attempts to imply otherwise. And Ms. Koeppel did not testify that Ms. Bebo told her that a written agreement was much more important than simply documentation of a conversation. (Koeppel, Tr. 3328 ("Again, you know, audit evidence -- much more important ...").)

3. Grant Thornton's scope of understanding.

To undermine the testimony supporting Ms. Bebo's defense provided by the Grant Thornton witnesses, despite finding them credible, the Initial Decision erroneously casts testimony provided Mr. Robinson as non-responsive: "Bebo argues that Grant Thornton did not find 'troublesome' the fact that ALC's employee lists included the same employees at multiple locations for the same quarter. Not so; in fact, Robinson was notably non-responsive when asked about this." (Dec. at 36.) This is false. In the testimony cited by the Initial Decision, Mr.

Robinson plainly acknowledged that someone could be listed for multiple properties during the same time period because an individual might stay at multiple properties and may need a room available at multiple properties. (Robinson, Tr. 3404 ("Well, I would have believed at the point in time that an individual might spend time at various of the locations because of the geographical proximity these locations had to each other, and that they may have needed to have rooms available to them at various locations.").) Grant Thornton did not believe that an employee listed for any given quarter actually stayed that entire time period, as Mr. Robinson's testimony makes clear. Grant Thornton knew that the lists did not represent lists of actual days and stays.

4. The alleged false representations to Grant Thornton.

The Initial Decision makes a number of other findings erroneously concluding that Ms. Bebo was either misleading or making false representations to Grant Thornton. For example, concluding (erroneously) that the Lease was breached, and assuming noncompliance would have a material effect on ALC's financial statements, the Initial Decision erroneously concludes that "Ms. Bebo repeatedly made false representations to Grant Thornton in connection with financial statement audits and reviews." (Dec. at 34.)

Because the Lease was not breached and Ms. Bebo reasonably believed ALC was in compliance, not to mention the fact that Grant Thornton itself did not believe that the covenants were violated, or at the very least, believed that any violation would not have had a material effect on ALC, the Initial Decision errs in concluding that Respondent repeatedly made false statements to Grant Thornton. (*See, e.g.,* Trouba, Tr. 3567-68 (occupancy and coverage ratio covenants not high risk; none of clients have had lender take property); 3569 (potential remedies and disclosure of same in 10-K did not change view on risk; "it would be fairly typical for a company to disclose whatever remedies might be out there"); 3574 ("My experience is that the

owner of the property typically does not want to kick out or take over the property. It's in their, typically, their best interest to as long as the company's paying, the tendency is to work it out"); Ex. 3322, p. 1 (internal Grant Thornton email correspondence; "Please note these are merely operating leases, so not a huge impact as the risk of Caravita [sic] moving ALC out as an operating entity appears unlikely."); *see also* Robinson, Tr. 3499-500 ("Q ... If you learned that there was actually no such agreement between ALC and Ventas regarding the inclusion of employees in the covenant calculations, would it still be appropriate to do so? ... [A] That's a difficult question to answer because of the lack of definition of occupancy within the lease agreement.").)

The Initial Decision broadly concludes that "Bebo misled Grant Thornton about ALC's covenant calculation process." (Dec. at 34.) But the ALJ does not point to any credible evidence that Ms. Bebo provided false information to Grant Thornton. At best, she had high level conversations with Ms. Koeppel and Mr. Robinson, without a significant amount of detail. But Ms. Bebo cannot be held responsible for any subsequent miscommunications between others at ALC and Grant Thornton, and she never told anyone to withhold information from or make false statements to Grant Thornton.

In fact, Grant Thornton had a team of five to eight people working on the ALC engagement. (Koeppel, Tr. 3308; Robinson, Tr. 3382-83.) That is, multiple people asked for or evaluated the information ALC was providing to Grant Thornton. Every quarter, ALC provided Grant Thornton a spreadsheet detailing the CaraVita covenant calculations. (*See, e.g.*, Ex. 3315 (email from Daniel Grochowski to Stephanie Liebl enclosing covenant calculation speadsheets); Robinson, Tr. 3398.) When Grant Thornton asked for documentation of the agreement with Ventas, ALC provided it, and Grant Thornton was satisfied with it. (Exs. 1379, 1379A.) When

Grant Thornton asked for a list of names for the employee additions to the occupancy calculations, ALC provided lists. (Koeppel, Tr. 3341-42.) After Grant Thornton learned that Ventas was not receiving the employee-specific information, they asked for documentation of the agreement with Ventas, again, and were satisfied with the sufficiency of the Solari email, again. (Robinson, Tr. 3418-20; Exs. 1824, 1824A (internal Grant Thornton email, dated March 5, 2012, attaching Solari email: "FYI - for ALC file to support Caravita lease using employees. We'll want to roll this from year to year."); Robinson, Tr. 3421-22 ("We concurred that this documentation, in addition to the fact that the company had been continuing to provide -- or include employees in their calculations for a number -- for a number of years, and that we had been told by management that this arrangement existed for a number of years, that there was adequate -- that that was adequate documentation.").) And neither ALC nor Mr. Bebo ever refused to provide information or answer questions about the employee leasing program. (Koeppel, Tr. 3360-61.) To the extent the Initial Decision suggests or finds otherwise, neither Mr. Robinson nor Ms. Koeppel testified that Ms. Bebo misled them or Grant Thornton. (*See, e.g.*, Dec. at 35 ("I therefore credit their testimony on this subject, and conclude that Bebo misled both Koeppel and Robinson, and more generally Grant Thornton, by mischaracterizing ALC's covenant calculation process.").) Ms. Bebo takes exception to all such findings or conclusions suggesting that she misled Grant Thornton.

Similarly, the Initial Decision errs in concluding that not only was Ms. Bebo misleading Grant Thornton, but that Grant Thornton "self-servingly" opined otherwise: "That Grant Thornton did not actually discover ALC's deception for three years, and then self-servingly opined that ALC had no material deficiencies in its 2011 (and subsequent) financial statements, does not change the fact that Bebo and ALC did, in fact, deceive Grant Thornton." (Dec. at 36.)

At the outset, although there was testimony about a miscommunication related to which documents and data were being shared with Ventas, Grant Thornton did not believe that either Ms. Bebo or ALC was deceiving them. (*See* Robinson, Tr. 3406-07.) There is no basis, and the Initial Decision does not cite any evidence, for the conclusion that Grant Thornton's sign off on the 2011 audit was simply self-serving or based on incomplete information. (*See* Dec. at 35, 36.) In fact, the evidence supports the equally strong, or stronger, opposite inference. That is, the Initial Decision found Ms. Koeppel and Mr. Robinson generally credible, and if they actually believed that ALC had been deceiving them, this would be the very time that Grant Thornton would want to blow the whistle on this issue (not sign off on it).

Ms. Bebo takes exception to all such findings or conclusions suggesting that she misled Grant Thornton.

G. The ALJ's erroneous findings regarding ALC's outside counsel, Quarles & Brady.

The Initial Decision treats the evidence inconsistently, depending on whether it helps or hurts Ms. Bebo's position, and this is again true for the evidence related to Ms. Bebo's communications with ALC's outside counsel, Quarles & Brady. For example, the Initial Decision accepts Mr. Buono's newfound understanding of the validity of the employee leasing program, but at the same time concludes that any evidence related to Quarles & Brady's reasonableness opinion is immaterial because it was issued after the alleged misconduct ceased. (*See, e.g.,* Dec. at 45.) Similarly, although the ALJ concludes that the mere inclusion of employees without a formal modification of the Lease is the relevant breach of the Lease rendering Ms. Bebo's and ALC's statements regarding compliance false, the Initial Decision faults Ms. Bebo for not providing additional details, when seeking (and receiving) a reasonableness opinion from Quarles & Brady, finding that it supports a finding of scienter.

(Dec. at 45.) At the time of that opinion, however, Quarles & Brady knew the basic material facts, including, among others, the number of units involved, the fact non-employees were included, and that units were paid for through intercompany transfers. (Resp't Br. at 149-50.)

The Initial Decision further ignores the Division's improper impeachment of Ms. Bebo, and instead uses it to support the conclusion that her testimony regarding her discussions with Quarles & Brady was incredible, finding the Division's cross-examination "especially powerful." (Dec. at 45.) The ALJ states that Ms. Bebo's testimony was "strikingly inconsistent" with some of her earlier investigative testimony, but ignores the context of her earlier testimony (and the questions she was asked) to reach that conclusion. She did not change her "story" from "one false account to another," but instead took issue with the Division using her answers to different questions to try to impeach her, and maintained that she was "stand[ing] by [her] testimony[.]" (Bebo, Tr. 2187.) In the testimony and alleged impeachment relied upon by the Initial Decision to draw its conclusion, the Division asked whether Ms. Bebo obtained legal advice from Quarles & Brady (or other attorneys) about the permissibility of employee leasing under the Lease, and her answer—that she did not obtain legal advice from Quarles & Brady prior to 2012—has remained consistent between her investigative testimony and her hearing testimony. The Initial Decision errs in using the absence of Quarles & Brady from Ms. Bebo's investigative testimony regarding whether she obtained a legal opinion to find that she changed her story, when she testified that she generally discussed employee leasing with Quarles & Brady in connection with whether ALC's Lease disclosure was proper (not whether the practice was permissible in the first place), after ALC received the SEC's comment letter. Ms. Bebo takes exception to all such findings regarding Ms. Bebo's credibility.

H. Erroneous findings regarding the relevance and materiality of Milbank's investigation and report, and order precluding Ms. Bebo from obtaining access to critical witness statements.

The Initial Decision's conclusions with respect to the Milbank investigation into the employee leasing program are yet another example of the inconsistency with which the ALJ treated the evidence in this case, in his efforts to reach his predetermined conclusions. Despite basing the Initial Decision's erroneous finding that Ms. Bebo did not *subjectively* believe that ALC had reached an agreement with Ventas on the double hearsay contained in an email that Ms. Bebo did not write or receive, the ALJ gives "no weight" to the evidence of the Milbank investigation and its *opposite* conclusion, on the basis that it is double hearsay. (Dec. at 47.) And despite acknowledging that Milbank's conclusions were based on the interviews of sixteen (16) people from ALC, as well as Mr. Solari (through counsel), in 2012, the Initial Decision asserts that the reliability of the investigation "is at best doubtful." (Dec. at 47.) The Initial Decision provides no explanation for this, other than the self-serving statement that Milbank was apparently biased and predisposed toward finding no impropriety, citing only *the ALJ's own statements* on the record as support. (Dec. at 47 (citing Tr. 667).) Further, the "self-refuting" conclusions cited by the Initial Decision are not self-refuting at all; both conclusions noted that Milbank was not able to conclude that ALC was not in compliance with the Lease. (Dec. at 47 ("Milbank 'was not able to conclude that [ALC] was not in compliance with the lease,' but did conclude ... that it could not disprove 'the assertion that some persons at Ventas approved the leasing arrangement.'").) Why Mr. Solari's inability to dispute the existence of an agreement in 2012 is "unenlightening," but his 2015 testimony that he "would not have agreed" is reliable enough for the Initial Decision to base its conclusion that no agreement existed is unfathomable. Respondent takes exception to all of the Initial Decision's findings related to the reliability, relevance, and materiality of the Milbank investigation. (*See* Dec. at 46-47.)

Further, the ALJ erred in precluding Respondent from either questioning the Milbank attorneys about the investigation or requiring them to produce their notes. Interestingly, the Initial Decision faults Ms. Bebo for not calling the Milbank investigating attorneys as witnesses, in noting that all of the evidence pertaining to the investigation was hearsay. (Dec. at 47.) The Initial Decision later acknowledges that they were unavailable to testify because "doing so would disclose attorney work product." (Dec. at 47.) But the ALJ's ruling that the investigation, its results, or Milbank's notes were protected from disclosure by any privilege or work product is also in error.

ALC, the holder of the attorney-client privilege relating to Milbank's withheld documents, expressly waived the privilege. Although Milbank argued that ALC's waiver was limited to certain communications between counsel and ALC executives, and that documents within the scope of that waiver would have been subject to a broader non-waiver agreement as to parties other than the SEC, this is not the case. (*See* Division of Enforcement's Response to the Court's Order Regarding Subpoenas to Produce, at 2 (agreeing that "ALC generally waives the attorney-client privilege relating to the subject matter of these proceedings.").)

That the internal investigation was not conducted because of potential litigation with the SEC is further borne out by the declaration of Michael Hirschfield filed by Milbank. In his declaration, Mr. Hirschfield describes Milbank's representation of ALC for the internal investigation as distinct from its representation of ALC during the Division's investigation:

> At all relevant times, I was one of the partners leading the Milbank teams performing various engagements on behalf of Assisted Living Concepts, Inc. ("ALC" or the "Company") and its directors, including, among other matters, an internal investigation (the "Internal Investigation") and a separate investigation by staff members of the Securities and Exchange Commission ("SEC") relating to events that are now at issue in this administrative proceeding.

(Hirschfield Declaration at 1.)

But even if Milbank could make the requisite showing that it produced the documents it claims are work product in anticipation of litigation, Ms. Bebo has shown that she has a substantial need for the information and cannot obtain it from another source. In other words, she has established that any work product protection that applies to the documents at issue is overcome by her particularized need, and the documents should be produced. That is, Ms. Bebo has no other means to access the statements made and the positions taken by the witnesses before they were approached by the Division, which is relevant to their credibility and the determination of the underlying facts of this case.

I. Erroneous conclusions of fact about Ms. Bebo's veracity.

Respondent takes exception to the Initial Decision's factual findings that weigh against Respondent's credibility. (*See, e.g.*, Dec. at 25–26.) For example, the ALJ erroneously concluded that Respondent was unnecessarily evasive, discursive, and longwinded, and thus incredible. (Dec. at 26.) As seen below, the Division's questioning tactics explain why Respondent may have appeared to "split hairs" in her testimony or appeared longwinded. Further, Respondent felt compelled to give those answers because the Division was repeatedly trying to take her testimony out of context, give false impressions, present incomplete pictures of the evidence, or misconstrue the meaning of certain terms. Ms. Bebo should not have had to answer in such a manner, but she had no other option in light of the Division's tactics. Finally, it is telling that the Initial Decision failed to account for the significant amount of testimony that Ms. Bebo gave in this case and the fact that, when viewed in its totality, her testimony was remarkably consistent.

Respondent also takes exception to the Initial Decision's findings that Respondent was not credible and the ultimate conclusion that Respondent was impeached over twenty-five times. (Dec. at 25.) Respondent's Reply to the Division of Enforcement's Post-Hearing Brief, including

its Appendix, proved that Ms. Bebo was impeached far less than the Division and the Initial Decision claim. Although the Initial Decision credited some of Respondent's arguments that the Division's impeachment was improper and reduced the overall count of the Division's purported impeachment from over thirty-five instances to over twenty-five instances, the ALJ erred by finding that Ms. Bebo was still impeached over twenty-five times. (*See* Dec. at 25.) Also, importantly, the ALJ erred in ignoring examples of the Division's most egregious improper impeachment that were included in the body of Respondent's brief, rather than in the Appendix. For example, the Initial Decision did not address Respondent's argument that the following "impeachment" included in Respondent's brief were improper:

Division's Purported Impeachment - First Example:

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

	Answer: I don't believe so." You were asked that question, and you gave that answer under oath?
A	I did, and I would like to explain that. I believe Mr. Tandy's question that starts back with my recollecting around 20 to 50 calls -- or pardon me, 20 to 50 communications with Mr. Rhinelander is to exclude board meetings.

(Bebo, Tr. 1984-86.)

Why the Division's Impeachment was Improper - First Example

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

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

(Bebo, Tr. 1985-86.)

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

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

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

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

Ms. Bebo's hearing testimony about Mr. Rhinelander being at Board meetings where employee leasing was discussed was consistent with her prior investigative testimony, because the investigative testimony the Division cites to impeach her was given by Ms. Bebo *with the explicit instruction to exclude Board meetings.* If anything, Ms. Bebo's credibility is bolstered by the Division's attempted impeachment, because her hearing testimony was accurate and she was able to point out the Division's error simultaneously.

Division's Purported Impeachment - Second Example:

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

(Bebo, Tr. 2160-2161.)

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

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

Division's Purported Impeachment - Third Example:

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

	Answer: We all agreed. Question: Okay. Answer: They all agreed that -- Question: And you don't recall when that meeting was? Answer: I don't. It's -- it's after the -- it's after the discussion with Alan, you know, and I can sort of place it that way. I'm just not positive if it's '09 or '10. Question: And then there was a subsequent discussion of the employee stays in connection with the CaraVita covenant calculations at the board meeting? Answer: Not until much later, like 2012. Question: Until March of 2012? Answer: Actually, not -- not -- not there, not that I was a part of anyway." You were asked those questions, and you gave those answers under oath?

(Bebo, Tr. 2040-42.)

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

The Division's impeachment was improper because it ignored a clarification that Ms. Bebo made in the same line of questioning. On the very same page of prior sworn testimony that the Division cited to impeach her, Ms. Bebo also stated "[o]h, wait. I apologize. Just, I guess, I just want to clarify that we did talk about the, we did talk about the Grant Thornton people yesterday doing some presentations there. So, I just don't want to lose sight of that." (Ex. 497, p. 202.) A page of investigative testimony later, Ms. Bebo clarified that she omitted those presentations from her answer. (Ex. 497, p. 203.) Then to be extra clear, the Division stated "but you would have included, those should be included for purposes of your answer because those were discussions of the employee stays at the, in connection with the CaraVita Covenant calculations?" and Ms. Bebo replied "Yes." (Ex. 497, p. 203.)

Thus, the Division did not impeach Ms. Bebo, because her hearing testimony was consistent with her investigative testimony. Instead, the Division overlooked investigative

testimony—which was consistent with Ms. Bebo's hearing testimony—surrounding the same investigative testimony it cited to "impeach" her.

Ms. Bebo's hearing testimony, despite being consistent with the portion of testimony discussed above, was also consistent with other parts of her investigative testimony. (*See* Ex. 501, p. 1035 (discussing two Board/Audit committee meetings where Mr. Robinson was present and where employee leasing was discussed prior to March 2012).)

Division's Purported Impeachment - Fourth Example:

Q	Okay. So let's put the board members off to the side, okay? Aside from the board members prior to March 2012, you never told an attorney that ALC was using non-employees in the Ventas covenant calculations.
A	That wouldn't be correct from the perspective of Mr. Fonstad is aware that my mom and dad -- Mr. Fonstad and I had a discussion about my mom and dad going on the list, so he would be aware that my dad's not an employee.
Q	Okay. Page 5 -- or Exhibit 502, please. Page 1134, line 5 through 8. I can represent this is the last time you testified before the division, okay? And you were asked, "Question: So you cannot recall telling -- you cannot recall telling an attorney that ALC had been using non-employees to meet the covenant calculations, correct? Answer: Correct, I cannot recall a time." You were asked that question and gave that answer under oath?

(Bebo, Tr. 2194.)

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

The Division's claim in its Post-Hearing Brief that this was impeachment completely takes Ms. Bebo's answer out of context. The Division's citation fails to account for Ms. Bebo's testimony on the prior page which states:

Q	BY MR. HANAUER: Back on the record at 11:07. So, going back to my last question, did you

	ever tell an attorney that in practice, that ALC had been using people who were not employees to meet the covenant calculations?
A	So, starting with Eric?
Q	Start, if he was the first one. And again, I don't want you to get caught up in, was it permissible. I want, it's the, ALC's begun the practice, we're counting people who aren't employees, did you ever tell an attorney that?
A	*With regard to Mr. Fonstad, it's, there's a discussion right at the time of the practice beginning because I, because I asked Mr. Fonstad about putting my parents on the list. So, in as much as, I'm not sure how much you want to characterize my parents because we've talked about my mom having been an employee, a W2 employee. My dad is not, that's why my dad was not a W2 employee, do you want me talk about that situation.*
Q	Okay, so, well, I think we'll try and, *let's put that one off to the side.*
A	Okay. So. And if I could just clarify, your question excludes the idea that, that I explained that people don't have to be employees, but your question is specifically that I'm telling you an attorney that I have non-employees on the list, is that correct?
Q	Correct.
A	Without the benefit of my notes, I, I can't recall at this time when else I specifically say that.

(Ex. 502, pp. 1133-34 (emphasis added).).

Thus, Ms. Bebo's hearing testimony was consistent with her prior investigative testimony. The only reason her hearing testimony did not match the Division's cited investigative testimony is because they told her *to put that one off to the side* when she was previously testifying. This was not impeachment; rather, it was a blatant disregard for the rule of completeness and duty of candor to the court. Also, Ms. Bebo further reiterated her conversation about her parents with Mr. Fonstad later (on pages 1134-1135), when she discussed telling Mr. Fonstad about including her parents on the lists. (*See* Ex. 502, p. 1134-35.)

Ms. Bebo also takes exception to the ALJ's repeated selection of adverse inferences among equally plausible inferences with respect to Ms. Bebo's veracity. (*See, e.g.*, Dec. at 9, 38, 39-41, 54.) For example, the ALJ found Ms. Bebo prevented Ventas from visiting the facilities during mealtimes. (Dec. at 54.) This is based solely on Mr. Buono's revisionist testimony that is

flatly contradicted by contemporaneous documents. (*See* Ex. 1389, 1505.) And the ALJ inferred that Ms. Bebo was acting with fraudulent intent when she told an investment banker helping to sell ALC not to provide certain data to Ventas (Dec. at 39-40), but disregarded the fact that Ms. Bebo specifically deferred to ALC's Vice Chairman, Mel Rhinelander, for what would be provided to potential acquirors (Ex. 3714; Ex. 292; Tr. 2905, 2911, 2914.) And most troublingly, the ALJ found that Ms. Bebo deliberately attempted to confuse matters by use of the term "employee leasing" during the investigation, without any citation or evidence to support this claim. (Dec. at 54.) Indeed, as set forth below, the record establishes that the Division's own lawyers came up with the phrase "employee leasing" to describe the use of employees in the covenant calculations. (Ex. 500 (Bebo Investigative Test., Apr. 8, 2014, p. 846.)

II. The ALJ's Erroneous Conclusions Of Law In The Initial Decision Regarding The Disclosure Fraud Violations.

The ALJ committed numerous errors of law in the Initial Decision. Among other errors, the Initial Decision applied an incorrect burden of proof and legal standard to the opinion statements alleged to be false or misleading in the OIP, and misapplied the Supreme Court's decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015). The Initial Decision erroneously concluded that the misstatements alleged in the OIP were material. This decision was based on several errors of law, including among others, the conclusions that (a) a statement is automatically material for Section 10(b) purposes if it is contained in a public filing; (b) relying on an accounting standard for the standard of materiality where there was no accounting error or misstatement alleged; (c) improperly striking Ms. Bebo's expert reports and failing to reject the Division's expert opinions; (d) treating this case as an omission case after previously concluding the case involved only misrepresentations; (e) determining that the May 4 disclosure of an internal investigation could

constitute a "corrective disclosure" under the law. Also, the ALJ incorrectly concluded that Ms. Bebo could be found liable for "scheme" liability under Rule 10b-5(a) and (c) as well as for making material misstatements pursuant to Rule 10b-5(b), or could be liable without any misstatement to investors being proven. He then compounded that error by punishing Ms. Bebo for multiple violations of the same Rule: Rule 10b-5. Finally, the ALJ erred when he concluded that the Division had proven *scienter*, particularly the highest level of *scienter* necessary to establish fraud claims based on opinions and forward-looking statements.

A. The ALJ shifted the burden of proof to Ms. Bebo

The Division had the burden of proving all of the violations alleged in the OIP by a preponderance of the evidence. (Dec. at 2 citing *Steadman v. SEC*, 450 U.S. 91, 102 (1981).) Although the Initial Decision acknowledges this standard, this was not the standard that the ALJ applied in assessing disputed facts and issues. Rather, as described herein, where there were equally plausible inferences that could be drawn from documents or testimony, the ALJ almost invariably selected the inference adverse to Ms. Bebo. If the evidence on a particular issue is of equal weight or if equally strong inferences may be drawn from documents or testimony, the Division has failed to meet its burden of proof. *See* 4 Modern Fed. Jury Instructions-Civil, § 73.01 (Matthew Bender 2010) (stating that the party with the burden has failed to meet it if the evidence is "in balance or equally probable").

In addition, the ALJ even drew inferences wholly unwarranted by the evidence. For example, the ALJ speculated that Ventas alleged in its lawsuit that ALC breached the financial covenants when in it included the following allegation in an amended complaint:

> 53. Additionally, the ALC Entities have failed to comply with their reporting obligations under Section 25 of the MLA.

(Dec. at 38 (citing Ex. 1194, ¶ 53).) It clearly does not make any allegation on its face with respect to any breach of the financial covenants contained in an entirely different section of the Lease (Section 8.2.5). And there was no testimony or other evidence to indicate that this related in any way to any allegations of financial covenant violations. Indeed, the Division itself acknowledged in its pre-hearing brief that the amended complaint contained no allegations related to ALC's inclusion of employees in the covenant calculations. (Division's Pre-Hearing Br. at 18 n.5.)[23] The undisputed fact is that there is not a single mention of the financial covenants in any of the pleadings from the Ventas lawsuit against ALC contained in the record.

Similarly, the ALJ concluded that a corrective disclosure occurred in a Form 8-K filed with the Commission on May 4, 2012. That disclosure contained two pieces of information. First, it disclosed that Ventas had filed a lawsuit against ALC alleging a default under the Lease based on State actions to revoke operating licenses for three of the Ventas facilities. Second, it disclosed that ALC's Board had decided "to investigate possible irregularities in connection with the Company's lease with Ventas." (Ex. 2075 (May 4, 2012 Form 8-K).) The ALJ found that public investors could have somehow concluded that the reference to "irregularities" pertained to financial covenant violations. (Dec. at 61-62.) However, there is no evidence to support this conclusion, and the only evidence presented at the hearing was that every analyst and press report tied the investigation to the allegations of poor patient care and safety contained in the lawsuit. (Tr. 3645-47.)

[23] The Division wrote: "Rather than referencing the May 9 letter alleging fraud against ALC, paragraph 53 of the OIP incorrectly alleges that, after receiving ALC's request for the release, Ventas moved to amend its complaint against ALC to include allegations of fraud relating to ALC's inclusion of employees in the covenant calculations. The Division apologizes for this mistake."

Even Ventas' motion for expedited discovery in the lawsuit established that Ventas believed that the "irregularities" were tied to the resident care issues alleged in the lawsuit:

> To this day, ALC has failed to provide Ventas with any details regarding the scope or subject matter of this investigation or the irregularities concerning the Ventas Lease. Because of the increasing reports of ALC's mismanagement of the facilities, *Ventas fears that the "irregularities" are related to deficiencies in Defendants' operation of the assisted living and/or independent care facilities and the care for the residents therein.*

(Ex. 357, p. 3 (emphasis added).) These are just a few examples that reveal the improper burden-shifting that occurred more generally in this case.

B. The ALJ misapplied the *Omnicare* standard for proving the falsity of opinion statements.

The ALJ's burden shifting was particularly inappropriate in this case, which involves the alleged falsity of ALC's opinion that it was in compliance with the Ventas Lease. Section 10(b) prohibits the making of an untrue or misleading statement of material *fact*. Statements of opinion - such as the statement that asserted ALC's compliance with the Lease covenants - are only actionable under limited circumstances. *See Omnicare,* 135 S. Ct. at 1327; *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095-96 (1991); *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 111 (2d Cir. 2011). Because a claim based on an opinion turning out to be incorrect would be impermissibly based on hindsight, the Division was required to prove both that (1) the opinion stated was unreasonable; and (2) the speaker of the opinion knew that the opinion was incorrect or did not believe it was accurate herself. *See id.*

In the Supreme Court's recent *Omnicare* decision, the Court considered whether certain alleged misstatements of opinion were false under Section 11 of the Securities Act - a strict liability statute. The Court held that statements of opinion can be false only if the speaker did not hold the belief she professed. *Omnicare*, 135 S. Ct. at 1326-27. The Court reasoned that a

sincerely held statement of opinion cannot be an untrue statement of material fact, *even if the opinion ultimately proves to be incorrect*:

> [A]s we have shown, a sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless of whether an investor [or the Division] can ultimately prove the belief wrong. That clause, limited as it is to factual statements, does not allow investors [or the Division] to second-guess inherently subjective and uncertain assessments. In other words, the provision is not ... an invitation to Monday morning quarterback an issuer's opinions.

Id. at 1327; *see also Nakkhumpun v. Taylor*, 782 F.3d 1142, 1159 (10th Cir. 2015) (holding that, under *Omnicare*, "[a]n opinion is considered false if the speaker does not actually or reasonably hold that opinion" and dismissing a complaint because no facts were alleged "that would cast doubt on the sincerity or reasonableness of [defendant's] statement of his opinion").

The ALJ's Initial Decision, however, failed to view Ms. Bebo and ALC's compliance judgments through the lens of reasonableness, and instead evaluated, with the benefit of hindsight, whether those judgments were correct. Thus, the Initial Decision found liability under circumstances where the Supreme Court in *Omnicare* held was forbidden—second-guessing ALC's and Ms. Bebo's assessment that the telephone call and subsequent e-mail with Mr. Solari was sufficient basis to conclude that they were in compliance with the financial covenants when ALC rented apartments at the leased facilities for use by employees and others.

The appropriate standard is not whether ALC was in fact in compliance with the Lease, but whether there was any reasonable basis to assert compliance with the Lease. Put another way, the lens through which the case should have been viewed was not whether ALC and Ms. Bebo were correct in their assertion of compliance, but whether they were reasonable. The ALJ was not charged with evaluating, in the first instance, whether ALC breached the Lease or not. Rather, the ALJ should have evaluated and assessed whether any reasonable jury could have found in ALC's favor in a hypothetical dispute between ALC and Ventas. In assuming he was

deciding simply whether, in the first instance, there was an agreement or not, the ALJ erred. Viewing the facts through the lens of reasonableness would necessarily change the inferences that must be drawn with respect to the underlying facts.[24]

C. The ALJ erred in concluding that the "Compliance Statements" were not statements of opinion under *Omnicare* and its progeny.

The two challenged statements in ALC's Form 10-Qs and 10-Ks are statements of opinion and judgment. They are: (1) that ALC was in compliance with "certain operating and occupancy covenants" in the Lease as of the end of each time period covered by the particular filing; and (2) that ALC "believe[d]" there was no reasonably likely degree of risk of breach of the same (unstated) operating and occupancy covenants in the Lease "[b]ased upon current and reasonably foreseeable events and conditions."[25] (Dec. at 50-51.) The Initial Decision referred to the first set of challenged statements as the "Compliance Statements" and the second set of challenged statements as the "Belief Statements." (*Id.*)

The ALJ concluded that the Compliance Statements were not matters of opinion or judgment subject to the *Omnicare* standard. (Dec. at 51-52.) This was error.

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[24] The ALJ also erred in relying on an Eastern District of Wisconsin decision denying a motion to dismiss in the private securities litigation against ALC and Ms. Bebo. (Dec. at 57 citing *Pension Tr. Fund for Operating Eng'rs v. Assisted Living Concepts, Inc.*, 2013 WL 3154116 (E.D. Wis. June 21, 2013).) There is no mention at all about the use of rooms for employees to meet the covenant calculations. The only reference to occupancy reporting to Ventas is the allegation that "ALC allegedly would temporarily house residents for whom it lacked the capacity to treat and rent rooms to third parties in order to temporarily inflate their occupancy rate." *Pension Tr. Fund*, 2013 WL 3154116, at *3. And the court rejected the tactic of converting allegations of misrepresentations to Ventas into a claim that the same proves a misrepresentation to ALC shareholders: "In essence, the Pension Trust is attempting to argue that a misrepresentation to a third party [Ventas] constitutes a misrepresentation to shareholders. That position is simply untenable." *Id.* at *13. Finally, the Pension Trust Fund case did not address the appropriate standard for pleading and proving a Section 10(b) claim premised upon an opinion, perhaps because that issue was not raised, given the host of other allegations unrelated to assertions of lease compliance that were included in the case. Neither the Initial Decision nor the Division's post-hearing briefs identified any precedent finding securities fraud under the circumstances where the entire case is premised upon the sole allegation that a single statement affirming compliance with lease or debt covenants was false or misleading, particularly where the lease or debt agreement would have no impact on the ability of the company to continue operating. This case is unprecedented in that regard.

[25] This statement was added to ALC's periodic filings starting with the second quarter 2011 Form 10-Q.

As part of its analysis, the *Omnicare* Court first discussed what distinguishes between a statement of "fact" and a statement of "opinion." The Court stated that statements of fact are certain and objective while statements of opinion are uncertain and subjective, often (though not always) signaled by words like "I believe" or "I think." *Omnicare*, 135 S. Ct. at 1325. With respect to opinions, the Court quoted the following definition: "an opinion 'rest[s] on grounds insufficient for complete demonstration.'" *Id.* at 1325 (quoting 7 Oxford English Dictionary 151 (1933).)

In the months following the *Omnicare* decision, lower courts have applied its reasoning to various statements that are not preceded by the type of "I believe" signaling language referred to in the opinion. For example, the *Omnicare* standard governing opinions has been applied to judgments about the interpretation of clinical trial results. *In re Merck & Co., Inc. Sec., Derivative & "ERISA" Litig.*, Nos. 05-1151, 05-2367, 2015 WL 2250472, at *19-20 (D.N.J. May 13, 2015) (concluding the statement "that the cardioprotective effect of naproxen was the 'best interpretation of the data'" was an opinion to which *Omnicare* applied); *Corban v. Sarepta Therapeutics, Inc.*, 2015 WL 1505693, at *6 (D. Mass. Mar. 31, 2015) (holding "many of the challenged statements consist of interpretations of the company's data, which constitute non-actionable expressions of opinion" unless plaintiffs could meet the *Omnicare* standard); *see also MHC Mut. Conversion Fund, L.P. v. Sandler O'Neill & Partners, L.P.*, 761 F.3d 1109, 1120 (10th Cir. 2014) (stating "it's equally true that statements not preceded by the word 'opinion' can nevertheless represent opinions rather than facts").

In this case, the ALJ erred in concluding that ALC's statement that it was in compliance with the Lease covenants was not a statement of opinion. Legal compliance with a complex lease, containing numerous irrelevant and inapplicable provisions, and containing significant

ambiguity (as to occupancy) and discretion (as to coverage ratios) in how covenants are to be calculated is undeniably a "matter of judgment."[26] *See City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, __ F. Supp. 3d __, 2015 WL 5311196 at *10 (S.D.N.Y. Sept. 11, 2015) (statement of loan loss reserves constituted an opinion because it involved substantial judgment). An assertion of legal compliance cannot be definitively true or false at the time it is made except in the rare case in which a court has already definitively ruled on the legality of the issuer's actions. The ultimate accuracy of the stated belief hinges on future events and the decisions of counterparties, judges, juries, or regulators. Assessing legal compliance thus calls for an exercise of judgment about unknowable future events and falls within the ambit of *Omnicare.*

D. The Initial Decision contains multiple errors of law and fact with respect to the finding of materiality.

The Initial Decision's reasoning with respect to materiality relies on a host of incredible evidence and strained inferences. First, the ALJ reasons that a finding of materiality is supported by the simple fact that ALC filed the Lease as a material contract, included the challenged statements in its Commission filings, and also disclosed the worst case scenario of a default under the Lease. (Dec. at 57-58.) This is tantamount to saying that *any* disclosure is material because it is included in a periodic filing. This should be rejected for the circular reasoning that it is, as at least one other court considering a similar argument has determined. In *SEC v. Reyes*, 491 F. Supp. 2d 906 (N.D. Cal. 2007), the government argued that the mere fact of a misstatement of a company's expenses was material without regard to the nature or scope of the misstatement. The court rejected this type of reasoning as it would eliminate the materiality

[26] The Restatement (Second) of Torts § 538A (Am. Law Inst. 1977) defines a statement of opinion as a statement of "the belief of the maker, without certainty, as to the existence of a fact" or of "his judgment as to quality, value, authenticity, or other matters of judgment." (Emphasis added.)

requirement entirely:

> For its part, the SEC has suggested that investors punished Brocade's stock simply because the company's financial statements had been inaccurate, or in other words, because they believed Brocade's executives had lied. This observation may be true, too, but it is a woefully insufficient basis for finding that the misrepresentations are "material" as a matter of law. If a misrepresentation is deemed material simply because it is a misrepresentation, then the law's materiality requirement is altogether meaningless.

Id. at 912 n.6.[27]

Moreover, there was no evidence submitted with respect to ALC's basis for filing the Lease with the Commission in 2008. Rather, the only evidence was provided by Ms. Bebo's disclosure practices expert, Mr. Martin, who opined that based on his experience and knowledge of public company disclosure practices and customs, it would have been reasonable to determine that the Lease did not need to be filed as a material contract. As discussed below, Mr. Martin's expert opinion was improperly stricken and disregarded by the ALJ.

Second, the ALJ relies on Staff Accounting Bulletin (SAB) 99 as a proxy for the legal standard of materiality in this case. (Dec. at 56.) SAB 99 is Commission guidance for accountants in determining when financial statement errors could be material. Neither the Division in briefing nor the Initial Decision cites any authority to support the conclusion that SAB 99 should constitute the legal standard to be applied in any case, much less a case that does not even involve any allegations of accounting errors. SAB 99 sheds no light on materiality in these circumstances.

Similarly, the ALJ's reliance on the Division's audit expert John Barron was erroneous. For the reasons stated in Ms. Bebo's Post-Hearing Brief, it was established on cross-examination

[27] The ALJ's conclusion that materiality is supported because "integrity of management is [always] important to the reasonable investor" (Dec. at 63), should be rejected as erroneous for the same reason: it essentially eliminates the materiality standard entirely.

that Mr. Barron's opinions were unreliable and did not support any finding of materiality. (Resp't Br. at 163-67.)

The principal reason that it is unreliable is because it relies on the false assumption that every event of default would necessarily result in the imposition of the worst-case scenario of acceleration of all future rent and termination of the Lease. The ALJ rejected the contention that Mr. Barron's opinion contained such an assumption (Dec. at 58-59), but it is clearly stated in his expert report: "It is my understanding that there are requirements in the law for persons who have suffered damages to take reasonable actions to mitigate the loss suffered. It is not possible for me to take such, or other, potential outcomes into account in reaching a conclusion with respect to the materiality of potential losses in accordance with the terms of the Ventas lease." (Ex. 377 at 21.) In other words, his materiality opinion is premised on the assumption that every event of default would result in the worst-case scenario, an assumption that was proven false at the hearing. Moreover, the Division's own witness from ALC's outside securities counsel, Quarles & Brady, testified that not all events of default are material. Rather each must be evaluated based on its own facts and circumstances. (Davidson, Tr. 2297-99.)

The ALJ erred in "accord[ing] Barron's opinion considerable but not dispositive weight" (Dec. at 59), instead of disregarding it and giving it no weight as urged by Ms. Bebo in post-hearing briefing. It is well-established that an expert can base his opinion on underlying facts or assumptions he did not find on his own only if competent evidence is also presented to prove the truth of those underlying assumptions. *Dura Auto. Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 615 (7th Cir. 2002); *Target Mkt. Publ'g, Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1144-45 (7th Cir. 1998) (affirming exclusion of expert opinion on expected revenues using unrealistic assumptions); *Fail-Safe, L.L.C. v. A.O. Smith Corp.*, 744 F. Supp. 2d 870, 891 (E.D. Wis. 2010)

(excluding expert testimony of future damages because expert relied on assumptions "without providing any explanation for such an assumption other than general platitudes about the strength of [the company]"); *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 810 (N.D. Ill. 2005).

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

In contrast to the ALJ's treatment of Mr. Barron, he *sua sponte* struck and disregarded the entire expert report of Ms. Bebo's expert in public company disclosure practices, David Martin, and struck all but two pages of the report of Ms. Bebo's expert in the assisted living industry, including leasing practices in the industry.[28] (Dec. at 48-49, 58.) This was legal error as a matter

[28] The ALJ's conduct supports the inference that he pre-judged matters in this case. Having reviewed the evidence prior to the hearing, on the seventh day of trial, when it was becoming clear that the trial would not conclude within the three weeks originally scheduled, the ALJ stated: "In that case, here's what I want to do. I have read all the parties' expert reports. I do not feel the need for any cross-examination of Mr. Martin, so I don't think we need that. I think that will streamline matters a little bit. I don't feel the need for cross-examination of Mr. Durso, except on the issue of his comments on the appraisal, or the value of the properties, which is the very end. It's like the last -- this doesn't even comprise a full page, but it's the very last portion of his expert report, Section 3C or C3, something like that. The rest of it I don't feel the need for cross-examination, so the Division should not -- don't put on any examination. Now, I do want a robust examination of Mr. Smith." (Tr. 1761.) In the same discourse, the ALJ made

of procedure and substance. *See Huddleston v. Herman & MacLean,* 640 F.2d 534, 552 (5th Cir.1981), *modified on other grounds*, 459 U.S. 375 (1983) (attorney expert in securities law allowed to testify that a statement in a prospectus was standard language for the issuance of a new security because this information helped the jury weigh the evidence of defendants' scienter and materiality); *United States v. Garber,* 607 F.2d 92, 99 (5th Cir.1979) (trial court erred in refusing to let experts on income tax law testify regarding whether failure to report funds received for sale of blood plasma constituted income tax evasion; by disallowing the expert's testimony that a recognized theory of tax law supports the defendant's subjective belief in the propriety of her conduct, the court deprived the defendant of evidence showing her state of mind to be reasonable). The ALJ's total disregard of the unrebutted reports of Mr. Martin and Mr. Durso was particularly prejudicial when those reports provided relevant, persuasive evidence with respect to the reasonableness of Ms. Bebo's and ALC's compliance judgment, Ms. Bebo's state of mind, and the lack of materiality of the Lease in the first instance.[29]

Third, the Initial Decision improperly accorded "significant weight" to ALC's alleged payment for the CaraVita Facilities at a price in excess of the appraised value. (Dec. at 59.) For the reasons stated in Ms. Bebo's Post-Hearing Brief (at pages 152-56), the great weight of the evidence demonstrates that any losses recorded by ALC were not related to anything having to do with the employee leasing arrangement. Indeed, the evidence establishes that this was a highly favorable transaction for ALC, that it added approximately $2.40 of value per share to the company, and ALC's stock price went up in response to the announcement that it had purchased

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it plain to Ms. Bebo and counsel that he disliked the fact that he was required to stay in Milwaukee for the lengthy hearing. (Tr. 1761-63.)

[29] In addition, to the extent that the ALJ's reasoning is not erroneous, it must at least be applied consistently to exclude Mr. Barron's report which does nothing more than apply the facts of the case (as he viewed them) to the standard of materiality adopted by the ALJ—SAB 99.

the CaraVita Facilities for $100 million and would be recording the one-time write-offs. (*Id.* (citing evidence).) The facts at the hearing established that, at the time the Board approved purchasing the facilities from Ventas, the alleged defaults related to regulatory violations for substandard resident care drove the settlement. The ALJ made no attempt to parse out what portion of the losses could be attributable to the purported financial covenant defaults versus the licensing defaults, and there is no evidence upon which to perform such an analysis. Because ALC's litigation counsel at Quarles & Brady concluded that the regulatory defaults were virtually indefensible and entitled Ventas to the full range of remedies under the Lease, there is no basis to conclude, as the ALJ does, that ALC could have achieved a better settlement "on terms that incorporated only damages for regulatory breaches." (Dec. at 64.)

Furthermore, the ALJ's primary reliance on ALC's accounting memorandum ignored the fact that the drafter of that memorandum did not have personal knowledge about the lawsuit and did not know the lawsuit contained no allegations of financial covenant violations.[30] (Lucey, Tr. 3741-42.) The ALJ relied upon the ALC appraisals used in the accounting treatment that were obtained long after Ms. Bebo had left ALC. The ALJ ignored the substantial evidence indicating that those appraisals were low and ALC had financial incentive to have those appraisals come in as low as possible. This includes, among other evidence, Exhibit 2088, which confirmed that the appraisals relied on by ALC, and the ALJ, assessed four properties that were entirely untainted by the licensing issues or the employee occupancy issues in the case *at half the value of an appraisal conducted a year earlier.*

Finally, the ALJ's reasoning on this issue again revealed how he shifted the burden to Ms. Bebo by relying exclusively on ALC's accounting treatment for the transaction long after Ms.

[30] This error also requires the reversal of the finding of "substantial loss" to sustain third-tier penalties.

Bebo was gone from ALC, despite rejecting similar "post-Bebo" events and circumstances as "irrelevant" in his factual conclusions with respect to Grant Thornton's approval of ALC's internal controls with full knowledge of facts learned through the Milbank investigation, among other facts. This type of fact-finding—where if its "heads" the Division wins and "tails" the Respondent loses—should not be condoned.

E. The ALJ's factual and legal conclusions with respect to Professor Smith's unrebutted report were clearly erroneous.

In the Initial Decision, the ALJ acknowledged the expertise, credibility and event study methodology of Ms. Bebo's financial economist, Professor David Smith, but adopted the Division's attempts to twist the conclusion of his study that there was an abnormal price decline on May 4, 2012 into rejecting Professor Smith's conclusion that this decline did not relate to any *disclosure* of alleged improper financial covenant calculations. (Dec. at 60-61.)

The ALJ first erred by conflating public disclosure of allegations of financial covenant violations with facts and circumstances occurring out of public view: "I disagree with Smith's contention that the May 4, 2012 disclosure did not relate to the financial covenant calculations at all." (Dec. at 61.) Professor Smith made no such conclusion. What he concluded, and what he testified to at trial, was that there was no public indication that the May 4 disclosure of an investigation into "irregularities" in connection with the Ventas Lease related to financial covenant allegations. Thus, although it is true that inside ALC and at Milbank people knew that the internal investigation related to whistleblower allegations relating to alleged financial covenant violations, the public did not. The only evidence presented at the hearing, through Professor Smith, was the following:

Q	And you're aware that that reference to investigating possible irregularities in connection with the company's lease with Ventas is a reference to the financial covenant allegations?

A	There's no public disclosure that connects that statement of possible irregularities with the company's lease to the financial covenant allegations. There's no -- certainly it's not in the 8-K. If you look at the press analysis, you look at the analyst reports that follow this, everybody that's looking at that sentence is not making any connection to anything having to do with financial covenants. And if anything, they make the natural connection that the investigation into the lease irregularities have to do with the allegations and the alleged breaches under the Ventas lawsuit. There's nothing here that says, hey, financial covenant allegations. Nothing.
Q	You are aware that is what that's a reference to?
A	I've had the -- you know, the luxury of, you know, knowing what -- seeing that there was a whistleblower letter behind the scenes that may have prompted this investigation. I don't know for sure that that's the prompting, but the more important point is from an investor's perspective, that -- those irregularities probably have to do with the -- an investigation into the -- the pieces of the Ventas lawsuit.
Q	But you don't know that, right? You don't know that for sure?
A	*All I can do is look at every press report, look at every analyst's report, look at the disclosures by the companies themselves including Ventas, who has never disclosed at any filing alleging there was a financial covenant allegation, that there was a financial covenant allegation particularly that there was a link between the financial covenant allegations and this investigation.* The natural way -- and also the analysts that commented on this tied the investigation to the Ventas lawsuit.
Q	And you actually never talked to an investor to see if they tied that internal investigation to the Ventas lawsuit or to a separate issue that dealt with irregularities in the Ventas lease, did you?
A	I did not, but I just went on the fairly relatively copious information that came out discussing this disclosure by analysts and by the press, and nobody makes that connection.

(Smith, Tr. 3645-47 (emphasis added).) The ALJ's opposite conclusion must be rejected as it is contrary to the evidence presented, and entirely speculative.[31]

[31] For example, the ALJ writes, "Although ALC did not specifically mention the financial covenant allegations, investors *could have* reasonably assumed that the 'irregularities' might end up being substantiated." (Dec. at 61 (emphasis added).) Of course, in reality, ALC did not specifically or generally mention the financial covenant

Second, the ALJ's own analysis and parsing of the stock drop on May 4 was an improper substitution of his own views that contradict the only expert testimony on the subject from Professor Smith. Put another way, the ALJ purports to act as the "expert" that the Division failed to produce. For example, the ALJ sets forth his own, uninformed lay opinion that all of the $1.16 decline below the May 2 close is attributable to other bad news in the May 4 Form 8-K. (Dec. at 61.) Professor Smith testified it was likely that much of that additional decline was the result of the failure of the anticipated good news (sale of the company) to materialize. (Smith, Tr. 3638-41.) The Initial Decision provides no reasoned basis to reject this testimony and substitute the ALJ's own opinion.

Third, there is no evidentiary support for the ALJ's conclusion that the disclosure of the internal investigation somehow also disclosed that ALC had been misrepresenting its compliance with the Lease by improperly including employees in the covenant calculations. He concludes, without reference to any evidence, that "the reason for the investigation suggested to investors that there were other issues with the Lease in addition to the lawsuit." (Dec. at 61.) But, as noted, the only evidence on this issue was Professor Smith's summary of the analyst reports that all indicated that analysts and investors tied the lawsuit and the investigation together. The ALJ's further speculation about investors' potential interpretation of the May 4 Form 8-K based on his analysis of the syntax of the disclosure cannot substitute for *actual evidence to the contrary*. Nor is there any evidence to support the ALJ's conclusion that ALC's statement that it intended to retain outside counsel for the investigation (Dec. at 61-62) had any importance to investors, and it was unreasonable to conclude that anyone tied the retention of outside counsel to potential misconduct with respect to including employees in financial covenant calculations.

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allegations on May 4, and the evidence shows investors tied those irregularities to the allegations of patient safety and care at issue in the Ventas lawsuit. And aside from being entirely speculative, whether *those* "irregularities" were substantiated is irrelevant. The ALJ's reasoning is a non sequitur.

Next, the ALJ erred in his divination that investors could have "with minimal effort," linked the following paragraph of the amended complaint (filed as an exhibit to a motion for leave to amend on May 10) to the disclosure of "possible irregularities" in connection with the Lease:

> 53. Additionally, the ALC Entities have failed to comply with their reporting obligations under Section 25 of the MLA.

(Dec. at 62 (citing Ex. 1194, ¶ 53).)

But even Ventas did not think that the disclosure of "irregularities" pertaining to the Lease had anything to do with the financial covenants. As noted previously, in the days following the disclosure of the internal investigation, Ventas filed a motion for expedited discovery into the investigation. Ventas' motion confirms the opposite of the ALJ's conclusion and tracks Professor Smith's testimony. Ventas stated it feared the "irregularities" pertained to staffing and care of the residents at the leased facilities. (Ex. 357, p. 3.) The motion never mentions the financial covenants or ALC's reporting obligations more generally under the Lease. There is no basis to believe the public somehow reached a different conclusion with far less information.

Moreover, even if the ALJ's inferential leap was warranted, it demonstrates nothing about whether the share price decline was caused by information disclosing that ALC had been meeting the covenants through employee leasing. Consequently, the conclusion that the "drop in stock price on May 11, 2012, was at least partially attributable to the amended complaint" (Dec. at 62), which also contains no reference to allegations of financial covenant violations, is irrelevant.

Finally, the ALJ builds upon each of the illegitimate factual findings described above to reach the following penultimate erroneous conclusion: "The May 14 disclosure was much more detailed than the May 4 disclosure, but a reasonable investor could have inferred enough information from the May 4 disclosure, combined with Ventas' May 10 motion to amend, that the May 14 disclosure would have added little to the mix." (Dec. at 62.) The plain, undisputed fact is that the May 14 disclosure *was the first time that ALC provided any sort of detail about an allegation that ALC had breached the Ventas Lease by fraudulently counting rentals related to employees as bona fide rentals to third parties.* To conclude that the "May 14 disclosure is best considered as inconclusive evidence," as the ALJ does (*id.*), is arbitrary, capricious, and a patent substitution of the ALJ's biased viewpoint for the actual facts and the well-reasoned, well-founded expert opinion of Mr. Smith.

In the end, however, the ALJ's analysis must be rejected for a more fundamental reason: even the facts as he found them do not constitute a corrective disclosure for purposes of assessing materiality through the use of an event study *as a matter of law*. To be a "corrective disclosure" the disclosure has to reveal the falsity of the prior statements. *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 473 (4th Cir. 2011) (holding that, to be a corrective disclosure, the new disclosure "must reveal to the market in some sense the fraudulent nature of the practices about which a plaintiff complains"); *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 n. 4 (disclosure must "reveal to the market the falsity" of the prior misstatements). The disclosure of unstated "irregularities" or an investigation about them does not constitute a corrective disclosure as a matter of law. *See Meyer v. Greene*, 710 F.3d 1189, 1201 (11th Cir. 2013) (holding that disclosure of an investigation is generally not a corrective disclosure because "[t]he announcement of an investigation reveals just that—an investigation—and nothing more"); *In re*

Almost Family, Inc. Sec. Litig., 2012 WL 443461, at *13 (W.D. Ky. Feb. 10, 2012) ("Numerous federal district courts have held that a disclosure of an investigation, absent an actual revelation of fraud, is not a corrective disclosure.") (collecting cases).

Consequently, courts addressing the legal boundaries of what constitutes a corrective disclosure rule out the very types of facts that the ALJ found critical in this case: disclosures of internal or SEC investigations, and disclosures of the retention of outside counsel to conduct internal investigations. Those facts are legally insignificant unless there is actual revelation of the specific fraud at issue.

F. The ALJ erred in concluding this case involved only misrepresentations but finding that omitted information would be material to investors.

The ALJ concluded that ALC affirmatively misrepresented its compliance with the Lease, and that "the omission of descriptions of the covenant calculation process from ALC's periodic reports is not an independent basis for finding material misstatements under Section 10(b)." (Dec. at 50.) This is because no liability could be premised on an omission theory under the well-established case law cited by Ms. Bebo in her briefing. Put simply, there was no duty to disclose how ALC was meeting the covenants. The law does not require issuers to disclose every basis for an opinion or information that may contradict it. (Resp't Br. at 185-91.) The ALJ erred when distinguishing the cases and concluding otherwise. (Dec. at 56-57.)

However, the ALJ further erred in his materiality finding by concluding that omitted facts would be material even though he previously found that such facts were not a basis for finding material misstatements. (Dec. at 64.) In the "Summary" of the his materiality findings, the ALJ specifically noted that "[a] reasonable investor would have wanted to know such a fact [that ALC had deviated from its normal occupancy determination methodology], and would have otherwise been entitled to assume that ALC used TIPS, as it did for its other occupancy calculations." (*Id.*)

These findings cannot coexist with the ALJ's prior conclusion that omitted information is irrelevant because ALC's compliance opinion constituted a misrepresentation.

G. The ALJ improperly concluded that the knowledge and advice of counsel and outside auditors was irrelevant.

1. The ALJ's erroneous conclusion that the Lease required a formal modification.

The ALJ's decision largely hinges on his mistaken conclusion that a formal modification was necessary as a matter of law in order for ALC to include units related to employees in the covenant calculations. The ALJ's basic reasoning is summed up in the following statement from the Initial Decision: "the January 20, 2009, call [and subsequent e-mail] did not effect a modification of ALC's Lease with Ventas, ALC was therefore contractually obligated to meet the Lease's covenants [without units related to employees], and ALC did not do so." (Dec. at 33.) The ALJ's determination that a formal modification was required under the Lease is erroneous as a legal matter. ALC and Ventas could, and did, reach informal understandings with respect to the meaning of ambiguous terms in the Lease. This situation was no different.

In addition, it again reveals the ALJ's failure to comply with the applicable legal standard regarding opinion disclosures. His job was not to decide a breach of contract case in the first instance, but to decide whether ALC's judgment was reasonable. And with respect to the issue of whether the Lease required a formal modification, the ALJ stands alone in that judgment. As set forth below, Grant Thornton did not believe that the Lease had to be formally modified. Nor did ALC's outside counsel, Quarles & Brady, when it issued a reasonableness opinion in April 2012. (Ex. 1037.) Nor did the Milbank attorneys that investigated this matter in 2012. (Tr. 3481; Ex. 1879, pp. 4-5.) Nor did other members of ALC's disclosure committee, Messrs. Lucey and Hokeness, think that a formal modification was required. (Resp't Br. at 118-20.) Nor did

Ms. Bebo's industry leasing expert. (Ex. 2185, p. 15.) Where the touchstone of this case is reasonableness, these undisputed facts demonstrate the ALJ's error as a matter of law.

2. Ms. Bebo relied on the advice of counsel and auditors in reaching the conclusion that no formal modification was required.

As importantly, however, Ms. Bebo sought and obtained the advice of ALC's general counsel and outside auditors with respect to that basic, and in the ALJ's view critical, issue. As noted above, the mere fact that Mr. Fonstad attended the call with Mr. Solari is highly relevant, despite the ALJ's conclusion to the contrary. Moreover, it is undisputed that (a) Mr. Fonstad participated in preparing and reviewing the Solari e-mail which was not a formal modification signed by the parties; and (b) by overseeing the company's disclosure committee was aware that ALC was including employees in the covenant calculations on the basis of the e-mail and not a formal modification. Consequently, Ms. Bebo sought and obtained advice of counsel based on full knowledge and disclosure of the pertinent facts, at a minimum, with respect to this particular issue and her reliance on the advice of counsel acts as a defense to the underlying violations, provides a strong inference that she did not act with scienter, and counts as a mitigating factor for purposes of imposing penalties.[32] *See United States v. Benson*, 941 F.2d 598, 614 (7th Cir. 1991) (tax case); *SEC v. e-Smart Techs., Inc.*, 82 F. Supp. 3d 97, 105-06 (D.D.C. 2015) (emphasis added)(citing *Zacharias v. SEC,* 569 F.3d 458, 467 (D.C. Cir. 2009); *see also SEC v. Harwyn Indus. Corp.*, 326 F. Supp. 943, 955 (S.D.N.Y. 1971) (dismissing claims because "defendants at all times relied on advice of counsel"); *In re Coxon*, Release No. 140, 1999 WL 178558, at *10 (Apr. 1, 1999) ("Reliance upon advice of counsel is a fact that may be taken into account in determining what sanctions are appropriate. . ."); *see also Blinder, Robinson & Co. v. SEC*, 837

[32] There was also substantial evidence presented that Mr. Fonstad was aware of the key pertinent facts with respect to how ALC proceeded under the arrangement with Ventas, and, as noted earlier, also approved ALC's disclosure affirming that it was in compliance with the Lease covenants.

F.2d 1099, 1109 (D.C. Cir. 1988) ("As to sanctions, the *extent* to which petitioners sought the advice of counsel, the *clarity* of the advice, and the petitioners' reasons for following or disregarding it, in whole or in part, are highly relevant, *even though the reliance on counsel may not have been sufficient to discharge petitioners from the underlying liability for statutory violations*." (citation omitted)); *Howard v. SEC*, 376 F.3d 1136, 1147-48 (D.C. Cir. 2004). The ALJ's findings to the contrary constituted error.

Similarly, it is undisputed that Grant Thornton was aware that there had been no formal modification of the Lease governing the employee leasing arrangement. Indeed, Grant Thornton's witnesses and internal documents all establish that they did not believe that a formal modification was required. Whatever other specific facts or circumstances Grant Thornton did or did not know, it is undisputed they knew there was no formal lease modification to support ALC's employee leasing practice. Consequently, the ALJ erred as a matter of law in not concluding that the reliance on outside auditors mitigated the scienter finding and precluded a securities fraud violation. *SEC v. Snyder*, 292 F. App'x 391, 406 (5th Cir. 2008); *see also SEC v. Caserta*, 75 F. Supp. 2d 79, 94 (E.D.N.Y. 1999) ("Good faith reliance on the advice of an accountant or an attorney has been recognized as a viable defense to scienter in securities fraud cases.")

3. The ALJ erred as a matter of law in concluding that the advice of counsel and auditors did not apply more generally.

In addition, as set forth previously, ALC and Ms. Bebo disclosed many additional pertinent facts about ALC's covenant compliance beliefs and processes to both Mr. Fonstad and Grant Thornton, even if they were not aware of every single detail of the process. It was erroneous, as a matter of law, to conclude that the advice of counsel and auditor case law did not apply. That error was compounded when the ALJ concluded an inference of scienter was

enhanced because Ms. Bebo and ALC disclosed the basic, pertinent facts but did not disclose *every* fact and circumstance to them.

H. The ALJ committed other legal error in concluding Ms. Bebo acted with scienter.

The ALJ's conclusion that Ms. Bebo acted with scienter (Dec. at 53-55) is infected by the numerous factual errors identified elsewhere in this petition, and Ms. Bebo takes exception to the finding of scienter in its totality. The ALJ also erred in his legal conclusion that a finding of scienter was warranted because Ms. Bebo had "a motive to avoid reputational damage or discipline, because she was an enthusiastic advocate for entering into the Lease." (Dec. at 55.) Facts or allegations of motive to withhold bad news from investors to avoid reputational harm or discipline have been routinely rejected by courts as support for an inference of scienter. *See, e.g. Pugh v. Tribune Co.*, 521 F.3d 686, 695 (7th Cir. 2008); *Novak v. Kasaks*, 216 F.3d 300, 307-08 (2d Cir. 2000) (allegations of "motives possessed by virtually all corporate insiders" do not suffice to establish scienter, instead, plaintiffs must "allege that defendants benefited in some concrete and personal way from the purported fraud."); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1422 n.12 (3d Cir. 1997); *McIntire v. China MediaExpress Holdings, Inc.*, 927 F. Supp. 2d 105, 120 (S.D.N.Y. 2013) (collecting cases). The basic reason for this is clear: such an allegation or finding could be made in every disclosure fraud case. *See id.*

I. The ALJ improperly concluded that "scheme" liability applied to this case.

The ALJ erred in concluding that "scheme" liability applies in this case, and improperly double-counted violations under subsections of Rule 10b-5. (Dec. at 64-66.) There is no basis in the law to support the invocation of "scheme" liability in a way that converts Rule 10b-5 into a rule proscribing general corporate wrongdoing or breach of fiduciary duty that does not specifically result in a fraudulent misstatement to investors. "Scheme" liability under

Rule 10b-5(a) and (c) *does not* generally prohibit sending misleading e-mails or even preparing internal "sham transactions," as the Division and the ALJ contend, *unless* the result of those actions was to misstate the company's financial statements or other disclosures *to investors*. This is made clear in the Commission's analysis of scheme liability in *In re John P. Flannery*, Release No. 3981, 2014 WL 7145625 (Dec. 15, 2014). There, the Commission acknowledged that scheme liability expands the reach of securities fraud to those actors that participate in preparing a false statement to investors or participated in the preparation of internal financial statements or fraudulent accounting that resulted in a company's misstated financial statements, even if those persons did not themselves make the false or misleading statements to investors. *Id.* at *12. In sum, the Commission stated: "those who engage in such conduct are independently liable for their own deceptive acts, *even if a material misstatement by another person creates the nexus between the scheme and the securities market.*" *Id.* (emphasis added) (citation omitted); *see also In re Robert W. Armstrong*, Release No. 2264, 2005 WL 1498425 (June 24, 2005) (Commission found that the controller, Armstrong, for a subsidiary of a public company could be liable under Rule 10b-5 even though he had no involvement in the actual preparation of the parent company's periodic filings). Scheme liability exposes those to securities fraud liability where they did not "make" the statement at issue. It does not impose additional liability on a maker of the statement; such additional liability could be imposed in virtually every "maker" case.

III. The ALJ Committed Factual And Legal Error In Finding Ms. Bebo Misled ALC's Auditors.

The ALJ's finding with respect to the misleading auditors claim pursuant to Rule 13b2-2 appears to be premised on statements in management representation letters provided to Grant

Thornton that stated that ALC was in compliance with aspects of contractual agreements that would have a material adverse effect on ALC in the event of non-compliance.[33] (Dec. at 70.)

This conclusion was wrong for a number of reasons. First, ALC was in compliance with the Ventas Lease during the entire time period, as there was an agreement with Mr. Solari and Ventas to include rooms related to employees in the covenant calculations. At a minimum, ALC acted reasonably in reaching that conclusion based on all the facts and circumstances. Second, Grant Thornton knew that the sole basis for ALC's compliance was based upon the employee leasing arrangement, and further knew that the arrangement was based solely upon a conversation with Ventas and the confirmatory e-mail to Mr. Solari. As noted previously, the ALJ's findings to the contrary on these points were arbitrary and incorrect.

Third, we know Grant Thornton was not misled by either the management representation letters or Ms. Bebo's statements because, after a full and complete investigation by Milbank through which Grant Thornton obtained an even more complete understanding of the manner in which ALC was meeting the covenants, it still concluded that ALC was in compliance with the Lease. If it had concluded that ALC was not in compliance with the Lease during any time between 2009 and 2012, it would have required ALC to re-state its financial statements and disclosures for the relevant time period. This evidence is highly relevant and was improperly

[33] Although it is unclear, based on the Initial Decision's discussion of the Rule 13b2-2 claim, whether the ALJ relied on the occupancy reconciliation reports that were provided to Grant Thornton, to the extent the ALJ did, that was flawed as well. Those reports are clear on their face that they were not meant to convey the actual days and stays of employees and other non-residents at the Ventas facilities. At the time, Grant Thornton recognized that there were a number of employees that were included for entire quarters, or even years, at multiple facilities. (*See, e.g.*, Exs. 17-31 (CaraVita covenant calculations).) Grant Thornton understood those employees were not living at multiple facilities, but rather the rooms were set aside or made available for those employees to visit the particular facilities during the month or quarter in question. (*See* Robinson, Tr. 3401-3404.) And Grant Thornton also knew that units were being made available by ALC for non-employees, such as contractors or others that would have reason to assist in the operations of the facilities.[33] (*Id.*) Each quarter, Grant Thornton reviewed the journal entries flowing through the 997 Account, and knew the manner in which ALC was handling the internal accounting treatment. (*See, e.g.*, Resp't Br. at 135-37 (citing evidence).)

dismissed by the ALJ. Moreover, no Grant Thornton witness testified that they believed they were misled by Ms. Bebo.

In addition, the ALJ erred by imputing conduct of other ALC employees and their interactions with Grant Thornton to Ms. Bebo. (Dec. at 16-17; 34-35.) For example, the ALJ relied extensively on Grant Thornton's misunderstanding during 2010 and 2011 that Ventas was receiving the same reports with the employee lists that Grant Thornton was receiving. (Dec. at 34-35.) Yet it was undisputed that Ms. Bebo had little direct communication with Grant Thornton about the employee leasing arrangement, outside of her initial conversation with Melissa Koeppel and being present at the Board meetings where Grant Thornton presented on the subject. (*See, e.g.*, Koeppel, Tr. 3326.) Similarly, she had very limited communication with Jeff Robinson, once he took over as the engagement partner. She had no communications with Grant Thornton about this particular subject.

As a matter of corporate law, knowledge and conduct of executives and other individuals gets imputed to the corporation—not the other way around. *See, e.g., United States v. LaGrou Distrib. Sys., Inc.*, 466 F.3d 585, 591 (7th Cir. 2006) (stating, "[w]here a corporate agent obtains knowledge while acting in the scope of agency, he presumably reports that knowledge to his corporate principal so the court imputes such knowledge to a corporation.") (quoting *United States v. One Parcel of Land Located at 7326 Highway 45*, 965 F.2d 311, 316 (7th Cir. 1992)). Thus Ms. Bebo's knowledge gets imputed to ALC, but the knowledge and conduct of other ALC employees or executives *may not* be imputed to Ms. Bebo. *See Coach, Inc. v. Sapatis*, 27 F. Supp. 3d 239, 245 (D.N.H. 2014) (stating that "Actions taken or knowledge obtained by a corporation via its agents is not imputed to its officers simply due to their positions within the corporation."); *Mark I, Inc. v. Gruber*, 38 F.3d 369, 371 (7th Cir. 1994) (stating "As a rule, a

corporate officer's acts are imputed to the corporation, rather than the other way 'round."); *Nat'l Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 44 (Mo. 1966) (holding that one corporate officer's knowledge of misappropriation and misuse of competing corporation's blueprints and material was not imputable to other officers).

The result is no different with respect to scienter under the federal securities laws - the knowledge and conduct of other employees or executives within a company should not be imputed to an executive that has no knowledge of the specific conduct. *See In re Alpharma Inc. Sec. Litig.*, 372 F.3d 137, 149 (3d Cir. 2004) (rejecting allegations that premised corporate executives' knowledge of GAAP violations on their titles alone), *abrogated on other grounds by Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

Finally, the ALJ's decision that Ms. Bebo intended to mislead the auditors was arbitrary and unsupported.[34] There is no evidence in the record establishing that Ms. Bebo intended to deceive Grant Thornton. (*See, e.g.*, Koeppel, Tr. 3360-61.) ALC employees testified that Ms. Bebo never told them to withhold information from Grant Thornton or mislead the auditors. Indeed, her openness with the auditors was one of the reasons that Milbank concluded there had been no wrongdoing on the part of management. In their words, her openness "suggests no ill intent by management." (Robinson, Tr. 3483-84; Ex. 1879, p. 6.)

IV. The ALJ Erred By Concluding Ms. Bebo Violated The Exchange Act's Books And Records And Internal Controls Provisions.

In determining that Ms. Bebo violated section 13(b)(5) of the Exchange Act and Rule 13b2-1 promulgated thereunder, and that she caused ALC to violate sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act, the ALJ based his decision on the same erroneous findings of

[34] A claim under Rule 13b2-2 requires a showing of scienter, such as intent to deceive or extreme recklessness to mislead the auditors. *See SEC v. Todd*, 642 F.3d 1207, 1220 (9th Cir. 2011); *SEC v. Espuelas*, 905 F. Supp. 2d 507, 525-26 (S.D.N.Y. 2012). The ALJ assumed a scienter standard applied, without deciding. (Dec. at 70.)

fact discussed previously. In addition, the evidence demonstrated Ms. Bebo did not instruct ALC's accounting staff to intentionally record false information in the journal entries or the quarterly compliance certification documents; all of the transactions relating to employee leasing that the accounting staff recorded in these records were based on criteria that Ms. Bebo and Mr. Solari agreed upon during their January 20, 2009 telephone conversation. (*See* Resp't Br. at 99-111 (citing evidence).) As such, neither the journal entries nor the compliance documents were false in any material way in violation of Section 13(b)(2)(A). They simply were not intended to track the length of actual employee stays. Per the conversation with Mr. Solari, they were meant to track rooms that were or would be available for employees that had a reason to go to a particular facility during the quarter.

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

Moreover, because ALC had sufficient internal controls in place to safeguard against intercompany revenue associated with employee leasing affecting ALC's public reporting, Ms. Bebo did not cause a violation of Section 13(b)(2)(B). ALC's accounting department, supervised by Mr. Buono and Mr. Levonovich, established a process by which the revenue related to ALC's rental of units for employees and other residents at the various CaraVita

Facilities would be recorded at the facility level and then eliminated in consolidation. (*See* Resp't Br. at 99-101 (citing evidence).) This was referred to as the 997 Account. Contrary to the ALJ's findings, the 997 Account served as an effective internal controls measure, because revenue relating to employee leasing never affected the accuracy of the Company's financial statements, and ALC's financials were always GAAP compliant (and the Division has never asserted otherwise).

The ALJ also erred in rejecting the importance of Grant Thornton's audit opinions on ALC's internal controls in March 2012 (for the year ending December 31, 2011) and in March 2013 (for the year ending December 31, 2012). The Initial Decision states "Grant Thornton's self-serving unqualified opinion in March 2012 changes nothing, because even Grant Thornton did not know all the pertinent facts regarding ALC's convenient calculation process." (Dec. at 68.) The Initial Decision provides no basis in fact or the record evidence for the conclusion that Grant Thornton's 2012 year end opinion was "self-serving." Indeed, that would have been the most appropriate time for Grant Thornton to raise issues or withdraw from the ALC engagement if, as the ALJ concluded, it learned that ALC had been misleading them about whether Ventas was receiving the same employee lists that Grant Thornton was receiving.

In fact, the ALJ totally ignores evidence that Grant Thornton audited ALC and issued a clean internal controls opinion at 2012 year-end *after* receiving a full report from Milbank based on its internal investigation relating to employee leasing, including information that ALC booked revenue for employees who went to the leased facilities as well as those employees with a reason to go, but did not actually go. (Ex. 2183; *see also* Barron, Tr. 1722.)

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

V. The ALJ Erred In Concluding That Rule 13a-14 Provided A Basis For A Separate And Independent Violation For Liability And Penalty Purposes.

The ALJ erred in finding an independent cause of action for violating Rule 13a-14 and for imposing penalties for those violations. *First*, as demonstrated above there is no basis to conclude that ALC's public filings contained any material misstatements or omissions. And because there was no underlying falsity in the filings, there can be no violation of Rule 13a-14 either. *Second*, a violation of Rule 13a-14 does not give rise to an independent cause of action. *In re Silicon Storage Tech., Inc., Sec. Litig.*, 2007 WL 760535, at *17 (N.D. Cal. Mar. 9, 2007); *In re Radian Sec. Litig.*, 612 F. Supp. 2d 594, 620 (E.D. Pa. 2009); *In re Huffy Corp. Sec. Litig.*, 577 F. Supp. 2d 968, 1020 (S.D. Ohio 2008); *SEC v. Black*, 2008 WL 4394891, at *17 (N.D. Ill. Sept. 24, 2008).

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

The sanctions ordered by the ALJ were erroneous for a variety of reasons, including many of the same reasons discussed above. As discussed more fully below, the ALJ's decision to impose draconian third-tier civil penalties was not supported by the facts or the law. Nor did (or could) the ALJ articulate any reasoned justification for the penalties he imposed or the method he used to calculate those penalties, and he failed to adequately explain (or even attempt to explain) why the Initial Decision departed from Commission precedent when calculating and imposing such draconian monetary penalties or the other sanctions ordered. The civil penalties imposed were likewise grossly disproportionate to the gravity of Ms. Bebo's alleged offense and

therefore violated the Eighth Amendment of the Constitution. For these reasons, as discussed more fully below, review of the Initial Decision is required.

A. The record does not support the ALJ's imposition of third-tier monetary penalties.

The ALJ ruled that "maximum" third-tier civil penalties were appropriate in this case because Ms. Bebo's alleged violations "involved fraud and/or at least reckless disregard of a regulatory requirement, and the resulting harm caused substantial losses to ALC and a significant risk of substantial losses to investors. " (Dec. at 79.) But for the reasons discussed above, the ALJ's conclusions that Ms. Bebo's conduct involved fraud or recklessness, and likewise resulted in substantial losses to ALC or a significant risk of substantial loss to investors, were unsupported by the facts or the law. Because the ALJ's imposition of third-tier monetary penalties was premised on these erroneous findings, that decision was erroneous for the same reasons.

B. The Initial Decision failed to articulate a reasoned justification for the civil penalties and officer and director bar.

In determining to impose a drastic $4.2 million monetary penalty and an officer-and-director bar, the ALJ purported to conclude that such sanctions were in the public interest, in light of the evidence presented at trial. (Dec. at 76-77.) But the Initial Decision does not include a meaningful examination of the public interest factors necessary to justify any sanction, much less the draconian sanctions imposed by the ALJ in this case, and it makes no attempt to even consider whether less draconian sanctions might protect investors or serve the public interest. To the contrary, the Initial Decision merely cites the various public interest factors required to be considered when determining an appropriate sanction for securities violations, and then declares in conclusory fashion that certain of those factors weigh in favor of a drastic sanction. (Dec. at 77.) Indeed, the Initial Decision even goes so far as to declare that "two factors (egregiousness

and scienter) decisively weigh in favor of the heaviest possible sanction," while at the same time simply disregarding those factors that weighed against a sanction without any meaningful consideration. (Dec. at 76.) Thus, the Initial Decision failed to articulate any reasoned justification for the sanctions imposed, and the ALJ committed legal error by collapsing a multi-factor test to an assessment based solely on scienter and egregiousness.

Moreover, even assuming the ALJ appropriately considered the various factors necessary to support sanctions, he wrongly concluded that those public interest factors supported the imposition of such drastic (or any) sanctions in this case. Among other errors, the ALJ erroneously concluded that:

- Ms. Bebo committed multiple violations, "involving multiple distinct violative acts." (Dec. at 76.) However, they were not distinct violative acts under applicable precedent, *see infra*, but one course of conduct.

- The circumstances of this case suggest a likelihood of violations by Ms. Bebo in the future. (Dec. at 76.) But there was no evidence presented that Ms. Bebo had ever violated securities laws in the past. She is unemployed and there was no evidence presented that she would be in any position to violate the securities laws in the future. A civil penalty of this magnitude and a permanent officer and director bar must be based on a firm showing of likelihood of future violations. *See, e.g. SEC v. Patel*, 61 F.3d 137, 141-42 (2d Cir. 1995).

- Ms. Bebo continues to have an opportunity to violate securities laws as an officer or director of a public company. (Dec. at 76.) But the evidence established Ms. Bebo has been unemployed since working for ALC, and there is no evidence to suggest that she will be employed as a public company director or officer, or in any other capacity that involves the securities laws.

- Ms. Bebo's alleged misconduct harmed "the marketplace, shareholders, and Ventas" and caused losses to ALC and its shareholders. (Dec. at 76.) This is false. No one was harmed as a result her alleged misconduct. The misconduct did not create the liability for default under the Lease. To the extent her alleged misconduct prevented Ventas from pursuing its remedies against ALC earlier, it actually benefited ALC and its shareholders because the accelerated rent payments were reduced by approximately $15 million during that time period. Moreover, the entire theory of harm to ALC is based on overpaying Ventas for the properties. Thus, it is a mystery how Ventas was harmed. The Initial

Decision does not explain it. Nor does it explain how the "marketplace" was harmed, or what that even means.[35]

- Ms. Bebo's conduct was egregious and involved a high degree of scienter. (Dec. at 76-77, 80.) This is erroneous for the reasons previously stated.

- There is "a need to deter [Ms. Bebo] and others from committing accounting fraud." (Dec. at 80.) This is an unfounded, fundamental misstatement. This case did not even involve accounting fraud. There is no dispute that ALC's financial statements were accurate, and ALC disclosed the worst case scenario if it defaulted under the Lease.[36]

- By exercising her right to vigorously contest the Division's allegations against her, Ms. Bebo "utterly failed to recognize the wrongfulness of her conduct" and "offered no assurances against future violations," thereby warranting heightened sanctions. (Dec. at 76.) In effect, the ALJ punished Ms. Bebo for having the audacity to defend herself against the Division's allegations in this administrative proceeding. Courts have rightly rejected this faulty reasoning. *See SEC v. Johnson*, 595 F. Supp. 2d 40, 45 (D.D.C. 2009) ("The SEC also argues that [defendant] has not recognized the wrongful nature of his actions because he testified in a July 2007 deposition that he thinks he did nothing wrong. Needless to say, [defendant] has a right to vigorously contest the SEC's allegations and was not required "to behave like Uriah Heep in order to avoid an injunction."); *SEC v. Ingoldsby*, 1990 WL 120731, at *3 (D. Mass. May 15, 1990) ("Absent a showing of bad faith, the defendant should not be prejudiced for presenting a vigorous defense and requiring the SEC to meet its proper evidentiary burden both at trial and at the injunctive relief stage of the judicial proceedings.")

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[35] The ALJ's reference to the settlement of a shareholder suit is particularly inappropriate. (Dec. at 76.) For one thing, the settlement of a lawsuit is not an admission of liability, so the fact that ALC chose to settle the class action does not mean that the suit had any merit and does not indicate that the underlying conduct at issue in the case exposed anyone, including the company or its shareholders, to any risk of loss or liability. Indeed, it is for that very reason that evidence of settlement agreements or negotiations are ordinarily inadmissible in our courts. *See* Fed. R. Evid. 408. And more fundamentally, the existence of a class action premised on the same allegations raised by the Division in its enforcement proceedings (or even a settlement of such a class action) cannot constitute the "substantial loss" necessary to support third-tier sanctions. The inevitable result of the ALJ's contrary finding is that any violation or alleged violation involving allegations of misrepresentations in public filings would merit third-tier monetary sanctions, because the very fact that allegations are raised by the SEC (whether meritorious or not) creates a risk that shareholders will piggyback on those allegations and bring their own derivative action. In effect, then, it is the nature of the allegations raised against Ms. Bebo that creates the risk of loss, regardless of whether her conduct ever directly caused or risked any loss (substantial or otherwise) in the first place.

[36] Moreover, the ALJ's conclusion that $4.2 million is the amount necessary to deter accounting fraud is patently erroneous given that the Commission approved sanctioning Mr. Buono, ALC's Chief Financial Officer, only $100,000 for his involvement in the exact same conduct. *In the Matter of Laurie Bebo and John Buono, CPA*, Exchange Act Release No. 74177 (Jan. 29, 2015).

The Initial Decision was therefore erroneous and should be reviewed, and ultimately reversed, by the Commission for these reasons as well.

C. The Initial Decision imposed multiple civil penalties for the same conduct and failed to reconcile the penalties imposed with Commission precedent interpreting the Exchange Act penalty provisions.

The Initial Decision must also be reviewed because the ALJ utilized a method for calculating penalties which effectively punished the same conduct multiple times over, resulting in an excessive monetary sanction that far exceeded the gravity of Ms. Bebo's alleged misconduct. In doing so, the ALJ failed to articulate a reasoned basis for calculating the appropriate penalty on that basis. Moreover, the ALJ failed to show that such a calculation of penalties in that manner was consistent with the language of the statute, and the approach taken by courts and the Commission in applying the statute in other cases. Indeed, the ALJ did not even make any attempt justify his departure from the approach taken in those other cases. Ms. Bebo's Petition for Review should be granted for this reason too.

The governing statutes and regulations establish a maximum penalty to be imposed for securities violations, which is based on the number of violative "acts." But instead of treating all conduct of a like kind as one course of conduct, and therefore a single violative "act," as required by the Commission's prior decisions and federal court precedent (*see* Resp't Br. at 283-84 (citing cases)), the ALJ calculated the monetary penalty he imposed against Ms. Bebo by assessing the maximum third-tier penalty for each of four categories of violations across the seven quarters the Division alleged Ms. Bebo committed violations. The obvious effect of this treatment was that Ms. Bebo was effectively sanctioned multiple times for the same alleged misconduct. For instance, the ALJ imposed separate maximum $150,000 penalties for alleged false statements in ALC's public filings, false statements to auditors, and the falsification of ALC's books and records, and then yet another maximum $150,000 penalty for the "execution of a scheme to

defraud," despite the fact that the individual steps allegedly taken by Ms. Bebo to execute such a scheme (making false statements in periodic filings, falsifying books and records, and making false statements to auditors) had already been sanctioned. And even though Ms. Bebo did nothing new in each of the successive quarters, and the alleged "violative acts" remained the same, the ALJ imposed those maximum penalties seven times for each quarter that passed before the "scheme to defraud" ceased.

The only rationale cited by the ALJ to support this method of calculating penalties was that "[c]ounting four units of violation for each quarter prejudices Bebo less than counting the maximum legally available." (Dec. at 79.) The ALJ otherwise made no effort to support this method of calculating penalties, including by articulating a reasoned basis for departing from the long line of Commission and federal court precedent, which ordinarily treats a course of conduct like the one at issue here as a single unit of violation for purposes of calculating the appropriate sanction. When the Commission imposes such draconian civil penalties, particularly on an individual, it has a higher burden of explaining and justifying its decision. The Initial Decision failed to satisfy this burden and should be reviewed as a result.

D. The ALJ imposed excessive monetary sanctions in light of the fact Ms. Bebo did not financially benefit from the misconduct.

In his Initial Decision, the ALJ rejected the Division's request for disgorgement, finding that there was insufficient evidence that Ms. Bebo benefitted financially from her alleged "misconduct" by way of bonuses or salary payments. (Dec. at 78.) Thus, the ALJ rejected the Division's request and ordered no disgorgement. Nonetheless, the ALJ ordered monetary penalties totaling $4.2 million, an amount which is grossly disproportionate to the gravity of Ms. Bebo's offense and bears no relationship to the amount of disgorgement.

Indeed, the ALJ specifically acknowledged that Ms. Bebo did not benefit financially from her alleged misconduct, but expressly rejected the idea that such a factor should weigh against the imposition of harsh sanctions, concluding: "Bebo's misconduct did not clearly benefit her financially, but it helped her avoid discipline and reputational harm; although this factor does not weigh in favor of a severe penalty, it also does not weigh against it." (Dec. at 79-80.) But despite this conclusory assertion to the contrary, the Commission *has* traditionally treated the lack of unjust enrichment as a factor weighing against harsh sanctions. *See, e.g., In Re F.X.C. Inv'rs Corp.*, Release No. 218, 2002 WL 31741561, at *21 (Dec. 9, 2002) (denying Division's request for "massive penalties" and declining to award civil penalties in any amount where the harm to others was not great and Respondents had not enriched themselves financially). As a general rule, the Commission seeks to impose civil penalties that bear some relationship to the amount of disgorgement. *Id.* The ALJ, however, failed to do so here, and likewise failed to provide any explanation for his departure from the Commission's usual practice in this case.

The ALJ's justification for the draconian penalties he imposed was inadequate and out of step with the Commission's usual practice. The decision should be reviewed for this reason as well.

E. The $4.2 Million penalty and permanent bar are grossly disproportionate to the gravity of Ms. Bebo's alleged offense in violation of the Eighth Amendment.

For the reasons discussed above, the $4.2 million penalty imposed on Ms. Bebo by the ALJ is grossly excessive in light of the gravity of the offense she is alleged to have committed. Despite the ALJ's repeated characterization of Ms. Bebo's conduct as "egregious," that assertion is belied by the actual evidence presented at trial, which showed, among other things, that Ms. Bebo did not act with scienter, her alleged violations occurred years ago and have not been repeated, no other parties were harmed, and Ms. Bebo did not reap any financial gains as a result

of her actions. Nonetheless, the ALJ imposed 28 maximum $150,000 third-tier penalties against Ms. Bebo, without any meaningful consideration for whether such draconian penalties were truly justified under the circumstances of this case. They are not, and the imposition of those penalties is punitive and grossly disproportionate to the gravity of Ms. Bebo's alleged offense, in violation of the Excessive Fines Clause of the Eighth Amendment. *See, e.g., In Re F.X.C. Investors Corp.*, 2002 WL 31741561, at *21 ("I conclude that the $100,000 penalties sought by the Division in this proceeding are grossly disproportionate to the gravity of the proven offenses, and thus constitutionally excessive under the Excessive Fines Clause of the Eighth Amendment. That is a matter that justice requires me to consider.").

Review of the Initial Decision is necessary to correct this error.

F. The $4.2 million in civil penalties should be reversed because Ms. Bebo does not have the ability to pay it.

Because it could not be anticipated that the ALJ would impermissibly stack violations and penalties in contravention of the language of the statute, precedent interpreting the statute, and other applicable law, Ms. Bebo did not make a showing in the post-hearing briefing regarding her ability to pay any civil penalty imposed. The ALJ's imposition of the $4.2 million penalty should be reviewed and reversed because Ms. Bebo does not have the ability to pay that award.

VII. The ALJ Erred In His Evidentiary Decisions And The Proceedings Deprived Ms. Bebo Of Due Process.

Respondent has been deprived of the fundamental fairness every citizen is owed when being investigated and prosecuted by her government. She was prosecuted without the protections and benefits of the Federal Rules of Evidence, meaningful discovery, a fair and impartial jury, or any fact-finder who does not share an employer with opposing counsel. From his pretrial rulings through his findings in the Initial Decision, the ALJ strained to find sense in

the non-sense of the government's case and turned a blind eye to compelling and irrefutable evidence that undercuts it. Likewise, his pretrial and evidentiary rulings were part of a larger pattern and practice of conduct designed to maximize a favorable outcome for the government.

The ALJ's bias became apparent from the start, and infected each stage and day of the proceedings, culminating in his Initial Decision. From refusing to allow Ms. Bebo's experts to testify, to allowing the Division to present wholly irrelevant evidence, to reviewing full investigation transcripts of Mr. Henniger and Ms. Ng prior to the hearing that the Division improperly sought to admit and Ms. Bebo opposed, to sustaining practically every objection the Division made and overruling almost all of Ms. Bebo's, the ALJ's bias permeated throughout the courtroom. Notably, this is not the first time that a respondent in front of this ALJ has raised legitimate concerns with respect to his impartiality. Numerous other respondents and a national newspaper have also raised similar concerns. These concerns prompted the Commission to ask ALJ Elliot in another matter to submit an affidavit with respect to whether he felt pressure to rule in favor of the Division and provide in the affidavit addressing "any other matter pertaining to allegations of bias or partiality that he may consider pertinent or wish to address." *In the Matter of Timbervest, LLC*, Investment Advisers Act Release No. 4103 (June 4, 2015).

Here, among other rulings that reflect a lack of fundamental fairness, the ALJ permitted the Division to submit declarations of individuals otherwise available for testimony, contrary to the explicit provisions of the rules and prohibited discovery of Ventas' practices related to fully paying tenants who default on financial covenants—holding it as irrelevant to Ms. Bebo's state of mind—but permitting the entirety of the evidence the Division solicited from Ventas to be based on just that. Then in his Initial Decision, he gave the lack of memory more weight than actual memory, relying on precisely the type of evidence he previously held was "irrelevant" to Ms.

Bebo's state of mind. The ALJ also declared the credibility of certain witnesses "largely immaterial" or "of little significance," but then based crucial findings on their testimony. (*See, e.g.,* Dec. at 29 ("His [Solari's] credibility is thus of little significance."); Dec. at 5, 21, 29 (stating Ventas/Mr. Solari "agreed to nothing[,]" citing Mr. Solari's testimony).)

Many of the material factual findings in the Initial Decision have been marred or precipitated by a lack of fundamental fairness in the evidentiary decisions made throughout these proceedings, as well as in the rationale underlying those factual and credibility determinations. But the Initial Decision is not merely about credibility determinations that weigh entirely against Ms. Bebo; rather, the ALJ arrived at factual findings and conclusions of law that required an alternative reality that, in a most favorable light to the Initial Decision, evidenced a lack of understanding of the actual evidence presented (or failed to be presented) or was contrary to law. For example, the ALJ concludes that conduct engaged in without a "good faith basis" negates the need for a materiality determination—*i.e.*, an absence of good faith in a CEO's actions are always, per se, "material" actions, even if investors' conduct suggests the opposite. And here, his lack of good faith determination is a leap that ignores Mr. Buono's uncontested testimony that he too believed at the time that the conduct was appropriate. His newfound belief, post-settlement with the government, is irrelevant to Ms. Bebo's state of mind and scienter.

Respondent takes exception to all such findings and deprivations of fundamental fairness, including the ALJ's erroneous evidentiary rulings, which not only deprived Ms. Bebo of her right to due process but are also prejudicial errors that are independent grounds for reversal. Among other findings, Ms. Bebo takes exception to the ALJ's reasoning that resulted in the conclusion that "Bebo's due process arguments are meritless" (Dec. at 73-75), that "Bebo received a trial before an impartial factfinder ... [and t]he process Bebo received in this case was at least

equivalent to what she would have received in a district court bench trial, and arguably more." (Dec. at 72-73.)

The Initial Decision's attempts to minimize Respondent's assertions as "meritless" are undermined by its inconsistent findings and conclusions elsewhere throughout the decision. For example, the Initial Decision states that "[t]here is no reason to think that Bebo's inability to call Hennigar or Ng prejudiced her, or that they were in any sense 'key witnesses.'" (Dec., p. 74.) But at the same time, the Initial Decision recognizes that the knowledge of the Board is relevant to scienter, and that it is an "exceptionally knotty" issue, citing evidence in the record that Ms. Ng—the Chair of the Audit Committee—and others were aware of the inclusion of employees in the covenant calculations, despite Board members' "adamant" testimony to the contrary. (*Compare* Dec.at 74 *with* Dec. at 42 (citing Ex. 1115 (email correspondence between Mr. Buono and Ms. Ng)).) In fact, the ALJ—the factfinder in this case—read the full investigative testimony of Ms. Ng and Mr. Hennigar, despite the fact that the Division withdrew its request to admit the testimony and Ms. Bebo had no opportunity to cross-examine them, depose them, or challenge their credibility. (Tr. 106-107 ("JUDGE ELLIOT: Very well. Well, it does -- it looks to me like it's probably a board member, based upon -- at least based upon Mr. Hennigar's and Ms. Ng's transcripts, which I've read but have not admitted.").) And multiple witnesses testified that they had discussions with Ms. Ng regarding the inclusion of employees in the covenant calculations. (*See, e.g.*, Buono, Tr. 2417-18, 2523-24; Robinson, Tr. 3435-36; Exs. 1913, 1913A.) There is no reason to think that Ms. Bebo's inability to call Ms. Ng did not prejudice her.

Ms. Bebo takes exception to all findings that dismiss her challenges to the fundamental fairness of these proceedings, for all of the reasons highlighted above and below.

A. Ms. Bebo was not given adequate time to prepare a defense.

For over two years, the Division investigated whether there had been any violations of the federal securities laws in relation to certain periodic financial reports filed with the Commission by ALC. The Division issued forty-three (43) subpoenas for testimony or documents, collected millions of pages of documents (approximately 270 gigabytes of data), and took a cumulative total of fifty-five (55) days of on the record testimony from thirty-three (33) witnesses. On the Monday after Thanksgiving, December 3, 2014, the Division issued the OIP, initiating administrative proceedings against Ms. Bebo.

Respondent twice asked for an extension of time to prepare. At the outset of the proceedings, Ms. Bebo moved for an extension of the hearing date, as the ALJ set a hearing date in April 2015, which provided Ms. Bebo just four months to prepare her defense, even though the Division had been investigating the matters that resulted in the allegations contained in the OIP for over two and one half years and had plenty of time to prepare its case for the anticipated hearing. Ms. Bebo cited the nature of the claims at issue, which involve complex legal and factual circumstances; the scope of the factual circumstances—the OIP's allegations span five years; the massive investigative file containing millions of pages of documents, and the technical difficulty accessing the critical documents; the number of witnesses; and the need for multiple expert witnesses. Ms. Bebo renewed her motion as the hearing date approached. Both times the request was denied.

Indeed, the substantive allegations contained in the OIP span over a period of five years, with January 2009 to May of 2012 being the critical time period relevant to Division's allegations that Ms. Bebo caused ALC to file false or misleading periodic filings with the Commission. There are more than 100 witnesses with relevant information, based on the allegations and theory of the Division, as reflected in the OIP's allegations. Those witnesses are spread throughout the

United States and even internationally—principally in Canada. As noted above, during the course of its two-year investigation the Division took a cumulative total of fifty-five (55) days of on the record testimony from thirty-three (33) witnesses. The Division interviewed at least sixteen (16) other witnesses, from whom it obtained written statements.

The Division also collected millions of pages of documents from various persons and entities relevant to the claims in the case, and Division staff have represented to Ms. Bebo's counsel that they have reviewed every single one of those documents during their lengthy investigation. The investigative file, excluding documents collected in the course of the investigation, is approximately 5 gigabytes of information. Including the various document productions, the amount of information produced by the Division beginning on December 9, 2015 was over 250 gigabytes of information. This was all amassed by the Division in an investigation that began in the summer of 2012, over two and a half years prior to filing the OIP on December 3, 2014.

The size of the investigative file and number of documents produced beginning on December 9, 2014 alone would have made it prejudicial to force Ms. Bebo to a hearing within four months. However, the format and manner in which the Division provided the information prevented Ms. Bebo and her counsel from meaningfully accessing the critical documents for over a month. On December 9, 2014, the Commission provided an internal hard drive with 265 gigabytes of electronic data and gave access to a 5 gigabyte production via a secure File Transfer Protocol (FTP). The volume of documents exceeded 1.5 million pages. The letter enclosing the internal hard drive explained that the material was being provided electronically to "avoid any delay and unnecessary cost," but had the opposite effect.

First, the information was contained on an internal hard drive that had to be mounted and integrated into another computer. An external hard drive would have been much easier and quicker to access. Next, the size of the data was so large that counsel could not begin processing the data on the 265 gigabyte internal hard drive, without first upgrading its server capacity.

Once this process was complete, counsel learned that the databases related to the documents were produced in a format that made it extremely difficult for Ms. Bebo and her counsel to process and review the documents in a meaningful way and in a timely manner. As set forth in the affidavit of William K. Boren, Reinhart's head Litigation Support Project Manager, the Division's production was contained in 9 Concordance databases, a program for which Ms. Bebo's counsel does not maintain a license. (Aff. of William Boren dated Jan. 2, 2015 (hereinafter "Boren Aff.") ¶¶ 1-8.) To work with the underlying documents, a litigation technology specialist worked in the accompanying .dat files which are accessible through a text editing program. The .dat files were unnecessarily large because the text from every page from the respective production was incorporated in the .dat file instead of providing a path to the text contained in a separate.txt file, a method routinely used by law firms and e-discovery companies. (Boren Aff. ¶ 9.)

As a result, a single .dat file contained text from tens of thousands of pages of documents, which rendered the file incredibly large—5 gigabytes for ALC's production alone. (Boren Aff. ¶ 11.) This decision created innumerous delays as the litigation technology specialist modified the text files to include header information that had been omitted from the .dat files, but which was needed for a meaningful review of metadata in Relativity, the program used by Ms. Bebo's firm to review documents. (*See* Boren Aff. ¶¶ 11-17.) Since the Division did not include headers in the .dat file, the litigation technology specialist had to refer to a separate file identifying the

headers and then incorporate those references for each of the nine .dat files. The nine databases had different header information and one databases alone had more than 70 headers. While the "find and replace" function automates much of the text editing process within a single database, each separate search function took significantly longer than necessary because the text from each document was included in a single file. Much of the delay could have been avoided had the Division clicked a different option when making its production through Concordance. (Boren Aff. ¶ 18.)

Based on the problems with Division's production format, Ms. Bebo's counsel only gained access to the seven smaller databases after Christmas 2014 and requested that the Division reproduce the two largest databases, those containing documents produced by ALC and Grant Thornton—the most important documents in this case—in a usable format so that those databases could be imported without further delay or expense. Nonetheless, Ms. Bebo was not granted any additional time to prepare her defense.

The Commission recently proposed rules that would presumptively allow for additional time for respondent's to prepare their defense in complex cases like Ms. Bebo's. *See, e.g.,* Amendments to the Commission's Rules of Practice, 80 Fed. Reg. 60091-92 (proposed Oct. 5, 2015) (to be codified at 17 C.F.R. pt. 201). This is further evidence and an admission by the Commission that the ALJ's decision to arbitrarily adhere to the presumptive deadlines contained in the current Rules of Practice was erroneous and a deprivation of Ms. Bebo's right to due process.

B. The Division's investigative methods, chosen forum, and access to witnesses prejudiced Ms. Bebo's defense.

Nearly all of the thirty-one (31) witnesses who testified at Ms. Bebo's hearing met or spoke with the Division, at least once, in advance. Many met with the Division for hours or over

the course of multiple days. (*See, e.g.*, Doman, Tr. 250-51; Solari, Tr. 440-42; Bell, Tr. 661-62; Fonstad, Tr. 1524-25; Hokeness, Tr. 3033-35.) Most met with the Division during the investigation and then again prior to their hearing testimony. (*Id.*) Only three of those witnesses, other than Ms. Bebo herself, agreed to speak with Respondent's counsel—Ms. Bebo's mother and two former colleagues who the Division never contacted during its investigation.

The fact that the Division spoke with the witnesses during the course of and after the investigation is not the problem—that is their job. Instead, it is the manner in which the Division approached and interviewed these witnesses, the manner in which testimony was preserved, and the manner in which the witnesses were prepared for testimony—all with an eye towards the initiation of, if not during, these administrative proceedings—that is problematic. Ms. Bebo did not have access to these witnesses or sufficient opportunity to challenge their credibility, both things she would have had in federal district court.

C. The Division influenced witnesses with suggestions of criminal prosecution and finger pointing, resulting in a lack of credibility.

In its communications with counsel for ALC and individual witnesses, the Division of Enforcement referenced criminal referrals and 5th amendment privileges before taking depositions and completing its investigation. Before a single deposition was taken in its investigation, the Division suggested that ALC's counsel and witnesses take note of the criminal referral provisions in its Enforcement Manual and indicated that witnesses should consider taking advantage of the cooperation tools available. (*See* Ex. 1967 (in email correspondence, Division counsel states "...I'm sure you're aware of this but in case you haven't started considering it yet, I would like to refer you to Section 5 of our Enforcement Manual..."); *see also* Securities and Exchange Commission, Division of Enforcement, Enforcement Manual, Section 5 (addressing, inter alia, criminal referrals).) Similarly, before issuing a subpoena for a

witness's deposition, the Division asked his counsel whether the witness would testify or "take the 5th." (*See* Ex. 1970 (September 2013 email correspondence between the Division and witness's counsel).)

While veiled and inherent threats would have a tendency to influence witnesses' testimony, even more troubling was the Division's representation to co-respondent John Buono, on the day of his investigative testimony, that Ms. Bebo had "thrown him under the bus[,]" which she had not done. (Buono, Tr. 2434-35.)

> Q You mentioned earlier -- we talked about this testimony about a concern over Ms. Bebo throwing you under the bus. Did you ever come to think that she did throw you under the bus?
> A I didn't know.
> Q I mean, to this day do you know?
> A To this day, I -- you're asking me if the SEC lied to me by saying she threw me under the bus?
> Q Well, that's -- did the SEC tell you that she threw you under the bus?
> A They gave me the impression that she implied -- or she blamed things on me.
> Q And when did they give you that impression?
> A They would have given it to me at that -- probably at that meeting. When was that testimony?
> Q Which -- the one here on February 26th or the last one?
> A The last one -- the testimony, not the proffers. There's only one testimony.
> Q November 19th, the one that we just talked about?
> A Yes.

What is more, Mr. Buono was not provided with Ms. Bebo's transcripts during the investigation. (Buono, Tr. 2490-91; *see also* Buono, Tr. 2491 ("Q: Well so earlier when you had a belief that she had thrown you under the bus in her testimony, that was based not on what you read, but on what someone told you? A: It was based on what someone had told me. I had not read Laurie's testimony.").) While the Division of Enforcement's mission is "to protect investors and the markets by investigating potential violations of the federal securities laws and litigating the

SEC's enforcement actions," *see* Enforcement Manual, Section 1.4.1, they are not cops, and the Division's attorneys must abide by the same rules of professional conduct as all other attorneys.

Not surprisingly, Mr. Buono's version of the critical events has changed over time through his cooperation with the Division—he admitted as much in his testimony—compromising his credibility:

> Q And let's look at 1130A for a minute. These are the minutes from the year end meeting that was attached; is that correct?
> ...
> A It is a meeting of the disclosure committee in reference to the fourth quarter annual report, 2008, yes.
> ...
> Q Yeah. And let's go to page 3, please. And now I want to go to (g), if you can enlarge (g). So this is -- this part of the report appears to be from Financing/Treasury, John Buono for Wally Levonowich. Does that mean that you were providing the bulleted information for -- in Wally's place?
> A Appears to be, yes.
> Q I'm interested in, as you might imagine, the fourth bullet point. Ventas lease covenants continue to be monitored, and correspondence between ALC and Ventas has occurred whereby the covenant calculations have been clarified as to census. Now, would you have written that bullet point?
> A No. Dave Hokeness would have written all of minutes.
> ...
> Q Do you recall putting -- trying to -- let's first talk about whether you believe this is accurate. Is this your belief at the time that this was written back in 2009?
> A I have no reason to believe it's not accurate.
> Q And do you believe it's -- today, as you sit here, that it's still accurate?
> A That there was correspondence whereby the covenant calculations have been clarified. Now it's been pointed out to me that we never mentioned the covenant calculations. We mentioned employee leasing.
> Q All right. So when you say it's been pointed out to you, what do you mean by that?
> A It means that during the course of reviewing materials and having questions from the SEC and others, they pointed out that the phrasing covenant calculations is not there in our correspondence to Ventas, and I don't recall it being discussed on the call with Ventas.
> ...
> Q I'd like for you to tell me the basis for your belief that the statement whereby the covenant calculations have been clarified is no longer true as you sit here today.

A Because we did not in our correspondence to Ventas mention covenant calculations. We merely mentioned employees will be staying at the locations. My interpretation was that Ventas would realize they could be put in the covenant calculations.
Q Why did you have that interpretation?
A Because why else would we -- why else would we do it? It doesn't make any sense to book journal entries for the sake of booking journal entries.

(Buono, Tr. 2492-96.) The Division's methods of investigation and communication in this case have compromised the credibility of the witnesses and the fundamental fairness of these proceedings. Attorneys have a different ethical obligation than law enforcement agents. It is improper to deceive a witness in the hopes of gaining favorable statements or testimony. And this pattern of conduct by the Division attorneys continued during the hearing itself.[37]

D. The hearing testimony of witnesses, reflecting significant preparation with the Division, lacks credibility.

While refusing to speak with Ms. Bebo's counsel, nearly every witness who testified during Ms. Bebo's hearing spent time with the Division prior to his or her testimony. Over the course of the investigation and hearing, one witness—John Buono—spent between forty-five and sixty hours with the Division. (Buono, Tr. 2420.) He is one example of how the testimony of many of these witnesses lacks credibility:

Q Can you go to Exhibit 152, please. And I'll ask you to go to the memo on the second page. And can you just blow up the first half of the memo, please. There you go. Did you draft that memorandum?
A Yes.
Q And in the third paragraph of the memo, it says, ALC is contemplating an arrangement with Ventas whereby scheduled lease payments will be accelerated, perhaps three years, and prepaid. In exchange, ALC would receive a modification or waiver of certain lease covenants. What caused you to draft a memo about that proposal?
A Something that Alan Bell said to me after the board meeting. He said you guys, before you're out of compliance with the covenants, should go down

[37] Ms. Bebo is filing a brief supplement to this petition under seal with additional detail related to this statement as it is based on a portion of the record that has been sealed.

to Ventas and discuss ways to modify it, and he suggested that prepaying rent would be possibly a way to get modifications.
Q And so I believe I may have misspoken. You didn't draft that memorandum, did you?
A Oh, no, I did not. That was from David.
Q But you received it?
A I'm sorry. I'm thinking of the wrong memo.
Q You never received this memorandum?
A I never received this memorandum, no.
Q Pardon me?
A Give me a second, please.
Q Right.
A Yes.
Q And I believe I
A Yes.
Q I believe I misspoke and I asked if you drafted it.
A Yes. I did not draft it. I received it from Dave Hokeness.
Q And to what extent do you know if Ms. Bebo was aware of this proposal?
A I believe she was.

(Buono, Tr. 2330-31.)

Similarly, testimony was elicited by the Division from Joe Solari, the Ventas representative who participated in the January 20, 2009 phone call, that significantly deters from his credibility. Apparently having rehearsed his testimony with the Division prior to the hearing, Mr. Solari uttered the phrase "I would never agree to such a thing, and I didn't have the authority to agree to it" nearly verbatim ten different times in response to the Division's questioning. (*See, e.g.*, Solari, Tr. 416-23.)

While the Division was able to effectively rehearse its cross-examinations with witnesses, Ms. Bebo was not permitted to treat many as adverse witnesses, despite their unwillingness to meet with Ms. Bebo's counsel and their adverse interests. For example, Dr. Charles Roadman replaced Ms. Bebo as CEO of ALC, and played a part in terminating her employment, yet, the ALJ did not consider Dr. Roadman to be an adverse witness. (Roadman, Tr. 2563.) And in the upside-down world of this administrative proceeding, Mr. Roadman's "cross-examination" was

rehearsed with the Division's attorney putting on his cross-examination. This was a common occurrence with respect to witnesses called by Ms. Bebo.

E. Ms. Bebo was denied access to crucial evidence and witnesses by virtue of the nature of these proceedings.

By proceeding administratively, the Division also stripped Ms. Bebo of the ability to secure the testimony at the hearing, much less at a deposition, of key witnesses in the case, including ALC's Chairman of the Board and the Chair of ALC's Audit Committee—David J. Hennigar and Malen S. Ng.

During the time period 2009 to 2012, ALC had two classes of stock. ALC's Class A Common Stock was listed and traded on the New York Stock Exchange under the symbol "ALC." ALC's Class B Common Stock was neither listed nor publicly traded. The holders of Class B Common Stock were entitled to ten votes per share held with respect to each matter presented to ALC's shareholders. The holders of Class A Common Stock were entitled to only one vote per share held with respect to each matter presented to ALC's shareholders. Due to its combined ownership of Class A Common Stock and nearly all of the Class B Common Stock, Thornridge Holdings Limited controlled the voting power of ALC's shareholders and therefore controlled the company. (*See* Bebo, Tr. 3831-32.)

Mr. Hennigar was President of Thornridge and that company's chairman of the board. Thus, Mr. Hennigar possessed de facto control over ALC through Thornridge. In addition, Mr. Hennigar acted as ALC's Chairman of the Board and exercised ultimate control over the strategic direction of the company. Mr. Hennigar is a citizen of Nova Scotia, Canada. Ms. Ng was a member of ALC's Board of Directors and the Chairperson of the Audit Committee of ALC's Board. Ms. Ng is a citizen and resident of Ontario, Canada. Ms. Bebo was unable to subpoena either witness for deposition, discovery or testimony at the hearing in the administrative

proceeding. Both were deposed by the Division during the investigation, outside the presence of Ms. Bebo's counsel.

In late summer of 2014, the Division interviewed Mr. Hennigar and Ms. Ng, among others, off the record in preparation to take their testimony on the record. Thereafter, the Division was able to obtain their on the record testimony through an investigative cooperation program with the Canadian securities agencies. That on the record testimony was conducted as a de facto direct examination of those witnesses rather than for the purpose of investigation and fact finding. The Division sought to introduce the one sided investigative testimony at the hearing in this matter, but ultimately withdrew the request. Nonetheless, Ms. Bebo was precluded from eliciting any testimony from these two key witnesses, as they were outside the subpoena power of the SEC.

And the ALJ did admit the deposition testimony of Mr. Hennigar from unrelated litigation, over the objection of Ms. Bebo. While Ms. Bebo's counsel did question the witness, the deposition was taken in the course of an employment dispute between Ms. Bebo and ALC, not in regard to the Division's allegations of securities fraud. Ms. Bebo never had an opportunity to examine Mr. Hennigar in connection with the allegations in this case, because the Division opted to initiate these administrative proceedings, instead of litigation in federal district court, where testimony could have been compelled. The admission of this testimony is fundamentally unfair for the same reasons noted above. Further, testimony from those unrelated proceedings is irrelevant and immaterial to this proceeding for any purpose other than impeachment. But, of course, Mr. Hennigar did not testify. That the SEC's Rules of Practice contemplate admission of prior sworn statements does not make the admission of any deposition transcript fair or just as a matter of course.

F. Despite Ms. Bebo's lack of access to witnesses, the Division was permitted to admit declarations in lieu of live testimony.

Notwithstanding Ms. Bebo's lack of access to substantially all of the relevant witnesses in this case, the Division was permitted to admit declarations from sixteen witnesses obtained over a more than six month period—more time than Ms. Bebo is allowed to prepare her entire defense—without having to subpoena the witnesses or make them available at trial for cross examination. The Division did not allege that any one of these witnesses was dead or outside the subpoena power. Nor did the Division suggest that it was unable to secure the witnesses' attendance by subpoena. Quite the opposite, the Division itself did not want to procure the attendance of the witnesses by subpoena and preferred to shortcut due process by admitting the prior sworn statements of witnesses, most of which were made without respondent's participation.

Among the many advantages held by the Division in the administrative proceeding is its ability to conduct a full investigation before commencing administrative proceedings, which includes the ability to compel deposition testimony. The ALJ allowed the Division to further tip the scales in its favor by introducing sworn statements obtained during the investigation from available witnesses, while Ms. Bebo would have been precluded from compelling sworn testimony from a witness unless she could identify specific reasons why she "believes the witness will be unable to attend or testify at the hearing..." Rule 233(a). In short, under the Rules of Practice, Ms. Bebo would have been precluded from obtaining the type of evidence from available witnesses that the Division was allowed to introduce without live testimony.

Even if the facts contained in the prior sworn statements are not ultimately in dispute, those witnesses may have evidence that Ms. Bebo could use in her defense. The problem with the admission of prior sworn statements is that they lack the information known by the witnesses

that was not elicited by the Division. Without the right to discovery that is available to a defendant in a civil action, Ms. Bebo was unable to determine what relevant information is known by the witnesses without voluntary cooperation. Since Ms. Bebo's attorneys were not present for any meetings or discussions involving the Division and the sixteen witnesses who have provided sworn declarations, Ms. Bebo is without knowledge of the facts disclosed to the Division that were omitted from the final sworn statement or questions not asked by the Division. Given the manner in which the Division obtained its sworn statements, it has cherry picked the facts included into the sworn statement, thereby preventing Ms. Bebo from obtaining other potentially relevant information.

While the Division preferred to avoid inconveniencing the witnesses by calling them to give live testimony, it merely shifted the onus to Ms. Bebo. During the investigatory phase of the its action, the Division obtained the facts it believes are required to prove its case and sought to admit those facts—and only those facts—through these declarations. Due process and fundamental fairness require that the Division be required to make its case in an open hearing, rather than through the admission of sworn statements obtained outside the presence of Ms. Bebo's counsel and, in most instances, before the proceeding was commenced against her.

G. Evidentiary rulings, through the admission of irrelevant, speculative, or unreliable evidence to the lack of uniform application of (any) evidentiary rules, prejudiced Ms. Bebo's defense.

Without the protection of the Federal Rules of Evidence or the Federal Rules of Civil Procedure, irrelevant, speculative, and unreliable evidence was admitted, and the application of any evidentiary rules uneven, at best. Ms. Bebo was denied access to relevant evidence when the ALJ quashed subpoenas he previously issued and denied the ability to use the witnesses' and the Division's own language when cross-examining and attempting to impeach witnesses. These evidentiary rulings were fundamentally unfair, and prejudiced Ms. Bebo's defense.

H. The ALJ allowed Ventas representatives to provide speculative testimony, while prohibiting Ms. Bebo from collecting documents to challenge that testimony.

The OIP set forth various allegations with regard to Ms. Bebo's purported knowledge of and/or reckless indifference to the accuracy of ALC's statements in its periodic filings with the Commission that it was in compliance with certain (unspecified) operating and occupancy covenants set forth in ALC's Lease with Ventas. To prepare her defense to these allegations, Ms. Bebo sought production of documents from several third parties, including Ventas. The Ventas subpoena sought information that would support Ms. Bebo's defense that her statement that ALC was in compliance with the covenants in the Ventas Lease was accurate and reasonable due to how Ventas has addressed similar situations with other lessees. For certain requests, the ALJ required Ms. Bebo to establish why the information requested in the subpoenas was relevant to the proceedings and proper in scope. (Order on Request for Issuance of Subpoenas, Release No. 2247 (Jan. 23, 2015).) Upon doing so, the ALJ issued supplemental subpoenas, including one to Ventas, on February 5, 2015. (Subpoena to Produce Docs. to Ventas, Inc., Feb. 5, 2015.) Ventas moved to modify the subpoena (which, in reality, was a request to quash the better portion of the subpoena). (Ventas's Mot. to Modify Subpoena, Mar. 3, 2015.) Ms. Bebo filed a response establishing the relevance of her requests to her defense to the allegations in the OIP. (Resp't Laurie Bebo's Resp. to Ventas's Mot. to Modify the Subpoena, Mar. 9, 2015.)

Despite having issued the subpoena after requiring Ms. Bebo to establish the relevance of the requested information and documents, on March 11, 2015, the ALJ issued an order granting Ventas' motion, effectively quashing the bulk of the subpoena. (*See* Order on Mot. to Modify Subpoena, Release No. AP 2410 (the "Order").) In the Order, the ALJ held that the documents

sought by the subpoena documents were irrelevant, stating:

- How Ventas treated Old CaraVita in the course of their business relationship is not at issue, and Bebo is incorrect that it is a relevant line of argument that Ventas would have accepted the alleged way ALC, under Bebo's leadership, reported under the Ventas lease agreement – including by including ALC employees as tenants of facilities leased from Ventas (Order at 1);

- The OIP's charges of violations of Exchange Act Sections 10(b), 13(a) and 13(b), and related Exchange Act Rules, are concerned with alleged dishonest actions and statements by ALC, allegedly caused by Bebo, and not whether Ventas agreed with those statements. What might be relevant to Bebo's defense is evidence of Bebo's knowledge and understanding of what Ventas would or would not have accepted in terms of reporting. Documents responsive to Requests 1-3 would not fall into this category of evidence; that evidence would instead be found in documents Bebo viewed and that have already been produced to her by ALC and/or Ventas – for example, emails between Bebo or other ALC employees and Ventas – and in the testimony of Bebo or her colleagues at ALC about what Ventas had indicated was acceptable reporting (Order at 2);

- It is irrelevant what approach Ventas took as to lessees other than ALC; what is relevant is what Bebo understood Ventas' approach as to ALC to be. Evidence supporting that is found in documents that Bebo saw when she was with ALC; if such documents exist, they would have already been produced by ALC and/or Ventas (*id.*); and

- As discussed above, the only relevant aspect of that theory is Bebo's knowledge or understanding of what Ventas sanctioned (*id.* at 3).

The Order makes clear, on four separate occasions, that the only relevant information regarding Ventas, as it relates to these proceedings, is Ms. Bebo's knowledge or understanding of Ventas' treatment of ALC. The Order prevented Ms. Bebo from conducting discovery on Ventas' treatment of other lessees (including ALC's predecessor, referred to in the briefings as "Old CaraVita") or Ventas' leasing and covenant practices generally.

Nonetheless, despite quashing Ms. Bebo's subpoena seeking information to challenge Ventas' expected testimony about Ventas' general leasing and covenant practices, the ALJ allowed Ventas witnesses to testify about what they would or would not have done, their

policies, their practices, and internal communications notwithstanding their failure to either communicate them to Ms. Bebo or recall the contents of their conversations with her. (*See, e.g.*, Solari, Tr. 414-17 (Mr. Solari permitted to testify about what he would or would not have done or agreed to despite having no recollection of the specifics of the call except that they discussed "whether certain corporate employees from Assisted Living Concepts, while traveling to those facilities on business, could stay in vacant units rather than in a hotel").)

I. The ALJ prohibited Ms. Bebo from using the Division's or the witnesses' own language when cross examining and attempting to impeach witnesses.

Through the course of its investigation, the Division used the term "employee leasing" in more than fifty questions while taking the testimony of Ms. Bebo and Mr. Buono. The term was used more than one hundred times by the parties and witnesses. The Division used it during its examination of witnesses during the hearing in roughly thirty-five different questions. Witnesses used the term during their testimony. Yet, when Respondent's counsel attempted to use the language to either question or impeach witnesses, it was often met objections from the Division and derision from the ALJ.

John Buono used the term "employee leasing" five times during his direct examination. On cross-examination, Mr. Buono testified that one of the Board members "knew about employee leasing":

> Q Now, you mentioned earlier, and I think maybe the judge had asked you a question about -- or maybe it was something I had asked about Mr. Robinson, and you said it in the context of Ms. Ng. And it was in the context that you believed Ms. Ng knew about the arrangement with Ventas and Mr. Solari, correct?
> A She knew about employee leasing

(Buono, Tr. 2417.) Moments later, Respondent's counsel asked Mr. Buono whether another

Board member knew about "employee leasing," and was met with objection:

> Q Yeah. With respect to the employee leasing arrangement that you've just we've just been talking about, the agreement with Mr. Solari to use employees, do you have any basis to believe that Mr. Hennigar knew about that?
> MR. HANAUER: Objection. Vague. Use employees for what?
> JUDGE ELLIOT: Mr. Cameli, you're going to get -- you get one more bite at the apple. Okay? You've got to be specific. You get one more bite at the apple, and I'm shutting you down.

(Buono, Tr. 2421-22.) The Division objected to the term when it was to the Division's strategic advantage to stifle Respondent's ability to effectively cross-examine the witness and elicit testimony favorable to the defense:

> Q Mr. Buono, do you agree that you have testified in the past that you were informed by Mr. Fonstad that employee leasing was okay?
> MR. HANAUER: Objection to the term "employee leasing," Your Honor. We've been through this.
> JUDGE ELLIOT: Sustained.
> MR. CAMELI: I'm using the witness's own language.
> JUDGE ELLIOT: Mr. Cameli, you're down to nine minutes.

(Buono, Tr. 2745.) The Division's protestations are particularly disingenuous given that the Division itself used the term "employee leas[ing]" as shorthand while taking investigative testimony:

> Q But this whole practice that we've been talking about today where you put in lists of employees or other folks who you believe had a reason to stay at the CaraVita properties, that was, that, I'm just going to call it employee lease [*sic*], you understand that?
> A Okay, sure.

(Ex. 500 (Bebo Investigative Test., Apr. 8, 2014, p. 846).)

J. Ms. Bebo was unable to properly prepare her defense because she was denied discovery opportunities regarding the spoliation of evidence caused by a third party.

Ms. Bebo does not believe the Division is responsible for spoliation of evidence that would have assisted her defense in this matter. However, the Division's administrative proceeding denied Ms. Bebo the opportunity—both procedurally and because of the inadequacy of time—to explore the party responsible for spoliation. And this proceeding further denied her an opportunity to explore either retrieval of the evidence or a secondary manner of procuring its substance (*i.e.*, deposing others with potential knowledge). If the Division had commenced these proceedings in district court, those opportunities would have been afforded Ms. Bebo and the fruits of those efforts may have dissuaded the government from pursuing an enforcement action and/or assisted Ms. Bebo greatly in her defense.

Moreover, while the government may not have been responsible for the spoliation, it was aware of Ms. Bebo's claims of the same and, by choosing to prosecute administratively, denied her the ability to fully investigate the facts and circumstances surrounding her missing materials. Likewise, while the Division may not have been a spoliation culprit, its prosecution relied heavily upon witnesses who certainly may have been responsible for the destruction or concealment of such evidence and with whom the government chose nevertheless to align.

Evidence of spoliation exists in this case both circumstantially and directly. First and foremost, Ms. Bebo's notes—which are relevant to any facts concerning her agreement with Ventas and her communications with board members, auditors and others regarding employee leasing as it relates to occupancy census and covenant calculations—are nonexistent. The utter absence of these notes is implausible based on the evidence at trial. Likewise, Ms. Bebo's maintenance of her original Board materials and accompanying notes is consistent with her management style and the testimony of third parties. But without the benefit of discovery

attendant to a district court proceeding, Ms. Bebo was left with the fact of this destroyed or concealed evidence and nothing more.

1. Ms. Bebo took and maintained copious notes and maintained copies of all her Board materials.

Ms. Bebo stated that while CEO at ALC, and with respect to activities outside of the Board of Directors meetings, she took notes for all of the meetings she attended (even those in her office) with business associates both internal and external. (Bebo, Tr. 3857-58.) This included conference calls. (*Id.*) If the subject of those meetings was business or follow up items, it was her practice to take notes. (*Id.*) In fact, if a matter was business related, she would probably have some notes on even trivial matters. (*Id.*) Ms. Bebo further testified that she would have a date on the first page of her notes for a particular topic, meeting or conference call. (Bebo, Tr. 3859.) Her notes identify names of those in attendance on calls or at meetings, as well as the subject of the meeting. (*Id.*) In general, those notes were taken on 8½ x 11 inch yellow or white pads, but on some occasions she used legal-sized pads as well. (Bebo, Tr. 3859-60.)

Importantly, Ms. Bebo would not take pages out of a notepad on which she was writing and often had more than one notepad in use at one time, sometimes color coding them for different agendas or types of meetings. (Bebo, Tr. 3860.) When the pads were full (some might have blank pages but no pages removed) Ms. Bebo or an assistant would file them in a lateral drawer behind Ms. Bebo's desk to her right. (Bebo, Tr. 3860-61.) At the time Ms. Bebo left ALC in May of 2012, she approximates that she had accumulated more than 200 notepads. (Bebo, Tr. 3861.)

Likewise, during Board of Directors meetings, Ms. Bebo would bring specific notes and additional presentation materials that she might use for the meeting. (Bebo, Tr. 3861.) She

would then take notes in her Board book and on the Board materials themselves that she had brought in to the meeting. (*Id.*) It was her practice always to take enough notes that she could produce the minutes of a Board meeting in the event somebody did not write them down or was not able to get them completed. (Bebo, Tr. 3861-62.) Board meeting attendees received half sized lined paper pads, and Ms. Bebo would use that for notes and then place it in a pocket of her Board book, a three ring binder. (Bebo, Tr. 3862.) Her Board binders and the notes contained therein were stored in a particular way in Ms. Bebo's office. (Bebo, Tr. 3862.) The binders were placed in a specific cabinet with frosted doors and shelves behind the doors. (Id.) The binders would be placed on those shelves in the order for each of the board meetings at ALC. (*Id.*) When Ms. Bebo left the company in May 2012, those notepads and binders were still in her office. (*Id.*)

Immediately upon leaving ALC, Ms. Bebo attempted to obtain her notepads or copies thereof and nothing was forthcoming. (Bebo, Tr. 3862-63.) It was not until after her arbitration proceedings had concluded that she was permitted access to any notepads, and on that occasion, approximately 40 notepads were provided to her at ALC's attorney's offices in Chicago. (*Id.*) When she examined those notepads at the ALC attorney's offices, Ms. Bebo observed that there were a number of pages scattered throughout that were torn out with "chunks" missing in the front, middle or back of the notepads. (Bebo, Tr. 3863-64.) The notes that were present were missing numbers of pages—typically, large numbers of pages. (*Id.*) And virtually none of the remaining pages related to discussions with Mr. Henninger and Mr. Rhinelander for operational items. (*Id.*) Rather, the notepads mostly retained discussions about regulatory items, a few specific resident issues, and a substantial amount regarding ALC occupancy development calls. (*Id.*)

When Ms. Bebo was permitted to go to ALC to pick up personal items more than a month after her departure, there were no notepads in any of the boxes presented to her or otherwise located within her line of sight. (Bebo, Tr. 3864-65.) She was permitted to take things from Extendicare or from Highliner, a different company from that of ALC. (*Id.*) She was also permitted to review and take matters of a personal nature, such as books or gifts, or materials from a conference or training of some sort, not ALC type materials. (*Id.*) The materials to which she was given access at ALC were not orderly in any way. Her materials were not in the boxes in a way that they would have been in her office, or in other words, the items in a box were from three different places in her office. (*Id.*) At the time she was at ALC, approximately a month after her departure, the materials provided to her contained no notepads and there were no Board books. (*Id.*) The only place Ms. Bebo ever saw an item from a Board book is when she had an opportunity in the instant proceedings to go to Ropes & Gray in Chicago, meet with attorneys for ALC, and examine a box that had "a lot of different remnant" separate papers that were rubber banded together or clipped together. (Bebo, Tr. 3865-66.) In that process, she came across one page that was ripped from one of her Board books that contained her handwriting; specifically, it contained her notes from a discussion about the topic on that page. (*Id.*)

Ms. Bebo's testimony regarding her note taking and storage of notes and Board books was corroborated by other credible witnesses. (*See generally* Trs. of Dengel, Zaffke, Bucholtz, G. Bebo, and Houck.) Even John Buono corroborates evidence regarding her note-taking habits.

Specifically, Jason Dengel, a former ALC employee and current state law enforcement officer, testified that he observed probably 100 or 200 legal pads with notes in Ms. Bebo's office. (Dengel, Tr. 3916.) Officer Dengel observed that Ms. Bebo took notes diligently—"she was always taking notes." (*Id.*) While Officer Dengel was unable to confirm that her notes were

maintained intact, he testified that he had never seen Ms. Bebo tear pages out of a notepad and that she "pretty much saves everything." (Dengel, Tr. 3916-17.) Officer Dengel further testified that he observed a series of three ring binders maintained in Ms. Bebo's office from board meetings, and he approximated that she maintained probably 15 or 20 binders. (Dengel, Tr. 3917.)

Likewise, Joy Zaffke, Ms. Bebo's executive assistant and someone with whom she worked closely for a four-year period, observed Ms. Bebo's note taking habits. (Zaffke, Tr. 3209.) She testified that she was able to see into Ms. Bebo's office, given the location of her desk, and could observe notepads on her desk or in front of her while Ms. Bebo was in a meeting or speaking with someone casually. (*Id.*) Ms. Zaffke testified that Ms. Bebo always had a notepad in hand and that she was "always taking notes, no matter what situation she was in." (*Id.*) Among other settings, such note taking occurred during meetings with other ALC employees in her office as well as meetings in other conference rooms or boardrooms in the building. (Zaffke, Tr. 3209-10.) Ms. Zaffke testified that at any given time in her desk area, Ms. Bebo had approximately 20 notepads. (Zaffke, Tr. 3210.) Additionally, a table in Ms. Bebo's office contained another pile of notepads and the credenza behind her desk had various notepads as well. (*Id.*) Ms. Zaffke also testified that Ms. Bebo never used partially full notepads and that typically she would go through them from start to finish chronologically. (Zaffke, Tr. 3211.) Ms. Zaffke had no recollection of Ms. Bebo ever tearing a sheet out of her notepad and stated that if she ever needed to pass a note to someone she would not use something from a notepad. (*Id.*) Also, Ms. Zaffke observed that the filing cabinets in Ms. Bebo's office contained Board binders, and the notepads used during the Board meeting would be in those Board binders in a

separate filing cabinet in Ms. Bebo's office. (*Id.*) Ms. Bebo was never observed to discard any of her notepads or remove any pages out of her notepads. (Zaffke, Tr. 3212.)

With respect to Board binders, Ms. Zaffke testified that Ms. Bebo's Board binders were in a shelving unit and that after a Board meeting it was Ms. Zaffke's responsibility to clear the contents of all of the Board binders except Ms. Bebo's. (Zaffke, Tr. 3212.) Except to move the binder from the boardroom and put it on Ms. Bebo's shelf, Ms. Zaffke would not have otherwise touched Ms. Bebo's Board binder. (Zaffke, Tr. 3213.) In addition to Board materials, Ms. Bebo's Board binders also contained notes written on pages of the Board materials and also on a smaller notepad that would fit inside the cover of the binder. (*Id.*)

Gale Bebo, Ms. Bebo's mother and at times executive assistant, corroborated the testimony of others on this topic, noting that Ms. Bebo always kept her Board materials intact and in a cabinet. (G. Bebo, Tr. 3248.) Likewise, contained in the pocket within the binder were Ms. Bebo's notes from the Board meeting and her little notepad of notes from the Board meeting, all of which were filed in a cabinet in Ms. Bebo's office. (G. Bebo, Tr. 3248-49.) Gale Bebo further corroborates that Ms. Bebo had at least a couple hundred notepads in a drawer within her office. (G. Bebo, Tr. 3261-62.) She also stated that Ms. Bebo never ripped pages from the notepads, but in many cases, the pads were filled up. (G. Bebo, Tr. 3262.) Critically, Gale Bebo testified that she was asked to retrieve notes pertaining to the call with Mr. Solari and that they contained information relevant to these proceedings; specifically, they contained documentation memorializing the Ventas agreement and the Board's approval of the same. (G. Bebo, Tr. 3272-74.)

Like other witnesses, Kathy Bucholtz was also familiar with Ms. Bebo's note taking habits and described them as "copious." (Bucholtz, Tr. 2953.) At every meeting involving Ms.

Bucholtz and Ms. Bebo, Ms. Bucholtz observed that Ms. Bebo "always had a pad of paper and was taking notes." (*Id.*) Like others, Ms. Bucholtz testified that Ms. Bebo saved her notes and one of her credenzas had "stacks of pads" in it. (*Id.*) Ms. Bucholtz did not think that Ms. Bebo wrote on pads that were only partially full pads and she did not know Ms. Bebo to have ever torn pages out of her legal pads. (Bucholtz, Tr. 2954.) With respect to Board materials, Ms. Bucholtz testified she was familiar with how Ms. Bebo stored them and that they were maintained in a cabinet—each one of her binders was in a particular cabinet and when an annual conference (meeting) occurred, the Board binders were in another cabinet. (Bucholtz, Tr. 2954.) According to Ms. Bucholtz, Ms. Bebo was a "bit of a packrat." (Bucholtz, Tr. 2954-55.) Ms. Bucholz confirms that inside the binders were the Board agenda and notes regarding the meetings. (Bucholtz, Tr. 2955.)

Corroborating her mother's testimony, Ms. Bebo testified that she last saw her notes from the call with Mr. Solari in April 2012 in connection with the reasonableness letter from Quarles & Brady. (Bebo, Tr. 4022.) In addition to this occasion, Ms. Bebo also saw those notes on other occasions shortly after the call, in early 2009, during discussions about the agreement with Mr. Solari and the new understanding with Ventas; she would have had her notes with her for reference. (Bebo, Tr. 4022-23.) Ms. Bebo also testified that her notes would have reflected her conversations between Mr. Rhinelander and herself regarding the specifics of the Ventas employee leasing arrangement. (Bebo, Tr. 4199-4200.) Mr. Rhinelander did not want to have a lot of written communication with Ms. Beo, but instead communicated more by phone. (Bebo, Tr. 4200.)

Jared Houck also testified that he frequently attended meetings with Ms. Bebo and other members of the senior leadership team, that he had an occasion to notice that Ms. Bebo would

take extensive notes during meetings and calls, and that she saved those notes in her office. (Houck, Tr. 1478-79.)

Mr. Buono's specific recollection about the location of the notes and binders is unclear. However, while he does not recall exactly whether Ms. Bebo took notes during her call with Mr. Solari, "it wasn't uncommon for her to take notes." (Buono, Tr. 2465.) Mr. Buono would generally agree that it was Ms. Bebo's habit and routine to take notes during telephone conversations with counterparties. (Buono, Tr. 2465.)

2. The current state of Ms. Bebo's notes and Board books suggests spoliation has occurred.

Despite all of this corroborating evidence about Ms. Bebo's note taking habits and her preservation of such notes, when the current state of Ms. Bebo's notes and binders were physically presented in court, they bore no resemblance to the form or substance described by multiple witnesses. (*See* Ex. 2200 A-X and Aff. of Mark A. Cameli Regarding Notepads and Board Materials Produced at Hearing.) Specifically, the documents produced in court and made part of the record photographically and testimonially were very different than the state of the notes and Board binders described in the testimony of these witnesses. (*See generally* Bebo, Tr. 3929-54.)

In short, the nature of these administrative proceedings have made it impossible for Ms. Bebo or her counsel to properly investigate the disposition of those critical documents and the parties responsible for their destruction and/or concealment, all of which are highly relevant and exculpatory for Respondent.

Ms. Bebo takes exception to all of the Initial Decision's findings to the contrary on these evidentiary and due process matters. (Dec. at 73-75.)

K. The ALJ erred as a matter of law by ignoring the *Mathews v. Eldridge* standard and concluding that Ms. Bebo's right to procedural due process had not been violated.

The Initial Decision never acknowledged, much less appropriately applied, the constitutional standard governing Ms. Bebo's procedural due process claims. (*See* Dec. at 72-75.) This was error and necessitates review of the decision.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). In determining whether governmental action has violated procedural due process, courts first consider whether plaintiffs will be deprived of a liberty or property interest, and then must determine "what process is due." *Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999).

There is no dispute that Ms. Bebo had a property interest at stake in the case, and so the issue becomes whether the process afforded to her under the circumstances comported with due process. She established that based on the facts set forth above, most of which are undisputed, and federal court precedent that she was deprived of procedural due process. *See, e.g., Jenkins v. McKeithen*, 395 U.S. 411 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Texas-Capital Contractors, Inc. v. Abdnor*, 933 F.2d 261 (5th Cir. 1990); *Treadwell v. Schweiker*, 698 F.2d 137 (2d Cir. 1983); *Lidy v. Sullivan*, 911 F.2d 1075 (5th Cir. 1990); *Lonzollo v. Weinberger*, 534 F.2d 712 (7th Cir. 1976); *Gullo v. Califano*, 609 F.2d 649 (2d Cir. 1979); *see also Communist Pty. of the United States v. Subversive Activities Control Bd.*, 254 F.2d 314, 327-28 (D.C. Cir. 1958); *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979); *Standard Oil Co. v. F.T.C.*, 475 F. Supp. 1261, 1274-75 (N.D. Ind. 1979).

VIII. The ALJ Erred In Finding No Constitutional Violations In The Administrative Proceeding Or In The Law Enabling The Proceeding.

Ms. Bebo raised several constitutional challenges in her post-hearing brief: Article II officer appointment and removal challenges, facial equal protection and due process challenges, and an as-applied procedural due process challenge. The ALJ found all of them to be without merit. Ms. Bebo seeks review by the Commission of each of her constitutional challenges.

A. Article II challenges to the appointment and removal of SEC ALJs.

The ALJ dismissed Ms. Bebo's arguments under the Appointments and Take Care Clauses of Article II in two sentences on his Initial Decision. (Dec. at 71.) He provided no analysis or reasoning for finding Ms. Bebo's Article II claims meritless; he simply cited an order in which the Commission found that because SEC ALJs are not "inferior officers," their appointment is not subject to the requirements of the Appointments Clause. (*Id.* (citing *In the Matter of Raymond J. Lucia Cos. & Raymond J. Lucia, Sr.*, Release No. 4190, 2015 WL 5172953, at *21 (Sept. 3, 2015)).)[38]

There is no dispute that the method by which SEC ALJs are appointed to their positions does not conform to the requirements of Article II, clause 2. That is, the Appointments Clause requires that constitutional officers be appointed by the President, a court of law, or a department head; the Commission agrees that SEC ALJs are not hired in that manner. *Id.* at *21.

Similarly, under the Supreme Court's holding in *Free Enterprise*, it is clear that the removal protection enjoyed by SEC ALJs does not conform to the requirements of Article II, clause 3. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) (pursuant to Article II's vesting of the executive power in the President, constitutional officers

[38] The *Raymond J. Lucia* decision did not address the argument that removal provisions for SEC ALJs violate the Take Care Clause of Article II. However, both the appointment and removal claims depend on a common legal determination: whether the SEC's ALJs are constitutional officers. The Commission in *Raymond J. Lucia* decided they are not. *In the Matter of Raymond J. Lucia Cos.*, 2015 WL 5172953, at *21. That holding is erroneous.

cannot be separated from the President by multiple levels of protection from removal). SEC ALJs enjoy dual-layer tenure protection, as they can be removed only by the Commission, whose members can be removed only by the President.

The dispositive legal question for Ms. Bebo's Article II challenges, then, is not whether the appointment and removal of SEC ALJs conforms to Article II prescriptions (because they do not), but whether Article II applies to them at all. The Commission's holding in *Raymond J. Lucia* that SEC ALJs are not constitutional officers, and therefore that Article II does not apply to them, is erroneous. Among other reasons, federal district courts have found that SEC ALJs are indeed constitutional officers. *See, e.g., Hill v. SEC*, No. 1:15-CV-1801, 2015 WL 4307088, at *19 (N.D. Ga. June 8, 2015); *Duka v. SEC*, No. 15 CIV. 357, 2015 WL 4940057, at *2 (S.D.N.Y. Aug. 3, 2015). In fact, Commissioners Daniel M. Gallagher and Michael S. Piwowar cited to the *Hill* and *Duka* opinions in their dissent from the majority's decision in *Raymond J. Lucia*, stating that although "the Commission is free to express its views on Constitutional issues, we recognize and believe it is appropriate that Article III federal judges ultimately resolve this issue." SEC Public Statement, *Opinion of Commissioner Gallagher and Commissioner Piwowar, dissenting from the opinion of the Commission* (Oct. 2, 2015), http://www.sec.gov/news/statement/dissenting-opinion-gallagher-piwowar.html.

The Commission's decision in *Raymond J. Lucia* is flawed, and the ALJ's reliance on it caused his Initial Decision to be erroneous. SEC ALJs are constitutional officers, and therefore their appointment and removal are subject to the prescriptions of Article II. The ALJ erred in holding that Ms. Bebo's Article II claims are without merit.

B. The ALJ erred in rejecting Ms. Bebo's facial Fifth Amendment equal protection challenge.

As Ms. Bebo laid out in her Post-Hearing Brief, the legal scheme established by Congress through Section 929P(a) of the Dodd-Frank Act impermissibly affords SEC prosecutors the unguided discretion to choose whether a respondent will have a right to be tried by a jury. Such a law violates the equal protection guarantee of the Fifth Amendment, and is therefore facially unconstitutional. *See McGowan v. Maryland*, 366 U.S. 420, 425 (1961) (laws that create classifications that "affect some groups of citizens differently than others" implicate the concerns of equal protection and are struck down unless they can survive judicial scrutiny).

The ALJ found that Dodd-Frank's grant of authority to the SEC to choose the forum in which it prosecutes unregulated citizens for monetary penalties, thereby choosing which class of citizens will receive the procedural protections of federal district courts and which will not, does not violate equal protection. This finding is erroneous.

First, the ALJ took issue with the fact that Ms. Bebo "cite[d] literally no evidence particular to this proceeding, beyond the mere fact of the proceeding itself, in support of her claim." (Dec. at 72.) Requiring Ms. Bebo to cite evidence "particular to this proceeding" misses the point that hers is a facial challenge: Section 929P(a) of Dodd Frank is unconstitutional in all instances, not just as applied to her proceeding. *See Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011) ("In a facial constitutional challenge, individual application facts do not matter. Once standing is established, the plaintiff's personal situation becomes irrelevant. It is enough that '[w]e have only the [statute] itself' and the 'statement of basis and purpose that accompanied its promulgation.'") (citing *Reno v. Flores,* 507 U.S. 292, 300–01 (1993)).

What is more, the ALJ denied Ms. Bebo the opportunity to discover facts that might be relevant to her equal protection and due process claims. On April 3, 2015, before the hearing

had commenced, the ALJ issued an order granting the Division's Motion in Limine for a Protective Order barring Ms. Bebo from calling any Division attorneys as witnesses. He issued this order without even allowing Ms. Bebo to respond to the Division's motion. Had Ms. Bebo been allowed to examine Division attorneys either by deposition or at the hearing, she could have elicited evidence regarding the reasons the Division chose to bring its claims against Ms. Bebo administratively rather than in federal district court.

Second, the ALJ reasoned that the Commission's exercise of forum selection is discretionary and depends on the facts of individual cases, and therefore the attendant differential treatment of SEC enforcement targets is a necessary consequence of that discretion, not a constitutional violation. (Dec. at 72.) But it is the grant of discretion in this case that forms the basis of the constitutional violation. This case is not like *Engquist v. Oregon Department of Agriculture,* 553 U.S. 591 (2008), on which the ALJ relied to support his finding. In that case, the Supreme Court held that the equal protection clause does not apply to a public employee asserting a violation under a "class of one" theory because employment decisions necessarily involve discretion by any employer. *Id.* at 605 ("To treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship.") In contrast, there is nothing "typical" about prosecutors having discretion to decide which constitutional rights a respondent will receive; in fact, under no other administrative scheme are agency prosecutors allowed to seek equivalent remedies, including monetary penalties, in either federal court or administrative court at their sole discretion. The ALJ's reliance on distinguishable precedent was erroneous and must be reviewed.

Third, the ALJ stated that Dodd-Frank's award of forum selection discretion was rationally related to the government's interest in protecting the country's financial system. (Dec. at 72). But the question is not whether Congress had a rational basis in expanding the SEC's enforcement authority, it is whether the SEC has a rational basis to distinguish between citizens who will be tried in federal court and those who will be tried in administrative court. The ALJ did not substantively address or distinguish the Supreme Court cases Ms. Bebo cited in her brief that found no rational basis for this type of discriminatory discretion. (Resp't Br. at 221-23.) For example, in *Humphrey v. Cady,* the Supreme Court noted the equal protection problem with a prosecutor's discretion to seek a remedy for certain conduct under either of two acts, one of which provided for a jury determination and one of which did not; the Court did not analyze whether the legislature had a rational basis for requiring commitment proceedings, but rather whether or not the petitioner was deprived a jury determination "merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other." 405 U.S. 504, 512 (1972). The ALJ's reasoning as to Ms. Bebo's equal protection claim is flawed and must be reviewed and overturned.

C. The ALJ erred in rejecting Ms. Bebo's facial Fifth Amendment substantive due process challenge.

Ms. Bebo also brought a facial substantive due process challenge to Dodd-Frank because the law allows SEC prosecutors to punish a citizen for the prospective exercise of a constitutional right (to elect to be tried by a jury) by subjecting citizens who it believes will exercise that right to administrative proceeding instead. "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort...." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

In addressing Ms. Bebo's substantive due process claim, the ALJ did not address this argument, but instead summarily noted that respondents in administrative proceedings are not entitled to a jury trial. (Dec. at 73.) He misses the point. Ms. Bebo would have the right to be tried by a jury if the SEC brought its claims in federal district court; the risk that the SEC would choose to bring its claims in administrative court instead *so that* Ms. Bebo could not exercise her right to a jury is not compatible with substantive due process. *See Blackledge v. Perry*, 417 U.S. 21 (1974) (prosecutorial discretion authorized by a state statutory regime was unconstitutional because of the risk that the prosecutor's actions would be motivated by the goal of penalizing a defendant's assertion of his right to a jury trial).

Moreover, the ALJ's blanket reliance on *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977) was improper. (Dec. at 73.) *Atlas Roofing* held that, "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible" without violating the Seventh Amendment. *Atlas Roofing*, 430 U.S. at 455. The Court again stressed this applied to the creation of new statutory rights to the administrative venue: "Congress is not required by the Seventh Amendment to choke the already crowded federal courts with *new* types of litigation or prevented from committing some *new* types of litigation to administrative agencies with special competence in the relevant field." *Id.* (emphasis added). As set forth in Ms. Bebo's briefs and prior motions in this matter, the statutory ability of the government to pursue fines or penalties from non-regulated citizens has existed for over 80 years, and the forum for litigating those matters was in federal district court where the citizen's right to a trial by jury was established. *See Tull v. United States*, 481 U.S. 412 (1987). Thus, the change effected by Section 929(P)(a) does not fall within the ambit of *Atlas Roofing*.

Further, the ALJ dismissed as "speculative" and "unlikely" Ms. Bebo's argument that under Dodd-Frank the SEC could file in district court and then voluntarily dismiss and re-file administratively if the respondent exercises her right to a jury trial in federal court. (Dec. at 73.) It is the possibility, not the likelihood, of the prosecutor's punishment of an exercise of a constitutional right that raises a due process concern. *Perry*, 417 U.S. at 28.

The ALJ's analysis in dismissing Ms. Bebo's substantive due process claim was flawed, and therefore must be reviewed.

Dated this 13th day of November, 2015.

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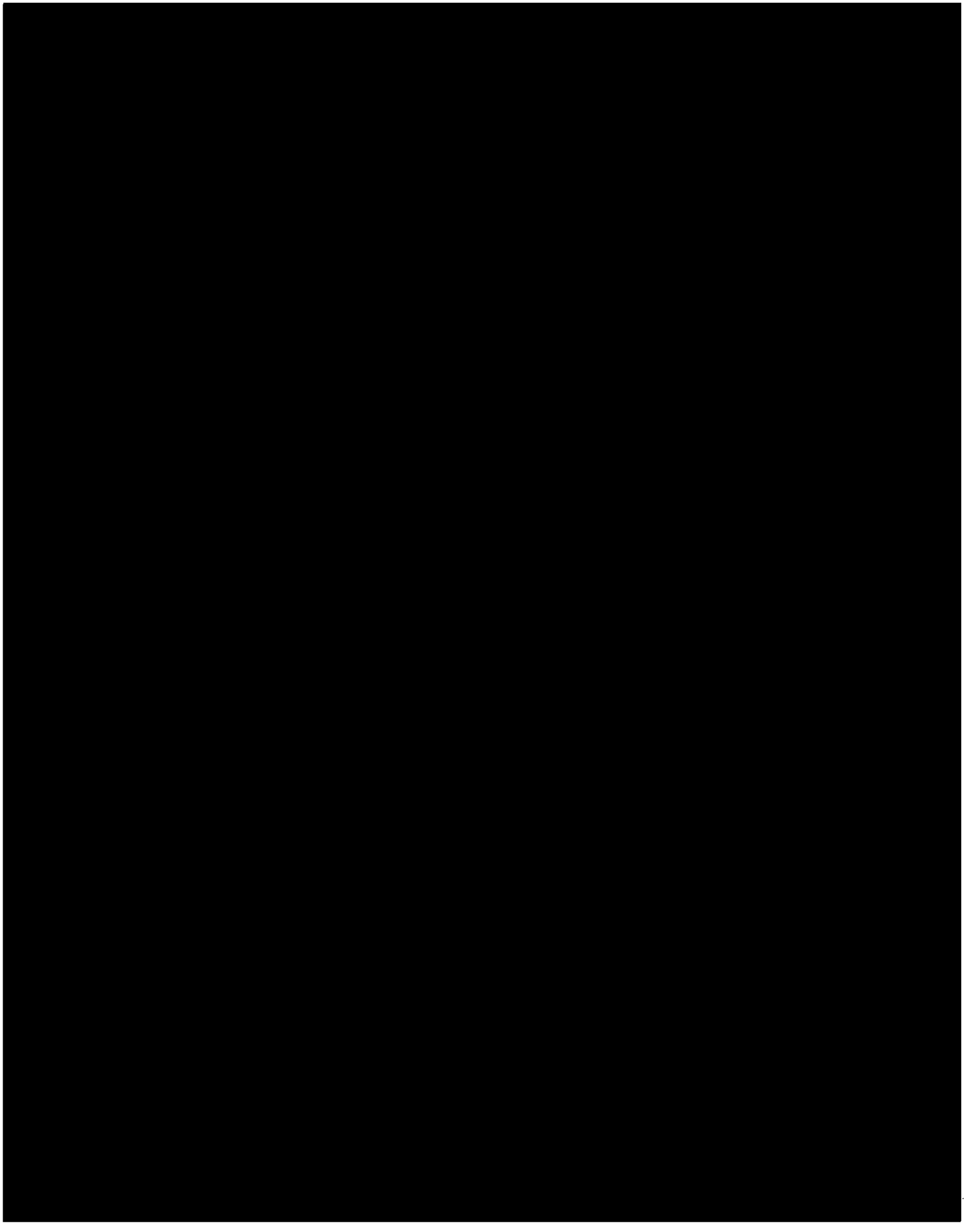
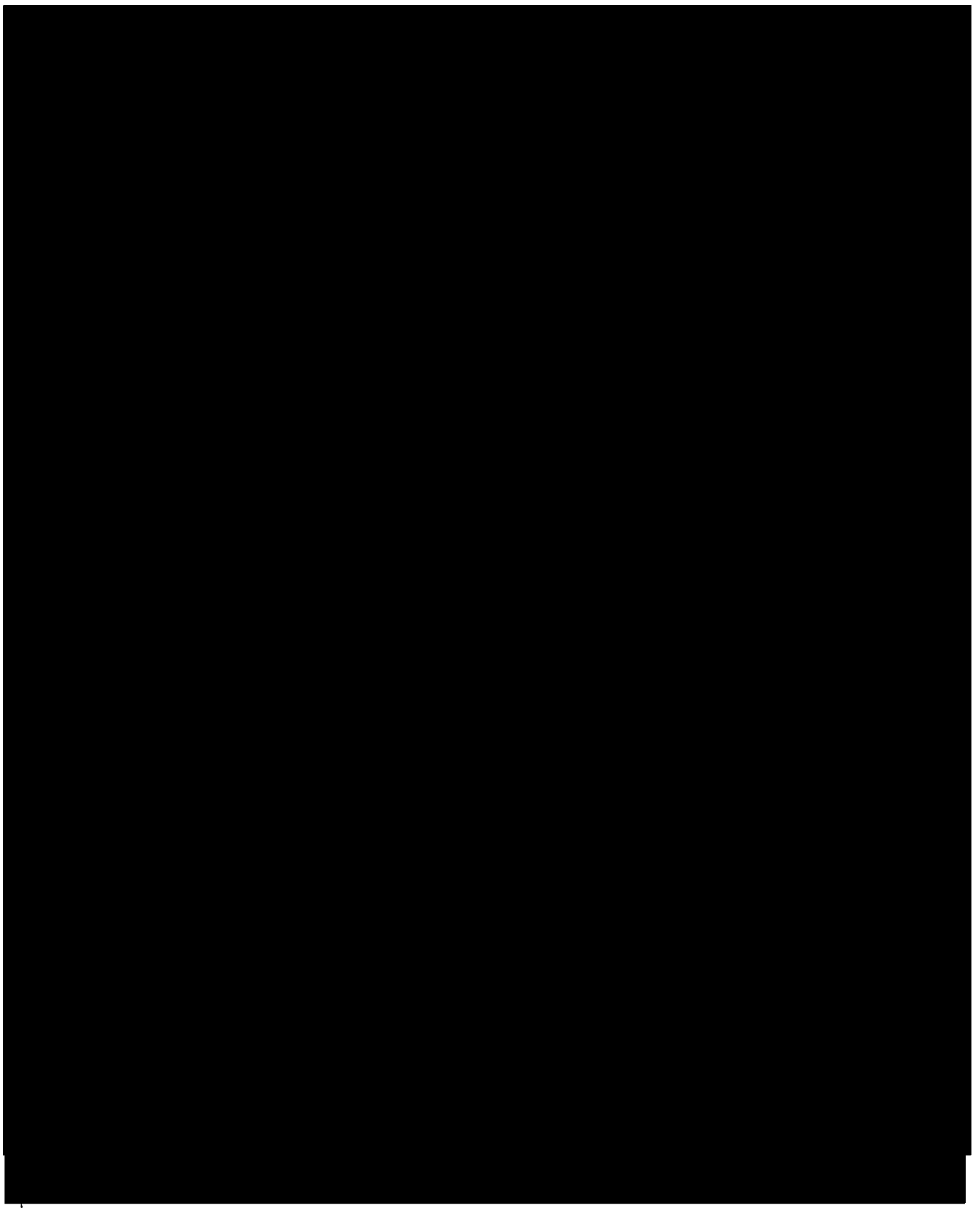
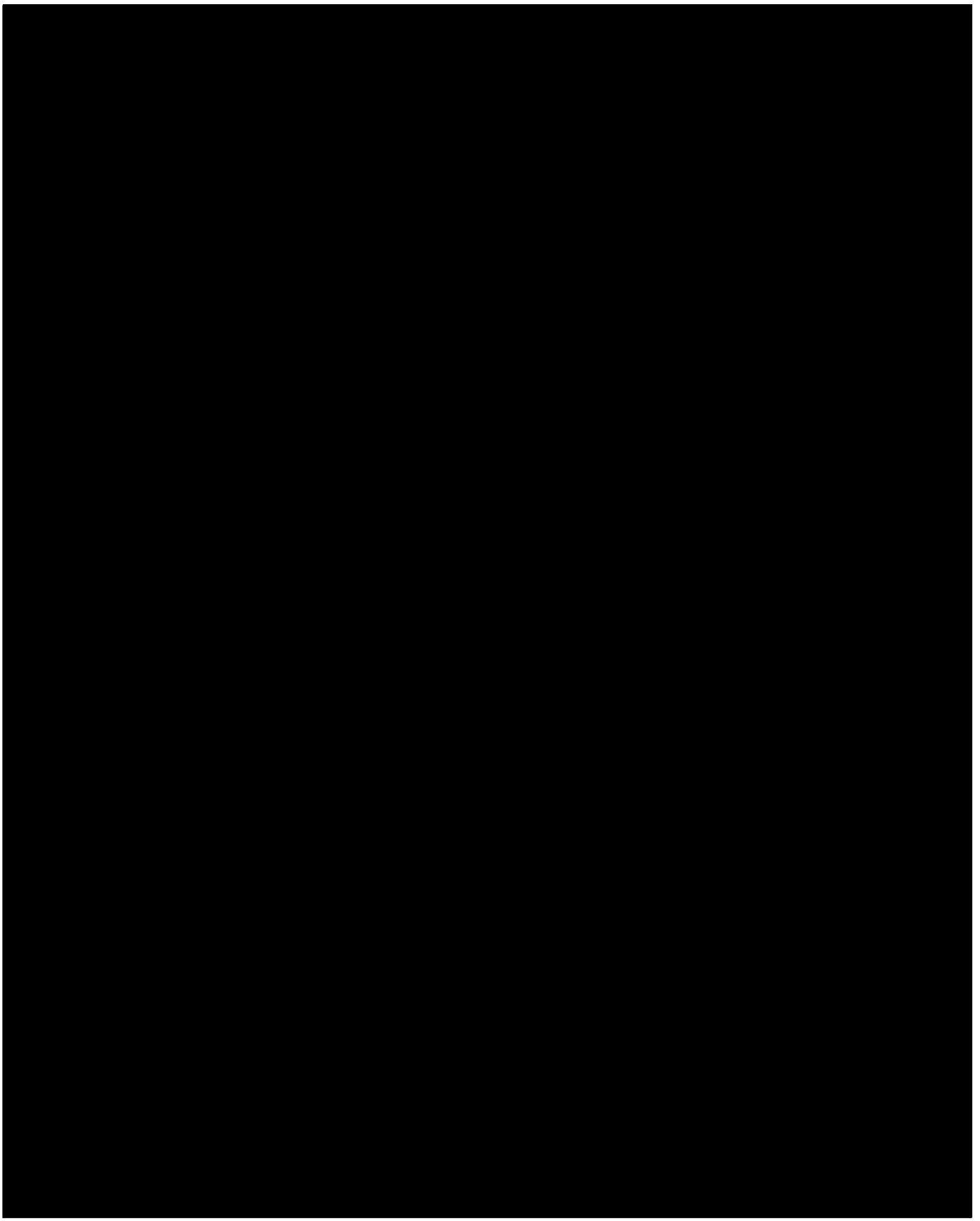
Exhibit A







ORIGINAL

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of

LAURIE BEBO, and
JOHN BUONO, CPA,

Respondents.

CERTIFICATE OF SERVICE

Ryan S. Stippich of Reinhart Boerner Van Deuren s.c. certifies that on November 13, 2015, he caused a true and correct copy of Respondent Laurie Bebo's Petition for Review of the Initial Decision to be served on the following by e-mail and United States mail:

The Honorable Cameron Elliot
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-2557

Benjamin J. Hanauer, Esq.
Scott B. Tandy, Esq.
Daniel J. Hayes, Esq.
Timothy J. Stockwell, Esq.
Division of Enforcement
U.S. Securities and Exchange Commission
175 West Jackson Boulevard, Suite 900
Chicago, IL 60604

and by e-mail only to:

Jessica Neiterman
neitermanj@SEC.GOV

Dated this 13th day of November, 2015.

REINHART BOERNER VAN DEUREN S.C.
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By: _____

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November 13, 2015

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DELIVERED BY MESSENGER

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

Dear Mr. Fields:

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

I enclose for filing in the above-referenced matter an original and three copies of Respondent Laurie Bebo's Petition for Review of the Initial Decision and Certificate of Service.

Thank you for your assistance.

Yours very truly,

Ryan S. Stippich

32956793RSS:amb

Encs.

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