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 BRIEF IN OPPOSITION TO THE DIVISION OF ENFORCEMENT'S MOTION TO INTRODUCE PRIOR SWORN STATEMENTS OF ALC PERSONNEL INCLUDED IN COVENANT CALCULATIONS**

The Division of Enforcement denied Ms. Bebo her constitutional right to a jury trial when it decided to pursue its fraud claims against her in an administrative proceeding, rather than in federal court. The Division now seeks to deny Ms. Bebo the right to cross-examine witnesses it intends to use to make its fraud case against her, despite the availability of the witnesses and the presumption in favor of in-person testimony.

In moving to admit prior sworn statements from approximately 20 witnesses that the Division obtained during the year leading up to its Order Instituting Proceedings, the Division does not even pay lip service to the presumption in favor of in-person testimony and instead focuses on the ease with which it can prosecute its case if permitted to use these prior sworn statements. The Division attempts to introduce prior sworn statements of otherwise available witnesses out of expedience—rather than in furtherance of justice—at the expense of Ms. Bebo's due process rights. This premature motion to admit prior sworn statements should be denied, or, at a minimum, Ms. Bebo should have the opportunity to continue her review of the Division's substantial production to evaluate whether she consents to the use of prior sworn statements—a course of action Ms. Bebo proposed to the Division less than a week before it filed its motion.

I. Prior Sworn Statements Are Not A Substitute For In Person Testimony Under Rule 235

Rule 235 does not exist for the convenience of the Division—it provides the procedure by which a party may obtain permission to introduce prior sworn statements under certain circumstances. Under Rule 235:

> *At a hearing*, any person wishing to introduce a prior, sworn statement of a witness, not a party, otherwise admissible in the proceeding, may make a motion setting forth the reasons therefore…A motion to introduce a prior sworn statement may be granted if:
>
> (1) the witness is dead;
>
> (2) the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement;
>
> (3) the witness is unable to attend or testify because of age, sickness, infirmity, imprisonment or other disability;
>
> (4) the party offering the prior sworn statement has been unable to procure the attendance of the witness by subpoena; or
>
> (5) in the discretion of the Commission or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In making this determination, due regard shall be given to the presumption that witnesses will testify orally in an open hearing. If the parties have stipulated to accept a prior sworn statement in lieu of live testimony, consideration shall also be given to the convenience of the parties in avoiding unnecessary expense.

Rule 235(a) (emphasis added).

Substituting out of court statements made outside the presence of opposing counsel because of convenience is "fundamentally unfair." *See, e.g., In the Matter of Del Mar Fin. Servs., Inc., et al.*, AP File No. 3-9959, 2001 WL 919968, *4 (Aug. 14, 2001) (denying introduction of investigatory testimony when witness could have given live testimony and impeached with prior statement). Moreover, "live testimony is preferable to written testimony, especially where credibility is at issue." *Id.**4, n. 6.

Courts permitting the admission of prior sworn statements have done so when the witness was unavailable or under exceptional circumstances, not because of convenience. *See In the*

Matter of Robert W. Armstrong, III, AP No. 3-9793, 2004 WL 737067 (Apr. 6, 2004) (permitting introduction of investigative testimony of two deceased witnesses and a witness who was unable to appear because of age and infirmity); *In the Matter of MGSI Sec., Inc.*, AP No. 3-9702, 2000 WL 19098, *8-9 (Jan. 12, 2000) (finding interests of justice favored admission of prior sworn statement when witness refused to respond to subpoena).

When both parties stipulate to accept prior sworn statements in lieu of live testimony, the hearing officer shall consider the "convenience of the parties in avoiding unnecessary expense" in deciding whether it is in the interests of justice to forego live testimony. Rule 235(a)(5).

II. The Division Fails To Overcome The Presumption In Favor of In-Person Testimony.

The Division moves to admit 16 sworn statements obtained over a more than six-month period—more time than Ms. Bebo is allowed to prepare her entire defense under the Commission's Rules of Practice—without having to subpoena the witnesses or make them available at trial for cross-examination. The Division has not alleged that any of these 16 witnesses are dead or outside the subpoena power. Nor has the Division suggested that it is unable to secure the witness's attendance by subpoena. Quite the opposite, the Division itself does not want to procure the attendance of the witness by subpoena and prefers to shortcut due process by admitting the prior sworn statements of witnesses, most of which were made without respondent's participation.[1]

Given Rule 235(a)(5)'s presumption in favor of in-person testimony and the apparent availability of the witnesses, the Division attempts to fashion a new standard for the admission of prior sworn statements when (1) the "subject of the prior sworn statement is basic or background

[1] The Division seeks to introduce nineteen prior statements, but Ms. Bebo's counsel only observed the deposition testimony of three witnesses. The three depositions all took place in Milwaukee, Wisconsin (Ex. 2-4) and the Division offers no explanation why these witnesses could not give testify orally in the open hearing that will also take place in Milwaukee, Wisconsin.

information about the declarant" or (2) the statement was made in the presence of the respondent's counsel. (Mot. at 4 (citing *MGSI Sec.*, 2000 WL 19098; *In the Matter of Kenneth J. Schulte*, AP File No. 3-9501, 1997 WL 173668 (Apr. 10, 1997))).

First, Rule 235(a)(5) does not excuse prior sworn statements concerning background information from the presumption in favor of in-person testimony. The Division offers no authority to support its interpretation that Rule 235(a)(5) authorizes prior sworn statements pertaining to background information. In *MGSI*, the proceeding on which the Division relies for support, the hearing officer admitted sworn statements when a subpoenaed witness failed to respond to the subpoena—the admissibility of prior sworn statements when the witness refuses to respond to a subpoena is expressly covered under Rule 235(a)(4). *MGSI*, 2000 WL 19098 at *8-9. In *MGSI*, the underlying testimony and whether it was disputed did not enter the hearing officer's rationale for admitting the out-of-court statements. *See id.*

Second, the presence of respondent's counsel when the prior sworn statement is given is not a sufficient basis to find that an otherwise available witness should not be required to testify in person. The only decision cited by the Division in which a hearing officer admitted prior sworn statements of an otherwise available witness was based on dilatory acts of the respondent that are inapplicable to this proceeding. *In the Matter of Kenneth J. Schulte*, the hearing officer decided it was in the interests of justice to admit deposition testimony made in the presence of respondent's counsel to accommodate the respondent's late-in-the-game request to change venue from Ohio, where the witnesses lived, to Florida, where the respondent had relocated during the proceedings. *Schulte*, 1997 WL 173668, *1. Less than a month before the hearing was to commence in Florida, the respondent called a second audible and requested to move the proceeding back to Ohio. *Id.* The hearing officer again accommodated the requested change in

venue, further delaying the proceeding, but did not disturb her prior order admitting "transcripts of sworn testimony of persons taken at depositions *where [respondent] was represented by counsel.*" *Id.* *1, n.4 (emphasis added). Although there is a presumption in favor of in-person testimony, the respondent's counsel was present for the prior sworn statements and, by maintaining her prior order, the hearing officer avoided requiring the witnesses from attending the hearing with little notice. Here, respondent's counsel observed three of the depositions that the Division seeks to admit as prior sworn statements, but played no role in the Division's acquisition of the sixteen other statements subject to the motion. Any potential witnesses will have adequate notice to make travel arrangements if the Division decides to seek trial subpoenas given that the first hearing date is nearly three months from when the Division filed its motion to admit the sworn statements. If the Division is primarily concerned with providing notice to the witnesses, it has only limited the amount of notice available by first pursuing this motion, rather than issuing the subpoenas and working with Ms. Bebo toward a possible stipulation.

Absent a stipulation between the parties, the costs associated with the attendance of the witnesses should not factor into the Court's decision whether the interests of justice warrant prior sworn statements over in-person testimony. The Division notes that it would have to pay the costs associated with the witnesses' attendance and the hearing may be shorter if it does not have to establish the facts contained in the sworn statements. (*See* Mot. at 4-5). However, Rule 235(a)(5) instructs a hearing officer to consider "the convenience of the parties in avoiding unnecessary expense" when the parties have *stipulated* to accept prior sworn statement in lieu of live testimony. As explained to the Division before it filed this motion, and discussed below, Ms. Bebo cannot stipulate to the admission of these statements before she has an opportunity to

review the Division's production and determine whether these witnesses have additional information that may be relevant to her defense. *See* Exhibit A.

Rule 235 provides for the admission of sworn statements under limited circumstances, primarily when the witness is unavailable for trial. The Division may not rely on this rule to avoid calling otherwise available witnesses simply because it has obtained sworn declarations containing only the subset of facts that the Division believes it will need to prove its case.

III. The Interests Of Justices Require That Ms. Bebo Be Given The Opportunity To Support Her Defense With Cross-Examination Of In-Person Witnesses.

Fundamental fairness requires that the witnesses the Division will rely on to try to prove fraud by Ms. Bebo must be present at the hearing so that Ms. Bebo has an opportunity to present her defense, particularly given Ms. Bebo's limited ability to obtain sworn statements from third-parties absent voluntary cooperation. *See, e.g., Del Mar Fin. Servs., Inc.*, 2001 WL 919968, *4. 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 Division now wants to further tip the scales in its favor by introducing sworn statements obtained during the investigation from available witnesses, while Ms. Bebo is precluded from compelling sworn testimony from a witness unless she can 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 is precluded from obtaining the type of evidence from available witnesses that the Commission seeks to introduce without live testimony.

Even if the facts contained in the prior sworn statements are not ultimately in dispute, these witnesses may have evidence that Ms. Bebo will use in her defense. Ms. Bebo is not insisting on in-person testimony of witnesses for the sake of formality. In fact, her counsel

explained his willingness to stipulate to undisputed facts. (Ex. A). The problem Ms. Bebo has with the admission of prior sworn statements is the information known by the witnesses that was not elicited by the Division. On January 23, 2015, in response to the Division's request for a stipulation to the admissibility of the ALC employee declarations, Ms. Bebo's counsel stated:

> I want to submit as much of this case as practical to our ALJ on stipulations and declarations wherever there are no issues of material fact in dispute. So, here's the issue with your request, which is consistent with my comments yesterday when we spoke.
>
> We believe these witnesses have other testimony, in addition to that which you solicited from them, which is relevant to the defense, particularly in light of the statements you have proffered. I am interested in exploring supplements to the declarations or stipulations with you in that regard. While that can't be done immediately, it can likely occur over the next 2-3 weeks. So, I think you have a few options: (1) request issuance of subpoenas and we'll work together over the next 2-3 weeks to obviate the need for live testimony. If we reach an agreement, you can always call off the witnesses; or (2) same as one, except hold off on issuance to see if we can reach a stip or otherwise agree to supplement.
>
> What do you think? Mark.

(Ex. A). Of the two options suggested by Ms. Bebo in an effort to avoid live testimony from witnesses when not necessary, the Division chose a third option:

> Mark: Thanks for getting back to me.
>
> I concur with your statement on trying to reach stipulations when practical and appropriate, and am open to discussing the supplemental stipulations referenced in your email.
>
> That said, I want to avoid the delay and uncertainty involved in trying to resolve this on our own, and don't want to be left unprepared if we can't reach a resolution. So I plan on filing a motion on the issue, in the hope that we can get quicker certainty for our pretrial preparations.
>
> Thanks
> -Ben

(Ex. A). Despite expressing a willingness to stipulate to specific facts once counsel had an opportunity to complete its review of the Division's voluminous production, the Division filed

this motion to force the issue and force Ms. Bebo to divert her resources away from a review of the Division's production to respond to this motion on an expedited basis.[2]

Without the right to discovery that is available to a defendant in a civil action, Ms. Bebo is unable to determine what relevant information is known by the witnesses without voluntary cooperation. To date, Ms. Bebo's counsel has attempted to contact each witness who gave a declaration to the Division, but has been able to speak to only one, for a brief conversation. Since Ms. Bebo's attorneys were not present for any meetings or discussions involving the Division and the 16 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. Rule 235(a) provides that that the hearing officer may require all relevant portions of the statement into evidence if a party moves to admit only part of a statement into evidence. But 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 allegedly prefers to avoid inconveniencing the witnesses by calling them to give live testimony, it is merely shifting 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 now wants to admit those facts – and only those facts – through Rule 235. If the Court permits the introduction of these prior sworn statements it will allow the Division to force Ms. Bebo, the party without investigatory powers or even basic discovery rights, to be the party to inconvenience potentially adverse witnesses by subpoenaing them to testify at trial. Due process and fundamental fairness require that the Division be required to make its case in an

[2] The review of the more 1.5 million pages of documents produced by the Division was delayed by the Division's production format as outlined in Respondent Laurie Bebo's Pre-Hearing Conference Submission Regarding The Necessity For Relief From Rule 360(B) Presumptive Hearing Schedule.

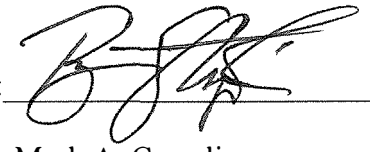
open hearing, as provided by Rule 235, rather than through the admission of sworn statements obtained outside the presence of Ms. Bebo's counsel and, in most instances, before the proceeding was commenced against her.

CONCLUSION

For the foregoing reasons, Ms. Bebo respectfully requests that the Court deny the Division's Motion to Introduce Prior Sworn Statements of ALC personnel absent a stipulation of the parties to the admission of any statements.

Dated this 3rd day of February, 2015.

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

By: 

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[redacted]

30483618

Mark A. Cameli

From: Hanauer, Benjamin J. <HanauerB@sec.gov>
Sent: Friday, January 23, 2015 3:47 PM
To: Mark A. Cameli
Cc: Ryan S. Stippich; Tandy, Scott B.
Subject: RE: Bebo

Mark: Thanks for getting back to me.

I concur with your statement on trying to reach stipulations when practical and appropriate, and am open to discussing the supplemental stipulations referenced in your email.

That said, I want to avoid the delay and uncertainty involved in trying to resolve this on our own, and don't want to be left unprepared if we can't reach a resolution. So I plan on filing a motion on the issue, in the hope that we can get quicker certainty for our pretrial preparations.

Thanks
-Ben

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312-353-8642
hanauerb@sec.gov

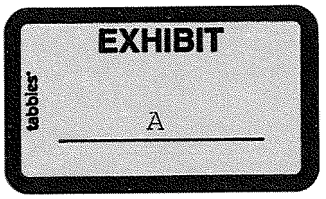
From: Mark A. Cameli [mailto:mcameli@reinhartlaw.com]
Sent: Friday, January 23, 2015 3:30 PM
To: Hanauer, Benjamin J.
Cc: Ryan S. Stippich
Subject: RE: Bebo

Was just about to send you a note on this.

I want to submit as much of this case as practical to our ALJ on stipulations and declarations wherever there are no issues of material fact in dispute. So, here's the issue with your request, which is consistent with my comments yesterday when we spoke.

We believe these witnesses have other testimony, in addition to that which you solicited from them, which is relevant to the defense, particularly in light of the statements you have proffered. I am interested in exploring supplements to the declarations or stipulations with you in that regard. While that can't be done immediately, it can likely occur over the next 2-3 weeks. So, I think you have a few options: (1) request issuance of subpoenas and we'll work together over the next 2-3 weeks to obviate the need for live testimony. If we reach an agreement, you can always call off the witnesses; or (2) same as one, except hold off on issuance to see if we can reach a stip or otherwise agree to supplement.

What do you think? Mark.



From: Hanauer, Benjamin J. [mailto:HanauerB@sec.gov]
Sent: Friday, January 23, 2015 2:52 PM
To: Mark A. Cameli
Subject: RE: Bebo

Mark:

In follow-up to yesterday's conversation, will you be able to stipulate to the admissibility of the ALC employee declarations?

Thanks
-Ben

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From: Mark A. Cameli [mailto:mcameli@reinhartlaw.com]
Sent: Thursday, January 22, 2015 8:57 AM
To: Hanauer, Benjamin J.
Subject: RE: Bebo

Ben

I think I'll be at my cell for our call. Try that number instead of my office: [redacted] Mark

Mark A. Cameli
[redacted] | Milwaukee, WI 53202 Ph: [redacted]

-------- Original message --------
From: "Hanauer, Benjamin J."
Date:01/21/2015 3:20 PM (GMT-06:00)
To: "Mark A. Cameli"
Subject: RE: Bebo

Will do.

Thanks

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From: Mark A. Cameli [mailto:mcameli@reinhartlaw.com]
Sent: Wednesday, January 21, 2015 3:16 PM
To: Hanauer, Benjamin J.
Subject: RE: Bebo

It does. Want to call me?

From: Hanauer, Benjamin J. [mailto:HanauerB@sec.gov]
Sent: Wednesday, January 21, 2015 3:15 PM
To: Mark A. Cameli
Subject: RE: Bebo

Let's do tomorrow morning. Does 930 work?

Benjamin J. Hanauer
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312-353-8642
hanauerb@sec.gov

From: Mark A. Cameli [mailto:mcameli@reinhartlaw.com]
Sent: Wednesday, January 21, 2015 3:10 PM
To: Hanauer, Benjamin J.
Subject: RE: Bebo

Thanks Ben. I'm good either way—your call.

From: Hanauer, Benjamin J. [mailto:HanauerB@sec.gov]
Sent: Wednesday, January 21, 2015 3:00 PM
To: Mark A. Cameli
Subject: RE: Bebo

I'm tied up from 4-6. I could do a call after 6 or tomorrow morning.

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From: Mark A. Cameli [mailto:mcameli@reinhartlaw.com]
Sent: Wednesday, January 21, 2015 2:58 PM
To: Hanauer, Benjamin J.
Subject: RE: Bebo

Probably closer to the end of the day. How's the remainder of your p.m. look?

From: Hanauer, Benjamin J. [mailto:HanauerB@sec.gov]
Sent: Wednesday, January 21, 2015 2:56 PM
To: Mark A. Cameli
Subject: Bebo

Mark:

Do you have a few minutes for a call? I'm free for the next hour and before 10:30 tomorrow.

Thanks
-Ben

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