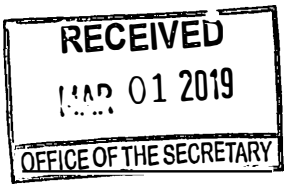
UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION




**ADMINISTRATIVE PROCEEDING**
**File No. 3-16293**

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| **In the Matter of**<br><br>**LAURIE BEBO, and**<br>**JOHN BUONO, CPA**<br><br>**Respondents.** | **RESPONDENT LAURIE BEBO'S MOTION FOR SUMMARY DISPOSITION FOR CONSTITUTIONAL VIOLATIONS** |

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Other Authorities**

**Regulations**



**Rules**

## INTRODUCTION AND PROCEDURAL HISTORY

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank") created a government enforcement scheme unheard of in the administrative state. Congress unconstitutionally established two parallel adjudicatory processes where the government can pursue the same remedies for the same alleged securities law violations. However, it provided no legislative basis for determining how or why a citizen should be subject to an Article I administrative determination of guilt and penalty or an Article III determination, which comes with a Seventh Amendment right to a jury trial and other procedural protections in federal court. There are no statutes or regulations to guide these decisions. Instead, the SEC chooses which forum would be most beneficial or expedient to the government, which inevitably must involve an assessment of how a jury would view the case against the citizen, punishing her for the jury trial right provided by the Constitution. This grant of authority to arbitrarily (at best) choose the forum in which to bring enforcement actions is facially unconstitutional under the Fifth Amendment's guarantees of equal protection and due process.[1]

In addition, based on the undisputed procedural history of this case and the continued unconstitutional nature of Commission administrative law judges, these proceedings should be dismissed with prejudice. This proceeding, based on conduct that occurred between approximately 2009 and 2012, was initiated by a December 3, 2014 Order Instituting Public

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[1] This is a purely legal challenge to the statute, and a successful "facial attack means the statute is wholly invalid and cannot be applied to anyone." *Ezell v. City of Chi.*, 651 F.3d 684, 698 (7th Cir. 2011). Because Section 929(P)(a) of Dodd Frank is unconstitutional on its face, the proceeding instituted pursuant to it cannot go on. This motion only addresses Bebo's facial challenges to Section 929P(a) of Dodd-Frank. Bebo also asserts, in the alternative, an as-applied challenge to the Commission's exercise of its authority in pursuing Bebo in this administrative proceeding instead of federal court. Bebo is currently seeking discovery in support of those challenges.

Administrative and Cease-and-Desist Proceedings ("OIP"). The Division brought the case administratively, instead of filing an action in federal district court against Bebo, where she would be permitted to exercise her right to have a jury determine her fate.

The OIP followed a two-year investigation by the Division of Enforcement into whether there had been any violations of the federal securities laws in relation to certain periodic reports filed with the Commission by Assisted Living Concepts, Inc. ("ALC").[2] The net result of this extensive investigation is the allegation that out of those thousands of pages of financial statements and Commission filings that are otherwise indisputably true, a single statement—asserting a belief that ALC was in compliance with a lease agreement—was knowingly false or was misleading because it failed to provide additional information about the basis for that belief. The Division alleges, in turn, that Bebo, who was the Chief Executive Officer of ALC during the time period in which the challenged periodic reports were filed with the Commission (approximately 2009 to 2012), should be found guilty of committing securities fraud; should be subject to a cease-and-desist order (the functional equivalent of an injunction); should be subject to millions in civil monetary penalties and disgorgement; and should be subject to a permanent ban on serving as an officer or director of a publicly-traded company.

Prior to the passage of Dodd-Frank, which became effective July 21, 2010, the SEC would have been required by law to bring charges seeking these remedies in federal district court, in particular if the SEC determined it wanted to punish Bebo by inflicting civil monetary penalties. However, pursuant to Section 929P(a) of Dodd-Frank, the SEC may now obtain the same remedies in administrative proceedings overseen by the Commission itself. Providing an

[2] The Division of Enforcement issued 43 subpoenas for testimony or documents, collected millions of pages of documents (over 300 gigabytes of data), and took a cumulative total of 55 days of on-the-record testimony. The original trial in this matter lasted four full weeks of testimony, 31 witnesses, and involved the admission of thousands of exhibits.

agency with the ability to obtain the same remedy in federal court or in an administrative proceeding is a unique (and unconstitutional) enforcement regime previously unheard of in the large and ever-growing administrative state.

And because the remedies are the same in either forum, in bringing these charges administratively, the SEC presumably concluded that the government would have been disadvantaged by Bebo's anticipated assertion of her Seventh Amendment right to a jury trial in district court. Under established Supreme Court precedent, this statutory regime, which penalizes the exercise or anticipated exercise of a fundamental constitutional right, is a violation of the Bebo's right to due process.

Similarly, because Section 929P(a) provides the SEC with arbitrary and unlimited discretion to choose which citizen will be subject to which forum, Dodd-Frank on its face establishes a process that violates Bebo's right to equal protection under the law. Dodd-Frank established a structure where the government may choose the forum based solely on whether it would be in the government's interest to deprive a citizen of her right to a jury trial and other substantive and procedural protections afforded by the Federal Rules of Civil Procedure and Federal Rules of Evidence. Thus, in Bebo's case, the SEC presumably concluded that it would be advantageous as a litigation tactic to deprive Bebo of her right to have a jury determine the validity of its charges. Indeed, it would be impossible to conduct a litigation forum assessment without considering this factor. It determined that it would be advantageous to deprive Bebo of her right to have a trial subject to the Federal Rules of Evidence, which preclude unreliable evidence like hearsay. It determined that it would be advantageous to deprive Bebo of the numerous substantive and procedural mechanisms of the Federal Rules of Civil Procedure.

In other cases against unregulated citizens, the SEC will exercise the unbridled authority granted to it by Dodd-Frank to bring cases in federal district court, where the citizen will be afforded all of the rights to which Bebo has been denied. In those cases, the SEC will have concluded that the defendant will be unsympathetic to a jury, or the SEC needs the procedural mechanisms afforded by the Federal Rules, or the SEC needs time to identify and procure expert witnesses. A statutory regime that permits such arbitrary classification constitutes a blatant violation of the Constitution's guarantee of equal protection under the laws.

Bebo has pursued these, and other constitutional challenges to these proceedings since they began in December 2014. She first presented her constitutional challenges in a federal court action seeking to enjoin this one. Although the federal court held it lacked jurisdiction, in assessing the likelihood of success on the merits of her constitutional claims, the court stated the claims were "compelling and meritorious." *See Bebo v. Securities and Exchange Commission*, Case No. 2:15-cv-00003, Doc. No. 23 (E.D. Wis. Mar. 3, 2015) (Decision and Order on Bebo's Motion for Preliminary Injunction). The claims brought in federal court included, in addition to the equal protection and due process challenges, claims that all Commission ALJs were inferior officers that were unconstitutionally appointed and too well-insulated from removal by the President, both in violation of Article II of the Constitution. She pursued all of these constitutional challenges throughout earlier proceedings presided over by a different ALJ, through a four week trial that began a mere four months after the OIP was issued, and through post-trial proceedings.

While her case was pending, the United States Supreme Court agreed with Bebo's Appointments Clause argument in the appeal of another case, and held that all Commission ALJs were unconstitutional. *Lucia v. SEC*, 138 S. Ct. 2044 (2018). Further, the Court held that the

appellant, Lucia, and others subjected to the unconstitutional administrative proceedings, like Bebo, were entitled to new proceedings before a new ALJ. *Id.* at 2055. However, *Lucia* did not reach the separate Article II question regarding the multi-layered removal protections provided to Commission ALJs.

Thus, Commission ALJs continue to be protected by multiple layers of tenure in violation of Article II of the United States Constitution, and this further renders the proceedings over which an SEC ALJ presides unconstitutional. And finally, the proceedings instituted against Bebo must be dismissed because the original OIP was facially invalid by assigning the matter to an unconstitutional hearing officer. New proceedings, consistent with *Lucia*, would need to begin with the issuance of a valid OIP, which would be barred by the applicable statute of limitations. Because this proceeding is time-barred, was instituted pursuant to an unconstitutional law, and is overseen by an ALJ with unconstitutional tenure protection, Bebo requests that this Court grant her motion for summary disposition and dismiss these proceedings with prejudice.

## ARGUMENT

### I. The Summary Disposition Standard.

After an answer to the OIP has been filed and documents have been made available for the respondent to review, Rule 250 of the Commission's Rules of Practice ("ROP") permits a respondent to move for summary disposition of one or more claims or defenses. *See* ROP 250; 17 C.F.R. § 201.250. The hearing officer may grant the respondent's motion for summary disposition if "there is no genuine issue with regard to any material fact and...the movant is entitled to summary disposition as a matter of law." *See id.* Finally, the "facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially

noted pursuant to § 201.323." *See In re Joseph P. Doxey & William J. Daniels*, Release No. 10077, 2016 WL 2593988, *1, n.1 (May 5, 2016).

Bebo's request for summary disposition should be granted because there are no genuine issues with regard to any material fact, and she is entitled to summary disposition as a matter of law.

## II. The Federal Law Enabling This Proceeding, Section 929P(A) Of Dodd-Frank, Is Unconstitutional On Its Face.

For the first fifty years of the SEC's existence, it had no authority to obtain monetary penalties at all, much less from ordinary citizens that were not regulated members of the securities industry. Rather, the SEC was limited to seeking injunctions of on-going fraud or disgorgement in federal court. *See* Carole B. Silver, *Penalizing Insider Trading: A Critical Assessment Of The Insider Trading Sanctions Act of 1984*, 1985 Duke L.J. 960, 960-63, 966 (describing state of remedies available to the government, and noting SEC first obtained authority to obtain civil penalties in federal court in 1984). In addition, the SEC could bar securities professionals (or their firms), like broker-dealers and investment advisors, from the industry in administrative proceedings. *Id.* at 966 n.43. But if a citizen was forced to pay a fine as a result of violating the federal securities laws, Congress required the Department of Justice to bring criminal charges in federal court. *See id.* at 960-63. Of course, the citizen would have all of the Constitutional protections provided to a citizen being prosecuted by her government, including the requirement that the government prove guilt beyond a reasonable doubt. *Id.*

In 1984, Congress first granted the SEC authority to obtain civil penalties in federal district court, but it was limited to insider trading cases and the penalty was limited to three times the amount of profit gained or losses avoided as a result of the insider trading. *Id.* (citing *Insider Trading Sanctions Act of 1984*, Pub. L. No. 98-376, 98 Stat. 1264 (1984)). The SEC continued

to have no authority to assert civil penalties in administrative proceedings against even regulated entities and persons.

Six years later, in the Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Congress granted the SEC authority to obtain civil monetary penalties in administrative proceedings only against regulated entities and persons like brokers and investment advisors. Pub. L. No. 101-429, 104 Stat. 931, §§ 202, 301 (1990). In addition, Congress broadened the SEC's authority to obtain civil penalties in federal district court against citizens otherwise unregulated by the Commission. *Id.* §§ 201, 302.

For the next twenty years, the remedies the SEC could obtain against an ordinary citizen were much like the enforcement authority of other federal agencies, where Congress has provided for additional, more severe and punitive remedies outside of the administrative proceeding context where the citizen being prosecuted would have the various procedural protections afforded to an ordinary citizen in either a civil or criminal case being brought against her by the government.[3] Thus, like other federal agencies with enforcement powers, the level of due process afforded the citizen tracked the punitive gradient of the remedy sought. This legal regime set a delicate balance—a balance that in various decisions from the Supreme Court

[3] For example, under the Clean Water Act ("CWA"), the Environmental Protection Agency ("EPA") can enforce its orders through administrative actions or judicial actions. With respect to administrative actions, § 309(g) of the CWA, 33 U.S.C. § 1319(g), prescribes two classes of penalties that the EPA can levy against violators. Based on a finding that a person has violated a permit condition, the EPA Administrator may assess either a Class I or Class II civil penalty. *See* 33 U.S.C. § 1319(g). Class I penalties, for less egregious conduct, may not exceed $16,000 per violation, with a maximum of $37,500. Violations that are more serious invite Class II penalties, which may not exceed $16,000 for each day the violation continues, with a maximum of $187,500. *Id.* (The EPA adjusts the penalties as necessary for inflation according to a formula prescribed by the Debt Collection Improvement Act of 1996.) Section 309(d) of the CWA also authorizes the EPA to bring federal judicial enforcement actions seeking civil penalties. A court can assess a civil penalty not to exceed $37,500 per day for each violation. Unlike for administrative actions, the CWA does not identify any total maximum penalty amount for the court. *See* 33 U.S.C. § 1319(d). Further, under the FTC Act, the Federal Trade Commission ("FTC") can enforce requirements of consumer protection law through either administrative or judicial processes. *See* 15 U.S.C. §§ 45(b), 53(b). In administrative proceedings, the FTC cannot levy civil penalties for unfair or deceptive acts or practices; however, if the FTC files suit in federal court, the court can award monetary equitable relief (including restitution or rescission of contract), among other relief, against violators. *Id.*

evaluating similar agency adjudication frameworks was held constitutionally permissible. *See, e.g. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977) (holding no Seventh Amendment jury trial right in OSHA administrative proceeding).[4]

Section 929P(a) of Dodd-Frank destroyed that delicate balance when it granted the SEC authority to obtain civil penalties against any citizen in the country in an administrative proceeding.[5] In granting the SEC this authority, the remedies that the SEC can seek administratively are now functionally identical to the remedies that it can obtain in federal district court. In fact, the legislative history regarding Section 929P(a) of Dodd-Frank confirms that this was Congress' intent:

> *Section 211. Authority to impose civil penalties in cease and desist proceedings*
>
> This section streamlines the SEC's existing enforcement authorities by permitting the SEC to seek civil money penalties in cease-and-desist proceedings under Federal securities laws. The section provides appropriate due process protections by making the SEC's authority in administrative penalty proceedings coextensive with its authority to seek penalties in Federal court. As is the case when a Federal district court imposes a civil penalty in a SEC action, administrative civil money penalties would be subject to review by a Federal appeals court.

H. Rep. No. 111-687, at 78 (2010) (Investor Protection Act of 2009) (emphasis added).

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[4] The Occupational Health and Safety Administration does not have the option to try to impose civil penalties in federal court. Indeed, it has no authority to bring cases in federal court, except to restrain "any conditions or practices in any place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures . . . ." 29 U.S.C. § 662.

[5] The SEC's enforcement director acknowledged that the remedies available in either forum are on par: "Ceresney responded to the view by some that the SEC will bring more cases administratively to avoid losses in court. He noted that the SEC won eight out of its last 10 court cases. Congress gave the SEC the authority to obtain the same remedies as in federal court, he explained, and administrative proceedings offer a streamlined procedure in which cases can be brought much more quickly, while the evidence is still fresh." *Officials discuss administrative proceedings and more at PLI conference*, Federal Securities Law Reports, Nov. 20, 2014, at 2 (emphasis added). Although there are minor, immaterial differences in the remedies that can be achieved in federal court or district court, as set forth in the Enforcement Director's comments, the remedies are functionally equivalent.

By granting this parity of remedy, Congress threw off the delicate due process balance that the Supreme Court had approved and in a manner not permitted by the Constitution. The fundamental Constitutional deficiency of the structure is that it places in the hands of the government prosecutor, in the form of the SEC, the sole power to provide or withhold the citizen's Seventh Amendment right to a jury trial for the same conduct and potential punishment. More problematic, the government will only grant the citizen her Constitutional right to a jury trial when the Commission, in consultation with the Division of Enforcement attorneys that conducted the investigation, concludes that, on balance, it is to the government's advantage to permit the citizen her right to a jury. Indeed, in a 2014 speech, the only factors that the SEC's enforcement director identified with respect to how the Division and Commission, will decide to file in district court is whether it would be advantageous as a litigation tactic to file there. *See* Andrew Ceresney, Remarks to the American Bar Association's Business Law Section Fall Meeting (Nov. 21, 2014), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370543515297#.VJ25mV4AA.

Similarly, in another statement in 2014, the Chief of the Market Abuse Unit of the Division, stated that "[i]n every case you make judgments about which forum is most advantageous for the interests of your client [the SEC]" and before deciding on a forum, the SEC performs "an extensive risk analysis" that takes into account the "trade-offs" associated with each

option. Phyllis Diamond, *SEC's Hawke Defends Admin. Forum for Insider Cases*, Corp. Couns. Wkly., Oct. 22, 2014, at 323.[6]

As set forth in more detail below, the legal scheme established by Congress through Section 929P(a) of the Act impermissibly allows SEC prosecutors the unguided authority to choose whether to classify a citizen as one that will have a right to be tried by a jury or one that will not.[7] Such a law violates the equal protection and due process guarantees of the Fifth Amendment, and is therefore facially unconstitutional.

### A. Section 929P(a) of Dodd-Frank violates the Fifth Amendment's guarantee of equal protection, and is therefore unconstitutional on its face.

The Constitution's promise of equal protection guarantees that similarly situated individuals will be similarly treated. 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. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). This constitutional safeguard is

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[6] The SEC appears to have sought and obtained the additional authority under Dodd-Frank to utilize the procedural advantages of the administrative proceeding to increase its success rate. Since Dodd-Frank, and as of 2015, "the SEC prevailed in 90% of administrative proceedings, but only 69% of federal district court cases." Lucille Gauthier, *Insider Trading: The Problem with the SEC's In House ALJs*, 67 Emory L. J. 123, 142 (2017). This comparative success rate is driving more cases into the administrative setting. As one commentator noted in 2017: "Given the procedural and punitive advantages for the agency in administrative proceedings resulting from the Dodd Frank Act, the SEC has since increased the amount of cases it brings in administrative proceedings as opposed to in federal courts." *Id.* at 141. Her analysis showed an approximately 20% increase in the rate of administrative filings compared to federal court filings, which resulted in the SEC hiring two more ALJs in 2014. *Id.*

[7] The SEC's decision to bring its enforcement actions in one forum as opposed to the other is apparently not guided by any reasoned direction from Congress or even the Commission itself. *See* Commissioner Michael S. Piwowar, Remarks at the "SEC Speaks" Conference 2015: A Fair, Orderly, and Efficient SEC (Feb. 20, 2015), *available at* http://www.sec.gov/news/speech/022015-spchcmsp.html#.VR8HHvnF9Fs ("Our enforcement program could also benefit from a look through the lens of fairness. In order to ensure that the Commission does not engage in arbitrary or capricious conduct in enforcement matters, the Commission should formulate and adhere to a consistent set of guidelines when conducting our enforcement proceedings . . . . To avoid the perception that the Commission is taking its tougher cases to its in-house judges, and to ensure that all are treated fairly and equally, the Commission should set out and implement guidelines for determining which cases are brought in administrative proceedings and which in federal courts.").

offended if the government's classification rests on grounds irrelevant to the achievement of a legitimate government objective. *McGowan,* 366 U.S. at 425.[8]

A statutory scheme that, for no legitimate purpose, affords some litigants a jury trial while denying the same to similarly situated litigants violates the equal protection guarantee of the Fifth Amendment. The Supreme Court's consideration in *Baxstrom v. Herold* of such a statutory scheme is instructive. 383 U.S. 107 (1966). The petitioner in *Baxstrom,* a prison inmate in New York at the end of his sentence, challenged the New York statutory scheme that allowed for inmates at the end of their sentences to be committed to a mental hospital without the jury review available to all other persons civilly committed in that state. *Id.* at 110. Under New York law at that time, "[a]ll persons civilly committed . . . other than those committed at the expiration of a penal term, [were] expressly granted the right to de novo review by jury trial of the question of their sanity . . . ." *Id.* at 111.

Applying rational basis scrutiny, the Court found "no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments." *Id.* at 111-12. Where the question to be determined by the tribunal was the same—whether the person before it was mentally ill—the Equal Protection Clause required that all people facing that determination be given the same protections. *Id.* The Court explained that "the State, having made this substantial review proceeding generally available on this issue, may

[8] While the Fifth Amendment does not contain the words "equal protection" as does the Fourteenth Amendment, which applies only to the states, the United States Supreme Court has interpreted the Due Process Clause of the Fifth Amendment to include an equal protection guarantee enforceable against the federal government. *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638 n.2 (1975). Because a facial attack is directed at the Congressional action and legislative classification, that action is assessed under a rational basis standard. *Baxstrom v. Herold,* 383 U.S. 107, 111-12 (1966). The "class-of-one" equal protection standard has no application to a facial challenge to legislation. *Monarch Beverage Co. v. Cook,* 861 F.3d 678, 682-83 (7th Cir. 2017).

not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some." *Id.* at 111.

Almost a decade later the Supreme Court again considered the equal protection implications of a state's commitment laws, this time in Wisconsin. *Humphrey v. Cady,* 405 U.S. 504 (1972). Though the Court remanded before finding a constitutional violation, the Court noted in strong language the constitutional problem with denying a jury to one class of commitment candidates but not another when the determination to be made (mental illness warranting institutionalization) and the potential outcome (commitment) was the same for both classes.

The petitioner in *Humphrey* challenged on equal protection grounds the constitutionality of Wisconsin's disparate treatment of people committed for treatment under the state's Mental Health Act and its Sex Crimes Act. *Id.* at 508. A person committed under Wisconsin's Mental Health Act at that time had a statutory right to have a jury determine whether he met the standards for commitment, but a person facing commitment under Wisconsin's Sex Crimes Act, like the petitioner, was not afforded a jury determination. *Id.*

Before remanding for an evidentiary hearing, the Court observed that under its reading of the two Acts, the *same conduct* could warrant commitment proceedings under either Act. If it developed on remand that the "petitioner was deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other," the Court stated, "[t]he equal protection claim would seem to be especially persuasive . . . ." *Id.* at 512.

Thus, *Baxstrom* and *Humphrey* stand for the proposition that when the alleged wrongful conduct and the remedy sought are the *same*, a statutory scheme that allows the government

arbitrarily to choose its forum (and thereby choose whether the defendant will receive a jury trial) violates the Constitution's promise of equal protection. Such is the case with Section 929P(a) of Dodd-Frank, which grants the SEC authority to obtain civil penalties against any citizen in the country in either district court, where the defendant can elect to be tried before a jury, or an administrative proceeding, where she cannot.

Moreover, with its passage of Section 929P(a), Congress provided no guidance to SEC prosecutors as to when and for what reasons it would be appropriate for them to choose to bring their charges in an administrative proceeding rather than in district court. And the SEC's exercise of that authority is no different than the grant of arbitrary and unbridled discretion to withhold the right to a jury or other procedural protections found constitutionally infirm in *Baxstrom* and *Humphrey*. If the "arbitrary decision of the State to seek . . . commitment under one statute rather than the other" was viewed with such judicial ire in *Humphrey*, so must be the SEC's authority arbitrarily to select its forum, one with a jury and one without. *Id.*

Here, the government's unequal treatment under Section 929P(a) of unregulated people accused of securities violations is *at best* arbitrary. As noted previously, public statements made by the SEC's enforcement director and other staff demonstrate that the unequal treatment of defendants under this scheme is actually a litigation tactic put in place to give the government its

best opportunity to win.[9] Even under the least stringent form of constitutional scrutiny, a law that permits arbitrary classification, at best, and improper punishment of a citizen for the grant of the constitutional right to a jury, at worst, must be struck down.

### B. Section 929P(a) of Dodd-Frank violates the Fifth Amendment's guarantee of due process, and is therefore unconstitutional on its face.

Where the principal objective of a statutory scheme or government practice is "to discourage the assertion of constitutional rights it is patently unconstitutional." *Chaffin v. Stynchcombe*, 412 U.S. 17, 33 n.20 (1973). And "[t]o 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). Courts have invalidated statutory provisions that penalize citizens for possessing or exercising their constitutional rights.

The Supreme Court's decision in *United States v. Jackson*, 390 U.S. 570 (1968) is instructive. There, the Court held that the capital punishment provision of the federal anti-kidnapping law was unconstitutional because it penalized a defendant for exercising his right to a jury trial. The problem with the statutory regime in *Jackson* was that the defendant

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[9] The SEC's decision to bring its enforcement actions in one forum as opposed to the other is not guided by any reasoned direction from Congress. *See* Pub. L. No. 111-203 § 929P(a). The relevant legislative history is also silent on this matter. *See* H.R. Rep. No. 111-517, at 870-71 (2010) (Conf. Rep.); H.R. Rep. No. 111-687, pt. 1, at 78 (2010). SEC attorneys have acknowledged the lack of *any* congressional principal guiding the SEC's selection of a forum in which to bring an enforcement action. In 2014, when asked by a federal district court to articulate "the criteria that the SEC uses to determine whether a matter is referred to court, criminally or civilly, versus referred for administrative proceeding," an SEC attorney responded, "[t]o start with, Congress gave the SEC two distinct paths that it can follow in pursuing a civil action: You can go into Federal District Court; you can bring it in an administrative proceeding. *It did not provide any criteria as to when the Commission would or should do one versus the other.* It's entirely left to the Commission's discretion. The Commission decides—does not have formal criteria. The Commission decides on a case-by-case basis, based on everything before it, which route it might want to follow." Tr. of Mot. for TRO at 66-67, *Jarkesy v. S.E.C.*, No. 1:14-cv-00114-BAH (D.D.C. June 11, 2014) (ECF No. 22) (emphasis added). Although the Division of Enforcement has since issued purported "guidelines" for the selection of forum in its enforcement actions, *see* U.S. Securities and Exchange Commission, *Division of Enforcement Approach to Forum Selection in Contested Actions*, https://www.sec.gov/divisions/enforce/enforcement-approach-forum-selection-contested-actions.pdf (last visited July 30, 2015), the non-exhaustive list of four factors described therein does not include any direction from Congress. The Division also made clear that the circumstances of each particular case will ultimately govern where the case is brought, and it disclaimed any kind of set formula used to make the forum determination.

would be exposed to a death sentence if he exercised his right to have a jury determine the outcome of his case. *Id.* at 570-71. By waiving his right to have a jury determine his guilt, and instead agreeing to have his case heard by a federal judge, the maximum sentence he could receive, if found guilty by the judge, would be life in prison. *Id.*

In striking down the penalty provision, the Court stated "Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." *Id.* at 582. And the Court held that "Congress cannot impose . . . a penalty in a manner that needlessly penalizes the assertion of a constitutional right." *Id.* at 583.

Relying on *Jackson*, the court in *Wymelenberg v. Syman*, 328 F. Supp. 1353 (E.D. Wis. 1971), struck down a Wisconsin statute that forced new residents coming into the state to wait two years before they could obtain a divorce. The court stated "the instant statute must clearly fail as it is impermissible for a state to attempt to chill an individual's constitutional right to travel to and settle in the state of his choice." *Id.* at 1355.

Similarly, the Supreme Court has also found violations of due process where the government retaliates against the exercise of constitutional rights. For example, in *Blackledge v. Perry*, 417 U.S. 21 (1974), the Supreme Court found unconstitutional the prosecutorial discretion authorized by a state statutory regime 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. There, North Carolina charged Perry with a misdemeanor assault. *Id.* at 22. State law provided that such misdemeanors could be tried initially in a court without a jury, and then appealed at the option of the defendant for a trial before a jury *de novo*. *Id.* However, North Carolina law also permitted the prosecutor to obtain a new felony indictment for the same conduct, which the

prosecutor did after Perry exercised his right to have a jury determine his original misdemeanor charge. *Id.* at 23.

The Court held that risk of punishment for the exercise of Perry's right to appeal and have a jury determine the charges against him violated due process. *Id.* at 28-29. The Court reasoned that no actual evidence of bad faith or foul motive need be established because the statute itself permitted the potential for an improper motive to enter the government's decision-making.[10] *Id.*; *see also Marshall v. Jerrico, Inc.*, 446 U. S. 238, 249 (1980) (citations omitted) ("In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law.").

This same reasoning provides the foundation for the Supreme Court's jurisprudence with respect to the Fifth Amendment right against self-incrimination. *See Griffin v. California*, 380 U.S. 609 (1965); *Miranda v. Arizona*, 384 U.S. 436 (1966). Thus, in *Griffin* the Court held that a defendant could not be penalized by the prosecution impeaching the defendant at trial with his pre-trial custodial silence. In reaching this conclusion, the Court reasoned that the Constitution cannot condone "a penalty imposed by courts for exercising a constitutional privilege." *Griffin*, 380 U.S. at 614. Citing *Griffin*, the *Miranda* Court explained that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation." 384 U.S. at 468 n.37.

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[10] Notably, the Court recognized the government's interest in streamlining prosecutions and conserving resources as potentially driving the decision to retaliate against persons that exercised their right to have a new *de novo* trial in front of a jury and impermissibly injecting "the opportunities for vindictiveness" into the decisions. *Perry*, 417 U.S. at 27-28. Expediency, of course, is the same factor that creates the opportunity for vindictiveness in the SEC's selection of forum under Dodd-Frank.

In this case, Congress has gone beyond simply imposing a penalty on a person for asserting her constitutional right. Rather, the Act affects a wholesale transfer of Bebo's constitutional right to a jury trial *to the government itself.* Because the remedies that the SEC may obtain in either forum are functionally equivalent, the sole consideration for the government in exercising its discretion of where to bring the case is where it is more likely to be successful. Consequently, the government can and will conclude after Dodd-Frank that there are circumstances where the defendant would be unsympathetic to a jury. In those cases, the government will penalize the citizen and bring the case in federal court. In other instances, such as in this case, the government may conclude that a jury may view the defendant as sympathetic or credible, and thus determine that the defendant should be stripped of her right to a jury and forced to proceed administratively. Either way, the government is penalizing the citizen for possessing the Seventh Amendment jury right in way that is inimical to the Constitution.

Make no mistake, the fact that Bebo *would* have the right to a jury trial in federal court does not cure Section 929(P)(a) of its constitutional defect. Put simply, the risk that the SEC would choose to bring its claims in administrative court instead *so that* 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).

Dodd-Frank, on its face, also permits the SEC to file a case in district court and wait to see if the defendant asserts her right to a jury trial. The SEC has the option to then voluntarily dismiss the case and obtain the same remedy administratively. Further, is beyond cavil that such a practice (even if unlikely) which is possible and permissible under Dodd-Frank, runs afoul of

the dictates of *Jackson*, *Perry*, and their progeny. It makes no difference, from a constitutional perspective, that Dodd-Frank sets up a mechanism whereby the Commission, in confidential consultations with its staff attorneys that will prosecute the case, assumes that a citizen will assert her jury trial right if the case is filed in district court and then concludes that the benefit to the government of proceeding in that forum does not outweigh the perceived "cost" of the citizen's right to a jury trial (and other procedures that govern district court actions). Just because the government's actions are a preemptive punishment of the citizen's exercise of her constitutional rights makes it no less penal and no less a constitutional violation. *See United States v. Alvarado-Sandoval*, 557 F.2d 645, 645-46 (9th Cir. 1977).

## III. The SEC'S Chosen Forum Violates Article II Of The United States Constitution.

Article II of the U.S. Constitution vests "[t]he executive Power . . . in a President of the United States of America," who must "take Care that the Laws be faithfully executed[.]" U.S. Const. art. II, § 1, cl. 1; *id.* § 3. Under the Supreme Court's decision in *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), Article II's vesting of the executive power in the President and the Take Care Clause, requires that inferior officers of the federal government cannot be separated from the President by multiple layers of protection from removal. *Id.* at 483-84 (citation omitted). "The President cannot 'take Care that the laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Id.* at 484 (citation omitted).

Consequently, Article II is violated when an executive officer can only be removed for good cause, and the power to remove that officer is held by another officer who can only be removed for good cause. *See id.* Commission ALJs enjoy *at least* two levels of good-cause protection, with the result being ALJs who are "not accountable to the President, and a President

who is not responsible for the" ALJs. *See id.* at 495. "[S]uch multilevel protection from removal is contrary to Article II's vesting of the executive power in the president." *Id.* at 484.

**A. SEC ALJs are protected by multiple layers of tenure.**

Under the Administrative Procedures Act ("APA"), 5 U.S.C. § 500 et seq., "[e]ach agency shall appoint as many administrative law judges as are necessary . . . ." 5 U.S.C. § 3105. The APA—5 U.S.C. §§ 556, 557—sets forth the ALJs' considerable power and authority, as have also been delegated by the Commission and incorporated into the securities laws, regulations, and the SEC's rules of practice. *See, e.g.,* 15 U.S.C. §78d-l; 17 C.F.R. § 200.14; 17 C.F.R. § 200.30-9. Indeed, the SEC's rules and regulations specifically do not limit the powers provided by the APA. *See* 17 C.F.R. § 201.111 ("No provision of these Rules of Practice shall be construed to limit the powers of the hearing officer provided by the [APA], 5 U.S.C. § 556, 557.") An ALJ receives a career appointment, not subject to probationary period requirements. 5 C.F.R. § 930.204.

SEC ALJs are protected by multiple layers of tenure. That is, SEC ALJs are protected from removal except for "good cause" as "established and determined" by the Merit Systems Protection Board ("MSPB"). 5 U.S.C. § 7521(a). In turn, members of the MSPB can "be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). Further insulating SEC ALJs from the President, under Section 7521, they may only be removed by the Commission after the MSPB determination; the MSPB cannot take action on its own. And members of the Commission, like the members of the MSPB, also cannot be removed by the President except for inefficiency, neglect of duty, or malfeasance in office. *See Free Enterprise*, 561 U.S. at 487, 495 (citations omitted) ("none of [the Commissioners] is subject to the President's direct control"); *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619-20 (2d Cir. 2004) ("the power to remove Commissioners belongs to the President, and even that is

'commonly understood' to be limited to removal for 'inefficiency, neglect of duty or malfeasance in office.'") (citations omitted).

**B. This multilevel protection scheme violates the Take Care Clause.**

As the *Free Enterprise* court found with respect to similar removal protections afforded other inferior officers within the SEC, this multilevel protection scheme is unconstitutional:

> [T]he President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's 'constitutional obligation to ensure the faithful execution of the laws.'

*Free Enterprise*, 561 U.S. at 484 (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)). Because the President cannot oversee SEC ALJs in accordance with Article II, SEC administrative proceedings are governed by SEC ALJs in violation of the Constitution.

The Commission's decision in *In the Matter of Timbervest, LLC*, Investments Advisers Act Release No. 4197, 2015 WL 5472520, at *26-28 (Sept. 17, 2015), which was itself vacated by *Lucia*, is no longer binding precedent on this Court and should no longer provide any support to a contrary conclusion. First, the opinion was premised on the notion that ALJ's were not inferior officers, which was rejected by *Lucia*. Second, the Commission's specific position with respect to removal in *Timbervest* was similarly repudiated by the United States Solicitor General in his brief filed *on behalf of the Commission* in *Lucia*. *See Brief for Respondent Supporting Petitioners*, No. 17-130, 2018 WL 1251862 at *39-44 (filed Feb. 21, 2018). As Justice Breyer's *Lucia* dissent highlighted: "And in [the Solicitor General's] view, the administrative law judges' statutory removal protections violate the Constitution (as interpreted in *Free Enterprise Fund*),

unless we construe those protections as giving the Commission substantially greater power to remove administrative law judges than it presently has."[11] *Lucia*, 138 S. Ct. at 2061.

Third, *Timbervest's* reasoning is flawed. In *Timbervest*, the Commission stated "[o]ur conclusion that the Commission's ALJs are employees therefore disposes of Respondents' *Free Enterprise* objection." *Id.* at 27. Thus the Commission's decision rested on the fact that it regarded ALJs as employees, not inferior officers, at that time. *Id.* As noted, this fundamental premise is now gone.

The Commission also reasoned in *Timbervest* that "the nature of [ALJs'] duties differ[] so dramatically from those of the PCAOB to obviate any potential concerns about the removal limitations." *Id.* at 27. But this ignores the clear language of *Free Enterprise* (and the current Solicitor General position) which states:

> [W]e have previously upheld limited restrictions on the President's removal power. In those cases, however, only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided whether the officer's conduct merited removal under the good-cause standard . . . . The Act before us does something quite different. It not only protects Board members from removal except for good cause, but withdraws from the President any decision on whether that good cause exists . . . . By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers.

*Free Enterprise*, 561 U.S. at 495-498.

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[11] In addition to acknowledging that Commission ALJ's continue to be unconstitutional under *Free Enterprise*, the Solicitor General argued that the Supreme Court could, under the guise of statutory interpretation, re-write the statutory standard for their removal and make them constitutional again. This attempt to re-write the statutes through judicial construction is improper. *See, e.g. United States v. M/V Big Sam*, 693 F.2d 451, 454-55 (stating "it is simply not part of [the] function [of] judges to re-write, in the guise of statutory construction, unambiguous statutory language in order to cure what to us seems to be statutory deficiencies."). Justice Breyer recognized as much is describing the Solicitor General's argument *as one giving the Commission substantially greater removal powers "than it presently has."* *Lucia*, 138 S. Ct. at 2061. Thus, Justice Breyer implicitly rejected the Solicitor General's position.

The *Timbervest* decision is also premised on the judicial nature of the ALJ's role when compared to the broader functions of the PCAOB. However, the *Timbervest* decision relied on footnote 10 of *Free Enterprise* for the significance of this purported distinction. 2015 WL 5472520, *27 n. 179. Footnote 10, in turn is based on the view that it was "disputed whether "administrative law judges are necessarily 'Officers of the United States.'" *Free Enterprise*, 561 U.S. at 507 n. 10. The Court in *Lucia* determined that they were inferior officers, 138 S. Ct. at 2049, thus eliminating the foundational premise for this distinction.

And it is contrary to other Supreme Court precedent that has found quasi-judicial officers are subject to the President's power of removal under the Take Care Clause of Article II, just as other officers with purely regulatory or policymaking functions. *See Myers v. United States*, 272 U.S. 52, 135 (1926) (officers with duties of a "quasi-judicial character" must be subject to the same Presidential control as other officers even if the President has no control over adjudicatory decisions in particular matters); *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935) (finding that independence of quasi-judicial officers can be appropriately safeguarded by *one* layer of for-cause removal).

Because the *Timbervest* decision rested on the faulty assumption that ALJs are mere employees, and because *Timbervest* improperly restricts the application of *Free Enterprise* and other Supreme Court precedent based on an underlying faulty presumption that ALJs were mere employees, that decision should be accorded no persuasive authority.

In sum, because Commission ALJs are protected by multiple layers of for-cause removal, these proceedings are a continuing violation of Article II and should be dismissed.

## IV. The Initial OIP Was Legally Invalid, And So This Case Must Be Dismissed With Prejudice.

*Lucia* requires that Bebo receive a new hearing because the hearing set by the OIP in this case was conducted in violation of the Appointments Clause. *Lucia*, 138 S. Ct. at 2055. The Court remanded the case to the D.C. Circuit with instructions that Lucia must, at a minimum, be granted a new hearing before a different, properly appointed ALJ. *See id.* The Court did not consider whether a new OIP needed to be issued or even could properly be re-issued in accordance with the law. As set forth below, the constitutional infirmity determined by the Supreme Court rendered the OIP in this case legally invalid and statutorily defective. In order to proceed, this case must therefore be recommenced with a valid notice of hearing as mandated by the Securities Exchange Act. But because the Commission cannot bring the same action today, this case must be dismissed.

### A. The original OIP never "commenced" an action, and so a new OIP must be filed to proceed administratively against her.

Under its own rules, the Commission "commences" an administrative proceeding by issuing a valid OIP pursuant to Rule of Practice 200, "Initiation of Proceedings." *See* 17 C.F.R. § 201.101(4) (an enforcement proceeding is initiated by an order instituting proceedings), (7) (an OIP is an order "commencing" a proceeding). By statute, the OIP must include a "notice instituting proceedings [that] shall fix a hearing date" within the prescribed time absent the consent of the respondent. 15 U.S.C. § 78u-3. The Exchange Act further mandates that such a hearing take place, at a minimum, before an "officer" of the Commission, which includes the Commission ALJs. *See* 15 U.S.C. § 78v (hearings may be held only before the Commission, its members, or officers of the Commission); 17 C.F.R. § 201.110 ("All proceedings shall be presided over by the Commission or . . . a hearing officer"). And to be sure, the Act distinguishes an "officer," from an "agent" or "employee" or an executive department. 15 U.S.C.

§ 78c.[12] To initiate proceedings under the Act, then, the Commission must include in the OIP a notice a hearing before a valid officer of the Commission, the Commission itself, or members thereof.

The issue here is that the "officer" who the Commission noticed Bebo would preside over her hearing was *not* an officer of the Commission because none of the ALJs employed by the agency at the time of the OIP had been constitutionally appointed. *Lucia*, 138 S. Ct. at 2049. Simply put, an OIP noticing a defective hearing is a defective OIP. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2110 (2018) (holding that a notice to appear that did not specify the time and place of the hearing as required by statute was ineffective); *United States v. Virgen-Ponce*, 320 F. Supp. 3d 1164 (E.D. Wash. 2018) (deficient notice to appear failed to confer jurisdiction on the immigration court). Thus, the OIP never instituted valid proceedings and was itself a nullity. *See Freytag v. Commissioner*, 501 U.S. 868, 879 (1991) (a defect in the appointment of an adjudicator "goes to the validity of the [administrative] proceeding"); *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (failure to appoint an ALJ in compliance with the Administrative Procedure Act "was an irregularity which would invalidate a resulting order"); *Papasan v. Allain*, 478 U.S. 265, 276 (1986) (government action taken pursuant to unconstitutional authority is without legal effect because the "authorization for such action is a nullity" (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)).

Just as if the Commission directed Bebo to appear for a hearing before its mail clerk—clearly unlawful under the Exchange Act—ordering her to appear before a different employee

[12] Further, the Commission's own rules spell out that such a hearing officer "shall have the authority to do all things necessary and appropriate to discharge his or her duties[,]" 17 C.F.R. § 201.111, including the very powers which the Supreme Court pointed to when holding that the Commission's ALJs were officers of the United States. *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2053 (2018).

who equally lacked the authority to preside fared no better. The Commission must commence new proceedings in order to pursue civil remedies against Bebo. *See* 15 U.S.C. § 78u-3(a).

**B. Because the statute of limitations has long passed, any new OIP would be untimely and this case should be dismissed.**

The statute of limitations applicable to the claims against Bebo requires all actions to be commenced "within five years" of when the claim accrued. 28 U.S.C. § 2462; *see also Kokesh v. SEC*, 137 S.Ct. 1635, 1640 (2017) (Section 2462 applies to any SEC action for penalties, including disgorgement). Since the original action was never "commenced" by law, and the claims accrued at the latest in 2012, any new OIP that would validly commence an action against Bebo would be time-barred unless the original OIP somehow tolled the statute of limitations.

Courts have grappled with nearly this precise issue in the context of indictments, the criminal law equivalent of the OIP here. *United States v. Gillespie*, 666 F. Supp. 1137 (N.D. Ill. 1987) is instructive on this point. There, a grand jury returned an indictment after the lapse of its statutorily authorized sitting. *Id.* The court held that a purported superseding indictment, bringing charges otherwise outside the statute of limitations, could not relate back to the original indictment because it was invalid. The court explained:

> [A] *valid* indictment insulates from statute-of-limitations problems any refiling of the same charges during the pendency of that valid indictment (that is, the superseding of a valid indictment). But if the earlier indictment is *void*, there is no legitimate peg on which to hang such a judicial limitations-tolling result.

*Id.* at 1141 (emphasis original); *United States v. Crysopt Corp.*, 781 F. Supp. 375, 378 (D. Md. 1991) (explaining that allowing an indictment with a single defective charge to toll the statute of limitations "would directly conflict with the general rule that only a *validly* pending original charge will save an untimely superseding indictment" (footnote omitted) (emphasis original)). Similarly, the invalid OIP in this case could not toll the statute of limitations here.

It is also noteworthy that in the criminal context Congress has expressly provided a window for the government to re-file charges after the dismissal of an invalid indictment that would otherwise be time-barred.[13] Bebo is aware of no similar saving statute for administrative charging instruments. Because Congress knew how to save a proceeding from time bar due to a defective charging instrument, this Court should infer that it desired not to do so for defective OIPs. *See Fish v. Kobach*, 840 F.3d 710, 740 (10th Cir. 2016) ("When Congress knows how to achieve a specific statutory effect, its failure to do so evinces an intent *not* to do so.") (emphasis original).

Just like a civil complaint filed in a court without jurisdiction, the Commission's OIP in this case could not toll the statute of limitations because it initiated proceedings before a tribunal without legal authority. *See Woodson v. Allstate Ins. Co.*, 855 F.3d 628, 633 (4th Cir. 2017); *Shofer v. Hack Co.*, 970 F.2d 1316, 1319 (4th Cir. 1992) ("The commencement of an action in a clearly inappropriate forum, a court that clearly lacks jurisdiction, will not toll the statute of limitations."). Because the OIP in this case was defective and did not commence a proceeding in accordance with the law, it—like its immigration, criminal, and civil analogues—did not toll the statute of limitations.

## CONCLUSION

For the foregoing reasons, Bebo respectfully requests that the Court grant her motion for Summary Disposition.

[13] 18 U.S.C.A. § 3288 ("Whenever an indictment or information charging a felony is dismissed for any reason after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment . . . .").

Dated this 28th day of February, 2019.

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**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-16293**

**In the Matter of**

**LAURIE BEBO, and**
**JOHN BUONO, CPA,**

**Respondents.**

**CERTIFICATE OF SERVICE**

Ryan S. Stippich of Reinhart Boerner Van Deuren s.c. certifies that on February 28, 2019, he caused a true and correct copy of Respondent Laurie Bebo's Motion for Summary Disposition for Constitutional Violations to be served on the following by e-mail and United States mail:

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Scott B. Tandy, Esq.
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Dated this 28th day of February, 2019.

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