UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

RECEIVED
SEP 30 2019
OFFICE OF THE SECRETARY

ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of **LAURIE BEBO, and** **JOHN BUONO, CPA** **Respondents.**	**RESPONDENT LAURIE BEBO'S SUPPLEMENTAL POST-HEARING BRIEF**

Mark A. Cameli
mcameli@reinhartlaw.com
Ryan S. Stippich
rstippich@reinhartlaw.com
Reinhart Boerner Van Deuren s.c.
1000 North Water Street, Suite 1700
Milwaukee, WI 53202
(414) 298-1000
Attorneys for Laurie A. Bebo

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Regulations

Respondent Laurie A. Bebo, by and through her counsel, Reinhart Boerner Van Deuren s.c., hereby respectfully submits this Supplemental Brief Pursuant to the Court's August 28, 2019 Order and requests that the Court conclude that the claims set forth in the December 3, 2014 Order Instituting Proceedings ("OIP") filed by the Securities and Exchange Commission's ("SEC's" or the "Commission's") Division of Enforcement (the "Division") be dismissed in their entirety.

INTRODUCTION

This case should not have been prosecuted. But since it was, it should now be dismissed based on the Division's failure to produce factual proof in its support. In particular, the evidence fails to prove an absence of Bebo's reasonable belief in the truth of the subject single statement contained in her company's voluminous SEC filings as well as the entire absence of any proof relating to its materiality. Documents recently received—reports generated by the company's law firm during their independent internal investigation—corroborate Bebo's defense.

To give this greater context, this case does not involve a claimed misstatement in any public filing about the company's revenue, profit, expenses, liabilities, or occupancy for facilities operated by the company. Rather, this case centers on certain terms within a lease agreement that accounted for only about 4% of the facilities operated by the company and only 5.6% of its revenue (in 2011). By 2011, ALC was actually losing money on the leased facilities' operations. The subject "misstatement" concerns compliance with occupancy and coverage ratio covenants, holdover requirements from a lease ALC assumed from a smaller, financially less secure operator. In fact, ALC *never* defaulted on its lease payments to Ventas. And it never did so during the worst financial recession since the Great Depression. Yet, the entire theory of this prosecution rests on the notion that the CEO's belief that "we were in compliance with all such [operating and occupancy] covenants" was a materially false statement about that *de minimis* holding in their portfolio.

The evidence in this case, particularly as bolstered by the recently produced documents from ALC's attorneys, supports Bebo's testimony and her reasonable conclusion that the statement (as vetted by the company's general counsel and disclosure committee) was indeed true. Moreover, and importantly, the evidence of materiality of the statement remains entirely absent in the record. In this regard, the Division decided to simply ignore it as an element of their proof—understandably so, as no such proof exists.

For these reasons, as more fully articulated herein and in the previously provided briefing, the OIP should be dismissed.

FACTUAL OVERVIEW[1]

ALC and Ventas

From November 2006 to July 2013, Assisted Living Concepts, Inc. ("ALC") was a publicly-traded company, with shares traded on the New York Stock Exchange. ALC's business was owning and operating senior living facilities in various regions throughout the United States. At the end of 2009, ALC owned and/or operated 215 assisted and independent living residences in 20 states totaling 9,398 units. (Ex. 5 at 3.)[2] ALC operated about the same number of facilities and units throughout the relevant time period, with 211 facilities as of the end of 2011. (Ex. 13 at 3.)

[1] The record in these proceedings is immense and the factual disputes are many. This overview is meant only to provide just that—a high-level brief of the facts necessary to put the legal and factual matters discussed below in their proper context. For a complete recitation of the facts, *see* Bebo's Post-Hearing Brief at pp. 26-174. Importantly, the parties rely on earlier post-hearing briefing in the case, and the Court should rely principally on those briefs in evaluating the merits. This brief only supplements those prior briefs.

[2] Citations to pages of the record exhibits are to the page of the pdf unless otherwise indicated.

ALC preferred to own most of its facilities—161 of the 211 it operated as of the end of 2011. It leased the other 50 facilities. (Ex. 13 at 4-5; Tr. 2856, 3876-77, 3879-87, 4600-01.) From 2009 to 2011, ALC generated revenues of approximately $230 million, net income of $16-$24 million, and cash flows from operating activities of approximately $44-$55 million. (Ex. 377 at 6-7, n.6.)

ALC's financial performance was largely driven by occupancy. (*See* Tr. 2570-71, 3834; Ex. 13 at 20-21, 24.) ALC tracked occupancy in its facilities based on the number of units occupied, even if more than one person occupied the unit. (Tr. 4105-06.) ALC never tracked whether a resident was actually living in or staying at its facilities for occupancy purposes, but counted it as "occupied" as long as there was a commitment to pay for the unit. (*See* Tr. 512-13, 1482-83, 2414, 4105-06.)

Every night, senior management, divisional personnel, regional personnel, and others would receive a nightly occupancy snapshot, broken out by region and facility, for the entire Company. (Tr. 2959-61; Ex. 2133.) They were passed out at Board meetings. (Tr. 2868-70, 2959-61.) None of the data included units related to employee-leasing.[3] (*Id.*; Tr. 1484.)

At all times relevant, Ventas, Inc. was a large, publicly-traded healthcare real estate investment trust based in Chicago, Illinois. In 2008, at the time the Lease with ALC was executed, Ventas owned a portfolio of 513 senior housing and healthcare-related properties. (Ex. 2106 at 83.) These included 440 "senior housing communities" and skilled nursing facilities. (*Id.*) A number of these properties were in the same markets as ALC facilities, so that Ventas was a direct competitor to ALC (particularly with respect to its operating portfolio).

[3] As used herein, reference to "employee-leasing," "employee-leasing program" or similar language refers to the practice whereby ALC paid for units at the CaraVita Facilities for employees with a reason to go to those Facilities. It also includes the circumstance of ALC paying for rooms in those few situations where units were used or available to family members of employees or other contractors who were performing services in furtherance of the operations of the Facilities.

(*See*, *e.g.*, Tr. 299-300.) As Ventas grew between 2008 and 2012, the number of markets where it competed with ALC also grew. (*See* Tr. 261-62, 2831, 4138-39.)

Ventas has an acquisitions group that works hand-in-hand with its asset management group. Joe Solari was the Managing Director-Acquisitions at Ventas, and he negotiated the terms of the Lease (defined below) with ALC. As Solari acknowledged, he later became ALC's principal contact and relationship manager for all things related to the Lease. (Tr. 399-400, 444-45.) Solari was a senior executive of Ventas who reported directly to Ray Lewis, Ventas' Chief Investment Officer. Lewis reported directly to Ventas' CEO Debbie Cafaro. (Tr. 442-43.) In a December 2008 meeting, Cafaro told Bebo and Buono that Solari should be their point of contact for "everything" important regarding the relationship between the two companies, including issues pertaining to the Lease. (Tr. 2741-42; *see also* Tr. 3992.)

The Challenged "Boilerplate" Language In ALC's Commission Filings

There is no dispute in this case that ALC's periodic filings with the Commission accurately stated the Company's overall occupancy, and that ALC accurately stated the Company's revenue, expenses, profits, EBITDA, and other financial metrics in all of its filings with the Commission. Rather, the Division challenges a statement about what "could" happen if ALC was found to have been non-compliant with any of dozens of lease covenants, and ALC's opinion that it was in compliance.

Effective January 1, 2008, various subsidiaries of ALC entered into an Amended and Restated Master Lease Agreement (the "Lease") with a subsidiary of Ventas whereby ALC rented eight senior living facilities located in several states in the Southeast United States (the "CaraVita Facilities").

The Division challenges ALC's disclosure pertaining to the Lease beginning with the first quarter 10-Q for 2009. (Div. Post-Hearing Br. at 32.) Around that time and continuing through its 2011 annual report on Form 10-K, ALC started including a disclosure in its periodic filings with the Commission about the possible unfavorable impact of a provision of the Lease. (*See, e.g.* Ex. 2 at 30; Ex. 3 at 37, Ex. 4 at 42, Ex. 5 at 45; Ex. 6 at 34; Ex. 7 at 36; Ex. 8 at 38; Ex. 9 at 45; Ex. 10 at 33; Ex. 11 at 36; Ex. 12 at 36-37; Ex. 13 at 43.) This disclosure appeared under the caption "**Future Liquidity and Capital Resources,**" and imbedded within a full-page, 332-word disclosure about ALC's revolving credit facility was the following challenged statement about the Lease:

> In addition, the failure to meet certain operating and occupancy covenants in the CaraVita operating lease could give the lessor the right to accelerate the lease obligations and terminate our right to operate all or some of those properties. We were in compliance with all such covenants as of March 31, 2009, but declining economic conditions could constrain our ability to remain in compliance in the future.

(*See, e.g.*, Ex. 2 at 30.)[4]

Beginning with its 10-Q for the second quarter of 2011, ALC added the following sentence to the end of the disclosure: "Based upon current and reasonably foreseeable events and conditions, ALC does not believe that there is a reasonably likely degree of risk of breach of the CaraVita covenants." (Ex. 11 at 36; Ex. 12 at 36-37; Ex. 13 at 43.) Otherwise, ALC's disclosure about the Lease covenants remained unchanged throughout the entire time period.

One of Bebo's experts to testify at trial, Professor David Smith, stated that in his vast experience analyzing public company filings related to covenant violations, the disclosure at issue here was "boilerplate language that's in a lot of 10-Ks of firms that have financial

[4] "Occupancy" and "occupancy rate" were ambiguous, undefined terms in the Lease.

covenants." (Tr. 3631.) Other hearing evidence demonstrated this statement was universally overlooked for the insignificant boilerplate language that it is.

It was so inconsequential that ALC's general counsel at the time, Eric Fonstad, apparently could not recall at trial any discussion about it at the disclosure committee meetings he chaired and could not recall any legal advice that he provided with respect to the disclosure (though it was indisputable that he did approve the affirmation of compliance in February 2009). (Tr. 1569-71, 1593, 1597, 1603.) Similarly, ALC's general counsel who succeeded Fonstad has no recollection of the discussions at the disclosure committee about it and the additional sentence added to the second quarter 2011 filing. (Tr. 4379-81.) Nor could she recall a single detail about discussions of this disclosure at a Board meeting in July 2011. (Tr. 4378-79.)

At trial, ALC's director of financial reporting, John Lucey, and ALC's director of Internal Audit, David Hokeness, apparently could not recall any specifics with respect to discussions of the disclosure at ALC's disclosure committee meetings other than what was contained in the minutes. (Tr. 3708, 3712-13, 3082-87.) Even a Ventas witness testified that she never noticed whether ALC's filings mentioned the Lease or covenant compliance in her review of them. (Tr. 951.)

Moreover, ALC's stock was covered by several stock market analysts who prepared periodic reports about the Company (*see* Ex. 2186 at 18-23; Tr. 3645-47), and the Division did not present any evidence that analysts believed the Lease or compliance with the occupancy covenant (or the other unspecified covenants contained in the challenged disclosure) was material or important. Therefore, it can be inferred that no questions were asked about the Lease covenants on any ALC earnings calls with investors and analysts. This lack of evidence demonstrates the challenged disclosure was immaterial. *See Flannery v. SEC*, 810 F.3d 1, 11-12, 14 (1st Cir. 2015).

Professor Smith also provided the key evidence related to materiality in the case. He conducted an event study, which is a well-established method used by financial economists to determine whether the public release of new, firm-specific information is important to market participants— *i.e.*, investors—and whether it is important in a positive or negative way. (Ex. 2186, pp. 10-11.) Smith's event study confirmed that, the first time investors learned about Ventas' allegations of financial covenant violations, they did not react negatively. (*Id.* at 16.) Consequently, "the lack of a statistically significant price impact is inconsistent with the market interpreting the Financial Covenant Allegations as negative news." (*Id.* at 16-17.) This type of event study is one of the best measurements of materiality, and here it conclusively determined that statements about compliance with financial covenants were not material. The Division elected not to perform this kind of analysis, or ignored the results if it did.

Events prompting the phone call with Solari on January 20, 2009 (the "Solari Call")

A declining economy and resulting drops in occupancy at the CaraVita Facilities resulted in discussions at ALC board meetings in late 2008 about the implications of non-compliance with the Lease's financial covenants (Ex. 1204), and a meeting among Bebo, Buono, Cafaro, and Solari in December 2008 to discuss how ALC and Ventas might work together through the Great Recession.

Around the same time, Bebo learned that ALC actually had a handful of employees living at the CaraVita Facilities, as hold-overs from the predecessor operator of the Facilities. ALC did not realize this until it terminated one of them in late 2008, and needed to determine whether it was necessary to evict the employee. (Tr. 1883, 3993-94.)

ALC and Bebo also believed that these employees were included in ALC's occupancy and coverage ratio covenant calculations for 2008 and in reporting by the prior operator. (Tr. 1884-86.) Consequently, in December 2008 or January 2009, Bebo, Buono and Hokeness met with ALC's general counsel, Fonstad, to discuss more generally the permissibility of the inclusion of units rented to employees in the covenant calculations. (Tr. 1307, 1888-89, 3046-47.)

ALC also had a policy of having employees stay at ALC's facilities (including Ventas') when they travelled to them on business. (Tr. 1551, 2966-67.) This included regional management staff, facilities management staff, and marketing, information technology, and finance personnel. (Tr. 1306, 1551.) To save costs, these employees would stay in a vacant room at the facility instead of a hotel.

On the Solari Call, Ventas agrees ALC could pay for apartments for people with a reason to go to the CaraVita Facilities.

Bebo's Testimony. After discussions internally about how to proceed in light of employee units previously being included in the covenant calculations, ALC decided to discuss two principal matters during the Solari Call: increasing the performance of the Facilities by (a) partnering with a hospice company, and (b) ALC paying for apartments for employees or others with a reason to go to the Facilities. (Tr. 3997-99.) As described below, Bebo was the only witness with a specific recollection of what occurred on the 30 minute call, which took place on speakerphone in Bebo's office. (Tr. 4002.) Bebo, Buono and Fonstad participated from Bebo's office. (Tr. 1902.) Solari was the only announced participant from Ventas. (*Id.*)

During the call, Bebo told Solari that ALC had identified a few employees who had been renting units at the CaraVita Facilities that carried over from the prior operator. (Tr. 1903.)

Solari indicated he was not aware these employees had been living at the Facilities and included in the covenant calculations, but did not think it was a problem. (Tr. 1903-04.)

At that point, Bebo described ALC's desire to initiate a broader employee-leasing arrangement whereby ALC would pay for units that would be available in the CaraVita Facilities for people who would have reason to go there. (Tr. 1904-05, 1907-08.) Bebo made clear that ALC would not be tracking the whereabouts of the employees. (Tr. 1907-08.) On the call, Solari agreed that these units could be included in the covenant calculations for both occupancy and coverage ratio purposes. (Tr. 1908.)

Bebo asked Solari a question to the effect of, "Do you care how many?" Solari stated he did not care. (Tr. 1909.) Bebo's missing hand-written notes of the call confirm this, according to witness testimony. (Tr. 3273-74.) They discussed the rate at which ALC should pay for the apartments, and Solari told Bebo "that it should be, like, an arm's-length, third-party transaction, and it would be at the market rate." (Tr. 1908-09.)

Buono corroborates Bebo. During cross-examination, Buono corroborated numerous aspects of Bebo's account of the call. He testified Solari agreed that ALC would pay for apartments to be used by those employees, and Solari expressed no concern about that practice. (Tr. 4656-59.) Of course, Buono could only have that understanding based on the phone call if those matters were discussed.

Buono testified he believed at the time that ALC did have an agreement consistent with Bebo's understanding: "In 2009, my understanding was that Ventas was aware we were going to put employees into the--into the properties, and it was my interpretation of that that--those employees, we would only do that--a reasonable person would only think we'd do that in order to meet covenants." (Tr. 2489-90.) Similarly, in response to questions from the ALJ, Buono acknowledged that from 2009 to 2012 he understood ALC and Ventas had an agreement based on the Solari Call and follow-up email, but his impression has changed based on his interaction with the Division attorneys: "So there's been additional information after that time [May 8, 2012] that would lead me to believe that maybe this [Solari Email] *wasn't as good of an agreement as we would have hoped.*" (Tr. 4645.) As reflected in this statement, Buono's version of events has evolved as he spent more time with Division lawyers (about 60 hours altogether), who inappropriately told Buono that Bebo had "thrown him under the bus" while simultaneously depriving him of the ability to review her transcript.[5] (*See, e.g.*, Tr. 2434-35, 2490-91.)

Importantly, however, Buono's testimony on direct was wholly inconsistent with how he acted from 2009 through 2013. Throughout that time period he acted consistent with the belief that there was an agreement with Ventas to count rooms in the covenant calculations that ALC paid for employees and others to use in assisting with facility operations. (*See generally* Tr. 2390-2545, 2667-2756.) The recently produced Milbank interview memoranda discussed below underscore his earlier convictions about this agreement, prior to the Division's intervention.

Solari Has No Recollection of the Call. On several occasions prior to the Division's investigation, Solari told others he had no recollection of the call and could not dispute Bebo's version of it. (Tr. 449-52; Tr. 3480; Ex. 1879 at 4 ("He was unable to deny the Bebo representation of his approval.").) His trial testimony about the 30-minute call was general and non-specific. (Tr. 414, 450.) In light of Solari's failed memory of this telephone conversation and virtually every other pertinent discussion with ALC personnel (Tr. 413, 446-51, 456-59), his recitation of the denials scripted by the Division with respect to various aspects of Bebo's

[5] This troubling changed belief only occurred in connection with his settlement on favorable terms and attempt to enter into the SEC cooperation program, where Buono understood he would answer the Division's questions and "offer things to help them." (*See* Tr. 2432-33.)

recollection of the call regarding what he "would" have done or said was speculative and should be given no weight.

ALC's General Counsel, Eric Fonstad, Attended the Call. Three witnesses besides Bebo place Fonstad in Bebo's office during the call. (Tr. 2343, 2781-82, 2939-40, 3217-18.) Even Division witness Buono testified under oath during his investigative testimony that Fonstad was present for the Solari call; although, he conveniently could not recall that fact at the hearing. (Tr. 2343, 2781-82.)[6]

Bebo sent a February 4, 2009 confirmatory email to Solari (the "Solari Email") regarding employee-leasing.

After hanging up with Solari, Fonstad agreed with Bebo and Buono that the parties had come to an understanding of ambiguous Lease terms and that no formal notice or modification was required. (Tr. 1924-25, 1936.) Buono and Fonstad then took the lead in preparing a follow-up email to Solari. (Tr. 1931-32, 2354, 2468, 2756-57; Ex. 1320 and 1320A.) Consistent with the Solari Call, the Solari Email mostly covered the hospice proposal. (*See* Tr. 1914; Ex. 1334.) One paragraph addressed employee-leasing. (Ex. 1334.) It stated that ALC was "confirming our notification of our rental of rooms to employees. We confirm that all rentals related to employees are in the ordinary course of business and on terms no less favorable than would be obtained in a comparable arms-length transaction with an unrelated third party." (*Id.*)

Ventas responded to the Solari Email twice, at no point objecting to ALC's confirmation it was renting units at the CaraVita Facilities related to employees. Ventas' asset manager asked to set up a phone call to discuss the hospice *proposal*, but his response was silent with respect to

[6] Buono also told the Division during an interview that "[he] was with Bebo on the Call and Eric [Fonstad] was in the room during the call." (Ex. 2122 at 2.) Emblematic of Buono's molded testimony in favor of the Division, in response to questioning on cross-examination about this point, he stated, "No matter what you do or say, I'm not going to remember if Eric [Fonstad] was in that room." (Tr. 2182.)

ALC's *confirmation* of its rentals of rooms related to employees. (Exs. 1343, 3377.) He copied numerous other Ventas executives. (*Id.*)

Based on these two emails, Bebo was aware that *every senior executive and key Ventas employee with direct responsibility for the CaraVita Facilities and the Lease (who were copied on the emails) was aware of ALC's confirmation of the company renting rooms related to employees.* (Exs. 1335, 3376; Tr. 191-92, 452-53 (describing roles and responsibilities).) No one from Ventas ever asked any questions or raised any concerns about the employee-leasing arrangement described in the Solari Email. (Tr. 255-56, 352-54, 427-29.)

Fonstad's further involvement in approving ALC's practice and disclosure

Fonstad provided a preliminary analysis of issues pertaining to ALC's rental of units for employees or family members under the Lease in a January 19, 2009 email. At its base, he advised that ALC could conduct employee-leasing if Ventas approved. (*See* Ex. 1152.)

Moreover, the undue importance placed on the template appended to the email by the Division is a strawman because:

- Fonstad never advised that the then-contemplated arrangement of renting units for employees would require a formal modification. Both his email and the template letter accompanying it advised Bebo that ALC seek "confirmation of [ALC's] interpretation of the lease" or send a letter "confirm[ing] the understanding we reached about the interpretation of certain terms of the [Lease]." (Ex. 1046.)
- Fonstad never advised a formal notice under Section 33 of the Lease was required. (*Id.*)

In the end, the Solari Email confirmation and acknowledgement of its receipt by Ventas—in writing—achieved the same result as the contemplated template letter (as Fonstad no doubt agreed since Bebo sent him both the Solari Email and Ventas' response).

It is indisputable that Fonstad continued to be involved in every step of ALC's decision to pursue employee-leasing. For example:

- On February 5, 2009, Fonstad received the Solari Email from Bebo after it was sent to Ventas, reviewed it, and printed it for his records. (Ex. 1171; Tr. 1529-31, 1558-59.)

- He received Ventas' response to the Solari Email, reviewed it, and printed it for his records. (*Id.*);[7]

- He chaired several disclosure committee meetings where the challenged disclosures were discussed in light of the Solari Email and including employees in the covenant calculations, including one only eight days after receiving the Solari Email. (Ex. 124.)

- Like Bebo, ALC's director of financial reporting and internal auditor relied on Fonstad's lack of objection to the practice and ALC's disclosure in meeting their obligations. (Tr. 3054-55, 3689-90, 3703-04.)

Finally, on February 19, 2009—two weeks after the Solari Email and six days after the disclosure committee meeting where it was discussed—Fonstad *approved ALC's affirmation of compliance, the same disclosure that the Division and the ALJ contends constituted a misrepresentation.* (Ex. 1057; Tr. 1580-82; *see also* Tr. 1929-30.) Bebo relied on his approval. (Tr. 1929-30.)

ALC's Disclosure Committee Considered Employee-Leasing And Determined ALC's Statement Of Lease Compliance Was Appropriate.

As part of its SEC disclosure process, ALC established a disclosure committee to meet its obligations. (Ex. 1919 at 3; Tr. 1567-68.) Specifically, the disclosure committee was tasked with identifying and reviewing ALC's disclosures and making recommendations to senior officers like Bebo, regarding changes or additions. (*Id.*) Although she relied on its deliberations, Bebo had no role in or influence on the disclosure committee, as she was not a member of it. (Tr. 3704-05.)

Beginning with the February 13, 2009 meeting—only nine days after the Solari Email—and at each quarterly meeting in 2009 thereafter, the disclosure committee discussed how ALC

[7] Despite knowing he received these emails, in testimony elicited by the Division Fonstad incredibly testified that he had no idea one way or another whether the phone call on January 20th ever occurred. (Tr. 1507, 1555-56.)

was meeting the financial covenants, which had been "clarified" through the Solari Email so that ALC could include rooms related to employees in the covenant calculations. (Tr. 3702; Exs. 124 at 3; 125 at 4; 126 at 4; 1159B at 4.) The minutes of two of the 2009 Disclosure Committee meetings state:

> Lease covenants continue to be monitored. Adjustments to calculations for Ventas covenant continue to be processed. There has been no relief in covenants and currently there are no on-going negotiations. With respect to Ventas lease[,] correspondence between ALC and Ventas has occurred whereby the covenant calculations have been clarified as to census. The Company affirmatively asserts compliance for Q2. No lease covenants violated.

(Exs. 126 at 4; 1159B at 4.)

No one associated with the committee raised a concern about the practice or a need to modify ALC's disclosure about the Ventas Lease in its Commission filings.[8] (Tr. 1592-95, 3100-04, 3699-3704, 3707, 3711.)

Bebo Understood ALC Disclosed The Basic, Key Facts To ALC's Outside Auditors.

ALC's outside auditors, Grant Thornton ("GT") and its engagement partners were aware of the basic, important facts surrounding the employee-leasing arrangement from the outset:

- GT knew employee-leasing was premised on a conversation with Ventas followed by a confirmatory email. When GT asked for documentation of the agreement with Ventas, ALC provided it, and GT was satisfied. (Exs. 1379, 1379A.)
- Upon GT's request, ALC provided GT lists of names for the covenant calculations, and part of GT's general practice was to review the details and look for unusual items. (Tr. 3341-42.) Many of those lists included the same employees at multiple locations for the same quarter and GT did not find that troublesome. (*See* Ex. 3315; Tr. 3398, 3404 (stating he understood employees "may have needed to have rooms available to them at various locations.").)

[8] Similarly, after Ventas sued ALC and ALC discussed the employee-leasing arrangement with its securities disclosure counsel, Quarles & Brady, in April 2012, neither Quarles nor any other third party recommended that ALC should modify its disclosure in its Q1 Commission filings or otherwise disclose how it was meeting the financial covenants through the use of apartments that ALC paid for employees and others to use. (Tr. 4483-84, 3723-26; Ex. 2058, 2058A at 18.) By the time of the reasonableness opinion and preparation of these draft filings, Quarles lawyers were aware that 70 to 90 units for employees were being utilized for the covenant calculations and that ALC was paying for them through intercompany revenue. (Ex. 3684.)

- GT understood that ALC, not employees, paid rent. (Tr. 3404-05.)

- GT knew that ALC would have failed the covenants without the employee units. (Tr. 3514.)

- GT made site visits to several of the CaraVita properties for audits, including in 2010. (Tr. 3338-40.)

- GT tested the journal entries associated with employee-leasing; the engagement team knew the purpose of and tested "the 997 activity in the elimination of intercompany revenue." (Tr. 3351-53; Ex. 1679.)

- By the 2011 audit, GT knew that Ventas was not receiving the occupancy reconciliations setting forth the rooms related to employees. (Tr. 3406-07, 3418-20; Exs. 1824, 1824A.)

As importantly, GT acknowledged that ALC provided all of the information about the employee-leasing practice that it asked for, that nothing was withheld from them, and Bebo never refused to provide information or answer questions about the employee leasing program. (*See* Koeppel, Tr. 3360-61.)

Bebo Disclosed The Basic, Key Facts About Employee-Leasing To ALC's Board.

In summary form, the Board knowledge-related evidence established the following:

- Buono confirmed Bebo's account of the Board instructing management to meet the covenants through employee-leasing at the outset in February 2009. (Tr. 1958-66, 2393-96, 4029-32, 4204; Exs. 2092, 2094, 2117 at 1.)

- Bebo discussed details about employee-leasing at the Q3 2009 Board meeting, which was corroborated by Buono, who also confirmed that ALC director Buntain instructed Bebo and Buono to add additional employees for a "cushion" in the financial covenant reporting. (Tr. 1372, 2023-26, 2392-93, Ex. 2117 at 6.)

- Bebo and Buono discussed the employee-leasing program with the Board again in 2011 when evaluating ALC's response to an SEC comment letter (Tr. 2108, 4246, 4249-52, 4629-31, Exs. 86 at 46, 1048), which was confirmed by an ALC Board member (Tr. 1452-54).

- ALC's Vice Chairman testified Buntain made a similar "cushion" comment in a Fall 2011 Board meeting. (Tr. 2816-17.)

GT's engagement partners, Koeppel and Robinson, each testified that they spoke to the Audit Committee—which was typically attended by all Board members—about employee-leasing. In mid-2009, Koeppel briefed the Board on employee-leasing, telling them that "management had entered into an arrangement with Ventas to include in the covenant calculations employees who had stayed at the properties for a business purpose." (Tr. 3328-30.) No one was surprised (*id.*), because Bebo had already disclosed that to them. She revisited the issue with the Board and in her separate meetings with the Audit Committee chair on subsequent occasions. (Tr. 3335-38, 3440.)

Like Koeppel, Robinson discussed with the Board the fact that the company would not be meeting the Lease covenants without including rooms for employees in the covenant calculations in early 2011 and discussed similar matters with the Audit Committee chair. (Tr. 3430-31, 3435-36, 3514-17, Exs. 1913, 1913A.)

Buono confirmed GT's testimony. He stated that the chair of the Audit Committee, Malen Ng, "knew about employee-leasing" because Robinson discussed it with her. (Tr. 2417-18.) He specifically recalled that in a meeting to discuss Q3 2009 Ng told him "Robinson had discussed employee-leasing, that we were renting rooms to employees, and that was part of how the covenants were being made." (*Id.*; *see also* Tr. 2523-24; Ex. 1115.) He also told the Division that "Robinson did discuss [with the Audit Committee] it would be better if there were actually paying customers at the properties" and that two Board members "knew long before this about the employee adds." (Ex. 2122 at 7.)

Milbank's Internal Investigation Resulted In The Board Taking No Action

After a thorough internal investigation, where Milbank collected documents and emails from approximately 23 company personnel and interviewed approximately 16 witnesses

(Ex. 1873, pp. 4-5; 1879), Milbank concluded Bebo was "open and transparent" and possessed "no ill intent." (Tr. 3483-84; Ex. 1879 at 6.) Milbank further concluded that Bebo acted reasonably in relying on Ventas' silence in response to the Solari Email and that no formal modification of the Lease was necessary. (Tr. 3481; Ex. 1879 at 4-5.)

Based on Milbank's report to the Board, ALC and the Board took no action at all. It did not restate its financial statements. (*See* Roadman, Tr. 2623.) It did not disclose a material weakness in its internal controls during 2012 or prior periods. It did not terminate Buono, who was the person primarily responsible for the Ventas covenant calculation process. (Roadman, Tr. 2619-20.) Rather, in subsequent representations to GT, board members affirmed that they were not aware of any "indications of fraudulent activities" at any time during 2012 and affirmed the appropriateness of ALC's internal controls for that time period. (Tr. 3467-71; Exs. 1035 at 3, 1701.)

ARGUMENT

I. The Milbank Interview Memoranda Further Demonstrate The Lack Of Merit In The Division's Case And The Molding Of Testimony As Part Of Its Investigation.

Throughout this case, the Division has attempted to mold the facts to its pre-determined narrative, rather than crafting a narrative and viable legal theory around the facts as adduced at the 2015 hearing. As discussed in more detail below, the Milbank interview memoranda make this clearer than ever.

The prime example of this is Buono, whose testimony has been shaped and molded through approximately 60 hours of meetings with Division lawyers to discuss his testimony. The record of his Milbank interview provides further proof that his direct examination was sculpted by these meetings with the government, as it contains critical new exculpatory details about the Solari Call and other critical issues.

Numerous other Division witnesses could conveniently only remember certain facts favorable to the Division's case, but their memory was an empty slate with respect to everything else pertinent to the case. The starkest example in this regard is ALC's general counsel, Fonstad. Milbank's interview memoranda, including Fonstad's, further support the conclusion that Fonstad knew about and approved ALC's employee-leasing practice and the Lease compliance disclosure. Further, ALC's director of financial reporting, Lucey, also told Milbank additional details about the disclosure committee discussions of employee-leasing that he conveniently "forgot" at trial.

And finally, the ALC director witnesses. Although their testimony at trial was directly contradicted by other Division witnesses, as well as some of the board members themselves, the Milbank interview memoranda present a number of new inconsistent statements, principally by board witnesses Bell and Buntain. At other points statements made to Milbank are highly inconsistent with statements Division witnesses provided at trial.

A. Buono recalled additional key details about the Solari Call and Solari Email.

It is undisputed that Bebo and Buono participated in the Solari Call, and that they discussed, at some level, whether Ventas would object if ALC rented rooms at the CaraVita facilities related to employees using them or staying there. Before the Division's involvement, Milbank spoke to Solari through Ventas' counsel. (Ex. 1879, p. 4; Tr. 3480.) Ventas' counsel reported that Ventas was "unable to say they, Ventas, had not agreed to the employee use," and that Solari was "unable to deny the Bebo representation of his approval" of the use of room rentals related to ALC employees. (*Id.*)

As noted, Buono's version of what transpired during the call has evolved about this key phone call based on his meetings with the Division, during which, on one occasion they incorrectly told him Bebo had "thrown him under the bus" while simultaneously depriving him of the ability to review the transcripts of her investigative testimony. (Tr. 2434-35, 2490-91.)

By the time of his direct testimony at the trial, the Division had convinced Buono that (a) nothing was discussed with Solari regarding occupancy or coverage ratio covenants (Tr. 2344); (b) Solari "did not agree to anything" over the phone (Tr. 2345); (c) and Buono did not understand that Solari had agreed to include employees in the covenant calculations (Tr. 2346). Bebo's prior post-hearing briefs demonstrate that this testimony is highly inconsistent with other statements Buono made, including during proffer sessions with the Division.

However, the new Milbank interview memoranda contain stunning and explosive new statements that are directly contrary to the direct testimony elicited by the Division. First, Buono told Milbank that the parties did specifically discuss the covenant calculations during the phone call. According to Buono, *Bebo told Solari the covenant calculations were "getting tight,"* but she did not say the company was not meeting the covenants. (Jt. Supp._Ex. 1, MB_BEBO_0000064.) He does not recall her specifically saying that ALC intended to use the employee leases for occupancy covenant purposes. (*Id.*) However, in the context of the discussion about the prior operator leasing units to employees, *and including them in the covenant calculations*, this would have been obvious. According to Milbank:

> Buono's recollection was that Bebo informed Solari that the prior operator had used employee leases in its covenant calculations and that ALC intended to do the same thing.

(Jt. Supp. Ex. 1, MB_BEBO_0000060.) Later in the interview, Buono stated that he could not recall if Bebo told Solari specifically that ALC would include rooms related to employees in the covenant calculations. (*Id.*) Rather, he recalled that Bebo had told Solari that ALC intended to put employees in units at the Ventas facilities and charge them at an arms-length rental rate. (*Id.*)

Combined with the February 4, 2009 Solari Email there was no doubt in Buono's mind that he believed that ALC had an agreement with Ventas, based on his statements to Milbank:

- "Bebo participated in an email exchange with Ventas regarding the practice of leasing units to employees.... *According to the arrangement reached* with Ventas, ALC could keep employees in a unit at one of the Ventas facilities so long as the lease arrangements were on an arms-length basis." (Jt. Supp. Ex. 1, MB_BEBO_0000058.)

- "To the best of Buono's recollection, Joe Solari of Ventas responded to Bebo's February 4, 2009 email and said that Ventas would consider the employee leasing arrangement. In his email response, Solari copied Bill Johnson, one of his Ventas colleagues. Asked whether this [employee leasing] arrangement was a 'sham,' Buono disagreed and *said that it had been done with the full knowledge of Ventas.*" (*Id.* at MB_BEBO_0000059.)

Buono also affirmatively stated that Ventas, based on the Solari Call and Email, knew what ALC was doing and "ok'd" it. (*Id.*)

B. The Milbank interview memoranda confirm ALC's General Counsel, Fonstad, knew about employee-leasing to meet covenant calculations.

One of the hotly contested issues in the earlier proceedings in this matter was the role and involvement of Fonstad and its effect on the assessment of Bebo's state of mind. This issue is crucial because, as described below, an executive's reliance on the advice of counsel or other professionals negates a finding of scienter and can also constitute a complete defense. The Division contends that Fonstad's involvement was limited to writing a solitary January 19, 2009 email memorandum to Bebo and Buono, discussed above. (*See, e.g.* Division Post-Hearing Brief at 11-12.) At this point, according to the Division and Fonstad's testimony on direct examination, Fonstad's role in assessing, discussing, or advising ALC or Bebo with respect to employee-leasing ceased.

Consequently, the new Milbank interview memoranda are important with respect to Fonstad's role and involvement. First, Fonstad told Milbank he *did* recall that he was aware ALC had begun using room rentals related to employees in the Ventas lease covenant calculations. According to Milbank, Fonstad's "general recollection is that if ALC sent employees to work at a facility and those employees stayed at the facility during their visit, *they* *could be included in the occupancy count.*" (Jt. Supp. Ex. 1, MB_BEBO_0000080 (emphasis added).) Fonstad told Milbank that he thought this was an "aggressive" position, but it was the position the company took (implicitly with his knowledge and approval). (*Id.*)

When pressed on whether he was aware at the time whether ALC was simply seeking approval for employees to stay at the Ventas facilities, or stay and be included in the covenant calcuations, Fonstad said that if employees were leasing units, the company should be allowed to count them in the occupancy covenant calculations. (Jt. Supp. Ex. 1, MB_BEBO_0000081.) He said this issue first arose when the company decided to send employees to the properties to shore up operations. According to Milbank, Fonstad told them, "He believed the *company included these employees in the covenant calculations* for the period in which they stayed."[9] (*Id.*)

This is directly contrary to testimony elicited from Fonstad by the Division on direct examination, where he denied knowing ALC had ever included rooms related to employees in the covenant calculations. (Tr. 1508.)

Furthermore, on direct examination, Fonstad disavowed any knowledge about the Solari Call that was scheduled to occur the day after his January 19 email memorandum. (Tr. 1505.) Yet he told Milbank the opposite. Milbank's interview memorandum states:

> It was [Fonstad's] understanding that Ventas was not holding ALC to the letter of the lease with respect to reporting requirements. On the issue of including employee leases in the covenant calculations, however, Fonstad said it was important to get Ventas's consent in writing on this issue.... He was told that Bebo and Buono would be talking to Ventas about the situation, and it was in this context that Fonstad prepared the template designed to evidence Ventas' consent to the arrangement. *Fonstad later heard that a conversation between Bebo and Buono and Ventas had gone well.*

[9] Fonstad also told Milbank, that he was not aware that ALC intended to set aside or reserve rooms for employees where they may not actually visit the facility. (Jt. Supp. Ex. 1, MB_BEBO_0000081.)

(Jt. Supp. Ex. 1, MB_BEBO_0000081 (emphasis added).) These statements are still against the weight of the evidence presented at trial, where, as noted, several witnesses placed Fonstad on the Solari Call itself. In any event, they are reflective of the Division's apparent effort to mold the testimony to their pre-determined narrative.

In addition to Fonstad's statements to Milbank, Buono also told the lawyers that Fonstad reviewed and approved employee leasing. (*Id.* at MB_BEBO_0000063.) Specifically, Buono stated that, based on his interactions with Fonstad, the general counsel "understood that the purpose of setting aside units for employees was to meet occupancy covenants." (*Id.*) Fonstad had no issue with this as long as ALC provided notification to Ventas. (*Id.*) Buono further stated that he and Bebo sought Fonstad's input after sending the Solari Email, and that Fonstad was comfortable with the Solari Email serving the purpose of notification to Ventas. According to Milbank, Buono stated "that Fonstad did not express any reservations regarding the quality of the notice as reflected in Bebo's February 4, 2009 email to Solari." (*Id.* at MB_BEBO_0000065.)

C. ALC's Director of Financial Reporting, John Lucey, provided new details about the discussion of employee-leasing at ALC Disclosure Committee meetings, chaired by Fonstad.

In a purported disclosure fraud case, the Division's prior briefing and indeed the Division's entire presentation of evidence at the hearing was utterly lacking with respect to the challenged disclosure and why ALC continued to include it in their filings after February 2009. Indeed, there is scant mention of ALC's disclosure committee, chaired by Fonstad, that was the central clearinghouse for vetting ALC's Commission filings. Bebo expected that any issues or concerns with disclosures, including the disclosure challenged here, would percolate through the disclosure committee to her—if there were any.

In Bebo's prior briefing, she established that the disclosure committee repeatedly evaluated the challenged disclosure in light of employee-leasing, and concluded it was appropriate. (Bebo Post-Hearing Br. at 93-94, 118-20 (citing evidence).) Then, six days later, Lucey sought Fonstad's approval of the disclosure challenged in this case:

> Eric,
>
> Please review this new paragraph on the CaraVita lease in the 10-K
>
> I'm sure I do not have the correct legal entity for Ventas
>
> Thanks
>
> *Lease agreement with Ventas*
>
> On January 1, 2008, ALC acquired the operations of eight assisted and independent living residences consisting of a total of 541 leased units for a purchase price including fees and expenses of $14.8 million. The lease has an initial term expiring in March 2015 with four five-year renewal options. The aggregate minimum rent payments for the remaining initial lease term with Ventas for the calendar years 2009 through 2015 are $5.1 million, $5.2 million, $5.3 million, $5.5 million, $5.6 million, $5.7 million and $1.4 million (three months), respectively. The minimum rent will increase by 2.5% over the prior year's minimum rent for each of the calendar years 2009 through 2015. Annual minimum rents for the first, second and third renewal terms will increase by X%, X% and X%, respectively. The final 5 year renewal increase is subject to negotiation. In accordance with FASB Technical Bulletin 85-3, ALC accounts for the effect of scheduled rent increases on a straight-line basis over the lease term.
>
> In connection with the assumed lease, the Company guarantees certain quarterly minimum occupancy levels and are subject to net worth, minimum capital expenditure requirements per residence, per annum and minimum fixed charge coverage ratios. Failure to comply with these covenants could result in an event of default under the lease. At December 31, 2008, ALC was in compliance with all covenants.

(*Id.* at 94, quoting Ex. 1057 (emphasis added).)

At trial, Lucey was ambivalent about what was discussed about the Ventas Lease covenants at the February 13, 2009 disclosure committee meeting, just a few days before he sent the above email. He claimed to have no recollection of what was discussed, and stated that Buono would simply affirm that ALC was in compliance with the lease covenants.[10] (Tr. 3706-08.)

---

[10] For example, when asked, "Prior to 2012, did the disclosure committee ever discuss how the inclusion of employees in the covenant calculations provided to Ventas would affect ALC's compliance with the lease covenants?" Lucey answered, "I would say never in detail. It was -- the majority of the comment was just, you know, are we in compliance. And Mr. Buono would say, yes, we're in compliance." (Tr. 3706.) Despite being a

However, in his interview with Milbank, Lucey provided an additional key detail about the February 13, 2009 disclosure committee meeting, and what was discussed in Fonstad's presence:

> Lucey recalled that the subject of the employee leasing arrangement came up at quarterly Disclosure Committee meetings. At these meetings, Buono advised the group that the company was in compliance with the Ventas lease. He recalled that *Buono on one occasion (probably 2009) advised the Committee that the company was using employee leases to meet the occupancy covenants.*

(Jt. Supp. Ex. 1, MB_BEBO_0000053 (emphasis added).) Lucey further stated it was commonplace knowledge after 2009 that the company was leasing units for the benefit of employees to meet the occupancy covenants under the Ventas lease. (*Id.*)

Later in his interview with Milbank, Lucey again confirmed that, Buono told the disclosure committee that ALC was using employee leasing to meet the occupancy covenants. (*Id.*) At the next meeting, Fonstad apparently made a comment that ALC was close to falling below the occupancy covenant threshold at the Ventas facilities. (*Id.*) Lucey was surprised by the comment, and thought it was potentially disingenuous because he knew Fonstad was told at the prior meeting ALC was using employee leasing to meet the covenants.[11] (*Id.*)

D. Statements to Milbank further contradict the director witnesses' direct examination testimony about their knowledge of employee leasing.

One of the most remarkable positions taken by the Division is its insistence that the Board was completely unaware of the inclusion of rooms related to employees in the covenant calculations at all until March 2012. (*See, e.g.,* Division's Post-Hearing Br. at 2, 35-36.) The

---

witness for Bebo, Lucey met with the Division to go over his cross-examination. (Tr. 3676-77.) He refused to meet with Bebo's counsel. (Tr. 1344-45.)

[11] When asked whether he thought Fonstad could have been assuming that ALC was only counting actual employee stays towards the covenants, Lucey stated he did not believe anyone could be under that assumption. (Jt. Supp. Ex. 1, MB_BEBO_0000054.) This was perhaps because he observed that it was common-knowledge among management that the company was renting a large number of units for employees to use at the facilities for the purpose of meeting the covenants. (*Id.*, MB_BEBO_0000053-54.)

Division's own witnesses, including the cross examination of directors Bell, Buntain, and Rhinelander, have proven that to be false. (*See* Resp't Br. at 120-29 (citing evidence).) And Grant Thornton witnesses testified in detail about the several times that they discussed how ALC was meeting the Ventas financial covenants through units rented by ALC for employees. (*Id.* at 123-26.)

Various statements made to Milbank during its internal investigation contradict the board members testimony at trial and further support Bebo's position that the use of employee-leasing to meet the covenant calculations was discussed repeatedly with the board. First, at trial Alan Bell professed to focus on the occupancy trends at the CaraVita Facilities in 2008, resulting in a request for management to specifically address it in future reports. (Tr. 554.) However, when discussing this same matter with Milbank, Bell stated the board had not focused on occupancy at the Facilities. When specifically asked whether the board focused on occupancy at the Ventas facilities in 2008, Bell responded, "no, I am sure it did not." (Jt. Supp. Ex. 1, MB_BEBO_0000132.)

Similarly, Buntain, on direct examination, professed ignorance of even the concept of using units for employees to meet the covenants prior to March, 2012. (Tr. 1359-61.) But when discussing this issue with Milbank, he told them that the concept of "us[ing] employees to fill units to meet the lease covenants" came up even before ALC closed on the acquisition of the Ventas facilities and entered into the lease with Ventas. (*Id.*, MB_BEBO_0000138.) He stated that, at this time, he understood management to be indicating that ALC could place employees in one or more units, and count those toward the covenants. (*Id.* at MB_BEBO_0000139.) Buono told Milbank that it was actually one of the *directors* that told management they could put employees in units at the facilities to meet the covenants prior to entering into the Lease. (*Id.*, MB_BEBO_0000060.)

Buntain also told Milbank he became aware that the number of units being set aside for employees was as high as 100 in the first quarter of 2012, but *he was aware of this practice prior to that time* (believing the number was lower). (*Id.*) At trial, in response to a specific clarifying question from the Division, Buntain testified that he was aware prior to March 2012 that a few employees had been staying at the Ventas facilities, but specifically denied being aware that any units related to employees were included in the covenant calculations. (Tr. 1359-60.)

Both Bell and Buntain testified that GT never presented information to the Board about ALC's use of employee-related units to meet the covenants. (Bell, Tr. 723-24; (Buntain, Tr. 1434-35.) However, Bell told Milbank that he recalled "one line" by GT audit partner Jeff Robinson to the effect of "if you have employees in there, it is hard to make a profit." (Jt. Supp. Ex. 1, MB_BEBO_0000133.) Bell, however, incredibly claimed he thought this statement related to some kind of "freebies" granted to employees. He still claimed that GT did not indicate this pertained to occupancy covenants. (*Id.*) And Buntain told Milbank that he affirmatively *asked* GT about covenant compliance with the Ventas lease. (Jt. Supp. Ex. 1, MB_BEBO_0000140.) In response, GT told him ALC was in compliance and Buntain admitted that in 2011 GT also told the Board that ALC employees were staying at the facilities (it is unclear whether this is the same conversation). (*Id.*)

Buono confirmed in his interview with Milbank that GT provided detailed information about employee-leasing to the Board. (Jt. Supp. Ex. 1, MB_BEBO_0000060 ("Buono stated that the Grant Thornton auditors advised the Audit Committee on occasion that the company was using employees to satisfy occupancy covenants.").) First, he described a detailed presentation by GT auditor Melissa Koeppel in the third quarter of 2010. Koeppel presented an analysis of the Ventas properties, which showed the company was satisfying the occupancy covenants by putting employees in units at the facilities. (*Id.*, MB_BEBO_0000061; *see also id.*, MB_BEBO_0000066.)

Second, he described a presentation by Robinson at a Board or Audit Committee meeting. Robinson described for the board the fact that ALC was using units for employee use in determining ALC's compliance with the coverage ratio and occupancy covenants. (*Id.*) This is likely reference to the same meeting Bell described in his Milbank interview. Although Buono placed the meeting in late 2011, according to Robinson this occurred in early 2011. (Tr. 3430-31.)

Buono further confirmed for Milbank that ALC renting rooms for employees to use was part of an open and on-going discussion with the board. In early 2009, as ALC was "getting tighter" on the lease covenants, he recalled management made a proposal to the board about how to address occupancy covenants under the Lease: "He recalled participating in discussions with the Board about what the company should do to address this issue. It was at this time that management proposed a solution of leasing units for the benefit of employees at the properties. Buono does not recall who brought up the possibility of leasing units to employees. He does not recall anyone saying that the company could not do this." (Jt. Supp. Ex. 1, MB_BEBO_0000062.) He told Milbank about another specific meeting around the same time with director Mel Rhinelander, Bebo, and another ALC employee where they discussed these room rentals related to employees, and Rhinelander said "we'll just add employees now." (*Id.*)

Buono also confirmed that "employee leasing data was certainly presented to the Audit Committee" at certain times. (*Id.*, MB_BEBO_0000066.) Incredibly, the Division elicited testimony from the company's audit committee members, like Bell, that they failed or refused to review the detailed financial information about ALC's individual facilities that was critical to monitoring the business. (*See, e.g.* Tr. 546, 576, 1353, 1368-69.) Buono explained to Milbank how this was not only incredible on its face, but false:

> Information regarding the performance rankings of the various ALC facilities was presented at Audit Committee meetings. At one point, the Chair of the Audit Committee was looking at one of the Ventas properties and asked why the Ventas properties were far down the list. Buono recalls advising the Audit Committee Chair that the reason the Ventas properties were further down on the list than usual was that the list did not include the intercompany transfers associated with employee leases.

(Jt. Supp. Ex. 1, MB_BEBO_0000067.)

E. Because Ventas was primarily interested in getting paid rent, particularly at the height of the Great Recession, everyone at ALC believed any covenant violations would be resolved without significant financial consequences.

Bebo's earlier briefing noted that Ventas has not defaulted a tenant and asserted its remedies under a lease where the sole basis for the default was an occupancy or coverage ratio covenant violation." (Bebo Post-Hearing Br. at 61-63, citing evidence.) Further, in public statements and SEC filings, Ventas touted the financial covenants contained in its leases as protection against non-payment of rent. (*Id.* citing Ex. 2069, p. 5; Tr. 309.) Importantly, Bebo was aware of this because of her lengthy experience in the industry and because she periodically reviewed Ventas' SEC filings. (*Id.* citing Bebo, Tr. 4047-51.)

Statements made to Milbank during their internal investigation confirm these facts. The Division called one of the directors, Mel Rhinelander, as their witness at trial. There he testified he voted to approve the Lease despite Bell's concerns about the covenants because Bebo told him she was comfortable in ALC's ability to meet them. (Tr. 2805) However, he told Milbank that he never had any concern about the covenants at all. He said if "you blow through" a Lease covenant, it was "no big deal." (Jt. Supp. Ex. 1, MB_BEBO0000108.) Rhinelander stated he would not have expected Ventas to try and accelerate rent or kick out ALC for a covenant default, especially in the midst of the Great Recession, peaking around 2009. (*Id.*) Ventas would want a lessee paying rent instead of having to find a new tenant. Even when ALC lost licenses, Ventas was willing to negotiate. (*Id.*) At most, he believed that ALC would pay "a few dollars" in connection with renegotiating the lease and move on with its business. (*Id.*)

II. Case Law Developments Since Post-Hearing Briefing Further Confirm The Division Has Failed To Establish Any Violation Of The Securities Laws.

A. Courts applying *Omnicare* to compliance opinions demonstrate the Division's Section 10(b) claim fails.

As demonstrated in Bebo's prior briefing, 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* Bebo Post-Hearing Br. at 177-79 citing *Omnicare, Inc. v. Laborers Dist. Council Contr. Indus. Pension Fund,* 135 S. Ct. 1318, 1327 (2015); *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095-96 (1991).) Since the time of the earlier briefing, additional cases applying *Omnicare* further support Bebo's position in this case. *See Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016); *In re Plains All American Pipeline, L.P. Sec. Litig.*, 245 F. Supp. 3d 870 (S.D. Tex. 2017).

The *Sanofi* case involved allegations that opinion statements about the company's compliance with the FDA drug approval process were false. Despite making positive statements about the progress of a key drug through the approval process, the government agency had provided repeated concerns about Sanofi's testing methodology. *Sanofi*, 816 F.3d at 211-12.

The court held that "a statement of opinion is not misleading just because external facts show the opinion to be incorrect," and, therefore, undisclosed statements by the FDA criticizing the company's drug trial process did not render the statement false or misleading. *Id.* at 212.

The court further emphasized that this was particularly true because reasonable investors are aware of the custom and practices of the industry in which they are investing, and would understand that this is part of the process. *Id.* The court reasoned:

> Plaintiffs' case essentially boils down to an allegation that the statements were misleading for failure to include a fact that would have potentially undermined Defendants' optimistic projections [of FDA approval]. But *Omnicare* imposes no such disclosure requirements on issuers. Defendants were only tasked with making statements that fairly aligned with the information in the issuer's possession at the time. Defendants need not have disclosed the FDA feedback merely because it tended to cut against their projections—Plaintiffs were not entitled to so much information as might have been desired to make their own determination about the likelihood of FDA approval by a particular date. Certainly Plaintiffs would have been interested in knowing about the FDA feedback, and perhaps would have acted otherwise had the feedback been disclosed, but *Omnicare* does not impose liability merely because an issuer failed to disclose information that ran counter to an opinion expressed in a registration statement.

Id. at 212 (quotations omitted).

In *Plains All American*, the company owned and operated a series of oil and gas pipelines. When one of the pipelines in California ruptured, causing significant environmental damage, the company's share price dropped and investors brought a securities fraud case. The shareholders alleged that Plains made false statements about its legal compliance with various environmental laws. *Id.* at 903. The complaint alleged that, unbeknownst to investors, the company was not actually in compliance because it failed to take numerous actions required by environmental laws and regulations, such as inspecting the lines that ruptured, failing to have adequate monitoring systems, and failing to address anomalies in the lines discovered by the company. *Id.* In addition, Plains failed to disclose that a government agency had cited the company for various record-keeping violations in connection with its pipeline maintenance and monitoring activity. *Id.*

The court held that even if the allegations, viewed holistically, demonstrate that the "federal government was generally 'taking the opposite view' as to Plains's legal compliance," this was insufficient to establish liability under *Omnicare*. *Id.* at 909. The court reasoned that the "context" of the alleged statements was particularly important:

> Evaluated in context, the statements here were not misleading because a reasonable investor would not understand the company's high-level, general statements that it was operating in substantial compliance with regulatory requirements as implicitly assuring absolute compliance, even with the recordkeeping regulations that the violation notices addressed. The plaintiffs' allegations related almost exclusively to Lines 901 and 903. But, as already discussed, Lines 901 and 903 are a small portion of Plains's overall pipeline operation.

Id. A reasonable investor would not "infer that the company was in absolute compliance or that its regulators had no objections to the company's compliance on any pipeline. Instead, reasonable investors would understand that, for a very large pipeline company in this heavily regulated industry, regulatory notices of recordkeeping violations on minor portions of the company's operation are commonplace and unremarkable." *Id.* at 909-10.

Here, the Division's case fails for similar reasons. *First*, the Division has merely attempted (and failed) to prove that, in hindsight, the opinion that ALC was in compliance with the Lease through employee-leasing was wrong. But as the cases applying *Omnicare* demonstrate, even if true, that is insufficient to establish securities fraud for an opinion statement.

Second, as established in these cases, a company is not required to disclose factual details that cut against the opinion. Consequently, for example, ALC was not required to disclose facts about the Solari Email, such as how it failed to explicitly mention covenant calculations or that it did not require a counter-signature by Ventas. Nor was it required to disclose how it was tracking room rentals related to employees and the fact the occupancy reconciliations were not provided to Ventas.

Third, the context of the statement is particularly important, including the industry and the Great Recession in which ALC was operating. Bebo's expert, Smith, an auditor, and various other witnesses testified that financial covenant violations under loan documents or leases almost always get resolved with minimal financial consequences to the debtor or tenant. (Tr. 2298-99, 3568, 3634-35, 3660-63; Ex. 2185 at 10-11.) Here, the evidence is undisputed that Ventas had never defaulted another tenant for a financial covenant violation. (Bebo Post-Hearing Br. at 61, citing evidence.) The evidence is that Bebo (and everyone else at ALC), based on Ventas' actions and statements and her knowledge of the industry, believed that there was no risk that ALC could face the draconian penalties for a covenant violation, such as rent acceleration, contained in the Lease.[12] (*Id.* at 61-64, citing evidence.) The evidence even established that, in 2009, the State of Alabama took action to revoke the license on one of the CaraVita Facilities. When Ventas learned of this event of default—which is far more serious than a financial covenant violation—it took no action under the Lease. (*Id.*) Indeed, a reasonable investor, having knowledge of the terms of the Lease, would expect that ALC could trip some of the numerous operating covenants contained in the Lease, that a dialogue would ensue with Ventas, and resolution would be reached with little financial consequences. Under *Omnicare*, it is only once a default has been asserted and the penalties invoked that disclosure would be required.

[12] Indeed, under the law that would govern the Lease in this regard, the acceleration of rent provision would be unenforceable. (*See* Bebo Post-Hearing Br. at 190-91.)

B. As a matter of law, ALC had no obligation to disclose immaterial information about the basis for its compliance opinion.

As demonstrated in Bebo's prior briefing, the law does not require companies to disclose every basis for a stated compliance judgment or information that may contradict the assertion of compliance. (Bebo Post-Hearing Br. at 185-194 citing, *inter alia*, *Zaluski v. United Am. Healthcare Corp.*, 527 F.3d 564, 572 (6th Cir. 2008); *Gallagher v. Abbott Labs.*, 269 F.3d 806 (7th Cir. 2001); *Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 831 (8th Cir. 2003).) Consequently, where a company has a reasonable defense to an asserted breach of a contract or to assertions of non-compliance with laws or regulations, no claim may be premised on alleged undisclosed information about the basis for the opinion or undisclosed information contradicting it. (*Id.*) Put simply, there is no duty to disclose.

A recent decision from the Third Circuit, involving very similar circumstances, further supports Bebo's position. *See Williams v. Globus Medical, Inc.*, 869 F.3d 235 (3d Cir. 2017). In *Williams*, a medical device company (Globus) told investors that its sales "*could* be adversely affected" if it lost key sales representatives or any of its independent distributors. *Id.* at 238 (emphasis added). At the same time, and unknown to investors, Globus already made the decision to terminate one of its key independent distributors. *Id.* at 239. Later, Globus disclosed that its sales and financial performance had declined due in large part to its earlier decision to terminate the distributor. *Id.*

In the face of allegations that Globus was obligated to disclose the decision to terminate the contract when it told investors about the future risk to sales if it lost distributors, the Third Circuit held, as a matter of law, there was no duty to disclose the contract termination. The court reasoned that the "risk actually warned of is the risk of adverse effects on sales—not simply the loss of independent distributors generally. Accordingly, the risk at issue only materialized—

triggering Globus's duty to disclose—if sales were adversely affected at the time the risk disclosures were made." *Id.* at 242. Further the court held, that because Globus was not "already experiencing an adverse financial impact at the time of the risk disclosures," the claim was not actionable.

Importantly, the court also held there was no actionable misstatement because the allegations did not establish that the drop in sales as a result of the contract termination was "inevitable." *Id.* at 243. Unless the "risk about which Globus warned—the risk of adverse effects on sales as a result of the loss of a single independent distributor—had actually materialized at the time of either the 2013 10-K or the 2014 1Q 10-Q, Globus had no duty to disclose its decision to determinate its relationship with [the distributor], and the risk disclosures were not materially misleading." *Id.* at 243.

The analysis is the same in this case. As in *Globus*, ALC warned investors of a risk to "Future Liquidity and Capital Resources" if (a) it breached "certain operating and occupancy covenants; and (b) Ventas exercised its remedies under the lease, including acceleration of rent. Just like Globus, ALC emphasized that a breach of the covenants *could* result in the financial consequences disclosed. And as in *Globus*, at no time during the period ALC issued the challenged statements was ALC realizing the potential consequences of a covenant breach. Indeed, as noted above, in 2009 ALC breached a covenant, and nothing happened. In 2010, Ventas issued a notice of default for alleged reporting violations (Ex. 1231), and nothing happened. Consequently, just as Globus was not required to make a disclosure of the contract termination until the financial consequences of it materialized, it is also the case that ALC was not required to disclose immaterial information about its dealings with its contractual counter-party unless and until the potential financial consequences of a "operating or occupancy covenant" breach materialized.

C. New precedent confirms that this Court should find no scienter where Bebo consulted and received advice from counsel and auditors.

As Bebo demonstrated in her prior briefing, consulting with legal counsel or other professionals, such as auditors, supports a finding that the person did not act with *scienter*. (Bebo Post-Hearing Br. at 195-96, 202-03 citing cases.) The Eleventh Circuit's recent decision in *SEC v. Bankatlantic Bancorp, Inc.*, 661 F. App'x. 629 (11th Cir. 2016), further supports Bebo's position in this case. In that case, the Commission brought a federal court disclosure fraud action against a bank and its CEO, alleging they covered up its loan losses and credit risk in 2007, "in the face of the looming Great Recession." *Id.* at 630-31. At one point, the bank's CFO emailed the CEO claiming that the company needed to change its accounting treatment for certain loans, which would have resulted in significant additional losses at the bank. *Id.* at 632. The CFO (who was not a defendant) then communicated with the bank's outside auditors. *Id.* The auditors advised that the accounting treatment depended on whether management intended to sell the loans, or hold the loans "for the foreseeable future." The defendants continued to consult with the auditor about the process, including providing pertinent information about the bank's hiring of a investment bank to market the loans for sale. *Id.* The bank ultimately decided to retain the loans, and even though it was marketing them for sale, continued to account for them at the higher "investment" value. *Id.* at 632-33.

The SEC alleged that the defendants committed fraud by continuing to account for the loans as held-for-investment even though they engaged a third party to try and sell them. The district court rejected the advice-of-professional defense as a matter of law because the defendants did not provide the auditor with the third party's engagement letter, marketing materials, and certain emails sent to potential buyers. *Id.* at 634. The Eleventh Circuit held the district court erred, and that a jury could find that the advice-of-professional defense applied even though the auditor was not provided all the relevant materials.

The court found it critical that the defendants and the auditors agreed that they had all the information necessary to render the advice, and specifically relied on testimony from one of the audit team members who confirmed that they were provided any materials that were requested from the company. *Id.* at 637. Finally, there was testimony and emails from the auditors indicating they understood the "crucial issue" pertaining to the accounting treatment, even if they did not have all of the relevant materials. *Id.*

This case is no different. With respect to GT, they had documents and information sufficient to understand the basic facts and the "crucial issue[s]" pertaining to employee-leasing. The testimony and documentary evidence confirming this fact is abundant. (Bebo Post-Hearing Br. at 133-38, citing evidence.) Although during a large part of the time, GT was confused about whether Ventas also received the occupancy reconciliation spreadsheets with the employee names, that confusion was cleared up during the audit of ALC's 2011 financials, and GT issued clean audit and internal controls opinions. (Bebo Post-Hearing Br. at 134-35.) Just as in *Bankatlantic*, GT testified that neither ALC nor Bebo ever refused to provide information or answer questions about the employee-leasing program. (*See* Tr. 3360-61.)

Similarly, and as discussed earlier, ALC's general counsel was involved and consulted with at every stage of the process. Although the weight of the evidence supports the conclusion that Fonstad attended the Solari Call, it is undisputed that he received a copy of the Solari Email and Ventas' response. The new evidence from Fonstad's Milbank interview confirms that he was aware ALC had embarked on the employee-leasing process after that time, and he knew ALC was meeting the covenants only as a result of using room rentals related to employees. Lucey's Milbank interview provides new critical information about the disclosure committee meeting, chaired by Fonstad, which occurred days after the Solari Call and Email. At what is likely the February 13 meeting, Lucey confirmed that Buono expressly told Fonstad and the rest of the committee that ALC was meeting the covenants through the use of employee rooms in the covenant calculations.

For these reasons, and as confirmed by *Bankatlantic*, Bebo's reliance on the advice of auditors and counsel demonstrates a lack of scienter and supports a complete defense to the Division's allegations.

D. Subsequent decisions regarding the calculation of civil penalties supports Bebo's previous arguments.

As shown in Bebo's Post-Hearing Brief (at 277-84) and Post-Hearing Reply Brief (at 96-104), the facts of this case do not justify the imposition of a monetary penalty and they certainly do not justify the draconian third-tier penalty that the Division seeks. However, if the Court were to find that civil penalties are appropriate, cases decided since the parties' original briefing demonstrates that a penalty based on a single violation would be appropriate, and that a third-tier penalty is not appropriate.

1. Any penalty imposed should be based on the single course of conduct alleged.

The Exchange Act establishes a three-tier system for calculating the maximum amount of any civil penalty, which may be imposed if a Respondent willfully violates the Exchange Act. 15 U.S.C. § 78u-2(a), (b). Only where a respondent's conduct involved fraud or reckless disregard of a regulatory requirement *and* resulted in substantial losses or created a significant risk of substantial losses to other persons, the Commission may impose a maximum third-tier penalty of up to $150,000 for each act or omission constituting a violation of the securities laws.

15 U.S.C. § 78u-2(b)(3); 17 C.F.R. § 201.1004. In addition, before assessment of any penalty, the Commission must find that such an assessment is in the public interest. Section 21B(a) of the Exchange Act requires that the public interest finding support not only the decision to assess a penalty in the first place, but the amount of the assessment as well. *See* 15 U.S.C. § 78u-2(b)(3).

Although the statute provides that a penalty can be imposed for each act that constitutes a violation of the law, it leaves the precise manner of calculating the violations undefined. *In re Raymond J. Lucia Cos., Inc. & Raymond J. Lucia, Sr.*, Release No. ID-540, 2013 WL 6384274, at *59 (Dec. 6, 2013) overruled on other grounds by *Lucia v. SEC*, 138 S. Ct. 2044 (2018). Calculation of the number of violations varies among the Commission's administrative law judges. *See, e.g.,* Jonathan N. Eisenberg, *Calculating SEC Civil Money Penalties*, available at http://corpgov.law.harvard.edu/2016/01/24/calculating-sec-civil-money-penalties/ (Jan. 24, 2016).

However, this Court has largely followed the principle that a single course of conduct should constitute a single violation for purposes of calculating penalties. *In the Matter of Tod A. Ditommaso, Esq.*, Release No. ID -1142, 2017 WL 2570718, at *5 (June 13, 2017) (finding that the issuance of 10 attorney opinion letters were considered to be one course of action and imposing a single first-tier penalty) (ALJ Foelak); *In the Matter of David B. Havanich, et al.*, Release No. ID-935, 2016 WL 25746, *11 (Jan. 4, 2016) (ALJ Foelak); *In the Matter of Spring Hill Capital Markets, LLC, et al.*, Release No. ID-919, 2015 WL 7730856, *19 (Nov. 30, 2015) (imposing two second-tier penalties based on two distinct "courses of action") (ALJ Foelak); *In the Matter of Natural Blue Resources, Inc., et al.*, Release No. ID-863, 2015 WL 4929878, *33 (Aug. 18, 2015) (two individuals orchestrated fraudulent scheme as *de facto* officers, while calling themselves outside consultants, over a three-year period involving numerous acts and omissions constituted "one course of action" warranting second-tier penalties) (ALJ Foelak).

Similarly, the full Commission, albeit without detailed analysis, affirmed imposition of a single penalty based on multiple acts and omissions as one course of conduct in *In the Matter of Mohammed Riad & Kevin Timothy Swanson*, Release No. 34-78049, 2016 WL 3226836, at *46 (June 13, 2016). That case involved misrepresentations contained in multiple Commission filings, including annual and semi-annual reports to investors, of a closed-end investment company resulting in $45 million in investor losses. The Commission affirmed the imposition of one third-tier penalty in the amount of $130,000 because, although there were multiple Commission filings containing misrepresentations, it was a single "course of action resulting in one unit of violation." *Id.*

Federal district courts have also more recently trended toward calculating penalties in this manner. *SEC v. Garfield Taylor, Inc.*, 134 F.Supp.3d 107, 110 (D.D.C. 2015) (noting that "[w]hile the Court has found some support for the position, other courts have assessed only a single penalty where the violations arose from a single scheme or plan" and ultimately applying a single penalty because the violations arose out of a single plan); *SEC v. Riel*, 282 F.Supp.3d 499, 528–29 (N.D.N.Y. 2017) (rejecting the SEC's request for 5 separate violations for each victim and finding that "[s]ince the violations here arose out of a single scheme or plan, for purposes of this case the Court will apply a single monetary penalty"); *SEC v. BIC Real Estate Dev. Corp.*, 2017 WL 1740136, at *6 n. 2 (E.D. Cal. May 4, 2017) (in dicta the court noted that "the weight of authority favors interpreting each violation to mean each scheme in which the defendant was involved" as opposed to each victim).

Here, Bebo's acts similarly constitute a single course of conduct for purposes of calculating penalties. This case involves one alleged misstatement repeated in various Commission filings, and only one course of conduct with respect to the reason that statement was allegedly false or misleading. To the extent any civil penalty should be imposed (it should not), one penalty is appropriate under recent case law developments.

2. Even if the Court finds some violations, imposition of third-tier penalties would be inappropriate.

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

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

Nor can the Division demonstrate that Bebo's alleged violations caused or even risked substantial losses to investors, as required to support its request for third-tier sanctions. Recent cases demonstrate that the flimsy connection between the supposed losses incurred and the alleged misconduct cannot support a third-tier penalty. *See SEC v. Forum Nat'l Investments Ltd.*, 2016 WL 6875953, at *6 (C.D. Cal. Nov. 18, 2016) ("There is insufficient evidence to support the imposition of third tier penalties. The SEC has not submitted any evidence of losses to others, but only broad statements about the value and number of shares of Forum stock, most of which was owned by the management of the company"); *SEC v. Carrillo Huettel LLP*, 2017 WL 213067, at *9 (S.D.N.Y. Jan. 17, 2017), report and recommendation adopted, 2017 WL 1162199 (S.D.N.Y. Mar. 28, 2017); *SEC v. Madsen*, 2018 WL 5023945, *1-4 (S.D.N.Y. Oct. 17, 2018) (all Section 10(b) fraud ostensibly creates some harm to investors, but the remedy provisions of the securities law require direct causal evidence that the fraud caused the alleged losses otherwise every case would permit tier-three penalties).

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

The Division's request for an officer and director bar should be denied for many of the same reasons its request for monetary sanctions should be denied. In addition, Bebo has been effectively barred from acting as a public company officer and director while this case has been pending. Indeed, she has not been gainfully employed at all. Any further director and officer bar would be unwarranted.

III. This Proceeding Violates Bebo's Constitutional Right To Equal Protection Because Bebo Was Denied Her Right To A Jury Trial While Other Similarly-Situated Persons Were Provided That Right.

Throughout these proceedings, Bebo has sought discovery to support an as-applied equal protection violation. Those efforts have been opposed by the Division, and based on several orders and decisions by two ALJ's, Bebo has been denied that discovery. Bebo believes such additional extrinsic evidence would further support an as-applied equal protection challenge for the reasons set forth below, and Bebo raises these issues despite this Court's prior decisions in order to preserve them in future proceedings.

The Constitution's promise of equal protection guarantees that similarly situated individuals will be treated similarly. Despite this promise, Bebo has been denied equal protection throughout this proceeding. In particular, Bebo, unlike similarly situated litigants, has been arbitrarily denied the right to a jury trial. The SEC's decision to deny Bebo her right to a jury trial violates the Fifth Amendment's guarantee of equal protection.

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). This is true even if the Commission was acting in its discretion when it imposed disparate treatment on Bebo, as the Commission's decision to prosecute its claims against Bebo in an administrative forum while similarly situated defendants were afforded the opportunity to defend themselves in federal district court was arbitrary and irrational. *See Gupta v. SEC*, 796 F. Supp. 2d 503, 513 (S.D.N.Y. 2011); *see also Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.") Because Bebo was treated differently than similarly situated defendants, her right to equal protection was violated in this case.

While the Division brought Bebo's action administratively, it has asserted similar claims against similarly situated CEOs and officers in federal court. For example, on May 6, 2015, the

SEC filed a complaint against four former officers of Wilmington Trust Corporation (the "Defendants"), including the former CFO, in the United States District Court for the District of Delaware. *See SEC v. Gibson, et al.*, Case No. 1:15-cv-00363-RGA, ECF No. 1. In this action, the SEC alleged the Defendants knowingly made or participated in making material false disclosures regarding Wilmington Trust Corporation's accruing loans 90 days or more past due. *See id.* at ¶ 1. Specifically, the SEC alleged the Defendants violated Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), and Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78m(b)(5), and Rules 10b-5 and 13b2-1 thereunder. *See id.* at ¶ 6. The SEC further alleged violations of Exchange Act Rule 13a-14 and Sections 13(a), 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act, along with violations of Rules 12b-20, 13a-1, 13a-11, and 13a-13. But while the claims asserted against the Defendants in the Wilmington Trust Corporation matter were analogous to those asserted against Bebo in the present action, Bebo was not afforded the same constitutional protections that the Defendants enjoyed in federal court. Most importantly, unlike the federal defendants, Bebo does not have a right to a jury trial.

The Constitution does not allow this arbitrary classification, which, for no legitimate purpose, affords some litigants a jury trial while denying the same protection to those that are similarly situated. Because Bebo has been treated differently than others who are similarly situated, she has been denied not only her right to a jury trial, but also the right to equal protection under the law.

CONCLUSION

For the reasons stated in this Supplemental Post-Hearing Brief and in Bebo's original Post-Hearing Brief and Post-Hearing Reply Brief, the OIP's allegations are unsupported and the OIP should be dismissed in its entirety.

Dated this 27th day of September, 2019.

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

By: ______________________________

Mark A. Cameli
WI State Bar No.: 1012040
E-mail: mcameli@reinhartlaw.com
Ryan S. Stippich
IL State Bar No.: 6276002
E-mail: rstippich@reinhartlaw.com

1000 North Water Street, Suite 1700
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097

CERTIFICATE OF COMPLIANCE

Pursuant to Commission Rule of Practice Rule 450(d), incorporated in to this Court's August 28, 2019 order governing supplemental briefing, I hereby certify that the Respondent Laurie Bebo's Supplemental Post-Hearing Brief complies with the length limitation set forth in Commission Rule of Practice 450(c). According to the Word Count function of Microsoft Word, this brief contains 13,609 words, exclusive of the table of contents, table of authorities, cover page, signature block and this certification.

Dated: September 27, 2019

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

By: ______________________________

Mark A. Cameli
WI State Bar No.: 1012040
E-mail: mcameli@reinhartlaw.com
Ryan S. Stippich
IL State Bar No.: 6276002
E-mail: rstippich@reinhartlaw.com

1000 North Water Street, Suite 1700
Milwaukee, WI 53202
Telephone: 414-298-1000
Facsimile: 414-298-8097