UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of

LAURIE BEBO, and
JOHN BUONO, CPA,

Respondents.

THE DIVISION OF ENFORCEMENT'S SUPPLEMENTAL POST-HEARING RESPONSE BRIEF

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A. Introduction

Bebo begins her Supplemental Brief by proclaiming that this action should never have been brought and must be dismissed. She does so despite the following components of her scheme not being in dispute. First, Bebo does not dispute that ALC's true occupancy at the Ventas facilities failed the covenants, and by wide margins. Second, Bebo concedes that to address ALC's occupancy failures, she directed ALC to include in its covenant calculations large numbers of fake occupants who did not actually stay at the Ventas facilities. Third, Bebo admits that she personally selected the identity of these phony residents – including her friends, family, and a seven-year old boy – in order to provide audit evidence to Grant Thornton. Fourth, ALC's Commission filings undisputedly represented that ALC was in compliance with the Ventas covenants, but made no mention that ALC's compliance hinged on the inclusion of fake occupants.

Rather than challenge the facts comprising her scheme, Bebo attempts two arguments in an effort to escape liability. Asking the Court to reject the testimony of the many witnesses who refute her story, Bebo claims she disclosed limited aspects of her scheme to ALC's attorneys, auditors, and board. Bebo argues that this somehow excuses her conduct. And, despite overwhelming evidence to the contrary, she claims that ALC's compliance with the Ventas covenants was not material.

In making these arguments, Bebo ignores that a federal court, in a lawsuit against her and ALC, previously determined that the false statements at issue in this case – ALC's statements of compliance with the Ventas covenants – appropriately support a securities fraud charge. *Pension Trust Fund for Operating Eng'rs v. Assisted Living Concepts, Inc.* 2013 U.S. Dist. LEXIS 87568, at *24-27, *45-46 (E.D. Wis. June 21, 2013).

Belying her claims of being the victim of a misplaced prosecution, Bebo also ignores that her subordinate Buono, who undisputedly took orders from Bebo vis-à-vis ALC's covenant practices, was charged in this case with the exact same conduct and under the same legal theories. For his role in Bebo's scheme, the Commission ordered Buono to cease-and-desist from violating the same statutory provisions charged against Bebo, pay a $100,000 penalty, be barred from serving as a public company officer or director, and be prohibited from appearing before the Commission as an accountant. *Laurie Bebo and John Buono, CPA*, Exchange Act Rel. 74177 (Jan. 29, 2015).

Bebo's fraud also ended the public company auditing careers of the two Grant Thornton partners who audited ALC. *Melissa K. Koeppel, CPA and Jeffrey J. Robinson, CPA*, Exchange Act Rel. 76537 (Dec. 2, 2015). In barring both auditors from practicing before it, the Commission found that Koeppel and Robinson: "repeatedly violated professional standards while ignoring numerous red flags and fraud risks that allowed ALC...to file numerous reports with the Commission that were materially false and misleading" and "failed to identify a fraud perpetrated by ALC's CEO and CFO." *Id.*, ¶¶ 1-2. The Commission additionally imposed a $3 million penalty against Grant Thornton, and required it to perform significant remedial undertakings, for its failure to halt Bebo's fraud. *Grant Thornton, LLP*, Exchange Act Rel. 76536 (Dec. 2, 2015).

Bebo still cannot answer the fundamental question of why less culpable individuals – Buono, Koeppel, and Robinson – should be severely punished for their smaller roles in a scheme Bebo masterminded, while Bebo escapes liability and sanctions altogether.

Bebo's Supplemental Brief also fails to answer a series of questions the Division posed in its initial post-hearing briefing that demonstrate Bebo's version of the events is untrue:

- Why, as Bebo argues, would Solari and Buono lie about the January 20, 2009 call in which Bebo claims Solari approved the inclusion of employees in the covenant calculations? (Div. Reply Br. (Aug. 28, 2015), p. 2).

- Why would three prominent Canadian citizens – directors Bell, Buntain, and Rhinelander – voluntarily travel to the United States to perjure themselves, as Bebo claims, by testifying that Bebo concealed her covenant scheme from ALC's board? (*Id.* at 3).

- Why would the former Surgeon General of the Air Force – director Roadman – risk his unblemished reputation by testifying consistently with Bell, Buntain, and Rhinelander, if, as Bebo claims, that testimony was untrue? (*Id.* at 4).

- Why would three attorneys – Fonstad, Zak, and Davidson – jeopardize their law licenses by, as Bebo claims, falsely testifying that Bebo did not apprise them or ALC's board of her scheme? (*Id.*).

- Why would three CPAs – Herbner, Hokeness, and Ferreri – risk their careers by refuting Bebo's version of the events if their accounts, as Bebo claims, were not true? (*Id.* at 5).

- Why, if Solari truly agreed to include employees in the covenant calculations, didn't Bebo obtain written approval from Ventas or disclose her practices in any document provided to ALC's board or attorneys? (*Id.* at 10-11).

It is telling that, despite the opportunity for discovery and a new hearing following remand post-*Lucia*, Bebo fails to answer these basic questions. She still cannot explain why no percipient witness or contemporaneous document corroborates Bebo's story of what she told the board, ALC's attorneys, Grant Thornton, and Ventas about her inclusion of employees in the covenant calculations.

Instead, all that Bebo can muster are minor inconsistencies between the testimony of certain witnesses and the depictions of their off-the-record interviews contained in the Milbank memoranda. But those memoranda constitute multiple levels of hearsay, contain internal inconsistencies, and are unpersuasive compared to the witnesses' sworn testimony. More importantly, even if the Milbank memoranda are accepted as accurate, they at best show that

certain witnesses were aware of only limited aspects of ALC's covenant practices at the onset of Bebo's scheme: the inclusion of the handful of employees who actually stayed at the Ventas properties, under the false belief that Ventas agreed to it. Even crediting the Milbank memoranda, there is simply no evidence, beyond Bebo's self-serving testimony, that any attorney or board member knew ALC was using fake occupants, or large numbers of them, to meet the Ventas covenants.

And, to the extent Bebo wants to rest her defense on the Milbank memoranda, she does not explain the wild inconsistencies between her own Milbank memo and her later testimony, which dwarf by comparison any discrepancies she identifies for the other witnesses. Indeed, the sharp differences between Bebo's Milbank memo and trial testimony dovetail with her repeated impeachment at trial and the fact that the documentary evidence and so many witnesses refute her version of the events. Rather than help her, Bebo's Milbank memo only supports the notion she perjured herself repeatedly throughout these proceedings.

Accordingly, for the reasons discussed herein and in the Division's prior briefing, the Court should find that Bebo engineered an egregious scheme and impose sufficient sanctions to punish her, protect investors, and deter other public company executives from engaging in fraud.

B. Bebo's "Factual Overview" Misstates the Record and is Factually Incorrect

Like her original post-hearing briefing, Bebo's supplemental brief presents a skewed depiction of the record that is reliant on Bebo's implausible and self-serving testimony. Bebo fails to acknowledge that her version of the facts is inconsistent with the contemporaneous documentary evidence and was refuted by every percipient witness. While the Division's initial post-hearing briefing details how the overwhelming evidence disproves Bebo's version of the facts, the Division offers the following rebuttal to the factual story presented in Bebo's supplemental brief.

1. ALC, Investors, and the Division of Corporation Finance Considered ALC's Covenant Compliance to be Material

Bebo claims that ALC's representations in its Commission filings about complying with the Ventas covenants were "boilerplate," and that ALC's covenant compliance was not material to investors. (Bebo Supplemental Brief ("Supp. Br.") at 5-6). But the record shows that ALC's covenant compliance was material to a variety of constituencies. Examples include:

- Bebo testified she understood that ALC's board and its chairman considered it important to know whether ALC was complying with the covenants. (Tr. 1785:14-1786:21, 1834:9-25).

- Accordingly, ALC's board required quarterly reports from management on ALC's covenant compliance. (Tr. 557:7-11, 576:24-578:6, 1357:5-14, 1785:18-1786:2, 2321:21-2322:7, 2807:21-2808:6; Ex. 98, p. 5; Ex. 150).

- Bebo and ALC's accounting department regularly reviewed and monitored occupancy and coverage ratios at the Ventas facilities for covenant compliance. (Tr. 838:14-22, 1839:5-13, 2321:3-20, 2327:20-2328:5; Ex. 150).

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

- Belying Bebo's argument that the disclosures were "boilerplate," the Commission's Division of Corporation Finance inquired about ALC's covenant disclosures in a July 2011 comment letter, and ALC modified its disclosures in response. (Ex. 295).[1]

- Buntain, who was an investor as well as a director, testified ALC's compliance with the Ventas covenants was important to him as an investor, and that he had discussions with chairman Hennigar, ALC's largest shareholder, about the impact of non-compliance on ALC's stock price. (Tr. 1357:22-1358:17, 1359:6-15).

- ALC's May 4, 2012 Form 8-K disclosed that it retained counsel to investigate "irregularities" in the Ventas lease. (Tr. 3640:8-12; Ex. 14). Confirming the importance of that information to investors, that day ALC's stock price dropped from $19.17 to

[1] Following that inquiry, ALC's revised the purportedly "boilerplate" disclosures in its 2011 Form 10-K and subsequent Forms 10-Q, adding the following false and misleading representation: "ALC does not believe that there is a reasonably likely degree of risk of breach of the [Ventas] covenants." (Tr. 1772:7-17; Ex. 11, p. 36; Ex. 12, pp. 36-37; Ex. 13, p. 43).

$16.80 – a price drop Bebo's expert witness conceded was a "significant abnormal decline." (Tr. 3637:5-3638:4).[2]

- Bebo herself admitted that a potential investor in ALC would want to know whether a valid agreement existed to include employees in the covenant calculations. (Tr. 2134:17-2136:23).

Bebo claims the Division not calling a stock analyst witness means that ALC's covenant disclosures must have been immaterial. (Supp. Br. at 6-7). Yet she cites no authority requiring a stock analyst's testimony to prove materiality, and the Division is unaware of any such holding. Moreover, it is notable that, in the face of all the above evidence demonstrating the covenants' materiality, Bebo did not call any analyst, investor, or other fact witness to testify they considered ALC's covenant compliance to be unimportant.

2. Bebo Continues to Use the Vague, Imprecise, and Misleading "Employee Leasing" Terminology

Bebo insists on continuing to use the misleading and imprecise terminology "employee leasing" to describe her scheme of including employees and other non-residents in the covenant calculations. (*See, e.g.*, Supp. Br. at 3 and n.3). The Court should reject this terminology because it encompasses a variety of practices, ranging from valid to highly fraudulent.

At one end of the spectrum, "employee leasing" can mean the legitimate practice ALC initially implemented to address declining occupancy at the Ventas facilities: Bebo's decision, in late 2008, to send a temporary taskforce of ALC corporate employees to the Ventas facilities to

[2] While Bebo claims the stock drop resulted from the disclosure of Ventas' lawsuit against ALC, that lawsuit was publicly filed on April 26, 2012, and the market had more than a week to factor its impact into ALC's stock price. (Tr. 3650:2-3651:15; Ex. 14). Thus, the only "new" information contained in the Form 8-K was ALC's disclosure it had retained counsel to investigate "irregularities" in the Ventas lease, a reference to Milbank's investigation into the [redacted] allegations against Bebo. (Tr. 386:3-6; Ex. 14).

improve sales and operations. (Tr. 559:1-560:2, 2328:12-2330:4, 2812:16-2813:3, 2939:2-9, 3070:22-3074:17, 4725:6-4726:19; Ex. 97, p. 4; Ex. 150, p. 4; Ex. 567).

Consistent with this testimony about Bebo's taskforce, many witnesses described to Milbank how Bebo sent a small number of ALC employees, for a limited period of time, to travel to the Ventas facilities in an effort to legitimately boost occupancy by improving the facilities' performance. (*See, e.g.* Joint Supp. Ex. 1, MB_BEBO_0000080-81 (Fonstad) ("the decision to send employees to the CaraVita properties was never presented as a way to meet the occupancy covenants. It was presented as an initiative to help increase occupancy by improving operations."); *id.*, MB_BEBO_0000018 (Bebo) ("Bebo was asked how many employees were staying at the CaraVita properties. Bebo repeated that there were just a 'handful' of employees staying at the properties."); *id.*, MB_BEBO_00000045 (Bucholtz) ("Buchholtz recalled that in later 2008, she and a colleague were asked to stay at the Peachtree facility to try and shore up operations, including occupancy...Thereafter, the company launched a second initiative in which it asked corporate employees to stay at the facilities for extended periods...this initiative lasted five to six months.")).

While this initial version of "employee leasing" was seemingly benign, at the onset it was not clear to Bebo whether ALC employees could even *stay* at the Ventas facilities, given the restrictive terms of the Ventas lease. (*See, e.g.*, Joint Supp. Ex. 1, MB_BEBO_0000016 (Bebo "stated that in late 2008 or early 2009 she had learned there were a 'handful' of employees living at the CaraVita properties...Bebo had discussions with her internal staff about whether the renting of units to employees would be an issue under the Ventas lease.")). To that end, Fonstad's email advising Bebo in advance of her January 20 call with Solari contained a detailed analysis of

whether the lease allowed ALC employees to rent rooms at the Ventas facilities, independent of including them in the covenant calculations. (Ex. 1152).

Moving down the spectrum, "employee leasing" can also refer to the practice of including in the covenant calculations the small number of ALC employees who actually traveled to and stayed at the Ventas facilities, for the period in which the employees actually stayed there. Indeed, this is the proposal that Bebo made to Fonstad in advance of the January 20 call with Solari, a proposal Fonstad said was permissible only with Ventas' written permission, which was never obtained. (Tr. 1305:25-1307:9, 1308:10-1309:17, 1314:8-16, 1316:24-1317:10; Ex. 1152). Similarly, Bebo would later misleadingly tell Grant Thornton that Ventas had agreed to this version of "employee leasing": including in the covenant calculations *actual stays* by ALC employees. (Tr. 2137:13-2138:20, 2150:4-18, 2150:25-2151:15, 2151:22-2154:16; 3366:5-17, 3401:24-3402:15, 3498:15-3499:6, 3495:25-3496:13, 3497:20-3498:9).

At the far end of the "employee leasing" spectrum is the highly fraudulent practice Bebo actually utilized as her scheme progressed: including large numbers of employees and other non-residents who did not actually stay at the Ventas properties during the period Bebo listed them as "occupants." It speaks volumes that Bebo is the only witness who testified Solari agreed to this practice or that Bebo disclosed it to ALC's board, attorneys, or auditors. On the other hand, every other percipient witness expressly refuted Bebo's account that she disclosed the full details of her scheme.

Given that the vague term "employee leasing" can refer to a variety of practices Bebo employed – ranging from the seemingly harmless genesis of her scheme to its highly fraudulent outcome – the Court should reject Bebo's attempts to use this misleading terminology to justify her fraud.

3. Bebo Did Not Know Whether CaraVita Included Employees in the Covenant Calculations

In her brief, Bebo claims that the prior tenant of the Ventas facilities, CaraVita, included in its covenant calculations the small number of CaraVita employees who actually lived at the Ventas facilities. (Supp. Br. at 7-8). Bebo presumably makes this assertion to suggest Ventas was aware of the practice or that it would be permissible for ALC to similarly include its employees. However, at trial, Bebo admitted she had no actual knowledge whether CaraVita included employees in its covenant calculations. (Tr. 1886:2-24). Bebo made the same concession to Milbank. (Joint Supp. Ex. 1, MB_BEBO_0000016 ("in late 2008 or early 2009 [Bebo] learned there were a 'handful' of employees living at the CaraVita properties...Bebo did not know whether CaraVita had included these employees in its occupancy covenant calculations under the Ventas lease.")). The Court should accordingly reject Bebo's argument that her scheme was merely a continuation of the covenant practices of ALC's predecessor. The Court should also take notice of Bebo's repeated efforts to misstate the evidence.

4. Bebo's Account of the Solari Call is Based Entirely on Her Testimony

In describing the relevant aspects of her January 20, 2009 call with Solari – on which Bebo claims Solari agreed ALC could include an unlimited number of non-residents to satisfy the covenants – the only evidence Bebo cites is her own self-serving and implausible account of the call.[3] (Supp. Br. at 8-9). In doing so, Bebo falsely asserts that she was the only witness who could

[3] For a variety of reasons, Bebo's version of the call is inherently implausible. For instance, she testified to remembering a remarkable number of minute details from a call that took place six years before her trial. (*See, e.g.*, Tr. 4001:19-4010:8). And, as discussed in the Division's earlier briefing, it is unrealistic to suggest that Solari, for no consideration, would agree to effectively waive the covenants by allowing Bebo to meet the covenants by including an unlimited number of phantom residents.

recall what occurred on the call. (*Id.* at 8). And she ignores that the three witnesses she claims were on the call – Solari, Buono, and Fonstad – each refuted her story.

Solari plainly recalled the January 20 call. Namely, Solari testified he and Bebo discussed two subjects: (1) subleasing units to a hospice provider; and (2) whether ALC corporate employees traveling to the facilities could overnight there instead of at hotels. (Tr. 414:2-12). Solari testified he did not agree to any of Bebo's proposals. (Tr. 415:15-18). While Solari testified he did not recall any discussion of the covenants, because no such discussion occurred, he was emphatic he did not agree that ALC could include employees in the covenant calculations. (Tr. 416:8-15). Solari was confident of this because he never would have agreed to such a proposal – an "outlandish request" that would "circumvent the integrity" of the covenants – and because he lacked the authority to do so. (Tr. 416:8-417:10, 422:21-423:12). Contrary to Bebo's assertion that Solari could not dispute Bebo's version of the call (Supp. Br. at 10), Solari was presented with, and unambiguously denied, Bebo's story. (Tr. 423:13-426:6).[4]

While Bebo claims that Buono "corroborates" her story (Supp. Br. at 9), Buono's testimony expressly refuted Bebo's version of the January 20 call. To that end, Buono testified consistently with Solari: that Bebo discussed with Solari the potential hospice sublease and a proposal to have ALC employees stay at the Ventas facilities. (Tr. 2344:8-17). Buono

[4] It is telling that Bebo's support for her claims Solari does not recall the January 20 call comes not from Solari – who testified he recalled the call – but from Grant Thornton partner Robinson's notes of his discussion with a Milbank lawyer, who himself spoke with a Ventas attorney (and not Solari). (Supp. Br. at 18 (citing Ex. 1879; Tr. 3476:18-3480:25)). Robinson's notes reflect at least three levels of hearsay (Ex. 1879), and do not refute Solari's testimony, which was itself corroborated by Buono. There is no evidence of what, if anything, Solari, who no longer worked at Ventas, conveyed to Ventas' lawyer. Bebo thus misleadingly cites Robinson's notes by claiming that "Milbank spoke to Solari through Ventas' counsel." (Supp. Br. at 18).

confirmed the covenants were not discussed, and that Solari did not agree to anything. (Tr. 2344:18-2345:5). Bebo cannot cite any testimony from Buono that covenants were discussed on the call or that Solari agreed to include employees. The only part of Bebo's story that Buono (and Solari) corroborates is that Bebo inquired whether ALC employees could actually stay at the Ventas facilities. This is a far cry from an agreement to include such employees in the covenant calculations.

In continuing to insist Fonstad participated in the call with Solari, Bebo implies that Fonstad perjured himself when he testified he was not on the call. (Tr. 1504:25-1503:3). However, consistent with his testimony, Fonstad's January 19, 2009 email to Bebo and Buono references a call that "you" (not "we") will have with Ventas the following day. (Ex. 1152). And, Bebo cannot explain why, in light of Fonstad's testimony that his practice was to take notes of all calls with Ventas, Fonstad's files did not include notes of the January 20 call. (Tr. 1504:25-1505:15).[5]

Even assuming Fonstad was on the call, that fact would not absolve Bebo. There was no discussion of the covenants on the call, nor were the covenants mentioned in the emails Fonstad received which purported to summarize the call. (Ex. 1171). Therefore, any reliance by Bebo on Fonstad's presence on the call would not excuse her conduct.

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[5] In attacking the credibility of Solari, Buono, and Fonstad, Bebo fails to answer the basic question of *why would each of these witnesses lie*? Solari and Fonstad did not sign ALC's Commission filings, and faced no liability in this case. As for Buono, he had already settled with the Division by the time of Bebo's trial. And, if Bebo's version of the call was accurate, it would have been in Buono's self-interest to testify to that effect. Indeed, Buono's highly inculpatory testimony bolsters his credibility.

5. Buono's Conduct After the Call Corroborates His Testimony

Bebo claims Buono's conduct following the January 20 call supports her story that Solari agreed ALC could include employees in the covenant calculations. (Supp. Br. at 10). But the record demonstrates that Buono's conduct in the days, months, and years following the call are entirely consistent with Buono's (and Solari's) testimony that Solari never agreed to allow the inclusion of employees in the covenant calculations.[6]

As an initial matter, on January 27, 2009, Buono prepared for Bebo a draft email to Solari summarizing the January 20 call. (Tr. 2467:15-2470:9, 2756:22-2758:18; Ex. 179). Entirely consistent with Buono's and Solari's testimony of the call, Buono's draft discussed the hospice sublease and whether ALC employees could rent rooms at the Ventas facilities. (Ex. 179). Also corroborating Buono and Solari, and refuting Bebo, Buono's draft makes no mention of the covenants or any proposal to include employees in the covenant calculations. (*Id.*). And, consistent with Buono's draft email, the version Bebo ultimately sent to Solari likewise makes no mention of the covenants or including employees in the calculations. (Ex. 184). These contemporaneous descriptions of the January 20 call, which do not mention the covenants, most accurately capture how the participants, in real-time, understood what was discussed.

Thereafter, the record is replete with evidence showing that Buono knew Solari never agreed to allow employees in the covenant calculations. Examples include:

- In February 2009, Buono and Bebo discussed with Solari a proposal for ALC to purchase two Ventas properties in New Mexico *in exchange for Ventas waiving the covenants*. (Tr. 429:15-431:19; Ex. 188, p. 2). Waiving the covenants would have been entirely

[6] In fact, as detailed in the Division's prior briefing, *Bebo*'s conduct in the aftermath of the January 20 call demonstrates *Bebo* knew that Ventas never agreed ALC could include employees in the covenant calculations.

unnecessary if, as Bebo claims, ALC could include an unlimited number of employees in the covenant calculations.

- At Bebo's direction, Buono provided Ventas with covenant figures that included employees but did not inform Ventas that employees were being included. (Tr. 2348:22-2349:8, 4669:21-4670:5). Had Solari agreed to include employees, there would have been no reason for Buono to conceal this fact from Ventas. Buono testified that the reason he followed Bebo's directives, despite Ventas never agreeing to include employees, is because Bebo would fire him if he disobeyed her. (Tr. 2348:13-21).

- Buono testified that he repeatedly warned Bebo that the practice of including employees had to be "real" and that he feared going to prison. (Tr. 2365:8-25). Bebo admitted that Buono, in voicing concern that their conduct was illegal, told her "I don't look good in stripes." (Tr. 4126:4-17).

- When ALC was exploring a sale of the company, Buono realized that potential buyers would uncover ALC's inclusion of employees in the covenant calculations, contact Ventas, and that Ventas would confirm it never agreed to include employees. (Tr. 2372:21-2373:16). Buono determined that to prevent this, ALC would need to purchase the Ventas facilities before selling the company. (Tr. 2373:23-2374:1).

- When Buono ultimately revealed the inclusion of employees in the covenant calculations to board members at the March 2012 CNG committee meeting, the board members were "surprised," "shocked," "dumbfounded," "confused," and "furious" at what Buono told them. (Tr. 1373:25-1374:2, 2389:6-9, 2613:1-13, 2652:10-2653:1, 2837:18-2838:1). In delivering the news, Buono appeared frightened, as if he thought he would be fired immediately. (Tr. 582:17-583:5, 1373:20-24). If, as Bebo claims, the board was fully aware of ALC's covenant practices, neither the directors nor Buono would have reacted in this manner to Buono's revelation.

6. Bebo's Efforts to Blame Fonstad and the Disclosure Committee Fail

Trying to deflect blame, Bebo continues to claim that Fonstad advised that her scheme was permissible and then approved ALC's Commission filings via his role on the Disclosure Committee. However, Bebo acknowledges that Fonstad advised her, before the January 20 call with Solari, that ALC could only include employees in the covenant calculations "if Ventas approved." (Supp. Br. at 12 (citing Ex. 1152)). As shown by Solari and Buono's testimony, and Bebo and Buono's conduct in the aftermath of the January 20 call, Ventas never agreed that ALC could include employees in the covenant calculations.

Bebo claims that following her January 20 call with Solari, she, Buono and Fonstad had a discussion in which Fonstad approved the inclusion of an unlimited number of employees in the covenant calculations, even employees who did not visit the Ventas facilities. (Tr. 1924:4-1927:11, 1928:22-1929:17). Refuting Bebo, Fonstad and Buono deny that Bebo discussed Solari's purported agreement with Fonstad, or that Fonstad otherwise approved any practice following the call. (Tr. 1507:24-1511:17, 1518:10-1519:6, 2347:17-20, 2380:21-2381:4).

Despite Fonstad and Buono's express testimony that Fonstad did not approve ALC's covenant practices, Bebo argues that Fonstad must have been aware of the inclusion of employees because he reviewed Bebo's email to Solari summarizing their January 20 call, as well as Solari's response. (Supp. Br. at 13). But the emails Fonstad reviewed make no reference to the covenants or ALC's inclusion of employees. (Ex. 1171). Similarly, the fact that Fonstad approved the statement in ALC's Commission filings regarding compliance with the Ventas covenants does not save Bebo, given that Fonstad was unaware that, without agreement from Ventas, ALC was including in the covenant calculations large numbers of employees who did not actually visit the Ventas facilities.

Even if the Court credits Bebo's claims that Fonstad knew ALC was including employees in the covenant calculations, it would not excuse her conduct. At the time Bebo argues Fonstad approved ALC's disclosures regarding covenant compliance (February 2009), ALC only included a small number of employees who actually stayed overnight at the Ventas facilities. (Tr. 756:13-757:20, 1989:2-9). Besides Bebo's self-serving testimony, there is no evidence that Fonstad (or ALC's other attorneys, board, or auditors) knew the full scope and extent of her scheme, such as Bebo's inclusion of large numbers of phony occupants. Moreover, given that Bebo knew Ventas never agreed ALC could include employees in the covenant calculations, any advice by Fonstad

that such conduct was permissible would have been "objectively unreasonable" for Bebo to rely on. *Robare Grp., Ltd. v. SEC*, 922 F.3d 468, 478 (D.C. Cir. 2019) (reliance defense unavailable if purported advice was objectively unreasonable).

For the same reasons, Bebo's references to the Disclosure Committee do not provide a defense to her fraud. Because Bebo never attended Disclosure Committee meetings, she admittedly did not know whether the committee even discussed the inclusion of employees in the covenant calculations. (Ex. 502, at 1139:20-21 ("I was not at the disclosure committee meeting, so I don't know what was shown at the meeting.")). Given her lack of knowledge of what the Disclosure Committee knew or discussed regarding ALC's covenant practices, Bebo cannot claim reliance on the committee or otherwise use the committee as an excuse for her fraud. *See, e.g., SEC v. BankAtlantic Bancorp, Inc.*, 661 Fed. Appx. 629, 637 (11th Cir. 2016) (reliance defense requires that defendant "fully disclosed all relevant facts").

Moreover, other than Bebo's testimony, there is no evidence the Disclosure Committee was aware of or discussed the full scope of Bebo's scheme, such as Ventas's lack of agreement or the inclusion of large numbers of fake occupants. Indeed, three of the witnesses who attended Disclosure Committee meetings – Buono, and attorneys Fonstad and Zak – had no recollection of ALC's inclusion of employees ever being discussed. (Tr. 1619:5-20, 2389:14-22, 4380:14-4381:3). Another Disclosure Committee witness, Hokeness, testified the committee was never given any specifics regarding the practice, such as the number of employees included or the fact that employees who did not stay at the facilities were being used to meet the covenants. (Tr. 3133:19-3134:15).[7] Consistent with these witnesses' testimony, the Disclosure Committee

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

meeting minutes do not mention the inclusion of employees in the covenant calculations and, in the case of the 2009 minutes, instead refer generally to "adjustments" and "clarifications as to census." (Exs. 124-127).[8]

Bebo's claims that ALC's securities counsel, Quarles & Brady, approved ALC's covenant practices are similarly unavailing. Quarles attorney Davidson, the only Quarles witness, testified that prior to 2012, Quarles was unaware of ALC's inclusion of employees in the covenant calculations. (2292:4-2295:16). Buono likewise testified that Quarles never approved the inclusion of employees. (Tr. 2380:7-15). Even Bebo admitted, in her investigative testimony (and contrary to her later trial testimony), that she did not seek advice from Quarles on ALC's covenant practices. (Tr. 2184:15-2185:17, 2187:16-2189:9).

Bebo's claims that Quarles did not advise ALC to change its disclosures in 2012 do not excuse her misconduct. (Supp. Br. at 14 n.8). There is no evidence that Quarles knew (a) Ventas never agreed to ALC's covenant practices, or (b) ALC was relying on large numbers of fake occupants. Moreover, because ALC quickly purchased the Ventas properties following the exposure of Bebo's scheme, ALC's Commission filings no longer addressed its compliance with the Ventas covenants and there were no such disclosures for Quarles to review.

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[8] Beginning with the February 2010 meeting, the minutes merely state: "Per J. Buono – lease covenants have all been achieved." (Exs. 128-136). It bears reminding that Buono was charged with fraud, and later barred from being a public company officer or director, for his role in Bebo's scheme.

7. Bebo Falsely Claims She Disclosed Her Scheme to Grant Thornton

Bebo claims that she provided Grant Thornton's audit partners, Koeppel and Robinson, with "basic" facts and that "nothing was withheld from them." (Supp. Br. at 14-15).[9] However, Bebo's own testimony demonstrates that she lied to Koeppel and Robinson. Indeed, Bebo testified she told each auditor Ventas had agreed that ALC could include employees in the covenant calculations. (Tr. 2145:14-2146:1, 2165:16-2168:2).

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

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

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[9] Bebo testified that Koeppel and Robinson were the only Grant Thornton personnel with whom she discussed ALC's covenant practices. (Tr. 2137:13-2138:20).

This evidence, including Bebo's own account, shows that Grant Thornton did not know the full scope of ALC's covenant calculation practices. Because Bebo did not fully disclose her conduct to Grant Thornton – instead concealing key facts while lying that Ventas had agreed to the inclusion of employees – any reliance on Grant Thornton cannot relieve her of liability. *See, e.g., Malouf v. SEC*, 933 F.3d 1248, 1262 (10th Cir. 2019) (reliance defense not available where respondent failed to make complete disclosure to chief compliance officer).

8. Bebo Falsely Claims She Disclosed Her Conduct to the Board

Bebo's brief continues her false refrain that she fully disclosed her scheme to ALC's board. (Supp. Br. at 15-16). Even though Bebo previously argued that she apprised the board of every detail of her scheme, she now claims the board was only aware of "basic" facts. (*Id.*).[10] In that vein, while attempting to show the board was aware of her conduct, Bebo merely uses the vague and general term "employee leasing." (*Id.*). It is also telling that, in arguing that the board approved including employees in the covenant calculations at its February 2009 meeting (before Bebo began including large numbers of fake occupants), and that she disclosed every detail of her scheme at the Q3 2009 meeting, Bebo's only evidence is her own testimony. (*Id.*).[11]

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[10] In her original post-hearing brief, Bebo claimed that the board was "fully aware" of ALC's covenant practices. (Post-hearing Br. at 120).

[11] While Bebo also cites Buono to support her claims she disclosed ALC's covenant practices at two board meetings in 2009, a review of Buono's testimony shows he did not testify to that effect. (Supp. Br. at 15 (citing Tr. 2392-96)). Bebo also misstates Buono's testimony about ALC's audit committee chair's knowledge of Bebo's covenant practices. Specifically, Bebo claims Buono testified that Grant Thornton partner Robinson discussed ALC's covenant practices with ALC's audit committee chair, Malen Ng, in 2009. (Supp. Br. at 16). Any such testimony could not have been accurate, because Robinson did not join the ALC engagement until 2011, two years after Bebo initiated her scheme. (Tr. 3381:25-3382:8).

Contrary to Bebo's self-serving testimony, five directors testified they were unaware ALC used employees in the covenant calculations until the March 6, 2012 CNG committee meeting. (Tr. 564:7-565:14, 567:4-571:15, 1360:13-1361:23, 1455:6-10, 2592:16-2593:18, 2645:11-2646:11, 2648:22-2651:7, 2816:15-2822:13; Ex. 492A at 53:20-56:19). Other witnesses who regularly attended board meetings – Fonstad, internal auditor Hokeness, and attorney Zak – also testified the inclusion of employees was not brought to the board's attention prior to March 2012. (Tr. 1523:2-6, 3134:21-3135:11, 4339:10-4340:16, 4344:6-4345:22). Consistent with these witnesses' testimony, the minutes of ALC's board and audit committee meetings, and the materials distributed in advance of board meetings, do not mention the use of employees in the covenant calculations or Ventas's agreement to such a practice. (Exs. 74-90, 92-120).

Even Buono testified that, prior to March 2012, there was only a single reference to employees being included in the covenant calculations made at a board meeting (by Buono, not Bebo, in August 2011), and that no details or specifics were given regarding the practice. (Tr. 2382:12-2383:19, 2384:25-2388:3, 4631:7-4632:20). Specifically, Buono testified that August 2011, more than two years into Bebo's scheme, was the first such reference made at any board meeting. (Tr. 2382:12-16).[12]

Bebo attempts to bolster her arguments that the board was aware of her scheme through the testimony of Koeppel and Robinson. (Supp. Br. at 16). Even crediting their self-serving

[12] At trial, Buono explained why inconsistencies may exist between his previous statements and his hearing testimony that the board was unaware of ALC's covenant practices: his earlier statements were based on false information Bebo gave him – namely that she had disclosed ALC's covenant practices to the board – and Buono did not realize Bebo lied to him until he reviewed, after receiving a Wells notice, the investigative testimony of the directors. (Tr. 2754:22-2755:4; 2784:14-2785:7).

testimony, because Koeppel and Robinson were unaware of key details of Bebo's scheme – i.e., no agreement with Ventas and the use of employees who did not visit the Ventas facilities – they could not have apprised the board of the full scope and extent of Bebo's conduct.

Moreover, Bebo's argument that Grant Thornton discussed ALC's use of employees in the covenant calculations at audit committee meetings is refuted by the minutes of those meetings, Grant Thornton's agendas and reports contained in the board materials, and the testimony of every ALC witness, save Bebo, who attended those meetings. (Exs. 74-90, 92-120). To that end, in April 2012, when Bebo's scheme was unraveling, Grant Thornton was unable to find evidence that it had disclosed ALC's use of employees to the board. (Ex. 1744; Ex. 1744A, p. 4; Division's Post-Hearing Reply Br. at 18-19). And, it bears reminding that Koeppel and Robinson received 102(e) bars for failing to halt Bebo's scheme.

The only other witness, besides Bebo, who testified that the inclusion of employees had been mentioned at board meetings was Rhinelander. Rhinelander testified that he first heard a reference to ALC including employees in the Ventas covenant calculations in the fall of 2011, but did not understand what the reference meant until March 2012. (Tr. 2816:15-2818:16). At minimum, if Buono's and Rhinelander's testimony is credited, it shows the board was entirely unaware of any aspect of Bebo's scheme for the first 2.5 years of its existence.

Despite her claims of full disclosure to the board, Bebo conceded that she *never* told the board: (1) ALC would fail the covenants without including employees, (2) ALC included her family and friends, or (3) ALC was including large numbers of employees who did not visit the Ventas facilities. (Tr. 2035:11-25). Again, Bebo's admitted failure to fully disclose her scheme precludes any reliance defense vis-à-vis ALC's board.

9. Bebo Mischaracterizes Milbank's Internal Investigation

Bebo continues to suggest that Milbank's internal investigation exonerated her, arguing that Milbank concluded Bebo "acted reasonably" and that ALC's board took no corrective action following the investigation. (Supp. Br. at 16-17). Contrary to Bebo's claims, Milbank did not exonerate Bebo, and merely concluded it could not disprove Bebo's claim of an agreement with Ventas. (Tr. 643:21-645:3; Ex. 558, p. 10). Milbank's investigation was inconclusive, *inter alia*, because Milbank did not interview several important witnesses – particularly Solari, any Ventas or Grant Thornton personnel, and certain directors. (Tr. 626:24-627:18, 2654:10-12; Ex. 558, pp. 1, 6; Ex. 1873, p. 4). Despite its limited scope, Milbank made various findings which discredited Bebo's version of the events. Examples include:

- No documents were lost or erased. (Tr. 627:19-628:7; Ex. 558, p. 1). This finding rebuts Bebo's self-serving assertion that she took verbatim notes of her call with Solari that mysteriously disappeared once her scheme unraveled.

- Fonstad advised Bebo that ALC could not enter into the "employee arrangement" unless Ventas sent a "written confirmation agreement." (Ex. 558, p. 4; Tr. 633:14-634:1).

- "Bebo did not tell Solari that the employee leasing arrangement would be used for purposes of covenant compliance or that ALC was close to violating the covenant." (Tr. 636:12-17; Ex. 558, p. 6). Milbank must have made this determination based on its interviews of Bebo and Buono, the only participants on the call it interviewed.

- "A list of all employees went to Grant Thornton but never went to Ventas and never went to the board." (Ex. 558, p. 6).

- "The board never knew the employees were needed for purposes of compliance with the Ventas lease covenants...The board believed the number of employees were small." (*Id.*, p. 7, ¶¶ nn, oo).

- "GT [Grant Thornton] wanted to talk to Ventas. Bebo said, no, GT can't talk to Ventas." (*Id.*, p. 8, ¶ vv.)

Bebo stresses that Milbank did not recommend any corrective action when its investigation ended. But, because Bebo had already been terminated by ALC, the most logical corrective action for ALC to take was no longer necessary. (Tr. 745:19-746:2, 2655:4-10).

C. The Milbank Attorney Interview Memos Do Not Exonerate Bebo

As discussed in the Division's Supplemental Brief, the Milbank attorney interview memos cannot absolve Bebo of liability. Those memoranda constitute multiple levels of hearsay, and would be plainly inadmissible under the Federal Rules of Evidence Bebo complains are not applied in these proceedings. *See, e.g., Marshall v. Precision Pipeline LLC,* 2015 U.S. Dist. LEXIS 4820, *27 (W.D. Wis. Jan. 14, 2015). For instance, the memoranda do not meet the impeachment requirements of Rule 802(d)(1), because the Milbank interviews were unsworn and the witnesses are not subject to cross-examination. Nor do the memoranda qualify as recorded recollections under Rule 803(5), because there is no evidence that the witnesses can no longer recall the subject of their testimony and because the witnesses never adopted Milbank's interpretations of the interviews. Given the opportunity for discovery and a new hearing in these remanded proceedings, Bebo could have called the Milbank attorneys to provide foundation for the memoranda. Yet she chose not to do so.

Admissibility aside, the Milbank memoranda are simply not persuasive evidence compared to the witnesses' trial testimony. There is no way to know whether the memoranda accurately reflect the witnesses' interviews or appropriately capture any nuance in the questions or responses. We also do not know what follow-up questions Milbank asked, whether Milbank even had enough information to ask the right questions, or what documents the witnesses had seen or had access to at the time of their interviews. For instance, in preparing for and in the course of their trial and investigative testimonies, the witnesses were shown numerous

contemporaneous documents – materials they presumably did not have at the time of their earlier Milbank interviews. This is one simple reason for any discrepancy between the Milbank memoranda and the witnesses' later sworn testimony. In any event, because the Milbank memoranda provide far less probative value than the witnesses' sworn testimony, the Court should afford them little, if any, weight.

As detailed below, the Milbank memoranda are neither "stunning" nor "explosive," as Bebo claims. (Supp. Br. at 19). Rather, as the Division demonstrated in its supplemental brief, the memoranda corroborate witness testimony on an important issue in this case: that Bebo concealed key information about her scheme from ALC's attorneys and board. Thus, whatever discrepancies Bebo identifies do not absolve her of liability.

Perhaps recognizing the Milbank memoranda do not establish a defense to her fraud, Bebo cavalierly attempts to blame the Division's attorneys for any discrepancies between certain witnesses' trial testimony and earlier statements. Without any evidence whatsoever, she accuses the Division's attorneys of illegal conduct by claiming that the Division "sculpted" witness testimony. (Supp. Br. at 17-19). But the Division meeting with witnesses to gain a thorough understanding of the evidence and prepare for trial is a routine litigation practice. *United States v. Lee*, 815 F.2d 971, 974 (4th Cir. 1987) ("prepar[ing] and present[ing] the witness for maximum dramatic effect" was not improper).[13]

And, in blaming the Division's trial preparation for any witness inconsistency, Bebo fails to acknowledge that her own trial testimony differed wildly from her earlier investigative testimony

[13] While Bebo cites the amount of time the Division spent meeting with witnesses, she ignores that the Division's testimonies and interviews were not just in preparation for trial, but also in the course of its ongoing investigations into ALC and Grant Thornton, the latter of which culminated in enforcement actions after Bebo's trial had concluded.

and interviews with Milbank. As detailed in the Division's supplemental brief, the scope and extent of Bebo's inconsistent statements is far greater than the ones Bebo claims exist for the other witnesses. It speaks volumes that Bebo conveniently ignores her own Milbank interview.

1. Buono

Bebo emphasizes the following portion of Buono's Milbank memorandum, relating to the January 20 call: "Buono's recollection was that Bebo informed Solari that the prior operator [CaraVita] had used employee leases in its covenant calculations and that ALC intended to do the same thing." (Jt. Supp. Ex. 1, MB_BEBO_0000060). However, the very same paragraph of the memo notes that Buono didn't know whether CaraVita had included employees in its covenant calculations. (*Id.*). That same paragraph also documents that Buono did not recall anyone telling Solari that CaraVita had "counted employees in its occupancy calculations" or that ALC would use employees to meet the covenants. (*Id.*). Consistent with these latter statements, Milbank's account of a follow-up interview of Buono states that Buono did not recall Bebo telling Solari (a) that ALC was not meeting the occupancy covenants or (b) that ALC "intended to use the employee leases for occupancy covenant purposes." (*Id.*, MB_BEBO_0000064).

To the extent Milbank accurately interpreted Buono's interview, which we will never know, the most reasonable explanation is that the answer Buono gave twice and in follow-up to an initial question provides the best account of what Buono was attempting to convey to Milbank. That account – that Bebo did not tell Solari ALC would include employees in the covenant

calculations – is entirely consistent with Buono's and Solari's trial testimony and Bebo's and Buono's contemporaneous emails summarizing the January 20 call. (Exs. 179, 184).[14]

The next inconsistency Bebo claims exists for Buono's Milbank interview deals with his recollection of *a document* Milbank did not show Buono: the February 4, 2009 email (Ex. 184) Bebo sent Solari summarizing the January 20 call. (Supp. Br. at 19-20). According to Bebo, Buono recalled to Milbank that the email shows Ventas' agreement to include employees in the covenant calculations. (*Id.*). But Milbank's memorandum demonstrates that Milbank failed to show Buono the very email Milbank was asking him about. Had Milbank actually shown Buono the email, Buono would have seen the email makes no mention of covenants or the inclusion of employees. (Ex. 184).[15] And, had Milbank shown Buono his own earlier draft email summarizing the January 20 call (Ex. 179), Buono would have seen that his contemporaneous account of the call similarly made no reference to the covenants, adding employees, or any agreement by Ventas.

Simply put, Buono's Milbank interview memo is consistent with his trial testimony, his contemporaneous account of the January 20 call, and his deceptive conduct towards Ventas in the wake of that call. It must also be noted that Buono was interviewed by Milbank well before Buono realized, after reading documents and testimony produced in the course of the Division's investigation, that Bebo had given him false information regarding ALC's covenant practices. (Tr. 2754:22-2755:4; 2784:14-2785:7). Indeed, Buono's memo highlights how Milbank's failure to

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[14] As discussed above and in the Division's supplemental brief, Buono's and Bebo's deceptive conduct towards Ventas following the January 20 call with Solari would have been completely unnecessary had Bebo fully disclosed her covenant plans to Solari and obtained his agreement.

[15] At trial, Buono testified that Exhibit 184 was consistent with the January 20 call with Solari in that the email made no mention of including employees in the covenant calculations. (Tr. 2345:11-2346:13).

show witnesses documents could account for limited discrepancies between the memos and the witnesses' later trial testimony.

The Milbank memoranda's unreliability is further demonstrated by their depiction of Buono's account of Grant Thornton's interactions with ALC's board. Per Buono's Milbank memo, in Q3 2010 Koeppel presented an "analysis" showing that ALC "was satisfying the occupancy covenants by putting employees in units at the facilities." (Jt. Supp. Ex. 1, MB_BEBO_0000060-61). However, Koeppel's actual presentation from that meeting referenced the "Caravita covenants" and "Minimum average occupancy," but made no mention of ALC's use of employees. (Ex. 1744A, p. 4).

Also inconsistent with the documentary record, Buono's Milbank memo describes Robinson mentioning "employee leases" at a 2011 audit committee meeting. (Jt. Supp. Ex. 1, MB_BEBO_0000061). The account is refuted by Grant Thornton's own failed efforts to demonstrate it had detailed ALC's covenant practices to the board. Specifically, in April 2012, after ALC's board learned about the inclusion of employees and confronted Grant Thornton, Robinson emailed his subordinate, Amy Henselin, and asked if she was "able to find any documentation that we discussed the issue of employee occupancy with the board." (Ex. 1744). In response, Henselin wrote that she could only find evidence of a *single occasion* where Grant Thornton discussed the issue with the board: Grant Thornton's presentation for the Q3 2010 audit committee meeting which, as described above, did not mention the inclusion of employees. (*Id.*; Ex. 1744A, p. 4).

Moreover, the notion that Grant Thornton detailed ALC's covenant practices to the board or audit committee is refuted by contemporaneous documentary evidence. The minutes of ALC's board/audit committee meetings, and Grant Thornton's agendas and reports contained in

board materials, make no mention of including employees in the covenant calculations. (Exs. 74-90, 92-120).

Bebo also points to Buono's Milbank memo's discussion of a meeting in early 2009 involving Bebo, Buono, Rhinelander, and Robin Birr (Herbner), where Rhinelander purportedly instructed Bebo to "add employees." (Jt. Supp. Ex. 1, MB_BEBO_0000062). As an initial matter, Herbner and Rhinelander refuted this account at trial. (Tr. 841:14-842:17, 2823:14-2824:12). Herbner testified she was never in a meeting with Rhinelander where the covenants were discussed. (Tr. 841:14-842:17). Rhinelander similarly denied this discussion occurred and testified he had never even met Herbner/Birr. (Tr. 2822:14-2824:12).

Rather than being inconsistent, the account in Buono's Milbank memorandum is similar to an episode he testified to at trial, a meeting in December 2008 involving the same participants. According to Buono, Rhinelander said something to the effect of "if the lease doesn't say you can't include employees, let's include employees" and told Bebo proceed with the "employee leasing program." (Tr. 2393:20-2396:6). Buono testified the meeting took place while Bebo was contemplating sending the employee taskforce to the Ventas facilities to improve occupancy. (Tr. 2759:21-2760:10). To the extent this discussion occurred as described in Buono's Milbank memo, it likely was in the context of asking Rhinelander whether allowing employees to *actually stay* at the properties was appropriate. (Tr. 2759:21-2760:10).

As for Bebo's account of an early 2009 meeting with Herbner and Rhinelander, Bebo testified she told Rhinelander any inclusion of employees would be done with *Ventas' agreement*. (Tr. 1959:1-1965:5). And, Bebo admits that in February 2009, when Bebo claims this meeting took place, Bebo had not yet determined to include large numbers of employees, or employees who did not stay at the properties, in the covenant calculations. (Tr. 1989:2-1990:7).

Accordingly, even accepting Bebo and Buono's accounts of this encounter shows that it took place before Bebo fully implemented her scheme to include large numbers of fake occupants. And, crediting Bebo's claims that she told Rhinelander Ventas agreed to include employees merely proves she lied to Rhinelander, since there never was an agreement with Ventas.

2. Fonstad

Bebo argues that a single line from Fonstad's Milbank interview memorandum refutes his trial testimony that (a) he was unaware if Ventas agreed to include employees in the covenant calculations and (b) Bebo never apprised him of the details of her scheme, such as the use of employees who did not visit the Ventas properties. (Tr. 1308:10-1309:17; 1505:12-1506:1; 1509:2-11). In particular, Bebo cites the following line: "[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." (Joint Supp. Ex. 1, MB_BEBO_0000080).

Rather than being contradictory, this statement is consistent with Fonstad's trial testimony. Fonstad testified that, prior to Bebo's January 20, 2009 call with Solari, Bebo told Fonstad that she was a "proponent" of including in the covenant calculations employees who actually stayed at the Ventas facilities. (Tr. 1307:10-1308:22). And, consistent with his Milbank interview, on January 19, 2009, Fonstad provided Bebo a draft letter to send to Ventas requesting Ventas's *written permission* to include in the covenant calculations *employees who actually stayed* at the Ventas properties and for the period of their actual stays. (Ex. 1152).[16]

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[16] Bebo misleadingly cites Buono's Milbank interview memorandum to claim that "Fonstad reviewed and approved employee leasing." (Supp. Br. at 22). But the portion of Buono's Milbank memo Bebo cites merely describes Fonstad's January 19, 2009 email to Bebo in advance of the Solari call (Ex. 1152) approving of the concept of including actual employees so long as Ventas agreed in writing. (Joint Supp. Ex. 1, MB_BEBO_0000063). Bebo also cites to Buono's Milbank memo saying that "Fonstad did not express any reservations regarding the

However, Fonstad's awareness of Bebo's *ex ante* proposal to include actual employees in the covenant calculations, and only for the period of their actual stays, is a far cry from being aware of the full scope and extent of Bebo's scheme that eventually unfolded. Indeed, no witness other than Bebo testified (or told Milbank) that Fonstad was aware of anything beyond Bebo's original proposal on which he provided legal advice in advance of the January 20 call.

To the extent Bebo wants the Court to credit Fonstad's account to Milbank, as described in his interview memo, the following additional aspects of Fonstad's Milbank memo are wholly consistent with his trial testimony:

- Fonstad was unaware that Bebo wanted to include in the covenant calculations ALC employees who did not stay at the Ventas facilities. (Joint Supp. Ex. 1, MB_BEBO 0000081).

- Fonstad was not present for Bebo's January 20, 2009 call with Solari, and that following the call he did not discuss ALC's covenant compliance practices with Bebo. (*Id.*, 0000081, 82).

- Fonstad, who attended ALC board meetings and prepared the minutes until his retirement at year-end 2010, confirmed that Bebo never informed the board that ALC was meeting the covenants by including employees. (*Id.*, 0000082).

- Fonstad was unaware that ALC included large numbers of employees in the covenant calculations. (*Id.*, 0000084).

Accordingly, Fonstad's Milbank memo, consistent with his testimony, shows that Bebo rejected his advice to disclose her covenant proposal to Ventas and obtain Ventas' written

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quality of the notice" in Bebo's February 4, 2009 email to Solari. (*Id.*, MB_BEBO_0000065). But there is no indication Buono was discussing including employees in the covenant calculations. Indeed, both the preceding portion of Buono's Milbank interview memo (MB_BEBO_0000064) and Bebo's February 4 email (Ex. 184) address a discussion with Solari about ALC employees renting rooms at the Ventas facilities, not including those employees in the covenant calculations. Consistent with Buono's account of the January 20 call, Bebo's February 4 email makes no mention of including such employees in the covenant calculations.

permission. Fonstad's interview memo also confirms that Fonstad and the board were unaware of, and never approved, the full scope and extent of Bebo's scheme. Accordingly, Fonstad's Milbank interview memo cannot be used to sustain any reliance defense.

3. Lucey

Bebo points to Lucey's Milbank interview memo describing a single instance, in 2009, of Buono advising the Disclosure Committee that ALC was using "employee leases" to meet the Ventas covenants. (Joint Supp. Ex. 1, MB_BEBO_0000053). Bebo implies that this comment confirms Fonstad's and the committee's awareness of her covenant scheme. But Lucey's Milbank memo provides no further detail on what Buono said, or didn't say, about the practice. Moreover, to the extent Buono did mention including employees in the covenant calculations in 2009, it would have been early in Bebo's scheme when ALC was meeting the covenants by including only a small number of *actual* employee stays. And, Lucey also told Milbank that he believed (incorrectly) that Ventas had approved the practice of including such employees in the covenant calculations. (*Id.*, MB_BEBO_0000053).

Lucey's Milbank interview memo also describes Lucey's *speculation* about what Fonstad knew about ALC's covenant practices. (*Id.*, MB_BEBO_0000053-54). There is nothing in Lucey's Milbank memo to indicate that the Disclosure Committee ever discussed, or that Fonstad was aware, that ALC utilized large numbers of employees or employees who did not stay at the Ventas facilities. Indeed, the only evidence suggesting Fonstad's awareness of these key facts comes from *Bebo's* self-serving testimony.

Bebo's discussion of Lucey's Milbank memo concludes with the depiction of Lucey viewing as "potentially disingenuous" a statement made by Fonstad that ALC was close to failing the Ventas covenants. (Joint Supp. Ex. 1, MB_BEBO_0000053). But there would be nothing

disingenuous about that comment if, consistent with Fonstad's testimony and Milbank interview memo, Fonstad was unaware ALC could meet the covenants by using large numbers of employees regardless of whether they actually stayed at the Ventas facilities. However, unlike Fonstad, Lucey worked in Buono's finance group. For this reason, unlike Fonstad, Lucey was aware of the large numbers of employees ALC included in the covenant calculations, including employees who did not actually stay at the Ventas facilities. (*Id.*, MB_BEBO_0000051, 53-54).

4. Bell

The only inconsistency Bebo identifies in director/attorney Bell's Milbank interview memorandum is the statement that the board did not "focus" on occupancy trends at the Ventas facilities in 2008.[17] (Supp. Br. at 25 (citing Jt. Supp. Ex. 1, MB_BEBO_0000132)). But the very next two sentences describe Bell telling Milbank that the board questioned management (i.e., Bebo and Buono) about compliance with the Ventas covenants at each of the quarterly board meetings. (Jt. Supp. Ex. 1, MB_BEBO_0000132). Thus, Bell's Milbank interview is consistent – with his trial testimony, the testimony of every other percipient witnesses, and the board meeting minutes – that the board devoted time at each quarterly meeting to confirming ALC was complying with the Ventas covenants.

Moreover, to the extent any inconsistency exists between Bell's Milbank interview and his trial testimony, it involves a collateral issue that in no way casts doubt on Bell's emphatic testimony that the board was unaware of, and did not approve, Bebo's scheme. Indeed, as detailed in the Division's supplemental brief, Bell's trial testimony and Milbank interview memo are entirely consistent in documenting that Bebo did not begin disclosing the inclusion of employees to

[17] Consistent with Bell's recollection, the board was first apprised of occupancy problems at the Ventas facilities late in 2008, at its November meeting. (Ex. 150 Tr. 2811:8-2812:15).

the board until March 2012, and even then, never disclosed key details of her scheme. (*See* Div. Supp. Br. at 27-28).

5. Buntain

Bebo attempts to create inconsistencies between Buntain's trial testimony and Milbank interview memo by pointing to an excerpt of the memo describing Buntain saying that *before ALC even entered the Ventas lease*, management told the board it could meet the Ventas covenants by including employees. (Supp. Br. at 25 (citing Jt. Supp. Ex. 1, MB_BEBO_0000138-39)). Notably, no witness, *not even Bebo*, testified that ALC contemplated using employees in the covenant calculations prior to entering the Ventas lease (in late 2007). To that end, Bebo testified that she did not even learn that ALC employees were staying at the properties until late 2008 or early 2009, and that this discovery was the genesis of *her own* idea to include employees in the covenant calculations. (Tr. 1882:18-1883:7, 1884:19-1885:15, 1889:2-18). Moreover, any belief by Buntain that ALC could legitimately meet the lease covenants by including employees conflicts with his actual conduct: abstaining from the board's vote to enter the Ventas lease, on account of his concerns the covenants were too onerous. (Tr. 1356:12-20; Jt. Supp. Ex. 1, MB_BEBO_0000138).

The above episode demonstrates the inherent unreliability of the Milbank memos. Milbank's memo portrays Buntain recounting an event that undisputedly, not even in Bebo's version of the events, never occurred. Milbank apparently lacked sufficient information to ask follow-up questions, or provide Buntain with documents that would have clarified Buntain's statement.

Further demonstrating that the above episode never occurred, Buntain's Milbank memorandum later describes Buntain saying that he first learned that ALC was including

employees in the covenant calculations in Q4 2011 or Q1 2012. (Jt. Supp. Ex. 1, MB_BEBO_0000139-140). That statement is consistent with the testimony of the other board members and witnesses who attended board meetings, and Buntain's own trial testimony, that prior to March 2012 Bebo never advised him or the board that ALC was including employees in the covenant calculations. (Tr. 1359:20-1361:23, 1363:21-1366:16, 1455:6-10).

Continuing her misleading use of the vague term "employee leasing," Bebo cites Buntain's Milbank interview memorandum where he discussed being under the impression, prior to 2012, that only a limited number of rooms were "set aside" for employees. (Supp. Br. at 26). But that portion of Buntain's interview memorandum discusses Buntain's awareness of employees *staying* at the Ventas properties. (Jt. Supp. Ex. 1, MB_BEBO_0000140 ("Buntain stated that at one meeting with the auditors in 2011, Jeff Robinson told the Board that some ALC employees were *staying* in units at the CaraVita facilities.") (emphasis added)). As discussed above, there is a stark difference between employees staying at the Ventas facilities and including such employees in the covenant calculations. Bebo's attempts to confuse the Court by conflating the two concepts further evidences her continuing deception.

6. Rhinelander

Bebo's discussion of Rhinelander's Milbank's interview memo focuses on Rhinelander's belief that it would not be a "big deal" if ALC violated the Ventas covenants. (Supp. Br. at 28-29). In doing so, Bebo cannot point to any inconsistencies between Rhinelander's testimony and his account to Milbank. As detailed in the Division's supplemental brief, Rhinelander gave consistent accounts to Judge Elliot and Milbank that he did not learn any details about ALC's inclusion of employees in the covenant calculations until the March 2012 CNG meeting. (Div. Supp. Br. at 31).

Moreover, even if Rhinelander subjectively considered that ALC's compliance with the covenants did not matter, this would have no impact on whether Bebo believed ALC's compliance was important. As stated in the Division's previous briefing, Bebo's real-time beliefs are amply demonstrated by evidence including:

- The statements in ALC's Commission filings, which Bebo signed, stating that the consequences of a covenant default could have a "material adverse impact" on ALC's operations;
- The quarterly conference calls Bebo had with Ventas where Ventas inquired about ALC's covenant compliance;
- The significant accounting staff resources that went into preparing ALC's quarterly covenant compliance certifications for Ventas;
- The requirement by ALC's board that Bebo and Buono report on covenant compliance at each board meeting; and
- The fact that Bebo engaged in an elaborate scheme to include employees to meet the covenants, and to hide that fact from Ventas. All this effort would have been unnecessary if Bebo truly believed that Ventas did not consider ALC's covenant compliance important.

D. The Recent Cases Cited by Bebo do Not Relieve Her of Liability

The recent decisions cited in Bebo's supplemental brief merely contain newer articulations of unpersuasive and inapplicable concepts Bebo argued in her original briefing. As discussed below, the cases Bebo cites are readily distinguishable and do not excuse her misconduct.

1. *Omnicare* and Its Progeny Offer No Defense

In its original briefing, the Division demonstrated *Omnicare* and other cases discussing statements of opinion in securities fraud actions do not relieve Bebo of liability. (*See,* Div. Post-Hearing Reply at 28-30). The Division demonstrated that the cases Bebo cites are inapposite because ALC's statements of compliance with the Ventas covenants were statements of fact, as opposed to opinions. (*Id.*). The Division also noted that, even if the ALC's statements of

compliance are considered to be opinions, ALC's Commission filings still contained material omissions. (*Id.*). The Division also showed that ALC's statements of compliance with the covenants are fraudulent because Bebo did not believe them to be true. (*Id.*). Finally, the Division pointed out that a federal court, *in a securities fraud case against Bebo*, found the very statements at issue in this case to be actionable while rejecting the same arguments Bebo again raises here. *Pension Trust Fund*, 2013 U.S. Dist. LEXIS 87568, at *24-27, *45-46 ("[I]t is clear that [the plaintiff] has pled facts sufficient to establish that ALC and Bebo provided false statements when they stated that ALC was in compliance with its Lease with Ventas.")

The subsequent cases cited by Bebo do not help her. *Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016) involved allegations that a drug company failed to disclose FDA concerns about a drug study while making statements of "optimism" about the drug's prospects for FDA approval. 816 F.3d 199, 211 (2d Cir. 2016). As an initial matter, *Tongue* is not applicable here because, as detailed in the Division's Post-hearing Reply, ALC's statements of covenant compliance were statements of fact, not statements of opinion.

Nevertheless, *Tongue* quoted *Omnicare* by recognizing that, to be actionable, "the omitted facts must 'conflict with what a reasonable investor would take from the statement itself.'" *Tongue*, 816 F.3d at 211 (quoting *Omnicare*, 135 S. Ct. at 1329). Here, any reasonable investor would consider ALC's statement, that it was complying with the Ventas covenants, to be based on ALC's *actual* occupancy and revenue data, not the use of fake occupants and their attendant revenue. By concealing that ALC's covenant compliance was contingent on the use of large numbers of phantom residents, Bebo gave investors the false impression that actual occupancy and revenue met the covenants. Because no reasonable investor could be expected to divine that the only way ALC met the covenants was through Bebo's elaborate scheme, even if ALC's

statements of compliance are deemed opinions, they would still be actionable because they contained material omissions.

Bebo's next case, *In re Plains All Am. Pipeline, L.P.*, 245 F. Supp. 3d 870, 903 (S.D. Tex. 2017), involved an oil pipeline company's statements that it was in "substantial compliance" with various regulations. The court described the following test to determine if statements of opinion violate the antifraud provisions:

> Under *Omnicare*, statements of opinion can be actionably misleading (1) when the speaker does not actually hold the expressed opinion; or (2) when, even though the speaker genuinely holds the opinion, the plaintiff shows that "(i) the speaker 'omit[ed] material facts about the issuer's inquiry into or knowledge concerning a statement of opinion,' and (ii) 'those facts conflict with what a reasonable investor would take from the statement itself.'" *In re BP p.l.c. Secs. Litig.*, 2016 U.S. Dist. LEXIS 73721, 2016 WL 3090779 (S.D. Tex., June 2, 2016), at *9 (quoting *Omnicare*, 135 S. Ct. at 1329).

Plains, 245 F. Supp. 3d at 905.

Because the *Plains* plaintiffs conceded they were only proceeding under the second prong of the *Omnicare* test, the court determined that "the issue is whether the plaintiffs have adequately pleaded that the defendants were aware of material facts that: (1) contradicted or undermined their compliance opinion statements; and (2) that an investor would reasonably believe were not true based on that statement." *Id.*

In dismissing the complaint, the *Plains* court first noted the failure to allege that any defendant was aware of facts making the compliance-related statements misleading. *Id.* at 907-908. That holding is certainly inapposite to Bebo's case, as the Division provided overwhelming evidence that Bebo knew the only way ALC satisfied the Ventas covenants was via her inclusion of fake residents.

The *Plains* court next found the statements of "substantial compliance" to be nonactionable under *Omnicare* 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..." *Id.* at 909. The court also found that reasonable investors would understand "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 910.

Unlike the general statements in *Plains*, ALC's statements of compliance were specific and referred to the occupancy and coverage ratio covenants in the Ventas lease, as well as the precise financial consequences of non-compliance. (*See, e.g.*, Ex. 9, pp. 45, 71). And, as discussed above, no reasonable investor would be able to ascertain that ALC's "compliance" with the Ventas covenants was only possible by virtue of Bebo's scheme.

Because ALC's statements of compliance were statements of fact, because Bebo did not actually believe ALC was complying with the covenants, and because a reasonable investor would want to know the facts underlying ALC's statements of compliance – *i.e.*, Bebo's fraudulent use of employees – *Omnicare* and its progeny provide no defense to the Division's claims.

2. *Globus* Hurts, Rather than Helps, Bebo

Williams v. Globus Med., Inc. involved a medical device company who failed to disclose it had terminated its relationship with a key distributor. 869 F.3d 235 (3d Cir. 2017). The actionable statement in Globus's filings was the hypothetical risk disclosure that loss of any of its distributors could adversely affect Globus's sales. *Id.* at 242. The court held that this statement could not sustain a securities fraud charge because, at the time of the Commission filings, Globus's sales had not been negatively impacted. *Id.* at 243.

In reaching this decision, the Third Circuit reiterated a core legal principle on which the Division bases its fraud charges against Bebo. "Once a company has chosen to speak on an

issue—even an issue it had no independent obligation to address—it cannot omit material facts related to that issue so as to make its disclosure misleading." *Globus* at 241. This proposition dooms Bebo. Once ALC decided to tell investors it was complying with the Ventas covenants, ALC could not conceal that its compliance was only by virtue of Bebo's scheme to include large numbers of fake occupants.

Further distinguishing *Globus*, which involved hypothetical risks that had not materialized at the time of the company's Commission filings, Bebo's case involved affirmative false statements to investors. Contrary to ALC's Commission filings, ALC was violating the Ventas covenants, and by wide margins. And the only reason ALC had not suffered adverse consequences at the time of its filings is because Bebo was engaging in an elaborate fraud to conceal ALC's noncompliance from Ventas. Thus, Bebo's case is not analogous to the "materialization of risk" issues presented in *Globus*, and the decision offers no defense to her fraud.

3. *BankAtlantic* Demonstrates the Failure of Bebo's Reliance Defense

Bebo cites *SEC v. BankAtlantic Bancorp, Inc.*, 661 Fed. Appx. 629 (11th Cir. 2016), arguing that her reliance on Grant Thornton negates her scienter. Bebo neglects to apprise the Court that the portion of the *BankAtlantic* decision involving the reliance defense was an appeal of a *summary judgment* ruling, and the court merely held the defendants had offered sufficient evidence of their interactions with auditors to create an issue of fact. *Id.* at 637. Given the procedural posture, there was no finding sustaining a reliance defense.

Nevertheless, the Eleventh Circuit made clear that in order to succeed on the "reliance-on-professional-advice" defense, the defendant must establish that it "fully disclosed all relevant facts" and "relied in good faith" on the professional's advice. *Id.* at 637 (citations omitted). The court

additionally made clear that the "burden to demonstrate good faith reliance-on-professional-advice lies with the defendant." *Id.* (citations omitted).

As discussed above and in previous briefing, Bebo cannot meet her burden because she not only concealed key facts from Grant Thornton, she *affirmatively lied* to Koeppel and Robinson by telling them that Ventas had agreed to include employees in the covenant calculations. (Tr. 2137:13-2138:20, 3366:5-17, 3495:25-3496:13). Given Bebo's lies to Grant Thornton and failure to disclose the details of her scheme, she cannot establish good-faith reliance.

For the same reasons, Bebo cannot show that she relied on Fonstad or ALC's board. Regarding Fonstad, Bebo testified she never disclosed to Fonstad, or any attorney, that ALC would fail the covenants without using employees or that ALC was including non-employees in the covenant calculations. (Tr. 2193:5-2195:5). Moreover, the only evidence (beyond Bebo's self-serving testimony) of Bebo seeking Fonstad's advice was her general inquiry, prior to her call with Solari, whether ALC's covenant calculations could include the limited number of employees who actually stayed at the Ventas facilities. (Ex. 1152). Bebo never disclosed to Fonstad, or received his advice regarding, key details of her scheme, such as the use of: (a) large number of employees, (b) employees who did not stay at the Ventas facilities, and (c) the simultaneous use of employees at multiple properties.[18]

Bebo also cannot claim reliance on ALC's board, because she lied to the board while concealing her scheme. On a quarterly basis, Bebo lied by telling the board that ALC was meeting the covenants while hiding ALC's inclusion of employees. Every percipient witness

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

refuted Bebo's story that she told the board that ALC was including large numbers of employees who did not stay at the Ventas properties.

Even accepting Bebo's claims that she was acting at the direction of the board – which all board members deny – she would still be liable. As the Commission recognizes: "Courts have repeatedly affirmed that someone who participates in a fraudulent scheme by following his superior's instructions to carry out fraudulent acts can be liable as a primary violator under Section 10(b) and Rule 10b-5." *Robert W. Armstrong, III,* Exchange Act Rel. 51920, 58 S.E.C. 542, 563 (June 24, 2005) (citations omitted).

E. The Court Should Impose Significant Third-Tier Penalties to Punish Bebo and Deter Others

For the reasons cited in the Division's original post-hearing briefing, Bebo's conduct in this case easily meets the requirements for the imposition of third tier penalties.[19] *See* Exchange Act Sections 21B(b)(3) and 21(c). Bebo's misconduct involved fraud, deceit, manipulation, and the deliberate disregard of regulatory requirements and her responsibilities as a public company CEO.

Bebo created both a substantial risk of loss to ALC and its investors and, in fact, caused substantial losses. Specifically, when ALC disclosed the "'irregularities' caused by Bebo," ALC's stock price dropped 12.36%. (Tr. 3637:5-3638:4, 3640:8-12; Ex. 14). When Ventas later learned of ALC's inclusion of employees, ALC settled Ventas's lawsuit by purchasing the Ventas facilities for $34 million in excess of their appraised value. Grant Thornton confirmed the considerable overpayment constituted "damages as a result of occupancy rates falling

[19] Because Bebo's supplemental briefing does not discuss the Division's requests for disgorgement or cease-and-desist orders, the Division rests on its original post-hearing briefing on those subjects.

significantly below required covenant occupancy rates." (Ex. 3369, pp. 7-8). ALC paid an additional $12 million when it settled with the investors who sued it and Bebo for the false statements in ALC's filings at issue in these proceedings. *Pension Trust Fund v. ALC*, No. 12-C-884-JPS, Docket No. 70-1 (E.D. Wis. Sept. 6, 2013). Had the full scope of Bebo's fraud been known to Ventas or investors prior to ALC's 2013 acquisition by another firm, the losses incurred could have been much greater.

Here, a multi-million dollar penalty is well-justified and consistent with other financial fraud cases against CEOs. *See, e.g., SEC v. Razmilovic*, 738 F.3d 14, 38 (2d Cir. 2013) ($20.8 million penalty), *SEC v. Musk*, Case No. 18-cv-8865, Docket No. 14 (S.D.N.Y. Oct. 16, 2018) ($20 million penalty); *SEC v. Life Partners Holdings, Inc.*, 2018 U.S. Dist. LEXIS 198333, *16-17 (W.D. Tex. Sept. 28, 2018) ($3.55 million penalty); *SEC v. E-Smart Techs., Inc.*, 2016 U.S. Dist. LEXIS 4664, *26-29 (D.D.C. Jan. 14, 2016) ($2 million penalty); *SEC v. Mahabub*, 2019 U.S. Dist. LEXIS 151337, *21-25 (D. Colo. Sept. 5, 2019) ($1.28 million penalty). The Court should likewise impose a large penalty against Bebo, to punish her for her fraud and deter similar misconduct by other highly compensated executives.

Bebo claims that only a single penalty should be imposed to address her "course of conduct." But formulating a penalty based on the number of distinct violations, in this case the false statements contained in each Form 10-K and 10-Q, is well-established by the Commission, federal courts, and this Court. *See, e.g., Francis Lorenzo*, Securities Act Rel. 9762, 2015 SEC LEXIS 1650, *61 (Apr. 29, 2015) (penalty for each fraudulent email); *James Winkelmann*, Initial Decision Rel. 1261, 2018 SEC LEXIS 2836, *204-25 (Oct. 15, 2018) (penalty for each fraudulent sale of securities); *SEC v. Huff*, 758 F. Supp. 2d 1288, 1366 (S.D. Fla. 2010) (penalty for each false Commission filing), *aff'd*, 455 Fed. Appx. 882 (11th Cir. 2012); *SEC v. Colonial*

Inv. Mgmt. LLC, 381 Fed. Appx. 27, 32 (2d Cir. 2010) (penalty for each fraudulent transaction); *Life Partners*, 2018 U.S. Dist. LEXIS 198333, *14-17 (penalty for each instance of Section 13(a) violation).

Given the egregiousness of Bebo's fraud and the fact she orchestrated her scheme as a public company CEO while earning a CEO's salary, imposing only a single penalty would be insufficient punishment and would serve as weak deterrence to other executives.

F. The Court Should Bar Bebo from Being an Officer or Director

Because of Bebo's serious fraud, her high level of scienter, and the fact that Bebo engineered her scheme from the highest-possible corporate position, the factors outlined in *SEC v. Bankosky*, 716 F.3d 45, 48-49 (2d Cir. 2013), provide ample support for the imposition of a permanent officer and director bar. *See also SEC v. Hall*, 759 Fed. Appx. 877, 884-85 (11th Cir. 2019) (affirming 10-year bar). While Bebo argues that her unemployment for the last five years militates against a bar, Bebo does not even claim to have *sought employment* during that time, at a public company or any other employer. Moreover, given that Buono was barred for his role in Bebo's scheme, it would be highly inequitable to impose a lower sanction on Bebo, given her higher-ranking position and greater degree of culpability.

G. Bebo's Constitutional Argument Lacks Merit

Bebo continues to press her meritless argument that this proceeding violates her constitutional right to equal protection. She maintains the Commission's decision to institute this proceeding in an administrative forum—rather than in federal court—violates her right to a jury trial.

Although Bebo previously argued that Section 929P(a) of the Dodd-Frank Act, which authorizes the imposition of civil penalties in this proceeding, is facially unconstitutional, Judge

Foelak recently rejected that argument in denying Bebo's post-*Lucia* motion for summary disposition. AP Rulings Release 6571 (May 10, 2019). Nor does Bebo argue that Section 929P(a), although facially neutral, has a disparate impact on any identifiable group, *see Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272-73, 279 (1979), or that she has been singled out because of her membership in any such group, *see Fog Cutter Cap. Grp. v. SEC*, 474 F.3d 822, 826 (D.C. Cir. 2007) ("To prove selective prosecution, a claimant must be part of a protected class under the Equal Protection Clause.").

Rather, Bebo now contends that the Commission's discretionary choice to proceed administratively in this case impermissibly disadvantages her relative to other individuals whose cases are brought in federal court. (Supp. Br. at 42-43 (citing *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (recognizing "class of one" equal protection claims "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")). The Commission has stated repeatedly, however, that such "class-of-one" equal protection claims are "not legally cognizable" in this context. *Timbervest, LLC*, Advisers Act Release 4197, 2015 WL 5472520, at *28 (Sept. 17, 2015); *Mohammed Riad*, Advisers Act Release 4420, 2016 WL 3226836, at *50 (June 13, 2016); *Harding Advisory LLC*, Advisers Act Release 3796, 2014 WL 988532, at *6, *8 (Mar. 14, 2014) (finding such claim "facially defective" and rejecting "superficial comparisons of a few other proceedings").

Those Commission decisions are correct. As the Supreme Court has explained, there "are some forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 594 (2008). In those cases, "treating like individuals differently is an accepted consequence of the discretion granted" and "allowing a challenge based on the arbitrary singling

out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." *Id.* at 594, 603; *see also, e.g., United States v. Moore*, 543 F.3d 891, 901 (7th Cir. 2008) (the "discretion conferred on prosecutors in choosing whom and how to prosecute" precludes a class-of-one-claim). The Commission has rightly concluded that its "choice of forum in pursuing a civil enforcement action for a violation of the securities laws" is just such a "discretionary decision." *Timbervest*, 2015 WL 5472520, at *29. Bebo's equal protection claim is therefore not legally cognizable.

But even if it were, it would still fail for two additional, independent reasons. First, the fact that the Commission has at times brought enforcement actions against others in federal court for violating the same, or similar, provisions does not itself establish that Bebo was treated differently from others similarly situated. *Cf. Timbervest*, 2015 WL 5472520, at *29. Second, Bebo has failed even to allege, let alone establish, that the Commission lacks a rational basis for any alleged difference in treatment. *Cf. id.* (rejecting equal protection claim premised on "[t]he mere fact that another case involves the same provisions of the Advisers Act" and "speculat[ion] that the Commission's 'motive is to disadvantage Respondents in their defense of this matter'"); *Harding Advisory*, 2014 WL 988532, at *8.

H. Conclusion

For the reasons stated herein and in the Division's prior briefing, the Court should find that Bebo committed the violations alleged in the OIP, and impose meaningful sanctions in the public interest.

Respectfully submitted:

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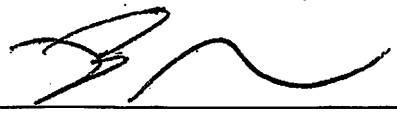
Rule 450(d) Certification

The undersigned counsel for the Division of Enforcement hereby certifies that this brief is 13,516 words, exclusive of the tables of contents and authorities.



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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

Benjamin J. Hanauer, an attorney, certifies that on November 1, 2019, he caused a true and correct copy of the foregoing The Division of Enforcement's Supplemental Post-Hearing Response Brief to be served on the following by overnight delivery and email:

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