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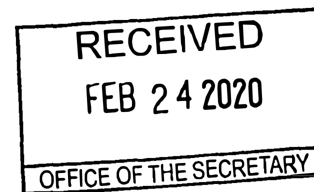


The Honorable Jason S. Patil
Administrative Law Judge
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Dear Judge Patil:

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

Respondent Laurie Bebo provides this submission pursuant to the Court's February 10, 2020 Order Following Oral Argument (the "Order") and in response to the Division's February 13, 2020 letter regarding the same. In the Order, the Court requested that the Division provide the citations and brief discussion of the precedent that the Division presented to the Court and the parties at oral argument regarding three issues. The Court provided the Respondent this opportunity to provide a letter brief with argument distinguishing those cases and/or contrary authority.

Issue No. 1. First, the Court sought from the Division "cases in which there was a sole event study finding no materiality, but the decision concluded there was materiality anyway." Although the Division provided a list of five cases, it was forced to acknowledge that *none of them actually answer or address the Court's question*. The Division notes: "While the cases may not involve event studies, they feature negligible stock price changes that presumably an event study would find to be insignificant." Thus, after years of briefing the issues in this case—and the importance of the event study evidence has always been critical to the materiality analysis—and having additional time to search for precedent that would specifically answer the Court's question, it found no such authority.

Instead, it asks the Court to *presume* the effect an event study would have on these cases, where no such study exists. This argument is emblematic of its entire materiality argument. Indeed, at oral argument the Division, in attempting to explain the complete absence of evidence of any analyst or publication ever mentioning the Ventas lease or lease covenants, went so far as urging this Court to *presume* that analyst witnesses would support their case if they had actually called them. This is improper and reveals the lack of evidence to support a finding of materiality.

Aside from the fact that none of the referenced cases involved event studies, they are inapposite for other reasons. For example, *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Co.*, 320 F.3d 920, 934 (9th Cir. 2003) involved a motion to dismiss, and specifically mentioned that there was a "slightly delayed" share price decline that supported the decision to permit plaintiff's class action to proceed past a motion to dismiss. It is in that discovery period, where event studies would be critical.

*SEC v. Montessoro*, 768 F.Supp.2d 1244 (S.D. Fla. 2011), involved a company that inflated its reported revenue by 80% to 90% annually over the course of three years. The court found the company also "routinely emphasized" its revenue growth in press releases. *Id.* at 1263-64. Later, it restated its financials. *Id.* Of course, none of those factors are present in this case.[1] As noted at oral argument, all of ALC's financial metrics were indisputably true, ALC never touted the Ventas lease or covenant compliance in press releases, and after the Milbank investigation ALC never restated its financials or indicated there was an internal control weakness.

Contrary to the Division's inapposite authority that included no event study analysis, Bebo provided the court with at least two cases that are persuasive with regard to the issue identified by the Court. First, in *SEC v. Mangan*, 598 F.Supp.2d 731 (W.D.N.C. 2008), which has been cited in Bebo's post-hearing briefing, the defense offered an event study that demonstrated the allegedly omitted information was not material. The SEC's event study expert utilized an incorrect methodology and was rejected by the court. *Id.* at 735. Consequently, the SEC attempted to rely on other indicia of materiality. *Id.* at 736-37. The court, however, granted the defendant summary judgment based on the event study. *Id.*

Second, the *Barclays Bank* case cited at page 18-19 of Bebo's Supplemental Post-Hearing Reply Brief addresses the question posed by the Court. There the court granted summary

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[1] *SEC v. Stanard*, 2009 WL 196023 (S.D.N.Y. Jan. 27, 2009) is similar. That case involved a multi-year scheme to manipulate a public company's quarterly earnings reports, creating reserves in profitable quarters to be deployed in less profitable ones. Consequently, defendants' reliance on minimal share price movement, *again without an expert or event study*, did not overcome the established manipulation of key financial metrics reported to investors. Here there is no such misstatement and Bebo did conduct an event study through an expert. The Division's last two cases fair no better. *United States v. Bilzarian*, 926 F.2d 1285 (2d Cir. 1991) did not involve alleged disclosure fraud by a public company, but rather by a shareholder building a position in the company who filed false Section 13D forms. And in the case cited by Bebo, *SEC v. ITT Educational Servs., Inc.*, 311 F.Supp.2d 977 (S.D. Ind. 2018)—where the Commission admitted that "event studies are a widely used methodology" for proving materiality (or the lack thereof) in these kinds of cases—the court simply permitted the SEC to present expert testimony about why an event study would not be helpful in that particular case as well as other expert testimony related to materiality. *Id.* at 993-94. Bebo has never taken the position that no other kind of evidence or expert testimony is relevant to materiality. Just that the Division's expert here is not relevant or reliable, and the Division presented no other credible evidence of materiality to overcome the reliable event study prepared by Professor Smith.

judgment to the defendant based on an event study, despite other arguments and evidence (but no event study) about why the disclosures could have been material and caused plaintiff's losses.[2] *See also Akerman v. Oryx Comm., Inc.*, 810 F.2d 336, 343 (2d Cir. 1987) (granting defendant summary judgment because its event study evidence was dispositive).

Issue No. 2. The Court asked the Division to address precedent regarding the "effect an issuer's statement in a public filing that a certain disclosure was material has on the question of materiality." The Division cited no precedent that actually answered this inquiry as well. Two of the cases, *SEC v. Mayhew*, 121 F.3d 44 (2d Cir. 1997) and *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), are insider trading cases that stand for the unremarkable proposition that an inference may be drawn that non-public information possessed by an insider was material if he bought or sold stock based on it. They have nothing to do with an *issuer's* statement about materiality, and are inapposite otherwise.[3]

The only case the Division cited that at all deals with the impact of a public company's statement about the materiality of that same statement actually supports Bebo's position. *Media General, Inc. v. Tomlin*, 387 F.3d 865 (D.C. Cir. 2004) arose out of a public company's acquisition of the stock of a private company. The private company allegedly misrepresented the seriousness of a lawsuit pending against it by a former employee. The public company, Media General, issued an 8-K two weeks after the merger closing that "failed to list [the lawsuit] as a material contingency even though Media General knew the full extent of [the] claims at the time of its 8-K filing." *Id.* at 870. The defendants argued the 8-K was an admission by the company that the lawsuit was not material. *Id.* at 870-71. The court held that the 8-K was not dispositive of the materiality issue, that the circumstances surrounding it had to be evaluated, and the alleged materiality of the omission by the defendants at the time of the merger closing had to be independently evaluated. *Id.*

Moreover, the Division's statement at oral argument that if disclosure was required by Commission rules, it can be deemed material, was wrong. The standards for disclosure under Commission rules and materiality under Section 10(b) are different, and one does not inform the other. *See Oran v. Stafford*, 226 F.3d 275, 287-88 (3d Cir. 2000) (J. Alito) (materiality standards for Section 10(b) and Rule 10b-5 differ significantly from disclosure requirements under other

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[2] As noted in Bebo's Supplemental Post-Hearing Reply Brief, this case is persuasive authority even though it addresses the issue of loss causation, which is highly related to materiality in private securities fraud cases. (*See* Supp. Post-Hearing Reply Br. at 19 n.7.)

[3] Similarly, *United States v. Ghilarducci*, 480 F.3d 542, 547 (7th Cir. 2007) is a wire fraud case based on blatantly false statements made by an investment advisor to induce investments and subsequent theft of assets. This has nothing to do with issuer statements of materiality. In addition, the case applied the wire fraud materiality standard—"a tendency to influence"—rather than a Section 10(b) standard. *Id.* at 546.

SEC rules, such as Item 303.); *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1055-56 (9th Cir. 2014) (same).

In the end, whether a statement contained in an issuer's filing is material must be evaluated based on all the facts and circumstances from the perspective of a reasonable public investor. As described at the oral argument and in prior briefing, the inquiry is whether the undisclosed information presents a *substantial* likelihood the information *significantly* altered the total mix of information available to investors.

Issue No. 3. The Court inquired of the Division "whether penalties imposed in a related settled action have an impact on the penalties imposed in a contested proceeding, and to what degree." The Division did not really answer that inquiry, instead citing cases where a greater penalty or sentence was imposed upon a co-defendant who did not plead guilty. Although that proposition is generally correct, it is also true that the penalty or sentence imposed upon co-defendants, whether one or both plead guilty, should not be unreasonably disparate from one another. The following cases stand for this proposition:

*United States v. Thurston*, 456 F.3d 211 (1st Cir. 2006) (evaluating sentence that departed from 5 year prison sentence under federal guidelines to three months because of disparity with plea bargaining co-defendant that would have resulted).[4]

*United States v. Lazenby*, 439 F.3d 928 (8th Cir. 2006) (stating "the district court gave too little weight to the extreme disparity between the sentences imposed on two similarly situated conspirators...").[5]

*United States v. Hensley*, 363 F.Supp.2d 843, 845 (W.D. Va. 2005) (stating "In light of the similar conduct of the defendants here, and their similar records, I find a sentence below the guideline range is appropriate" because it "takes into account the 'need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.'").

*United States v. Revock*, 353 F.Supp.2d 127, 129 (D. Maine 2005) (reducing sentence to be similar to co-defendant where conduct and records were highly similar).

[4] Although the First Circuit reversed the sentence in this case, its decision was vacated by the United States Supreme Court and the district court's sentence was then affirmed in *United States v. Thurston*, 544 F.3d 22 (1st Cir. 2008).

[5] In *United States v. McDowell*, 676 F.3d 730 (8th Cir. 2012) the court stated *Lazenby's* precedential value was "suspect" because the "extraordinary circumstances" standard of review applied was modified by subsequent Supreme Court precedent. It nonetheless still supports the proposition that it is appropriate to assure that similarly situated defendants' treatment is not disparate, as the *McDowell* decision itself recognized. *See id.* at 732-33 ("The district court was aware of the need to avoid unwarranted sentence disparities...").

Therefore, to the extent any securities law violations are found (none should be), the Court can consider the $100,000 penalty imposed upon Respondent Buono in determining Bebo's penalty and should assure that there is no significant disparity between the two.

Thank you for your continuing attention to this matter.

Respectfully submitted,

Ryan S. Stippich

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