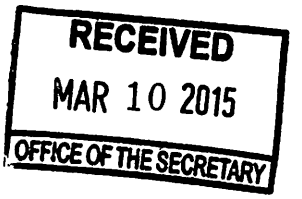
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-16293

In the Matter of

LAURIE BEBO, and
JOHN BUONO, CPA

Respondents.

RESPONDENT LAURIE BEBO'S RESPONSE TO VENTAS'S MOTION TO MODIFY THE SUBPOENA

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Respondent Laurie Bebo ("Bebo"), by her counsel, files this Response to Ventas' Motion to Modify Respondent's Subpoena.

INTRODUCTION

Styled as a motion to "modify" Ms. Bebo's subpoena, Ventas actually moves to quash the subpoena and contends that it should not be required to produce *any documents* in response to the supplemental subpoena approved for issuance by this Court on February 5, 2015. A review of Ventas' correspondence in response to Ms. Bebo's good faith efforts to address any purported concerns about the burden of complying with the subpoena demonstrates that Ventas intended to file its motion from the outset.

As set forth below, Ventas' assertions of undue burden are over-blown, particularly considering the numerous proposals that Ms. Bebo provided to Ventas in an attempt to address those concerns. As it did in its pre-motion correspondence with Ms. Bebo, Ventas continues to misconstrue the nature of its own business in the motion (assertions which are contradicted by its own SEC filings) in order to try and support its claims. Those efforts should be rejected.

Moreover, Ventas' assertion that none of the requested documents are relevant to this case is unfounded. The allegations of the OIP in this case are based on the assertion that three lines in the Company's form 10-Q's and 10-K's for the periods from approximately late 2009 through 2011 were false or misleading. These three lines—out of hundreds of pages of disclosures and financial statement information (none of which is alleged to be incorrect)—stated ALC's opinion or belief that it was in compliance with "certain operating and occupancy covenants" contained in the operating lease the Company had entered into with an affiliate of Ventas. The lease applied to only eight of the approximately 211 assisted living facilities that ALC owned and/or operated.

The Division contends that ALC and Ms. Bebo acted improperly when the Company

rented rooms at the eight Ventas facilities to have them available for ALC employees that had a reason to travel to the area to serve the operations of those facilities. The Division contends that this was improper despite the fact that Ms. Bebo discussed this arrangement with Ventas ahead of time, and sent correspondence to Ventas confirming ALC's plan to utilize rentals of rooms related to employees.

Thus, the Division's attempt to convert ALC's interactions with its contractual counterparty into a securities fraud case makes the issue of ALC's ability to defend against any asserted breach of the lease by Ventas through ALC's utilization of the rentals of rooms related to employees of critical importance. This is because, under the applicable law, the Division must demonstrate both that (1) there was no objectively reasonable basis for the judgment that ALC was in compliance; and (2) ALC and Ms. Bebo did not believe that the statement was accurate. *See Virginia Bankshares v. Sandberg*, 501 U.S. 1083 (1991); *Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d Cir. 2011). The Division's case effectively requires a trial with in a trial to determine whether ALC would have any reasonable defense to an asserted breach by Ventas, and that makes Ventas' interactions with the prior operator of the CaraVita Facilities and its interactions with its other Senior Housing Community operators—there are only a handful of them during the applicable time period—highly relevant. Ventas' motion to quash should be denied.

PROCEDURAL BACKGROUND

The Securities and Exchange Commission (the "SEC") instituted these proceedings against Bebo (and co-Respondent John Buono, CPA) on December 3, 2014. (*See* Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 4C and 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice (the "OIP")). Given the requirement that the ALJ issue an initial decision not later than

300 days from service of the OIP, Bebo is currently attempting to build her defense via the limited discovery permitted by the Commission's Rules of Practice. As such, on January 14, 2015, Bebo requested the issuance of a subpoena duces tecum to Ventas, Inc. ("Ventas"). (Bebo Request for Issuance of Subpoenas Duces Tecum, Jan. 14, 2015.) The ALJ issued the subpoena, in part, and with some modifications.[1] (*See* Order on Request for Issuance of Subpoenas, Jan. 23, 2015.)

On February 4, 2015, Bebo renewed her request for fifteen categories of documents struck from the initial subpoena in a supplemental subpoena. With Bebo's request for issuance, she narrowed certain requests and provided additional information on the relevance of the requested documents to address the ALJ's concerns expressed in its Order on the original subpoenas, dated January 23, 2015. Specifically, Bebo provided the statements regarding relevance:

- Categories two through four of the initial subpoena, seeking communications with Ventas' prior tenant/operators of the CaraVita facilities between 2005 and 2007, were struck and the ALJ stated that there was "no apparent relevance to these documents and they are outside the scope of the OIP." (*Id.* at 4.) Bebo provided a statement describing the relevance of the requested documents with her supplemental subpoena request. Specifically, Bebo stated:

> ALC stepped into the shoes of the previous tenant, Old CaraVita.[2] The OIP makes numerous allegations with respect to ALC's reporting under the lease to Ventas, including that it included employees, that at times they reported occupancy over 100%, and that the facility financials failed to comply with GAAP. The implication is Ventas would not accept this

[1] Ventas produced a handful of documents in response to the initial subpoena.

[2]The term "Old CaraVita," as used in the Subpoena and in this Response, refers to the entities operating the CaraVita Facilities, including BBLRG, LLC, CVSC, LLC and the principal managers of those entities, Josh Coughlin and Laura Elizabeth "Beth" Cayce, and any representatives of the eight special purpose entities that owned the facilities.

> reporting, but this is contradicted by their past practice with the previous tenant, Old CaraVita. Ms. Bebo believes the evidence will establish that Old CaraVita engaged in practices in terms of lease reporting that (a) included employees in the covenant calculations; (b) included reports with over 100% occupancy; (c) included non-GAAP financials; and (d) shifted expenses from the financials of the facility to an affiliated home health company. Ms. Bebo believes all of this was known to Ventas, and she should be permitted document subpoenas to obtain this evidence that contradicts the Division's theory of the case. As such, these requests are both relevant and narrowly tailored.
>
> (Stippich Aff., ¶ 6, Ex. B at 4.)

- Categories ten through sixteen of the initial subpoena, seeking documents relating to treatment of other Ventas lessees, were struck as overbroad, as the requests sought documents dating back to 2007 and the ALJ stated there was no apparent relevance to the documents. (*See* Order on Request for Issuance of Subpoenas, Jan. 23, 2015 at 4.) Bebo narrowed the time frame, seeking only documents no earlier than January 1, 2008. In addition, Bebo provided a statement on the relevance of the documents:

> This information is relevant to Bebo's defense because it supports her challenge to the assertions of Ventas representatives with respect to the company's purported practice of not waiving covenants or reaching other accommodations with tenants. Bebo is entitled to obtain evidence necessary to challenge these assertions. The request is narrowly tailored to seek these documents during the time frame from when ALC began a tenant of Ventas until the last purportedly false and misleading disclose. (See OIP ¶ 41.)
>
> (Stippich Aff., ¶ 6, Ex. B at 5.)

After reviewing Bebo's request for issuance of the supplemental subpoena with the additional information on relevance, the ALJ issued the supplemental subpoena (the "Subpoena"), in full, on February 5, 2015. (*See* Ex. A. to Ventas Mot.)

After Ventas was served with the Subpoena, the counsel for Bebo and Ventas had two conference calls, on February 9, 2015 and February 16, 2015, to discuss the Subpoena. (Affidavit of Ryan S. Stippich, ¶ 2.) During these calls, counsel for Bebo made several proposals with

respect to how the parties could address Ventas' concerns with respect to the burden of complying with the Subpoena. (*Id.* at ¶ 3.) The afternoon following the second call, Ventas sent correspondence to counsel to Ms. Bebo which failed to consider any of the parties' previous discussions, and argued that compliance with the requests at issue in this motion would be unreasonable, oppressive or unduly burdensome. (Ventas Mot., Ex. B.)

In response, Bebo sent a letter to Ventas on February 19, 2015 reiterating the modifications and alternatives available for compliance that had been previously discussed in the parties' telephone calls. (*Id.*) Bebo also identified the numerous statements about Ventas' business contained in the February 16 correspondence that were contradicted by Ventas' own SEC filings. Ventas sent a reply to Bebo on February 27, 2015 still stating that compliance would be unreasonable, oppressive or unduly burdensome, but offering to produce documents pursuant to Requests Nos. 1-3 and 13-14, if Bebo withdrew Requests Nos. 6-12. (*Id.*) Given the importance of the Requests to Bebo's defense, Bebo declined to withdraw Requests Nos. 6-12. (Stippich Aff., ¶ 4.) As a result, Ventas filed the instant motion, which effectively seeks to quash the Subpoena.[3]

LEGAL STANDARD

The SEC rules of practice provide that a party may request "subpoenas requiring the production of documentary or other tangible evidence returnable at any designated time or place." 17 C.F.R. § 201.232(a). If the ALJ determines that "compliance with the subpoena would be unreasonable, oppressive or unduly burdensome," the ALJ "can quash or modify the subpoena, or may order return of the subpoena only upon specified conditions. 17 C.F.R. §

[3] Although Ventas never mentioned in either of the phone calls discussing the Subpoena or in its letters about the Subpoena, in its motion to quash Ventas asserted for the first time that the city and state location of each of its Senior Housing Communities is contained in a Schedule filed with its Form 10-K reports. Bebo has had a chance to locate those schedules, and believes that they contain the appropriate information requested by Request No. 13, thus eliminating the parties' dispute over those documents. (*See* Stippich Aff., ¶ 5, Ex. A.)

201.232(e)(2). The burden is on the movant to show that compliance would be unreasonable, oppressive or unduly burdensome. *See Gregory J. Melsen, CPA, et al.*, Admin. Proceeding File No. 3-7998, at 1 (Feb. 2, 1994).

A movant asserting that subpoena requests are irrelevant has a heavy burden. The standard of relevance in administrative proceedings is very broad, it does not hinge on admissibility and the documents requested only need to appear to be reasonably calculated to lead to the discovery of admissible evidence. *Gregory M. Dearlove, CPA*, Admin. Proceeding File No. 3-12064 (Jan. 9, 2006) at 2. Further, "[w]hen admitting evidence at an administrative hearing before the Commission, the standard of 'relevance' is very broad" but "[t]he standard of relevance is even broader when it comes to document subpoenas." *Id.*

I. VENTAS HAS FAILED TO SHOW THAT THE OLD CARAVITA DOCUMENTS REQUESTED ARE IRRELEVANT OR THAT THEIR PRODUCTION WOULD BE UNREASONABLE, OPPRESSIVE OR UNDULY BURDENSOME.

A. The Documents Requested are Relevant to Bebo's Defense.

As noted above, like in general civil litigation, the bounds of relevance are quite broad in SEC administrative proceedings. The broad standard for relevance is especially justified in this context given the limited time and options for taking discovery. The documents sought by Bebo only need to be "reasonably calculated to lead to the discovery of admissible evidence" to be discoverable via subpoena. *Gregory M. Dearlove, CPA*, Admin. Proceeding File No. 3-12064 (Jan. 9, 2006) at 2. As described in detail below, Bebo has met this standard.

As noted previously, it is the Division's burden in this case to demonstrate that there was no reasonable basis for ALC to assert that, in its judgment, the Company was in compliance with certain (unstated) operating and occupancy covenants in the Ventas lease. Request Nos. 1-3 of the Subpoena seek documents or communications with or regarding circumstances that affected Old CaraVita's calculation of the covenants in its lease with Ventas. As noted in ALC's Request

for Issuance of Supplemental Subpoenas Duces Tecum, ALC effectively stepped into the shoes of the previous tenant, Old CaraVita. (Stippich Aff., ¶ 6, Ex. B at 4, ¶ 7, Ex. C.) Although ALC signed a separate lease with Ventas and certain terms of the lease did change, there were no changes to many of the provisions of the Old CaraVita lease, including to the occupancy covenants and financial coverage ratio covenants.

While a Ventas lessee, Old CaraVita appears to have engaged in conduct that the Division alleges that Ventas would not permit a tenant to do (*i.e.*, including employees in covenant calculations, having over 100% occupancy, and shifting expenses from a facility to an affiliated home health company).[4] (Stippich Aff. ¶ 8, Ex. D.) For example, the OIP asserts that a reporting of occupancy over 100% is somehow improper. (OIP at ¶ 37.) But evidence already in the investigative file indicates that Old CaraVita calculated occupancy in a manner that resulted in occupancy over 100%. (Stippich Aff., ¶ 8, Ex. D (see occupancy percentages for 2007).) These same documents show that Ventas was aware of this activity and did not assert a default or take other adverse action based on it. Yet, the OIP alleges that ALC's calculation of occupancy over 100% somehow supports the Division's case here.

The fact that Ventas allowed these variations in Old CaraVita's covenant calculations supports Bebo's defense to the OIP claims given the "trial within a trial" that the Division's case requires. The documents fall squarely within the scope of relevant documents for purposes of document subpoenas in SEC proceedings and should be produced.

B. Compliance with the Subpoena, Subject to the Modifications Offered by Bebo Would Not Be Unreasonable, Oppressive or Unduly Burdensome.

In order to mitigate the purported burden of compliance, Bebo's counsel offered

[4] Whether evidence proffered by the Division with respect to what Ventas "would" or "would not" have done is ultimately admissible is a dispute left for another day.

suggestions for how to limit the breadth of searches for documents responsive to Request Nos. 1-3. For example, Bebo proposed that Ventas limit its searches of e-mails to those between Ventas and the principal operator of Old CaraVita, Josh Coughlin, and provided Ventas with the e-mail address Coughlin used at that time. (Ventas Mot., Ex. B.) In addition to the Coughlin e-mails, Bebo requested the quarterly compliance reports[5] related to Old CaraVita. (*Id.*) Such a limited search would require minimal time on the part of either Ventas or its counsel, and Ventas has made no demonstration or assertion otherwise.

Ventas' motion focuses on the subpoena as written, rather than the modifications proposed verbally and in writing by Bebo. Ventas' motion makes no allegation that compliance with the subpoena, pursuant to the above modifications, would be unreasonable, oppressive or unduly burdensome. In fact, Ventas' reply, dated February 27, 2015, to Bebo's correspondence concedes that Ventas' compliance argument is meritless. Ventas is willing to produce the Coughlin e-mails, but only if those documents can be used as a bargaining chip. (Ventas Mot., Ex. B.) It is clear that producing the Coughlin e-mails is not unduly burdensome for Ventas, and full compliance with Bebo's requests, as modified, would only require Ventas to produce the quarterly compliance reports in addition to those e-mails. Ventas has failed to meet its burden of showing that the requests are unreasonable, oppressive or unduly burdensome and, as such, should be ordered to comply with Request Nos. 1-3 of the Subpoena.

II. VENTAS SHOULD BE ORDERED TO COMPLY WITH THE REQUESTS RELATING TO VENTAS' RELATIONSHIP WITH OTHER TENANTS, SUBJECT TO THE PROPOSED MODIFICATIONS.

A. Ventas' Treatment of Other Similarly Situated Tenant Operators is Critical to Bebo's Defense.

The OIP asserts that Ventas never agreed to or was aware of ALC's inclusion of non-

[5] Quarterly compliance reports are prepared for each lessee and address issues of importance to Ventas and likely would include discussion of covenant compliance issues, such as variations, modifications, waivers or default.

residents in its covenant calculations. (OIP, ¶ 27.) Bebo will establish at the hearing in this matter, the allegation is demonstrably false because there was both oral and written disclosure of the same to Ventas. The written disclosure was reviewed by multiple executives at Ventas, and no one questioned ALC further about it. In the testimony contained in the investigative file, the Ventas executive that participated in the telephone conversation with Ms. Bebo testified he could not recall the substance of the conversation. (Stippich Aff., ¶ 9, Ex. E, 59:9-:60:17.) In an attempt to remedy this obvious flaw in the case, the Division has elicited testimony from witnesses to the effect that Ventas would not have approved of any modifications or waivers, and to describe the purported seriousness of covenant violations.[6] Bebo is entitled to obtain evidence to rebut those statements, and is only seeking documents during the time frame from when ALC began a tenant of Ventas until the last purportedly false and misleading disclose.

B. Compliance with These Requests, Subject to Certain Modifications, is Not Unreasonable or Unduly Burdensome.

As with showing that the requests are irrelevant, Ventas bears the burden of showing that compliance with the subpoena would be unreasonable, oppressive or unduly burdensome. Ventas fails to make that showing. Ventas' entire argument focuses on the fact that there are: (1) 244 properties at issue, (2) a large number of documents, some of which are not OCR'd for searching, and (3) the documents may contain confidential or proprietary information. These arguments, when looked at closely, do not withstand scrutiny. Each of Ventas' arguments is based on a distorted view of the facts, and it omits critical information that would allow an assessment of the actual burden that the subpoena causes. None of them support the motion to quash.

First, Ventas continues to distort the asserted burden of compliance. Bebo's requests with respect to other Senior Housing Community tenant-operators is limited to events of default,

[6] Bebo contends that any such testimony would be inadmissible.

waiver and modifications, or informal understandings reached regarding these issues. Thus, the fact that Ventas spent a certain amount of time and money on searching for every document related to the relationship with ALC in order to comply with the Division's subpoena is unfounded. It is a comparison of apples to oranges, and provides no insight into the potential burden in responding to Bebo's subpoena, which is far more limited in nature.

In addition, based on Ventas' own filings with the Commission, there appear to be only 5 to 8 other tenant-operators similar to ALC during the relevant time period. (Stippich Aff., ¶ 5, Ex. A. at 5.) Each of these operators, like ALC, operated multiple buildings that are separate tenants. But all of the communications, like ALC, are with the main operator entity. Not the individual tenants. Ventas' continued assertion on the number of properties covered by the requests is thus irrelevant and reveals the lack of merit to its claims.

Second, Ventas' motion seems to establish that the key correspondence related to defaults, waivers and modifications would be housed in a central document management system. Based on Bebo's review of Ventas' production to the Division, it appears that this document management system is referred to as the "Hummingbird" system. Based on those documents and Ventas' motion, it seems clear that (1) important documents such as those requested by the Subpoena are loaded into Hummingbird; (2) those documents are organized by tenant-operator; and (3) they are searchable, except for the purported 172,000 documents in Hummingbird that are not searchable. (Stippich Aff., ¶¶ 10, 11, Exs. F, G.) Ventas conveniently omits the amount of documents in the management system that are searchable. Thus, at a minimum Ventas should be required to conduct a reasonable search its document management system by Senior Housing Community tenant-operator for documents responsive to Requests 6-12.

With respect to potentially responsive e-mails, Ventas asserts that an initial search of

responsive documents uncovered more than 1 million e-mails. But Ventas provides scant information about what was searched and how it was searched. Ventas made no effort to inform Bebo or the ALJ what searches were run and whether, by working cooperatively with Bebo, those searches could be more appropriately narrowed to further reduce the burden. Ventas also did not confirm whether this initial search was limited to just the Senior Housing Communities or whether Ventas was able to create this many search results by searching its entire e-mail system.

Finally, Ventas asserts that the documents may contain confidential or proprietary information. To the extent Ventas' proprietary information is at issue, Bebo has already offered to put an appropriate protective order in place to preserve the confidential nature of the information. In regards to potential tenant confidential information, Ventas has not provided any exemplary clauses showing that Ventas' production of these documents would violate the tenants' rights under any of the leases. Ventas has not shown any clauses, which prevents assessment of Ventas' actual obligations to its tenants such as whether Ventas is entitled to produce tenant documents as required by a court or other legal proceeding, which is a common provision in many contracts.

Despite making a variety of arguments purporting to show a burden in complying with the Subpoena, these arguments are undeveloped, at best. Ventas, as the moving party, is required to demonstrate that compliance is actually burdensome. Ventas bears this burden where it seeks to prevent Bebo from documents necessary to building her defense. Because Ventas has not met this burden. Ventas should be ordered to produce the documents responsive to Request Nos. 6-12.

III. BEBO'S REQUEST FOR A LISTING OF THE OPERATORS FOR ITS SENIOR HOUSING COMMUNITIES IS RELEVANT TO BEBO'S DEFENSE.

With respect to Request 14, Bebo is seeking a listing of the operators of Ventas' Senior Housing Communities from 2008 to 2012 to support her contention that ALC was the operator of only a small portion of Ventas' Senior Housing Communities. During the relevant time period, Ventas provided a listing of tenant operators for all of its facilities. (Stippich Aff., ¶ 5, Ex. A at 8.) Bebo simply seeks documentation reflecting a subset of the listings for Senior Housing Community operators. This would impose minimal burden and is relevant to the case because it places the ALC relationship in context and will support the inference that the CaraVita facilities were an extremely small part of Ventas' portfolio.

CONCLUSION

Bebo is entitled to seek documents such that she can prepare her defense. Bebo has attempted to work with Ventas to mitigate the burden caused by the subpoenas issued to ALC, however, the parties were unable to come to a resolution. Ventas should be ordered to comply with the subpoena requests because Ventas has failed to meet its burden to establish that the documents sought are irrelevant or that the requests are unreasonable, oppressive or unduly burdensome. Based on the foregoing, Bebo respectfully requests an order denying Ventas's Motion to Modify the Subpoena.

Dated this 9th day of March, 2015.

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March 9, 2015

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DELIVERED BY COURIER

Brent J. Fields, Secretary
Office of the Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Dear Mr. Fields:

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

I enclose for filing in the above-referenced matter an original and three copies of Respondent Laurie Bebo's Response to Ventas's Motion to Modify the Subpoena, Affidavit of Ryan S. Stippich, and Certificate of Service.

Thank you for your assistance.

Yours very truly,

Ryan S. Stippich

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Encs.

cc The Honorable Cameron Elliot (w/encs.)
Patrick S. Coffey, Esq. (w/encs.)
Benjamin J. Hanauer, Esq. (w/encs.)
Scott B. Tandy, Esq. (w/encs.)
Roger H. Stetson, Esq. (w/encs.)
Ms. Christina Zaroulis Milnor (w/encs. by e-mail only)