

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

LAURIE A. BEBO,

Plaintiff,

v.

Case No. 15-cv-00003

SECURITIES AND EXCHANGE
COMMISSION,

Defendant.

COMPLAINT

Laurie A. Bebo, by her attorneys Reinhart Boerner Van Deuren s.c., for her complaint against the Securities and Exchange Commission (the "SEC" or the "Commission") alleges as follows:

INTRODUCTION

1. For over two years, the Division of Enforcement of the SEC has been investigating whether there had been any violations of the federal securities laws in relation to certain periodic financial reports filed with the Commission by Assisted Living Concepts, Inc. ("ALC"). The SEC issued 43 subpoenas for testimony or documents, collected millions of pages of documents (approximately 270 gigabytes of data), and took a cumulative total of 55 days of on-the-record testimony.
2. Those financial reports, filed on Forms 10-K (annual reports) and 10-Q (quarterly reports) consist of thousands of pages of information about ALC.
3. The net result of this investment of extensive investigation is the allegation that a single statement – asserting compliance with a lease agreement – out of

those thousands of pages of financial statements and disclosure documents was false or misleading because it failed to provide additional information about how the Company was meeting the lease covenants. The SEC alleges, in turn, that Ms. Bebo, who was the Chief Executive Officer of ALC during the time period in which the challenged periodic reports were filed with the Commission (approximately 2009 to 2012), should be found guilty of committing securities fraud; should be subject to civil monetary penalties of hundreds of thousands, or even millions, of dollars; and should be subject to a permanent ban on serving as an officer or director of a publicly-traded company.

4. Prior to the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (hereafter "Dodd-Frank"), which became effective July 21, 2010, the SEC would have been required by law to bring charges seeking the remedies set forth in the immediately preceding paragraph in the federal district court.

5. Ms. Bebo would have had a Seventh Amendment right to a trial by a jury of her peers. Any trial in the action would have been subject to the Federal Rules of Evidence, which preclude the use of unreliable evidence such as hearsay.

6. Ms. Bebo would have been protected by the numerous substantive and procedural mechanisms of the Federal Rules of Civil Procedure, including depositions and other discovery. And Ms. Bebo would have had a reasonable amount of time to review the 1.5 million pages of documents that the SEC has collected over the course of its two-year investigation.

7. However, pursuant to Section 929P(a) of Dodd-Frank, the SEC may now obtain the same remedies in administrative proceedings overseen by the Commission

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

8. That is, the SEC has been given unlimited discretion to bring enforcement actions against unregulated persons either in federal district court or in internal administrative proceedings. There are no statutes or regulations to guide these decisions.

9. On December 3, 2014 the SEC exercised its newly-granted discretion and, instead of filing an action in federal district court, the Commission issued an Order Instituting Public Administrative and Cease-and-Desist Proceedings ("OIP"), initiating administrative proceedings against Ms. Bebo.

10. The SEC's rules of practice set a presumptive hearing date (trial) within four months (i.e. April 2015), which will preclude Ms. Bebo from adequately defending against the charges against her given the massive investigative file amassed during the two-year investigation. The SEC's Rules of Practice also preclude most pre-hearing discovery, such as depositions, and the final hearing will not be governed by the Rules of Evidence.

11. Most disturbingly, as set forth in more detail below, by proceeding administratively the Commission has stripped her entirely of the ability to secure the testimony at the hearing, much less at a deposition, of key witnesses in the case, including the ALC's chairman and vice chairman of the board, the chair of ALC's audit committee, and two other members of the audit committee.

12. In sum, the SEC has chosen a forum that allows it to investigate, prosecute, adjudicate, and if successful in supporting the charges before an administrative

law judge, provide appellate review of a case for which the very same Commissioners approved the filing of charges in the first place.

13. These administrative proceedings violate the U.S. Constitution, and the SEC's unlimited ability to choose that forum deprives Ms. Bebo of her constitutional rights to due process and equal protection under the law.

14. SEC administrative proceedings—governed by an administrative law judge protected by at least two layers of tenure—violate Article II of the U.S. Constitution, which mandates that the "executive Power shall be vested in a President of the United States of America."

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

16. Section 929P(a) of the Dodd-Frank Act, which grants the SEC authority to choose, arbitrarily and without any legitimate reason, to pursue civil remedies against unregulated citizens in either federal district court (where the defendant is entitled to a jury) or SEC administrative proceedings (where she is not), violates the U.S. Constitution's Fifth Amendment guarantee of equal protection of law.

17. Without declaratory and injunctive relief, Ms. Bebo will suffer irreparable harm by being forced to endure an expensive, time-consuming unconstitutional

proceeding without recourse for recovering those expenses, and an attack on her reputation without the equal protection of the law and the safeguards of due process.

PARTIES

18. Ms. Bebo is a natural person, citizen of the State of Wisconsin, and resident of Waukesha County, Wisconsin.

19. Ms. Bebo formerly served as the Chief Executive Officer of Assisted Living Concepts, Inc., a Wisconsin-based company.

20. The SEC is an agency of the United States government, headquartered in Washington, D.C.

VENUE AND JURISDICTION

21. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337, 1346, 1651, 2201 and 5 U.S.C. §§ 702 and 706. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (e).

22. This Court should exercise jurisdiction over Ms. Bebo's claims because (a) without judicial review at this stage, meaningful judicial review will be foreclosed; (b) Ms. Bebo's claims are wholly collateral to the review provisions of the securities laws; and (c) Ms. Bebo's claims are not within the particular expertise of the SEC.

BACKGROUND OF ALC

ALC's Background: Owned and Controlled by Canadians Not Amenable to Subpoena in an Administrative Proceeding

23. During the time period 2009 to 2012 (the "relevant time period") ALC owned and/or operated approximately 200 senior and independent living residences in about 20 states. These facilities, each of which was owned or operated by a subsidiary of ALC, totaled approximately 9,000 units.

24. During the relevant time period ALC had two classes of stock. ALC's Class A Common Stock was listed and traded on the New York Stock Exchange under the symbol "ALC." ALC's Class B Common Stock was neither listed nor publicly traded.

25. The holders of Class B Common Stock were entitled to ten votes per share held with respect to each matter presented to ALC's shareholders. The holders of Class A Common Stock were entitled to only one vote per share held with respect to each matter presented to ALC's shareholders.

26. Due to its combined ownership of Class A Common Stock and nearly all of the Class B Common Stock, Thornridge Holdings Limited controlled the voting power of ALC's shareholders and therefore controlled the company.

27. David J. Hennigar was President of Thornridge and that company's chairman of the board. Thus, Hennigar possessed *de facto* control over ALC through Thornridge.

28. In addition, Hennigar acted as ALC's Chairman of the Board and exercised ultimate control over the strategic direction of the company.

29. Hennigar is a citizen of Nova Scotia, Canada. Ms. Bebo will be unable to subpoena Hennigar for deposition, discovery or testimony at the hearing in the administrative proceeding.

30. Melvin A. Rhineland was the Vice Chairman of the board of directors of ALC. Rhineland was Ms. Bebo's professional mentor since both worked at a company called Extendicare (also owned by Hennigar and his family).

31. Ms. Bebo spoke with Mr. Rhineland on a weekly basis, if not more often, related to the business and strategic direction of ALC. Mr. Rhineland was

Ms. Bebo's liason to the rest of ALC's board of directors. He shaped the agenda for the matters to be considered by the board and Ms. Bebo typically sought approval from Mr. Rhinelanders with respect to company matters prior to addressing those matters with the rest of the board, including the matters specifically at issue in the OIP.

32. Rhinelanders is a citizen and resident of Ontario, Canada. Ms. Bebo will be unable to subpoena Rhinelanders for deposition, discovery or testimony at the hearing in the administrative proceeding.

33. Malen S. Ng was a member of ALC's Board of Directors and the Chairperson of the audit committee of ALC's Board.

34. Ng is a citizen and resident of Ontario, Canada. Ms. Bebo will be unable to subpoena Ng for deposition, discovery or testimony at the hearing in the administrative proceeding.

35. Alan Bell was a member of ALC's Board of Directors and a member of the audit committee of the Board.

36. Bell is a citizen and resident of Ontario, Canada. Ms. Bebo will be unable to subpoena Bell for deposition, discovery or testimony at the hearing in the administrative proceeding.

37. Derek H.L. Buntain was a member of ALC's Board of Directors and a member of the audit committee of the Board.

38. On information and belief, Buntain is a citizen of Canada and resides in the British Virgin Islands. Ms. Bebo will be unable to subpoena Buntain for deposition, discovery or testimony at the hearing in the administrative proceeding.

39. Thus, due to the Commission's decision to bring charges administratively Ms. Bebo will be precluded from obtaining any evidence or testimony from five out of seven members of ALC's Board of Directors during the relevant time period (Ms. Bebo was the eighth member of the board), and three out of four members of the audit committee of the Board.

Roles and Responsibilities of ALC's Board of Directors and the Audit Committee

40. According to ALC's Corporate Governance Guidelines, the role and responsibility of ALC's board of directors during the relevant time period included, among other things:

<p>I. Role and Responsibility of the Board</p> <p>The Board is responsible for the stewardship of ALC, including:</p> <ul style="list-style-type: none">• reviewing and monitoring performance of ALC's business and its operating, financial and other corporate plans, strategies and objectives, and changing plans, strategies and objectives as appropriate;• mandating policies of ethical behavior and integrity by officers and employees in all aspects of ALC's business and monitoring compliance with those policies;• understanding ALC's risk profile and monitoring its risk management programs;• reviewing and monitoring ALC's disclosure, internal control and management information systems;• establishing goals, evaluating performance, and determining the compensation for the chief executive officer and other senior executives;• developing succession plans for senior management; and• evaluating the procedures, operation, composition and overall effectiveness of the Board and its committees.

41. According to the Charter of ALC's Audit Committee, the general role and responsibility of ALC's audit committee during the relevant time period included, among other things:

- reviewing and evaluating the performance of the external auditors annually or more frequently as required
- reviewing the audit plan with the external auditor and with management

- reviewing with management and with the external auditor any proposed changes in major accounting policies, the presentation and impact of significant risks and uncertainties, and key estimates and judgments of management that may be material to financial reporting
- reviewing all audited annual financial statements and interim unaudited financial statements before release to the public
- reviewing and recommending approval to the Board all public disclosure documents containing audited or unaudited financial information before release to the public, including any prospectus, quarterly and annual financial statements, management's discussion and analysis, and annual report
- reviewing the evaluation of internal controls by internal and external auditors
- reviewing with management all issues of operational risk management, including legal exposure and compliance with regulatory requirements

42. In addition, the audit committee, with the assistance of a major New York law firm, conducted an internal investigation of the matters alleged in the OIP. The audit committee and, in turn, the board of directors concluded that no wrongdoing with respect to those allegations had occurred.

The Allegations of the OIP

43. Ms. Bebo denies all allegations of wrongdoing and stands ready to mount a defense against each and every one of the Commission's claims.

44. The OIP alleges that, during the relevant time period, ALC leased eight of its senior and independent living facilities from an affiliated of Ventas, Inc. ("Ventas"). ALC entered into a lease with the Ventas affiliate effective as of January 1, 2008 (the "Ventas Lease"). The Ventas Lease contained certain occupancy and financial coverage ratio covenants which ALC had to meet. If it failed to meet the covenants, ALC would potentially be in default under the Lease, and Ventas could pursue certain remedies under the Lease.

45. The OIP alleges that a default under the Lease, combined with the remedies that Ventas could pursue for a default, could have had a material impact on ALC's financial condition.

46. The OIP alleges that ALC's periodic financial statements and disclosure documents filed with the Commission during the relevant time period were false or misleading because ALC stated it was in compliance with the occupancy and financial coverage ratio covenants when in fact it was not.

47. The OIP alleges that Ms. Bebo was responsible for ALC's statements, and that she acted with scienter – the intent to deceive ALC investors – by causing the statement to be included in ALC's periodic filings. The OIP alleges that ALC's statement regarding compliance with certain operating and occupancy covenants were false or misleading because ALC did not disclose that management, including Ms. Bebo, understood ALC had reached an agreement with Ventas whereby ALC could count toward the occupancy and coverage ratio covenants units ALC set aside/rented at the facilities for ALC employees (and others performing services for ALC) who had reason to stay at the leased facilities in furtherance of their operations (hereafter the "employee leasing practice").

48. The SEC's disclosure fraud case against Ms. Bebo is highly attenuated on both the law and the facts. For example, it is impossible for the SEC to establish scienter where knowledge about the material aspects of the employee leasing practice was wide-spread both inside and outside the company. Indeed, as Ms. Bebo will establish at any trial on the matter, ALC's stated opinion that it was in compliance with the Ventas Lease was indisputably shared by the company's Board of Directors, in-house legal

counsel, the company's outside legal counsel, the company's disclosure committee (which in-house counsel chaired), the company's internal auditor, the company's independent external auditor, among others.

49. Most importantly for purposes of this action, ALC's Chairman (Hennigar) and Vice Chairman (Rhineland) specifically instructed Ms. Bebo to proceed with the practice in early 2009 and were otherwise knowledgeable about the use of the employee leasing practice to meet the covenants in the Ventas Lease.

50. In addition, Ng, as Chairperson of the audit committee, knew about the use of the employee leasing practice to meet the covenants in the Ventas Lease through specific conversations with ALC's CFO, John Buono, and ALC's outside auditors.

51. ALC's other board members are critical witnesses with respect to the allegations of the OIP as well.

52. Indeed, the OIP is replete with allegations regarding what Ms. Bebo did or did not report to members of the Board of Directors:

OIP Paragraph	Allegation
12	Board interested in expanding operations by acquiring right to operate the facilities.
16	Certain directors [including Bell and Buntain] were allegedly opposed to entering the lease.
19	ALC's board required Ms. Bebo to report on compliance with the covenants, and alleging by inference that she failed to report that ALC was meeting the covenants through the employee leasing practice.
21	Board raised concerns in August 2008 about ALC's ability to meet certain covenants in the lease.
24	"Rather than report the defaults to Ventas, ALC's board of directors, or ALC's shareholders, Bebo directed Buono and his staff to include employees and other non-residents in the financial covenant calculations."
40	Bebo tried to convince ALC's board not to disclose the employee leasing practice to potential bidders interested in acquiring ALC.

52	Bebo allegedly tried to convince ALC's board to not disclose the employee leasing practice to Ventas in April 2012, and actively lobbied against Mr. Bell's demand that ALC include specific reference in a settlement proposal to Ventas.
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53. In addition, the SEC has identified statements made by Mr. Buntain and Ms. Ng during their interviews with SEC attorneys as being potentially exculpatory statements.

54. The SEC brings the charges against Ms. Bebo administratively, rather than in district court, because it could not carry its burden of proving to a jury the required elements of the charges in a proceeding governed by the Federal Rules of Evidence. The Commission is well-aware that Ms. Bebo will not be able to compel testimony at the hearing or in a deposition from the members of the board that are citizens of Canada.

55. This appears to be the Commission's intent as evidenced by its conduct during the investigation leading to the OIP. In late summer of 2014, the SEC interviewed Hennigar, Rhineland, Ng, Buntain, and Bell off the record in preparation to take their testimony on the record. Thereafter, the SEC was able to obtain their on-the-record testimony through an investigative cooperation program with the Canadian securities agencies. That on-the-record testimony was conducted as a *de facto* direct examination of those witnesses rather than for the purpose of investigation and fact-finding. The SEC presumably intends to present their investigative testimony at the hearing in this matter, since it also cannot compel their appearance at the hearing, knowing that Ms. Bebo would be unable to access these witnesses in connection with the administrative proceeding.

56. Such a duplicitous effort to deny Ms. Bebo of the ability to present critical evidence supporting her defense to the charges is a fundamental violation of her right to due process.

THE SEC'S CHOSEN FORUM IS UNCONSTITUTIONAL

57. An administrative proceeding is an internal SEC hearing, initiated by the Commission, litigated by the SEC's own attorneys, governed by the SEC's Rules of Practice ("Rules of Practice," or "RoP"), and conducted by a Commission-appointed Administrative Law Judge ("SEC ALJ").

58. That is, administrative proceedings do not afford respondents the opportunity to have their case heard by a jury. Instead, an SEC ALJ presides over the proceedings, acting as the factfinder and deciding matters of law.

59. For the reasons that follow, SEC ALJs are executive branch "officers" within the meaning of Article II.

60. Under *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 484 (2010) ("*Free Enterprise*"), pursuant to Article II's vesting of the executive power in the President, such officers cannot be separated from the President by multiple levels of protection from removal. "The President cannot 'take Care that the laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Id.* That is, Article II is violated when an officer can only be removed for good cause, and the power to remove that officer is held by another officer who can only be removed for good cause. *See id.*

61. SEC ALJs enjoy at least two levels of good-cause protection, with the result being ALJs who are "not accountable to the President, and a President who is not responsible for the" ALJs. *Id.* at 495. The SEC administrative proceedings—governed

by ALJs protected by multiple layers of tenure—therefore violate Article II and are unconstitutional.

A. SEC ALJs exercise considerable discretion and significant authority.

62. SEC ALJs exercise considerable discretion and significant authority in these administrative proceedings, which makes them officers as contemplated by Article II of the U.S. Constitution.

63. The SEC ALJs' authority is delegated to them by the Commission. *See* 15 U.S.C. 78d-1(a) (the SEC "shall have the authority to delegate ... any of its functions to ... an individual Commissioner, an administrative law judge, or an employee ..."); 17 C.F.R. § 200.14(a) ("...the Office of Administrative Law Judges conducts hearings in proceedings instituted by the Commission."); 17 C.F.R. § 200.30-9 (the Commission "hereby delegates ... to each [ALJ] the authority ... [t]o make an initial decision ...").

64. The SEC ALJs, also referred to as "hearing officers," are given significant authority by regulation.

The [ALJs] are responsible for the fair and orderly conduct of the proceedings and have the authority to:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas;
- (3) Rule on offers of proof;
- (4) Examine witnesses;
- (5) Regulate the course of a hearing;
- (6) Hold pre-hearing conferences;
- (7) Rule upon motions; and
- (8) ... prepare an initial decision containing the conclusions as to the factual and legal issues presented, and issue an appropriate order.

17 C.F.R. § 200.14 (a); *see also* 17 C.F.R. § 201.111 (ALJs have power to, *inter alia*, revoke, quash or modify subpoenas; receive relevant evidence and rule upon admission of evidence; consider and rule upon all procedural and other motions; regulate the

conduct of the parties and their counsel; reopen any hearing prior to the filing of an initial decision, etc.).

65. In addition, under the SEC Rules of Practice ("RoP"), an SEC ALJ is given the power to do the following, among other things:

- Amend the SEC's OIP, RoP 200(d)(2), and require amended answers to be filed. RoP 220(b).
- Require the SEC to file a more definite statement of specified matters of fact or law to be considered or determined. RoP 220(d).
- Grant or deny leave to amend an answer. RoP 220(e).
- Grant or deny leave to move for summary disposition, if necessary, and rule on motions for summary disposition. *See* RoP 250(a), (b).
- Stay proceedings pending Commission consideration of offers of settlement. RoP 161(c)(2).
- Express views on offers of settlement. RoP 240(c)(2).
- Grant extensions of time. RoP 161.
- Find a party in default and set aside a default. RoP 155.
- Reject filings that do not comply with the SEC's Rules of Practice. RoP 180(b).
- Enter default, dismiss the case, decide a particular matter against a party, or prohibit introduction of evidence when a person fails to make a required filing or cure a deficient filing. RoP 180(c).
- Order that scandalous or impertinent matter be stricken from any brief or pleading. RoP 152(f).
- Order production of documents pursuant to subpoena. RoP 230(a)(2), 232.
- Order depositions, and act as the "deposition officer." RoP 233, 234.
- Regulate the SEC's use of investigatory subpoenas after the institution of proceedings. RoP 230(g).

- Modify the Rules of Practice with regard to the SEC's document production obligations. RoP 230(a)(1).
- Require the SEC to produce documents it has withheld. RoP 230(c).
- Issue protective orders governing confidentiality of documents. RoP 322.
- Certify issues for interlocutory review, and decide whether to stay proceedings after an application for or grant of review. RoP 400(c), (d).
- Direct the parties to meet for prehearing conferences, and preside over such conferences as the ALJ "deems appropriate." RoP 221(b).
- Order any party to furnish prehearing submissions. RoP 222(a).
- Allow the use of prior sworn statements when, in its discretion, it would be desirable, in the interests of justice, to do so, and limit or expand the parties' intended use of the same. RoP 235(a), (a)(5).
- Take "official notice" of facts not appearing in the evidence in the record. RoP 323.
- Determine the scope of cross-examination. RoP 326.
- Order that hearings not be recorded or transcribed. RoP 302(a).
- Issue orders specifying corrections to the transcript. RoP 302(c).
- Rule on motions to correct errors in the initial decision. RoP 111(h).
- Impose sanctions on parties for contemptuous conduct. RoP 180(a).
- Disqualify himself or herself from considering a matter. RoP 112(a).
- Consolidate proceedings. RoP 201(a).
- Regulate appearance of amici. RoP 210(d).
- Modify the rule regarding the participation of intervening parties and amici, among others. RoP 210(f).

66. After the hearing, the SEC ALJ issues an "initial decision," which includes: "findings and conclusions, and the reasons or basis therefore, as to all the material issues of fact, law or discretion presented on the record and the appropriate order, sanction, relief, or denial thereof." RoP 360; *see also* 17 C.F.R. 200.14 (a).

67. The initial decision must also state the time period, no longer than twenty-one days without good cause, within which a petition for review must be filed. RoP 360. The time period is prescribed by the ALJ. *See* RoP 410(b).

68. The ALJ's initial decision becomes the final decision of the Commission if no petition is filed, and the Commission does not review the decision on its own initiative. The Commission issues an order that the decision is final. RoP 360.

69. With certain exceptions inapplicable here, the Commission's decision to review is discretionary. In determining whether to grant review, the Commission considers whether "a prejudicial error was committed in the conduct of the proceeding; or ... the decision embodies: (A) a finding or conclusion of material fact that is clearly erroneous; or (B) a conclusion of law that is erroneous; or (C) an exercise of discretion or decision of law or policy that is important and that the Commission should review." RoP 411(b)(2).

70. If the Commission does not review the matter (either by petition or on its own accord), the decision becomes final, and "the action of [the] administrative law judge . . . shall, for all purposes, including appeal or review thereof, be deemed the action of the Commission." 15 U.S.C. § 78d-l(c). The Commission issues an order, and "[t]he decision becomes final upon issuance of the order[, which] shall state the date on which sanctions, if any, take effect." RoP 360(d)(2).

B. The SEC ALJ's position, duties, salary, and means of appointment for office are specified by statutes and regulations.

71. The SEC is a "Department" of the Executive Branch. *Free Enterprise*, 561 U.S. at 511 ("Because the Commission is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component, it constitutes a 'Departmen[t]' for the puposes of the Appointments Clause.").

72. The Commissioners are the "heads" of the Department. *Free Enterprise*, 561 U.S. at 512-13.

73. The Commissioners appoint the SEC ALJs.

74. Under the Administrative Procedures Act ("APA"), 5 U.S.C. § 500 *et seq.*, "[e]ach agency shall appoint as many administrative law judges as are necessary." 5 U.S.C. § 3105.

75. The APA—5 U.S.C. §§ 556, 557—sets forth the ALJs' considerable power and authority, as have also been delegated by the Commission and incorporated into the securities laws, regulations, and the SEC's RoP. *See* 15 U.S.C. §78d-1 (the SEC "shall have the authority to delegate ... any of its functions to ... an individual Commissioner, an administrative law judge, or an employee ..."); 17 C.F.R. § 200.14 ("... the Office of Administrative Law Judges conducts hearings in proceedings instituted by the Commission."); 17 C.F.R. § 200.30-9. Indeed, the SEC's rules and regulations do not limit the powers provided by the APA. *See* 17 C.F.R. § 201.111 ("No provision of these Rules of Practice shall be construed to limit the powers of the hearing officer provided by the [APA], 5 U.S.C. 556, 557.")

76. The SEC ALJs' salaries are set by statute, and are based on the Executive Schedule. 5 U.S.C. § 5372; *see also* 5 U.S. C. § 5311.

77. Pursuant to regulation, "[a]n agency may appoint an individual to an [ALJ] position only with prior approval of [the Office of Personnel Management ("OPM")], except when it makes its selection from the list of eligible provided by OPM." 5 C.F.R. § 930.204.

78. An ALJ receives a career appointment, not subject to probationary period requirements. *Id.*

C. SEC ALJs are officers of the United States protected by multiple layers of protection from removal.

79. SEC ALJs are "officers" of the United States due to, among other things, the statutory authority creating their position; their career appointments by the Commission—heads of an Executive Branch department; the statutory and regulatory requirements governing their duties, appointment, and salary; the significant authority and discretion they exercise, as detailed above; and their power, in certain instances, to issue the final decision of the agency.

80. SEC ALJs are protected from removal except for "good cause" as determined by the Merit Systems Protection Board ("MSPB"). 5 U.S.C. § 7521(a).

81. Similarly, the SEC Commissioners, who have the power to remove the ALJs, cannot be removed by the President from their position except for "inefficiency, neglect of duty, or malfeasance in office." *See Free Enterprise*, 561 U.S. at 487, 496 ("none of [the Commissioners] is subject to the President's direct control"); *MFS Sec. Corp. v. SEC*, 380 F.3d 611, 619-20 (2d Cir. 2004) ("... the power to remove Commissioners belongs to the President, and even that is 'commonly understood' to be limited to removal for 'inefficiency, neglect of duty or malfeasance in office.'").

82. Further, members of the MSPB can "be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

D. SEC ALJs' multiple levels of protection from removal violate Article II.

83. Article II of the U.S. Constitution vests "[t]he executive Power . . . in a President of the United States of America," who must "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.*, § 3. "In light of '[t]he impossibility that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'" *Free Enterprise*, 561 U.S. at 483 (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)).

84. As executive officers, SEC ALJs may not be protected by more than one layer of tenure. "[S]uch multilevel protection from removal is contrary to Article II's vesting of the executive power in the president." *Free Enterprise*, 561 U.S. at 484.

85. Because SEC ALJs cannot be removed except for "good cause," the Commissioners are similarly protected from removal but for "inefficiency, neglect of duty, or malfeasance in office," and the MSPB members (who determine whether good cause exists to remove an ALJ) are also protected from removal but for "inefficiency, neglect of duty, or malfeasance in office," SEC ALJs are protected by multiple layers of protection from removal which violates Article II.

86. That is, under this multilevel protection scheme, "the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply

because that officer disagrees with him. This contravenes the President's 'constitutional obligation to ensure the faithful execution of the laws.'" *Free Enterprise*, 561 U.S. at 484 (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)).

87. As in *Free Enterprise*, "[t]he result is a[n] [ALJ who] is not accountable to the President, and a President who is not responsible for the [ALJ]." *Id.* at 495.

88. Because the President cannot oversee SEC ALJs in accordance with Article II, these SEC administrative proceedings violate the Constitution.

SECTION 929P(A) OF DODD-FRANK IS FACIALLY UNCONSTITUTIONAL

89. Prior to the enactment of Dodd-Frank, the SEC's remedies in administrative proceedings against an unregulated person, like Ms. Bebo, were limited principally to an administrative cease-and-desist order—the functional equivalent of a district court injunction—and disgorgement. If the SEC sought to punish an unregulated citizen like Ms. Bebo through the imposition of a civil penalty, the statutory scheme required the SEC to pursue that punishment in federal district court. It could also obtain an injunction in federal court—the functional equivalent of the administrative cease-and-desist order—as well as disgorgement. Finally, if the SEC thought it appropriate to fine or imprison a citizen, it would need to refer the matter to the Department of Justice for criminal prosecution.

90. Like other federal agencies with enforcement powers, the level of due process afforded the citizen tracked the punitive gradient of the remedy sought. This legal regime set a delicate balance—a balance that in various decisions from the Supreme Court evaluating similar agency adjudication frameworks held was constitutionally permissible.

91. Section 929P(a) of Dodd-Frank destroyed that delicate balance when it granted the SEC authority to obtain civil penalties against any citizen in the Country in an administrative proceeding.¹ In granting the SEC this authority, the remedies that the SEC can seek administratively are functionally identical to the remedies that it can obtain in federal district court.

92. In fact, the legislative history regarding Section 929P(a) of Dodd-Frank confirms that this was Congress' intent:

Section 211. Authority to impose civil penalties in cease and desist proceedings

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

House Report 111-687 on H.R. 3817, The Investor Protection Act of 2009 at p. 78 (December 10, 2010).

93. Where the principal objective of a statutory scheme or government practice is "to discourage the assertion of constitutional rights it is patently unconstitutional." *Chaffin v. Stynchcombe*, 412 U.S. 17, n.20 (1973). And "[t]o punish a

¹ The SEC's enforcement director acknowledged that the remedies available in either forum are on par: "Ceresney responded to the view by some that the SEC will bring more cases administratively to avoid losses in court. He noted that the SEC won eight out of its last 10 court cases. Congress gave the SEC the authority to obtain the same remedies as in federal court, he explained, and administrative proceedings offer a streamlined procedure in which cases can be brought much more quickly, while the evidence is still fresh." *Officials discuss administrative proceedings and more at PLI conference*, Federal Securities Law Reports, No. 2655 (Nov. 20, 2014) (emphasis added). Although there are minor, immaterial differences in the remedies that can be achieved in federal court or district court, as set forth in the Enforcement Director's comments the remedies are functionally equivalent.

person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

94. In the case of Section 929P(a) of Dodd-Frank, Congress has gone beyond simply imposing a penalty on a person for asserting her constitutional right. Rather, Dodd-Frank affects a wholesale transfer of Ms. Bebo's constitutional right to a jury trial *to the government itself*. Because the remedies that the SEC may obtain in either district court or in an administrative proceeding are the same, the sole consideration for the government in exercising its discretion of where to bring the case is whether it would be advantageous to the government to have a jury decide the charges. For example, in some cases the government can and will conclude that the defendant would be unsympathetic to a jury. In those cases, the government will penalize the citizen and bring the case in federal court. In other instances, such as in this case, the government may conclude that a jury may view the defendant as sympathetic or credible, and thus determine that the defendant should be stripped of her right to a jury and forced to proceed administratively. Either way, the government is penalizing the citizen for possessing the Seventh Amendment jury right in way that is inimical to the Constitution.

95. The power granted to the SEC by Section 929P(a) to determine whether or not an unregulated person charged with securities violations will receive a jury trial also violates the Fifth Amendment's guarantee of equal protection of the law. Where the government makes a jury trial available to some litigants facing a certain charge (as Congress has in Section 929P(a)), it may not, consistent with the constitutional promise of equal protection, arbitrarily withhold it from others facing the same charge. *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966).

THE ADMINISTRATIVE PROCEEDING VIOLATES MS. BEBO'S RIGHT TO PROCEDURAL DUE PROCESS

96. It is axiomatic that "[t]he right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause." *Jenkins v. McKeithen*, 395 U.S. 411, 424 (1969).

97. As set forth above, among other defenses, Ms. Bebo will demonstrate that evidence of scienter is lacking because she disclosed the employee leasing practice that is at the heart of the SEC's allegations to ALC's board of directors and its audit committee that oversaw the company's investor disclosures. Disclosure of the alleged fraudulent conduct to the company's board of directors (among other personnel inside and outside of the company) is obviously inconsistent with intent to deceive the company's investors.

98. Yet, due to the fact that the SEC has brought the charges against Ms. Bebo in an administrative proceeding, she will be unable to secure the presence of key members of the company's board of directors for hearing or obtain any discovery from those witnesses as part of the proceedings. This is because they are all Canadian citizens who may not be subpoenaed as part of the administrative proceeding.

99. Specifically, the Securities Exchange Act only authorizes the "attendance of witnesses and the production of any such records.... *from any place in the United States or any State*" *See* 15 U.S.C. 78u(b) (emphasis added). In other words, an ALJ's subpoena power is restricted to U.S. territorial boundaries. *Id.*; *see also* RoP 232. Further, even if an ALJ issued an order to serve a subpoena on a third party outside U.S. borders, it is unlikely that federal courts would have the power to enforce the subpoena. *See, e.g., CFTC v. Nahas*, 738 F.2d 487, 491, 496 (D.C. Cir. 1984).

100. Conversely, Ms. Bebo would have been able to obtain deposition and document discovery from each of these Canadian witnesses in federal district court. Canada is not a signatory to the Hague Convention, so parties use letters rogatory—a formal written request from one court to another for assistance—to compel Canadian witnesses to produce documents and be examined under oath. After receiving a request from a U.S. court, Canadian courts have broad discretion under the *Canada Evidence Act*, RSC 1985, c. E-5, Part II (and equivalent provincial legislation) to enforce letters rogatory and generally do so unless the request is determined to be contrary to public policy. The resulting evidence can then be used in the district court proceedings.

101. The SEC's decision to bring this case in an administrative proceeding and to deprive Ms. Bebo of her ability to defend the case by precluding her from subpoenaing and calling witnesses on her behalf is a blatant violation of her constitutional right to due process.

THE SEC'S DECISION TO USE AN ADMINISTRATIVE PROCEEDING WILL CAUSE MS. BEBO SEVERE AND IRREPARABLE HARM

102. Without injunctive relief from this Court, Ms. Bebo will be required to submit to an unconstitutional proceeding. This violation of a constitutional right constitutes an irreparable injury. *Preston v. Thompson*, 589 F.2d 300, 303 n.3 (7th Cir. 1978) ("The existence of a continuing constitutional violation constitutes proof of an irreparable harm, and its remedy certainly would serve the public interest."). Moreover, Ms. Bebo will be stripped of the protections afforded to federal court litigants in the process.

103. Ms. Bebo cannot assert counterclaims or seek declaratory relief in an administrative proceeding, foreclosing any opportunity to assert, in the administrative

proceedings, the relief she is seeking here. What is more, the ALJ presiding over the administrative proceedings has, on at least one occasion, expressed grave doubts as to whether he has the authority to address constitutional challenges. *In the Matter of David F. Bandimere & John O. Young*, Release No. 507, Release No. ID -507, 2013 WL 5553898, at *72 (ALJ Oct. 8, 2013) ("I have grave doubts whether [an equal protection] claim is justiciable in this forum. . . . It would seem that any relief on equal protection grounds must be predicated on a finding that the present proceeding should never have been instituted, that is, that the Commission's institution of this proceeding in itself violated Bandimere's equal protection rights. Such a finding presupposes that I have the authority to second-guess the Commission's decision to issue the OIP. I doubt that my authority extends that far.").

104. Further, if Ms. Bebo was to lose in an administrative proceeding, the damage could be severe and irreversible. The availability of an appeal after an administrative proceeding to a federal circuit court of appeals cannot avoid this harm, because the administratively-imposed sanctions, such as a bar on Ms. Bebo's employment as a director or officer, will likely take effect before the appellate court can make a ruling.

105. Likewise, the harm cannot be remedied after the fact by money damages. Various immunity doctrines substantially constrain Ms. Bebo's ability to seek damages from the SEC. Furthermore, even if damages were procedurally available, the professional and reputational harm to Ms. Bebo should the ALJ impose an unfavorable ruling in an unconstitutional administrative proceeding would be impossible to monetize.

106. The SEC will suffer no harm if its administrative proceeding against Ms. Bebo is stayed pending the determination of whether the very existence of the

proceedings is constitutional. The SEC spent over two years investigating Ms. Bebo, and chose to initiate these proceedings only weeks before the date of this complaint. The SEC could always pursue Ms. Bebo in federal district court, should they want, decide, or need to do so.

**COUNT ONE
INJUNCTIVE RELIEF**

107. Ms. Bebo realleges and incorporates Paragraphs 1-106 above, as if fully set forth herein.

108. Ms. Bebo's constitutional rights will be irreparably harmed if preliminary and permanent injunctions are not issued against the SEC's administrative proceeding. As set forth above, Ms. Bebo has a substantial likelihood of success on the merits of her claim. Without injunctive relief, Ms. Bebo will be irreparably harmed and the harm Ms. Bebo would suffer outweighs any harm the SEC may suffer if injunctive relief is granted. Finally, an injunction will serve the public interest by protecting other parties' constitutional rights that are violated by these administrative proceedings.

**COUNT TWO
DECLARATORY JUDGMENT**

109. Ms. Bebo realleges and incorporates Paragraphs 1-106 above, as if fully set forth herein.

110. As alleged herein, an actual, substantial case or controversy has arisen between the parties.

111. Ms. Bebo requests a declaratory judgment that the statutory and regulatory provisions providing for the position and tenure protections of SEC ALJs are unconstitutional, that Section 929P(a) of Dodd-Frank is unconstitutional, and that

Ms. Bebo's rights to due process and equal protection have been violated and will continue to be violated by the administrative proceeding being brought against her.

Jury Demand

112. Ms. Bebo hereby demands a trial by jury on all issues so triable.

WHEREFORE, Ms. Bebo prays for judgment and relief as follows:

A. An order and judgment declaring that the administrative proceeding is an unconstitutional violation of Ms. Bebo's rights to due process and equal protection under the U.S. Constitution and declaring Section 929P(a) of Dodd-Frank unconstitutional.

B. An order and judgment declaring unconstitutional the statutory and regulatory provisions providing for the position of SEC ALJ and the tenure protections for that position.

C. An order and judgment enjoining the Commission from carrying out an administrative proceeding against Ms. Bebo.

D. Such other and further relief as this Court may deem just and proper, including reasonable attorneys' fees and the costs of this action.

Dated this 2nd day of January, 2015.

s/ Mark A. Cameli

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