No. 15-1511

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

LAURIE A. BEBO,

Plaintiff-Appellant,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant-Appellee.

On Appeal From the United States District Court
for the Eastern District of Wisconsin
Case No. 15-CV-00003
The Honorable Rudolph Randa, District Judge

APPELLANT'S PETITION FOR REHEARING EN BANC

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DISCLOSURE STATEMENT

The undersigned, counsel of record for Laurie A. Bebo, Plaintiff-Appellant, furnishes the following list in compliance with Circuit Rule 26.1:

1. The full name of every party that the attorney represents in the case: the undersigned counsel represents Plaintiff-Appellant, whose full name is Laurie A. Bebo.

2. Plaintiff-Appellant is not a corporation and therefore does not have: (a) a parent corporation or (b) stockholders which are publicly owned companies.

3. The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this Court: Reinhart Boerner Van Deuren s.c.

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RULE 35(b)(1) STATEMENT IN SUPPORT OF REHEARING EN BANC

Laurie A. Bebo's appeal involves a question of exceptional importance to the law of federal court jurisdiction and constitutional separation of powers: whether the executive branch is the appropriate branch of government initially to review constitutional challenges to the act of Congress enabling that branch's power and to the authority of its administrative law judges ("ALJs"). This is a case with national implications. Numerous litigants in jurisdictions across the country have, like Ms. Bebo, recently asked district courts to enjoin administrative proceedings instituted against them by the Securities and Exchange Commission ("SEC") because of serious, constitutional defects in the SEC's enabling legislation and the authority of its ALJs. Despite three district court judges (including the district court judge in this case) noting the merits of these constitutional challenges, the SEC continues to capitalize—at an accelerating pace—on the authority granted to it by an (unconstitutional) act of Congress to pursue unregulated citizens for civil penalties in its home court, free from rules of procedure and evidence, with virtually unblemished success.

The panel's decision in this case is also in conflict with case law from the United States Supreme Court, at least one other Circuit, and this very Court. The panel's decision conditions district court jurisdiction over claims involving the SEC solely on whether and when the SEC chooses to institute an administrative enforcement action. No court, including the Supreme Court, has ever adopted such a jurisdictional test.

STATEMENT OF CASE AND SUMMARY OF PROCEEDINGS

On January 2, 2015, Ms. Bebo filed a Complaint in the District Court for the Eastern District of Wisconsin alleging that her constitutional rights to due process and equal protection under the Fifth Amendment had been, and continued to be, violated by a facially unconstitutional act of Congress. (*Bebo v. S.E.C.*, No. 15-1511, ECF No. 1 ¶¶ 15–16.) Specifically, Ms. Bebo alleged that the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank") granted the SEC unconstitutional, unlimited authority to choose whether a citizen against whom it seeks civil penalties for alleged securities violations will be tried in federal district court, where she can invoke her Seventh Amendment right to a jury, or in its own administrative proceedings, where she cannot. (Compl. ¶ 91.)

Prior to the passage 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 and disgorgement. (*Id.* ¶ 89.) If the SEC sought to punish an unregulated citizen like Ms. Bebo through the imposition of a civil penalty, it was required by law to pursue that punishment in federal district court. (*Id.*) Section 929P(a) of Dodd-Frank changed that, allowing the SEC to seek functionally identical remedies against unregulated citizens in the forum of its choice: federal district court or its own administrative proceedings. (*Id.*); *see also Jarkesy v. S.E.C.*, No. 14-5196, 2015 WL 5692065, at *1 (D.C. Cir. Sept. 29, 2015) (The practical effect of Dodd-Frank was to "make the SEC's authority in administrative penalty proceedings coextensive with its authority to seek penalties in Federal court. Nothing in Dodd–Frank or the securities laws

explicitly constrains the SEC's discretion in choosing between a court action and an administrative proceeding when both are available.") (citation omitted).

Ms. Bebo alleged in her Complaint that Section 929P(a) of Dodd-Frank is unconstitutional on its face under the Fifth Amendment guarantees of equal protection and due process because it provides the SEC unguided authority to choose which citizens will (and which will not) receive the procedural protections of federal district court, including the right to be tried by a jury, in defending themselves against the same alleged violations for the same potential penalties. (Compl. ¶¶ 93–95.) The law thus also unconstitutionally transfers the citizen's Seventh Amendment right to the government, allowing the government to the citizen's right against her.

Ms. Bebo also alleged that the SEC's internal administrative proceedings violate Article II's mandate that the President "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, because the ALJs who preside over SEC administrative enforcement actions are separated from the President by multiple levels of protection from removal in violation of Article II. (Compl. ¶¶ 59–61, 88.)

The district court dismissed Ms. Bebo's action for lack of subject matter jurisdiction, holding that although Ms. Bebo's claims are "compelling and meritorious," the district court cannot consider them because the administrative review scheme set forth in the Securities Exchange Act of 1934 ("Exchange Act") requires Ms. Bebo to litigate her claims before the SEC itself. *Bebo v. S.E.C.*, No. 15-C-3, 2015 WL 905349, at *2 (E.D. Wis. Mar. 3, 2015). In other words, the district court held that Ms. Bebo must first

ask the SEC ALJ presiding over her administrative proceedings to rule that those proceedings and his position are unconstitutional.

Ms. Bebo appealed to this Court, and following expedited briefing and argument, the panel consisting of Judges Rovner, Hamilton, and Bauer affirmed the district court's dismissal for lack of subject matter jurisdiction.

In the meantime, the administrative proceedings initiated by the SEC in December 2014 against Ms. Bebo progressed through a four-week hearing. Last week, the presiding ALJ issued his initial decision finding Ms. Bebo liable for securities violations; he ordered her to pay a civil penalty of $4,200,000 and imposed on her an officer and director bar.

Ms. Bebo will petition the full Commission for review of that decision, and if she is "aggrieved" by a final order of the Commission, the Exchange Act's statutory review scheme allows her to appeal that order to either this Court or the Court of Appeals for the District of Columbia Circuit. *See* 15 U.S.C. § 78y.

ARGUMENT

I. The Panel's Decision is Inconsistent with Precedent From the Supreme Court, This Court, and at Least One Other Circuit Court.

Federal district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. The question in this appeal is whether the statutory review provision of the Exchange Act, 15 U.S.C. § 78y, bars federal district courts from exercising jurisdiction over claims presented by a litigant who is also a respondent in an SEC enforcement action.

As the panel explained in its decision, a statutory review scheme such as Section 78y removes district court jurisdiction only when, first, that scheme displays a fairly discernable intent to limit jurisdiction, and, next, the claims at issue are of the type Congress intended to be reviewed within the statutory structure. (*Bebo v. S.E.C.*, No. 15-1511, Slip Op. at 5-6 (7th Cir. Aug. 24, 2015).) The panel acknowledged that, as to the first question, the Supreme Court has already held that Section 78 is *not* the exclusive route to review for all claims involving the SEC. (*Id.* at 6.)

To determine whether a litigant's claims are of the type that Congress *did* intend to funnel through the SEC administrative process, courts consider three factors: whether the litigant would receive meaningful review of her claims in the administrative process, whether her claims are wholly collateral to the administrative action, and whether the claims fall outside the agency's expertise. (*Id.* at 7.)

Though the Supreme Court has never indicated that all three factors must weigh in favor of district court jurisdiction for such jurisdiction to be proper, the panel found that just one factor weighing against district court jurisdiction was enough to preclude it. (*Id.* at 2). Specifically, the panel held that even though Ms. Bebo's claims can "reasonably be characterized as 'wholly collateral' to the statute's review provisions and outside the scope of the agency's expertise," the third factor weighs sufficiently against district court jurisdiction. The panel held that Ms. Bebo can obtain "meaningful judicial review" following the administrative process and, therefore, her claims are the type that must be heard in administrative court instead of district court. (Slip Op. at 2-3.)

In attempting to distinguish *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010)—a case in which the Supreme Court held that Section 78y did not provide meaningful review for a plaintiff with a claim very similar to Ms. Bebo's—the panel reached a conclusion that contradicts that case. This contradiction was noted by a panel of the D.C. Circuit in its recent opinion in *Jarkesy*. 2015 WL 5692065, at *11 ("In its recent decision, the Seventh Circuit declined to find district-court jurisdiction on that basis alone, which the court viewed to be the 'most critical' factor. *Bebo,* 2015 WL 4998489, at *8. Because we approach the various factors as guideposts for a holistic analysis, we proceed to examine the remaining considerations without assessing whether the capacity for meaningful review would alone suffice to negate jurisdiction.").

According to the panel, the "key factor" distinguishing *Free Enterprise* from this case is that Ms. Bebo "is already the respondent in a pending enforcement proceeding, so she does not need to risk incurring a sanction voluntarily just to bring her constitutional challenges before a court of competent jurisdiction." (Slip Op. at 17-18.) Indeed, the only meaningful distinction to which the panel cites between *Free Enterprise*, where the Supreme Court held that Section 78y did not preclude district court jurisdiction, and this case, where the panel held that it does, is that the SEC had already commenced an administrative proceeding against Ms. Bebo when she filed her federal action, while the *Free Enterprise* plaintiffs were the subject of an investigation but not an administrative proceeding at the time they filed suit.

But the Supreme Court has never held that federal jurisdiction turns on whether and when an executive agency decides to commence an administrative enforcement action. The determining factor for the *Free Enterprise* Court was the type of claim presented (*i.e.*, a challenge to the entire administrative process, as opposed to the merits of any potential allegations against the accounting firm), and by ignoring this dispositive factor and focusing instead on the happenstance of the procedural posture, the panel's interpretation results in subject matter jurisdiction in this case, and similar cases, turning solely upon when the SEC issues an Order Instituting Proceedings ("OIP"). Under this erroneous interpretation of *Free Enterprise*, the district court would have had jurisdiction over Ms. Bebo's claims had she filed them on December 2, 2014 (the day before an administrative proceeding was commenced against her), but it lost jurisdiction the next day when the SEC issued its OIP. This is not what the Supreme Court intended. If the fact that an agency has commenced an enforcement action was enough to determine the jurisdictional question, the Supreme Court easily could have said so in *Free Enterprise* or any of its other decisions bearing on this analysis.

The error in the panel's reasoning can be seen by comparing the procedural status of the agency action at the time the plaintiffs filed their district court cases in *Free Enterprise* and *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), to the procedural posture in *Thunder Basin Coal Company. v. Reich,* 510 U.S. 200 (1994). The plaintiff mine operator in *Thunder Basin* had not yet been issued a citation and there was no administrative action pending when it filed its complaint. This is no different than the accounting firm in *Free Enterprise*—the firm had been subject to an ongoing formal

investigation by the PCAOB, which had issued a report critical of its auditing procedures, but no administrative proceeding had been commenced.[1] 561 U.S. at 487. The same is true of the procedural posture in *McNary*; the plaintiffs in that case were alien farmworkers whose immigration applications had been denied, but against whom no deportation proceedings had been commenced. *McNary,* 498 U.S. at 487.

Thus, the stage of the agency proceedings in *Thunder Basin*, *Free Enterprise*, and *McNary* was identical. Yet in *Thunder Basin*, the Supreme Court held that jurisdiction *was not* proper in the district court and that the petitioner was required to invoke an administrative process in order to raise its claims. 510 U.S. at 205. But in *Free Enterprise* and *McNary*, where there were also no agency proceedings pending at the time the plaintiffs filed their district court actions, the Court held that jurisdiction was proper in the district court and the petitioners were not required to invoke an administrative process in order to raise their claims. Consequently, it is clear that the procedural status of the agency action (or inaction) in *Free Enterprise, McNary,* and *Thunder Basin* did not drive the Court's different outcomes.

The *Free Enterprise* Court's reasoning turned instead on the nature of the petitioner's claim—a constitutional challenge to the very existence of the administrative apparatus by which it was being investigated for wrongdoing.[2] Ms. Bebo's claims are

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[1] The accounting firm's district court complaint clearly anticipated an enforcement proceeding, and sought "declaratory and injunctive relief prohibiting the Board from carrying out its duties, including taking 'any further action' against [the accounting firm]." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 670 (D.C. Cir. 2008).

[2] Analyzing the type of claim is also the proper way to reconcile *Free Enterprise* with *Elgin v. Department of Treasury*, 132 S. Ct. 2126 (2012). The *Elgin* plaintiffs *challenged the merits* of their

analogous; she claims that all administrative enforcement proceedings the SEC institutes pursuant to its enforcement authority under Section 929P of Dodd-Frank are constitutionally defective *ab initio* because the Act of Congress enabling them is unconstitutional. That the SEC had already formally instituted an enforcement action against Ms. Bebo when she filed her complaint in district court does not cause subject matter jurisdiction over a constitutional challenge to the existence of the entire administrative proceeding apparatus suddenly to vanish. *See Leedom v. Kyne*, 358 U.S. 184, 190 (1958) (upholding injunction of agency action where petitioners had "no other means, within their control ... to protect and enforce that right").

Not only is the panel's decision contrary to Supreme Court precedent in this respect, it is also contrary to binding precedent from this Circuit. In *Jewel Cos., Inc. v. F.T.C.*, the Seventh Circuit found jurisdiction in federal district court was proper for the plaintiff's constitutional claims against the FTC *despite* the fact that an agency proceeding had already commenced. 432 F.2d 1155 (7th Cir. 1970). The plaintiff in *Jewel* brought several claims to the district court regarding an ongoing FTC proceeding. Considering the issue of jurisdiction on appeal, the Court parsed out the litigant's various claims and decided that some of them went to the merits of the administrative proceeding pending against it—and therefore could be meaningfully addressed within the administrative process—but that the litigant's claim attacking the FTC's authority

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removal from federal employment on the ground that the statute requiring it was unconstitutional. They sought "reinstatement …, backpay, benefits"—the same remedies regularly sought through administrative challenges to terminations. In contrast, Ms. Bebo's constitutional challenges do not at all affect the merits of the SEC's allegations that she violated the Exchange Act; her claims are not the type for which SEC enforcement actions are set up.

was unrelated to any substantive determination by the FTC and could therefore be lodged in district court. *Id.* at 1159. In other words, the Seventh Circuit has already decided that the institution of an agency proceeding is not determinative of whether district court jurisdiction is proper. The panel's reliance on the timing of the OIP in this case is therefore contrary to Seventh Circuit precedent.

At least one other circuit has similarly found that the institution of an SEC administrative proceeding is not determinative of district court jurisdiction. In *Touche Ross & Co. v. S.E.C.*, the Second Circuit held that the district court had erred in dismissing on jurisdictional grounds a federal question challenge to the SEC's statutory authority to conduct accountant disciplinary proceedings. 609 F.2d 570 (2d Cir. 1979). The Second Circuit reasoned that the issue was purely one of statutory interpretation and would not benefit from factual development or the application of agency expertise through an administrative proceeding. *Id*. at 577. At the same time, the *Touche Ross* court affirmed the dismissal of other claims that would have benefitted from administrative adjudication in the first instance. *Id.* at 574-75; *see also Central Hudson Gas & Electric Corp. v. E.P.A.*, 587 F.2d 549, 553 (2d Cir. 1978) (finding district court jurisdiction proper even though EPA proceeding had be initiated).

Because the panel's decision conflicts with precedent from the Supreme Court, this Circuit, and at least one other Circuit, this case warrants rehearing en banc.

II. This Case Presents a Question of Exceptional Importance Due to the Seriousness of the Claims Underlying the Jurisdictional Issue, the Prevalence of Similar Cases Pending Across the Country, and the Confused State of the Relevant Precedent.

A. Several Courts Across the Country are Considering this Important Jurisdictional Issue and Have Come to Different Conclusions.

The constitutional challenges Ms. Bebo seeks to press in district court are serious; she challenges the enabling legislation that authorizes the SEC arbitrarily to choose which citizens receive a jury trial and which other citizens will be subject to proceedings in its home court. She also challenges the authority of the ALJs who preside over every one of those administrative enforcement actions. The consequences for the SEC's enforcement authority, should Ms. Bebo's claims be found meritorious, are enormous.

Several other litigants, themselves respondents in SEC administrative proceedings, have also recently challenged the constitutional defects in the SEC's enabling legislation and in the appointment and retention of its ALJs. *See Jarkesy,* 2015 WL 5692065, at *1 (no jurisdiction over due process, equal protection, and APA claims); *Tilton v. S.E.C.*, No. 15-CV-2472, 2015 WL 4006165, at *1 (S.D.N.Y. June 30, 2015) (no jurisdiction over Appointments Clause and removal power claims); *Spring Hill Capital Partners, LLC v. S.E.C.*, No. 15-CV-4542 (S.D.N.Y. June 26, 2015) (bench ruling) (no jurisdiction over Appointments Clause claim); *Hill v. S.E.C.*, No. 15-CV-1801, 2015 WL 4307088, at *4, *9 (N.D. Ga. June 8, 2015) (jurisdiction over non-delegation, Seventh Amendment, Appointments Clause, and removal power claims); *Gray Fin. Grp., Inc. v. S.E.C.*, No. 15-cv-00492-LMM, (N.D. Ga. Aug. 4, 2015) (jurisdiction over removal power claim); *Duka v. S.E.C.*, No. 15 Civ. 357, 2015 WL 1943245, at *3-4, *7 (S.D.N.Y. Apr. 15,

2015) (jurisdiction over removal power claim); *Chau v. S.E.C.*, 72 F. Supp. 3d 417, 430, 436 (S.D.N.Y. 2014) (no jurisdiction over due process and equal protection claims).

The question of jurisdiction has played prominently in each of the similar cases pending in other jurisdictions. The Southern District of New York and the Northern District of Georgia, as noted above, have both found jurisdiction proper over claims similar or identical to Ms. Bebo's. In *Tilton v. S.E.C.*, the Second Circuit heard argument on September 16 and the very next day issued an order enjoining the SEC from conducting the hearing scheduled to take place in October in Ms. Tilton's administrative proceeding. No. 15-2103, ECF No. 77 (2d Cir. Sept. 17, 2015).

The national press has also noted the importance of both the jurisdictional and constitutional issues presented in Ms. Bebo's case and similar cases in other jurisdictions. *See, e.g.,* Peter J. Henning, *Constitutional Challenges to SEC's Use of In-House Judges,* N.Y. Times (October 5, 2015), http://www.nytimes.com/2015/10/06/business/dealbook/constitutional-challenges-to-secs-use-of-in-house-judges.html ("So much of this battle has been focused on what is the proper procedure for raising constitutional questions about the S.E.C.'s administrative process, and far less on the substance of the claims.").

Whether a citizen must endure an administrative process she contends is unconstitutional before she can challenge the act of Congress that established the agency's authority to institute that process is a question of exceptional importance to Ms. Bebo, to other similarly situated (unregulated) citizens, and to the SEC.

B. An Opinion by the Full Court Would Be Beneficial Given the Uncertain State of the Law, as Reflected by the Panel's Opinion.

This case is also one of exceptional importance because it presents an opportunity for this Court to clarify a confused area of the law. The issue in this appeal is a complicated one. As the panel noted in its decision, there are "unsettled" questions left by the patchwork of Supreme Court opinions dealing with administrative review schemes. (Slip Op. at 17.) One cause for confusion in the case law is the lack of clarity regarding when or if the related, but distinct, doctrines of exhaustion and finality should impact the subject matter jurisdiction analysis. Based on Supreme Court precedent, those doctrines are to be utilized in cases involving challenges to agency action, and not in cases (like this one) where the litigant's challenge does not bear at all on the merits of the agency's allegations or orders.

The distinction matters. In cases involving a litigant's challenge to "agency action," the Administrative Procedures Act ("APA") (or an analogous statutory review scheme like Section 78y) prescribes a route to judicial review in the federal courts of appeals following a final order from the agency. 5 U.S.C. § 704. Litigants trying to get into district court to challenge agency action before a final order must demonstrate why they should be excused from exhausting the remedies (*i.e.,* reaching a final order and taking it to a court of appeals) and allowed to proceed in district court instead. But Ms. Bebo has not challenged "agency action," and therefore the jurisdictional analysis for *her* claim starts from a different first principle. Ms. Bebo does not have to demonstrate why she should be excused from exhausting administrative remedies through Section 78y;

the question is whether Ms. Bebo's challenge to an act of Congress that in no way implicates the merits of securities fraud allegations implicates Section 78y at all.

In reaching its decision in this case, the panel mistakenly relied on principles taken from a case involving a challenge to agency action. (Slip Op. at 18-19 citing *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980)). In explaining why she will not obtain meaningful review if her claims are kept out of district court, Ms. Bebo noted in her briefs and at argument that by the time she reaches a court of appeals after agency review, she will have already been subjected to an unconstitutional proceeding and the court of appeals will not be able to afford the relief she seeks. (*See* Slip Op. at 18.) The panel dismissed this argument, citing a Supreme Court case that held that a litigant with a challenge to agency action who is forced to endure an administrative proceeding does not suffer irreparable harm. (*Id.* citing *Standard Oil*, 449 U.S. at 244.)

But the holding in *Standard Oil* is not applicable here. The *Standard Oil* Court addressed irreparable harm only because the plaintiff, attempting to gain access to district court to challenge agency action, argued that it should be excused from demonstrating the "finality" requirement under the APA because it would be irreparably harmed if forced to proceed administratively. *Standard Oil*, 449 U.S. at 244.

Ms. Bebo's cause of action is not premised on the APA, and she need not demonstrate finality of agency action to gain access to the district court. *Cf. Standard Oil*, 449 U.S. at 246 (the challenged agency action in that case was "a step toward, and [would] merge in, the Commission's decision on the merits"). Hers is an implied constitutional cause of action, which the court can entertain under its inherent equitable

power to enjoin unconstitutional acts by the government. *Bell v. Hood*, 327 U.S. 678, 684 (1946); *see also Free Enterprise,* 561 U.S. at 491 n.2 (an implied private right of action directly under the Constitution exists to challenge governmental action). The panel's analogy of this case to *Standard Oil* improperly conflates an analysis of irreparable harm aimed at determining whether a cause of action exists under the APA with a jurisdictional analysis of whether review of Ms. Bebo's constitutional claims in the administrative process is "meaningful" such that Section 78y should apply at all.

Finally, and importantly, proving irreparable harm is not a requisite for district court jurisdiction. Of course, Ms. Bebo would have to show irreparable harm in order to secure an injunction, but courts do not require a litigant to make that showing just to get into the courthouse in the first place. *See Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011) ("Of course, as our decision illustrates, a plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm necessary to obtain it.").[3] To suggest otherwise, as the panel did in this case, evidences a confusion of the question here: it is not whether Ms. Bebo has proven she is entitled to an injunction, but to whom she must present the request.

CONCLUSION

Because this case presents a question of exceptional importance, and because the panel's decision conflicts with controlling precedent, Ms. Bebo respectfully requests that this case be reheard en banc.

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[3] And violation of fundamental constitutional rights, as implicated in this case, has been found to constitute irreparable harm. But that is not a question for this appeal.

Dated this 8th day of October, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel for the Plaintiff-Appellant, Laurie A. Bebo, hereby certifies that this petition conforms to the rules contained in Circuit Rule 32 and Federal Rule of Appellate Procedure 32(a)(7). It was prepared with Microsoft Word using a proportionally spaced font, with 12-point print used in the text and 11-point print used in the footnotes.

Dated this 8th day of October, 2015.

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CERTIFICATE OF SERVICE

The undersigned, counsel for the Plaintiff-Appellant, Laurie A. Bebo, hereby certifies that on October 8, 2015, I electronically filed the Appellant's Petition for Rehearing En Banc with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that counsel for the Defendant-Appellee, Securities and Exchange Commission, is a registered CM/ECF user and that service will be accomplished by the CM/ECF system.

Dated this 8th day of October, 2015.

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