

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of

GREGORY T. BOLAN, JR.,
AND JOSEPH C. RUGGIERI

INITIAL DECISION
September 14, 2015

APPEARANCES: Alexander M. Vasilescu, Preethi Krishnamurthy, Sandeep Satwalekar, and Charles Riely for the Division of Enforcement, Securities and Exchange Commission

Silvia L. Serpe, Paul W. Ryan, and Eric B. Einisman, Serpe Ryan LLP, for Respondent Joseph C. Ruggieri

Noam A. Kutler, Michael J. Missal, and Stephen J. Crimmins, K&L Gates LLP, for non-party Wells Fargo Securities, LLC

BEFORE: Jason S. Patil, Administrative Law Judge

The Division of Enforcement alleges that Respondent Joseph C. Ruggieri participated in an insider trading scheme while employed as a trader at Wells Fargo Securities, LLC, in violation of the antifraud provisions of the federal securities laws. Gregory T. Bolan, Jr., a Wells Fargo research analyst, allegedly tipped Ruggieri of forthcoming ratings changes as to six stocks before they were made public. Ruggieri then allegedly used those tips to profitably trade in those six stocks, in a Wells Fargo institutional account, ahead of the ratings changes. Although the Division established that Ruggieri traded on such tips in four of six alleged instances, it did not satisfy its burden to establish that Bolan tipped Ruggieri for a personal benefit within the meaning of *Dirks v. SEC*, 463 U.S. 646 (1983), and *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014). This proceeding is therefore DISMISSED.¹

¹ This initial decision does not apply to Bolan. The proceeding was resolved as to Bolan based on his settlement offer. See *Gregory T. Bolan, Jr.*, Securities Act of 1933 Release No. 9795, 2015 SEC LEXIS 2201 (May 28, 2015). The Commission found Bolan liable for a violation of Securities Act Section 17(a)(3), which does not require scienter; imposed a cease-and-desist order; and ordered him to pay a \$75,000 civil penalty. *Id.* at *8-9 & n.2. It did not impose an industry bar or suspension.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission instituted this proceeding on September 29, 2014, pursuant to Section 8A of the Securities Act of 1933 and Sections 15(b) and 21C of the Securities Exchange Act of 1934. I granted, in part, summary disposition in favor of Ruggieri, ruling that the Division must establish that Bolan tipped him for a personal benefit in accordance with *Newman*, but deferred decision as to whether the Division met its burden. *See Gregory T. Bolan, Jr.*, Admin. Proc. Rulings Release Nos. 2350, 2015 SEC LEXIS 703 (Feb. 25, 2015); 2309, 2015 SEC LEXIS 523 (Feb. 12, 2015). I held twelve days of hearing in March and April 2015. The parties called several witnesses, including Ruggieri but not Bolan. I admitted into evidence hundreds of exhibits. Briefing concluded in June 2015.

I base my findings and conclusions on the record, applying preponderance of the evidence as the standard of proof.² *See Steadman v. SEC*, 450 U.S. 91, 100-04 (1981). Arguments and proposed findings that are inconsistent with this decision were considered and rejected.

B. Constitutional Issues

Ruggieri urges that I decide this case on the merits, but nevertheless raises constitutional issues for consideration.

1. Due Process

At the hearing, Ruggieri's counsel argued that this proceeding was "inherently unfair" because of "discrepancies" with district court procedures. Tr. 3058-59. However, "broad attacks on the procedures of the administrative process have been repeatedly rejected by the courts." *Harding Advisory LLC*, Securities Act Release No. 9561, 2014 SEC LEXIS 938, at *34-35 (Mar. 14, 2014) (citation omitted). It is settled that agency adjudication comports with due process and assures that the hearing officer exercises independent judgment, free from pressures by the parties or other officials within the agency. *See Butz v. Economou*, 438 U.S. 478, 513-14 (1978); *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1104-08 (D.C. Cir. 1988); *The Stuart-James Co.*, Exchange Act Release No. 28810, 1991 SEC LEXIS 168, at *4-5 (Jan. 23, 1991). Ruggieri cites no authority for the notion that administrative procedures must be coextensive with those in district court. Moreover, he has been given ample opportunity to defend the proceeding. *See Jonathan Feins*, Exchange Act Release No. 41943, 1999 SEC LEXIS 2039, at *25-26 (Sept. 29, 1999) ("Administrative due process is satisfied where the

² The hearing transcript is cited as "Tr. ___." The parties' exhibits are cited as they appear in their joint exhibit list: the Division exhibits and rebuttal exhibits, "DIV ___" and "DIV REB ___," and Ruggieri's exhibits and rebuttal exhibits, "JR ___" and "JR REB ___." The parties' joint stipulation as to findings of fact is cited as "JFOF ¶ ___." The Division's proposed findings of fact admitted by Ruggieri are deemed stipulated and cited as "Adm. FOF No. ___."

party against whom the proceeding is brought understands the issues and is afforded a full opportunity to meet the charges during the course of the proceeding.”).

2. Appointments Clause

Ruggieri asserts that this proceeding violates the Constitution’s appointments clause. In his view, SEC administrative law judges (ALJs) are inferior officers within the meaning of the appointments clause who must be appointed by the president, courts of law, or the Commission. Because I was not appointed in such manner, Ruggieri contends that this proceeding is defective. *See* Ruggieri Constitutional Obj. Reply at 1; *cf.* Ruggieri Answer at 6. In support, Ruggieri cites *Hill v. SEC*, 1:15-cv-1801, 2015 U.S. Dist. LEXIS 74822 (June 8, 2015), where a district court preliminarily enjoined a Commission proceeding on this basis. The *Hill* court’s injunction does not apply to this proceeding, and its conclusion is inconsistent with *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), which held that ALJs of the Federal Deposit Insurance Corporation were not inferior officers because they lacked final decision-making power. Based on *Landry*, the Commission has concluded that its ALJs are not inferior officers because they too lack such power. *Raymond J. Lucia Cos.*, Exchange Act Release No. 75837, 2015 SEC LEXIS 3628, at *5, *76-90 (Sept. 3, 2015).

In any event, Ruggieri’s constitutional argument is more properly addressed to the Commission, which assigned the case to an ALJ to hold a hearing and prepare an initial decision. The Commission is not bound by this decision, and its review of both fact and law is *de novo*. *See* 5 U.S.C. § 557(b); 17 C.F.R. § 201.411(a); *Francis V. Lorenzo*, Exchange Act Release No. 74836, 2015 SEC LEXIS 1650, at *37-38 (Apr. 29, 2015).

3. Tenure Protections

Next, Ruggieri claims that this proceeding violates the Constitution because ALJs have two layers of tenure protection. Contrary to his suggestion, the Supreme Court’s decision in *Free Enterprise Fund v. PCAOB* does not support his argument. *See* 561 U.S. 477, 492, 507 n.10 (2010) (holding that dual for-cause limitations on the removal of Public Company Accounting Oversight Board members contravene the Constitution’s separation of powers, but noting that “our holding also does not address that subset of independent agency employees who serve as [ALJs]” and that “unlike members of the Board, many [ALJs] of course perform adjudicative rather than enforcement or policymaking functions, . . . or possess purely recommendatory powers”).

4. Delegation

Ruggieri asserts that Congress’s delegation of authority to the Commission to pursue administrative proceedings violates the delegation doctrine in Article I of the Constitution. I do not have authority to adjudicate this claim. *See Milton J. Wallace*, Exchange Act Release No. 11252, 1975 SEC LEXIS 2238, at *7 (Feb. 14, 1975) (Commission explaining that it has “no power to invalidate the very statutes that Congress has directed [it] to enforce”). In any event, Ruggieri fails to cite any authority to support this claim.

5. Jury Trial

Ruggieri's contention that this proceeding violated his Seventh Amendment right to a jury trial is without merit. "[T]he Seventh Amendment is not applicable to administrative proceedings." *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) (citing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 454 (1977); *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974)).

II. BACKGROUND

A. Wells Fargo

Wells Fargo's sales and trading department generated profits through commissions earned by trading. Adm. FOF No. 2. For equity trades, Wells Fargo's institutional clients typically paid a certain amount of money (fixed by agreement with the client) per share of stock that Wells Fargo's traders traded for the client. Adm. FOF No. 3.

Wells Fargo's research department, including the equity research group, did not directly generate revenue or profit. Adm. FOF No. 4. Research by equity analysts helped generate revenue for Wells Fargo to the extent the research generated client trades through Wells Fargo. Adm. FOF No. 5.

The sales and trading department allocated a portion of its revenue to pay the research department's costs, including salaries of research department employees. Adm. FOF No. 6. This created tension between the research department and the sales and trading department, and the sales and trading department would voice displeasure if it did not believe the research department was doing a good job. Adm. FOF No. 7. Wells Fargo was in a competitive business that did not tolerate employees who underperformed. Adm. FOF No. 1.

B. Bolan

In June 2008, Bolan joined Wells Fargo (then Wachovia Capital Markets, LLC)³ as an equity research analyst and registered representative in Nashville, Tennessee. Adm. FOF No. 9; DIV 110 at 11, 183. Bolan holds a bachelor of business administration degree in finance from Emory University. DIV 39 at 6. Since his graduation in 2002, he has worked in the securities industry as an associate, analyst, and trader. DIV 39 at 8-9; DIV 110 at 10-11; JFOF ¶ 9. He holds multiple securities licenses. DIV 39 at 7.

At Wells Fargo, Bolan focused his research on three niche subsectors of the healthcare industry: pharmaceutical services or contract research organizations, healthcare information technology, and life science tools. Adm. FOF No. 10. Many of the stocks Bolan covered were small-cap, relatively illiquid stocks. Adm. FOF No. 11.

³ Wachovia was acquired by Wells Fargo in 2008. I refer to the former Wachovia as Wells Fargo in this initial decision.

Bolan had a reputation as “one of the rising stars within [Wells Fargo’s research] department.” Tr. 1376-77; *see* DIV 40 at 3; DIV 110 at 25-26. In October 2010, Ruggieri knew that Bolan was ranked as the best “up-and-comer” analyst in the healthcare technology and distribution subsector by *Institutional Investor’s* All-America Survey of U.S. Equity Research Analysts. Tr. 2042-43; DIV 40.

Wells Fargo did not require supervisory approval before an analyst like Bolan could publish a ratings change, although analysts did need approval to initiate coverage on a stock. Adm. FOF No. 99. Bolan’s supervisors told him that if he wanted to do so, he could let them know about his theories and thesis for a forthcoming ratings change, even though no approval was required. Adm. FOF No. 100.

From the time Bolan joined Wells Fargo until March 2011, Bolan was a vice president, a level below director. Tr. 1378-79; DIV 28. During this period, Todd Wickwire and Sam Pearlstein were the co-heads of Wells Fargo’s equity research department and supervised Bolan. Tr. 96, 236, 1315-16. In November 2010, Wickwire nominated Bolan for promotion from vice president to director, which became effective in March 2011. Adm. FOF No. 546; DIV 28.

In August 2010, Bolan hired Timothy Evans as his associate analyst in the Nashville office as a direct report to Bolan. JFOF ¶¶ 6-7; Tr. 1234-35. Over time, however, their relationship became strained. Tr. 1292-95. By the fall of 2010, Evans began raising concerns to Bolan about his selective dissemination of unpublished research to certain high-paying clients and, by April 2011, escalated those concerns to Wickwire. Adm. FOF Nos. 196, 198-99, 201-02, 205-06, 209-10, 605. Also in April 2011, a compliance officer at SAC Capital Advisers LP, a hedge fund client, alerted Wells Fargo’s compliance department that Ruggieri had sent an instant message to an SAC trader about Bolan’s unpublished research. Adm. FOF Nos. 602-03.

In April 2011, Wells Fargo decided to terminate Bolan, after a compliance investigation concluded that Bolan’s communication of nonpublic research to clients violated Wells Fargo’s prohibition against previewing as-yet-unpublished research and the firm’s requirement that research be publicly disseminated at the time of its disclosure—not selectively distributed to certain clients first. Adm. FOF Nos. 612, 614, 616. Wickwire traveled to Nashville to terminate Bolan in person, but Bolan resigned before Wickwire could do so. Adm. FOF No. 617. In July 2011, Wells Fargo filed a Form U5 disclosing that it had conducted an internal review of Bolan and concluded that he had selectively disseminated information and failed to preserve confidential information. Adm. FOF Nos. 618-19; DIV 163. After leaving Wells Fargo, Bolan worked as an analyst at two other firms. DIV 39 at 8; Adm. FOF No. 625.

C. Ruggieri

In August 2009, after about eight years of working as an analyst and then an equity trader for Banc of America Securities LLC, Ruggieri joined Wells Fargo as a senior trader of healthcare stocks and registered representative in the New York office. JFOF ¶¶ 10-11, 19; Adm. FOF No. 12. He was recruited to Wells Fargo by Matt Brown, who previously served as his supervisor at Banc of America. Adm. FOF Nos. 12-13. Ruggieri holds a bachelor of science degree in

business administration from the University of North Carolina and multiple securities licenses. DIV 77 at 6-7; Tr. 2035.

As a trader at Wells Fargo, Ruggieri worked in a different department than Bolan, who worked in equity research, and Ruggieri was not Bolan's supervisor. JFOF ¶¶ 12-13. After Ruggieri joined, Wells Fargo had only two healthcare traders: Ruggieri, the senior trader, and Chip Short, the junior trader. Adm. FOF Nos. 14-15. Upon joining, Ruggieri and Short divided the list of healthcare stocks Wells Fargo covered, and Ruggieri took more stocks than Short. Adm. FOF No. 16. Ruggieri covered at least 277 healthcare stocks at Wells Fargo, which Short would cover when Ruggieri was away from the trading desk. Adm. FOF Nos. 17-18. Ruggieri traded all the stocks Bolan covered as an analyst; Short did not cover any of Bolan's stocks. Adm. FOF No. 41. Ruggieri was Bolan's primary contact at Wells Fargo's trading desk, and Bolan rarely spoke with Short. Adm. FOF Nos. 42-43. Wells Fargo had at least seven other healthcare analysts with whom Ruggieri spoke, but Ruggieri interacted more with Bolan than with any other healthcare analyst. Adm. FOF No. 45. In addition, Ruggieri worked with Bruce Mackle, who was the desk analyst and part of the healthcare trading team with Ruggieri and Short, but Mackle did not place trades. Tr. 959, 2439, 2497, 3166-68.

When Ruggieri joined Wells Fargo, his title was director, and he remained at that level until approximately March 2011, when he was promoted to managing director. Adm. FOF No. 37; Tr. 2310. During this period, Brown was the head of cash trading and Ruggieri's direct supervisor. Tr. 915-16, 977. Brown reported to Chris Bartlett, the head of equity sales and trading. Tr. 915, 947, 1130.

Ruggieri's primary job at Wells Fargo was to execute customer transactions in the stocks he covered, in order to generate commissions for Wells Fargo. Adm. FOF No. 19. Ruggieri's job was to lose as little of the commissions as possible when unwinding the other side of customer trades. Adm. FOF No. 20. In addition, Ruggieri placed principal trades on Wells Fargo's behalf (i.e., in a principal capacity), in which he bet Wells Fargo's capital on stock positions and turned profits or took losses for Wells Fargo. Adm. FOF No. 21; JFOF ¶ 11. Ruggieri could take principal positions in any of the stocks he covered, but did not make as many principal trades as some of the other equity traders on the trading desk. Adm. FOF Nos. 22-23.

Ruggieri was one of the top-producing traders at Wells Fargo. Adm. FOF No. 40. In early 2010, competitor firms tried to recruit Ruggieri from Wells Fargo. Tr. 948, 2394-95. To persuade Ruggieri to stay, Wells Fargo matched one of its competitor's guaranteed offers of compensation. Tr. 1162-63. For 2010, Ruggieri's guaranteed compensation was \$1.8 million, which made him the highest-paid equity trader at Wells Fargo. Adm. FOF No. 75; JFOF ¶ 22.

Ruggieri had his own personal phone line—his specific extension—at Wells Fargo, ending in 6210 (the 6210 Line). Adm. FOF No. 224; JFOF ¶ 31. Ruggieri was the only person who made calls from the 6210 Line. Adm. FOF No. 225. Short generally picked up Ruggieri's 6210 Line when Ruggieri was on another phone line or away from the desk. Adm. FOF No. 231.

In April 2011, Bartlett terminated Ruggieri for cause. Adm. FOF No. 620. In July 2011, Wells Fargo filed a Form U5 disclosing that its termination of Ruggieri was a result of: "loss of

confidence due to failure to escalate issues regarding the inappropriate dissemination of information.” Adm. FOF No. 621 (capitalization altered); DIV 164. After Wells Fargo terminated Ruggieri, he worked as a trader at International Strategy and Investment Group until October 2014. Adm. FOF No. 622.

D. Moskowitz

The Division alleges that Bolan also tipped his friend Josh Moskowitz ahead of Bolan’s ratings changes.⁴ Bolan and Moskowitz became friends in 2005, when they both worked on the trading floor at First New York. Adm. FOF No. 24. They were “very good,” “close,” “trusted” friends. Adm. FOF No. 27. Moskowitz suffered from a debilitating disease and was unemployed from June 2009 through November 2010. JFOF ¶ 186; Adm. FOF No. 25. From at least June 2009 through November 2010, Moskowitz traded in his personal brokerage accounts. Adm. FOF No. 28. Moskowitz is now deceased. JFOF ¶ 202.

III. CONDUCT AT ISSUE

Ruggieri traded ahead of Bolan’s ratings changes as to six stocks, and Moskowitz traded ahead of Bolan’s ratings changes as to three of the same six stocks.

In late March and early April 2010, Ruggieri established a short position in Parexel International Corp. (PRXL) ahead of Bolan’s April 7 downgrade of PRXL; and on April 6, Moskowitz established a short position in PRXL ahead of the same downgrade.⁵ JFOF ¶¶ 59-61, 65-67, 69, 72, 75-77, 81; DIV 194-A at 1-2; Adm. FOF No. 278.

In June 2010, Ruggieri purchased shares of Covance Inc. (CVD) ahead of Bolan’s June 15 upgrade of CVD. JFOF ¶¶ 89-92; DIV 194-A at 3.

In early July 2010, Ruggieri and Moskowitz purchased shares of Albany Molecular Research Inc. (AMRI) ahead of Bolan’s July 6 upgrade of AMRI. JFOF ¶¶ 99-100, 102, 189; DIV 194-A at 4-5; Adm. FOF No. 318.

In August 2010, Ruggieri and Moskowitz purchased shares of Emdeon Inc. (EM) ahead of Bolan’s August 16 upgrade of EM. JFOF ¶¶ 121-22, 124; DIV 194-A at 6-7; Adm. FOF No. 351-52.

In early February 2011, Ruggieri purchased shares of athenahealth Inc. (ATHN) ahead of Bolan’s February 8 upgrade of ATHN. JFOF ¶¶ 135-36, 139; DIV 194-A at 8.

⁴ Moskowitz is referenced in the OIP as “Trader A.” OIP at 7. Although Ruggieri is not liable for Bolan’s alleged tips to Moskowitz, the conduct between Bolan and Moskowitz is relevant to determining whether Bolan was tipping Ruggieri.

⁵ The acronym following each company name is its stock symbol. Generally, I use the company name when referring to the company, and the stock symbol when referring to its stock.

In March 2011, Ruggieri purchased shares of Bruker Corp. (BRKR) ahead of Bolan's March 29 report initiating coverage of BRKR with an outperform/buy rating. JFOF ¶¶ 148-49, 151-52, 155-56, 161-62, 165, 167-68; DIV 194-A at 9; Adm. FOF No. 386.

Ruggieri traded in a principal capacity in a Wells Fargo's institutional account, whereas Moskowitz traded in his personal trading account. Ruggieri's trades at issue generated profits for Wells Fargo totaling at most \$117,127. JFOF ¶ 27; DIV 195; *see* Adm. FOF Nos. 288, 307, 339, 361, 378, 394.

IV. DISCUSSION

A. Overview

Ruggieri is charged with violating Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Exchange Act Rule 10b-5, which prohibit fraudulent conduct in the offer and sale of securities, and in connection with the purchase or sale of securities. *See* 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5; OIP at 9. These antifraud provisions do not require equal information among market participants; the mere act of trading on insider information is not fraud. *See Dirks v. SEC*, 463 U.S. 646, 654, 657 (1983); *United States v. Newman*, 773 F.3d 438, 445 (2d Cir. 2014). Rather, insider trading constitutes fraud within the meaning of these provisions when it involves a market participant's breach of a fiduciary duty owed to a principal for a personal benefit. *See United States v. O'Hagan*, 521 U.S. 642, 652-53 (1997); *Dirks*, 463 U.S. at 663; *Newman*, 773 F.3d at 446.

The Division alleges that Bolan tipped Ruggieri with confidential information (i.e., Bolan's not-yet-published ratings changes that should have been kept confidential) in breach of a duty to Wells Fargo for a personal benefit, and Ruggieri traded based on such tips. *See generally* OIP. Thus, the alleged breach arises under the misappropriation theory of insider trading liability. *See O'Hagan*, 521 U.S. at 652 (the misappropriation theory "holds that a person commits fraud 'in connection with' a securities transaction . . . when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information"), 653-54 ("A fiduciary who pretends loyalty to the principal while secretly converting the principal's information for personal gain . . . dupes or defrauds the principal." (internal quotation marks and brackets omitted)).

Ruggieri's liability as the alleged tippee is derivative of Bolan's alleged breach. *See O'Hagan*, 521 U.S. at 663; *Dirks*, 463 U.S. at 659. To establish Ruggieri's liability, the Division must therefore show that: 1) Bolan tipped material non-public information to Ruggieri in breach of a fiduciary duty owed to Wells Fargo for a personal benefit to himself; 2) Ruggieri knew or had reason to know of Bolan's breach, that is, he knew the information was confidential and divulged for a personal benefit; and 3) Ruggieri still used that information by trading or by tipping for his own benefit. *See Newman*, 773 F.3d at 450; *SEC v. Obus*, 693 F.3d 276, 286-87, 289 (2d Cir. 2012). *Scienter*—a required element of Section 17(a)(1), Section 10(b), and Rule 10b-5—can often be deduced from the same facts that establish the tipper acted for a personal

benefit.⁶ *Obus*, 693 F.3d at 286. Lastly, the interstate commerce element of these provisions can be satisfied by use of the telephone in some phase of the misconduct. *See SEC v. Stanard*, 06-cv-7736, 2009 WL 196023, at *25 (S.D.N.Y. Jan. 27, 2009).

There is no dispute that Bolan's ratings changes were material; ratings changes typically moved stock prices, and Ruggieri knew this. Adm. FOF Nos. 102, 105-07, 114; Tr. 1201, 2046-47. Bolan's ratings changes had a statistically significant impact on the stock prices of the securities being rated. Adm. FOF No. 115. Ruggieri paid attention to Bolan's ratings changes and observed that Bolan's ratings changes typically, but not always, moved stock prices. Tr. 2040-41.

It is also undisputed that unpublished research reports were confidential, nonpublic information. Adm. FOF No. 136. Wells Fargo prohibited its research analysts from sharing forthcoming research with the firm's traders, clients, or anyone else outside the research department; the reports were to remain nonpublic until they were publicly disseminated; and Bolan and Ruggieri knew this policy. Adm. FOF Nos. 136-40, 166-67. Further, Ruggieri knew that he was prohibited from trading based on nonpublic information from a forthcoming research report. Adm. FOF Nos. 169-70.

The contested issues are whether Bolan tipped Ruggieri and, if so, whether Bolan did so for a personal benefit.

B. Bolan Tipped Ruggieri

I find that Ruggieri traded ahead of Bolan's research reports on AMRI, EM, ATHN, and BRKR based on Bolan's tips of forthcoming ratings changes, but not as to PRXL and CVD.

As in most insider trading actions, there was no direct evidence that Bolan tipped Ruggieri. *See SEC v. Roszak*, 495 F. Supp. 2d 875, 887 (N.D. Ill. 2007). In the absence of direct proof, however, "circumstantial evidence such as suspicious timing of trades, contacts between potential tippees and tippees, and incredible reasons for such trades provide an adequate basis for inferring that tipping activity has occurred." *SEC v. Singer*, 786 F. Supp. 1158, 1164-65 (S.D.N.Y. 1992); *see Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960) ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."); *United States v. McDermott*, 245 F.3d 133, 139 (2d Cir. 2001); *United States v. Riley*, 13-cr-339, 2015 WL 891675, at *14-15 (S.D.N.Y. Mar. 3, 2015). Although Ruggieri disagrees with the Division's ultimate contention that Bolan tipped him, most of the underlying facts are undisputed.

⁶ "Essentially the same elements are required" to prove fraud under Section 17(a) as are required under Section 10(b). *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999). The Division correctly notes that Section 17(a)(2) and (3) do not require scienter, but does not separately argue its claims under those provisions. Div. Br. at 15 n.3; *see Aaron v. SEC*, 446 U.S. 680, 696-97 (1980).

1. General Issues

Before discussing the specific trades, I address several overarching issues that provide a framework for my analysis:

Bolan had the means and opportunity to tip Ruggieri with respect to each trade in question. As discussed below, this is generally established by phone calls that Bolan made to Ruggieri in advance of the trades and publication of the ratings changes. Although a handful of other individuals could have answered Ruggieri's phone at Wells Fargo if he was absent, Ruggieri was the primary user of his 6210 Line, and he was almost certainly at the New York office at the time of the calls in question. There is no evidence that any call at issue, between the numbers associated with Bolan and Ruggieri, involved anyone but the two of them. Even if, as Ruggieri contends, Bolan spoke to Mackle and Ruggieri equally, those calls were not joint and do not undermine that Bolan had the means to tip Ruggieri.

I am unconvinced by Ruggieri's argument that he would never have received a tip from Bolan on a Wells Fargo phone line because he "had the reasonable assumption that his calls on the trading desk lines were taped." Ruggieri Br. at 10. That assumption was not supported by his hearing testimony, where he revealed he did not consider the issue at the time and did not know either way. Tr. 2414-15. Ruggieri never said that he was advised that his calls would be taped, and Wells Fargo did not, in fact, tape his calls. JFOF ¶ 37. Ruggieri's after-the-fact assertion that he assumed calls were taped is therefore not credible and does not outweigh the Division's evidence.

The Division contends that it is statistically impossible that Ruggieri would have—as a matter of pure chance—held profitable overnight positions in the six stocks at issue for which Bolan issued ratings changes. Tr. 3537-40. That contention, while sound, does not fully address the issue. Ruggieri's defense is not that this occurred by mere chance, but that because of the "symbiotic relationship between analysts and traders," he was reacting to the same facts and circumstances regarding the fortunes of the companies in question. Ruggieri Br. at 3. Because the opinion of the Division's expert, Dr. Edward S. O'Neal, does not address the so-called "symbiotic relationship" between Bolan and Ruggieri, nor Ruggieri's "contemporaneous thesis" for each trade, I do not rely on it as an indictment of Ruggieri's explanation for the trades. *See generally* DIV 177 (O'Neal Report).

The Division contends that an analyst's rationale for a ratings change (which is based on a long-term projection) and a trader's trading strategy (which is generally short-term) are not necessarily the same. However, the data points followed by traders and analysts, which may have both short- and long-term effects, are subjects that analysts and traders should reasonably discuss. In addition, the Division seems to miss the point that even though short-term events may not necessarily influence an analyst's long-term outlook, they may nonetheless inform the analyst's decision about when to publish an upgrade or downgrade, in order to garner attention and influence with clients. It would be logical for an analyst to issue a research report on a certain stock at a time when institutional clients are focused on that stock—such as following a prominent conference regarding a company or its sector. Because those short-term events may also exert pressure on stock prices, the same event that motivates an analyst to publish may also

motivate an experienced trader to benefit from trading in relation to the event. This is borne out as to Ruggieri's trading in PRXL and CVD, as discussed below.

On the other hand, to the extent that Ruggieri's explanations for the trades are unpersuasive and incredible, Dr. O'Neal's expert report is on point: it is improbable and highly suspicious that Ruggieri just so happened to hold overnight positions that turned out to be profitable following Bolan's ratings changes.

Thus, for each trade at issue, I considered Ruggieri's explanation as to why he held a position before Bolan's ratings changes. Where Ruggieri has a clear, contemporaneous thesis for his position and the timing for that position, the evidence weighs toward finding that there was no tip. Where Ruggieri's thesis is persuasive, it bears to reason that, although Bolan could have tipped Ruggieri by virtue of their phone calls, such calls do not necessarily mean that Bolan tipped him. Bolan and Ruggieri presumably had other subjects to discuss, since they were not just expected, but directed, to be in "constant dialogue" by Wells Fargo. DIV 107 at 1; Tr. 1468. However, where Ruggieri's thesis fails to plausibly explain his position preceding Bolan's report, given the statistical implausibility of such a position occurring by chance, the evidence weighs toward finding that Ruggieri traded based on Bolan's tip.

In addition, Moskowitz communicated with Bolan and traded ahead of Bolan's ratings changes as to three of the same six stocks as Ruggieri: PRXL, AMRI, and EM. DIV 194-A at 1-2, 4-7. In each instance, Moskowitz made a profit. Adm. FOF Nos. 289, 338, 360. Bolan and Moskowitz were close friends and, at the time of the trades, they were not professional colleagues. Moskowitz was not a Wells Fargo employee and there is no plausible explanation for him to be in "symbiosis" with Bolan and Ruggieri. That Bolan's friend would have just so happened to trade in the same manner as Ruggieri, in a profitable manner in advance of Bolan's reports, is probative of a common tipping scheme—except as to PRXL where I find that Ruggieri has a clear, contemporaneous thesis for his trades.

Ruggieri argues that Moskowitz's trades do not support any pattern because Moskowitz did not trade in advance of three of six reports (namely, Bolan's reports covering CVD, ATHN, and BRKR), even though Moskowitz and Bolan spoke on multiple occasions before the CVD and ATHN ratings changes. Ruggieri Br. at 7-8. But, that Moskowitz did not trade on those occasions does not undermine the fact that he traded parallel to Ruggieri on three specific occasions. Moskowitz suffered from a debilitating disease that left him confined to his home, trading relatively modest sums in his personal accounts. He simply may have not had the wherewithal to trade on each tip he received.

In his report, Dr. O'Neal opined that "the most profitable way to trade in relation to an analyst ratings change would be to buy the stock the day before the change and sell it the day after the change." DIV 177 at 5. Ruggieri claims that his trades in PRXL, AMRI, and BRKR do not fit this pattern. Ruggieri Br. at 7. At best, that suggests that as to these three of the six trades at issue, he did not trade in "the most profitable way" ahead of research, but as to the other three, there is no dispute that his trading fit such pattern. In any event, the trading pattern in relation to profits is a helpful measure but not dispositive; it requires context. Dr. O'Neal's statement is simply a general proposition regarding how to maximize the profit from trading before a ratings

change, and does not consider other specific circumstances. So, for example, if Ruggieri was attempting to avoid or minimize the risk of detection, he may have gradually built or sold a position, as opposed to buying and selling immediately before and after the ratings change. Furthermore, if Ruggieri thought there were circumstances that minimized market risk from holding the position overnight, he may have held it longer than he would have otherwise. Simply put, Ruggieri's observation does not weigh in his favor.

Ruggieri also claims that "he traded in the opposite direction of Mr. Bolan's research on multiple occasions." Ruggieri Br. at 7. However, Ruggieri never traded in the opposite direction of Bolan's ratings changes at issue, which Ruggieri does not dispute were material to the stock prices.

Ruggieri contends that that "he did not trade in advance of the MDRX initiation of coverage with an out-perform rating" that took place in October 2009, roughly two months after Ruggieri joined Wells Fargo. Ruggieri Br. at 7 & n.2. However, the Division's case does not rise or fall on whether Bolan began to tip Ruggieri by that date or whether Bolan began tipping Ruggieri soon after he joined Wells Fargo.

Lastly, Ruggieri claims that "some trades took place before Mr. Bolan received approval of his request to change a rating." Ruggieri Br. at 8. Regardless whether Bolan thought he needed supervisory approval to publish a ratings change (and he did not, Adm. FOF No. 99), Bolan's "requests" to do so were never denied as to the six ratings changes at issue. If Ruggieri had waited for a ratings change to be approved, he may have missed the opportunity to build a profitable position. The ratings changes were usually published after the close of the trading day or in the early morning before the opening of trading. If Bolan's supervisory "approval" came late in the trading day, or after the close of trading, Ruggieri may have lost the opportunity.

2. The Trades

Parexel International Corp. (PRXL)

Parexel is a healthcare company in the contract research sector. JFOF ¶ 48. On March 22, 2010, Bolan published a squawk⁷ titled "CRO's: Stronger USD Creates Headwind." JR 14. Bolan noted that: 1) "A stronger USD hurts top line growth for [contract research organizations (CROs)]"; 2) "Our intra-quarter analysis indicates the biggest negative impact for PRXL and CVD"; and 3) Parexel's fiscal-year 2010 revenue would be negatively impacted by \$20 million, and earnings per share would be negatively impacted by \$0.02. *Id.* at 1-2. Ruggieri viewed the information contained in Bolan's squawk, and the fact that the company did not hedge its currency exposure, as potentially bad news for PRXL's price. Tr. 2689-91. In light of the stronger U.S. dollar, Ruggieri had concerns about Parexel's failure to hedge against currency risks. Tr. 2689-90; JR 14.

⁷ In contrast to a research report, a squawk is brief and hits "major points of typically faster moving information," which is then disseminated to clients and the general public. Tr. 93-94, 210, 309.

On the evening of March 22, Ruggieri hosted a Wells Fargo dinner with healthcare-dedicated hedge fund clients. Bolan attended the dinner. Tr. 2695; JR 18. Ruggieri reported to Brown and Bartlett about the event, and Bartlett encouraged Ruggieri to “monetize these events.” Tr. 2691-94; JR 17. The attendees were buy-side customers, described as “smart money” or experts on where stocks were headed in this sector. Tr. 998-99, 1028. They told Ruggieri that they were short in CROs. Tr. 2695-96; JR 18. Mackle testified that it is reasonable to develop a trading thesis based on what “smart” investors are doing. Tr. 3268-69.

The next day, Ruggieri shorted 5,000 PRXL shares. JFOF ¶ 51; Tr. 2696. On March 24, Bolan confirmed Ruggieri’s thinking that PRXL was not a crowded short, as Bolan said that he had “just started hearing that folks are shorting.”⁸ JR 20; Tr. 1001-02. Since it was not a crowded short, a short position was less risky. Tr. 2696-99. As of the market close on March 24, Ruggieri doubled his short position to 10,000 shares. JFOF ¶ 54. On March 25, Ruggieri exited his short position. Tr. 2835.

Ruggieri’s next short position in PRXL was not until March 30. Tr. 2836. He testified that he went “flat” in PRXL between March 24 and 30 because the stock began to trade lower, and there was a risk that the price could go back up with more demand, which would make a short trade less attractive. Tr. 2703-04, 2708; *see* JR 56.

Ruggieri’s active trading on behalf of clients gave him good visibility as to who was trading in PRXL and whether they were long or short. Tr. 2704-06; *see* JR 23. On March 29, Ruggieri sent an email to a client, Fidelity, informing that PRXL was trading as low as it had in a few weeks. Tr. 2706-07; JR 25. On or before March 29, Bolan began drafting a forthcoming research report that would downgrade PRXL. Adm. FOF No. 272.

On March 30, before the market opened, Raymond James, a Wells Fargo competitor, upgraded PRXL to a strong buy. Tr. 2708-09; JR 26. Ruggieri concluded that the Raymond James upgrade did not contain any new information that would change his thesis, but could cause PRXL’s price to increase in the short term, making it more attractive to short. Tr. 2711-12. At 7:07 a.m. on March 30, Ruggieri forwarded the Raymond James upgrade to Bolan, with the email’s importance level marked as “high.” JR 26. Three minutes later, Bolan called Ruggieri at the 6210 Line. JFOF ¶ 56; Tr. 2117-19. Wells Fargo analysts, as part of their constant dialogue with their trading counterparts, were directed to call their trader if a competitor changed a rating. DIV 107 at 2. The timing of Bolan’s call to Ruggieri, and the correspondence that preceded it, was consistent with that company policy.

At 7:19 a.m. on March 30, Ruggieri told a client that he viewed the Raymond James upgrade as an opportunity to sell short in PRXL. Tr. 2712-13; JR 33. On March 30, following the Raymond James upgrade, PRXL opened 3.6% higher than the prior day’s close. JR 56.

⁸ A crowded short is when many market participants hold short positions in the same stock; the fear is that the stock price will increase if everyone rushes to cover their short positions at the same time. Tr. 1001-02, 3283.

At 11:20 a.m. on March 30, Bolan called Ruggieri at the 6210 Line, and the call lasted two minutes. JFOF ¶ 57; Tr. 2119. At the time of this call, Bolan was between client meetings while in Boston. JR REB 111, 111A at 2; Tr. 2714-15. It would have been unusual if Bolan had not called Ruggieri to update him on the last client meeting. Tr. 2715. Ruggieri wrote in his midday report that “CROs have been one of the few bright spots after PRXL upgrade keeping the group afloat but we’ve been much better for sale again” JR 29. At 2:23 p.m. on March 30, Bolan sent Pearlstein, one of his supervisors, an email with his rationale for downgrading PRXL to “market perform,” and Bolan said he was thinking about issuing the downgrade “in the next day or so.” DIV 48. Pearlstein approved the downgrade. *Id.*

By the market close on March 30, Ruggieri shorted 5,000 shares in PRXL. JFOF ¶ 61. At 4:15 p.m. on March 30, Bolan again called Ruggieri at the 6210 Line. Tr. 2120, 2719; JFOF ¶ 62.

On March 31, in the last twenty-five minutes of the trading day, Ruggieri purchased 215,000 PRXL shares on behalf of Fidelity. JR 37. He told Bolan that there was a lot of supply in the stock. JR 37. When there is a lot of supply in a stock, it suggests that the stock price will likely go down, as there is more supply than demand. Tr. 981, 3270. In telling Bolan that there was a lot of supply, Ruggieri in effect communicated to Bolan that PRXL’s price would likely go down. Tr. 2723-24. On March 31, Ruggieri increased his short position in PRXL to 10,550 shares. JFOF ¶ 67.

On April 5, PRXL shares traded higher and Ruggieri increased his short position to 27,750 shares. JR 56; JFOF ¶ 72.

Also on April 5, at 5:53 p.m., Bolan called Moskowitz, and the call lasted two minutes. Adm. FOF Nos. 276-77; JFOF ¶ 195. At 7:39 p.m. that same day, Bolan called Ruggieri’s cell phone, and the call lasted approximately eighteen minutes. JFOF ¶ 73; Tr. 2125-26. At 7:54 and 7:55 p.m. during the call, Bolan sent Ruggieri four emails, each containing contact information for San Francisco-based portfolio managers. JR 45, 45A, 46, 46A, 47, 47A, 49, 49A; Tr. 2726-27. Ruggieri traveled to San Francisco on business four days later. Tr. 2727-28. Bolan’s calls reflect that he had the means and opportunity to tip Moskowitz and Ruggieri about his prospective PRXL downgrade; however, it seems more plausible that Bolan’s call to Ruggieri addressed Ruggieri’s upcoming trip to San Francisco given the emails exchanged.

On April 6, before the market opened, Ruggieri reported to the head of the Wells Fargo research sales office in San Francisco that the street’s expectations for PRXL were too high going into the quarter. Tr. 2729-30; JR 53. After the market opened that day, Ruggieri told a client that he did not like PRXL going “into the q[uar]ter,” but he had seen shorts in the stock since it had been trading at \$23. JR 54; *see* JR 51; Tr. 2731-32. At 2:21 p.m. on April 6, Bolan called Ruggieri, and the call lasted approximately three minutes. JFOF ¶ 74; Tr. 2126. At the market close that day, Ruggieri had nearly doubled his short position to 52,500 shares, which he held overnight. Tr. 2127; JFOF ¶ 77. Ruggieri did so because he had a conviction that the stock was going to trade lower, as it was as high as it had been in months, making a short trade more attractive. Tr. 2732-33, 3007-09; JR 56. That evening, Ruggieri called Bolan three times. JFOF ¶¶ 78-80; Tr. 2129-30.

Also on April 6, Moskowitz sold short 2,000 shares of PRXL, but unlike Ruggieri, he had not traded in PRXL for at least the prior six months. Adm. FOF No. 278.

On April 7, Wells Fargo published Bolan's research report, titled "PRXL: Downgrading to Market Perform[.] Optimism Running High and Valuation Running Even Higher." JFOF ¶ 81. Bolan downgraded PRXL because, among other reasons, the street's expectations were "baked into the current share price" and because the strengthening U.S. Dollar would "limit potential upside" to the company's revenue. JR 55. Bolan's reasons for the downgrade reflected similar concepts that had been in the market since his March 22 squawk and that were in Ruggieri's client communications. Tr. 2733-34. On April 7, Ruggieri forwarded the PRXL downgrade to Brown. JR REB 100. The same day, another Wells Fargo trader emailed Bolan that he liked the downgrade and thought it was a good time to do it. JR 57.

When the market opened on April 7, PRXL's price sank 3.2% from its closing price the prior day. Adm. FOF No. 285. Over the course of the same day, PRXL's trading volume increased 163% relative to the stock's average daily trading volume on the fifteen days before and after the downgrade. Adm. FOF No. 286. By the market close, PRXL's price had dropped 4.34% from the prior day's closing price. Adm. FOF No. 287.

On April 7, Ruggieri covered his entire short position in PRXL and generated gains of \$24,944 or \$29,032, depending on the calculation method. Adm. FOF No. 288. That same day, Moskowitz covered his short position in PRXL for a profit of \$1,007. Adm. FOF No. 289. When measured by dollar amount, Ruggieri's PRXL overnight position before Bolan's downgrade was the second-most profitable overnight position Ruggieri held during his tenure at Wells Fargo. Adm. FOF No. 290. When measured by percentage return on investment, Ruggieri's PRXL overnight position before Bolan's downgrade was in the top twenty-five most profitable overnight positions (out of at least 108 overnight positions) Ruggieri held during his tenure at Wells Fargo. Adm. FOF No. 291.

Following the trading at issue, Ruggieri also held substantial overnight positions in PRXL at other points in 2010, including a 5,617 share short position on April 9, a 30,922 share long position on June 2, a 7,300 share short position on June 14, a 23,353 share short position on October 6, and a 5,000 share short position on both November 24 and 26. DIV REB 132 at 10-11.

Based on the foregoing, the Division's claim that Bolan tipped Ruggieri about his PRXL downgrade *might* be true, given the timing of Ruggieri's trades and the calls between him and Bolan. Nonetheless, Ruggieri had a contemporaneous thesis for short selling PRXL. In accordance with that thesis, on March 23 and 24, 2010, Ruggieri held short positions of 5,000 and 10,000 shares in PRXL. This was days before Bolan began drafting or sought permission for the PRXL downgrade. The evidence independently demonstrates the desirability of building and holding a short position of PRXL, including Bolan's March 22 squawk, the price movements of the stock, and Ruggieri's communications with a client and a Wells Fargo research head.

The day before the short trade at issue, Ruggieri told a client that he did not like PRXL going into the quarter, meaning that he did not like PRXL long going into the next month. He then nearly doubled his short position to 52,500 shares at a time when PRXL was trading at its highest level in months, making a short trade more attractive. As Ruggieri points out, rather than infer a tip, it is just as plausible that Bolan timed his downgrade on the same basis as Ruggieri did in taking his positions: to be more impactful, issuing the report when PRXL was trading at its highest level in months. Ruggieri exited his position after Bolan's downgrade, but the circumstances represented a reasonable opportunity to do so. Indeed, these circumstances may have been the first occasion in which Ruggieri appreciated the impact of Bolan's ratings changes. Bolan's ratings change as to PRXL was largely based on information in the public domain already known to Ruggieri, but nonetheless exerted palpable downward pressure on PRXL's price. Further, while not central to my conclusion that Ruggieri's overnight position was not provoked by a tip, Ruggieri held substantial overnight positions in PRXL later in April and later that year, all unrelated to any alleged tips from Bolan. In other words, it was not so unusual for Ruggieri to carry overnight positions in PRXL.

In contrast to Ruggieri, Moskowitz built a short position in PRXL in the last couple of hours of trading on April 6, which was the day after his call with Bolan and before Bolan's April 7 downgrade. DIV 194-A at 2. Unlike Ruggieri, Moskowitz did not take significant short positions in PRXL earlier in the month or at any point throughout the year. While Bolan called Ruggieri the same night as Moskowitz, Ruggieri identified evidence showing that they talked about work issues, namely his upcoming San Francisco trip. In conclusion, the evidence may suggest that Moskowitz traded based on Bolan's tip, but the Division has not met its burden that such was the case between Bolan and Ruggieri.

Covance Inc. (CVD)

After the PRXL downgrade, Bolan's next ratings change was for CVD, the stock of another CRO. DIV 133 at 5; Tr. 2164-67, 2605-06.

On April 29, 2010, Bolan issued a hoot⁹ following a conference or earnings call with the company. Tr. 2609-11; JR 64. Ruggieri sent an email based on his understanding of Bolan's hoot, noting that CVD would be attractive to buy at a lower price—in the low \$50s—but not currently. Tr. 2609-10, 2612; JR 64. CVD had closed the previous day at \$60.50. JR 81. CVD's price dropped over the course of the next few weeks and dropped to a low of \$49.91 on June 8 before closing at \$50.56. *Id.* Ruggieri testified that the \$50 threshold for CVD was important because he wanted to make sure the stock would hold at that level. Tr. 2613-14.

On June 9, CVD opened at \$50.84. JR 81. Bolan disseminated a somewhat negative channel check, noting that work at one of the company's facilities had slowed down. Tr. 2614-16; JR 70. Ruggieri wanted to see whether Bolan's channel check might cause CVD's price to drop further. Tr. 2616. That day, Ruggieri communicated with a trader of client DE Shaw, which held one of the largest shorts of CVD, to test whether the client would cover the short

⁹ The "hoot" is Wells Fargo's internal system that analysts use to make public, and announce to the sales and trading departments, their opinion on a stock or any big trade. Tr. 1034-35.

position based on the \$50 share price; the client did not pursue it. Tr. 2619-22; JR 71. CVD stabilized in the low \$50s after the channel check. JR 81; Tr. 2616-17.

On June 10, Ruggieri learned that despite Bolan's channel check, one of the largest holders of CVD was increasing its position in the stock. Tr. 2617-18; JR 73.

On Sunday, June 13, Bolan told Pearlstein that he planned to upgrade CVD. Adm. FOF No. 296. That same day, Pearlstein approved. Adm. FOF No. 297.

Meanwhile, Ruggieri was focused on the upcoming Goldman Sachs healthcare conference on June 15, at which Covance was scheduled to make a presentation. Tr. 2622-23; JR 72, 74 at 2. Mackle testified that a trader's assessment of what company management is going to present at a conference could be a reasonable thesis for a trade. Tr. 3266-68.

On June 14, before the market opened, Bristol-Myers Squibb announced a deal with two CROs, namely Parexel and ICON (stock symbol ICLR). JR 78; Tr. 2628. One of the losers in the announcement was Pharmaceutical Product Development Inc. (stock symbol PPDI), which had previously done work with Bristol-Myers. JR REB 17. Following the Bristol-Myers announcement, on June 14, the share prices of ICLR, PRXL, and CVD increased 4%, 6.3%, and 3.2%, respectively. JR 77; Tr. 2651-52. During two calls on June 14, from Bolan's phone to the 6210 Line associated with Ruggieri, Ruggieri was in his New York office with access to that line. Tr. 2168-69; JFOF ¶¶ 87-88; JR REB 67 (Ruggieri exhibit listing when he was not in the office).

On June 14, Ruggieri purchased 40,000 shares of CVD and held them overnight. JFOF ¶¶ 89-91; Tr. 2170-72. In addition to his CVD trade, Ruggieri held overnight short positions in PPDI and PRXL. DIV REB 66A. Ruggieri shorted PRXL because he thought the market overreacted and PRXL had gone up too high following the Bristol-Myers announcement.¹⁰ Tr. 2652. Ruggieri testified that his trade in CVD was based on his prediction that the company would not lower guidance at the Goldman Sachs investor conference and that in turn the stock would trade higher. Tr. 2188, 2653-55. On June 14, Ruggieri shared this thesis with his clients. JR 76. He reiterated that thesis to clients the next day. Tr. 2654-55; JR 82.

Wells Fargo published Bolan's upgrade of CVD before the market opened on June 15, 2010, and the stock price opened 2.19% higher from the previous day's close. DIV 128; DIV 194-A at 3; JR 81. Bolan upgraded CVD shares to outperform, raising the valuation range to \$62-64 per share from \$58-59. JR 80. His report stated: "[W]e believe Covance's historical premium valuation is warranted and we feel quite comfortable advising investors to actively accumulate shares of CVD at these price levels." *Id.* Ruggieri forwarded the CVD upgrade to Brown. JR REB 98. Also on June 15, the Goldman Sachs conference was held, with the Covance presentation that morning. Tr. 2622-23, 2653.

¹⁰ The next day, he communicated to a client that yesterday's move by PRXL was "dumb," apparently because it moved higher on announcement of the Bristol-Myers deal, which Ruggieri suggested "won't go through." JR REB 235; Tr. 3289-91.

By early afternoon on June 15, Ruggieri sold the 40,000-share CVD position, which he had held overnight, and built another position for a client.¹¹ Tr. 2173-74; DIV 194-A at 3. Ruggieri's trades in CVD around Bolan's upgrade generated a profit of \$17,445 or \$14,144, depending on the calculation method. Adm. FOF No. 307. When measured by dollar amount, Ruggieri's CVD overnight position before Bolan's upgrade was the tenth-most profitable overnight position Ruggieri held (out of at least 108 overnight positions) during his tenure at Wells Fargo. Adm. FOF No. 308. When measured by percentage return on investment, Ruggieri's CVD overnight position before Bolan's upgrade was in the top twenty-five most profitable overnight positions (out of at least 108 overnight positions) Ruggieri held during his tenure at Wells Fargo. Adm. FOF No. 309.

In addition to his overnight positions before the CVD ratings change at issue, Ruggieri's Wells Fargo trading book held an overnight position in CVD on approximately fifteen trading days while he was employed by Wells Fargo. JFOF ¶ 178. Other than June 14 and 15, 2010, Ruggieri held only one long overnight position in CVD with a cost basis of \$25,000 or more: a 2,000-share long overnight position on January 20, 2011. Adm. FOF No. 310.

Before Wells Fargo published Bolan's CVD upgrade, Bolan had the means and opportunity to tip Ruggieri by phone in advance of his trades. See DIV 194-A at 3; JFOF ¶¶ 87-88; JR REB 67. Nonetheless, I do not find that Ruggieri traded based on a tip. Ruggieri had an independent thesis for his CVD trade, which he had shared with a client:

CVD is a name we talked about with investors a lot in Europe couple weeks ago – keep eye on it here – they speak at Goldman's conference tomorrow and the street expects them to tweak FX impact higher and impact their guidance but we think this is largely expected due to currency moves and continue to like the name here in the low \$50's – think if they do not materially guide lower tomorrow, stock will trade higher as shorts cover and longs defend here.

JR 76.

Although the Division attempts to portray this message as equivocal, it represents a contemporaneous thesis for the position that Ruggieri took shortly thereafter, in the afternoon of June 14. DIV 194-A at 3. That view is bolstered by the fact that Ruggieri took overnight positions not just in CVD that day, but in two other healthcare stocks. Indeed, after reviewing the background and exhibits regarding the CVD trade, Brown agreed that he would not be "the slightest bit surprised" to learn that Ruggieri traded long in CVD on June 14 and held it overnight. Tr. 1041-42, 1044.

¹¹ Towards the close of the trading day on June 15, Ruggieri traded in CVD in a principal capacity for a Wells Fargo client, and the client left him with a 10,000-share long position in CVD at the end of the day. Adm. FOF No. 305.

Just as Ruggieri decided to trade in advance of the company's announcement at the Goldman Sachs healthcare conference, so too it is likely that Bolan planned to issue his upgrade of CVD on June 15 to make his research timely and relevant. Although not dispositive to my finding, there was no parallel trading activity by Moskowitz. The Division's contention that Ruggieri traded on a tip is possible, but it has not proved that is the most likely explanation.

Albany Molecular Research Inc. (AMRI)

After the CVD upgrade, Bolan's next ratings change was for AMRI, the stock of another CRO. DIV 133 at 5; Tr. 2193-94, 2506.

On June 23, 2010, Bolan issued a squawk announcing that Albany Molecular had recently announced a \$10 million share buyback (also known as a repurchase) program. JR 87 at 2. For its stock, \$10 million represented approximately 1.8 million shares, or 6% of all outstanding shares. *Id.* at 1.

On June 24, six trading days before upgrading the stock, Bolan informed Brown, Bartlett, Wickwire, and Ruggieri that Albany Molecular would be utilizing Wells Fargo to execute the share buyback program. JR 87 at 1. This was the only time during Ruggieri's tenure that AMRI had used the Wells Fargo buyback desk to implement a share buyback program. Tr. 2747. Ruggieri testified that the share buyback program would cause AMRI shares to rise in price. Tr. 2514.

On June 25, Ruggieri notified Wells Fargo's buyback desk of the Albany Molecular's buyback plan; he asked the desk to "[k]eep an eye out for AMRI" and let him know if they see anything. Tr. 2515-16; JR 89. Ruggieri believed that Albany Molecular's use of Wells Fargo's buyback desk would allow Wells Fargo to sell the stock to customers and be involved principally. Tr. 2515.

On June 27, Bolan was hospitalized with appendicitis and was likely out of the office until June 30 or July 1. JR 90. On June 30, at 5:07 p.m., Bolan used his cell phone to call Moskowitz's home phone number, and the call lasted one minute. Adm. FOF No. 314. One minute later, at 5:08 p.m., Bolan used his cell phone to call Moskowitz's cell phone number, and that call also lasted one minute. Adm. FOF No. 315. Less than two hours later, at 6:56 p.m., Moskowitz called Bolan's cell phone from his home phone, and the call lasted seventeen minutes. Adm. FOF No. 316.

By at least July 1, Bolan began drafting a report to upgrade AMRI. Adm. FOF No. 313. Moskowitz began purchasing AMRI shares on July 1. JFOF ¶ 189. By the market close on July 2, Moskowitz held a long position of 24,252 AMRI shares. Adm. FOF No. 318. In at least the six months before these trades, Moskowitz had not traded any AMRI shares. Adm. FOF No. 319.

On July 1 at 6:14 p.m., Bolan blind-copied Ruggieri on a client email with his ranked view of six CROs in terms of the most to least long hedge positions, which did not include AMRI. DIV 57. At 6:15 p.m., Bolan called Ruggieri's Wells Fargo BlackBerry from his home

telephone while Ruggieri was on his cell phone with his mother; the call with Bolan lasted thirty-nine seconds. Adm. FOF Nos. 320-21; Tr. 2195-99; JFOF ¶ 40.¹² At 6:16 p.m., Ruggieri emailed Bolan, “Call u right back,” and at 6:18 p.m., Bolan replied, “Cool – call my home.” DIV 57. At around the same time, Ruggieri’s call with his mother ended. Tr. 2199. Ruggieri did not remember if he called Bolan back, but it is undisputed that he would not have ignored Bolan’s call. Tr. 2203, 2824. There is no record of any phone call between 6:18 p.m. on July 1 and July 6; Bolan’s call to Ruggieri’s Wells Fargo BlackBerry is the only call from Bolan to any number associated with Ruggieri between June 26 and July 6 for which records exist during that time period. JR REB 108.

Comcast’s telephone records that are more than twenty-four months old at the time of production are often incomplete. Adm. FOF No. 330. In fact, for Bolan’s home telephone line, telephone records less than twenty-four months old at the time of production showed over 900 incoming calls for the five-month period at the end of 2010, while telephone records more than twenty-four months old at the time of production showed less than ten incoming calls to Bolan during the first seven months of 2010. Adm. FOF No. 331; DIV 144, 220. Assuming that Ruggieri called Bolan right back, as he said he would, then before the AMRI upgrade, Bolan had the means and opportunity to tip both Moskowitz and Ruggieri. *See, e.g.*, DIV 57; DIV 194-A at 4-5; Tr. 2203; Adm. FOF No. 316.

Ruggieri purchased 36,250 AMRI shares on July 2, and held 35,050 shares overnight. JFOF ¶¶ 99-100; Tr. 2207. The market was closed the next three days, until July 6. Tr. 2207-08. He testified that he purchased these shares because that was the first day the buyback was in the marketplace. Tr. 2516-17; JR 91. On July 2, AMRI’s closing price was \$5.41, and on July 6, AMRI’s price opened at \$5.70, traded at a high of \$5.70 and a low of \$5.38, and closed at \$5.40. JFOF ¶ 103.

On July 6, at 12:03 a.m., Wells Fargo published Bolan’s research report upgrading his AMRI rating from market perform to outperform. Adm. FOF No. 334. Bolan increased 2010 and 2011 EPS estimates, while maintaining a valuation range of \$7-9 per share. DIV 3. On July 6, Ruggieri forwarded Bolan’s AMRI upgrade to Brown. Tr. 2519; JR REB 96. When the market opened on July 6, AMRI’s price increased 5.36%. Adm. FOF No. 335. Over the day’s course, AMRI’s trading volume increased 40% relative to its average daily trading volume on the fifteen days before and after the upgrade. Adm. FOF No. 336. On July 6, Ruggieri marketed a buyer of AMRI over the day; in other words, he was looking for a seller, which is usually how a buyback is executed. Tr. 2532-34; JR 93; *see* Tr. 1015.

Moskowitz held a position in AMRI until July 9, which is when he fully liquidated his position in the stock. JFOF ¶¶ 190-94. Moskowitz’s AMRI trades generated a profit of \$8,400. Adm. FOF No. 338.

¹² Adm. FOF No. 320 incorrectly identifies DIV 220 as phone records for Bolan’s cell phone. Rather, that exhibit reflects the records for the number ending in 2142, which was Bolan’s landline or home telephone. JFOF ¶ 40; Tr. 1597, 1681; DIV 57.

Ruggieri held AMRI shares overnight until July 12—that is, six calendar days and four trading days—following Bolan’s July 6 upgrade, although he sold off a portion of his AMRI position each day. JFOF ¶¶ 106-14; DIV 194-A at 4; DIV 227. Ruggieri’s AMRI trades generated a profit of \$9,334 or \$9,384, depending on the calculation method. Adm. FOF No. 339. When measured by dollar amount, Ruggieri’s AMRI overnight position before Bolan’s upgrade was approximately the sixteenth-most profitable overnight position Ruggieri held (out of at least 108 overnight positions) during his tenure at Wells Fargo. Adm. FOF No. 340. When measured by percentage return on investment, Ruggieri’s AMRI overnight position before Bolan’s upgrade was Ruggieri’s fourth most profitable overnight position (out of at least 108 overnight positions) during his tenure at Wells Fargo. Adm. FOF No. 341.

Before Bolan’s July 2010 upgrade of AMRI, Ruggieri previously held three overnight positions in this stock in January 2010, but each position was minimal—one share, seventy-nine shares, and forty-eight shares, respectively. DIV 150 at tab AMRI; Tr. 873. Other than his overnight positions in AMRI from July 2 through July 9, 2010, Ruggieri never held an overnight position in AMRI of more than seventy-nine shares during his tenure at Wells Fargo. Adm. FOF No. 342.

For AMRI, Ruggieri’s purported thesis is that he built a long overnight position once he knew that the company was executing its share buyback program. First, however, Ruggieri’s thesis is not credible. Ruggieri began building the long position two hours before any evidence suggests that he knew that the buyback had commenced. Compare DIV 194-A at 4, with JR 91 (“AMRI 25k to buy.”). However, what did happen before Ruggieri started building his position was, the night before, Bolan called Ruggieri’s BlackBerry, and Ruggieri said he would call him right back. Based on Ruggieri’s response to Bolan and his concession that he would not have ignored Bolan’s call, it is more likely than not that Ruggieri called Bolan back, which would have provided an opportunity for the tip. The lack of a record of the call is not troubling given that there were no records from Ruggieri’s phone and grossly incomplete records from Bolan’s phone for that period.

Second, even if I credit Ruggieri’s explanation, there is no credible explanation for the fact that Moskowitz, who spoke on the phone with Bolan, also built an overnight long position in AMRI before Bolan’s July 6 upgrade. On July 6, both Moskowitz and Ruggieri exited the majority of their respective long positions before the close of trading. Both then continued to hold modest overnight positions in AMRI for the next few trading days before exiting completely. Moskowitz’s position corroborates the Division’s claim that Bolan was tipping. In sum, the most plausible explanation for these similar trades by Moskowitz and Ruggieri is that they were both tipped by Bolan in advance of his upgrade.

Emdeon Inc. (EM)

After the AMRI upgrade, Bolan’s next ratings change was for EM, the stock of a healthcare information technology company. DIV 133 at 5; Tr. 2225-26, 2664-65; JFOF ¶ 124.

On the evening of August 12, 2010, Bolan’s supervisor, Pearlstein, approved Bolan’s request to upgrade the stock. Adm. FOF No. 346; JR REB 20.

On August 13, Bolan called Ruggieri's 6210 Line at 9:32 a.m. and 4:11 p.m. The calls lasted approximately three minutes and two minutes, respectively. JFOF ¶¶ 119, 123; Tr. 1688, 2227-28, 2233. For both calls, Ruggieri was in his New York office. Adm. FOF No. 349. On the afternoon of August 13—after Bolan's morning call to the 6210 Line—Ruggieri purchased 10,000 shares of EM in his Wells Fargo trading account and held them overnight. Adm. FOF No. 351; JFOF ¶ 122.

At 11:23 a.m. on August 13, Bolan used his home phone number to call Moskowitz's home number, and the call lasted eleven minutes. Adm. FOF No. 350. That afternoon, Moskowitz purchased 5,000 shares of EM and held them overnight. Adm. FOF No. 352. Moskowitz had not traded EM shares in at least the preceding six months. Adm. FOF No. 353.

As the foregoing establishes, before Wells Fargo published Bolan's EM upgrade on August 16, Bolan had the means and opportunity to tip Moskowitz and Ruggieri by phone. *See* DIV 194-A at 6-7.

On August 13, Ruggieri traded fewer than one million shares in total and around 250,000 shares in a principal capacity, which Ruggieri said meant it was a slow trading day. JFOF ¶ 118; Tr. 2668. Brown encouraged Ruggieri to make principal trades when the market was slow and to look for opportunities. Tr. 2668. Ruggieri testified that he bought EM shares on August 13 because the share price was down nearly 20% or 25% in a week and continued to be down, which he thought made it an outlier and "probably the most dislocated stock in the universe that week." Tr. 2668-70. Ruggieri said he considered the purchase to be a very low risk trade because the share price was down and the total investment was approximately \$100,000. Tr. 2669-70. Brown agreed that the EM trade was a low overnight risk. Tr. 1048-49.

On August 16, at 12:02 a.m., Wells Fargo published Bolan's research report upgrading EM from market perform to outperform. Adm. FOF No. 355. At the same time, Bolan lowered his 2010 EPS estimate, and he dropped his valuation range. DIV 63. Ruggieri forwarded the EM upgrade to Brown. JR REB 99. When the market opened that morning, EM's price rose 1.10%. Adm. FOF No. 356. Bolan was disappointed that EM's price did not move up as much as he had hoped after his upgrade. Adm. FOF No. 359. Over the day, EM's trading volume increased 107% relative to its average daily trading volume on the fifteen days before and after the upgrade. Adm. FOF No. 357. When the market closed on August 16, EM's price had risen 1.38% from the previous day's closing price. Adm. FOF No. 358.

On August 16, Moskowitz sold his entire EM position for a profit of \$835. Adm. FOF No. 360. That same day, Ruggieri sold his entire EM position for a profit of \$266 or \$267, depending on the calculation method. Adm. FOF No. 361.

Other than his overnight position in EM on August 13, 2010, Ruggieri held an overnight position in EM with a cost basis of at least \$25,000 or more only once during his tenure at Wells Fargo: on November 11 and 12, 2009, when he held an overnight position of 12,700 shares and 12,500 shares, respectively. Adm. FOF No. 362. In fact, Ruggieri took his only other overnight

position in EM on November 11 and 12, 2009, immediately following a research report by Bolan on EM. Adm. FOF No. 363; DIV REB 66-A at 3; Tr. 2240, 2244.

As established, Bolan communicated by phone with Moskowitz and Ruggieri before their EM trades. After the calls, Moskowitz and Ruggieri built long positions in EM by the close of trading on August 13, 2010. On August 16, the next trading day, Bolan's upgrade issued. Both Moskowitz and Ruggieri exited their positions that day. This behavior is the type one would expect in order to maximize profits on inside information. That the upgrade did not raise the stock price significantly does not diminish the likelihood that Bolan tipped them.

Ruggieri contends that he made the EM trade on August 13, a slow trading day, because its share price was down and he viewed the price as being inappropriately low, and the trade followed the company's August 6 release of an earnings announcement citing lower utilization rates. *See* Ruggieri Proposed FOF ¶¶ 274-80; Ruggieri Chronology of Events at 8-9; Ruggieri Br. at 11. In other words, Ruggieri purportedly decided that EM was sufficiently undervalued to make the purchase, which he deemed low risk, in order to turn around a modest profit. However, such explanation fails to credibly explain why Ruggieri just so happened to establish a 10,000-share overnight position in EM, on the afternoon of the last trading before Bolan's upgrade. Although Ruggieri does not say so directly, one would have to surmise that Moskowitz took an analogous overnight position by mere coincidence. Moskowitz had not traded EM for six months, and Ruggieri had not held an overnight position in EM since the previous year. It is implausible that these trades happened by mere chance. Rather, the evidence persuasively establishes that Ruggieri traded in EM based on Bolan's tip.

athenahealth Inc. (ATHN)

Next at issue is Ruggieri's purchase of ATHN, the stock of a healthcare technology company. Tr. 2545.

On January 7, 2011, Bolan issued a report increasing ATHN's valuation range from \$35-36 to \$37-38. JR 120 at 1. In it, Bolan stated his thesis: "While we like ATHN's unique business model, in which the company's financial success is directly correlated with that of its clients, we have limited visibility on short-term net new physician additions. Thus, we rate the shares Market Perform." *Id.* at 2. According to Ruggieri, more news about the addition of physician practices by the company would mitigate the risk of trading in ATHN. Tr. 2553-54. Mackle testified that the two most important metrics he looked at with regard to ATHN were additions of physician practices and enterprise pipelines. Tr. 3273.

On January 11, Ruggieri—at a client's request—asked the Wells Fargo healthcare trading analysts for the most crowded longs and shorts going into the quarter. JR REB 2. In response, Bolan listed ATHN as the most crowded short, which suggested that the stock price would increase if too many tried to cover their short position at the same time. JR REB 2; Tr. 1063-65.

By January 18, Bolan—despite his neutral published views—told Ruggieri of his "bullish" views on ATHN, based on the company's presentation at a healthcare conference and

speculation about the company possibly being bought. DIV 120; Tr. 2273-75, 3252-54. Mackle testified that it is possible for an analyst to convey that he is warming up on a stock without changing a rating, although analysts should not talk against their rating. Tr. 3265-66. On January 18, Ruggieri instant messaged Mackle that he would not be short in ATHN because the company had several physician practice deals in the pipeline. DIV 120; Tr. 2559-60.

On February 4, Athena issued a press release announcing an agreement adding a significant physician network to its software system. Tr. 2563-64; JR 130. That morning, Wickwire granted Bolan's request to change his ATHN rating. DIV 32. At 3:10 p.m. that same day, Bolan called the 6210 Line when Ruggieri was in the office, and the call lasted forty-one seconds. JFOF ¶ 134; Adm. FOF No. 370; DIV 194-A at 8. Despite the brevity of the call, Bolan had the means and opportunity to tip Ruggieri.

On February 7, Ruggieri began purchasing ATHN shares at 10:13 a.m., at a share price of \$46; by 11:49 a.m., the share price increased to \$46.90. Tr. 2566-68; JR REB 81; JR 134; DIV 194-A at 8. As Ruggieri continued to build his position over the day's course, Bolan called the 6210 Line at 2:03 p.m. and 2:20 p.m. when Ruggieri was in the office, and the calls lasted seven minutes and one minute, respectively. JFOF ¶¶ 137-38; DIV 194-A at 8; JR REB 81; Adm. FOF No. 370. By the market close on February 7, Ruggieri had purchased 13,500 shares of ATHN in a principal capacity, which he then held overnight. JFOF ¶¶ 135, 138; Tr. 2269, 2276-77, 2570-71. Ruggieri testified that he held an overnight position because he thought the stock price would continue to rise. Tr. 2570-71.

On February 8, at 12:13 a.m., Wells Fargo published Bolan's report upgrading ATHN from market perform to outperform. Adm. FOF No. 374. In the report, Bolan stated: "The impetus for these actions is our belief that ATHN may be on the cusp of adding a growing number of large group practices." DIV 60. That day, before the market opened, Ruggieri forwarded Bolan's upgrade of ATHN to Brown and Mackle. JR REB 3. When the market opened, ATHN's price rose 5.66%. Adm. FOF No. 375. Its price opened at \$48.74 and closed at \$48, on volume of 1,037,600 shares, after closing at \$46.13 the day before. JFOF ¶ 140. Over the day's course, ATHN's trading volume increased 116% relative to its average daily trading volume on the fifteen days before and after the upgrade. Adm. FOF No. 376. When the market closed on February 8, ATHN's price had risen 4.05% from the previous day's closing price. Adm. FOF No. 377.

On February 8, in the first two hours after the market opened, Ruggieri sold his entire ATHN position for a profit of \$40,686 or \$34,176, depending on the calculation method. Adm. FOF No. 378. When measured by dollar amount, Ruggieri's ATHN overnight position before Bolan's upgrade was the single most profitable overnight position Ruggieri held during his tenure at Wells Fargo. Adm. FOF No. 379. When measured by percentage return on investment, Ruggieri's ATHN overnight position before Bolan's upgrade was the sixth-most profitable overnight position (out of at least 108 overnight positions) Ruggieri held during his tenure at Wells Fargo. Adm. FOF No. 380.

Just after the market opened on February 8, Brown asked Ruggieri about the ATHN trade. Ruggieri said that both he and Mackle were long; Brown responded, "Nice. What I

wanted to hear.”¹³ JR 139; Tr. 2575-77. Brown believed that Ruggieri’s ATHN trade was reasonable. Tr. 1070.

In addition to the overnight positions before the ratings change at issue, Ruggieri’s Wells Fargo trading book held an overnight position in ATHN stock on approximately nine trading days while he was employed by Wells Fargo. JFOF ¶ 181. Other than his overnight position on February 7, 2011, Ruggieri held an overnight position in ATHN with a cost basis of \$25,000 or more only once during his tenure at Wells Fargo: from November 9 through November 19, 2010, Ruggieri held an overnight short position. Adm. FOF No. 381.

Ruggieri’s thesis for the ATHN trade appears to be that he was waiting for the addition of physician practices. *See* Ruggieri Br. at 11-12; Ruggieri Proposed FOF ¶¶ 286-304; JR 120. On January 18, 2011, Ruggieri expressed his understanding that the company had several physician practice deals in the pipeline, and that he would not be short in the stock. DIV 120. On February 4, roughly half an hour before the market opened, Athena issued a press release announcing an agreement adding a significant physician network. Tr. 2563-64; JR 130.

Although this announcement is purportedly the basis for Ruggieri’s trade, rather than go long in ATHN on February 4, he took no action. As established above, later that day, Wickwire granted Bolan’s request to upgrade ATHN and Bolan then called Ruggieri. On the morning of the next trading day, February 7, Ruggieri built a significant long position in ATHN, which he then held overnight. Bolan’s upgrade issued before trading opened on February 8, and Ruggieri exited his entire long position in the first two hours after the market opened.

If Ruggieri’s thesis was to trade long on significant news of physician additions, the time to capitalize on the news was the market open on February 4, especially given the speed with which such information may impact stock price. Ruggieri contends that his decision to not trade on the company’s earlier announcement “is not probative.” Ruggieri Br. at 12. That contention might be persuasive if he had instead waited to trade on a subsequent announcement that he thought was more meaningful and positive for company’s outlook. But such is not the case. Rather, Ruggieri’s trade was timed just right and profited from the release of Bolan’s upgrade. Given the timing of the trade and Ruggieri’s prior phone call with Bolan, the most plausible explanation is that Ruggieri’s ATHN trade was based on Bolan’s tip.

Bruker Corporation (BRKR)

Last at issue is Ruggieri’s trade in BRKR, the stock of a life science tools diagnostics company. Tr. 336, 2586.

¹³ Mackle, however, did not take actual positions in securities, but rather had a virtual trading book in which he placed fantasy trades that were not executed. Adm. FOF No. 367 (citing Tr. 3249-50). He did not recall whether he had a February 8 position in ATHN in his fantasy trading book. Tr. 3256.

On March 17, 2011, Bolan emailed Wickwire for approval to initiate coverage on BRKR and another company's stock. Adm. FOF No. 382. On March 22, Wickwire approved the initiations of coverage. Adm. FOF No. 383.

On the morning of March 23, Ruggieri began purchasing BRKR shares in a principal capacity—less than half an hour after Bolan's five-minute call to the 6210 Line. Adm. FOF No. 386; JFOF ¶¶ 146, 148. Between March 23 and March 29, it is undisputed that Bolan placed multiple calls to the 6210 Line, Ruggieri was at the office, and the calls lasted in the range of a little over a minute to five minutes. Adm. FOF No. 385. Thus, before Bolan's upgrade of BRKR, he had the means and opportunity to tip Ruggieri by phone. *See* DIV 194-A at 9. Further, beginning March 23, Ruggieri began gradually building a position in BRKR. He purchased shares for five consecutive trading days and held them overnight, totaling 25,000 shares by the market close on March 29. JFOF ¶¶ 148-49, 151-52, 155-56, 161-62, 165, 167.

On March 29, at 4:22 p.m., Wells Fargo initiated coverage of BRKR by publishing Bolan's research report rating the stock as outperform/buy. Adm. FOF No. 390. When the market opened on March 30, BRKR's price rose 2.56%.¹⁴ Adm. FOF No. 391. That same day, in the morning after the market opened, Ruggieri sold his entire BRKR position for a profit of \$24,452 or \$24,453, depending on the calculation method. Adm. FOF No. 394. When measured by dollar amount, Ruggieri's BRKR overnight position before Bolan's initiation of coverage was the third most profitable overnight position Ruggieri held during his tenure at Wells Fargo. Adm. FOF No. 395. When measured by percentage return on investment, Ruggieri's BRKR overnight position before Bolan's initiation of coverage was the second most profitable overnight position (out of at least 108 overnight positions) Ruggieri held during his tenure at Wells Fargo. Adm. FOF No. 396.

As an explanation for the trade, Ruggieri recounted that on March 10 or 11, 2011, a client had told him that BRKR was that client's favorite "long" for the next twelve months. Tr. 2590-91. The next week, two major firms published tepid research reports of an industry conference that covered Bruker and other life science companies. Tr. 2593-98; JR 145, 147. Ruggieri then did not take a long position in the stock until March 23, after several telling events: On March 22, Bolan received approval to initiate coverage of BRKR. On March 23, within less than half an hour of Bolan and Ruggieri speaking on the phone, Ruggieri began to build a long position in BRKR. He steadily built that position—buying shares and holding them overnight for five consecutive trading days, totaling 25,000 shares. Bolan's initiation of coverage was then issued late in the trading day on March 29, and Ruggieri exited his position the very next morning after the opening of trading.

Ruggieri emphasizes certain facts that purportedly undermine the Division's theory. First, Bolan had not covered the life sciences subsector before, and hence, his coverage was not likely to have as great an impact on the stock price as someone who did cover the sector. *See* Tr.

¹⁴ Over the course of the day on March 30, BRKR's trading volume increased 42% relative to its average daily trading volume on the fifteen days before and after the report. Adm. FOF No. 392. When the market closed on March 30, BRKR's price had risen 3.36% from its closing price the previous day. Adm. FOF No. 393.

1056, 2600. But there was no evidence suggesting that an initiation of coverage with an outperform/buy rating would have any effect other than increasing the price. Second, Brown testified that if Ruggieri were planning to trade based on the release of the BRKR initiation of coverage, he would have had bigger positions and he would not take the market risk days ahead of time. Tr. 1059-60. Although this would have made the trade more profitable and less risky, Ruggieri may have structured the building of his position so it did not clearly resemble insider trading, perhaps in an attempt to avoid detection. In sum, the most likely explanation is that Ruggieri traded based on Bolan's tip.

MedAssets, Inc. (MDAS)

Although the OIP does not allege that Ruggieri traded ahead of Bolan's downgrade of MDAS, this instance corroborates the Division's claim that Ruggieri was involved in a tipping scheme with Bolan.

On the morning of January 4, 2011, while the market was open, Ruggieri was in New York and at the trading desk. Adm. FOF No. 397. At 8:38 a.m., Bolan called the 6210 Line from his office number, and the call lasted forty-eight seconds. Adm. FOF No. 398. At 10:13 a.m., Bolan again called the 6210 Line from his office number, and the call lasted a little over three minutes. Adm. FOF No. 399.

On the morning of January 5, from 9:34 a.m. until 10:11 a.m., Ruggieri built a 15,000-share short position in MDAS in a principal capacity. Adm. FOF No. 400. That same morning, at 9:47 a.m., Bolan called the 6210 Line from his home number, and the call lasted about a minute and a half. Adm. FOF No. 401.

At 10:23 a.m., Wells Fargo issued Bolan's downgrade of MDAS, which was one of Bolan's eight ratings changes between March 30, 2010, and March 31, 2011. Adm. FOF No. 402. Bolan downgraded MDAS to a market perform/hold rating from an outperform/buy rating. Adm. FOF No. 403. Unlike the six ratings changes at issue, Wells Fargo issued Bolan's MDAS ratings change during the trading day, rather than between the market's closure on one day and its opening on the next. Adm. FOF No. 404. Within one hour after Wells Fargo published Bolan's downgrade at 10:23 a.m., Ruggieri covered his entire 15,000-share short position by buying 15,000 shares in a principal capacity between 10:31 a.m. and 11:10 a.m. that day. Adm. FOF No. 405.

Based on this sequence of events, the most plausible explanation for the trade is that when they spoke on the phone, Bolan tipped Ruggieri, and Ruggieri then traded on that tip. At the hearing, Ruggieri testified that a press release issued after the market closed on January 4, 2011, led to a purported negative stock price reaction that prompted him to build a short position. Tr. 2680-83, 2897. Later, however, Ruggieri conceded that the press release announced an internal promotion at the company and that the stock price actually opened slightly higher the next morning, minutes before Ruggieri began shorting the stock. Tr. 2897-904. Ruggieri's attempted explanation for this trade is untenable.

3. Conclusion

Given Ruggieri's credible explanations as to why he traded in CVD and PRXL, I find that he did not trade based on any tips in those two instances. His thesis as to those two trades outweighs the Division's contrary evidence.

On the other hand, I find that Ruggieri's trades in AMRI, EM, ATHN, and BRKR were based on Bolan's tips. Ruggieri has no convincing explanation that would explain why he took positions in those stocks, at exacting times, ahead of Bolan's reports and turned a profit. As to these trades, the Division's claim of a tipping scheme is corroborated by Moskowitz's parallel trading, as well as Ruggieri's trading in MDAS.

C. Bolan Did Not Tip Ruggieri for a Personal Benefit

1. Applicable Law

a. *The Division must prove personal benefit*

In an insider trading case against a tippee, the Division must prove, among other elements, that the tipper breached a fiduciary duty by disclosing non-public, material information to the tippee for a personal benefit, in accordance with *Dirks v. SEC*, 463 U.S. 646 (1983), and *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014).¹⁵ The personal benefit element applies in both classical and misappropriation cases.¹⁶ See *Newman*, 773 F.3d at 446 (“The elements of tipping liability are the same, regardless of whether the tipper’s duty arises under the ‘classical’ or the ‘misappropriation’ theory.”); *SEC v. Obus*, 693 F.3d 276, 285-86 (2d Cir. 2012) (“The Supreme Court’s tipping liability doctrine was developed in a classical case, *Dirks*, but the same

¹⁵ I previously discussed the applicability of *Newman* and the personal benefit element when ruling on Respondents’ summary disposition motions. See *Gregory T. Bolan, Jr.*, Admin. Proc. Rulings Release No. 2309, 2015 SEC LEXIS 523 (Feb. 12, 2015). Because a petition for review from a final Commission order may not necessarily lie in the Second Circuit, I set forth here why the personal benefit element applies.

¹⁶ “The classical theory holds that a corporate insider (such as an officer or director) violates Section 10(b) and Rule 10b-5 by trading in the corporation’s securities on the basis of material, nonpublic information about the corporation.” *Newman*, 773 F.3d at 445. “[T]he ‘misappropriation’ theory[] expands the scope of insider trading liability to certain other ‘outsiders,’ who do not have any fiduciary or other relationship to a corporation or its shareholders,” such as “where an ‘outsider’ possesses material non-public information about a corporation and another person uses that information to trade in breach of a duty owed to the owner.” *Id.* at 445-46. “The insider trading case law, however, is not confined to insiders or misappropriators who trade for their own accounts.” *Id.* at 446. “Courts have expanded insider trading liability to reach situations where the insider or misappropriator in possession of material nonpublic information (the ‘tipper’) does not himself trade but discloses the information to an outsider (a ‘tippee’) who then trades on the basis of the information before it is publicly disclosed.” *Id.*

analysis governs in a misappropriation case.”); *SEC v. Yun*, 327 F.3d 1263, 1274-75 (11th Cir. 2003) (holding that in a misappropriation case “the SEC must prove that a misappropriator expected to benefit from the tip”).

In *Dirks*, the seminal case establishing the personal benefit element, the Supreme Court rejected the premise that all disclosures of confidential information are inconsistent with the fiduciary duty that insiders owe to shareholders. *See* 463 U.S. at 661-62. Highlighting the “typical” scenario when insiders disclose information to market analysts, the Court reasoned that “[i]n some situations, the insider will act consistently with his fiduciary duty to shareholders, and yet release of the information may affect the market.” *Id.* at 662. For example, the Court explained, “it may not be clear—either to the corporate insider or to the recipient analyst—whether the information will be viewed as material nonpublic information. Corporate officials may mistakenly think the information already has been disclosed or that it is not material enough to affect the market.” *Id.*

The Court then held:

Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure. This standard was identified by the SEC itself . . . : a purpose of the securities laws was to eliminate “use of inside information for personal advantage.” Thus, the test is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach.

Id. (internal citations omitted). The Court—quoting an SEC Commissioner—emphasized: “It is important in this type of case to focus on policing insiders and what they do . . . rather than on policing information *per se* and its possession.” *Id.* at 662-63 (citation omitted, ellipses in original).

As *Dirks* instructs, mere disclosure of or trading based on confidential information is insufficient to constitute a breach of duty for insider trading liability. Not every breach of duty, and not every trade based on confidential information, violates the antifraud provisions of the federal securities laws. Rather, such conduct must involve manipulation, deception, or fraud against the principal such as shareholders or source of the information. *See United States v. O’Hagan*, 521 U.S. 642, 655 (1997) (“[Section] 10(b) is not an all-purpose breach of fiduciary duty ban; rather, it trains on conduct involving manipulation or deception.”); *Dirks*, 463 U.S. at 654 (“Not all breaches of fiduciary duty in connection with a securities transaction, however, come within the ambit of Rule 10b-5. There must also be manipulation or deception.” (internal citation and quotation marks omitted)); *id.* at 657 (rejecting the “SEC’s theory . . . that the antifraud provisions require equal information among all traders”); *Newman*, 773 F.3d at 445 (“[T]he Supreme Court explicitly rejected the notion of ‘a general duty between all participants in market transactions to forgo actions based on material, nonpublic information.’” (quoting *Chiarella v. United States*, 445 U.S. 222, 233 (1980))).

Indeed, the Court identified the personal benefit element as crucial to the determination whether there has been a fraudulent breach. *See Dirks*, 463 U.S. at 663 (“[T]o determine whether the disclosure itself deceives, manipulates, or defrauds shareholders, the initial inquiry is whether there has been a breach of duty by the insider. This requires courts to focus on objective criteria, *i.e.*, whether the insider receives a direct or indirect personal benefit from the disclosure.” (internal citation, quotation marks, and alteration brackets omitted)). If courts were to impose liability merely because confidential information was disclosed to a non-principal, this would potentially expose a person to insider trading liability “where not even the slightest intent to trade on securities existed when he disclosed the information.” *Yun*, 327 F.3d at 1278.

Contrary to the Division’s position, the alleged breach committed by a misappropriator is not any more “inherent” than the alleged breach committed by an insider in a classical case. In both scenarios, confidential information was leaked and/or used to trade in securities. The harm to the principal—the source of the information in a misappropriation case or the shareholders in a classical case—is the same, if “not more . . . egregious” in a classical case. *Yun*, 327 F.3d at 1277. “[I]t . . . makes ‘scant sense’ to impose liability more readily on a tipping outsider who breaches a duty to a source of information than on a tipping insider who breaches a duty to corporate shareholders.” *Id.*

It is true that *Dirks* was decided in the context where an insider leaked confidential information to expose corporate fraud, which put the Court in the unenviable position of either finding insider trading liability when there was no objective evidence of an ill-conceived purpose, or crafting a standard to ensure that the securities laws were of no greater reach than intended. The Division contends that *Dirks* required a benefit in classical cases to differentiate between an insider’s improper and proper use of confidential information. The Division asserts that “use of confidential information to benefit the corporation (or for some other benevolent purpose consistent with the employee’s duties to his employer) cannot logically breach a fiduciary duty to the corporation’s shareholders.” Div. Opp. to Motion for Summary Disposition at 21. But the same rationale applies in an alleged misappropriation case. An outsider might just as well divulge information for purposes that he believes might be in the best interest of the source to which a fiduciary duty is owed.

Courts cannot simply assume that a breach is for personal benefit. *See Newman*, 773 F.3d at 454 (“[T]he Supreme Court affirmatively rejected the premise that a tipper who discloses confidential information necessarily does so to receive a personal benefit.”). And the breach in a misappropriation case has not been defined by the Supreme Court as inherent, but as connected to personal benefit. The misappropriation theory “holds that a person commits fraud ‘in connection with’ a securities transaction, and thereby violates § 10(b) and Rule 10b-5, when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information.” *O’Hagan*, 521 U.S. at 652. “Under this theory, a fiduciary’s undisclosed, *self-serving use* of a principal’s information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information.” *Id.* (emphasis added). In contrast to a classical case premised “on a fiduciary relationship between company insider and purchaser or seller of the company’s stock, the misappropriation theory premises liability on a fiduciary-turned-trader’s deception of those who entrusted him with access to confidential information.” *Id.*

It is with this view that the Supreme Court “agree[d] with the Government that misappropriation, as just defined, satisfies § 10(b)’s requirement that chargeable conduct involve a ‘deceptive device or contrivance’ used ‘in connection with’ the purchase or sale of securities.” *O’Hagan*, 521 U.S. at 653. The Court “observe[d] . . . that misappropriators, as the Government describes them, deal in deception. A fiduciary who pretends loyalty to the principal while secretly converting the principal’s information *for personal gain* . . . dupes or defrauds the principal.” *Id.* at 653-54 (emphasis added) (internal quotation marks and alteration brackets omitted). The Court analogized misappropriation to the scenario where “an employee’s undertaking not to reveal his employer’s confidential information ‘became a sham’ when the employee provided the information to his co-conspirators in a scheme to *obtain trading profits*,” which constituted “fraud akin to embezzlement—‘the fraudulent appropriation to one’s own use of the money or goods entrusted to one’s care by another.’”¹⁷ *Id.* at 654 (quoting *Carpenter v. United States*, 484 U.S. 19, 27 (1987)) (emphasis added). Thus, the *O’Hagan* Court accepted the government’s misappropriation theory on the premise that the breach was committed secretly for self-gain, not on the assumption that this element is inherent.

I am unconvinced by the Division’s reading of case law as purportedly suggesting the contrary. In *United States v. Libera*, a Second Circuit panel provided a gloss on the elements of tippee liability, stating: “misappropriation theory requires the establishment of two elements: (i) a breach by the tipper of a duty owed to the owner of the nonpublic information; and (ii) the tippee’s knowledge that the tipper had breached the duty. We believe these two elements, without more, are sufficient for tippee liability. *See Dirks*, 463 U.S. at 659.” 989 F.2d 596, 600 (2d Cir. 1993) (first internal citation omitted). In articulating such elements, the *Libera* panel cited *Dirks*, where the Supreme Court stated:

Not only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they also may not give such information to an outsider [tippee] for the same improper purpose of exploiting the information for their personal gain. . . . [T]he tippee’s duty to disclose or abstain is derivative from that of the insider’s duty.

463 U.S. at 659. This strongly indicates that the panel viewed the misappropriation theory under the *Dirks* criteria.

The *Libera* panel was not confronted with the central issue presented in *Newman*—whether the tippee must have knowledge that the tipper disclosed confidential information in exchange for a personal benefit—or with the question presented by the Division here—whether the personal benefit element need not be proved at all in a misappropriation case. Some courts

¹⁷ *See O’Hagan*, 521 U.S. at 656 (an outsider “who trades on the basis of material, nonpublic information, in short, *gains* his advantageous market position through deception” (emphasis added)); *id.* (“The misappropriation theory targets information of a sort that misappropriators ordinarily *capitalize* upon to *gain no-risk profits* through the purchase or sale of securities. . . . [The theory] catches fraudulent means of *capitalizing* on such information through securities transactions.” (emphasis added)).

have read (or misread) *Libera* as suggesting that there is “no need to make an affirmative showing of benefit in cases of misappropriation.” *SEC v. Sargent*, 229 F.3d 68, 77 (1st Cir. 2000). However, as any such suggestion was dictum, it is not binding. *See Chem One, Ltd. v. M/V Rickmers Genoa*, 660 F.3d 626, 640 (2d Cir. 2011).

Similarly unpersuasive is the Division’s reliance on *United States v. Falcone*, where the circuit panel stated: “To support a conviction of the tippee defendant, the government was simply required to prove a breach by . . . the tipper[] of a duty owed to the owner of the misappropriated information, and defendant’s knowledge that the tipper had breached the duty.” 257 F.3d 226, 234 (2d Cir. 2001) (citing *Libera*, 989 F.2d at 600). Again, as in *Libera*, the panel was not squarely confronted with the issues presented here. As the Supreme Court made clear that the breach inquiry focuses on whether the tipper receives a personal benefit, *see Dirks*, 463 U.S. at 663, the panels in *Libera* and *Falcone* had no need to mention personal benefit as a distinct element underlying the breach inquiry.¹⁸

Neither the Supreme Court nor any federal court of appeals has drawn the curtain between classical and misappropriation cases that the Division urges. Rather, courts have emphasized that the two theories are complementary, not mutually exclusive. *See, e.g., O’Hagan*, 521 U.S. at 652-53; *Newman*, 773 F.3d at 445-46; *Yun*, 327 F.3d at 1275-76. In fact, “nearly all violations under the classical theory of insider trading can be alternatively characterized as misappropriations.” *Yun*, 327 F.3d at 1279; *see id.* at 1276 n.27. By requiring personal benefit to be proved in a misappropriation case, respondents are judged under similar standards. Liability should not vary according to the theory under which the case is prosecuted.

At bottom, the Division’s position here, as the one advanced in *Dirks*, would have “no limiting principle.” 463 U.S. at 664. The proposition that an alleged misappropriator violates his duty to a source, in violation of the antifraud provisions, by the mere disclosure of confidential information would improperly revive the notion that the antifraud provisions require equal information in the market, which has been rejected by the Supreme Court. *Id.* at 666 n.27 (rejecting similar arguments that “would achieve the same result as the SEC’s theory below, *i.e.*, mere possession of inside information while trading would be viewed as a Rule 10b-5 violation” and reemphasizing that “there is no general duty to forgo market transactions based on material, nonpublic information” (internal quotation marks omitted)). I therefore adhere to my ruling that the Division must prove personal benefit.

¹⁸ The district court cases cited by the Division are also unpersuasive. Those courts either did not reach the issue about the application of personal benefit in a misappropriation case, or to the extent they did, the issue was mentioned with minimal analysis. *See United States v. Whitman*, 904 F. Supp. 2d 363, 370-71 & n.6 (S.D.N.Y. 2012); *SEC v. Lyon*, 605 F. Supp. 2d 531, 548-49 (S.D.N.Y. 2009); *SEC v. Willis*, 777 F. Supp. 1165, 1172 n.7 (S.D.N.Y. 1991); *SEC v. Musella*, 748 F. Supp. 1028, 1038 n.4 (S.D.N.Y. 1989).

b. What constitutes a personal benefit?

“Determining whether [a tipper] personally benefits from a particular disclosure, a question of fact, will not always be easy for courts,” as the Supreme Court acknowledged in *Dirks*. 463 U.S. at 664. Nevertheless, the Court provided this guidance:

[T]o determine whether the disclosure itself deceives, manipulates, or defrauds shareholders, the initial inquiry is whether there has been a breach of duty by the insider. This requires courts to focus on objective criteria, *i.e.*, whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings. There are objective facts and circumstances that often justify such an inference. For example, there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient. The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.

Id. at 663-64 (internal citations, quotation marks, and alteration brackets omitted).

In *Newman*, a seminal Second Circuit case, the court found “[t]he circumstantial evidence . . . simply too thin to warrant the inference that the corporate insiders received any personal benefit in exchange for their tips.” 773 F.3d at 451-52. *Newman* involved a prosecution against two defendants who traded on confidential information that originated with insiders at Dell and NVIDIA; the defendants, however, “were several steps removed from the corporate insiders and there was no evidence that either was aware of the source of the inside information.” *Id.* at 443. In a nutshell, there were two tipping chains: 1) a Dell insider tipped information to the first tippee, who in turn gave the information to an analyst at another firm, who in turn gave the information to defendant Todd Newman and an analyst at yet another firm, who in turn gave the information to defendant Anthony Chiasson; and 2) a NVIDIA insider tipped information to the first tippee, who in turn gave the information to an analyst, who in turn circulated the information to a group of analyst friends, who in turn gave the information to the defendants. *Id.*

The Dell insider and first tippee were not “close” friends, but had known each other for years, having both attended business school and worked at Dell together. *Id.* at 443, 452. The insider, who wanted to become a Wall Street analyst like the tippee, sought career advice and assistance from him; some of this assistance, however, began before the insider began to provide the tips, and the first tippee testified that he would have given the advice anyway because he routinely did so for industry colleagues. *Id.* at 452-53. As to the NVIDIA tips, the insider and first tippee were “family friends” that had met through church and occasionally socialized together.¹⁹ *Id.* at 443, 452.

¹⁹ The evidence of a personal benefit was particularly “scant” as to the NVIDIA tips, because the insider and first tippee did not have a history of loans or personal favors between them, the tippee testified that he did not provide anything of value to the insider in exchange for the

The *Newman* court rejected the government’s position that these facts were sufficient to prove that the insiders derived some benefit from the tips. *Id.* at 452. “If this was a ‘benefit,’” the court posited, “practically anything would qualify.”²⁰ *Id.* It then clarified the law on personal benefit:

We have observed that “[p]ersonal benefit is broadly defined to include not only pecuniary gain, but also, *inter alia*, any reputational benefit that will translate into future earnings and the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend.” *United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013) (internal citations, alterations, and quotation marks deleted). This standard, although permissive, does not suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature. If that were true, and the Government was allowed to meet its burden by proving that two individuals were alumni of the same school or attended the same church, the personal benefit requirement would be a nullity. To the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee’s trades “resemble trading by the insider himself followed by a gift of the profits to the recipient,” *see* 463 U.S. at 664, we hold that such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature. In other words, as Judge Walker noted in *Jiau*, this requires evidence of “a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the [latter].” *Jiau*, 734 F.3d at 153.

While our case law at times emphasizes language from *Dirks* indicating that the tipper’s gain need not be *immediately* pecuniary, it does not erode the fundamental insight that, in order to form the basis for a fraudulent breach, the personal benefit received in exchange for confidential information must be of

information, and the tippee’s testimony that the insider did not know that the tippee was trading the stock undermined any inference that the insider intended to make a “gift” of profits. *Newman*, 773 F.3d at 453.

²⁰ The court also found:

Even assuming that the scant evidence . . . was sufficient to permit the inference of a personal benefit, . . . the Government presented absolutely no testimony or any other evidence that Newman and Chiasson knew that they were trading on information obtained from insiders, or that those insiders received any benefit in exchange for such disclosures, or even that Newman and Chiasson consciously avoided learning of these facts.

Id. at 453.

some consequence. For example, in *Jiau*, we noted that at least one of the corporate insiders received something more than the ephemeral benefit of the “value[] [of] [Jiau’s] friendship” because he also obtained access to an investment club where stock tips and insight were routinely discussed. *Id.* Thus, by joining the investment club, the tipper entered into a relationship of *quid quo pro* with Jiau, and therefore had the opportunity to access information that could yield future pecuniary gain. *Id.*; see also *SEC v. Yun*, 327 F.3d 1263, 1280 (11th Cir. 2003) (finding evidence of personal benefit where tipper and tippee worked closely together in real estate deals and commonly split commissions on various real estate transactions); *SEC v. Sargent*, 229 F.3d 68, 77 (1st Cir. 2000) (finding evidence of personal benefit when the tipper passed information to a friend who referred others to the tipper for dental work).

773 F.3d at 452-53 (alterations in original; internal citation altered).

In its petition for a writ of certiorari, the government contends that *Newman* conflicts with *Dirks* and erroneously heightened the burden of proof. See Pet. Writ Certiorari, *United States v. Newman*, No. 15-137 (July 30, 2015); 17 C.F.R. § 201.323 (official notice). I do not, however, read *Newman* as conflicting with *Dirks*, but rather as clarifying the standard where proof of a personal benefit is based on a personal relationship or friendship. See 773 F.3d at 452. As I already ruled, I apply *Newman*.

2. Analysis

The Division argues that “Ruggieri provided several benefits to Bolan in exchange for the tips: career mentorship and positive feedback that would potentially increase Bolan’s annual bonus and improve Bolan’s chances of promotion.” Div. Reply Br. at 18 (citing Div. Br. at 33-36). The Division also argues that that Bolan tipped Ruggieri to maintain and further their friendship. Div. Br. at 30-32; Div. Reply Br. at 17-18.

Bolan had an amicable working relationship with Ruggieri. Also, Ruggieri provided positive feedback about Bolan. However, Ruggieri did so both before and after the tips. Bolan sought and received feedback from various constituencies, both within and outside Wells Fargo, not just from Ruggieri. Bolan’s supervisor, Wickwire, rejected the notion that Ruggieri provided feedback in exchange for tips. These facts undermine the notion that Bolan sought or received feedback from Ruggieri in exchange for tips. Although the tips and some of Ruggieri’s feedback occurred within the same year’s timeframe, nothing otherwise suggests that Ruggieri’s feedback was in exchange for tips. It is more plausible that Ruggieri’s feedback was genuine, and that Bolan sought feedback as standard practice rather than for an illicit benefit.

Furthermore, the “friendship” and working relationship between Bolan and Ruggieri was not a meaningful, close, or personal one. Nor do the facts establish that Bolan had a *quid pro quo* relationship with Ruggieri.

The Division elected not to call Bolan to testify and objected to the admission of Bolan’s investigative testimony, which I overruled. Tr. 1616-24. Although I had issued a subpoena

ordering Bolan's appearance as a witness, the Division revealed—to the surprise of Ruggieri's counsel—that Bolan had returned to Nashville and objected to testifying.²¹ Tr. 1616-19. Bolan would have been uniquely situated to offer testimony on the issues, as I had expressed to the parties. Tr. 1341-42. Given the lack of sufficient evidence on personal benefit, the Division's failure to elicit Bolan's testimony further hindered its ability to meet its burden of proof.

a. Career mentorship

Regarding the alleged “mentorship” benefit, the Division did not elicit testimony from any witness on this issue except Mackle. *See* Tr. 3215-17. Mackle testified that Ruggieri “got along with all the analysts,” and the “only difference” with Bolan, “as well as another younger analyst . . . , was that [Ruggieri] tried to mentor them as some of the young, up-and-coming analysts.” Tr. 3215. Mackle identified Vincent Ricci as the other young analyst. Tr. 3216. Mackle did not differentiate between Ruggieri's mentoring of Bolan and Ricci, but posited that Ruggieri mentored them both for the same reason. Tr. 3215-16. When asked about Ruggieri's continued mentorship of Bolan after Ricci left Wells Fargo, Mackle explained that Ruggieri mentored Bolan because Bolan “was relatively new to the business” and “the most junior analyst”—not because of anything Bolan did for Ruggieri. Tr. 3216-17. The direct evidence therefore does not establish the Division's claim.

There is also a lack of circumstantial evidence to sufficiently link Ruggieri's mentorship to Bolan's tips, such as evidence regarding the timing of the tips and mentorship. The Division has not offered any explanation as to why, if Ruggieri mentored Bolan in exchange for the tips, Ruggieri also mentored Ricci. Following the Division's logic, one would have to infer Ruggieri's mentorship of Ricci as evidence that Ricci was tipping him as well. But Mackle's testimony indicates that Ruggieri was mentoring both Bolan and Ricci for a non-nefarious reason. This understanding is consistent with other evidence: Evans testified that he was attracted to work at Wells Fargo due to an understanding that the company had “a mentoring attitude” with “more opportunities for associates to be mentored.” Tr. 1234. In sum, the Division has not met its burden on this claim.

b. Positive feedback

Ruggieri provided positive feedback about Bolan in October 2009, just a few weeks after Ruggieri joined Wells Fargo and before any of the alleged tips took place. Adm. FOF Nos. 534-35; JFOF ¶ 11. Geoffrey Snyder, the head of Wells Fargo's institutional sales and a direct report to Bartlett, requested feedback on analysts. Adm. FOF No. 534. In response, Ruggieri said:

Greg Bolan[,] Vince Ricci[,] [and] Aaron Reames[,] These guys have been the most proactive and helpful in the few weeks since I joined. Bolan's in a league of his own – great dialogue w/ clients and gets it. Reames [is] very smart, probably underappreciated on the street but solid – needs to be more visible and probably

²¹ Bolan and the Division reached an agreement to settle on the last business day before the hearing. *See Gregory T. Bolan, Jr.*, Admin. Proc. Rulings Release No. 2476, 2015 SEC LEXIS 1138 (Mar. 27, 2015).

meet more clients – great asset. Vince Ricci has been solid, would love to see him pick up some names. James Omstrom has also been helpful lately with some of Tong’s names.

DIV 173.

In April, July, and December 2010, Snyder requested feedback on analysts and noted that any responses would be communicated anonymously to equity and research management. Adm. FOF Nos. 539, 542. In each of his responses, Ruggieri provided positive feedback. JR 63; DIV 204, 205. For example, in his December response, Ruggieri said: “Bolan – the best in our space. Proactive, great dialogue/traction with clients, communication with the desk is excellent and business in his names are the example.” DIV 205. In these instances, Ruggieri’s feedback was solicited and he provided positive feedback about other traders too, characterizing one as a “seasoned pro” and “solid add[ition].” *Id.*

Among discussing other topics, Ruggieri gave feedback about Bolan during meetings with Bolan’s supervisor, Wickwire. Tr. 1493-94, 2457-60. It does not, however, appear that Ruggieri arranged those meetings with the purpose to praise Bolan. Rather, the topic of Bolan was likely to come up as part of the conversation, as the two covered the same stocks. Wickwire did not believe the Division’s theory that Ruggieri provided positive feedback about Bolan in exchange for tips. Tr. 1556-57.

The Division asserts that “Bolan admitted that he asked Ruggieri to provide feedback to Wickwire because Bolan thought it would help him get promoted.” Div. Reply at 19. During the investigation, Bolan testified that it was “fairly standard” practice to ask individuals to give positive feedback. DIV 110 at 66. Bolan did not know he was under consideration for promotion, but did know he was eligible for a promotion, so he “tried to get as many folks to give positive feedback if [he] deserved it.” *Id.* at 64-65. From the sales and trading departments, Bolan testified that he “may have”²² asked Ruggieri, Beau Volley, Dave Foerstch, and Beau Jerry to provide feedback. *Id.* at 65. The Division never asked Bolan what individuals outside of sales or trading he approached to give positive feedback. *See id.* at 64-66. Nonetheless, Bolan’s nomination form reflects four managing director level references who supported the nomination: 1) Beau Volley, a managing director of equity institutional sales; 2) Mike Micciche, head of equity product marketing; 3) Gary Lieberman, a managing director in equity research; and 4) Peter Costa, another managing director in equity research. DIV 27 at 1; Tr. 1396-97.

From the foregoing, the feedback of the following departments was especially important to Bolan’s nomination: sales (distinct from trading), product marketing, and equity research. The evidence establishes that, in accordance with standard practice, Bolan asked as many people as possible to provide positive feedback. DIV 110 at 64-66.

²² During the investigative testimony, Division counsel appears to have treated Bolan’s answer that he “may have” made such a request to Ruggieri as a definitive answer that he did and then asked subsequent questions as if Bolan admitted it. I instead read Bolan’s answer literally, that he “may have”—meaning it is possible he did so because that was standard practice, but he did not recall the specifics.

The Division's argument appears to be that, out of all the individuals, Bolan's solicitation of positive feedback from Ruggieri was different because he had to tip for it, or that Bolan's tips made Ruggieri give even more glowing feedback than he would have otherwise.²³ The Division disputes Ruggieri's "claim[] that he gave Bolan positive feedback because he was 'a very strong analyst.'" Div. Reply at 19 (quoting Ruggieri Br. at 17). The Division contends that "Ruggieri's praise for Bolan far exceeded his praise for even veteran analysts who covered some of Ruggieri's stocks and whose overall ratings were significantly higher." *Id.*

If Ruggieri provided objectively unreasonable positive feedback regarding Bolan, that may be indirect evidence that Ruggieri gave such feedback in exchange for tips. To assess this point, for purposes of comparison, I look to the tenure of Ruggieri's predecessor in the trading department, David Graichen, who previously worked with Short and Bolan.²⁴

Before Ruggieri's tenure at Wells Fargo, Graichen traded all the stocks that Bolan covered and even wanted to keep Bolan's stocks under him when he switched departments. Tr. 3335, 3339. In July 2009, before Ruggieri joined Wells Fargo, Graichen wrote to Bartlett, Wickwire, and Wickwire's boss with the following feedback:

I just wanted to let you know that Greg Bolan has far and away been the most trader friendly analyst that I have had the pleasure to work with on the position desk. I am unaware how they are paid on a percentage of our trading revenues,^[25] but he has in the past 3 months provided me with some very nice trade ideas and has been directly involved in the healthcare pad[,] making some nice prop bets that resulted in the desk making money. I felt that before transitioning to the role of coverage trader, I wanted you to be aware of the solid work [Bolan] is doing, and that he has been very helpful to me and Chip Short.

JR REB 217; *see* Tr. 3450.

Short testified that he did not "have any reason to disagree" with Graichen's positive feedback on Bolan. Tr. 3451. In a message to Ruggieri, Short described Bolan as a "cash cow" for Wells Fargo, meaning that after Bolan met with clients they generally traded with Wells Fargo and those trades generated revenue. Tr. 3435-36; JR REB 232. Short gave both Bartlett and Wickwire feedback about Bolan. Tr. 1188, 1391.

²³ The BRKR trade took place *after* Bolan received his promotion. *See* DIV 28; DIV 194-A at 9. Thus, there is no chance that Bolan tipped Ruggieri about that stock's ratings change in order to receive feedback to help his promotion.

²⁴ Graichen is another individual who the Division elected not to call to testify.

²⁵ While the Division disputes Ruggieri's claim that he was unfamiliar with the compensation and bonuses of analysts, Ruggieri's view appears consistent with that of his predecessor on this point.

When Ruggieri joined the desk, he was told that Bolan was an excellent analyst by Short and/or Graichen:

I remember when I got to the desk . . . , I kind of got a lay of the land of the analysts and their perspective, and I remember them saying, “You’re going to love Greg Bolan. He’s just an animal.²⁶ He’s great. He’s great with clients. He knows his stocks. He really -- he cares.”

Tr. 2451. So, before Ruggieri ever met Bolan, he had already heard glowing feedback about him. Tr. 2452.

The Division contends that Bolan’s rankings rose significantly after he began tipping Ruggieri, suggesting that Ruggieri’s praise in exchange for tips was responsible for his significant rise from “mediocrity.” Div. Reply at 19. But Bolan’s supervisor, Wickwire, did not agree with the Division’s assessment that Bolan was mediocre. When Wickwire hired Bolan, he perceived Bolan as on his way to being a “rising star” and, without regard to trading impact rank, expected him to improve his overall ranking among the analysts from 2009 to 2010, which he did. Tr. 1525-26. In Wickwire’s words, Bolan was performing well by the end of 2010:

[A]t the time[,] [Bolan] was viewed as, not an up-and-comer, but slightly better than that. He was one of the rising stars within the department. You think about our department, we’ve got some very senior established analysts who have been doing it for 15 or 20 years, and then there’s a group below them who are really moving up the ranks based on their tenure and continuing to build their franchise, and [Bolan] was really at the top of that emerging group.

Tr. 1376-77.

Wickwire further confirmed that Bolan was on a “meteoric rise throughout 2010,” based on positive feedback from numerous constituencies, including sales, clients, and other directors of research. Tr. 1547. Further, Bartlett and Brown held Bolan as the standard among analysts. Tr. 1555. Clients had a favorable view of Bolan and used his research to trade. DIV 110 at 25-26; Tr. 2042.

To further test the Division’s argument, I consider how Bolan’s trading impact rank and feedback from the trading desk would have factored into his bonus or promotion prospects, and whether he was, in fact, stuck in mediocrity absent improvement in trading impact and Ruggieri’s feedback.

First, as to Bolan’s bonus: Annual bonuses for analysts were determined by ranking each analyst relative to his peers using a scorecard; analysts with a higher overall rank could receive a higher bonus. Adm. FOF Nos. 529-30. The scorecard consisted of a rank for several

²⁶ “[A]n animal” was clarified to mean that “he’s thinking about his stocks a lot, he’s talking to clients a lot, he’s proactive, he’s young, he’s hungry” Tr. 2451-52.

categories, as well as a weighted score and overall rank based on the weight assigned to each category. Adm. FOF No. 533; JR REB 106; Tr. 1412-14. The lower the weighted score, the higher the rank.²⁷ See JR REB 106.

Although the Division never questioned Bolan regarding the Wells Fargo scorecards, Wickwire testified that Bolan and the other analysts knew the “different categories and different percentages,” which were shared with them. Tr. 1526. Specifically, analysts were told that they ranked within a range (e.g., top five) for the following categories and the percentage that each category was worth toward the weighted score: sales survey impact (10%), client votes (15%), internal sales rank (10%), external rank (10%), stock picking (10%), and trading impact (5%). Tr. 1526-27, 1529; JR REB 106. Analysts were not told their rankings in three other categories: corporate leadership, retention/marketability, and quality and productivity. Tr. 1529; JR REB 106.

The trading impact rank was based on feedback about the analyst that Wells Fargo traders provided. Adm. FOF Nos. 532. This is the metric that Ruggieri’s feedback could have potentially affected. Bolan’s “trading impact” rank was based on feedback from specific traders, Bartlett, Snyder, Brown, and other members of the trading management team—not just Ruggieri.²⁸ Tr. 1520, 1535-36.

From 2009 to 2010, Bolan’s overall rank improved from #24 to #16, and his trading impact rank improved from #3 to #1. JR REB 106. His trading impact rank accounted for only 5% of his overall weighted score, and thus his trading impact rank improvement from 2009 to 2010 affected his weighted score by 0.1 point.²⁹ *Id.* In terms of percentage weight toward the overall weighted score, trading impact rank was the least important category on the scorecard among those categories of which analysts knew their ranking. *Id.*; Tr. 1529. The relative unimportance of trading impact rank is borne out by the overall analyst rankings, in which virtually all of the top analysts had trading impact ranks far below their overall rank. Tr. 1527-28; JR REB 106.

Based on Wickwire’s testimony, Bolan would have known that he was ranked in at least the top five in terms of trading impact. At the hearing, Wickwire speculated that a trading impact rank improvement from #3 to #1 could have changed Bolan’s overall rank one or two places. Tr. 1535. However, based on the 0.1 point change from 2009 to 2010, it did not affect his overall weighted score and rank in 2010. JR REB 106. Even without that improvement in

²⁷ An analyst in the middle of the rankings, such as Bolan, who moved up by one overall rank could potentially receive a bonus increase in the range of \$50,000 to \$75,000. Adm. FOF No. 574.

²⁸ Even assuming, *arguendo*, that Bolan tipped Ruggieri based on an agreement, or simply his hope, that Ruggieri would provide exaggerated feedback, Bolan had no way of controlling for the accomplishments of other analysts or the feedback from others.

²⁹ Based on a 5% weight assigned to trading impact, a rank of #3 translates into 0.15 point for the weighted score, whereas a rank of #1 translates into 0.05 point. Thus, the rank improvement resulted in a 0.1 point change for Bolan.

trading impact from 2009 to 2010 (i.e., assuming he remained #3), Bolan would still have been ranked #16 overall on the scorecard. As Bolan knew he ranked within the top five in trading impact and that this rank counted for only 5% toward the weighted score, Bolan would have known that he had reached a point where taking risks to boost his trading impact rank would have gained him nothing. Since Bolan already ranked so highly in trading impact, to take risks to improve that score would have been against his self-interest.

Five other categories—sales survey impact, client votes, internal sales rank, external rank, and stock picking—were individually worth at least twice as much as the trading impact rank. JR REB 106. Bolan would have known his approximate rank in these other categories and that his potential for upward movement in these categories was much more significant than trading impact, where he was already close to the top in 2009. *See* JR REB 106; Tr. 1526-27, 1529. Indeed, his overall rank did not increase as a result of the trading impact rank improvement. Rather, it rose because of major gains in these other categories. *See* JR REB 106. This undermines the Division’s contention that the trading impact rank was “one of the few factors he could control.” Div. Br. at 34.

Specifically, Bolan gained dramatically in the following:

- Bolan’s rank in sales survey impact—worth a total 10% toward the weighted score—improved from #21 in the first half of 2009 and #17 in the second half of 2009, to #15 in the first half of 2010 and #14 in the second half of 2010. This improved his overall weighted score by 0.45 point. That improvement was 350% greater than his 0.1 point improvement in trading impact. Without this improvement in sales survey impact, Bolan’s overall rank in 2010 would have been one place lower.
- Bolan’s rank in client votes—worth 15% toward the weighted score—improved from #23 in 2009 to #15 in 2010, improving his overall weighted score by 1.2 point. That improvement was 1100% greater than his 0.1 point improvement in trading impact. Without this improvement in client votes, Bolan’s overall rank in 2010 would have been one place lower.
- Bolan’s rank in internal sales—worth a total 10% toward the weighted score—improved from #25 in the second quarter of 2009, #19 in the third quarter of 2009, and #18 in the fourth quarter of 2009 (averaging #20.7), to #11 in the first half of 2010 and #8 in the second half of 2010 (averaging #9.5). This improved his overall weighted score by 1.12 point. That improvement was 1020% greater than his 0.1 point improvement in trading impact. Without this improvement in internal sales, Bolan’s overall rank in 2010 would have been one place lower.
- Bolan’s external rank—worth a total 10% toward the weighted score—improved from #25 as to the institutional investors’ rating in 2009 and #22 as to the Greenwich rating in 2009 (averaging #23.5), to #17 as to the institutional investors’ rating in 2010 and #24 as to the Greenwich rating in 2010 (averaging #20.5). This improved his overall weighted score by 0.3 point. Without it, Bolan would not have had a lower overall rank in 2010, but it was nonetheless 200% greater his 0.1 point improvement in trading impact.

- Bolan’s rank in stock picking—worth 10% toward the weighted score—improved from #39 in 2009 to #7 in 2010. This improved his overall weighted score by 3.2 points. That improvement was 3100% greater than his 0.1 point improvement in trading impact. Without this improvement in stock picking, Bolan’s overall rank in 2010 would have been four places lower.³⁰

To the extent Wells Fargo’s internal guidelines may have informed Bolan about his salary and bonus prospects, the factors listed in such guidelines are essentially memorialized in the scorecard. *See* DIV 98 at 158-59; JR REB 106. Even if Bolan had an incentive to improve his scorecard standing, the foregoing shows it is not likely that Ruggieri’s feedback (to the extent it could have impacted Bolan’s trading impact rank) constituted a personal benefit either objectively speaking or from Bolan’s point of view in terms of Bolan’s bonus prospects.

Second, as to Bolan’s promotion: In November 2010, Wickwire nominated Bolan for promotion from vice president to director.³¹ Adm. FOF No. 546. On the director nomination form, among several positive points about Bolan, Wickwire said: “[Bolan] is among the best analysts in the department in terms of his dialogue with trading. We consistently hear from trading that [Bolan] provides great information flow to the desk and they are able to monetize his efforts. They often hold him out as the standard.” DIV 27 at 5. In making such assessment, Wickwire considered feedback from Snyder and Bartlett, and understood that their feedback was based, at least in part, on Ruggieri’s feedback about Bolan. Tr. 1400-02, 1408-09, 1478. Wickwire thought highly of Ruggieri and it is reasonable to conclude that Wickwire valued Ruggieri’s opinion. Tr. 1498-1503. Feedback from Wells Fargo’s trading desk was taken into account in analyst promotions and was an important factor in analysts’ careers. Adm. FOF No. 564.

Bolan frequently received glowing feedback from various constituencies, including Ruggieri’s predecessor. Individuals such as Bartlett gave positive feedback about Bolan to Wickwire, based on their own assessments. *See, e.g.*, Tr. 1189-90. As discussed above, the nomination form listed four managing director level references who supported Bolan’s nomination, none of whom were from the trading department. DIV 27 at 1. Wickwire testified that Bolan would have been promoted regardless of his trading impact rank improvement. Tr. 1549. Further, among other matters noted on the nomination form, Wickwire praised Bolan’s work ethic, noted that his client votes were recognized as among the best in the department, and highlighted Bolan’s successful projects. DIV 27 at 3, 5, 7.

In an abstract sense, feedback from the trading desk, including Ruggieri, could be viewed as having some potential pecuniary value. The ultimate issue, however, is not whether Ruggieri’s feedback did or could help Bolan’s career, but whether Bolan tipped for it. Given the circumstances in which Ruggieri gave and Bolan sought such feedback, discussed *supra*, it is just as likely that Ruggieri gave such feedback because it was genuine, and that Bolan sought

³⁰ These figures are drawn from JR REB 106.

³¹ Bolan’s promotion came with a \$50,000 to \$100,000 salary increase. Adm. FOF No. 566.

feedback as part of standard procedure. The evidence does not weigh toward a finding that Ruggieri provided such feedback in exchange for tips or that Bolan sought feedback for illicit reasons.

I have considered the possibility that Bolan tipped Ruggieri with the expectation that Ruggieri would continue to provide positive feedback. In other words, the fact that Ruggieri's feedback was genuine is not necessarily mutually exclusive with the theory that Bolan tipped for a benefit. However, I decline to draw a speculative inference about Bolan's state of mind where the evidence does not support it.

c. Friendship

The Division also alleges that Bolan tipped to maintain and further his friendship with Ruggieri. *See* OIP at 8; Div. Br. at 30-32. As *Newman* instructs, however, the benefit received must be "something more than the ephemeral benefit of the value of . . . friendship . . ." 773 F.3d at 452. Rather, "in order to form the basis for a fraudulent breach, the personal benefit received in exchange for confidential information must be of some consequence." *Id.*

Ruggieri acknowledged that he and Bolan were "pretty good friends." Tr. 2055-57. Bolan acknowledged that he developed "a friendship" with Ruggieri. DIV 110 at 31. Although Ruggieri felt that he and Bolan "got along really well," Ruggieri maintained closer relationships with ten to fifteen other Wells Fargo employees, several with whom he socialized outside of the work context.³² Tr. 2470-71, 2477-78.

The Division contends that "[w]hether their friendship was as important to Ruggieri . . . is irrelevant," because the friendship must be viewed from the tipper's perspective. Div. Br. at 31-32. Its evidence on this point is unpersuasive. For example, the Division emphasizes that when Bolan began tipping Ruggieri, they had known each other for six months. Div. Br. at 32. Bolan was in Nashville and Ruggieri was in New York City. They met about fifteen times in person, and Ruggieri never visited him in Tennessee. Tr. 2471; DIV 110 at 28. Mackle, by contrast, had discussed visiting Bolan in Tennessee, despite having friction with Bolan. JR REB 244; Tr. 3209-10, 3311-12.

The Division states that Bolan and Ruggieri socialized outside the office when Bolan was in New York. Div. Br. at 31. As Bolan testified during the investigation, the "social" events were three or four in 2010 and one or two in 2009. DIV 110 at 30. These events involved post-work drinks and dinner events—typically attended by clients and other colleagues—as well as a client golf trip and client fishing tournament, which were work-sponsored functions. *Id.* at 29-31, 33-35; Tr. 2068-69, 2471-73.

The Division surmises that as a result of Bolan's difficult personality, Bolan's friendship with Ruggieri was important to Bolan. Div. Br. at 32. During his March 2013 interview with the Division, Evans (Bolan's office assistant) described Bolan as a "loner" who "doesn't maintain

³² Ruggieri did not consider work colleagues on the same level as his personal friends; his closest friends were from childhood. Tr. 2055-56.

close relationships.”³³ Tr. 1292-93. Evans felt Bolan had a temper and “was not comfortable with” how Bolan treated others when he got angry. Tr. 1293-94. Evans had no knowledge whether Bolan and Ruggieri were friends. Tr. at 1293. The Division’s conjecture—that Bolan, purportedly “less successful” with “a difficult personality,” needed Ruggieri as a friend, Div. Br. at 32—is unconvincing.

While the significance of Bolan and Ruggieri’s relationship after they left Wells Fargo is less clear, it may bear on whether they had a meaningfully close personal relationship or a *quid pro quo* relationship. On the other hand, interaction of a different character, after the trades took place, may simply reflect a changed circumstance. Here, their post-Wells Fargo interaction arose, at least in part, because Bolan quit his job in anticipation of being terminated, and Ruggieri was terminated for failing to escalate Bolan’s dissemination of channel check information in violation of Wells Fargo policy. Often a significant shared common experience—either positive or negative—can serve as a common bond that brings people together.

In the first few months after they left Wells Fargo, Ruggieri and Bolan communicated “quite a bit” because Bolan was trying to get a job at International Strategy & Investment (ISI), where Ruggieri had found work. DIV 110 at 31, 69. In April 2011, Bolan stayed in Ruggieri’s apartment for three days during job interviews, to save on hotel costs. *Id.* at 67, 70-71. During that time, Bolan’s interaction with Ruggieri involved “running, [getting] fruit juice, and [going] to dinner.” *Id.* at 67. It appears that Bolan kept the keys to Ruggieri’s apartment until the next month. DIV 45; DIV 110 at 71; Tr. 2375.

Ruggieri also recommended Bolan for an analyst role at ISI. DIV 110 at 69. In addition, on one occasion shortly after Bolan quit, Bolan went for drinks with Short, Mackle, and Ruggieri. Tr. 3402-03. The Division strove to show that Bolan talked to Ruggieri more than others; but as Short testified: the gathering was brief, lasting fifteen or twenty minutes; Ruggieri “was off to another interview”; and he did not recall Bolan speaking more to any particular person. Tr. 3403-04. Generally, Bolan and Ruggieri communicated infrequently after they left Wells Fargo, and once Bolan found a new job, their communications died off. DIV 110 at 31. In September 2011, they had an email exchange, during which Bolan asked Ruggieri if he had received the invitation to Bolan’s wedding, to which Ruggieri responded, “Not yet.” DIV 167 at 3-4. Ruggieri never went to the wedding, and testified that he never received the invitation. Tr. 2375-76.

The foregoing is more consistent with the account that absent their shared professional experience, Bolan and Ruggieri were not close.

The Division’s evidence regarding another tippee, Moskowitz, helped underscore the point that Bolan tipped in advance of his ratings changes. That evidence is also instructive on the issue of friendship. In contrast to Bolan’s “friendship” with Ruggieri, Bolan and Moskowitz were “old,” “close,” “very good,” “trusted” friends. DIV 110 at 110, 112-13; DIV 119 at 3. Bolan and Moskowitz knew each other since 2005, when they worked two rows apart on the

³³ When Evans gave sworn investigative testimony, the Division did not ask him to “describe Mr. Bolan’s personality or the strength of his friendships.” Tr. 1293.

trading floor at First New York. DIV 110 at 112; JFOF ¶ 201. From then until Moskowitz's death, they spoke on the phone "a couple of times a month." JFOF ¶ 202. In March 2011, Bolan tried to get Moskowitz a job at Wells Fargo, in an email titled: "Trusted friend looking for trading position on sell-side trading desk." DIV 119 at 3.

At the time of Bolan's 2013 investigative testimony, Bolan testified that he socialized with Moskowitz when Moskowitz left his apartment, which was "very rare" because of Moskowitz's illness. DIV 110 at 110-13. From at least June 2009 through November 2010, Moskowitz was unemployed. JFOF ¶ 203. During that time, Moskowitz, unlike Ruggieri, traded using his own money in personal brokerage accounts. DIV 151, 182. Hence, Moskowitz received a direct financial benefit from profitable trades based on Bolan's tips. Around the time Wells Fargo was conducting its internal inquiry into Bolan's conduct, Bolan asked Moskowitz for a lawyer reference. JFOF ¶ 203.

The relationship between Bolan and Moskowitz is more indicative of a "meaningfully close personal relationship that generates an exchange" of some value or potential value under *Newman*. See 773 F.3d at 452-53. By contrast, the evidence fails to establish that Bolan and Ruggieri's "friendship" was meaningful, close, or personal. Nor does it establish a *quid pro quo* relationship.

d. Working relationship

Apart from friendship, the Division appears to contend that Bolan and Ruggieri's working relationship was sufficiently close. The Division cites Wickwire's observation that Bolan and Ruggieri "developed a very close relationship that contained a significant amount of dialogue, more than [was] normal for [the research] department, and . . . there was a close relationship of two professionals supporting one another." Tr. 1557-58. Wickwire's statement relates to a professional, as opposed to personal, relationship between Bolan and Ruggieri. Indeed, Bolan spoke to Ruggieri at least a couple times a week at work. DIV 110 at 56. As an analyst and a trader assigned to the same sector, they were trying to improve Wells Fargo's healthcare business. DIV 44; Tr. 2059-61. In a July 2010 email, Bolan said to Ruggieri: "Dude, in 5yrs, I have a feeling we are going to rule the [healthcare] world" JR 92. And in an August 2010 email, Ruggieri said to Bolan: "Bro Fk it- Were partners. Together, we can lift this sector team and crush it. We have A LOT of work to do with others to get there but can do it. Biotch." DIV 44.

However, there's no rational indication that either believed that they could "lift this sector team," "rule the [healthcare] world," or otherwise advance their careers by tipping and trading ahead of Bolan's ratings changes. The size of Ruggieri's overnight positions in advance of the ratings changes could never reasonably have been expected to result in a meaningful advantage. Ruggieri's trading in these instances did not provide the team with any better standing.³⁴ It was

³⁴ Wells Fargo's trading desk made money for the firm primarily through commissions in executing client trades. Tr. 679, 1136; JFOF ¶ 47. The traders had an overall loss ratio, as did Ruggieri. Tr. 918-19, 1144, 2098, 3382-83. Any purported profits from the tips at issue would have had a negligible impact on Ruggieri's loss ratio and the commissions generated for Wells

also risky, as they knew that Wells Fargo policy prohibited employees from knowingly front-running research. DIV 6 at 1, 12-13; DIV 68 at 2; Tr. 158-59.

Although Bolan and Ruggieri's dialogue was greater than one may expect, it was a working relationship directed by Wells Fargo policy—which dictated “constant dialogue” between analysts and traders. DIV 107 at 1; Tr. 1468; *see* DIV 110 at 132-33. Following such policy and working in an amiable fashion does not establish a meaningfully close personal relationship or *quid pro quo*.

As already discussed, Ruggieri's predecessor also shared a close professional relationship with Bolan, as memorialized by the feedback that he provided to management. Beyond the analyst-trader dialogue, Bolan had impressed a number of Wells Fargo colleagues and clients. Indeed, none of the management-level references who supported Bolan's director nomination were traders or on the trading management team. DIV 27 at 1. Thus, in a tangible sense, Bolan strove to establish and maintain professional relationships with individuals from a variety of departments and entities. For example, Wickwire agreed that analysts work with the sales group—“an entirely separate group” from trading—“on a very close daily basis.” Tr. 1514-15. While focusing on Ruggieri, the Division has failed to consider Bolan's relationships with other colleagues. At the very least, this was a missed opportunity in establishing how the nature and extent of those interactions would lend themselves to the determination whether Bolan's relationship with Ruggieri was a personal benefit.

The Division references case law stating: “If a tip maintains or furthers a friendship, and is not simply incidental to the friendship, that is circumstantial evidence that the friendship is a *quid pro quo* relationship.” *United States v. Riley*, 13-cr-339, 2015 WL 891675, at *5 (S.D.N.Y. March 3, 2015). Even considering Ruggieri and Bolan's “friendship” in connection with Ruggieri's positive feedback and working relationship with Bolan, the totality of the evidence does not support the Division's position. It is just as plausible that Bolan's tips were simply incidental to his professional relationship with Ruggieri as opposed to part of any *quid pro quo*. Aside from the theory that Ruggieri provided positive feedback about Bolan in exchange for tips—a theory that is not borne out for the reasons discussed—nothing comes close to arguably suggesting a *quid pro quo* between the two. In fact, the OIP does not allege any personal benefit beyond the purported friendship benefit and positive feedback. That Bolan neither received nor

Fargo. Tr. 2379-80. When Ruggieri joined Wells Fargo in August 2009, he received a salary, plus approximately six percent of the monthly net revenue in his Wells Fargo trading accounts, plus a guaranteed bonus of \$400,000. Adm. FOF No. 70. In early 2010, competitor firms tried to recruit Ruggieri from Wells Fargo. Tr. 948, 2394-95. To persuade Ruggieri to stay, Wells Fargo matched one of its competitor's guaranteed offers of compensation. Tr. 1162-63. In 2010, Ruggieri's guaranteed compensation was \$1.8 million, which made him the highest-paid equity trader at Wells Fargo. Adm. FOF No. 75. Ruggieri knew that his salary would be guaranteed, and there is no question that Wells Fargo would honor that guarantee. Tr. 968-70. That is the same year that Ruggieri traded ahead of Bolan's ratings changes, meaning that even to the minute extent that those trades could marginally improve his overall loss ratio, it would have had no impact on his compensation for that year.

sought anything of value or potential value in exchange for the tips may seem unsatisfying, but it is the Division's burden to establish personal benefit. It cannot simply be presumed.

e. Gift to a trading friend

In a pre-*Newman* decision, the Commission found the personal benefit element satisfied because the respondent's tip to his coworker, who then traded and profited from the information, "constituted a gift to a trading friend under *Dirks*." *Robert Bruce Lohmann*, Exchange Act Release No. 48092, 2003 SEC LEXIS 3171, at *13 (June 26, 2003). The Commission reasoned that it was sufficient that the respondent and tippee coworker were "friendly, if casual, office acquaintances." *Id.* Although there was no evidence of a close personal relationship, there was evidence of the respondent's intent to benefit his coworker. *See id.* at *8-9 (the respondent told his coworker that the company's stock "acts great" and "a little birdie told me something good is going to happen" with it, and the respondent's handwriting appeared on the order ticket for his coworker's trades), at *13 (finding that the respondent offered the tip to help his younger coworker). Under *Newman*, however, it is doubtful that a tipper's "gift" of trading information to a coworker would suffice to meet the personal benefit element in the absence of a meaningfully close personal relationship that results in an exchange of value or potential value. *See* 773 F.3d at 452.

Dirks suggests that an inference of personal benefit may be drawn based on, *inter alia*, "an intention to benefit the particular recipient." 463 U.S. at 664. Standing alone, this formulation may suggest that the nature of the relationship between the tipper and tippee does not matter if the intent to benefit the recipient is present, as it was in *Lohmann*. *Dirks* further instructs that "[t]he elements of fiduciary duty and exploitation of nonpublic information *also exist* when an insider makes a gift of confidential information to *a trading relative or friend*." *Id.* (emphasis added). As Judge Rakoff has observed, it is arguably unclear whether this sentence modifies the prior reference or is an independent possibility. *SEC v. Payton*, --- F. Supp. 3d ----, 2015 WL 1538454, at *4 (S.D.N.Y. Apr. 6, 2015). In any event, the OIP does not allege and the Division does not argue that Bolan tipped Ruggieri with the intent to benefit Ruggieri. Accordingly, any such claim has been waived.

f. Bolan's motivations

In the absence of satisfactory proof of a personal benefit, one might reasonably ask why Bolan tipped Ruggieri. According to the Division, one of "the key facts" in this case is "Bolan's routine provision of material, non-public channel check information to Ruggieri and important clients, even after Wells Fargo had instructed Bolan not to do so." Div. Reply at 1. As the Division argues, Bolan repeatedly previewed his research and dismissed compliance concerns raised by others.

In February 2009, Lisa Hausner, Wells Fargo's global publishing director and the supervisor of its research supervisory analysts, learned that Bolan had shared his views on AMRI with a reporter before publishing them. Adm. FOF Nos. 171-72. She directed Bolan to publish his comments immediately and to refrain from speaking to a reporter again on any topic on which he had not published, and she warned Bolan that it was a "selective dissemination issue."

Adm. FOF No. 172. As another example, in September 2009, Bolan sent a channel check email concerning CVD to two individuals at a platinum client of Wells Fargo. Adm. FOF Nos. 173-74. Bolan provided a number of data points about CVD's toxicology facility, which he obtained from his toxicology consultant. JR 5. He then conveyed his opinion that

we will continue to see an incremental improvement through the end of the year and the more robust demand will return in Q1 or Q2. I know this goes against my past statements and it is surprising to me but we are nearly in Q4 and the activity only seems moderate. Especially with the holidays, I would expect it to be busier now for starting studies in Q4.

Id. Bolan said that this information was “very sensitive and somewhat costly data-point[s] to get” and asked the recipients to “please keep this close to the vest.” *Id.*

As a third example, in May 2010, Wells Fargo's email review program flagged a channel check email that Bolan had sent to “certain clients,” and supervisory analyst Mike Madsen reviewed the email. Adm. FOF No. 179. Madsen spoke with Bolan and told him that he needed to publish the channel check in a squawk without identifying statistics and names. Adm. FOF No. 180. In his conversation with Madsen, Bolan did not claim that he thought he was allowed to convey such information to select clients without publishing it first. Adm. FOF No. 181. Bolan emailed his channel check to the equity squawks mailbox to be published, and Wells Fargo published Bolan's channel check squawk. Adm. FOF No. 182. That was the only time Bolan published research at Wells Fargo with the terms “channel,” “check,” or “channel check” in the title of his research. Adm. FOF No. 183. In Madsen's years as a supervisory analyst, he did not recall any other instance in which he had told an analyst to publish research that was selectively disclosed to certain clients, and it was “exceedingly rare” that he saw a channel check email go out to clients without being published first. Adm. FOF No. 184. Because it was not a “run-of-the-mill” event, Madsen flagged the incident to his boss. Adm. FOF No. 185. After his May 2010 conversation with Bolan, Madsen thought Bolan would subsequently comply with Wells Fargo's publication policies and publish his channel checks in a squawk or note. Adm. FOF No. 186.

By late September 2010, Evans had become concerned that Bolan was violating Wells Fargo's compliance policies by selectively sharing unpublished, potentially material channel check research with certain high-paying clients. Adm. FOF No. 196. In October 2010, Evans raised his concerns with Bolan and told Bolan they should publish the channel check information in a research note or squawk. Adm. FOF No. 198. Bolan dismissed Evans' concerns and told Evans that Wells Fargo's compliance department had “cleared” the channel check emails. Adm. FOF No. 199. In early November 2010, Evans raised his concerns with Bolan again. Adm. FOF No. 201. By this time, Evans was not satisfied with Bolan's representation that he had cleared his channel check emails through Wells Fargo's compliance department and was “unclear whether [Bolan] had accurately represented what he was doing to someone in either an S[upervisory] A[nalyst] role or a compliance role, if indeed he had talked to someone.” Adm. FOF No. 202.

In mid-November 2010, Evans raised his concerns with Bolan a third time and told Bolan that Bolan was not being careful about the compliance rules. Adm. FOF Nos. 205-06. Evans documented his conversation in an email to himself, with the subject line “compliance.” Adm. FOF No. 208. After these three conversations, Evans realized that Bolan was not going to change his practices. Adm. FOF No. 209. Evans felt that Bolan’s behavior violated Wells Fargo’s policy and could result in Bolan and Evans’ termination. Uncomfortable with that risk, Evans tried looking for another job. Adm. FOF Nos. 210-11.

On April 1, 2011, Bolan instant messaged Ruggieri about “positive” channel checks on two “preclinical” CROs, and emailed an unpublished channel check concerning a preclinical CRO to Ruggieri and individuals who worked for a Wells Fargo client. Adm. FOF Nos. 591-92. That same day, after Evans and Wells Fargo clients noticed that the stock prices of CROs were moving following Bolan’s channel check emails, Bolan emailed a squawk concerning a preclinical channel check. Adm. FOF No. 595. That squawk contained information that Bolan had previously sent to a Wells Fargo client and Ruggieri. Adm. FOF No. 596.

By mid-afternoon on April 1, a compliance officer at SAC Capital Advisers LP, a hedge fund client, alerted Wells Fargo’s compliance department that Ruggieri had sent an instant message to an SAC trader about Bolan’s unpublished research on preclinical channel checks concerning CROs. Adm. FOF Nos. 602-03. As a result, Wells Fargo began investigating Ruggieri and Bolan. Adm. FOF No. 604. Around the same time, Evans escalated concerns about Bolan to Wickwire. Adm. FOF No. 605. As part of its review, the Wells Fargo compliance department became concerned by several instances in which Bolan had shared material, as-yet-unpublished research with Ruggieri and select external clients. Adm. FOF No. 612. Wells Fargo concluded that Bolan’s communication of nonpublic research to clients violated Wells Fargo’s prohibition against previewing as-yet-unpublished research and the firm’s requirement that research be publicly disseminated at the time of its disclosure—not selectively distributed to certain clients first. Adm. FOF No. 614. In April 2011, Wells Fargo decided to terminate Bolan. Adm. FOF No. 616. Wickwire travelled to Nashville to terminate Bolan in person, but Bolan resigned before Wickwire could do so. Adm. FOF No. 617.

The above reflects Bolan’s longstanding disregard of compliance rules, including a disclosure to the press, without preclearance, and numerous disclosures to clients. Bolan’s assistant, Evans, was so concerned about Bolan’s repeated disregard for Wells Fargo’s policies regarding the disclosure of nonpublic information that he memorialized his attempts to confront Bolan, and began to search for a new job because he felt that continuing to work with Bolan was unsustainable. It is arguable that Bolan broke rules due to a misguided belief that disclosing nonpublic information would help his career and advance his reputation. Another view—and one that seems equally if not more likely—is that Bolan simply could not follow the rules and keep his mouth closed. For example, he made the improper press disclosure for no apparent reason. Although Bolan made improper disclosures to a few select clients, none of the cited instances establish that he did so for personal gain or to further career prospects. Bolan’s failings, however imprudent, do not establish a personal benefit within the meaning of *Dirks*.

In conclusion, it is possible that Bolan tipped Ruggieri for a personal benefit, but the Division has not met its burden to establish this required element.

V. RECORD CERTIFICATION

I certify that the record includes the items set forth in the record index issued by the Secretary of the Commission on July 29, 2015.³⁵ *See* 17 C.F.R. § 201.351(b).

VI. ORDER

Accordingly, this proceeding is DISMISSED as to Joseph C. Ruggieri.

This initial decision shall become effective in accordance with and subject to the provisions of Commission Rule of Practice 360, 17 C.F.R. § 201.360. Pursuant to that rule, a party may file a petition for review of this initial decision within twenty-one days after service of the initial decision. A party may also file a motion to correct a manifest error of fact within ten days of the initial decision, pursuant to Rule of Practice 111, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then a party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact.

The initial decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct a manifest error of fact or the Commission determines on its own initiative to review the initial decision as to a party. If any of these events occur, the initial decision shall not become final as to that party.

Jason S. Patil
Administrative Law Judge

³⁵ On August 10, 2015, I ordered the parties to jointly maintain and preserve genuine copies of exhibits that they had filed in electronic format only, in the event they are requested to resubmit such exhibits in any appeal from this initial decision. *See Gregory T. Bolan, Jr.*, Admin. Proc. Rulings Release No. 3025, 2015 SEC LEXIS 3262.