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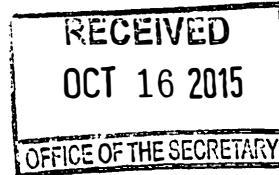
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16178

In the Matter of

Gregory T. Bolan, Jr. and
Joseph C. Ruggieri,

Respondents.



RESPONDENT JOSEPH C. RUGGIERI'S
CROSS-PETITION FOR REVIEW OF INITIAL DECISION

SERPE RYAN LLP
Paul W. Ryan
Silvia L. Serpe
1115 Broadway, 11th Floor
New York, New York 10010
(212) 257-5011

*Attorneys for Respondent
Joseph C. Ruggieri*

Pursuant to Commission Rule of Practice 410(b), respondent Joseph Ruggieri, by his attorneys Serpe Ryan LLP, respectfully submits this conditional request to cross-petition the Commission for review of the Initial Decision rendered by Administrative Law Judge (“ALJ”) Jason S. Patil on September 14, 2015. On October 5, 2015, the Division of Enforcement (“Division”) petitioned the Commission for review of the Initial Decision. If the Commission grants the Division’s petition, then Mr. Ruggieri seeks review of the findings and conclusions that, for four of the six trades at issue, he was tipped about forthcoming rating changes, and that he traded based on those tips.¹

PRELIMINARY STATEMENT

A recent Wall Street Journal article “SEC Wins With In-House Judges” quoted former ALJ Lillian McEwan as saying that she and her fellow in-house judges were expected to place “the burden [] on the people who were accused to show that they didn’t do what the agency said they did”² even though the law actually places the burden on the SEC. ALJ Patil’s finding that Mr. Ruggieri made trades based on knowledge of upcoming ratings changes was incorrectly arrived at only by precisely this shifting of the burden of proof, which erroneously required Mr. Ruggieri to prove that he made the trades at issue for legitimate reasons.

¹ By submitting this petition, Mr. Ruggieri does not waive his right to seek summary affirmance. (The Commission Rules of Practice are silent on this issue.) He makes this petition solely to preserve his right to challenge any final decision by the Commission holding Mr. Ruggieri liable for insider trading. SEC Rule 410(e) (noting that “a petition to the Commission for review of an initial decision is a prerequisite to the seeking of judicial review of a final order entered pursuant to such decision”).

² Jean Eaglesham, *SEC Wins With In-House Judges*, The Wall St. J. (May 6, 2015), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803>.

As the Initial Decision held, Mr. Ruggieri did not commit insider trading.³ This result was not surprising given that the overwhelming – and undisputed – evidence proved that Mr. Ruggieri had no conceivable incentive to trade based on inside information. Mr. Ruggieri was the highest paid trader on the Wells Fargo trading desk, where he earned a seven-figure salary. Notably, his salary was *guaranteed* during the majority of the relevant time period. Moreover, Mr. Ruggieri made all of the trades, from which the profits were a mere rounding error on his trading loss ratio, in his Wells Fargo trading book, i.e. on behalf of his employer and open for all to see.⁴

The ALJ's finding in favor of Mr. Ruggieri was based on the absence of any personal benefit provided to Mr. Bolan by Mr. Ruggieri for purportedly tipping inside information. (Initial Decision at 46, finding that “nothing comes close to arguably suggesting a *quid pro quo* between the two”). The lack of personal benefit was sufficient to vindicate Mr. Ruggieri, but the ALJ gratuitously found that Mr. Ruggieri illegally traded in four of the six trades at issue. Not only was this finding unnecessary, but it was based on (1) an improper reversal of the burden of proof, (2) a misguided reliance on flawed statistics, (3) speculation about trades and conduct involving deceased non-party, Mr. Moskowitz, and (4) a disregard of the weight of the evidence. Were the Commission to hear an appeal, Mr. Ruggieri requests a ruling that there is no need to reach the issue of whether Mr. Ruggieri traded based on any tips in light of the lack of any benefit to the alleged tipper. Alternatively, Mr. Ruggieri seeks a finding by the Commission that the Division failed to meet its burden of proof regarding the four trades at issue.

³ Mr. Ruggieri does not seek review of this ultimate finding, opposes the Division's petition for review of the Initial Decision, and will seek summary affirmance.

⁴ The Initial Decision found that “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 Fargo”. (Initial Decision, at 45-46 n.34).

SUMMARY OF GROUNDS FOR REVIEW

I. THE ALJ IMPROPERLY FOUND THAT RUGGIERI TRADED BASED ON TIPS

A. The ALJ Reversed the Burden of Proof⁵

The Initial Decision states that the ALJ based his findings and conclusions “on the record, applying preponderance of the evidence as the standard of proof”. (Initial Decision at 2). Thus, the Division was required to “demonstrate [at trial] that it is *more likely than not*” that Mr. Ruggieri received tips from Mr. Bolan and traded on those tips. *SEC v. Northshore Asset Mgmt.*, No. 05 Civ. 2192 (WHP), 2008 U.S. Dist. LEXIS 36160, at *21 (S.D.N.Y. May 5, 2008)(quotations omitted, emphasis added). Despite this black letter law, the Initial Decision reversed the burden, requiring Mr. Ruggieri to prove that he did *not* trade based on inside information, rather than holding the Division to its burden to prove that he did.

The fact that the ALJ reversed the burden of proof is evident on the face of the Initial Decision, which fails to even mention the Division’s burden of proof when describing the ALJ’s methodology:

Thus, for each trade at issue, I considered Ruggieri’s explanation as to why he held a position before Bolan’s rating 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. . . . 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.

(Initial Decision at 11). Thus, the ALJ improperly burdened Mr. Ruggieri with providing a “convincing explanation” for why he made trades. (*Id.* at 28). This is a significant error, although it is

⁵ Pursuant to Rule 410(b), the Division does not waive any ground for review based on findings or conclusions in the Initial Decision that contradict Mr. Ruggieri’s pre-hearing and post-hearing proposed findings of fact and conclusions of law, insofar as the contradictions relate to the elements of the Division’s Section 10(b) and Rule 10b-5 claims that require proof of a tip. Additionally, Mr. Ruggieri expressly reserves his constitutional challenges for review in a federal court of appeals. Rule 410(e).

not necessary for the Commission to fix it, in light of the Initial Decision's ultimate holding that because there was no benefit to the alleged tipper, there was no insider trading in this case.

B. The ALJ Relied on Flawed Statistics

Equally problematic, the ALJ based his finding on the purported "statistical implausibility" of the trades occurring by chance, but this was never established. The lynchpin of the Division's case was an expert who opined that there was a ".0002% probability" that the trades at issue were a product of chance. (Div. Post-Hearing Proposed Findings of Fact and Conclusions of Law ¶ 409). However, the Initial Decision's finding that Mr. Ruggieri did not commit insider trading for two of the six trades at issue contradicts the statistical model, because that finding necessarily means that 33% of the trades were made by chance. (Initial Decision at 15, 18 (crediting Mr. Ruggieri's "contemporaneous thesis for short selling PRXL" and "his independent thesis for his CVD trade")). Despite debunking the statistical analysis, ALJ Patil failed to reach the next logical conclusion; namely, that the Division's entire statistical theory was flawed and unreliable.

C. The ALJ Relied on Speculation About Trading by Mr. Moscowitz

ALJ Patil also improperly used speculation about purportedly similar trading by Mr. Moscowitz against Mr. Ruggieri. Prior to the hearing, Mr. Ruggieri made a motion *in limine* to exclude evidence of any trading by Mr. Moscowitz, who is deceased and had never even met Mr. Ruggieri, as prejudicial and not probative of whether Mr. Ruggieri committed insider trading. During the oral argument, ALJ Patil stated that evidence regarding Mr. Moskowitz was not likely to be relevant as to Mr. Ruggieri because such evidence "doesn't really prove anything about [Mr. Ruggieri's] conduct". (Transcript of Pre-Hearing Conference, dated March 17, 2015, at 49-51). ALJ Patil ultimately deferred the motion to exclude the evidence finding that it might be relevant in a limited way, such as to Mr. Bolan's credibility. The Division did not present a single fact witness regarding any conduct by Mr. Moscowitz, and Mr. Bolan's credibility was never at issue because he

never testified.⁶ Other than the fact of Mr. Moskowitz's trades and of phone calls between Mr. Bolan and Mr. Moskowitz, there was no evidence showing that Mr. Bolan tipped Mr. Moskowitz about ratings changes.

Nonetheless, ALJ Patil inexplicably weighed evidence of Mr. Moskowitz's trades as evidence of Mr. Ruggieri's supposed culpability, finding that the trades by both individuals were "similar". (Initial Decision at 21). In fact, the evidence demonstrated that the trading patterns of Mr. Moskowitz and Mr. Ruggieri were inconsistent. For two of the trades, CVD and ATHN, Mr. Bolan and Mr. Moskowitz had multiple phone calls prior to the upgrade, but Mr. Moskowitz *did not trade at all*. To explain this discrepancy, the ALJ assumed that Mr. Moskowitz "simply may not have had the wherewithal to trade" on each tip. (*Id.* at 11). This rank speculation exhibits a clear disregard for the SEC's burden of proof. The conclusion is also illogical: if Mr. Moskowitz was able to speak with Mr. Bolan on the phone to receive a tip, why was he then unable to use the same phone to call his broker to trade on that tip?

D. The ALJ Failed To Properly Credit the Clear, Contemporaneous Theses For the Trades

Mr. Ruggieri achieved the herculean task of reconstructing – years after the trades – his entirely proper reasons for making them. If the Commission reviews the Initial Decision, Mr. Ruggieri seeks *de novo* review of the evidence, which demonstrates that Mr. Ruggieri did not make any of the trades at issue with knowledge of an upcoming rating change by Mr. Bolan.

⁶ The Initial Decision rightly criticized the Division for not calling Mr. Bolan – the only other person aside from Mr. Ruggieri who had direct knowledge of the purported suspect communications. (Initial Decision at 36 ("Bolan would have been uniquely situated to offer testimony on the issues, as I had expressed to the parties.)). There can be no doubt that if Mr. Bolan had tipped Mr. Ruggieri of his upcoming ratings changes (and if he had received a benefit for doing so), the Division would have called him as a witness. Instead, at the final hour – and even after the ALJ pressed the Division to call him – the Division not only refused to do so, but even objected to the admission of his investigative testimony, which the ALJ rightly received into evidence over objection. (*Id.* at 35). ALJ Patil described the failure to call Mr. Bolan as "further hinder[ing]" the Division's case. (*Id.*). Obviously, the Division knew what it would hear were Mr. Bolan to testify, and wanted none of it.

It bears noting that ALJ Patil may have tacitly acknowledged his bias by relying on “[t]he Division’s proposed findings of fact admitted by Ruggieri” which he deemed stipulated, while omitting Mr. Ruggieri’s Post-Trial Findings of Fact and Conclusions of Law that were unopposed by the Division. (Initial Decision at 2 n.2).⁷ The ALJ should have deemed these facts stipulated, and he should have relied upon them in his decision.

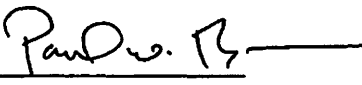
CONCLUSION

For the above reasons, were the Commission to grant the Division’s petition for review of the Initial Decision, Mr. Ruggieri respectfully requests that the Commission grant him his petition for cross review.

Dated: New York, New York
October 14, 2015

Respectfully submitted,

SERPE RYAN LLP

By: 

Paul W. Ryan
Silvia L. Serpe
Attorneys for Joseph Ruggieri
1115 Broadway, 11th Floor
New York, New York 10010
(212) 257-5011
pryan@serperyan.com

⁷ The Division’s Response to Respondent’s Post-Trial Findings of Fact and Conclusions of Law (filed June 9, 2015) did not dispute the vast majority of Mr. Ruggieri’s proposed findings.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Respondent Joseph C. Ruggieri's Cross-Petition For Review of Initial Decision upon the following parties on October 14, 2015, either by electronic mail in accordance with the parties' agreement, or as otherwise specified:

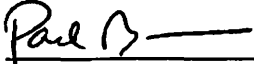
By Facsimile and Fed Ex:
Brent J. Fields, Secretary
Office of the Secretary
Securities and Exchange
Commission
100 F Street N.E., Mail
Stop 1090
Washington, DC 20549
Facsimile: (202) 772-9324

By Email and Fed Ex:
The Hon. Jason S. Patil
Administrative Law Judge
Securities and Exchange
Commission
100 F Street, NE
Washington, DC 20549
Facsimile: (202) 777-1031
alj@sec.gov

By Email and Facsimile:
Sandeep Satwalekar
(satwalekars@sec.gov)
Alexander M. Vasilescu
(vasilescua@sec.gov)
Preethi Krishnamurthy
(krishnamurthyp@sec.gov)
Facsimile: (212) 336-1348

Dated: New York, New York
October 14, 2015

SERPE RYAN LLP



Paul W. Ryan
Silvia L. Serpe
Attorneys for Joseph Ruggieri
1115 Broadway, 11th Floor
New York, New York 10010
(212) 257-5011
pryan@serperyan.com