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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 MOTION FOR SUMMARY AFFIRMANCE

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Respondent Joseph Ruggieri, by his attorneys Serpe Ryan LLP, respectfully submits this memorandum of law in support of his motion for summary affirmance pursuant to Rule 411(e) of the Commission's Rules of Practice.

PRELIMINARY STATEMENT

The Commission should summarily affirm the Initial Decision, dated September 14, 2015 (the "Decision"), dismissing claims of insider trading against Respondent Joseph Ruggieri. Administrative Law Judge Jason S. Patil ("ALJ") correctly concluded that the Division of Enforcement (the "Division") failed to prove that Mr. Ruggieri engaged in insider trading, because there was insufficient evidence to establish that the alleged tipper – Gregory Bolan, Jr. – received any personal benefit from Mr. Ruggieri in exchange for allegedly tipping inside information.

The Division proffered several possible "benefit" theories throughout this litigation, including ones that it pursued for the first time with the final witness called on its case. But all of its theories fell short. Mr. Ruggieri and Mr. Bolan did not have a meaningfully close relationship, and there was no evidence of any *quid pro quo* exchange between the two. Moreover, there was no evidence that Mr. Bolan intended to gift inside information to Mr. Ruggieri. The Division's inability to prove a benefit failed for many reasons, not least of which was its strategic decision not to call the only person who could corroborate it - the alleged tipper, Mr. Bolan. Indeed, the Division ignored repeated observations by the ALJ (both in Orders and orally during the hearing) that Mr. Bolan's testimony would be highly probative to the benefit analysis. In the face of such an obvious observation, the only logical conclusion one can draw is that the Division knew from Mr. Bolan's investigative testimony (and possibly through settlement conversations with Mr. Bolan's counsel) that Mr. Bolan would hurt its case. In a fifty-page single-spaced Decision, the ALJ carefully scrutinized all of the evidence, giving the Division the benefit of the doubt, even drawing inferences in its favor. Almost half of the Decision is devoted to the discussion of the benefit element. After

weighing all of the relevant evidence, and considering all possible inferences advocated by the Division, the ALJ held that the Division failed to establish benefit.

The Division wants another bite at the apple, and filed a Petition for Review ("Pet."). There is no basis for the Commission to review this record. The parties submitted voluminous pre and post hearing briefing on top of a twelve-day hearing. *De novo* review of such an exhaustive record would undermine the goal of administrative proceedings to provide for the "timely and efficient disposition of proceedings." Proposed Amendments to the Commission's Rules of Practice, 80 Fed. Reg. 60091 (proposed Sept. 24, 2015) (to be codified at 17 C.F.R. pt. 201); *see also* Jean Eaglesham, *SEC Is Steering More Trials to Judges it Appoints*, The Wall St. J., Oct. 24, 2014 (quoting the Division's Director of Enforcement as stating, "[w]e're using administrative proceedings more extensively because they offer a streamlined process with sophisticated fact finders"). Accordingly, because the Division failed to prove the personal benefit element under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder, the Commission should summarily affirm the Decision based on the factual record and settled case law.

ARGUMENT

I. Standard for Summary Affirmance

Pursuant to Rule 411(e)(2), the Commission may grant summary affirmance "if it finds that no issue raised in the initial decision warrants consideration by the Commission of further oral or written argument." It should grant summary affirmance absent a "reasonable showing that a prejudicial error was committed in the conduct of the proceeding or that the decision embodies an exercise of discretion or decision of law or policy that is important and that the Commission should review." *Id.*

As to the benefit element, the ALJ did not commit any prejudicial error in the conduct of

the proceeding.[1] The procedural posture explained in Section II below highlights the extensive opportunities that the Division has had to prove its insider trading case. Furthermore, the ALJ did not exercise any discretion that requires the Commission's review, but instead dismissed the case against Mr. Ruggieri after hearing twelve days of testimony and considering hundreds of exhibits. The ultimate holding – that there was no insider trading because the Division failed to prove that Mr. Bolan benefitted from purportedly tipping Mr. Ruggieri – resulted from a straightforward application of the facts to the well-settled insider trading law.

The Division may contend that the ALJ's application of *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, No. 15-137, 2015 U.S. LEXIS 6104 (Oct. 5, 2015), to this case presents the Commission with an "issue of exceptional importance" (Pet. at 2) that requires its review, but this is a red-herring, because the Division set out to prove a benefit (by espousing numerous theories, many of which were not even included in its OIP) and failed to do so under the law of the Supreme Court, as well as the law of the Second Circuit (or any other circuit for that matter). The Supreme Court's denial of certiorari in *Newman* – coincidentally on the same day that the Division filed its Petition – also puts to rest the Division's carefully-tailored characterization that the "Second Circuit arguably narrowed the personal benefit requirement." (*Id.* at 1). The ALJ properly analyzed *Dirks* and *Newman*, and accurately described the law of insider trading.

Thus, there is no need for the Commission to consider additional oral or written argument. As detailed in Section III below, the Decision carefully detailed the Division's failure to meet its burden of proof on the benefit element, and it should be summarily affirmed. *See Ross Mandell*,

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[1] Mr. Ruggieri disputes the ALJ's findings that Mr. Bolan tipped Mr. Ruggieri and that Mr. Ruggieri traded based on those tips for four of the six trades at issue. By submitting a conditional cross-appeal, filed October 14, 2015, Mr. Ruggieri preserved his right to contest those findings. However, the Commission need not review those findings in order to grant Mr. Ruggieri's motion for summary affirmance, because the lack of benefit precludes a finding of insider trading, regardless of whether there were tips.

Exchange Act Release No. 71668, 2014 SEC LEXIS 4614, at 3 (Mar. 7, 2014) (granting summary affirmance where "further oral or written argument regarding the issues raised in the initial decision is not warranted"); *Russo Secs., Inc.*, Exchange Act Release No. 39979, 1998 SEC LEXIS 1047, at 5 (May, 8, 1998) (granting summary affirmance where "no useful purpose [would] be served by revisiting matters that have been thoroughly considered three times").

II. As to the Benefit Element, There Was No Prejudicial Error in the Conduct of the Proceeding

The Commission should decline to revisit the Division's lack of proof on benefit, an issue that was exhaustively scrutinized by the ALJ. Prior to the hearing, Mr. Ruggieri requested leave to move for Summary Disposition contending that, because tipper personal benefit was lacking, there could be no finding of insider trading. (Motion for Summary Disposition, filed Jan. 8, 2015). The request was granted over the protestations of the Division that such a motion would "waste time and resources." (*See* Div. Ltr., dated Dec. 15, 2014; Order, dated Dec. 16, 2014). In a 35-page submission, with over 55 exhibits, the Division opposed that motion, contending that it need not prove a personal benefit in a misappropriation case, but even if it had to, then (1) either the friendship alleged in the Order Instituting Administrative and Cease-and-Desist Proceedings ("OIP") between Mr. Ruggieri and Mr. Bolan, or (2) the allegations in the OIP that Mr. Ruggieri "helped" Mr. Bolan obtain a promotion and salary would suffice. (Memorandum In Opposition, dated Jan. 22, 2015). After considering a 16-page Reply Memorandum by Mr. Ruggieri, and almost two hours of oral argument, the ALJ allowed the Division to make yet another written submission detailing what it intended to prove at the hearing "which will establish personal benefit, either pecuniary or additionally toward friendship, [including] the evidence that [the Division has] in the file or what [it] think[s] the testimony will show . . ." (Transcript, dated Feb. 11, 2015, at 129). At the ALJ's urging, the Division filed a ten-page supplemental brief and 18 additional exhibits, as well as

an additional three-page letter brief urging the ALJ to conduct a full hearing, rather than one limited to the issue of benefit. (Supplemental Submission Opposing Respondents' Motions for Summary Disposition, dated Feb. 13, 2015; Ltr., dated Feb. 23, 2015).

In an Order, the ALJ deferred decision on the motion, noting that it was an "exceedingly close matter" but ultimately decided that the Division was entitled to the benefit of the doubt, and should be allowed to attempt to prove its allegations of benefit during a full hearing on the merits. (Order, dated Feb. 25, 2015, at 1). In doing so, the ALJ specifically noted that the testimony of Mr. Bolan "will be relevant to the personal benefit issue." (*Id.* at 2). The parties proceeded to a twelve-day hearing in which the issue of personal benefit was aggressively litigated by both sides. Thus, far from any prejudicial error in this proceeding, the Division had multiple opportunities and avenues to demonstrate tipper benefit, and failed to do so.

There is no reason for the Commission to revisit such an exhaustively analyzed issue. In light of the absence of any prejudicial error in the proceeding, and coupled with the Division's tactical decision not to call *the* key witness on benefit, the Division is not entitled to additional review of this record.

III. The ALJ Correctly Applied the Law of Insider Trading

In order to prevail in any insider trading case, the Division must prove that the tipper disclosed "non-public material information to the tippee for a personal benefit." (Decision at 28 (citing *Dirks v. SEC*, 463 U.S. 646 (1983); *Newman*, 773 F.3d at 438)). This is true regardless of whether the alleged insider trading is premised on a classical or a misappropriation theory, as is the case here. (Decision at 28-29 (citing *Newman*, 773 F.3d at 446; *SEC v. Obus*, 693 F.3d 276 (2d Cir. 2012); *SEC v. Yun*, 327 F.3d 1263 (11th Cir. 2003)). Benefit must be proved, because not all insider trading is actionable under the antifraud provisions of the federal securities laws, and "[a]bsent some personal gain, there has been no breach of duty . . . ." *Dirks*, 463 U.S. at 662; *see also Obus*, 693 F.3d

at 284-85 (a misappropriator violates Section 10(b) by "converting the principal's information for personal gain.").

In order to establish benefit, there must be 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. *Newman*, 773 F.3d at 452. There must thus be a *quid pro quo* that is material. *Id.*; *see also SEC v. Payton*, No. 14 Civ. 4644 (JSR), 2015 WL 1538454, at *4 n.2 (S.D.N.Y. Apr. 6, 2015) (noting that "the *Newman* decision suggests that the latter type of relationship (i.e. mere friendship) can lead to an inference of personal benefit only where there is evidence that it is generally akin to *quid pro quo*"); *see also United States v. Riley*, No. 13 Cr. 339 (VEC), 2015 U.S. Dist. LEXIS 26400, at *4 (S.D.N.Y. Mar. 3, 2015) ("The existence of some *quid pro quo* is the *sine qua non* of tipper liability for insider trading.").

The Division argues that the ALJ erred by relying on *Newman* "when it should have relied on *Dirks*." (Pet. at 5).[2] But *Newman* is consistent with *Dirks*, and the Supreme Court's decision not to review *Newman* bolsters the ALJ's holding that *Newman* merely "clarifies the standard where proof of personal benefit is based on a personal relationship or friendship." (Decision at 35).[3] Thus, to establish personal benefit to a tipper, both *Dirks* and *Newman* counsel that a tipper may be liable for an insider's gift of information to a friend. This is because a tipper may be deemed to benefit from a disclosure when the tippee's trades "resemble trading by the insider himself followed by a gift of the profits to the recipient." *Dirks*, 463 U.S. at 664. In order for benefit to be established under this gift

[2] As the Division notes in its Petition (Pet. at 1 n.2), if a final Commission order were appealed to a federal circuit court of appeals, jurisdiction would lie either in the D.C. Circuit or in the Fourth Circuit Court of Appeals, where Mr. Ruggieri resides. Securities Exchange Act of 1934 § 25(a)(1), 15 U.S.C. § 78y(a)(1). The Division does not cite any case in either of those jurisdictions that are contrary to *Newman*, and *Dirks* is obviously controlling in any circuit.

[3] The Commission recently decided not to pursue its action against either Mr. Newman or Mr. Chiasson. *See* Letter from SEC, dated Oct. 16, 2015, *SEC v. Adondakis*, 12 Civ. 0409 (SAS), Dkt. No. 115.

theory, the relationship between the tipper and tippee must be sufficiently close for a fact finder to reasonably infer that the tipper *intended* to make such a gift and thus received the satisfaction of fulfilling his intention. *Newman* merely limits the circumstances where such an inference is reasonable. When information passes between family members or close friends, a benefit to the tipper may be inferred. But while some people take risks like this for a brother or wife or childhood friend, casual friends or acquaintances do not typically give each other the kinds of gifts contemplated by *Dirks*, i.e. money in the form of a stock tip based on inside information. Thus, in those cases where an inference is improper, there must be proof of a *quid pro quo*.[4]

In this case, the Division presented multiple theories of "personal benefit," but the evidence showed that none of them related to providing tips, but were instead part of the typical internal operations of traders and analysts at Well Fargo. As explained below, each of the Division's theories fell short: Mr. Bolan's friendship with Mr. Ruggieri was not especially strong and the good working relationship between the two was consistent with Wells Fargo policy; Mr. Ruggieri's "positive feedback" of Mr. Bolan was found to be justified and consistent with how other Wells Fargo employees viewed Mr. Bolan (even before Mr. Ruggieri began working there); Mr. Ruggieri's "career mentorship" of Mr. Bolan was also found not to be extraordinary at Well Fargo; and finally, an intended gift by Mr. Bolan was never proved, since the Division did not even call Mr. Bolan as a witness.

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[4] Moreover, the Division also had to prove the scienter element of its insider trading case which requires knowledge by the tippee of the tipper's benefit. (Decision at 8-9; *see also Newman*, 773 F.3d at 448 ("Thus, without establishing that the tippee knows of the personal benefit received by the insider in exchange for the disclosure, the Government cannot meet its burden of showing that the tippee knew of a breach.")).

IV. The ALJ Correctly Found That Mr. Bolan and Mr. Ruggieri Did Not Have a Meaningfully Close Relationship Sufficient to Establish Personal Benefit

The extensive factual record showed that the relationship between Mr. Ruggieri and Mr. Bolan was unexceptional. The ALJ found that the "'friendship' and working relationship between Bolan and Ruggieri was not a meaningful, close, or personal one." (Decision at 35). This finding was based on a detailed review of all of the evidence, and no reasonable finder of fact could have found otherwise. (*Id.* at 43-45). To claim otherwise, the Division misrepresents the factual record in its Petition. (Pet. at 3). For example, the Division emphasizes that the two "socialized outside the office when Bolan traveled to New York City" and that they "spoke at least twice a week." (*Id.*). In fact, the two never interacted socially during their tenure at Wells Fargo, except for a handful of work-sponsored events. (Decision at 43). Similarly, their frequent phone calls during the week were a function of company policy, which "dictated 'constant dialogue' between analysts and traders." (*Id.* at 46). Thus, the Division's claims that there was "essentially uncontroverted evidence"[5] of a "close relationship" (Pet. at 2), could not be further from the truth. Mr. Ruggieri and Mr. Bolan were nothing more than work colleagues and work friends, and therefore, pursuant to both *Dirks* and *Newman*, a benefit may not be inferred.

In face of the clear record, the Division contends that "tips to close co-workers satisfy the personal benefit element under both *Dirks* and *Newman*." (Pet. 6). With no citation to support such a bald assertion, the Division also self-proclaims that "[f]riendships with co-workers are some of the most meaningful friendships people have." (*Id.*). There is no basis in the case law to elevate the

[5] In its Petition, the Division makes over a handful of references to purportedly "uncontroverted" or "undisputed" evidence, as well to various qualified versions of these - such as "largely" or "essentially" uncontroverted or undisputed. (Pet. *passim*). Why did the hearing last twelve long days if there was no dispute? Quite the contrary, the issue of tipper benefit was hotly contested – so much so that the Division came up with a new theory of benefit (based on mentorship) at the end of its case, following an off hand comment made by the final witness that it called only at the ALJ's request. (*See infra* at 10-11). The Division cannot accept that it had many turns at bat, and simply struck out.

"close co-worker relationship" to the status of a meaningfully close personal relationship that would benefit from the *Dirks* inference and obviate the need to prove a *quid pro quo* exchange between tipper and tippee. The Division insecurely contends that "*Newman* appears to require only that the tipper and tippee have a 'meaningfully close personal relationship' before a fact finder may infer that the tipper tipped a friend or relative for personal benefit," and cites to the Ninth Circuit's decision in *United States v. Salman*, 792 F.3d 1087, 1094 (9th Cir. 2015), as allegedly supporting that contention. (Pet. at 4). But the Division's reliance on *Salman* is misplaced because there, not only was the tip to a brother, but the tipper also *testified* that he intended the information to be a gift. *Id.* Similarly, in *SEC v. Rocklage*, 470 F.3d 1, 4 (1st Cir. 2006), the tip was to a brother, and the Court found that "[b]y tipping her brother, [the tipper] was providing a gift of confidential information to a relative, and so she personally benefitted."

Even if the Commission were to accept the Division's proposed expansion of *Dirks* to include a new "close co-worker" category, Mr. Ruggieri and Mr. Bolan's relationship would not satisfy it. The record does not support the Division's contention. As the Decision notes, "Ruggieri maintained closer relationships with ten to fifteen other Wells Fargo employees, several with whom he socialized outside of the work context" and Mr. Ruggieri's closest friends were not work colleagues, but were friends from childhood. (Decision at 43, and n.32).

In sum, the Division failed to establish that Mr. Ruggieri and Mr. Bolan had a meaningfully close relationship.

V. The ALJ Correctly Found That the Division Failed to Establish a *Quid Pro Quo* Between Mr. Bolan and Mr. Ruggieri

Because Mr. Ruggieri's relationship with Mr. Bolan was not a meaningful, close or personal one, the Division was required to establish "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." (Decision at 34-35

(quoting *Newman*, 773 F.3d at 452-53)). Indeed, cases relied upon by the Division in its Petition (Pet. at 4-6) demonstrate the need to establish a *quid pro quo* where the relationship at issue is not familial or "meaningfully close." *See Yun*, 327 F.3d at 1280 (tipper and tippee "split commissions on various real estate transactions over the years"); *Payton*, 2015 WL 1538454, at *2 (tipper and tipper shared a "close, mutually-dependent financial relationship, and had a history of personal favors" such as sharing apartment expenses and providing legal assistance); *Riley*, 2015 U.S. Dist. LEXIS 26400, at *16-24 (tipper received "three concrete personal benefits": obtaining (1) help with a side business, (2) investment advice, and (3) help in securing next job); *SEC v. Megalli*, No. 1:13-cv-3783-AT, slip op., 18-21 (N.D. Ga. Sept. 24, 2015) (tipper received stock tips and inside information about other companies in exchange for his tips).[6]

Throughout the proceeding, the Division asserted multiple theories of a *quid pro quo* between Mr. Ruggieri and Mr. Bolan. As the ALJ found, "nothing comes close to arguably suggesting a *quid pro quo* between the two." (Decision at 46). There is no reason to review this issue.

A. The Division Could Not Prove That Mr. Bolan Received Career Mentorship in Exchange for Tips

The Division dismisses as "erroneous" the ALJ's finding that the Division failed to prove that Mr. Bolan tipped in order to receive career benefits. (Pet. at 6). Those findings were based on a sound factual record showing, among other damning evidence, that the "so-called" benefits that Mr. Ruggieri provided to Mr. Bolan were no different in quality or degree than what he provided to others. (Decision at 36). The Division's belated emphasis on the purported "mentoring" by Mr. Ruggieri of Mr. Bolan demonstrates the degree to which the Division was grasping at straws. The

[6] And *United States v. Evans*, 486 F.3d 315, 321-22 (7th Cir. 2007), cited by the Division (Pet. at 5), merely quotes *Dirks* but provides no clarity with respect to the benefit prong because in that case, the tip was inadvertent, and the tipper was found not guilty of insider trading. Moreover, unlike here, the tipper and tippee in *Evans* were good college friends who "talked daily via email or phone and saw each other frequently." *Id.* at 319.

very last witness, Bruce Mackle, who sat on the Wells Fargo trading desk with Mr. Ruggieri, was the first and only witness to even utter the word "mentor" during the trial (or, for that matter, during the Division's years-long investigation). Mr. Mackle, whom the Division called only at the ALJ's request, offered the unremarkable testimony that Mr. Ruggieri "tried to mentor [Bolan and other analysts] as some of the young, up-and-coming analysts. That would be the only difference of a relationship." (Tr., dated Apr. 10, 2015, at 3215). Wells Fargo had an industry reputation for its mentoring ethos, and Mr. Ruggieri thus engaged in that practice. (Decision at 36). As the ALJ found, the direct evidence failed to establish the Division's claim that Mr. Ruggieri mentored Mr. Bolan in exchange for a tip. (*Id.*).

B. The Division Could Not Prove That Mr. Bolan Received Positive Feedback In Exchange For Tips

The Division's primary theory of benefit (as alleged in the OIP) was that Mr. Bolan provided tips in exchange for Mr. Ruggieri's positive feedback to *his own* supervisors to aid (albeit in a highly circuitous fashion) in Mr. Bolan's promotion to director. This theory fell apart when the undisputed evidence established that Mr. Ruggieri had already provided the very same positive feedback about Mr. Bolan six months prior to the first allegedly suspect trade. (Decision at 36-37 ("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.")). For the Division's theory to make sense, Mr. Bolan would have had to have violated the federal securities laws for the benefit of receiving something he had already been given for free.

Moreover, Mr. Ruggieri was just one of many who spoke highly of Mr. Bolan. (Decision at 37-38). Tellingly, Mr. Bolan's reputation as a strong analyst was well established before Mr. Ruggieri ever set foot in Wells Fargo. Indeed, Mr. Ruggieri's predecessor on the trading desk, Dave Graichen, wrote to both his own boss *and* Mr. Bolan's boss and praised him for his "solid work" and described

him as "the most trader friendly analyst". (Decision at 38). It would be one thing if Mr. Ruggieri's positive feedback of Mr. Bolan was an outlier, but the opposite was true. "Numerous constituencies" praised Mr. Bolan as a "cash cow," an "up-and-comer," a "rising star" and "the standard among analysts," among other superlatives. (*Id.* 38-39).[7]

The Division also argues that Mr. Ruggieri's feedback "could and sometimes did advance Bolan's career...," but the key issue was whether the Division proved that Mr. Ruggieri provided that feedback in exchange for a tip. (Pet. at 6). Devoting a significant number of pages of the Decision to this analysis, the ALJ painstakingly analyzed each of the Division's claims and concluded that Mr. Ruggieri's feedback was part of the normal course of his business at Wells Fargo, and was not given for any nefarious purpose. (Decision at 36-43). Indeed, Mr. Ruggieri's positive feedback about Mr. Bolan had a negligible effect on his prospects at Wells Fargo (both in terms of a bonus and promotion to director), providing further circumstantial evidence that Mr. Ruggieri's praise was not something Mr. Bolan would have sought in exchange for tipping inside information. As the Division itself admits, feedback from all members of the trading desk, not just Mr. Ruggieri, accounted for a mere 5% of Mr. Bolan's overall score on his Wells Fargo Scorecard, which was used to determine his rank and bonus. (Decision at 40). This was the lowest weighted value compared to the other factors, including sales survey impact, client votes, internal sales rank, external rank and stock picking. (*Id.* at 40-41). Mr. Bolan was aware of the minimal impact the trading desk's ratings would have on his bonus prospects. (*Id.* at 41). It is no wonder that Mr. Bolan's immediate supervisor testified that he "did not believe the Division's theory that Ruggieri provided positive feedback about Bolan in exchange for tips." (*Id.* at 37).

In the face of the evidence at trial regarding the many individuals who praised Mr. Bolan, as well as the detailed analysis by the ALJ showing the negligible role that Mr. Ruggieri's feedback

[7] The Division elected not to call Mr. Graichen to testify at the hearing. (Decision at 38 n.24).

played in determining Mr. Bolan's bonus, or in his promotion, the Division lacks any credibility when it proclaims – without citation – that there was "overwhelming undisputed evidence of Ruggieri's importance to Bolan's career." (Pet. at 8). The record speaks for itself: Mr. Ruggieri's praise was not timed to any information provided by Mr. Bolan, because there was no connection between the two. For example, the ALJ found – correctly – that the purported tip prior to the Bruker trade took place *after* Mr. Bolan was promoted. "Thus, there is no chance that Bolan tipped Ruggieri about that stock's ratings change in order to receive feedback to help his promotion." (Decision at 38 n.23). The Decision rightly concluded that Mr. Ruggieri gave the feedback *because it was genuine* and the Division failed to meet its burden to prove that the feedback was given in exchange for tips.[8]

VI. The Division Did Not Prove that Mr. Bolan Intended to Benefit Mr. Ruggieri

The Division contends that the Decision erred by not concluding that Mr. Bolan tipped Mr. Ruggieri simply because he intended to benefit him – in other words, that he gave Mr. Ruggieri a gift of inside information without any expectation of anything material or consequential in return. (Pet. at 9). The Division also takes issue with the dicta in the Decision that it waived this issue. (*Id.*; Decision at 47). But whether this issue was waived is of no importance. It is much simpler than that: the Division never proved that Mr. Bolan intended to benefit Mr. Ruggieri.

Significantly, there was no live testimony from Mr. Bolan, and his investigative testimony did not support the Division's theory that he tipped Mr. Ruggieri, let alone that he did so intending it to be a gift. As highlighted by the ALJ: "[t]he Division elected not to call Bolan to testify and objected to the admission of Bolan's investigative testimony" and that:

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[8] Mr. Ruggieri's feedback was of no particular importance to Mr. Bolan. The Division decided not to call Mr. Bolan to testify, but his investigative testimony (which the Division sought unsuccessfully to exclude) speaks for itself. Mr. Ruggieri's feedback was so insignificant to Mr. Bolan, that he could not even remember whether he specifically asked Mr. Ruggieri for a recommendation or not, likely because he had solicited so many different individuals. (Decision at 37 n.32).

> [a]lthough 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 [shortly after reaching a settlement with the Division]. . . . 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.

(Decision at 35-36) (Footnote 21 summarized in above brackets).

The lack of direct evidence of Mr. Bolan's intent distinguishes this case from *Salman*. There, the alleged tipper testified that he tipped his brother with the intent to benefit him. 792 F.3d at 1094. The Ninth Circuit distinguished the facts of its case from those in *Newman*, noting that: "[i]n our case, the Government presented direct evidence that the disclosure was intended as a gift of market-sensitive information. Specifically, [the tipper] testified that he disclosed the material nonpublic information for the purpose of benefitting and providing for his brother." *Id.* Similarly, the Division's reliance on the *Lohmann* administrative case (Pet. at 6) is misplaced, because in that case, there was evidence of the respondent's intent to benefit his younger coworker by gifting him with a tip. *Robert Bruce Lohmann*, Exchange Act Release No. 48092, 2003 WL 21468604, at * 4 (June 26, 2003). Also, unlike here, there was direct evidence of a tip - the respondent's handwriting was on the order ticket for his co-worker's trade. *Id.* at *3. The Decision here thus correctly distinguishes *Lohmann*, and calls into question whether *Lohmann* would be similarly decided by any Court post-*Newman*. (Decision at 47).

In sum, the Division chose not to call Mr. Bolan as a witness, even though (as described above), the ALJ noted the obvious relevance of his testimony. The ALJ gave the Division too much credit when he characterized the Division's failure to meet its burden of proof merely as a "missed opportunity":

> [w]hile focusing on Ruggieri, the Division 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.

(Decision at 46). In fact, this evidentiary deficit was the direct result of a strategic decision by the Division. There is no reason for – and the Division should not be entitled to – a *de novo* review by the Commission of a lengthy factual record that clearly demonstrates that Mr. Bolan received no personal benefit in exchange for information given to Mr. Ruggieri.

CONCLUSION

For the above reasons, Mr. Ruggieri respectfully requests that the Commission summarily affirm the Decision.

Dated: New York, New York
October 26, 2015

Respectfully submitted,

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UNITED STATES OF AMERICA
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Gregory T. Bolan, Jr. and
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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Respondent Joseph C. Ruggieri's Motion for Summary Affirmance upon the following parties on October 26, 2015, either by electronic mail in accordance with the parties' agreement, or as otherwise specified:

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Dated: New York, New York
October 26, 2015

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October 26, 2015

VIA FACSIMILE AND FED EX

Brent J. Fields, Secretary
Office of the Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549
Fax: (202) 772-9324

Re: *In the Matter of Gregory T. Bolan, Jr. and Joseph C. Ruggieri*, AP File No. 3-16178

Dear Mr. Fields:

Counsel for Joseph C. Ruggieri respectfully submits the enclosed Motion for Summary Affirmance for filing with the Commission, pursuant to SEC Rule of Practice 411(e). The overnight Fed Ex package contains the original and three copies.

Thank you for your attention to this matter.

Respectfully submitted,

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cc: Administrative Law Judge Jason S. Patil (by e-mail & Fed Ex w/encl.)
Sandeep Satwalekar (by e-mail & facsimile w/ encl.)
Alexander M. Vasilescu (by e-mail & facsimile w/ encl.)
Preethi Krishnamurthy (by e-mail & facsimile w/ encl.)