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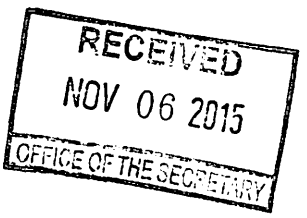
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16178

In the Matter of

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

Respondents.



RESPONDENT JOSEPH C. RUGGIERI'S REPLY BRIEF IN FURTHER SUPPORT OF HIS MOTION FOR SUMMARY AFFIRMANCE

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

PRELIMINARY STATEMENT

The Commission should grant Mr. Ruggieri summary affirmance of the Decision. The Division has failed to articulate any reason not to that satisfies the standard for summary affirmance. It does not allege that there was any prejudicial error conducted in the proceedings. Instead, the Division contends that the Commission should deny summary affirmance because the Decision applied *Newman*, which it characterizes as embodying a "new and important" legal standard. But the standard here is not just whether the law applied is "important". All law is important, but not all law (even if allegedly "new") must be one "that the Commission *should review*". Rule 411(e)(2) (emphasis added). The Division never states why the Commission should review *Newman's* application to this case. It does not argue that *Newman* should not apply in administrative proceedings. Instead, it seems to suggest that, because it believes *Newman* was wrongly decided, the Commission should perform a *de novo* review of the extensive factual record developed on the benefit prong. But *Newman* is settled law. Moreover, the Division fails to point to a single case pre-*Newman* that would be decided differently now. In fact, all cases cited by the Division include facts of an actual *quid pro quo* between the tipper and tippee, or direct evidence of the tipper's intent to benefit the tippee.[1]

The Decision's discussion of insider trading law is flawless. There is no dispute that the Division had the burden to prove that Mr. Bolan tipped Mr. Ruggieri for a personal benefit. The Division wishes that the ALJ had simply inferred a benefit, but there was no basis to do so. There was not a shred of evidence of a *quid pro quo* between the two. It was not a close call. As the ALJ

[1] All terms defined in Mr. Ruggieri's Motion for Summary Affirmance (Moving Br.) are incorporated herein.

rightly concluded, "nothing comes close to arguably suggesting a *quid pro quo* between the two." (Decision at 46). Furthermore, there was no evidence of any intent by Mr. Bolan to simply gift a tip to Mr. Ruggieri. In light of a factual record that did not support any exchange between the two, the Division's only hope was to prove benefit through this gift theory. But it failed to do that too. It made a calculated and strategic decision to not call Mr. Bolan to testify. Its attempt to fault Mr. Ruggieri for the absence of Mr. Bolan's live testimony flies in the face of *its* burden of proof. Thus, under all of the insider trading cases cited by the Division, the outcome here would be the same.

The Division lost. It did so fairly and squarely after the ALJ allowed the parties to engage in more extensive briefing and advocacy on this issue than any district court judge would have. There is nothing more that will be elicited in any "further oral or written argument" to justify denial of this motion. (Rule 411(e)(2)). It is time for the Division to make peace with its loss.

THE DIVISION'S ALLEGEDLY UNDISPUTED FACTS ARE UNAVAILING

In its never-ending attempt to advocate using statistics, the Division claims that Mr. Ruggieri "did not dispute most facts", and then it actually engaged in the wasteful effort of counting the number of facts that Mr. Ruggieri admitted – 565 of the proposed 640, or 88%. (Opp. at 3 n.1). This number is meaningless for many reasons, not least of which is that the vast majority of the facts proffered by the Division contained benign undisputed facts (such as dates and titles held by employees), but the focus needs to be on the heart of the dispute: Mr. Ruggieri vehemently disputed that Mr. Bolan gained any benefit or that his relationship with Mr. Bolan was sufficiently close and meaningful to justify an inference of a benefit. And the Division's math leaves out the hundreds of facts proffered by Mr. Ruggieri, and which it also admitted. Some of the key facts, which were *admitted* by the Division include the following:

- Mr. Ruggieri did not often socialize with Mr. Bolan and never outside of a work context. (Respondent's Post-Trial Findings of Fact and Conclusions of Law (RFOF ADMITTED) ¶ 325)[2].

- In total, Mr. Ruggieri and Mr. Bolan – who did not live or work in the same state (Mr. Bolan lived in Tennessee) – met in person only approximately 15 times. (RFOF ADMITTED ¶ 326; Decision at 4).

- Mr. Ruggieri had closer relationships with 10 to 15 other Wells Fargo colleagues. (RFOF ADMITTED ¶ 327).[3]

But whether Mr. Ruggieri agrees with the Division's statistical characterization of the undisputed evidence, there is one simple truth: the facts are what they are, and none of the underlying facts would change the result. This is because the facts need to be viewed within the broader context. The ways in which the Division pulled facts out of context is endless. For example, the Division focuses on how Mr. Ruggieri and Mr. Bolan spoke "regularly" and "had a constant dialogue". (Opp. Br. at 3). Of course they did. It was company policy that they did so. (Div. 107 email subject line: "**IMPORTANT** Have you called your trader today?"). This policy was not only undisputed by the Division, but was revealed in one of its own exhibits. In addition, numerous witnesses in this case testified to the company policy, thus undermining the Division's attempt to find a nefarious purpose behind the communications between Mr. Ruggieri and Mr. Bolan. (*See*

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[2] All of that facts contained in Mr. Ruggieri's RFOF that are cited in this brief were admitted by the Division, and referenced as "RFOF AMDITTED". Compare the paragraph number in the RFOF with the Division of Enforcement's Response to Respondent's Post-Hearing Statement of Facts and Conclusions of Law, dated June 8, 2015.

[3] The Division accuses Mr. Ruggieri of "often" proffering no contradictory evidence when he disputed the Division's Proposed Findings of Fact. (Opp. at 3 n.1). To support this accusation, the Division cites a single disputed fact. (*Id.*). There, the Division mischaracterized the testimony, claiming that Mr. Ruggieri "knew that if an investor successfully predicted when a research analyst was going to downgrade a stock, that would help the investor make money." (Div. FOF ¶ 108). The Division overstated this fact. He merely testified that this proposition was true "generally" (Tr. 2046-47), thereby justifying Mr. Ruggieri's objection that "the Division's description mischaracterizes the cited evidence", without the need to cite to any contrary evidence, since it would be the same citation. *See* Respondent's Response to Div. of Enforcement's Post-Hearing Proposed Finding of Fact and Conclusions of Law, dated June 18, 2015, ¶ 108.

Decision at 13 (citing Div. 107 and noting that "[t]he timing of Bolan's call to Ruggieri, and the correspondence that preceded it, was consistent with the company policy.")). As the ALJ found, the fact that an analyst and trader speak "regularly" in a "constant dialogue" as part of their jobs does not "establish a meaningfully close personal relationship or *quid pro quo*." (Decision at 46).

Moreover, the Division's advocacy exceeds the boundaries of the factual realities. For example, the Division repeatedly describes the trades in question as profitable. (Opp. at 14). As the Decision found, the impact on Mr. Ruggieri's trading book was "negligible." (Decision at 45 n. 34). In fact, the Division conceded that the trades had an approximately 1% impact on Mr. Ruggieri's loss ratio in his Wells Fargo book (RFOF ADMITTED ¶19), and that the total percentage return on the 6 trades at issue was a miniscule 2.41%. (RFOF ADMITTED ¶ 25). Indeed, one of the purportedly profitable trades at issue involved Emdeon, which the Division admitted generated a whopping $266. (OIP ¶ 23). Thus, the Decision reached the only possible conclusion: "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." (Decision at 45 (emphasis added)).

Finally, the Division highlights the fact that Mr. Bolan was nominated for a promotion to director one year earlier than an analyst would typically receive such a promotion. (Opp. at 6). But that undisputed fact only *hurts* the Division, since no one suggested that Mr. Ruggieri had anything to do with the timing of Mr. Bolan's promotion – a process in which Mr. Ruggieri played no direct role. The only reasonable inference that can be drawn is that, based on the overwhelming positive feedback from people both in and outside of Wells Fargo, his employer decided to promote him a year earlier. (*See infra* Section III). Tellingly, this is not even a fact that the Division ever focused on during this proceeding until now.

In sum, the Decision accurately describes the facts pertinent to its holding on benefit.

ARGUMENT

I. The ALJ's Analysis of *Newman* Does Not Warrant Commission Review

In its Opposition Brief ("Opp. Br."), the Division does not contend that there was any prejudicial error in the conduct of the proceeding. Instead, the Division claims that the Commission should deny Mr. Ruggieri summary affirmance because the Initial Decision "applies a new and important legal standard". (Opp. at 6). The Division seems to be implying that the Commission should review every Initial Decision that applies a Second Circuit decision for the first time in an administrative proceeding. (*Id.* at 7 ("The Initial Decision applies the Second Circuit's recent decision in *Newman* for the first time in a Commission administrative proceeding.")). Because *Newman* was an "important" decision, the Division argues that summary affirmance is not appropriate here because an ALJ analyzed *Newman* for the first time. *Id.*

But other than wanting a different result, it is unclear exactly what the Division is asking the Commission to do with respect to the first-time application of *Newman*. The Division does *not* state that *Newman* should not apply to administrative proceedings, but it seems to suggest that, arguing that *Newman* was wrongly decided: "Indeed, before *Newman*, the Supreme Court, the Commission, and every Circuit to have addressed the issue–including the Second Circuit–had held that a tipper's tip of inside information to a trading friend could alone satisfy the personal benefit requirement." (Opp. at 7). There are multiple problems with this statement. First, what may or may not have happened prior to *Newman* is irrelevant since – unlike when this issue was first argued in this case – *Newman* is now settled law. Second, the statement is incorrect. The fact is that *all* of the district court cases decided before *Newman* where friendship alone was alleged to satisfy the benefit element also included some *quid pro quo* between the tipper and tippee, or direct evidence to satisfy *Dirks'* gift theory. All of those cases would be the same under *Newman*.

In the amicus brief submitted by the Commission in support of an *en banc* rehearing by the

Second Circuit in *Newman*, it argued that *Newman* will "impede enforcement actions" based on tips to friends. (Br. for SEC as Amicus Curiae Supporting Pet. of the United States for Reh'g or Reh'g En Banc ("Amicus Br.") at 12). In support, it cited twelve cases claiming that the "only" purported benefit "to the tipper *apparent from the decisions* was providing information to a friend." *Id.* (emphasis added). This characterization was inaccurate. In fact, in *all* of these cases, the tipper received a clear *quid pro quo*, or there was direct evidence to satisfy the gift theory, thereby underscoring that while some people take risks 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*. *See SEC v. Warde*, 151 F.3d 42, 49 (2d Cir. 1998) (friends exchanged tips as evidenced by the lower court's decision in *Downe*, who tipped and received tips from Warde; *see SEC v. Downe*, 969 F. Supp. 149, 156 (S.D.N.Y. 1997)); *SEC v. Drucker*, No. 06-1644 (CM), 2007 WL 2042493, *1 (S.D.N.Y. July 13, 2007) (defendant, a corporate insider, traded in his own account and directed trading in his father's account); *SEC v. Breed*, No. 01-7798, 2004 WL 909170, at *1 (S.D.N.Y. April 29, 2004) (defendant, a tipper *and* tippee, received a tip in exchange for money and then "directed the trading" in the accounts of his wife, mother and brother); *SEC v. Conradt*, 947 F. Supp. 2d 406, 408 (S.D.N.Y. 2013) (tipper and tippee exchanged confidential information with each other)[4]; *SEC v. Svoboda*, 409 F. Supp. 2d 331, 337 (S.D.N.Y. 2006) (tipper and tippee traded together to "evade detection" and "split the profits evenly"); *SEC v. Palermo*, No. 99-10067, 2001 WL 1160612, at *5 (S.D.N.Y. Oct. 2, 2001) (tipper and tippee both profited from trading); *SEC v. Seibald*, No. 95-2081, 1997 WL 605114, at *2 (S.D.N.Y. Sept. 30, 1997) (tipper tipped his "good friend" from college, his father-in-law, and brother, thereby

[4] Moreover, in the related case, *SEC v. Payton*, 14 Civ. 4644 (JSR), 2015 WL 1538454, *2 (S.D.N.Y. Apr. 6, 2015), it is crystal clear that there was a *quid pro quo* exchange between Mr. Conradt and the tipper which included sharing apartment expenses and Mr. Conradt giving legal help to the tipper. After *Newman*, the Court vacated the guilty plea of Mr. Conradt (and others), but only because "*Newman* clarified . . . tippee knowledge requirements of tipping liability". *U.S. v. Conradt*, 12 Cr. 887 (ALC), 2015 WL 480419, *1 (S.D.N.Y. Jan. 22, 2015). This was a tipping chain and there was insufficient evidence that the down-stream tippees had knowledge of upstream benefits.

justifying the *Dirks* personal benefit inference); *SEC v. Farrell*, No. 95-6133, 1996 WL 788367, at *3 (W.D.N.Y. Nov. 6, 1996) (tipper instructed his friends to trade on his behalf); *SEC v. Musella*, 748 F. Supp. 1028, 1035, 1038 n.4 (S.D.N.Y. 1989) (tippers and a tippee were part of a "three-man scheme to profit"); *SEC v. Drescher*, No. 99-1418, 1999 WL 946864, at *1, *4 (S.D.N.Y. Oct. 19, 1999) (allegation that tipper gifted his close college friend was sufficient to survive a motion to dismiss); *SEC v. McGinnis*, No. 13-1047, 2013 WL 6500268, at *2 (D. Conn. Dec. 11, 2013) (both tipper and tippee profited "enormously"). *Newman* would not change the result in any of these cases.

Cases the Division cites in its Opposition Brief (Opp. Br. at 8 directing reader to cases cited in prior filings) are equally wanting. In *Jiau*, there was evidence of precisely the kind of *quid pro quo* necessary to establish a personal benefit. There, in exchange for tipping, the tipper was invited to join an investment club, where tips would be exchanged. *U.S. v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013). Indeed, in *Newman*, the Second Circuit specifically adopted the benefit analysis in *Jiau*: "as Judge Walker noted in *Jiau*, [benefit] 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]'". *United States v. Newman*, 773 F.3d 438, 452 (2d Cir. 2014), *cert. denied*, No. 15-137, 2015 U.S. LEXIS 6104 (Oct. 5, 2015) (quoting *Jiau*, 734 F. 3d at 153). There is certainly no reason to believe that *Jiau* would be decided differently after *Newman*.

This is equally true for the Second Circuit's decision in *Obus*. *Obus* did not hold that the mere *existence* of the friendship, absent some exchange satisfies this element. Rather, at the motion to dismiss phase, the "fact that Strickland and Black were friends from college [was] sufficient to send to the jury the question [of personal benefit]". *SEC v. Obus*, 693 F.3d 276, 291 (2d Cir. 2012). The Commission's trial against the *Obus* defendants was unsuccessful.[5]

[5] Equally curious is the Division's reliance on *Cuban*, *see* Opp. at 8, which the Division ultimately lost, and which stated that the Court might later infer that the tipper – the CEO of a company – could

The *single* case cited by the Division that the ALJ thought might arguably be decided differently post-*Newman* is the administrative decision in *Robert Bruce Lohmann*, Exchange Act Rel. No. 48092, 2003 WL 21468604 (June 26, 2003). (Decision at 47). But the Division fails to address Mr. Ruggieri's discussion of *Lohmann* (Moving Br. at 14), which pointed out that in that case, there was direct evidence of an intent by the tipper to gift the tip to his co-worker. Thus, just like the Ninth Circuit decision in *United States v. Salman*, 792 F.3d 1087 (9th Cir. 2015), decided after *Newman*, there is no issue about whether friendship alone was sufficient to establish benefit because, just like in *Lohmann*, there was direct evidence that the tipper intended to make a gift to his brother. (*Id.*).

The Division accuses Mr. Ruggieri of being disingenuous about *Newman's* significance. (Opp. at 7). To the contrary, Mr. Ruggieri has consistently advocated that *Newman* is a clarification of *Dirks*. Indeed, from the very beginning, Mr. Ruggieri asserted that "[t]he Second Circuit in *Newman* clarified the situations in which a friendship could satisfy the benefit prong. Notably, *Dirks* did not involve a friendship." Reply Memorandum in Further Support of Motion for Summary Disposition, dated February 6, 2015, at 6 n.2. The Initial Decision agreed, holding that *Newman* merely "clarifies the standard where proof of personal benefit is based on a personal relationship or friendship." (Decision at 35). In sum, the Division's claim that the sky now is falling is simply not the case.

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

The Division claims that the "essentially undisputed facts" about the relationship between Mr. Ruggieri and Mr. Bolan satisfied the "meaningfully close personal relationship" test in *Newman*.

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have derived a *quid pro quo* in the form of "goodwill from a wealthy investor and large minority stakeholder" in the company. *SEC v. Cuban*, 620 F.3d 551, 558 n. 38 (5th Cir. 2010).

(Opp. at 9).[6] To find otherwise, the Division argues, would mean that *Newman* conflicts with *Dirks*. Whether *Newman* conflicts with *Dirks* is no longer open for discussion – that argument was undermined when the Supreme Court denied *cert* in *Newman*. Moreover, the Second Circuit fully embraced the gift theory in *Dirks*, but held – as an evidentiary matter – that the bare fact that the tippers and tippees knew each other (in light of all the trial evidence describing that relationship) did not support an inference of an intention of the tipper to provide a gift to the alleged tippee. Similarly, after an exhaustive review of the evidence, the ALJ determined that an inference of personal benefit was not justified here.

The Division seems to be asking for the Commission to rule – as a matter of law – that *all* work colleague relationships, regardless of the actual factual evidence, support an inference of an intention of the tipper to gift the tippee. That reading of *Newman* is unfounded, and eviscerates the very holding that the mere fact of friendship is not *per se* evidence that a tipper intended to bestow a gift on the tippee.

In addition to wrongly claiming that the Initial Decision "too narrowly" interpreted *Newman* (Opp. at 9), the Division also mischaracterizes the evidence to claim that Mr. Ruggieri and Mr. Bolan "were more than just colleagues and work friends". *Id.* at 10. In support, the Division disregards the evidence about their relationship during their tenure at Wells Fargo, and focuses primarily on facts that happened *after* both individuals were no longer there: (1) Mr. Ruggieri allowed Mr. Bolan to stay in his apartment in New York City while he was interviewing for a new job and, not surprisingly, provided him with a set of keys to his apartment to assist with the logistics of that; and (2) Mr. Bolan supposedly invited Mr. Ruggieri to his wedding. Far from the latter being a "conceded" fact as the Division asserts (Opp. at 4), Mr. Ruggieri testified that he was never invited to Mr. Bolan's wedding.

[6] The Division diminishes its credibility throughout its briefing with its repeated use of the oxymoron "essentially undisputed" or variants thereof, which is not unlike saying that a woman is half pregnant.

The ALJ thus found – correctly – that Mr. Ruggieri never went to the wedding, and he credited Mr. Ruggieri's testimony that he never received an invitation.[7] (Decision at 44). With respect to allowing a former colleague – who also lost his job at Wells Fargo – to stay in his apartment, that fact was considered and rejected in light of the totality of the evidence about their relationship. Thus, the ALJ rightly concluded that these facts are "consistent with the account that absent their shared professional experience, Bolan and Ruggieri were not close". (*Id.*).[8]

Finally, for the first time and in a footnote, the Division espouses a theory that the "personal" benefit element should be broadly expanded to include all professionals and "people who have a relationship directly with each other". (Opp. at 10 n.6). That theory does not pass the laugh test. *Newman* is clear on its face that the bare fact that two people know each other is not enough to warrant an inference of a personal benefit. None of this is new. *Dirks* counsels that this is a highly fact intensive analysis. *Dirks v. SEC*, 463 U.S. 646, 664 (1983) ("Determining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts."). *Dirks* also recognized that the purpose of the disclosure is determinative of benefit. *Id.* at 662 ("Whether disclosure is a breach of duty therefore depends in large part on the purpose of the disclosure."). The purpose of a disclosure would be undermined if a fact finder were allowed to simply infer a personal benefit from the bare fact that two people knew each other. *Newman* likewise confirms the importance of a factual inquiry, and explains that the circumstance when an inference of benefit is permissible under *Dirks* is not without limit. Thus, the Decision rightly concluded that

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[7] Q. In fact, in September of 2011, Mr. Bolan sent you an invitation to his wedding; right?
A. That's not correct. I never got an invitation to his wedding. I got -- I think he mentioned he was going to invite me to his wedding, but we never got an invitation and we didn't attend.
(Tr. 2375:20-2376:3 (Mr. Ruggieri testimony)).

[8] The Decision also notes the insignificance of events occurring after the trades in question, noting that "interaction of a different character, after the trades took place, may simply reflect a changed circumstance" and that "[o]ften a significant shared common experience – either positive or negative – can serve as a common bond that brings people together." (Decision at 44).

Mr. Ruggieri and Mr. Bolan were work colleagues and work friends, and therefore, pursuant to both *Dirks* and *Newman,* a benefit could not be inferred. And, after a thorough examination of the evidence, the Decision rightly held that the Division did not satisfy its burden of proof as to benefit.

III. The Division Failed to Prove that Mr. Bolan Received Career Benefits in Exchange for Tips

The Division is apparently emboldened by a sentence in the Decision that "[in] *an abstract sense*, feedback from the trading desk including Ruggieri *could be* viewed as having some potential value." (Opp. at 6, 11 (twice quoting Decision at 42)(emphasis added)). On the face of this sentence, it is clear that the Decision was merely acknowledging the theory espoused by the Division throughout the case. But the ALJ rejected that theory in the next sentence:

> 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 . . . it is just as likely that Ruggieri gave such feedback because it was genuine, and that Bolan sought 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.

(Decision at 43).

Here is just some of the evidence that supports the ALJ's finding that Mr. Ruggieri's feedback of Mr. Bolan was genuine and matched those of his colleagues (including his predecessor):

- Mr. Ruggieri's predecessor on the trading desk – Mr. Graichen – told his bosses and Mr. Bolan's boss that Mr. Bolan was the most trader friendly analyst he had ever worked with, and described the "solid work" he did for him and his trading coworker, Chip Short. (RFOF ADMITTED ¶ 343; JR REB 217).

- Mr. Short described Mr. Bolan in an email 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". (RFOF ADMITTED ¶ 342; Decision at 38).

- Before Mr. Ruggieri started at Wells Fargo, Mr. Short encouraged clients to vote for Mr. Bolan, among other analysts, for the All-America Research Team. (RFOF ADMITTED ¶ 345).

- Clients had a favorable view of Mr. Bolan and used his research to trade. (Decision at 39 citing Div 110 at 25-26; Tr. 2042).

- When Mr. Ruggieri joined Wells Fargo he was told by his fellow traders that Mr. Bolan was an excellent analyst. (RFOF ADMITTED ¶ 340).

- By the end of 2010 – just three months after Mr. Ruggieri's arrival – Mr. Bolan was already a four-star analyst at Wells Fargo, and the third ranked analyst by trading impact. (RFOF ADMITTED ¶¶ 367, 369).

- Todd Wickwire, Mr. Bolan's boss, testified:
  Q. Which is that pretty much everyone had great things to say about Mr. Bolan; isn't that right?
  A. Yes, including me. (Tr. 1559:9-12).

- Mr. Bolan was on a "meteoric rise throughout 2010," (RFOF ADMITTED ¶ 353), "based on positive feedback from numerous constituencies, including sales, clients, and other directors of research". (Decision at 39).

- Mr. Ruggieri's direct boss, as well as Wells Fargo's head of institutional trading held Mr. Bolan out as the standard among analysts. (RFOF ADMITTED ¶ 365).

- Mr. Bartlett, the head of trading, testified:
  Q. And how about yourself, was the positive feedback that you gave to Mr. Wickwire, for example, was that based at all on your own impressions of Mr. Bolan?
  A. Yes, it was. (Tr. 1189:17-21).

- Mr. Bolan's director nomination form included feedback from four managing directors, none of whom had a dotted line connection to Mr. Ruggieri. (RFOF ADMITTED ¶ 358).

- Mr. Wickwire testified that Mr. Bolan would have been promoted to director regardless of his trading impact rank improvement. (Tr. 1549).

- Mr. Wickwire – called by the Division – testified that he did not believe the Division's theory that Mr. Ruggieri provided positive feedback about Mr. Bolan in exchange for tips. (Decision at 37 (citing Tr. 1556-57)).[9]

[9] The Division claims (Opp. at 6) that Mr. Ruggieri "disputes the source of this feedback" referenced in the director nomination form, but the Division has it backwards. Mr. Ruggieri always contended that the positive feedback to support the statements in the director nomination form came from multiple sources. It is the Division that wanted the ALJ to infer a *quid pro quo* from the mere fact that the feedback "at least in part" stemmed from Mr. Ruggieri. (*Id.*).

In light of all of this evidence, it was disingenuous for the Division to advocate in its closing arguments and post-trial briefing that Mr. Bolan was "stuck in mediocrity". (Tr. 3558; Decision at 39 (citing Div. Reply at 19)).

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

The Division claims (Opp. at 11) that the Decision applied the wrong legal standard when it faulted the Division for not calling Mr. Bolan to testify, and relies on *Dirks* for the unremarkable statement that "the SEC and courts are not required to read the parties' minds", but should instead focus on objective criteria – whether the insider received a personal benefit. 463 U.S. at 663. As the Supreme Court explained, determining whether the insider received a personal benefit is fact intensive, and not always easy for courts. *Id.* at 664. The Division correctly asserts that the Commission should not try to read the tipper's mind. (Opp. at 11). But that is *precisely* what it is asking the Commission to do in the absence of testimony from Mr. Bolan. No one is arguing that a fact finder could *never* find an intent to benefit absent testimony from the tipper, but obviously direct evidence of an intent to benefit makes the fact finder's job easier. That is exactly what happened in *Salman* (*see* Moving Br. at 9).

The recent *SEC v. Holley* case in the District of New Jersey is similarly instructive. In that case, after seven days of trial, the defendant pleaded guilty to insider trading in the parallel criminal proceeding. Following the plea, the respondent consented to a final judgment in the SEC case, but subsequently filed a motion to vacate it following the *Newman* decision. The respondent was a chairman of the board who had tipped several close friends and family members about an upcoming acquisition. He argued that since he had no expectation of a pecuniary benefit, *Newman* dictated that his conduct was no longer insider trading. The District Court flatly rejected this argument:

> Instead, the proof of a personal benefit to Defendant exists in Defendant's *repeated admission* that he shared the confidential information regarding the merger with his "companion" and his first cousin with the intent to confer a benefit on them.

SEC v. Holley, 2015 U.S. Dist. LEXIS 125448, at 11-12 (D.N.J. Sept. 21, 2015) (emphasis added). Thus, in light of *direct* evidence of an intent to benefit the tippees with a gift of confidential information, the *Holley* case is consistent with both *Dirks* and *Newman*.

In sharp contrast, the Division in this case never met its burden of proof on any gift theory. The Division disregards *its* burden to prove that Mr. Bolan benefitted – not Mr. Ruggieri's to *disprove* it – when it suggests that Mr. Ruggieri should have called Mr. Bolan to testify. (Opp. at 12 n.7). It now regrets that absent Mr. Bolan's live testimony, "Ruggieri [] obtain[ed] the benefit of Bolan's self-serving denial of any wrongdoing without the risk of exposing Bolan to the Division's cross-examination." (*Id.*). The Division's own characterization of Mr. Bolan's testimony as self-serving should fall on deaf ears where the Division made a conscious decision not to call him:

> Now, separately, the Division has conferred as to whether we need to call Mr. Bolan as part of our case, and we've determined we do not need to call him as part of our case, and that's partly based on his prior testimony. So the Division does not intend to call him.

(Tr. 1619:1-8).

The Division could have called Mr. Bolan and impeached his credibility. That it chose not to speaks volumes. It woefully failed to meet its burden on benefit, including under any gift theory. The Division wants the Commission to speculate as to Mr. Bolan's intent, and that – in any forum – should not be sanctioned.

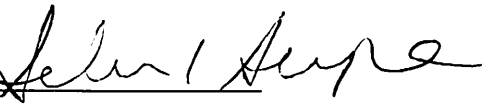
CONCLUSION

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

Dated: New York, New York
November 5, 2015

Respectfully submitted,

SERPE RYAN LLP

By: 

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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.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of Respondent Joseph C. Ruggieri's Reply Brief in Further Support of his Motion for Summary Affirmance upon the following parties on November 5, 2015, either by electronic mail in accordance with the parties' agreement, or as otherwise specified:

By Facsimile and Fed Ex:
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Dated: New York, New York
November 5 , 2015

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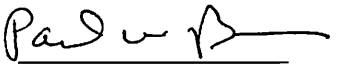

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November 5, 2015

VIA FACSIMILE AND FED EX

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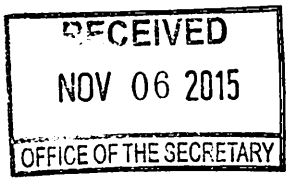

Re: *In the Matter of Gregory T. Bolan, Jr. and Joseph C. Ruggieri*, AP File No. 3-16178

Dear Mr. Fields:

Counsel for Joseph C. Ruggieri respectfully submits the enclosed Reply Brief in Further Support of his 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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