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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

THE DIVISION OF ENFORCEMENT'S BRIEF ON REVIEW OF THE INITIAL DECISION

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The Division of Enforcement respectfully submits this brief on review of the Initial Decision rendered by Administrative Law Judge Jason S. Patil ("ALJ") on September 14, 2015, pursuant to the Commission's Order dated December 10, 2015. The Initial Decision incorrectly concludes that Respondent Joseph C. Ruggieri did not violate Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder because settled Respondent Gregory T. Bolan, Jr. did not tip Ruggieri for personal benefit.[1]

PRELIMINARY STATEMENT

The Initial Decision finds that the Division has proven every element of its Section 10(b) and Rule 10b-5 insider trading claim except one: that the tipper tipped for personal benefit. The decision finds that Bolan risked his career to repeatedly tip Ruggieri with confidential, market-moving information that Ruggieri profitably traded on. Yet the decision implausibly concludes that Bolan did so for no personal advantage and erroneously dismisses the insider trading claim against Ruggieri.

The Initial Decision first finds that Bolan—an "up-and-comer" analyst who published market-moving research on healthcare stocks—tipped his friend, mentor, and trader colleague Ruggieri with material, non-public information. At least four times, shortly before Bolan published a positive ratings change on a stock, he tipped Ruggieri to his forthcoming ratings change. Ruggieri then profitably traded on these four tips: each time, he purchased the stock just before Bolan published his ratings change and sold the stock at a profit just after the ratings change raised the stock's price. Because Bolan's and Ruggieri's employer, Wells Fargo Securities, LLC ("Wells Fargo"), issued the ratings changes before the markets opened, Ruggieri had to hold overnight positions—something he otherwise rarely did—to profit from the ratings changes. Bolan similarly tipped

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[1] The Initial Decision also concludes that Ruggieri did not violate Section 17(a) of the Securities Act of 1933. The Division does not challenge that conclusion.

another friend, Joshua Moskowitz, to three ratings changes, and Moskowitz profitably traded on the tips. As Ruggieri admits, Bolan's forthcoming ratings changes were material, non-public information and Ruggieri knew he was prohibited from trading on them. As Ruggieri also admits, Bolan knew Wells Fargo prohibited him from disclosing forthcoming ratings changes to anyone outside the firm's research department, including traders like Ruggieri. Yet the Initial Decision implausibly concludes that Bolan tipped Ruggieri with no expectation of receiving a personal benefit in return.

In *Dirks v. SEC*, 463 U.S. 646 (1983), the Supreme Court first articulated a personal benefit requirement in insider trading cases to distinguish between proper and improper dissemination of confidential corporate information. No liability for insider trading exists when a tipper properly discloses such information for the benefit of the corporation or shareholders—for example, to blow the whistle on corporate fraud. Liability exists only when the tipper improperly disseminates such information for personal advantage or self-dealing. To clarify this distinction, the Court explained that tips to friends or relatives to benefit these tippees or tips to others to benefit the tipper's own reputation or career—rather than for a legitimate business reason—suffice to prove personal benefit. The Second Circuit's decision in *United States v. Newman,* 773 F.3d 438 (2d Cir. 2014), *cert. denied*, __ S. Ct. __, 2015 WL 4575840 (Oct. 5, 2015), does not alter this standard: *Newman* simply holds that the mere fact of a casual friendship between tipper and tippee cannot suffice to prove personal benefit.

Applying *Newman* for the first time in an administrative proceeding, the Initial Decision nevertheless rejects the largely undisputed, objective evidence of the personal benefits Bolan expected or received from Ruggieri. Among other things, the undisputed facts show that Bolan and Ruggieri shared a friendship and close working relationship; Ruggieri mentored Bolan; Bolan's supervisor valued Ruggieri's feedback; and Ruggieri provided positive feedback about Bolan that could improve Bolan's peer ranking, bonus, and promotion opportunities. Misinterpreting *Newman,*

the Initial Decision concludes that these benefits do not suffice to prove personal benefit. Instead, implicitly finding no legitimate business justification for Bolan's tips, the decision implausibly speculates that Bolan tipped simply because he could not "keep his mouth closed." The Commission should reject this flawed reasoning and find Ruggieri liable for insider trading based on the undisputed evidence. "Absent some legitimate reason for [the tipper's] disclosure . . . the inference that [his] disclosure was an improper gift of confidential corporate information is unassailable. After all, he did not have to make any disclosure, so why tell [the tippee] anything?" *SEC v. Maio*, 51 F.3d 623, 632 (7th Cir. 1995). Registered representatives in the securities industry should not be insulated from civil liability for giving valuable inside information—on which they cannot themselves trade—to their close colleagues and mentors to trade on instead. Neither *Dirks* nor *Newman* intends such a result.

THE HEARING

In its case-in-chief, the Division called thirteen witnesses, some of whom had also appeared on Ruggieri's witness list. The Division's witnesses included an expert witness and Ruggieri. Ruggieri called no additional witnesses in his defense case. Ruggieri conceded that (1) Bolan's ratings changes were material, non-public information; (2) Bolan and Ruggieri knew that Wells Fargo prohibited its research analysts from disseminating the contents of forthcoming research reports to traders, clients, or anyone else outside the research department; and (3) Ruggieri knew he was prohibited from trading based on non-public information from a forthcoming research report. (Initial Decision at 9.) The parties disputed only two issues: "whether Bolan tipped Ruggieri and, if so, whether Bolan did so for a personal benefit." (*Id.*)

After the hearing, the ALJ ordered each party to submit proposed factual findings. (Post-Hr'g Order ¶ 8 (Apr. 15, 2015).) The ALJ further ordered each party to respond to the other side's proposed findings with a counterstatement that "reflects those paragraphs as to which there is no

dispute" and, for disputed findings, to "support[ ] that counterstatement by citations and quotation(s)" to the record. (*Id.* at ¶ 9.) The Division submitted 640 paragraphs of proposed factual findings. (Div. Findings.)[2] Ruggieri admitted 565 of these paragraphs. (Ruggieri Response.) Ruggieri claimed to dispute the remaining paragraphs but often failed to cite any record evidence supporting his position. (Ruggieri Response at ¶¶ 39, 47, 104, 108, 111, 113, 122–23, *et al.*)

STATEMENT OF UNDISPUTED FACTS[3]

I. Wells Fargo Operated in the Competitive Securities Business.

Wells Fargo, a registered broker-dealer, provided a broad range of brokerage services to retail and institutional clients, including institutional equities trading and equity research. (JFOF ¶ 24.) The firm operated in a competitive business, it did not tolerate underperformers, and its commission revenue was dwindling. (Adm. FOF ¶ 1.)

Wells Fargo's sales and trading department generated profits from trade commissions. (Adm. FOF ¶ 2.) For each share of stock Wells Fargo traded for a client, the client would pay Wells Fargo a fixed commission: for example, one penny per share traded. (Adm. FOF ¶ 3.) Unlike the sales and trading department, Wells Fargo's research department, including its equity research group, generated no direct revenue. (Adm. FOF ¶ 4.) Research analysts helped produce revenue only if their research spurred clients to place trades using the firm's traders. (Adm. FOF ¶ 5.) The sales and trading department therefore paid a portion of the research department's costs, including research analysts' salaries, which created tension between the two departments. (Adm. FOF ¶¶ 6–7.)

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[2] "Div. Findings" refers to the Division of Enforcement's Post-Hearing Proposed Findings of Fact and Conclusions of Law. "Ruggieri Response" refers to the Respondent's Response to the Division of Enforcement's Post-Hearing Proposed Findings of Fact and Conclusions of Law. "Ruggieri Prop. Findings" refers to Respondent Joseph C. Ruggieri's Post-Trial Proposed Findings of Fact and Conclusions of Law. "Adm. FOF" refers to the Div. Findings expressly admitted by Ruggieri. "JFOF" refers to the parties' pre-hearing, stipulated Joint Findings of Fact. "Tr." refers to the hearing transcript. Numbered "Ex." refers to admitted hearing exhibits, and lettered "Ex." refers to attachments to this brief.

[3] Unless otherwise noted, the facts set forth in this section are undisputed.

II. Background: Bolan, Ruggieri, and Moskowitz

In 2005, Bolan worked on the trading floor of a securities firm with Moskowitz. (Adm. FOF ¶ 24.) They became friends. (*Id.*) In January 2006, Bolan became a junior equity research analyst at another firm. (Adm. FOF ¶ 8.)

In June 2008, Bolan joined Wells Fargo in Nashville, Tennessee as a senior equity research analyst and registered representative. (JFOF ¶ 1; Adm. FOF ¶¶ 8–9.) Bolan focused his research on three niche sub-sectors of the health care industry. (Adm. FOF ¶ 10.)

From June 2001 through August 2009, Ruggieri worked at Bank of America. (JFOF ¶ 10.) For several of those years, Ruggieri reported to Matt Brown. (Adm. FOF ¶ 12.) In about August 2009, Brown recruited Ruggieri to Wells Fargo, where Ruggieri traded healthcare stocks as a registered representative in New York. (Adm. FOF ¶ 13; JFOF ¶ 11.) Ruggieri's primary job was to execute customer trades in his stocks to generate commissions for Wells Fargo and to lose as little of the commission revenue as possible when unwinding the other side of customers' trades. (Adm. FOF ¶¶ 19–20.) Ruggieri also placed principal trades on Wells Fargo's behalf and generated profits or losses for Wells Fargo. (Adm. FOF ¶ 21.) Ruggieri could take principal positions in any of the 277 healthcare stocks he covered. (Adm. FOF ¶¶ 17, 22.)

From June 2009 through November 2010, Moskowitz was unemployed, [redacted], and traded in his personal brokerage accounts. (Adm. FOF ¶ 28; JFOF ¶ 186.) Bolan and Moskowitz were close friends, and they spoke regularly by phone. (Adm. FOF ¶ 27; JFOF ¶¶ 201–02.) [redacted] (JFOF ¶ 185.)

III. Bolan and Ruggieri Shared a "Very Close" Working Relationship at Wells Fargo.

From June 2008 until March 2011, Bolan was a vice president at Wells Fargo. (JFOF ¶ 1; Adm. FOF ¶ 31.) Bolan was an ambitious, up-and-coming research analyst. (Adm. FOF ¶ 32.) Yet he had a temper, got angry at co-workers, and was generally a loner. (Adm. FOF ¶¶ 33–34.)

Ruggieri joined Wells Fargo as a director—one level above Bolan's title of vice president—and remained at that level until March 2011. (Adm. FOF ¶¶ 31, 37.) Ruggieri was ambitious and became one of the top-producing traders at Wells Fargo. (Adm. FOF ¶¶ 38, 40.) Ruggieri and Chip Short, Wells Fargo's only two healthcare traders, covered different stocks. (Adm. FOF ¶¶ 14, 16.) Ruggieri, the senior healthcare trader, traded all the stocks Bolan covered; Short, the junior healthcare trader, traded none of Bolan's stocks. (Adm. FOF ¶¶ 15, 41.) Ruggieri was therefore Bolan's primary contact on the trading desk. (Adm. FOF ¶ 43.) Bolan rarely spoke with Short unless Ruggieri was away from the office. (Adm. FOF ¶ 42.) Besides Bolan, Wells Fargo had at least seven other healthcare analysts with whom Ruggieri spoke—including at least one analyst Ruggieri considered "a seasoned pro"—but Ruggieri interacted more with Bolan than with any other healthcare analyst. (Adm. FOF ¶ 45.)

Bolan and Ruggieri spoke "regularly" and "had a constant dialogue." (Tr. 2051–52, 2062–63 (Ruggieri) ("We spoke regularly, whether it was multiple times a day or every day. I know there were some times where we didn't speak for a couple of days.").) In comparison, Ruggieri spoke to his mother approximately twice a week. (Tr. 2198 (Ruggieri).) Bolan and Ruggieri had personal "things in common," including that they "were both from the south," were a similar age, had no children then, and "liked golf and fishing." (Tr. 2055, 2059 (Ruggieri).) As Ruggieri admits, they "got along really well" and became "pretty good friends." (Adm. FOF ¶¶ 50–51 (citing Tr.).) Although Bolan worked in Nashville and Ruggieri worked in New York, Ruggieri considered himself better friends with Bolan than with all but one of the other Wells Fargo senior healthcare analysts. (JFOF ¶¶ 7, 11; Tr. 2049–50, 2056–58 (Ruggieri).)

During their overlapping eighteen months at Wells Fargo, Bolan traveled to New York occasionally. (JFOF ¶¶ 1, 11; Tr. 2058–59 (Ruggieri).) When he did, he and Ruggieri socialized outside the office about four to seven times, typically with other colleagues. (Ex. DIV 110 at 29–31

(Bolan investigative testimony); Ruggieri Prop. Findings ¶ 325 (quoting Ex. DIV 110 at 30–31); Tr. 2058–59 (Ruggieri) ("Q. And sometimes you had drinks with Mr. Bolan outside the office; correct? A. Yes.").) When they socialized, Bolan and Ruggieri discussed both work and family. (Ruggieri Prop. Findings ¶ 325 (quoting Ex. DIV 110 at 31 ("Well, we would go to the bar and we would discuss work and we'd discuss family, and we just would be guys.")).)

Ruggieri also mentored Bolan, along with a junior research analyst, and tried to "make them more commercial." (*Compare* Div. Findings ¶ 47 (citing Tr. 3215–17) *with* Ruggieri Response ¶ 47 (disputing but citing no counter-evidence).) Ruggieri and Bolan viewed themselves as partners trying to lift Wells Fargo's healthcare business, and each hoped to benefit his own career in the process. (Adm. FOF ¶ 48.) As Bolan's supervisor Todd Wickwire testified, "Greg [Bolan] and Joe [Ruggieri] developed a very close relationship that contained a significant amount of dialogue, more than is -- was normal for our department, and...there was a close relationship of two professionals supporting one another."[4] (Tr. 1557–58.)

IV. Ruggieri's Trading Profitability Played an Important Role in His Career.

A trader's profit-and-loss figure was an important empirical measurement of a trader's performance and talent. (Adm. FOF ¶ 66.) To assess Ruggieri's profitability, Wells Fargo calculated both a net revenue figure (Ruggieri's commissions from client trades, plus profits or minus losses on his principal trades) and a loss ratio (the percentage of commissions lost through his trades). (Adm. FOF ¶¶ 54–55.) Traders at Wells Fargo typically had an overall loss ratio—that is, Wells Fargo kept less than 100% of the commissions clients paid. (Adm. FOF ¶ 56.) Wells Fargo's business was "generating commissions and trying to keep the loss ratio as low as possible." (Adm. FOF ¶ 57.)

Ruggieri worked directly for Brown. (Adm. FOF ¶ 58.) Brown's main supervisory responsibility was to keep an eye on his traders' profits and losses. (Adm. FOF ¶ 59.) As Ruggieri

[4] Ruggieri neither specifically admitted nor specifically refuted this testimony.

knew, Brown expected his traders to alert him to any potential trading loss of $50,000 or more. (Adm. FOF ¶ 61.) Brown reported to Chris Bartlett, the head of equity sales and trading at Wells Fargo. (Adm. FOF ¶ 62.) Bartlett oversaw 300 employees and in turn reported to Wells Fargo's president, who evaluated Bartlett's performance on the profitability and operation of Bartlett's division. (Adm. FOF ¶¶ 62–63.) Brown and Bartlett each devoted one of their computer screens to traders' real-time profit and loss fluctuations. (Adm. FOF ¶¶ 60, 64.)

In March 2010, in his first performance review at Wells Fargo, Ruggieri received a rating of 3, where 1 was the lowest and 5 was the highest. (Adm. FOF ¶ 53.) The first sentence of the first criterion of Ruggieri's performance evaluation mentioned "net revenue." (Adm. FOF ¶ 67.) By making profitable principal trades, Ruggieri could reduce his loss ratio and generate more net revenue for Wells Fargo. (Adm. FOF ¶ 68.) Brown encouraged Ruggieri to improve his stock-picking ability when making principal trades and to talk to analysts to do so. (Adm. FOF ¶ 69.)

V. Ruggieri's Trading Profitability Affected His Compensation and Promotion.

When Ruggieri joined Wells Fargo, Wells Fargo paid Ruggieri a salary plus approximately 6% of the monthly net revenue in his Wells Fargo trading accounts plus a guaranteed bonus of $400,000. (Adm. FOF ¶ 70.) Starting in early 2010, at least one competitor firm tried to recruit Ruggieri away from Wells Fargo. (Adm. FOF ¶ 71.) Wells Fargo rarely provided compensation guarantees to traders. (Adm. FOF ¶ 72.) In deciding whether to provide such a guarantee, Wells Fargo considered the trader's profitability. (Adm. FOF ¶ 73.) On or after June 15, 2010, Wells Fargo's president approved an unwritten compensation guarantee for Ruggieri—$1.8 million for 2010—which made Ruggieri the highest-paid equity trader at Wells Fargo. (Adm. FOF ¶¶ 74–75.) When Ruggieri's compensation guarantee expired on January 1, 2011, Wells Fargo returned to paying Ruggieri a salary plus approximately 6% of the monthly net revenue in his Wells Fargo

trading accounts. (Adm. FOF ¶¶ 75, 80.) In approximately February or March 2011, Wells Fargo promoted Ruggieri to managing director. (Adm. FOF ¶ 81.)

VI. Wells Fargo Typically Published Bolan's Influential Ratings Changes at Night.

Wells Fargo published Bolan's research reports under his name. (JFOF ¶ 26; Adm. FOF ¶ 89.) His reports included one of three recommendations about the covered company's stock: "outperform," or buy; "market perform," or hold; or "underperform," or sell. (Adm. FOF ¶¶ 89–90.) At times, Bolan published a ratings change, a report changing his recommendation on a company's stock—for example, from "hold" to "buy." (Adm. FOF ¶ 91.) During his tenure at Wells Fargo, Bolan also initiated coverage of twelve stocks, 75% of the time with a neutral, "hold" rating. (Adm. FOF ¶¶ 90, 93–97.)

As Bolan and Ruggieri knew, Bolan's forthcoming ratings changes remained non-public until Wells Fargo issued them for publication. (Adm. FOF ¶¶ 136–39.) Wells Fargo typically issued Bolan's ratings changes and initiations of coverage between 4:00 p.m. Eastern time, when the markets closed, and 9:30 a.m. the next trading day, when they re-opened. (Adm. FOF ¶ 101.)

As Bolan and Ruggieri knew, Bolan's ratings changes typically moved stock prices. (Adm. FOF ¶¶ 105–07; *compare* Div. Findings ¶¶ 104, 108, 111, 113 (quoting Bolan's investigative testimony, Ruggieri's hearing testimony, and emails) *with* Ruggieri Response ¶¶ 104, 108, 111, 113 (disputing proposed findings as "mischaracteriz[ation]s" but citing no counter-evidence).) In fact, Bolan's ratings changes had a statistically significant impact on the prices of the affected stocks. (Adm. FOF ¶¶ 114–21; *compare* Div. Findings ¶¶ 122–26 *with* Ruggieri Response ¶¶ 122–26 (disputing but citing no counter-evidence).)

VII. Bolan and Ruggieri Knew That Wells Fargo Prohibited Tipping and Trading Ahead of Ratings Changes.

Wells Fargo prohibited its research analysts from sharing forthcoming research with the firm's traders, clients, or anyone else outside the research department, as its written compliance

policies and annual compliance training explained. (Adm. FOF ¶¶ 140–43, 145–60.) In fact, Wells Fargo's 2009 annual compliance training advised Bolan: "No previewing research/opinions/ estimates[.] No contradictions or signals indicating a change to published views[.]… No discussions on timing and views of reports with anyone outside Research." (Adm. FOF ¶ 160.) Bolan and Ruggieri understood that Bolan was prohibited from communicating the contents of his research reports, including ratings changes, before they were published. (Adm. FOF ¶¶ 166–68.) Ruggieri also knew he was prohibited from trading in a stock with knowledge that an analyst intended to upgrade or downgrade his rating on the stock. (Adm. FOF ¶¶ 169–70.)

VIII. Bolan Deliberately Violated Wells Fargo's Policies By Selectively Giving Important Clients Previews of His Research.

On September 17, 2009, Bolan sent a "big," "platinum" Wells Fargo client a channel check email about Covance, Inc. ("Covance") and blind-carbon copied Ruggieri.[5] (Adm. FOF ¶¶ 173–74.) Bolan said the information was "very sensitive and [a] somewhat costly data-point to get" and asked the recipients to "please keep this close to the vest." (Adm. FOF ¶ 175.) Bolan then opined: "Based on all this, my gut tells me that we will continue to see an incremental improvement through the end of the year…. 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." (Adm. FOF ¶ 177.) Ruggieri knew the information was confidential and extolled Bolan: "Love Bolan, think he's our best analyst." (Ex. JR 5; Tr. 2072–73 (Ruggieri) ("Q. Sir, [Bolan] said: 'Please keep this close to the vest.' Right? A. Yes. Q. Don't those words mean to you, keep it confidential? A. I don't think, if he sent an e-mail to clients, that that meant keep it confidential, but I don't know what else that could mean, but...").)

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[5] Wells Fargo's global head of research compliance described a "channel check" as follows: "an example might be a restaurant analyst who is trying to see how popular Applebee's is, a recent promotion, might call up the restaurant and ask, hey, on a Friday night, how long is your wait time to get a table, and then the general manager might answer that question. And then the analyst might do it a few dozen times…. So it is a non-traditional way of getting information as it might relate to the company itself without getting it directly from the company." (Tr. 73, 114–15.)

On May 5, 2010, Wells Fargo's email review program flagged another channel check email that Bolan had sent only to certain clients, and Mike Madsen, a supervisory analyst, saw it. (Adm. FOF ¶ 179.) Madsen promptly told Bolan to publish the channel check, and Bolan did so later that day with the term "channel check" in the title. (Adm. FOF ¶¶ 180–82.) Madsen could recall no other time he had had to tell an analyst to publish research that the analyst had already disclosed to certain clients, and it was "exceedingly rare" that Madsen saw a channel check email to clients that had not first been published. (Adm. FOF ¶ 184.) Because it was not a "run-of-the-mill" event, Madsen flagged the incident to his boss. (Adm. FOF ¶ 185.) Madsen expected Bolan to comply with Wells Fargo's policies thereafter and publish his channel checks. (Adm. FOF ¶ 186.)

Yet throughout Ruggieri's tenure at Wells Fargo, at least until March 2011, Bolan continued to regularly blind-carbon-copy Ruggieri on channel check emails to clients. (JFOF ¶ 11; Adm. FOF ¶¶ 187–88.) Some of these emails contained information that would probably move the market or be important to certain clients. (*Compare* Div. Findings ¶ 190 (citing Tr. 2384–85 (Ruggieri)) *with* Ruggieri Response ¶ 190 (disputing but citing no counter-evidence).) But Bolan never again published research with the term "channel check" in its title.[6] (Adm. FOF ¶ 183.)

In August 2010, Timothy Evans joined Wells Fargo in Nashville as Bolan's associate analyst and reported to Bolan. (JFOF ¶¶ 6–7.) Within two months, Evans had become concerned that Bolan was violating Wells Fargo's compliance policies by selectively sharing unpublished, potentially material channel checks with certain high-paying clients. (Adm. FOF ¶ 196.) Evans raised his concerns directly with Bolan three times: on October 13, November 3, and November 12, 2010. (Adm. FOF ¶¶ 197–202, 204–06, 208.) Each time, Bolan was dismissive. (Adm. FOF ¶¶ 199, 209; *compare* Div. Findings ¶¶ 203, 207 (citing Ex. DIV 93, Ex. DIV 94 & Tr. 1260 (Evans)) *with* Ruggieri

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[6] Ruggieri contends he did not know that Bolan had not published these channel checks before emailing them. (*Compare* Div. Findings ¶ 189 *with* Ruggieri Response ¶ 189 (disputing but citing no counter-evidence).)

Response ¶¶ 203, 207 (disputing but citing no counter-evidence).) Bolan claimed that Wells Fargo's compliance department had approved his channel check emails. (Adm. FOF ¶ 199.) By January 2011, suspicious of Bolan's claim of compliance approval and concerned that Bolan's conduct could result in his and Bolan's terminations, Evans began looking for another job. (Adm. FOF ¶¶ 202, 209–11.)

IX. Shortly Before His Ratings Changes, Bolan Called Ruggieri and Moskowitz, Who Then Traded in the Right Stocks in the Right Direction Before the Ratings Changes.

From March 2010 through March 2011, Bolan published eight research reports changing his rating of a stock he covered, including one non-neutral initiation of coverage with a buy or sell rating. (Adm. FOF ¶¶ 95, 255.) Before Wells Fargo published six of these ratings changes, Bolan spoke to Ruggieri.[7] (Ex. DIV 194-A.) The six ratings changes were: (1) a downgrade of Parexel International Corp. ("Parexel") in April 2010; (2) an upgrade of Covance in June 2010; (3) an upgrade of Albany Molecular Research Inc. ("Albany") in July 2010; (4) an upgrade of Emdeon Inc. ("Emdeon") in August 2010; (5) an upgrade of athenahealth Inc. ("Athena") in February 2011; and (6) an initiation of coverage of Bruker Corp. ("Bruker") with an outperform, or "buy" rating, in March 2011 (collectively, the "Six Ratings Changes"). (JFOF ¶¶ 81, 92, 102, 124, 143, 148.) Before at

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[7] Ruggieri disputes that they spoke but generally concedes that the calls occurred. Specifically, in five of those instances, Bolan called Ruggieri on his Wells Fargo phone line—Ruggieri's "specific extension"—while Ruggieri was in the office. (Adm. FOF ¶¶ 224, 234, 260, 280, 299, 349, 370, 385; JFOF ¶¶ 34, 38–40, 56–57, 62–63, 74, 87–88, 119, 123, 134, 137–38, 146, 153, 157–59, 163.) The sixth time, Bolan called Ruggieri's cell phone, and Ruggieri sent Bolan an email saying that Ruggieri would call Bolan "right back." (Adm. FOF ¶¶ 320–24; Ex. DIV 57.) Although Ruggieri disputes that he called Bolan back, Ruggieri did not deny it when testifying; he testified only that he did not remember whether he did. (Adm. FOF ¶ 324; *compare* Div. Findings ¶ 325 (citing Ex. DIV 57 and Tr. 2203 (Ruggieri)) *with* Ruggieri Response ¶ 325 (disputing he called Bolan back but citing no counter-evidence).) The relevant phone records appear to be incomplete. (Adm. FOF ¶¶ 326–31.)

least three of these Six Ratings Changes, Bolan spoke to Moskowitz.[8] (Adm. FOF ¶¶ 276, 314–16, 350; JFOF ¶ 195; *see also* Ex. DIV 194-A (summary charts showing timelines).)

Shortly afterwards, Ruggieri began building overnight positions in the six stocks in the right direction—short positions before Bolan's downgrade and long positions before Bolan's upgrades. (JFOF ¶¶ 54–81, 87–92, 98–102, 117, 119–24, 134–39, 146–68.) Moskowitz did the same in three of these stocks. (JFOF ¶ 189; Adm. FOF ¶¶ 278, 314–16, 318, 350, 352.) Ruggieri's and Moskowitz's positions peaked at the close of the trading day just before Wells Fargo issued Bolan's ratings changes. (Ex. DIV 194-A (illustrating these undisputed positions).)

Once Wells Fargo issued the Six Ratings Changes, the stock prices of the companies that Bolan upgraded increased, and the stock price of the company that Bolan downgraded decreased. (Adm. FOF ¶ 261.) The morning after each ratings change was published, Ruggieri and Moskowitz began closing out their overnight positions. (Adm. FOF ¶ 262; *see also* Ex. DIV 194-A.) Each time, they generated a profit. (Adm. FOF ¶ 262.) Overall, Ruggieri generated profits of at least $111,455 for Wells Fargo from these trades. (*Compare* Div. Findings ¶¶ 264–65, 267–68 *with* Ruggieri Response ¶¶ 264–65, 267–68 (not disputing calculations but disputing only that profits were "illegal"); Adm. FOF ¶ 269.)

Ruggieri's overnight positions before Bolan's Six Ratings Changes included five of his most profitable overnight positions (measured in dollars) during his entire tenure at Wells Fargo—including his first, second, and third most profitable positions of the approximately 108 overnight principal positions he took. (Adm. FOF ¶¶ 270–71, 290, 308, 340, 379, 395.) Aside from his overnight positions on Bolan's Six Ratings Changes, Ruggieri lost money on over two-thirds of his overnight principal positions while at Wells Fargo. (Adm. FOF ¶ 263.)

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[8] Ruggieri does not necessarily admit that Bolan and Moskowitz spoke but concedes that the calls occurred.

X. Ruggieri Rarely Held Overnight Positions, and The Relevant Positions Did Not Result From Chance.

From at least 2009 through 2011, Wells Fargo's equity traders typically tried not to hold principal positions overnight, because market-moving news could break overnight when traders could not easily exit their positions. (Adm. FOF ¶¶ 82–83, 235.) Ruggieri wanted to minimize his overnight risk and generally did not hold an overnight position unless a client stuck him with a position at the day's end or he had a reason for the position. (Adm. FOF ¶¶ 84–85.) Over Ruggieri's 415 trading days at Wells Fargo, he held an overnight position in one of the 277 stocks he traded approximately 325 times—less than one position in one stock per night. (Adm. FOF ¶ 17; JFOF ¶¶ 25, 183.) Measured instead by the number of shares or the dollar amounts he traded, Ruggieri held overnight positions less than 1.5% of the time from March 30, 2010 through March 31, 2011. (Adm. FOF ¶ 87.)

The probability that Ruggieri took his overnight positions before the Six Ratings Changes simply by chance ranges from 0.1% to 0.002%—virtually zero—depending on the methodology. (Adm. FOF ¶¶ 406–09, 431, 433; *compare* Div. Findings ¶¶ 432, 434 *with* Ruggieri Response ¶¶ 432, 434 (conclusorily disputing expert's calculations "based on false assumptions and cherry-picked data" but citing no evidence).)

XI. Ruggieri Did Not Think He Would Be Caught.

A. When Ruggieri spoke to Bolan on the phone, nobody could hear Bolan.

Wells Fargo's trading floor was loud. (Adm. FOF ¶¶ 240–41.) Short and Mackle sat on either side of Ruggieri, and Brown sat two rows behind them. (Adm. FOF ¶¶ 242–43.) When Ruggieri was on the phone, Mackle could not hear what Ruggieri's interlocutor was saying. (Adm. FOF ¶ 245.)

B. Ruggieri's trades were unlikely to draw suspicion.

In 2009 through 2011, Wells Fargo had approximately forty traders, including about fifteen to twenty equity traders. (Adm. FOF ¶¶ 246–47.) Brown supervised the equity traders while also

trading his own set of technology stocks. (Adm. FOF ¶¶ 247–48.) Brown's equity traders made thousands of trades, totaling about 75 million shares of stock, each day. (Adm. FOF ¶¶ 249–50.) Brown did not review all these trades but questioned "outsized profit and loss moves." (Tr. 1103 (Brown); Adm. FOF ¶ 252.) Brown mentored Ruggieri, trusted Ruggieri, and never suspected him of any wrongdoing. (Adm. FOF ¶¶ 58, 253.)

XII. Ruggieri Could and Did Benefit Bolan's Career.

A. As Bolan had anticipated, Ruggieri's positive feedback about Bolan helped him obtain a promotion.

Feedback from Wells Fargo's trading desk was taken into account in analyst promotions and was an important factor in analysts' careers. (Adm. FOF ¶ 564.) Wickwire—Bolan's supervisor and the co-head of research at Wells Fargo—rarely spent time meeting with individual traders. (Adm. FOF ¶¶ 150, 549; Tr. 1498–1501 (Wickwire).) Yet Wickwire repeatedly met with Ruggieri in person at Brown's and Bartlett's request. (Adm. FOF ¶ 549; Tr. 1493, 1498–1501 (Wickwire); Tr. 2457–59 (Ruggieri) ("I mean, I met with Mr. Wickwire a handful of times, at least, for various reasons.").)

At the end of every calendar year, Wells Fargo's promotions committee of senior executives met to decide on all firm promotions to director or managing director. (Adm. FOF ¶¶ 554–57.) The committee received a nomination form for each candidate. (Adm. FOF ¶ 558.) To be promoted, a candidate required a favorable vote from two-thirds of the twenty-four committee members. (Adm. FOF ¶¶ 556, 563.) Wickwire sat on the promotions committee. (Adm. FOF ¶ 556.)

In approximately November 2010, Wickwire nominated Bolan for a promotion to director. (Adm. FOF ¶ 546.) Wells Fargo typically promoted research analysts to director after they had worked at the firm for three years; Bolan had then worked at Wells Fargo for only two years. (Adm. FOF ¶¶ 547–48.) In the context of being considered for a promotion, Bolan asked Ruggieri to provide feedback about Bolan's performance to Wickwire because Bolan thought it would improve his chances of being promoted. (Adm. FOF ¶ 553.) In his meetings with Wickwire, Ruggieri praised

Bolan. (Ruggieri Prop. Findings ¶ 347 ("When Ruggieri met with Wickwire…[h]e used Bolan as an example of an analyst who had a great feel for trading.").)

Wickwire filled out Bolan's director nomination form. (Adm. FOF ¶ 560.) Wickwire wrote:

> Greg [Bolan] is among the best analysts in the department in terms of his dialogue with trading. We consistently hear from trading that Greg [Bolan] provides great information flow to the desk and they are able to monetize his efforts. They often hold [him] out as the standard.

(*Id.*) By "trading," Wickwire meant feedback from Ruggieri, Bartlett, and Brown. (Ruggieri Prop. Findings ¶ 366.) Wickwire considered Ruggieri's feedback on the healthcare analysts to be more important than feedback from anyone else on the healthcare trading desk. (Adm. FOF ¶ 551.)

In March 2011, Wells Fargo announced Bolan's promotion to director. (Adm. FOF ¶ 565.) Bolan's promotion increased his salary by $50,000 to $100,000. (Adm. FOF ¶ 566.)

B. Ruggieri's feedback on Bolan factored into the analyst scorecard and analyst bonuses.

Each year, Wells Fargo ranked its equity research analysts against one another on a scorecard to determine their bonuses. (Adm. FOF ¶ 529.) The higher an analyst's overall ranking on the scorecard, the higher the analyst's bonus that year. (Adm. FOF ¶ 530.) The scorecard used several factors—including client votes, internal sales ranking, and "trading impact"—to calculate a composite weighted score for each analyst. (Adm. FOF ¶¶ 531, 533.) "Trading impact," the feedback the equity research managers received from Wells Fargo's traders, counted for 5% of an analyst's overall score. (Adm. FOF ¶¶ 532, 570.) Depending on the particular scores in a given year, feedback from Wells Fargo's trading desk had the potential to move an analyst up or down one to two slots in that analyst's overall scorecard ranking. (Adm. FOF ¶ 573.) Moving up just one slot—for example, from the 17th to the 16th best analyst overall—increased an analyst's bonus by approximately $50,000 to $75,000. (Adm. FOF ¶ 574.)

Although Wells Fargo research analysts did not know their precise rankings, they knew where they generally ranked among other analysts on most factors, including "trading impact." (Adm. FOF ¶ 575.) On its 2009 analyst scorecard, Wells Fargo ranked Bolan twenty-fourth out of twenty-eight Wells Fargo research analysts overall and third out of twenty-eight in terms of "trading impact." (Adm. FOF ¶¶ 536–37.)

On October 22, 2009—about two months after Ruggieri joined Wells Fargo and after Ruggieri had received Bolan's "very sensitive" Covance channel check to a "platinum" client—Wells Fargo's management asked Ruggieri and other traders to provide feedback on analysts. (JFOF ¶ 11; Adm. FOF ¶¶ 173–75, 534.) Wells Fargo's management informed the traders it would "accumulate all of the responses and communicate the results (assuring individual anonymity) to Equity and Research Management." (Adm. FOF ¶ 534.) Ruggieri replied that Bolan and two other analysts had been "the most proactive" and that "Bolan's in a league of his own- great dialogue with clients and gets it." (Adm. FOF ¶ 535.)

Ruggieri received virtually identical emails seeking analyst feedback on April 15, 2010, after he had profited from his overnight position in Parexel; on July 20, 2010, after he had profited from his overnight positions in Covance and Albany; and on December 6, 2010, after he had profited from his overnight position in Emdeon. (Adm. FOF ¶¶ 288, 307, 339, 361, 539, 542; JFOF ¶¶ 49–86, 89–96, 98–114, 120–26; *see also* Ex. DIV 194-A.) In April, Ruggieri said merely that Bolan and two other analysts had been "most helpful with communication, making strides to keep us in the loop on dialogue with clients, stories, etc." (Adm. FOF ¶ 540.) In July and December, Ruggieri offered the following feedback: "Bolan is far and away the best," and "Bolan – the best in our space. Proactive, great dialogue/traction with clients, communication with the desk is excellent and the business in his names are the example." (Adm. FOF ¶¶ 540, 543.) On his 2010 analyst scorecard,

Bolan was ranked sixteenth out of thirty-five Wells Fargo research analysts overall and first out of thirty-five in terms of "trading impact." (Adm. FOF ¶¶ 567–68.)

XIII. Upon Learning of More Channel Check Disclosures to Certain Clients, Wells Fargo Investigated Bolan and Ruggieri.

On March 31, 2011, Bolan emailed Ruggieri, Mackle, and Short an unpublished channel check. (Adm. FOF ¶ 577.) Within minutes of sending the email, Bolan wrote in an instant message to Ruggieri: "[i]f that doesn't get traction I don't know what will." (Adm. FOF ¶ 578.) Ruggieri responded: "BOOM." (Adm. FOF ¶ 580.) Ruggieri edited Bolan's email and emailed the edited channel check to over 35 clients. (Adm. FOF ¶¶ 582, 584.) Later that day, Bolan emailed Ruggieri and over 35 clients a second unpublished channel check. (Adm. FOF ¶ 586.)

On April 1, 2011, the next day, Bolan emailed a third unpublished channel check to Ruggieri and a Wells Fargo client. (Adm. FOF ¶ 592.) Bolan told Ruggieri and the client that Bolan's channel check findings were "extremely bullish." (*Compare* Div. Findings ¶¶ 593–94 (citing Ex. DIV 15 at 20) *with* Ruggieri Response ¶¶ 593–94 (disputing but citing no counter-evidence).) Evans confronted Bolan about his unpublished channel check. (Adm. FOF ¶ 595; Tr. 1267–71 (Evans).) Soon afterward, Bolan published the channel check information. (Adm. FOF ¶¶ 595–96.) Bolan later told a client that the channel check was "[s]uper duper ultra mega bullish." (Adm. FOF ¶ 598.) When Bolan then learned that the client had not actually received the channel check before its publication, Bolan apologized to the client for not having sent him the channel check before publishing it. (Adm. FOF ¶¶ 600–01.)

Later the same day, a compliance officer at a prominent hedge fund, SAC Capital Advisers LP ("SAC"), notified Scott Friedman, Wells Fargo's senior compliance officer, of a "compliance issue": a SAC employee had received a channel check before Wells Fargo had published it. (Adm. FOF ¶¶ 602–03.) Friedman determined that Ruggieri had sent the SAC employee Bolan's channel

check before its publication. (Adm. FOF ¶ 603.) Wells Fargo began a compliance inquiry of Bolan and Ruggieri. (Adm. FOF ¶¶ 602–04.)

XIV. Wells Fargo Terminated Bolan and Ruggieri.

In April 2011, Wells Fargo decided to terminate both Bolan and Ruggieri for cause—a rare occurrence in the securities industry. (Adm. FOF ¶¶ 616, 618–21, 626–27.) On July 8, 2011, Wells Fargo filed a Form U5 disclosing its reason for terminating Bolan: "Affirmation of Subject Individual's Selective Dissemination of Information and Failure To Preserve Confidential Information." (Adm. FOF ¶¶ 618–19.) The same day, Wells Fargo filed a Form U5 disclosing its reason for terminating Ruggieri: "Loss of Confidence Due to Failure To Escalate Issues Regarding the Inappropriate Dissemination of Information." (Adm. FOF ¶ 621.)

XV. Ruggieri Continued To Help Bolan Afterwards, and They Remained Friends for Some Time.

After Wells Fargo terminated him, Ruggieri gave a set of his apartment keys to Bolan so that Bolan could stay with Ruggieri while interviewing for a job in New York. (Adm. FOF ¶ 633.) In late April 2011, Bolan stayed at Ruggieri's apartment. (Adm. FOF ¶ 634.) Ruggieri let Bolan keep a copy of the keys until at least the next month. (Adm. FOF ¶ 635.) In late May 2011, Ruggieri offered to let Bolan stay at his apartment again with Ruggieri and his wife, whom Bolan had not met before. (Adm. FOF ¶ 638.)

Ruggieri eventually joined International Strategy and Investment Group ("ISI") as a partner and remained there until October 2014. (Adm. FOF ¶¶ 622, 636.) In approximately early May 2011, Ruggieri recommended Bolan for an analyst position at ISI. (Adm. FOF ¶ 636.) Bolan later joined another firm as a research analyst. (Adm. FOF ¶ 625; JFOF ¶ 8.) Months afterward, in approximately September 2011, Bolan invited Ruggieri to his wedding. (Adm. FOF ¶ 640 (citing Ex. DIV 167 at 4 (email from Bolan to Ruggieri) ("[D]id u get our wedding invite yet? Just went out.")).) According to Ruggieri, he neither received the invitation nor attended the wedding. (Tr. 2375–76.)

THE INITIAL DECISION

The Initial Decision correctly concludes that Bolan repeatedly tipped Ruggieri to material, non-public information. (Initial Decision at 8–28.) Specifically, the decision finds that Ruggieri traded on Bolan's tips on four of the Six Ratings Changes—Albany, Emdeon, Athena, and Bruker—in July 2010, August 2010, February 2011, and March 2011, respectively. (*Id.* at 19–27.) It concludes that Ruggieri traded on Bolan's tip on a fifth ratings change, not alleged in the OIP, in January 2011. (*Id.* at 27.) Among other things, the decision finds Ruggieri's purported explanations for these trades not credible. (*Id.* at 21 ("Ruggieri's thesis is not credible."); *id.* at 23 (Ruggieri's "explanation fails to credibly explain why Ruggieri just so happened to establish a 10,000-share overnight position in [Emdeon], on the afternoon of the last trading [day] before Bolan's upgrade."); *id.* at 27 ("Ruggieri's attempted explanation for this trade is untenable.").) The decision further finds that Bolan tipped Moskowitz to three of the same ratings changes and that Moskowitz traded on the tips. (*Id.* at 11.) The decision also concludes that Ruggieri did not trade on tips about two of the Six Ratings Changes—Parexel and Covance—in April and June 2010. (*Id.* at 12–19.)

Although Bolan repeatedly tipped Ruggieri to information Bolan knew was material and confidential, the Initial Decision incorrectly concludes that Bolan did not do so for personal benefit. (*Id.* at 9–12, 28–49.) Applying *Newman*, the Initial Decision rejects each of the benefits proffered by the Division.[9] (*Id.* at 35–49 ("I apply *Newman*.").)

The decision first concludes that "the 'friendship' and working relationship between Bolan and Ruggieri was not a meaningful, close, or personal one" under *Newman*. (*Id.* at 34–35, 43–47.) Specifically, the decision opines that, while they shared a close professional relationship, "absent their shared professional experience, Bolan and Ruggieri were not close." (*Id.* at 44; *id.* at 45

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[9] The decision notes that "a petition for review from a final Commission order may not necessarily lie in the Second Circuit." (Initial Decision at 28 n.15.) Ruggieri lives in North Carolina. (Tr. 2739 (Ruggieri).)

(concluding that Wickwire's testimony that Bolan and Ruggieri had "developed a very close relationship" "relates to a professional, as opposed to personal, relationship"); *id.* at 46 ("Ruggieri's predecessor *also* shared a close professional relationship with Bolan" (emphasis added)).)

The decision next concludes that Bolan did not have "a *quid pro quo* relationship with Ruggieri" for several reasons. (*Id.* at 35.) First, it rejects Ruggieri's mentorship of Bolan as a personal benefit. (*Id.* at 36.) It finds 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 [a junior analyst]." (*Id.*) Second, it rejects the conclusion that Bolan tipped Ruggieri to maintain or obtain positive feedback that could improve Bolan's peer ranking on the analyst scorecard and thus his bonus. (*Id.* at 36–42.) It concludes: "Even if Bolan had an incentive to improve his scorecard standing...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." (*Id.* at 42.) Third, the decision rejects the conclusion that Bolan tipped Ruggieri to improve Bolan's chances of a promotion. (*Id.* at 37, 42–43.) The decision relies partly on its "literal[ ]" reading of Bolan's investigative testimony to find that Bolan "may have" asked Ruggieri to provide feedback to Wickwire to help obtain a promotion—"meaning it is possible [Bolan] did so because that was standard practice, but he did not recall the specifics." (Initial Decision at 37 & n.22.) The decision concludes:

> 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.... [I]t 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.

(*Id.* at 42–43.)

The decision then declines to decide whether Bolan tipped for personal benefit by making a gift of valuable information to a trading friend, under *Dirks*. (*Id.* at 47.) The decision notes that *Dirks* 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," but concludes that the Division waived the issue by neither alleging nor arguing it. (*Id.* at 47.)

Ultimately, the Initial Decision proffers its own theory as to why Bolan repeatedly tipped Ruggieri:

> [While i]t is arguable that Bolan broke rules due to a misguided belief that disclosing nonpublic information would help his career and advance his reputation[, a]nother view—and one that seems equally if not more likely—is that Bolan simply could not follow the rules and keep his mouth closed.

(*Id.* at 49.) In reaching this inference, the decision partly rests on its determination that "[a]lthough Bolan made improper disclosures to a few select clients [in the context of his channel checks], none of the cited instances establish that he did so for personal gain or to further career prospects." (*Id.* at 49.) In support of its overall conclusion that Bolan did not tip for personal benefit, the decision notes that "the Division's failure to elicit Bolan's testimony further hindered its ability to meet its burden of proof."[10] (*Id.* at 36.)

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[10] The Initial Decision describes Bolan's absence from the hearing but omits some details. (Initial Decision at 35–36 (citing Tr. 1616–24).) The Division had originally sought the hearing subpoena issued to Bolan. (Tr. 1621.) On the business day before the hearing, Bolan and the Division reached a settlement in principle. (Initial Decision at 36 n.21.) Five days into the twelve-day hearing, the Division notified the ALJ and Ruggieri that it had spoken with Bolan's counsel. (Tr. 1617–18.) The Division explained that, according to Bolan's counsel, Bolan would need a few days to travel to New York to testify and had some concern about the fairness of being compelled to testify while the Commission was considering his settlement offer. (*Id.*) The Division stated that, in any event, it had elected not to call Bolan as a witness but noted that Ruggieri was of course free to enforce the Division's subpoena in order to call Bolan as his witness. (Tr. 1619–21.) Ruggieri

STANDARD OF REVIEW

The Commission conducts an "independent, *de novo* review of the record" on appeal. *Timbervest, LLC*, Rel. No. 4197, 2015 WL 5472520, at *1 (Sept. 17, 2015); *see also* 5 U.S.C. § 557(b).

ARGUMENT

Whether the Commission looks to *Newman* for guidance on the applicable legal standard or not, the largely undisputed facts establish that Bolan tipped Ruggieri for personal benefit—not for any legitimate reason. First, Bolan and Ruggieri shared a friendship, mentor relationship, and close professional bond far closer than the casual friendships *Newman* rejected as insufficient. Second, Bolan tipped Ruggieri with the intention of benefiting him by providing market-moving information Bolan knew Ruggieri would profitably trade on. Third, Bolan and Ruggieri shared a *quid pro quo* relationship. Ruggieri—a star trader who had the ear of Bolan's supervisor—could and did benefit Bolan's career, including through feedback that at least had the potential to influence Bolan's promotion and compensation. Finally, Bolan had no legitimate business reason for tipping Ruggieri—indeed, neither the Initial Decision nor Ruggieri have proffered one. Bolan had only one plausible reason for repeatedly risking his career to tip Ruggieri: because Bolan knew Ruggieri would benefit him in return, one way or another. Each of these four grounds independently suffices to prove personal benefit under *Newman* and other precedent.

I. Bolan's Close Relationship with Ruggieri Shows He Tipped for Personal Benefit.

A. A "meaningfully close personal relationship," standing alone, satisfies *Newman*.

The Supreme Court first required a showing of personal benefit in *Dirks*, when it faced the unusual circumstance of a tipper with a benevolent motive: a whistleblowing insider who had

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elected not to do so and instead successfully sought admission of Bolan's investigative testimony. (Tr. 1619–24.) This allowed Ruggieri to obtain the benefit of Bolan's self-serving denial of any wrongdoing without the risk of exposing Bolan to the Division's cross-examination.

tipped confidential, corporate information to expose his employer's accounting fraud. *Dirks*, 463 U.S. at 648–50. The Court concluded that a tipper does not breach his fiduciary duty by tipping confidential information unless he "personally will benefit, directly or indirectly, from his disclosure." *Id.* at 662. Whether a given disclosure will trigger insider trading liability therefore "depends in large part on the *purpose* of the disclosure." *Id.* at 662 (emphasis added). For a tipper to breach a fiduciary duty by tipping, "[t]he element of self-dealing, in the form of a personal benefit…must be present." *United States v. Whitman*, 904 F. Supp. 2d 363, 371 (S.D.N.Y. 2012); *see also Maio*, 51 F.3d at 632 ("An insider's disclosure is improper when corporate information, intended to be available only for corporate purposes, is used for personal advantage."). Put another way, *Dirks*' personal benefit requirement sought to distinguish between disclosures of confidential information for a proper, corporate purpose and disclosures for an improper, self-dealing purpose.

To clarify this requirement, *Dirks* explained that a personal benefit "exist[s] when a [tipper] makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the [tipper] himself followed by a gift of the profits to the recipient." *Id.* at 664; *see also id.* at 659 ("[I]nsiders…may not give such [undisclosed corporate] information to an outsider for the same improper purpose of exploiting the information for their personal gain.") (citing Exchange Act Section 20(b), 15 U.S.C. § 78t(b)).

Following *Dirks*, the Second Circuit repeatedly held that a "personal benefit to the tipper" includes "a 'reputational benefit' or the benefit one would obtain from simply 'mak[ing] a gift of confidential information to a trading relative or friend.'" *SEC v. Obus*, 693 F.3d 276, 285 (2d Cir. 2012) (quoting *Dirks*, 463 U.S. at 663–64); *see also United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013); *SEC v. Warde*, 151 F.3d 42, 48–49 (2d Cir. 1998); *cf. Jiau*, 734 F.3d at 153 ("The proof required to show personal benefit to the tipper is modest.").

Every other Circuit court that considered the issue similarly interpreted *Dirks*. *See SEC v. Rocklage*, 470 F.3d 1, 7 n.4 (1st Cir. 2006) ("[T]he mere giving of a gift to a relative or friend is a sufficient personal benefit."); *SEC v. Cuban*, 620 F.3d 551, 558 n. 38 (5th Cir. 2010) ("[A] gift to a trading friend or relative" could "suffice to show the tipper personally benefitted.") (citation omitted); *United States v. Evans*, 486 F.3d 315, 321 (7th Cir. 2007) ("[T]he concept of gain is a broad one, which can include a 'gift of confidential information to a trading relative or friend.'") (quoting *Dirks*, 463 U.S. at 664); *SEC v. Clark*, 915 F.2d 439, 454 (9th Cir. 1990) ("enriching a friend or relative" gives rise to Rule 10b-5 liability); *SEC v. Yun*, 327 F.3d 1263, 1275 (11th Cir. 2003) ("[A] gift to a trading friend or relative [can] suffice to show that the tipper personally benefitted.") (summarizing *Dirks*); *cf. Yun*, 327 F.3d at 1280 ("The showing needed to prove an intent to benefit is not extensive.").

With this uniform precedent behind it, the Second Circuit issued the *Newman* decision. It vacated and dismissed with prejudice the criminal convictions of two hedge fund managers—downstream tippees several tipping levels removed from the corporate insider tippers. *Newman*, 773 F.3d at 442–43. The court found the trial evidence insufficient to prove beyond a reasonable doubt that the two corporate insiders, who had never been criminally charged, received a personal benefit from their tips.[11] *See id.* at 443, 451–55.

Specifically, the trial evidence established that the first tipper and his tippee were "not close friends," though they had attended the same business school and worked at the same company, and that the tippee in turn gave the tipper "little more than the encouragement one would generally expect of a fellow alumnus or casual acquaintance." *Id.* at 452, 453. Similarly, the court described the second tipper and his tippee as "family friends" and "merely casual acquaintances," who "had met

[11] The court also overturned the defendants' convictions on the grounds that the downstream tippees had to "know" of the personal benefit to the tipper from the first-level tippee and that the trial evidence was insufficient to prove such knowledge beyond a reasonable doubt. *Newman*, 773 F.3d at 447–51, 453–55.

through church and occasionally socialized together." *Id.* at 452, 453. The court held that proving personal benefit beyond a reasonable doubt required more than simply "proving that two individuals were alumni of the same school or attended the same church." *Id.* at 452. The court then articulated this standard for 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.' *Jiau*, 734 F.3d at 153 (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 [(quoting *Dirks*, 463 U.S. at 664)].

Newman, 773 F.3d at 452.

This standard requires no more than a "meaningfully close personal relationship" between the tipper and tippee to prove the tipper's intention to benefit the tippee and therefore personal benefit. To the Division's knowledge, every court that has since analyzed the issue has interpreted *Newman* this way.[12] *See, e.g., SEC v. Megalli*, No. 1:13-cv-3783-AT, slip op. at 17, attached as Ex. A

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[12] Todd Newman's opposition to the United States Department of Justice's petition for certiorari in his case made a similar point. Br. for Todd Newman in Opp'n to Pet'n at 27–29, *Newman*, __ S. Ct. __, 2015 WL 4575840 (Aug. 24, 2015) (No. 15-137) ("[I]n every case of which we are aware in which the government has litigated *Newman*-based challenges to the personal benefit requirement, the government has prevailed.... The foregoing cases include...[those involving] gifts to friends and relatives with no money or 'similar' value provided in 'exchange.'"), available at *https://securitiesdiary.files.wordpress.com/2014/11/newman-opposition-to-cert-petition.pdf.*

(N.D. Ga. Sept. 24, 2015) ("*Newman* recognizes and appears to preserve Second Circuit precedents acknowledging that not all benefits must be immediately pecuniary.... *Newman* has made waves, but the Court is not convinced it is a total sea change."); *SEC v. McGinnis*, 2015 WL 5643186, at *18 (D. Vt. Sept. 23, 2015) ("A personal benefit may exist when an insider passes material nonpublic information to a trading relative or friend because '[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.'") (quoting *Dirks*, 463 U.S. at 664); *SEC v. Holley*, 2015 WL 5554788, at *5 (D.N.J. Sept. 21, 2015) ("Defendant's intent to benefit and help people close to him is precisely the type of personal benefit the Second Circuit referred to in *Newman*."); *United States v. Whitman*, __ F. Supp. 3d __, 2015 WL 4506507, at *3 n.5 (S.D.N.Y. July 22, 2015) ("*Newman*, in effect, reaffirmed *Warde* when it held that 'evidence of a relationship between the insider and the recipient that suggests...an intention to benefit the latter' is sufficient, and added only that such evidence requires more than proof of 'the mere fact of a friendship, particularly of a casual or social nature.'").

The Commission has reached the same conclusion in *dicta*. *See Thomas D. Melvin, C.P.A.*, Rel. No. 3682, 2015 WL 5172974, at *5 & n.38 (Sept. 4, 2015) ("The allegation that Melvin had a close personal relationship with his tippees independently supports the sufficiency of his personal benefit.") (citing cases).

Indeed, the Ninth Circuit—the only other Circuit that has addressed personal benefit since *Newman*—reads *Newman* to require no more than "evidence of a friendship or familial relationship between tipper and tippee" to demonstrate personal benefit. *United States v. Salman*, 792 F.3d 1087, 1093–94 (9th Cir. 2015). It has held:

> If [defendant-appellant's] theory were accepted...then a corporate insider or other person in possession of confidential and proprietary information would be free to disclose that information to her relatives, and they would be free to trade on it, provided only that she asked for no tangible compensation in return. Proof that the insider disclosed material nonpublic information with the intent to benefit a

> trading relative or friend is sufficient to establish the breach of fiduciary duty element of insider trading.

Id. at 1094. To the extent *Newman* requires a different interpretation, the Ninth Circuit has declined to follow *Newman*. *See id.* at 1093. Read properly, therefore, *Newman* requires only a "meaningfully close personal relationship" between the tipper and tippee to establish personal benefit.

B. Bolan and Ruggieri shared a "meaningfully close personal relationship."

Assuming the Court looks to *Newman* for the proper personal benefit standard, as the Initial Decision does, Bolan's relationship with Ruggieri alone satisfies the standard.[13] At a minimum, Bolan and Ruggieri shared a far closer, personal, and more meaningful relationship than the "casual acquaintances" *Newman* rejected as insufficient. *Newman*, 773 F.3d at 453. Unlike the *Newman* tippers and their tippees, Bolan and Ruggieri were "pretty good friends," Ruggieri was the only Wells Fargo trader who traded Bolan's stocks, Ruggieri mentored Bolan, the two spoke "regularly" and "had a constant dialogue," and they "developed a very close relationship…of two professionals supporting one another." (Adm. FOF ¶¶ 41, 51; *compare* Div. Findings ¶ 47 *with* Ruggieri Response ¶ 47; Tr. 1557–58, 2051–52, 2062–63.) Even after they stopped working together, Bolan stayed at

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[13] Several courts have expressed doubts about following *Newman*. *See SEC v. Payton*, 2015 WL 9463182, at *3 (S.D.N.Y. Dec. 28, 2015) ("[I]t is not so easy to reconcile…*Dirks*, *Obus*, and *Newman*."); *United States v. Melvin*, __ F. Supp. 3d __, 2015 WL 7077258, at *15 (N.D. Ga. Nov. 10, 2015) ("*Newman* is not binding authority.") (contrasting the Eleventh Circuit's "very expansive" definition of personal benefit). In fact, one district court in the Seventh Circuit recently instructed a jury in a Commission enforcement action as follows: "The concept of a personal benefit to a tipper is a broad one and includes, among other things, a benefit in exchange for the disclosure or the gift of confidential information to a friend." Instructions to the Jury at 31, *SEC v. Berretini*, No. 1:10-cv-01614 (N.D. Ill. Oct. 1, 2015) (no mention of "meaningfully close personal relationship"), excerpt attached as Ex. B.

If the Commission does not follow *Newman*, Ruggieri's admitted friendship with Bolan suffices to prove personal benefit, as the discussion above demonstrates. Indeed, Ruggieri's counsel conceded at oral argument on his motion for summary disposition that, before *Newman*, "it used to be that mere friendship was enough." (Tr. of Oral Argument at 58–59 (Feb. 11, 2015), attached as Ex. C.)

Ruggieri's apartment, Ruggieri recommended Bolan for a job at Ruggieri's new firm, and Bolan invited Ruggieri to his wedding. (Adm. FOF ¶¶ 634, 636, 640.)

Any reasonable definition of the term "meaningfully close personal relationship" includes this type of relationship. Br. for SEC as Amicus Curiae Supporting Pet. of the United States for Reh'g or Reh'g En Banc at 14, *United States v. Newman*, No. 13-1837 (2d Cir. Jan. 2015) (terms "meaningfully," "close," and "personal" are "not susceptible to a definite legal meaning"); *Payton*, 2015 WL 9463182, at *4 (roommates shared a "close[]" relationship when they "ate dinner, drank beers, played video games, watched TV, used drugs, and discussed their respective days, current events, and personal details of their lives"); *Megalli*, No. 1:13-cv-3783-AT, slip op. at 2, 15, 17, 20–22 & n.7 (distinguishing the "extremely weak evidence concerning the alleged benefits to the insiders" in *Newman* and finding that the tipper's gift of inside information to the tippee—with whom the tipper had "a personal and professional" relationship that "included travel, golf outings, lunches and other work and social events" and for whom "he felt bad"—satisfied the personal benefit requirement).

Even if the Commission accepts the Initial Decision's erroneous conclusion that Bolan's and Ruggieri's relationship was close *only* in a professional capacity, they still shared a "meaningfully close personal relationship." *Newman*'s use of the term "personal" does not exclude professional relationships. It simply requires a direct relationship between the tipper and the tippee, not just an attenuated connection arising primarily from membership in the same organizations. Indeed, *Newman* distinguishes between impermissible inferences based on "casual or social" acquaintances who are "alumni of the same school or attended the same church"—"personal" in the Initial Decision's sense of "not professional"—and permissible inferences based on direct interpersonal relationships. *Newman*, 773 F.3d at 452; *see also* Merriam-Webster Online Dictionary, *http://www.merriam-webster.com/dictionary/personal* (last visited Jan. 11, 2016) (defining "personal" in

part to mean "done in person without the intervention of another…carried on between individuals directly").

Nor would any other reading of *Newman* make sense. Professionals—particularly in the competitive securities industry—often rely on a network of close work friends and mentors. These relationships are meaningful precisely because they directly impact jobs and livelihoods. Indeed, while at Wells Fargo, Ruggieri spoke more often to Bolan than to his mother. (Tr. 2051–52, 2062–63, 2198). Recognizing the importance of such workplace relationships, the Commission has held that a tipper who tips a "friendly" co-worker does so for personal benefit where the tipper receives only "personal satisfaction" and the tippee's "admiration" in return. *See Robert Bruce Lohmann*, Exchange Act Rel. No. 48092, 2003 WL 21468604, at *4 (June 26, 2003). Reading *Newman* to exclude close professional relationships would deliver a perverse result: securities professionals and corporate executives would be free to tip their professional mentors and close colleagues to profitable inside information, but not their spouses or parents.

II. Bolan Tipped Ruggieri, a Professional Trader, With the Intent To Benefit Him.

The Initial Decision declines to decide whether Bolan intended to benefit Ruggieri by tipping him because it incorrectly concludes that the Division waived the argument. (Initial Decision at 47.) The Commission should consider the issue now and draw the only plausible inference from the facts: Bolan intended to benefit Ruggieri by giving him valuable, market-moving information on which Bolan knew Ruggieri would profitably trade.

First, the Division did not waive this issue. It explicitly contended below that Bolan's intention to benefit Ruggieri satisfies the personal benefit standard:

> *Dirks*' personal benefit inquiry addresses the tipper's 'intention to benefit' the recipient — the very phrase *Newman* quotes — and requires no resulting pecuniary exchange from the tippee to the tipper.

(Div.'s Post-Hr'g Proposed Conclusions of Law ¶¶ 27–34; *cf.* Resp. Joseph C. Ruggieri's Mot. for Summary Affirmance at 13 (describing the "dicta in the [Initial] Decision that [the Division] waived this issue" and arguing that "whether this issue was waived is of no importance").)[14]

Next, a tipper's intention to benefit his tippee suffices to show personal benefit under *Dirks* and *Newman*. As the Initial Decision correctly reasons, "*Dirks* suggests that an inference of personal benefit may be drawn based on, *inter alia*, 'an intention to benefit the particular recipient.'" (Initial Decision at 47 (quoting *Dirks*, 463 U.S. at 664).) *Newman* similarly permits personal benefit to rest on the tipper's intention to benefit the tippee: "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].'" *Newman*, 773 F.3d at 452 (citations omitted); *United States v. Gupta*, __ F. Supp. 3d __, 2015 WL 4036158, at *3 (S.D.N.Y. July 2, 2015) ("[A] tipper's intention to benefit the tippee is sufficient to satisfy the benefit requirement so far as the tipper is concerned, and no *quid pro quo* is required."). The *Gupta* court therefore takes *Newman*'s phrase "at least a potential gain of a pecuniary or similarly valuable nature" not to mean that the *tipper* must receive such a potential gain in return for his tip but rather that the tipper intend the *tippee* to receive such a potential gain from the tip. *See Gupta*, 2015 WL 4036158, at *3 ("[Defendant] reads this language to suggest that the potential pecuniary benefit must be to the tipper. This is not a fair reading since it would contravene the plain language of *Dirks*, *Jiau*, and *Newman* itself.").

Finally, the Commission need consider only the Initial Decision's factual findings and the undisputed facts to conclude that Bolan tipped Ruggieri to benefit him. As Bolan knew, Ruggieri traded stocks at Wells Fargo. (Initial Decision at 6.) Bolan knowingly and repeatedly broke Wells

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[14] As the Initial Decision notes, the OIP does not allege that Bolan intended to benefit Ruggieri. (Initial Decision at 47.) The Commission recently reiterated, however, that the OIP need only "provide notice of *what* violations of the securities laws are alleged; it need not detail *how* the Division ultimately will try to prove them." *Timbervest, LLC*, 2015 WL 5472520, at *19 (emphases in original).

Fargo's rules to give Ruggieri confidential information that "typically moved stock prices." (*Id.* at 9.) From Bolan's tips, Ruggieri earned profits from his trades for Wells Fargo, including a profit of over $34,000 on Athena—the single most profitable overnight position Ruggieri took during his entire tenure at the firm. (*Id.* at 24.) After Ruggieri received a compensation guarantee in June 2010, Ruggieri's profits on Bolan's tips did not directly affect Ruggieri's compensation for that calendar year, as the Initial Decision notes. (*Id.* at 46 n.34; Adm. FOF ¶¶ 74–75, 80.) However, Ruggieri's net revenue impacted his performance evaluation and his standing with his boss. (Adm. FOF ¶¶ 67–69.) In 2011, when Wells Fargo returned to paying Ruggieri a salary plus 6% of his monthly net revenue, Ruggieri's profits on his Athena and Bruker trades totaled over $58,000, raising his net revenue by that amount and his compensation by 6% of that amount. (Adm. FOF ¶¶ 75, 80, 378, 394.) Had Bolan and Ruggieri succeeded in continuing their scheme without detection, Bolan's future tips would have continued to increase Ruggieri's net revenue for Wells Fargo and his own compensation. The only plausible inference that can be drawn from these facts is that Bolan intended to benefit Ruggieri by tipping him and therefore tipped for personal benefit.

III. Bolan and Ruggieri Shared a *Quid Pro Quo* Relationship.

A. The undisputed evidence objectively shows a *quid pro quo* relationship.

Under *Dirks* and *Newman*, evidence of "a relationship between the [tipper] and the recipient that suggests a *quid pro quo* from the latter" satisfies the personal benefit standard. *Newman*, 773 F.3d at 452 (quoting *Jiau*, 734 F.3d at 153 (quoting *Dirks*, 463 U.S. at 664)). As *Dirks* instructs, the Commission must focus on objective evidence of the benefit to determine whether such a *quid pro quo* relationship exists—it need not try to read the tipper's mind:

> In determining whether the insider's purpose in making a particular disclosure is fraudulent, the SEC and the courts are not required to read the parties' minds.... 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.

Dirks, 463 U.S. at 663. *Dirks*' focus on objective evidence of benefit and away from subjective evidence of tippers' intent ensures that factfinders disregard tippers' "fabricated" testimony about "ostensibly legitimate business justification[s]" for their tips. *Id.*

The Commission also need not find any explicit agreement between the tipper and tippee about the particular benefit the tippee will provide in return for the tips. "The precise exchange need not be known by the parties at the time of the tip, so long as the tip leads to a 'reputational benefit that will translate into future earnings.'" *United States v. Riley*, 90 F. Supp. 3d 176, 184 (S.D.N.Y. 2015) (quoting *Jiau*, 734 F.3d at 153 (quoting *Dirks*, 463 U.S. at 663)); *see also Clark*, 915 F.2d at 454 ("tipping others with the expectation of reciprocity" gives rise to Rule 10b-5 liability); *cf. United States v. Jennings*, 160 F.3d 1006, 1014 (4th Cir. 1998) ("I'll scratch your back if you scratch mine" arrangements satisfy the *quid pro quo* element of criminal bribery). Indeed, even if the tippee provides a benefit that "ultimately d[oes] not help" the tipper's career and thus produces no pecuniary gain, "that is irrelevant when determining whether [the tipper's] tips were made as part of a *quid pro quo* agreement." *Riley*, 90 F. Supp. 3d at 187 (citing *Jiau*, 734 F.3d at 153 ("The fact that Ng did not receive any tips from Jiau's investment club in return for the tips he gave is of no moment. In joining the investment club, Ng entered into a relationship of *quid pro quo* with Jiau, and thus had the opportunity to access information that could yield future pecuniary gain.")). If the tipper tips to receive "a potential gain of a pecuniary or similarly valuable nature" from his tippee, then the tipper and tippee share a *quid pro quo* relationship. *Newman*, 773 F.3d at 452.

Under these broad standards, the undisputed facts establish that Ruggieri and Bolan had such a relationship: Ruggieri provided positive feedback about Bolan that helped Bolan obtain a promotion and could have helped him obtain a higher bonus. As to the promotion, the parties agree on five key facts. First, feedback from Wells Fargo's trading desk was taken into account in analyst promotions. (Adm. FOF ¶ 564.) Second, Bolan's supervisor considered Ruggieri's feedback more

important than that of anyone else on Wells Fargo's healthcare trading desk. (Adm. FOF ¶ 551.) Third, in the context of being considered for a promotion, Bolan asked Ruggieri to provide positive feedback to Bolan's supervisor because Bolan thought it would improve his chances of being promoted. (Adm. FOF ¶ 553.) Fourth, Ruggieri indeed provided positive feedback and Bolan's supervisor included the feedback in Bolan's promotion nomination. (Adm. FOF ¶¶ 549, 560; Tr. 2457–59; Ruggieri Prop. Findings ¶¶ 347, 366.) Finally, after four of the five tips on which the Initial Decision concludes Ruggieri traded, Bolan obtained a promotion and a corresponding raise. (Adm. FOF ¶¶ 564–66; Initial Decision at 19–27; *id.* at 38 n.23 (noting that only Ruggieri's Bruker trade occurred after Bolan's promotion).)

Similarly, the parties agree on at least four key facts showing that Ruggieri's positive feedback about Bolan had the potential to increase Bolan's bonus. First, traders' feedback on research analysts counted for 5% of an analyst's overall ranking on the scorecard that determined analysts' annual bonuses. (Adm. FOF ¶¶ 529–33, 570.) Second, in some years, feedback from traders could move an analyst up or down one or two slots, increasing or decreasing an analyst's bonus by $50,000 to $150,000. (Adm. FOF ¶¶ 573–74.) Third, as described above, Bolan's supervisor valued Ruggieri's feedback on analysts more than that of any other healthcare trader. (Adm. FOF ¶ 551.) Fourth, Ruggieri provided positive written feedback on Bolan before and after Ruggieri profited from the relevant trades. (Adm. FOF ¶¶ 534–35, 539–40, 542–43.) Taken together, these undisputed facts show that Ruggieri provided pecuniary and potentially pecuniary benefits to Bolan after profitably trading on Bolan's tips.

B. The Initial Decision errs in rejecting this objective, undisputed evidence.

Ignoring *Dirks'* instruction that objective evidence of personal benefit suffices to prove a *quid pro quo* relationship, the Initial Decision reaches an implausible result. *Dirks*, 463 U.S. at 663. While the decision correctly concludes that Ruggieri's positive feedback "could be viewed as having

some potential pecuniary value"—objective evidence of benefit—it rejects the conclusion that Bolan tipped to obtain this feedback. (Initial Decision at 42–43.) Instead, the decision speculates that "it is just as likely that Ruggieri gave such feedback because it was genuine, and that Bolan sought feedback as part of standard procedure." (*Id.*) In essence, the decision concludes (1) that Bolan knowingly and repeatedly broke Wells Fargo's rules to tip Ruggieri to confidential, market-moving information; (2) that Ruggieri profitably traded on the information; (3) that Ruggieri then provided positive feedback about Bolan; *but* (4) that Bolan believed his valuable, clandestine tips would not influence Ruggieri's future feedback about Bolan. This conclusion defies plausibility in precisely the way *Dirks* sought to avoid: if objective evidence of the tipper's receipt of a benefit from his tippee does not suffice to prove personal benefit, factfinders may reach far-fetched conclusions about what lies in a tipper's mind.

Next, the Initial Decision incorrectly relies on the timing of Ruggieri's feedback vis-à-vis the tips. Specifically, the decision emphasizes that Ruggieri began providing positive feedback before the tipping began, even though Ruggieri continued to provide positive feedback afterwards. (Initial Decision at 35–43.) Yet *quid pro quo* relationships often involve favors in both directions over a period of time. When tips serve as "a *quid pro quo* for past and prospective services" rendered by the tippee—as Bolan's tips did—they establish personal benefit. *Payton*, 2015 WL 9463182, at *4 (denying defendants' motion for summary judgment).

The decision further ignores Ruggieri's admission that Bolan *asked* Ruggieri to provide positive feedback to help Bolan obtain a promotion. (Adm. FOF ¶ 553.) Instead, misreading Bolan's investigative testimony, the decision concludes that Bolan "may have" asked Ruggieri to provide such feedback as a matter of "standard practice" but not that Bolan conclusively did so. (Initial Decision at 37 & n.22.) In fact, Ruggieri definitively admitted—presumably based on the plain meaning of Bolan's testimony—that "[i]n the context of being considered for a promotion, Bolan

asked Ruggieri to provide feedback about Bolan's performance to Wickwire because Bolan thought it would improve his chances of being promoted." (Adm. FOF ¶ 553 (citing Ex. DIV 110 at 65–66 (Bolan) ("Q. Did you ask Ruggieri to provide feedback to Mr. Wickwire about your performance in order to improve your chances of being promoted at Wells Fargo? A. I thought it would be helpful. Q. So did you ask Mr. Ruggieri to provide feedback to Mr. Wickwire in order to improve your chances of being promoted? A. Like I said, I thought it would be helpful.")).) Properly considered, Ruggieri's admission shows Bolan's "expectation of reciprocity." *Clark*, 915 F.2d at 454.

Finally, the Initial Decision relies in part on the purported "relative unimportance" of traders' 5% impact on the analyst scorecard. (Initial Decision at 40.) As the decision points out, trader feedback did not end up altering Bolan's ranking in 2010. (*Id.*) Yet, as Ruggieri admits, trader feedback could move an analyst up or down one or even two slots in the ranking, depending on how close together analysts' composite scores clustered in a given year. (Adm. FOF ¶ 573.) Incorrectly deeming this mathematical potentiality mere "speculat[ion]," (Initial Decision at 40), the Initial Decision errs in failing to conclude that this "potential gain of a pecuniary or similarly valuable nature" demonstrates a *quid pro quo* relationship. *Newman*, 773 F.3d at 452.

IV. It Is Implausible That Bolan Repeatedly Risked His Career To Tip Ruggieri Without Any Expectation of Personal Benefit.

Even if each benefit described above alone fails to demonstrate personal benefit, the undisputed facts and the Initial Decision's other findings together lead to only one conclusion: Bolan tipped for personal advantage, not for any legitimate business purpose. The Initial Decision acknowledges this possibility. (Initial Decision at 49 ("It is arguable that Bolan broke rules due to a misguided belief that disclosing nonpublic information would help his career and advance his reputation.").) Yet it concludes that "an equally if not more likely" possibility is that Bolan tipped not for personal benefit but because he "simply could not follow the rules and keep his mouth closed." (*Id.*) This speculative theory—never advanced by Ruggieri—is implausible for several

reasons. (Resp. Joseph C. Ruggieri's Post Hrg. Brief at 14–17 (espousing no such theory); Resp. Ruggieri's Reply to the Div. of Enforcement's Post-Hrg. Mem. of Law at 1–3 (same).)

First, Bolan had no legitimate reason for tipping Ruggieri. Wells Fargo had an important business purpose for prohibiting analysts from disseminating unpublished research: to ensure that all the firm's clients received material information simultaneously. (Initial Decision at 49 (noting "the firm's requirement that research be publicly disseminated at the time of its disclosure—not selectively distributed to certain clients first").) Bolan could have had no legitimate motive for defying this prohibition by tipping Ruggieri, and neither the Initial Decision nor Ruggieri has proffered one. Without any legitimate justification for his tips, Bolan can only have tipped for personal advantage. *See Maio*, 51 F.3d at 632; *Riley*, 2015 WL 891675, at *18 n.6 ("It is worth noting that the 'personal benefit' requirement exists to ensure that insiders are tipping in breach of their duties.... In this case, there is absolutely no doubt that [the tipper] disclosed MNPI in violation of his duty to [his employer] and not for any legitimate reason.").

Dirks and *Newman* do not require a different result. Their conclusions about the tippers' lack of personal benefit involved unusual facts not present here. *Dirks*, 463 U.S. at 648–50, 659 n.18, 665–67 ("On its facts, this case is the unusual one."); *Newman*, 773 F.3d at 448, 451–53 (noting "the doctrinal novelty of [the United States Attorney's] recent insider trading prosecutions, which are increasingly targeted at remote tippees many levels removed from corporate insiders"); *Megalli*, No. 1:13-cv-3783-AT, slip op. at 19 ("[T]he *Newman* defendants were at the tail end of a game of telephone, receiving distorted-at-best transmissions, so that it was not even clear that they knew they were trading on inside information *at all*.") (emphasis in original). Both courts pointed to evidence that the tippers had legitimate business justifications for tipping—not merely a dearth of personal benefit evidence. In *Dirks*, the Supreme Court concluded that a whistleblowing insider who had tipped confidential corporate information to expose his employer's accounting fraud did not tip for

personal benefit. 463 U.S. at 648–50; *cf. id.* at 663 (addressing the Commission's concern that imposing a personal benefit requirement would allow parties to fabricate "some ostensibly legitimate business justification for transmitting the information"). In *Newman*, the Second Circuit pointed to evidence that the insiders' corporate employers had permitted them to "leak" non-public earnings data to investment firms that might then buy the companies' stock—for the benefit of the tippers' employers, not the tippers themselves. 773 F.3d at 454–55.

Second, the Initial Decision relies on inferences at odds with its other factual findings. The Initial Decision primarily infers that Bolan could not "keep his mouth closed" because he engaged in a "longstanding disregard of compliance rules" for "no apparent reason." (Initial Decision at 47–49.) Yet, as the Initial Decision's other factual findings show, Bolan regularly violated Wells Fargo's policies by emailing his unpublished "channel check" research only "to certain high-paying," "select," "platinum" clients—not to run-of-the-mill clients. (*Id.* at 5, 47–49.) As Bolan knew, client votes accounted for 15% of his performance rank among his peers, which in turn directly affected his bonus. (*Id.* at 40–41 & n.27.) Not surprisingly, clients "had a favorable view of Bolan and used his research to trade." (*Id.* at 39.) These facts contradict the Initial Decision's conclusion that Bolan broke compliance rules by disseminating unpublished research to clients for "no apparent reason." In fact, Bolan had an important, self-serving reason for doing so: to obtain positive feedback from large clients who could help advance his career and compensation.

Nor can the Initial Decision's conclusion be reconciled with its findings about Bolan's tips to his close friend Moskowitz. The decision finds that Bolan tipped Moskowitz to several ratings changes in return for a personal benefit. (*Id.* at 7, 44–45 (concluding that Bolan's friendship with Moskowitz "is more indicative of a 'meaningfully close personal relationship that generates an exchange' of some value or potential value").) No plausible explanation exists as to why Bolan

tipped Moskowitz for personal benefit but tipped Ruggieri—and apparently no one else—only because Bolan could not "keep his mouth closed."

The Initial Decision's conclusion about Bolan's motive also implausibly contrasts with the decision's other findings about Bolan himself. Bolan was a seasoned industry professional and former trader with several securities licenses. (Initial Decision at 4.) He was a "rising star[ ]" ranked by one publication as the "best 'up-and-comer' analyst"' in his field. (*Id.* at 5.) By the end of his tenure at Wells Fargo, he had been promoted from vice president to director. (*Id.*) And he understood Wells Fargo's prohibitions on disclosing forthcoming ratings changes. (*Id.* at 9.) These facts cannot be reconciled with the Initial Decision's conclusion that Bolan "broke rules" because he could not "keep his mouth closed." Bolan was no bumbling novice trying to grasp the requirements of a job that demanded the utmost confidentiality. Indeed, he deliberately flouted confidentiality rules even after warnings from both a supervisory and a junior analyst. (*Id.* at 48–49.) Rather, Bolan tipped Ruggieri for the only plausible reason an analyst would repeatedly risk his career to tip a powerful mentor: to benefit himself.

CONCLUSION

For these reasons, the Commission should find Ruggieri liable for violations of Section 10(b) and Rule 10b-5 and impose appropriate sanctions and relief.[15]

Dated: January 11, 2016
New York, New York

DIVISION OF ENFORCEMENT

By: _____

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[15] To find Ruggieri liable, the Commission must also conclude that Ruggieri knew or should have known that he provided a personal benefit to Bolan. *See, e.g., Dirks*, 463 U.S. at 660 (in appeal of a Commission administrative proceeding, imposing tippee liability only when "the tippee knows or should know that there has been a breach"); *Newman*, 773 F.3d at 447–50 (in a criminal case, requiring that a tippee know of the personal benefit because, absent such knowledge, the tippee cannot know of the tipper's breach of duty); *Payton*, 2015 WL 9463182, at *4 ("[I]t is enough in a civil case like this one that the defendant[s] knew or had reason to know of the benefit to the tipper.") (quotation marks and citations omitted). If the Commission concludes Bolan tipped for personal benefit, as it should, no genuine dispute can exist that Ruggieri knew or should have known about the benefit because he was the one providing it.

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

THE DIVISION OF ENFORCEMENT'S BRIEF
ON REVIEW OF THE INITIAL DECISION

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
v.	:	
MARK MEGALLI,	:	CIVIL ACTION NO. 1:13-cv-3783-AT
Defendant.	:	

ORDER

This matter is before the Court on the Plaintiff's Motion for Summary Judgment [Doc. 29], and Defendant's Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment [Doc. 27]. Plaintiff Securities and Exchange Commission ("SEC") brought this civil enforcement action against Defendant Mark Megalli, alleging that Megalli violated Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 by trading Carter's, Inc. ("Carter's") stock while in the possession of material non-public information ("inside information") concerning that company. Megalli has already pled guilty to a criminal charge arising from the same alleged conduct. *U.S. v. Megalli*, No. 13-cr-0442-RWS, Doc. 9 (N.D. Ga. Nov. 25, 2013.)

For the reasons set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff's Motion for Summary Judgment [Doc. 29], and **DENIES** Defendant's Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment [Doc. 27]. The Court also **DENIES** Defendant's Motion for Oral Argument [Doc. 46].

I. BACKGROUND.

Mark Megalli was hired in 2009 by Level Global, a New York-based hedge fund, to launch a consumer group, hire analysts, and manage capital on behalf of the firm. (Defendant's Response to Plaintiff's Statement of Material Facts ("Def.'s Resp. SMF") ¶ 7.) On September 14, 2009, Megalli, on behalf of Level Global, entered into an agreement with a consulting firm owned by Eric M. Martin, a former Vice President of the Atlanta-based children's clothing company, Carter's, Inc. ("Carter's) (Def.'s Resp. SMF ¶¶ 10-12.) Megalli knew that Martin had recently left Carter's and assumed that he continued to have relationships at Carter's. (Def.'s Resp. SMF ¶¶ 13-14, 17.)

Martin did in fact continue to have relationships at Carter's, including with Richard Posey, a vice president at the company. (Def.'s Resp. SMF ¶ 15.) Martin and Posey had worked at Carter's together, and developed a "personal and professional relationship." *U.S. v. Megalli*, No. 13-cr-442-RWS Doc. 9 at pp. 18:20-25; 19:15-20 (N.D. Ga., Nov. 25, 2013)[1] ("Guilty Plea Transcript."); *see also*

[1] These portions of the Guilty Plea Transcript were, for some unexplained reason, not submitted by the SEC. Nonetheless, the Court may take judicial notice of guilty pleas because they are "not subject to reasonable dispute." *Colonial Penn. Ins. Co. v. Coil*, 887 F.2d 1236, 1239-40 (4th Cir.

(Plaintiff's Response to Defendant's Statement of Material Facts ("Pl.'s Resp. SMF") ¶¶ 6-12.) Posey disclosed inside information to Martin concerning Carter's. (Defendant's Response to Plaintiff's Statement of Additional Material Facts ("Def.'s Resp. to SAMF") ¶ 15) (Doc. 39-1.) Martin, in turn, passed that inside information to Megalli, who then made trades in Carter's stock based in part on the inside information between September of 2009 and July of 2010. (Def.'s Resp. SMF ¶¶ 22, 36.)

More specifically, Martin made a call to Megalli on October 23, 2009, where he disclosed inside information and recommended Megalli sell any stock he had in Carter's. (Def.'s Resp. SMF ¶ 20.) While still on the telephone with Martin, Megalli messaged Level Global's head of trading and asked that individual to liquidate Level Global's Carter's holdings, which were valued at nearly $9 million dollars at the time. (Def.'s Resp. SMF ¶ 21; Guilty Plea Transcript at pp. 20:13-20, 25:1-2) While Megalli relied in part on other information in deciding whether or not to sell Carter's stock, he stated at his plea hearing that the call with Martin during which he received inside information was "a catalyst. . . to continue selling [Carter's] stock." (Guilty Plea Transcript at p. 26:1-2; *see also* Def.'s Resp. SMF ¶ 23.)

Megalli's insider trading continued beyond 2009. In July of 2010, Megalli sold short positions in Carter's stock based on inside information he had received from Martin, generating profits for Level Global of $648,655. (Def.'s Resp. SMF

1989) (taking judicial notice of guilty plea); *U.S. v. Ferguson*, 681 F.3d 826, 834 (6th Cir. 2012) (same).

¶¶ 33-34.) All told, these trades helped Megalli's employer Level Global avoid losses of $2,034,000.00 (Def.'s Resp. SMF ¶ 26, Ans. ¶ 24) and gain profits of $648,655. (Def.'s Resp. SMF ¶ 34; Ans. ¶ 42.) During the entirety of this time, Megalli consciously avoided knowledge concerning the source of Martin's inside information. (Def.'s Resp. SMF ¶ 36; Guilty Plea Transcript at p. 25:7-8 ("[w]hat I'm pleading guilty to here today is conscious avoidance").)

The United States brought a criminal action against Megalli, alleging he conspired to engage in insider trading in violation of 15 U.S.C. §§ 78j(b) and 78ff, and 17 C.F.R. § 240.10b-5. (Plaintiff's Motion for Summary Judgment ("Pl.'s MSJ") Ex. 1.) Megalli pleaded guilty to the criminal information filed in that case and the court entered a judgment of guilty. (Pl.'s MSJ, Exs. 2, 7; Pl.'s Resp. SMF ¶ 1.) The SEC filed an action seeking to hold Megalli civilly liable for his alleged violations of securities laws alongside the criminal case. (Compl., Doc. 1.)

II. STANDARD OF REVIEW ON SUMMARY JUDGMENT.

The Court may grant summary judgment only if the record shows "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute is genuine if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is material if resolving the factual issue might change the suit's outcome under the governing law. *Id.* The motion should be

granted only if no rational fact finder could return a verdict in favor of the non-moving party. *Id.* at 249.

When ruling on the motion, the Court must view all the evidence in the record in the light most favorable to the non-moving party and resolve all factual disputes in the non-moving party's favor. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). The moving party need not disprove the opponent's case; rather, the moving party must establish the lack of evidentiary support for the non-moving party's position. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets this initial burden, in order to survive summary judgment, the non-moving party must then present competent evidence beyond the pleadings to show that there is a genuine issue for trial. *Id.* at 324-26. The essential question is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

The standard of review for cross-motions for summary judgment does not differ from the standard applied when only one party files a motion, but simply requires a determination of whether either of the parties deserves judgment as a matter of law on the facts that are not disputed. *Am. Bankers Ins. Group v. United States*, 408 F.3d 1328, 1331 (11th Cir. 2005). The Court must consider each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration. *Id.* The Eleventh Circuit has explained that "[c]ross-motions for summary judgment will not, in themselves,

warrant the court in granting summary judgment unless one of the parties is entitled to judgment as a matter of law on facts that are not genuinely disputed." *United States v. Oakley*, 744 F.2d 1553, 1555 (11th Cir. 1984). Cross-motions may, however, be probative of the absence of a factual dispute where they reflect general agreement by the parties as to the controlling legal theories and material facts. *Id.* at 1555-56.

III. DISCUSSION.

Section 10(b) of the Securities Exchange Act and its implementing regulations prohibit corporate insiders from trading based on confidential information obtained due to their position within their company. 15 U.S.C. § 78(j)(b); 17 C.F.R. § 240.10b-5; *SEC. v. Yun*, 327 F.3d 1263, 1269 (11th Cir. 2003). The Act also prohibits downstream recipients of inside information, known as "tippees," from trading on that information if they "know[] or should know" that disclosure of the information was accompanied by the insider's breach of a fiduciary duty. *Dirks v. SEC*, 463 U.S. 646, 660 (1983). "Tippee liability" serves to prevent insiders from passing along their advantages to others, thereby reaping personal, material, or reputational benefits, while not actually engaging in trading themselves. In other words, "the insider. . .[is] forbidden from doing indirectly what they are forbidden from doing directly." *Yun*, 327 F.3d at 1269-70.

Two components of tippee liability are important to define for the purposes of this case. First is what it means when a tippee "knows or should know" that an

insider has breached a duty. Actual knowledge of the breach is not required. Instead, if a tippee "consciously avoids" knowledge that an insider has breached a duty, they are still liable. *SEC v. Obus*, 693 F.3d 276, 288-89 (2nd Cir. 2012) (reversing district court grant of summary judgment for defendant and holding remote tippee liability may be based on conscious avoidance). The reason for this is plain – "to hold otherwise would subvert the laws against fraudulent trading in securities" by permitting downstream tippees to avoid liability even when they know that something is fishy by choosing to close their eyes and plug their ears. *SEC v. Musella*, 678 F. Supp. 1060, 1063 (S.D.N.Y. 1988) (conscious avoidance supported liability). The phrase "conscious avoidance" itself indicates that the tippee is aware – "conscious" – that they are likely receiving inside information disclosed in exchange for an improper benefit. They know there is a problem – they just don't want to know the details.

The second important component of tippee liability is what constitutes a "breach" of a fiduciary duty. The mere fact of disclosure of inside information by an insider is not by itself a breach, because not all disclosures are inconsistent with the duty an insider owes to their company or shareholders. *Dirks*, 463 U.S. at 661-62. Instead, the test to determine whether a disclosure is also a breach is "whether the insider personally will benefit, directly or indirectly, from his disclosure." *Id.* at 662. In short, without a benefit, there is no breach. *See id.*; *see also U.S. v. Newman*, 773 F.3d 438, 449 n. 4 (2d. Cir. 2014) (citing *U.S. v. Santoro*, 647 F. Supp. 153, 170-71 (E.D. N.Y. 1986), *rev'd on other grounds sub*

nom., U.S. v. Davidoff, 845 F.2d 1151 (2d Cir. 1988) ("[a]n allegation that the tippee knew of the tipper's breach necessarily charges that the tippee knew that the tipper was acting for personal gain")).

The Eleventh Circuit has recognized that the Supreme Court defined benefit "in very expansive terms" in the *Dirks* case. *Yun*, 327 F.3d at 1280. The "showing needed to prove an intent to benefit is not extensive," and includes both actually pecuniary benefits and more inchoate, reputational benefits that are likely to translate into future earnings. *Id.* It also includes circumstances where the insider is unlikely to receive any pecuniary benefit at all, such as when the insider "make[s] a gift to a trading relative or friend." *Id.* In that circumstance, the tip and trade resemble a trade by the insider himself, followed by a gift of profits to the tippee, *Dirks*, 463 U.S. at 664, and the "intention to benefit the particular recipient" of the tip is a sufficient benefit to create liability. *Id.*

Thus, in *Yun*, the Eleventh Circuit held that an executive's wife who disclosed inside information about her husband's company to a work friend with whom she sometimes shared real estate commissions "expected to benefit from her tip to [her friend] by maintaining a good relationship between a friend and frequent partner in real estate deals." 327 F.3d at 1280. Similarly, in *U.S. v. Jiau*, 734 F.3d 147, 153 (2nd Cir. 2013), a tipper received an invitation to a stock club where members exchanged stock tips. Even though the tipper never actually received or used any tips, access to the club alone was a sufficient benefit to allow conviction. *Id.*; *see also SEC v. Sargent,* 229 F.3d 68, 77 (1st Cir. 2000) (tipper

benefitted by providing inside information to his dentist (and friend) because he "maintain[ed] a useful networking contact," his sister owed tippee money, and he and tippee frequently worked on local chamber of commerce issues); *SEC v. Carroll*, 9 F. Supp. 3d 761, 770 (W.D. Ky. 2014) ("personal benefit requirement is satisfied" due to "friendship" of tipper and tippee).

Thus, a tippee is liable if (1) an insider discloses inside information to (2) a tippee that knows,should know, or consciously avoids the knowledge (3) that the insider breached a fiduciary duty (i.e. received a benefit), and (4) still trades on the inside information. *See Yun*, 327 F.3d at 1269-70 (holding tipper and tippee liable for insider trading); *see also U.S. v. Salman*, 792 F.3d 1087, 1092 (9th Cir. 2015) (sustaining insider trading conviction when tipper disclosed information to family member) (Rakoff, J.).

Finally, a tippee does not have to receive the information directly from an insider to be held liable. Instead, if they receive the inside information from an intermediate tippee, but otherwise satisfy the elements set forth above, they may be held liable as a "remote tippee." *See Musella*, 678 F. Supp. at 1063 (remote tippees liable because they avoided knowledge regarding original source of information).

The case concerns a remote tippee, Megalli, who knew he was receiving inside information from an intermediate tippee, consciously avoided any additional knowledge about the source of the information, and still traded on the information to the tune of nearly $2.7 million in profits and avoided losses.

Megalli pleaded guilty to criminal insider trading under the Securities Exchange. He nonetheless seeks to avoid civil liability in this enforcement action.

The crux of Megalli's argument is that *U.S. v. Newman*, 773 F.3d 438 (2nd Cir. 2014), a Second Circuit case that was decided after Megalli's guilty plea, has forever altered the landscape of securities law by imposing a requirement that a tippee who trades on insider information must (1) *actually* know that the original source of the inside information received a (2) "qualifying personal benefit. . .[like] cash or other pecuniary consideration[s]" in exchange for the information. (Def.'s MSJ Mem. 3.) He further argues that the pleadings and record show that he did *not* know that Posey, the insider, received a material benefit because Posey in fact received no such benefit. The SEC disagrees, and also argues that Megalli's criminal conviction precludes him from challenging his civil liability anyway.

A. Issue Preclusion

The first issue before the Court is whether Megalli is precluded from contesting his civil liability after he pleaded guilty to conspiracy to engage in insider trading in his earlier criminal case. The Court holds that he is precluded.

A criminal conviction precludes re-litigation of the issues decided by that conviction in a later civil action if:(1) the issues presented in both the prior and current action are identical; the issues were (2) actually litigated and (3) critical and necessary to the judgment in the prior action; and (4) the burden of persuasion in the current action is not significantly heavier. *U.S. v. Jean-*

Baptiste, 395 F.3d 1190, 1194-95 (11th Cir. 2005) (cocaine-distribution conspiracy participant could not contest his alleged lack of knowledge of the criminal nature of his acts in a denaturalization proceeding because scienter was an essential element of the crime for which he was convicted). In addition, the litigant must have had a full and fair opportunity to contest the earlier action. *See Bryant v. Jones*, 575 F.3d 1281, 1303 (11th Cir. 2009). All of these factors are met here.

1. Identity of Issues.

First, the issues presented in Megalli's civil and criminal proceedings are identical. In the securities regulation context, courts have regularly held that a criminal conviction for insider trading precludes a defendant from litigating their civil liability for insider trading, because the statutory elements for criminal and civil liability under 15 U.S.C. § 78j(b) and Rule 10b-5 are virtually the same. *See, e.g.*, *In re Bilzerian*, 153 F.3d 1278, 1280-81 (11th Cir. 1998) (defendant convicted of securities fraud could not contest SEC action seeking to exempt disgorgement award from bankruptcy discharge); *SEC v. Freeman*, 290 F. Supp. 2d 401, 405 (S.D.N.Y. 2003) (applying preclusion to a guilty plea to insider trading, because elements required to prove a civil insider trading violation are "essentially the same" as those required to prove a criminal violation); *SEC v. Gordon*, 822 F. Supp. 2d 1144, 1157 (N.D. Ok. 2011) (applying preclusion in SEC civil enforcement proceeding after defendant was criminally convicted of perpetrating a stock market manipulation scheme); *SEC v. Blackwell*, 477 F. Supp. 2d 891,

899-900 (S.D. Oh. 2007) (applying issue preclusion in civil enforcement action following insider trading conviction).

Turning to Megalli's case, it is plain that the criminal information he pled guilty to and the civil complaint filed against him concern the same conduct and alleged identical violations of Section 10b and Rule 10b-5's prohibitions against insider trading. The criminal information charged Megalli with conspiring to commit securities fraud by trading on material non-public information, while consciously avoiding knowledge concerning the source of that information, in violation of 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5. (Pl.'s MSJ, Ex. 1 at 1, 6.) This conspiracy charge was founded on Megalli's commission of multiple overt acts in 2009 and 2010 of trading in stock based on inside information. (Pl.'s MSJ, Ex. 1 at 6-8; Def's Resp. SMF ¶ 36 (admitting Megalli "traded in February and July 2010 based on actual knowledge of inside information shared by Martin and in October 2009 based on conscious avoidance as to the illicit basis for Martin's sale recommendation")). Megalli pled guilty to these charges.[2]

The civil complaint before the Court concerns the same violations under Section 10(b) and Rule 10b-5, based on the same conduct. (Compl. ¶¶ 51-54.) The complaint alleges that Megalli traded shares of Carter's based on material non-public information, that he consciously avoided knowing anything about the source of that information, and that he and the hedge fund that employed him

[2] A guilty plea is as conclusive as to the issues decided as any other criminal conviction, because a plea is an admission of all of the elements of the crime charged. *In re Raiford*, 695 F.2d 521, 523 (11th Cir. 1983) (citations omitted).

profited from those trades. (Compl. ¶ 1.) The complaint identifies the same overt acts identified in the criminal information. (*Compare* Compl. ¶¶ 19-24, 38-43 with Pl.'s MSJ, Ex. 1 at 6-8.) Megalli concedes that in his guilty plea he admitted that he made trades on "the basis of, in whole or in part, certain material, non-public information provided by Eric Martin. . . knowing and consciously avoiding the knowledge that the material, non-public information had been obtained by Martin from a Carter's insider in violation of the insider's duties of trust and confidence to Carter's." (Ans., Prelim. Stmt. at 2; *see also* Guilty Plea Transcript at pp. 16:20-25; 17:1-8. 22:12-13.)

This admission concedes all of the essential elements of the SEC's claims, and demonstrates the identity of issues in the civil and criminal matters. Megalli admits he traded on inside information, knowing or consciously avoiding the knowledge that the inside information came from an insider who had breached his fiduciary duties to his employer. As described above, an insider does not breach their fiduciary duty without receiving a benefit, and a tippee does not violate the law unless they knew or should have known about that breach. By admitting the breach in his guilty plea, Megalli has admitted that the insider (Posey) received a benefit, and that Megalli knew (or should have known) about that benefit.[3] *See Dirks*, 463 U.S. at 660 (establishing a knows or should have

[3] The Court gives no credence to Megalli's argument that proof of an independent fiduciary duty between the insider Posey and the immediate tippee Martin (as opposed to between the insider and the corporation he owes a duty to) is necessary to support liability here. (Def.'s MSJ Mem. 4.) That is simply not the law. If the elements necessary to support a fiduciary breach by the insider are present, then the breach travels downstream, leaving this argument up a creek. *See*

known standard for tippee liability); *Musella*, 678 F. Supp. at 1063 (remote tippees liable when they "did not ask because they did not want to know"); *Santoro*, 647 F. Supp. at 170-71 (*rev'd on other grounds*) ("[a]n allegation that the tippee knew of the tipper's breach necessarily charges that the tippee knew that the tipper was acting for personal gain")). Thus, there is an identity of issues in this case.[4]

2. Issues Actually Litigated.

The identical issues found in the civil and criminal actions were actually litigated in Megalli's criminal case. The Eleventh Circuit has held that a defendant may not plead guilty and then claim that the issues decided by their plea were not actually litigated, because a court must find a sufficient factual basis underlying the guilty plea in order to enter judgment against a defendant. *In re Raiford*, 695 F.2d at 523 (applying preclusion to bar discharge of debtor who had been convicted of engaging in fraud in bankruptcy proceedings because guilty plea must have a factual basis to be accepted by the court).

In this case, the facts underlying the criminal action included the allegation – admitted in Megalli's plea – that he consciously avoided knowledge about the

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Dirks, 463 U.S. at 660 ("a tippee assumes a fiduciary duty to the shareholders of a corporation not to trade on material nonpublic information. . .when the insider has breached his fiduciary duty to the shareholders").

[4] The SEC also alleges violations of 15 U.S.C. § 77(a)(1)-(3). For the purposes of issue preclusion, violations of these provisions are the same as violations of Section 10b and Rule 10b-5 because they involve fundamentally the same conduct. *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999) (elements of a violation under Section 17 are "essentially the same" as those under Section 10(b) and Rule 10b-5); *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 382 (S.D.N.Y. 2007) (applying issue preclusion in civil action under Section 17 after defendant pleaded guilty to Section 10(b) violation).

insider Posey's identity. This admission satisfies the requirement that Megalli know that he was trading on inside information obtained in exchange for a personal benefit to the insider. *Obus*, 693 F.3d at 288-89 (reversing district court grant of summary judgment for defendant and holding remote tippee liability may be based on conscious avoidance). Because this admission was necessary to Megalli's plea, it was actually litigated. *See In re Raiford*, 695 F.2d. at 523.

Megalli contends that at least some issues in this case were not actually litigated because the *Newman* decision introduced new elements essential to support civil and criminal insider trading liability. For the reasons described in Section B below, the Court disagrees. Megalli pleaded guilty in a court bound by Eleventh Circuit authority, and his plea admitted the facts necessary to support an insider trading conviction under Eleventh Circuit law. Even if governing authority in the Second Circuit may have changed, there is no indication at this juncture that it has in the Eleventh Circuit too.[5]

3. Full and Fair Opportunity to Litigate.

Megalli had a full and fair opportunity to present his case in the criminal proceeding. The Eleventh Circuit recognized in *In re Raiford* that the seriousness of a criminal prosecution by itself sufficiently incentivizes defendants to contest the proceedings. 695 F.2d at 524. That incentive was certainly present here, where Megalli pleaded guilty to a felony that carried a potential sentence of

[5] Nor does Megalli offer the Court any authority for the proposition that a defendant may *now* disclaim the crucial element of his plea tendered, as discussed next.

several years and significant financial penalties (and where he actually served a sentence of roughly one year).

The *Raiford* court also noted that defendants have the option to plead *nolo contendere* if they wish to avoid the effects of preclusion, and their failure to do so means they "cannot argue subsequently that the lack of a contested trial renders his plea ineffective for collateral estoppel purposes." 695 F.2d at 523. In any event, counsel for Megalli stated at his plea hearing that "the Government has been very forthcoming in providing its evidence, and allowing us more than ample opportunity to present factual and legal challenges, and it's been a very fair process." (Guilty Plea Transcript at pp. 30:23-25; 31:1.) Moreover, Megalli was aware, and the Government advised the criminal court, that the *Newman* case was "percolating" in the Second Circuit. (Guilty Plea Transcript at pp. 13:14-25, 14:1-8.) Nonetheless, Megalli chose to plead guilty.

4. The Relative Burdens of Proof.

Finally, with respect the final element of the issue preclusion test, it goes without saying that the burden of persuasion in this civil matter is less than what the government had to prove in Megalli's criminal case. Accordingly, issue preclusion applies to this matter.

B. The Impact of *Newman*.

Nonetheless, Megalli insists that *Newman* changed the elements of an insider trading violation, so that the underlying facts that he admitted to when pleading guilty in 2013 are no longer sufficient to establish his civil liability.

More specifically, Megalli argues that *Newman* now requires that remote tippee defendants have (1) *actual* knowledge of an insider's disclosure of confidential information in exchange for a (2) *pecuniary* personal benefit. (*See* Def.'s MSJ Mem. 3.) In fact, Megalli argues the undisputed facts in both his criminal case and this one show that he is *not* liable under the *Newman* standard for remote tippee liability.

The Court disagrees, for three primary reasons. First, *Newman* is a Second Circuit case, and thus is not controlling on the Court. What is controlling are Eleventh Circuit precedents rejecting Megalli's arguments that *actual* knowledge of an insider's receipt of an *immediately* pecuniary benefit is necessary to hold a remote tippee liable for securities violations. *See, e.g.*, *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 804-805 (11th Cir. 2015) (requiring conscious avoidance as opposed to actual knowledge); *Yun*, 327 F.3d at 1263 (benefit to insider need not be immediately pecuniary).

Second, the Court is not convinced that, at least as applied to this case, *Newman* is as radical a change as Megalli suggests. *Newman* recognizes and appears to preserve Second Circuit precedents acknowledging that not all benefits must be immediately pecuniary and that a tippee who consciously avoids knowledge concerning an insider is still liable. *Compare Newman*, 773 F.3d at 455 (insufficient evidence to allow jury to find defendants knew or consciously avoided knowledge that information came from insiders) *with Obus*, 693 F.3d at 288-89 (conscious avoidance sufficient). For these reasons, the Ninth Circuit

recently declined to follow or extend *Newman* in the manner Megalli urges this Court to do. *See Salman*, 792 F.3d at 1094 (always requiring a material benefit would mean "a corporate insider...would be free to disclose that information to her relatives [or friends], and they would be free to trade on it, provided only that she asked for no tangible compensation in return.") *Newman* has made waves, but the Court is not convinced it is a total sea change.

Third, even if the Court were to adopt a more stringent reading of *Newman*, the SEC would still be entitled to summary judgment as to Megalli's liability, for two reasons: one, because the government's case in *Newman* was far weaker than it is here, and two, because the insider in this matter (Posey) did in fact receive at least some benefits in exchange for his disclosure of inside information, as discussed further below.

Newman's facts posed significant problems for the government's case with respect to both the knowledge[6] and benefit elements of insider trading liability. The *Newman* court prefaced its analysis by airing its concerns about "the doctrinal novelty of [the government's] recent insider trading prosecutions, which are increasingly targeted at remote tippees many levels removed from corporate insiders." 773 F.3d at 448.

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[6] The Court declines to endorse Megalli's contention that *actual knowledge* of an insider's identity and the benefit he received, and *only actual knowledge*, is required by *Newman*. As described above, it is not the law in this Circuit; it is not the law in the Second Circuit, *see Obus*, 693 F.3d at 286; it is not the law under *Newman*, 773 F.3d at 438 (indicating that the government might have prevailed if had proven conscious avoidance), and, as far as the Court can tell, it is not the law anywhere.

The *Newman* defendants personified the Second Circuit's concerns. First, they were "three or four" levels removed from the actual insiders, and were receiving the "inside information" filtered through several levels of junior analysts. Those junior analysts testified that they did not actually inform the *Newman* defendants that they were communicating inside (as opposed to public or non-material) information to them. *Id.* at 443-44, 453. Moreover, the kind of information the *Newman* defendants received was of the type that was routinely used by investment professionals. The evidence in *Newman* "established that analysts at hedge funds routinely estimate metrics such as revenue, gross margin, operating margin, and earnings per share through legitimate financial modeling using publicly available information and educated assumptions about industry. . .trends." *Id.* at 454. Thus the information that the *Newman* defendants were receiving was "of a nature regularly and accurately predicted by analyst modeling." *Id.* at 455. In short, the *Newman* defendants would have been completely justified in assuming that the information they were receiving was simply the good work of their employees, and not based on inside information whatsoever. *See id.* at 455. Thus the government could not prove beyond a reasonable doubt that the *Newman* defendants knew that they were trading on inside information. *Id.* In essence, the *Newman* defendants were at the tail end of a game of telephone, receiving distorted-at-best transmissions, so that it was not even clear that they knew they were trading on inside information *at all*. *Id.* at 454.

The *Newman* defendants' ignorance about whether they were receiving inside information was not the government's only problem. The government also "presented absolutely no testimony or any other evidence. . .that [Defendants] consciously avoided learning" that they were trading on information obtained from insiders. 773 F.3d at 453. Because there was no testimony or evidence supporting conscious avoidance, no rational jury could find the remote tippees in *Newman* guilty under Second Circuit law. *Id.* at 455.

Finally, the Government also presented extremely weak evidence concerning the alleged benefits to the insiders, which included, for one insider, exactly "[nothing]" of value from a casual acquaintance," and for another, "career advice" like "minor suggestions" on a resume, and advice *prior* to an informational interview that would have been provided even if the insider had not passed along inside information. *Id.* at 453. Just as important, the intermediate tippees in *Newman* – the ones transmitting the alleged inside information to the actual *Newman* defendants – were not even clear whether or not the insiders were receiving any sort of benefit at all. *Id.* If the sources close to the insider could not even determine if the insiders expected a personal benefit, the *Newman* defendants could not be expected to understand the insiders' motives either (if they were even aware that the insiders existed, as noted above). *Id.* at 455.

By contrast, in this case Megalli was only one level removed from the insider, admitted he knew that he was trading on inside information, and

admitted he knew or consciously avoided all additional information, including who the inside source was and whether or not that insider was receiving a benefit in exchange for his disclosure. (Def.'s Resp. SMF ¶ 36.; Ans., Prelim. Stmnt. at 2.) Megalli's case is thus different from *Newman* in nearly all respects. Megalli knew he was trading on inside information, whereas in *Newman* the government failed to prove even that fact. He admitted consciously avoiding all other information, while the government in *Newman* presented "absolutely no" evidence supporting conscious avoidance. And Posey and Martin, the insider and immediate tippee in this case, were more than just friends – they were friends with (potentially pecuniary) benefits.

In particular, Posey passed along the inside information to Martin for a variety of reasons, including their friendship and because he felt bad for the way Martin had been treated by Carter's, a fact that indicates intent to make a gift of insider trading profits to Martin. (Pl.'s Resp. SMF ¶¶ 6-9; Guilty Plea Transcript at p. 18:20-25) (describing Posey and Martin's "personal and professional" relationship); *see also Salman*, 792 F.3d at 1092. Martin, in turn, passed stock tips to Posey, as well as what was likely inside information about a different company.[7] (Pl.'s Resp. SMF ¶¶ 10-11; Guilty Plea Transcript at p. 19:17-19); *see*

[7] There are additional facts in this case that are not *genuinely* disputed. Megalli "mostly agree[d] factually with pretty much everything" said by the government at his plea allocution, quibbling only over a few specific and largely minor issues. He raised no dispute about the government's characterization of Posey and Martin's relationship, which the government described as "a personal and professional" one that included travel, golf outings, lunches and other work and social events. Guilty Plea Transcript at p. 18:20-25. The government further alleged that Posey disclosed the information to Martin for "reciprocal stock tips about other public companies. . .future network opportunities, friendship and other tangible and intangible

also Jiau, 734 F.3d at 153 (invitation to stock club was a benefit). These facts put Megalli's case closer to *Salman* and *Jiau* (where convictions were sustained) than *Newman*. To the extent there are gaps about the nature of Posey and Martin's relationship or the extent of the benefits Posey expected to receive, they were supplied by Megalli's conscious avoidance of those facts, and filled by his guilty plea which included, as essential elements of the underlying crime, the existence of a benefit to Posey. *See Yun*, 327 F.3d at 1280 (requiring a benefit).

The *Newman* court recognized that a change in any or all of that case's circumstances would warrant another result. *See* 773 F.3d at 455 (indicating that consciously avoiding knowing that information came from an insider or that the insider received a benefit might have sustained conviction). This different case, with different facts, yields a different result. Summary judgment for the SEC on the question of Megalli's liability is therefore proper and is **GRANTED.**

C. Remedies Available to the SEC.

The next issue presented is what remedies the SEC can obtain. The SEC seeks three kinds of relief for Megalli's civil insider trading violations. First, it seeks disgorgement of his ill-gotten gains. Second, it seeks civil penalties. Finally, it seeks injunctive relief.

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benefits." (Guilty Plea Transcript at p. 19:15-20.) While Megalli now alleges that these facts are (1) disputed because they were not necessary to sustain his plea and (2) not material because they are insufficient to establish liability (Def.'s Resp. SMF ¶ 16), the Court disagrees on both counts. Under *Yun*, they were both necessary and sufficient to support and sustain a conviction. 327 F.3d at 1279-81.

1. Disgorgement.

Turning first to the issue of disgorgement, the SEC seeks an order requiring Megalli to remit the entirety of the profits earned and losses avoided by his employer, Level Global, along with prejudgment interest. This, according to the SEC, totals more than $3,000.000.00. Megalli, for his part, claims his direct personal profits from his insider trading were less than $2,000.00.

Disgorgement is an equitable remedy intended to deprive a wrongdoer of his ill-gotten gains. *SEC v. Miller*, 744 F. Supp. 2d 1325, 1342 (N.D. Ga. 2010). As such, disgorgement applies to the extent by which a defendant profited or avoided losses as a result of their wrongdoing. *SEC v. Patel*, 61 F.3d 137, 139-40 (2nd Cir. 1995) (imposing disgorgement of avoided losses); *SEC v. Smyth*, No. 01-cv-1344-CC, 2006 WL 5440414 at *1 (N.D. Ga. July 28, 2006) (same). Imposing a larger sum would be an improper penalty assessment. *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978).[8] However, district courts have broad discretion to fashion a disgorgement remedy, and the amount of disgorgement need only be a "reasonable approximation" of the profits or losses avoided connected to the violation. Further, the risk of uncertainty in calculating disgorgement falls upon the wrongdoer whose conduct created that uncertainty. *Patel*, 61 F.3d at 139-40.

[8] *Blatt* was decided by the former Fifth Circuit, and is thus binding authority in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

The issue here is whether this Court can impose disgorgement liability upon Megalli to the extent that his employer profited or avoided losses. As the Second Circuit recently observed in *SEC v. Contorinis*, 743 F.3d 296 (2014), "no other circuit has spoken to the precise question of disgorgement liability for an insider trader who had trading power but not disbursement control over a financial [institution] whose funds were used to perpetrate the fraud." 743 F.3d at 305 n.5. The *Contorinis* court held that such disgorgement was appropriate when the violator had substantial control over the trading powers of his firm (a fact that is not clear from the record here). However, the *Contorinis* court noted that the former Fifth Circuit had reached a different result on the related question of whether an individual participating in a securities fraud scheme could be required to disgorge profits beyond the amount of his personal gain. *Id.* at 305 n.5 (quoting *Blatt*, 583 F.2d at 1336).

In *Blatt*, the court imposed disgorgement, but only to the extent of "the amount of the fee realized by each defendant for his assistance in executing the fraud." 583 F.3d at 1336. Since *Blatt*, district courts in the Eleventh Circuit seem to have been careful in not imposing disgorgement above and beyond a "reasonable approximation" of the direct gain accruing to the wrongdoer. *See e.g., SEC v. Phoenix Telecom, LLC*, 231 F. Supp. 2d 1223, 1225-26 (N.D. Ga. 2001) (quoting *Blatt* and imposing disgorgement only to extent of wrongdoer's one-third interest in a company). As this Court remains bound by *Blatt*, it thus

declines at this time, without further evidence, to order disgorgement of the entirety of Level Global's admitted realized profits and avoided losses.

However, Megalli's contention that he only realized less than $2,000 in profits from his misconduct is also problematic. First, he provides no factual support whatsoever for how he arrived at that figure, merely asserting it in his briefs alongside a handful of context-less calculations. *Compare SEC v. Tourre*, 4 F. Supp. 3d 579 (S.D. N.Y. 2014) (disgorging 11% of hedge fund trader's bonus after reviewing evidence, including affidavits, concerning the amount of his bonus attributable to his wrongdoing). Thus the Court is unable to determine if the proposed amount is a "reasonable approximation" of the gain that Megalli realized from his violations through his bonus.

Second, Megalli omits any portion of his salary from his proposed disgorgement remedy, despite the fact that the Eleventh Circuit has held that salaries are a proper target for disgorgement. *SEC v. Merchant Capital, LLC*, 486 Fed. Appx. 93, 97 (11th Cir. 2012). The Court therefore lacks a sufficient basis to determine what amount of disgorgement is proper in this case, and **DENIES** summary judgment as to both Parties regarding the equitable remedy of disgorgement.

2. Civil Penalties.

Because the Court declines to grant summary judgment for the SEC on its request for disgorgement, a determination of civil penalties would be similarly inappropriate. Courts may impose a civil penalty of up to "three times the profit

gained or loss avoided as a result of" insider trading. 15 U.S.C. § 78u-1(a)(2). The Court cannot determine the amount of civil penalty without first determining what Megalli gained (or avoided) through his conduct.[9] Summary judgment is therefore **DENIED** as to both Parties on this issue.

3. Injunctive Relief.

Finally, the SEC has asked for an injunction against Megalli. The Court is cognizant of the fact that Megalli was sentenced in his criminal case based on his assurances to the court that he was "going to work through a settlement with the SEC that is going to involve permanent debarment from the industry." (Pl.'s MSJ, Ex. 8 at 8.). Nonetheless, the Court defers ruling on the appropriateness of injunctive relief, and the scope of that relief, until the Court has had an opportunity to hear from counsel at the hearing on equitable relief.

IV. CONCLUSION.

Accordingly, Plaintiff's Motion for Summary Judgment is **GRANTED IN PART AND DENIED IN PART.**

Defendant's Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment is **DENIED**. Defendant's Motion for Oral Argument [Doc. 46] is also **DENIED**, except to the extent that the Court hears such argument at the evidentiary hearing on equitable relief.

---

[9] The Court assumes, without deciding, that the civil penalty provision permits imposition of a penalty equal to three times the profit gained or loss avoided *by the defendant* (as opposed to his employer).

The Court will hold an evidentiary hearing as to the issue of disgorgement and the appropriateness of a civil penalty and injunctive relief on October 27, 2015, at 10:30 a.m.

IT IS SO ORDERED this 24th day of September, 2015.

Amy Totenberg
United States District Judge

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

THE DIVISION OF ENFORCEMENT'S BRIEF
ON REVIEW OF THE INITIAL DECISION

Exhibit B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	**Case No. 10-cv-01614**
v.	)	**Hon. Robert M. Dow, Jr.**
MORANDO BERRETTINI and RALPH J. PIRTLE,	)	
Defendants.	)	

INSTRUCTIONS TO THE JURY

Members of the jury, you have seen and heard all the evidence and arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

The SEC has brought six claims in this case. The first three claims are against defendants Pirtle and Berrettini. The second three claims are against defendant Berrettini only.

The SEC's first three claims are that defendants Pirtle and Berrettini engaged in what is sometimes called "insider trading" in connection with Berrettini's purchases of stock of Lifeline, Invacare, and Intermagnetics. The SEC alleges that defendant Pirtle "tipped" defendant Berrettini with material non-public information in breach of a duty, and that defendant Berrettini traded on that information. Claim 1 involves trading in the stock of Lifeline. Claim 2 involves trading in the stock of Invacare. Claim 3 involves trading in the stock of Intermagnetics. Defendants Pirtle and Berrettini deny the SEC's claims. You must consider each Defendant and each claim separately.

To prevail on Claims 1 - 3 against defendant Pirtle, the SEC must prove that: (1) defendant Pirtle provided material non-public information to defendant Berrettini; (2) defendant Pirtle knew or was reckless in not knowing that defendant Berrettini would buy or sell securities on the basis of that information; (3) defendant Pirtle violated a fiduciary duty or other duty of confidentiality by providing material non-public information to defendant Berrettini; and (4) defendant Pirtle received a personal benefit, such as a benefit from Berrettini in exchange for his disclosure or the benefit of making a gift of confidential information to a trading friend or relative.

To prevail on Claims 1 - 3 against defendant Berrettini, the SEC must prove that: (1) defendant Berrettini bought or sold securities knowingly or recklessly on the basis of material non-public information provided to him by defendant Pirtle; (2) defendant Berrettini either knew or should have known that he received this information as a result of a violation of fiduciary duty or other duty of confidentiality; and (3) defendant Pirtle received a personal benefit, such as a

benefit from Berrettini in exchange for his disclosure or the benefit of making a gift of confidential information to a trading friend or relative.

The SEC's next three claims are that defendant Berrettini engaged in insider trading in connection with his purchases of stock of Lifeline, Invacare, and Intermagnetics. Specifically, the SEC claims that defendant Berrettini engaged in insider trading, even if he performed market research at the request of defendant Pirtle relating to the real estate markets in portions of Boston, Cleveland, and Albany, New York. Claim 4 involves trading in the stock of Lifeline. Claim 5 involves trading in the stock of Invacare. Claim 6 involves trading in the stock of Intermagnetics. Defendant Berrettini denies the SEC's claims.

To prevail on Claims 4 - 6 against defendant Berrettini, the SEC must prove that he: (1) obtained material (2) non-public information intended to be used solely for a proper purpose, and then (3) misappropriated or otherwise misused that information (4) knowingly or recklessly, (5) in breach of a fiduciary duty, or other duty arising out of a relationship of trust and confidence, to make secret profits (6) in connection with the purchase or sale of a security.

I will now define certain terms for you.

The concept of a personal benefit to a tipper is a broad one and includes, among other things, a benefit in exchange for the disclosure or the gift of confidential information to a friend. The SEC is not required to prove that defendant Pirtle received a direct financial benefit from tipping defendant Berrettini.

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

THE DIVISION OF ENFORCEMENT'S BRIEF
ON REVIEW OF THE INITIAL DECISION

Exhibit C

UNITED STATES OF AMERICA
BEFORE THE SECURITIES AND EXCHANGE COMMISSION
ADMINISTRATIVE PROCEEDING

In the Matter of:

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

FILE NO: 3-16178

Respondents.

WEDNESDAY, FEBRUARY 11, 2015
3:00 p.m.

BEFORE:

JASON PATIL
Administrative Law Judge

APPEARANCES:

UNITED STATES
SECURITIES & EXCHANGE COMMISSION
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SILVIA L. SERPE, ESQ.

PROCEEDINGS

THE COURT: Good afternoon, everybody. Just give me a minute to get set up.

Thank you.

This is an administrative proceeding in the matter of Gregory T. Bolan, Junior and Joseph C. Ruggieri. They are the respondents. The administrative file number is 3-161178.

I'm the Administrative Law Judge, Jason Patil, and today we're here on a motion of summary disposition brought by both respondents. And unless there are any administrative or technical issues someone would like to raise, how I would proceed is go ahead and invite counsel for Mr. Bolan first to speak.

I am going to do one thing though. I'm going to have questions for you that would be questions that would be very applicable to counsel for the other respondent. So what I

would like to do is rather than have you get up and finish your presentation on particular questions I ask, I'll say is there anything different or supplemental that the other counsel would like to add to sort of get a full and complete sense of that issue right there. And that, in turn, will give the Division an opportunity to sort of have all their notes on that issue in one place.

So with the exception of that, after you're complete, I'll let the other moving party speak and deliver a presentation, and after that's finished, I'll let the Division go ahead. I will try not to interrupt you, but I do have a number of questions that I would like answered today, so we will definitely have time for those as well.

With that said, Counsel, please proceed.

MR. LIEBERMAN: May it please

lose money, because you could imagine, your Honor, if you were a trader and you have Blackstone calling and you have Fidelity calling, and they want to buy Parexel, well, they probably have a good reason for doing it, and you are just facilitating trades. You are not making investment decisions on the other side. You're going to lose money. The question is how much are you going to lose? They are managing risk. So just as a background so you understand.

Let's get to the benefit for Greg, because that's just as important.

So again getting back to the allegations that the Division has made. You have two allegations of benefit. One, they are friends. They are friends. That used to be what they could do. It used to be prior to Newman unfortunately that the SEC can say they are friends, which is

shorthand for we don't have to prove anything, because I got friends on Facebook, I have friends at work, pretty good friends. We all get that.

And Newman -- we can talk about Obus, you can talk about Libera, whatever the cases are. Newman could not be clearer that the mere fact of friendship is not enough.

THE COURT: That's the same question I had for counsel for Mr. Bolan. Is there any friendship relation --

MR. RYAN: Yes.

THE COURT: Tell me about it.

MR. RYAN: I disagree with the assessment we just heard. I think what Newman is saying, and I'm not sure it is the model of clarity, and it may be this has to be clarified, but they are talking in the context of a casual or social relationship. So they say, look, it used to be that mere friendship was enough, but we'll

get the quote.

He says the inference is impermissible in the absence of proof of a meaningfully close personal relationship. And then they get to the end where they say there is a quid pro quo from the latter or an intention to benefit the latter, and the Division points to that language in their brief. I think --

THE COURT: I have a question for you.

MR. RYAN: I just want to finish answering yours and I'll be real quick.

So I think there is going to be places where it is not such an easy factual, and there are probably going to be some fact issues, well, he is a brother, well, he is a cousin, well, he is a second cousin, we could do that, is it $10, is it $5, is it a penny. Is he a great friend? Well, how good of a friend. I see that and

I understand that.

Greg Bolan and Joe Ruggieri, your Honor, that one is so far off the spectrum it is not really part of this conversation.

THE COURT: I have a question along those lines. This is not something that was in the briefing. I'm looking at the words in the proceeding paragraph 35 and I'll quote the language for you. It says, "Ruggieri gave Bolan the keys to his apartment so that he could use it when interviewing for positions in New York."

Now, I just pulled that out myself. It has not been discussed, but does that not suggest a little more of a friendship?

MR. RYAN: Front of the line, back of the line, it makes sense. Let's look at this one.

Joe and Greg, they are in a room. Joe, I'm going to give you the

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Proceedings

keys to the kingdom, the six upgrades and downgrades are coming your way, they are going to make you money. Joe loves it. What an opportunity he says. I have a guaranteed comp, but still I want this. What are you going to give me Greg in return? And Greg says, well, I can't give you my friendship anymore because Newman says I can't, but I can give you, well, let's say we -- this all goes south and we have to leave Wells Fargo, and you come to New York because you have to get a new job, I'll hook you up with my keys.

Your Honor, that is -- I'm sorry, that is -- I don't believe that the SEC is even saying that. I think what they are trying to say is they are friends.

THE COURT: Maybe it's obviously not been amended, but my point was not that that was a quid pro quo. I was going along the lines of I don't give

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Proceedings

the keys to my house to people unless they are pretty good friends.

MR. RYAN: You read our briefs. The first brief we had, we had no facts. The second brief, we threw in a couple of facts because they threw the book at us in terms of the underlying facts. But we stipulated, they are pretty good friends. They are pretty good friends and no one is disputing that at this point.

Now, again, and this is just common sense, the first piece of this great feedback, they have known each other for all of three weeks. The first trade, they have known each other for all of six months. How meaningful was this friendship that Greg Bolan is willing to say, you know what, I'll do anything for you Joe.

With respect to the second piece, which is, you know, you asked a lot of questions and I think you deserve answers from me as well, which

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Proceedings

is let's think about the allegations that there was this feedback.

Again, they had to think it through. Joe, I'm going to give you the keys to the kingdom, I'm going to give you these analyst reports, what do you want. Greg says, well, if you can put in a good word to your supervisors. So Joe says, okay, I'll put in a word to my supervisors, going to go up here to the supervisors, hopefully, I don't know because I'm not in charge of the supervisory process, I'm not in charge of the promotional process, but hopefully it will make it over here to your boss, and then as part of the whole mix of information where you're looking at the sales trading, you're looking at the investor relations, you're looking at people at all these other offices, you're getting feedback from clients, all of this is going to get fed into a little bit of trail mix and this

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Proceedings

little peanut here is going to be part of that trail mix, and I think you might get that promotion, and Greg says, great deal, sounds like I'll do it.

What this goes to, your Honor, is the theory is absurd. The theory is absurd. No people would make an agreement. There must be some other explanation for these trades other that the nefarious one which makes no sense, none. And so this idea that there is going to be some material fact or some fact that you're going to find in the record which would be in the record before you if it was so sweet, but it is not because it doesn't exist.

THE COURT: Okay. All right. If there is anything else that you want to add.

MR. RYAN: They sat on the Wells submission for a year. A year. Why did they sit on the Wells notices? I

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

DIVISION OF ENFORCEMENT'S CERTIFICATE OF COMPLIANCE

Under Commission Rule of Practice 450(d), the Division certifies that its Brief on Review of the Initial Decision (the "Brief") complies with the 14,000-word limit set forth in the Commission's Order Denying Motion for Summary Affirmance, Granting Petitions for Review, and Scheduling Briefs, dated December 10, 2015. Exclusive of the Brief's table of contents, table of authorities, and exhibits, the Brief contains 13,998 words, based on the Microsoft Word program's word count.

Dated: January 11, 2016
New York, New York

DIVISION OF ENFORCEMENT

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

DIVISION OF ENFORCEMENT'S MOTION FOR ORAL ARGUMENT

Under Commission Rule of Practice 451(b), the Division requests oral argument on the appeal of this matter. This appeal implicates issues of first impression for the Commission concerning the scope and application of *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, __ S. Ct. __, 2015 WL 4575840 (Oct. 5, 2015). Oral argument would therefore benefit the Commission.

Dated: January 11, 2016
New York, New York

DIVISION OF ENFORCEMENT

By: _____

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January 11, 2016

VIA FACSIMILE AND UPS OVERNIGHT

Brent J. Fields, Secretary
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100 F Street, N.E., Mail Stop 3628
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:

The Division of Enforcement respectfully submits the enclosed documents for filing with the Commission: (i) the Division of Enforcement's Brief on Review of the Initial Decision, (ii) Exhibits A, B, and C thereto, (iii) the Division of Enforcement's Certificate of Compliance, and (iv) the Division of Enforcement's Motion for Oral Argument. The overnight UPS package contains the original of each document and three copies.

Thank you for your attention to this matter.

Respectfully submitted,

Preethi Krishnamurthy
Senior Trial Counsel
Division of Enforcement

cc: Administrative Law Judge Jason S. Patil (by e-mail & UPS w/encl.)
Paul Ryan, Esq. (by e-mail, fax & UPS w/encl.)
Silvia Serpe, Esq. (by e-mail, fax & UPS w/encl.)

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CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of January, 2016, I caused to be served true copies of (i) the Division of Enforcement's Brief on Review of the Initial Decision, (ii) Exhibits A, B, and C thereto, (iii) the Division of Enforcement's Certificate of Compliance, and (iv) the Division of Enforcement's Motion for Oral Argument, on the following by the specified means of delivery:

By Facsimile and UPS:

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Preethi Krishnamurthy