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.

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RESPONDENT JOSEPH C. RUGGIERI'S BRIEF IN SUPPORT OF HIS CROSS-PETITION AND IN OPPOSITION TO THE DIVISION'S BRIEF IN SUPPORT OF ITS PETITION FOR REVIEW

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

Attorneys for Respondent
Joseph C. Ruggieri

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Respondent Joseph Ruggieri, by his attorneys Serpe Ryan LLP, respectfully submits this brief in support of his request that the Commission reverse that portion of the Initial Decision rendered by Administrative Law Judge Jason S. Patil ("ALJ") on September 14, 2015 ("Decision"), holding that he was tipped about forthcoming rating changes on four trades, and that he traded based on those tips. He also submits this brief in opposition to the Division of Enforcement's (the "Division") brief, dated January 11, 2016 ("Br."), seeking review of the Decision's holding that the Division failed to satisfy the benefit element of insider trading.

PRELIMINARY STATEMENT

Joseph C. Ruggieri was a well-regarded trader in the industry who doubled the commissions on Wells Fargo's healthcare trading desk during his 20-month tenure. Shortly after hiring Ruggieri in August 2009, and faced with the possibility that Ruggieri would leave Wells Fargo to work for a competitor, Wells Fargo took the rare step of guaranteeing his 2010 compensation and made him the highest-paid equity trader at the bank. This is the same year that the Division alleges that Ruggieri began using tips provided by Gregory T. Bolan regarding his upcoming ratings changes in order to trade in a Wells Fargo work account. The Division never did prove – let alone explain – why either Ruggieri or Bolan would engage in such a scheme.

The Division's main theory is that Bolan tipped his allegedly close friend Ruggieri in exchange for Ruggieri's positive feedback. But they were not close friends, and Bolan did not need Ruggieri's feedback. He was on a "meteoric rise" at Wells Fargo even before Ruggieri's arrival. Everyone – including Ruggieri's predecessor – provided glowing feedback about Bolan. To believe the Division's theory would mean that Bolan – who was universally well regarded – committed a career-ending act in exchange for Ruggieri saying nice things about him to Ruggieri's own bosses, with the hope that this feedback would reach Bolan's supervisors and "help" him obtain a promotion to director. This indirect and attenuated benefit would have also required Ruggieri –

guaranteed to earn at least $1.8 million annually for most of the time period in question – to engage in career-ending trades, even though the four trades had no impact on his own evaluations, and resulted in a nominal profit of less than $75,000 in total to Wells Fargo. The Division's theory is baseless. The overwhelming evidence demonstrates that Ruggieri provided genuine positive feedback about Bolan as part of his job having nothing to do with any purported tips, and that Bolan would have been promoted to director regardless of such feedback.

In his Decision, the ALJ found no illicit trading with respect to two of the six trades at issue. This finding was correct, and the Division has not appealed it. The ALJ should have reached the same conclusion for the remaining four trades because that finding debunks any pattern of insider trading. Moreover, the direct evidence proves that Ruggieri's trading theses were logical and well-supported by contemporaneous documents. Additionally, the circumstantial evidence weighs against a contrary finding, including: (1) Ruggieri did not trade in front of half of Bolan's rating changes; (2) the timing for two of the four trades does not resemble insider trading; (3) he traded in the opposite direction of two of Bolan's reports containing material research other than rating changes; (4) the phone records do not support an inference that Bolan tipped Ruggieri; and (5) neither Ruggieri nor Bolan engaged in any "cover up" conduct.

Despite the direct and circumstantial evidence, the ALJ erroneously concluded that Ruggieri traded based on tips in four of the six trades. He did so after reversing the burden of proof, requiring Ruggieri to *disprove* trading based on a tip, rather than holding the Division to its burden to prove it by the preponderance of the evidence. In doing so, the ALJ relied on the purported statistical impossibility of Ruggieri having traded for legitimate reasons in the same direction as Bolan's ratings changes, but *only when* he did not think Ruggieri presented a cogent trading thesis. The problem with this arbitrary application of the expert's statistical conclusion is that the finding that one third of the trades were legitimate undermines the expert's theory. In fact, Ruggieri explained why he traded in the same direction of Bolan's research, which was not a coincidence given that both Bolan and Ruggieri often reacted to the same public news and it was not unusual for Bolan to learn from Ruggieri.

Similarly, the ALJ wrongly surmised that Bolan tipped Ruggieri because Bolan allegedly tipped his now-deceased friend, Joshua Moskowitz. But the evidence did not establish that Moskowitz traded on Bolan's tips, or that Moskowitz somehow traded "parallel" to Ruggieri. Moreover, to rely on Moskowitz's trades based on such a paucity of evidence – he was never interviewed by the Division before he passed away – would require the Commission to engage in sheer guesswork. In fact, one of the three supposedly "parallel" trades concerned PRXL – a valid trade. This fact alone shows that Moskowitz's trading proves nothing with respect to Ruggieri.

In summary, after reviewing the evidence *de novo*, Ruggieri respectfully submits that the Commission will find that Ruggieri did not trade on inside information for any of the remaining four trades. Moreover, were the Commission to reach the issue of benefit, the overwhelming evidence dictates a finding that Bolan did not benefit from any information regarding upcoming rating changes that he allegedly provided to Ruggieri. The Division has not proven these two essential elements of insider trading by a preponderance of the evidence. Accordingly, this action should be dismissed in its entirety.

STATEMENT OF FACTS

A. Ruggieri's Background

From August 2009 to April 2011, Ruggieri was a senior trader of healthcare stocks for Wells Fargo's equity-trading department in New York. (R. Adm. FOF ¶ 2.)[1] In March 2011, he was

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[1] This brief uses the same acronyms as the Division did. (Br. at 4 n.2.) Additionally, "R. Adm. FOF" refers to the Ruggieri Proposed Findings admitted by the Division – i.e. not disputed by it in its Response to Ruggieri's Post-Trial Proposed Findings of Fact and Conclusions of Law (filed June 8, 2015) ("Div. Resp.").

promoted to managing director. (Adm. FOF ¶ 37.) Before Wells Fargo, he worked at Bank of America Securities LLC for over six years, first as an analyst and then as a trader. (R. Adm. FOF ¶ 1.) Wells Fargo terminated Ruggieri, but did not conclude that he had violated any of its policies. (*Id.* ¶ 147.) Prior to that termination, Ruggieri had an unblemished compliance history, and was seen as a person of integrity. (*Id.* ¶¶ 146, 373-76.)

After leaving Wells Fargo, Ruggieri worked as a health care trader at International Strategy & Investment Group LLC until October 2014 (when this action was brought). (R. Adm. FOF ¶ 6.)

B. Bolan's Background

Bolan, who settled this action on the eve of trial, currently works for Avondale Partners, LLC, a registered brokerage firm. (FINRA BrokerCheck Report for Gregory T. Bolan.) He joined Wells Fargo in June 2008 as an equity research analyst in the health care sector. (Adm. FOF ¶ 9.)

C. Additional Key Players

Ruggieri reported to Matthew Brown, a managing director who ran cash equities trading (Tr. 909.)[2] Brown reported to Chris Bartlett, the head of equity sales and trading. (Tr. 1129-30.) Ruggieri sat on the healthcare trading desk with Chip Short, an equity trader, and Bruce Mackle, a desk analyst. (Tr. 3167-68.) Ruggieri's predecessor on the trading desk was Dave Graichen. (Tr. 3419:6-18.)

Bolan reported to Todd Wickwire and Sam Pearlstein, co-heads of the equity research department. (Tr. 1315-16.) Wickwire and Pearlstein reported to Diane Schumaker-Krieg, global head of equity research. (Tr. 1322.) Timothy Evans was an associate research analyst who worked with Bolan in the Nashville office. (Adm. FOF ¶¶ 194.)

[2] "Tr." refers to citations to the hearing transcript. For the Commission's convenience, all trial transcript excerpts referenced herein are attached to this brief as "Ex. 1" in page order.

D. Ruggieri Generated Commission Revenue for Wells Fargo

Ruggieri traded anywhere from 3 to 5 million shares a day. (Tr. 2407:2-6.) His primary job was to execute customer transactions to generate commissions for Wells Fargo. (Adm. FOF ¶ 19.) He also placed trades on behalf of Wells Fargo to try to make gains ("proprietary trades"). (*Id.* ¶ 21.) As compared to commissions, the revenue earned by proprietary trading was "inconsequential". (Tr. 983:20-984:2.)

E. Wells Fargo Expected Constant Dialogue Between Analysts and Traders

Wells Fargo encouraged its traders and research analysts to interact on a regular basis to help each other understand their industry groups and work with their buy side clients to generate increased commissions. (R. Adm. FOF ¶ 51.) In a detailed two-page email in October 2009, all analysts at Wells Fargo were instructed as follows: "You should call your trader at least once a day to exchange information . . . . Moreover, you never know what the trader may have for you that leads you to be more effective . . . . NOTHING ELSE you can do will impact revenues more directly than providing the person who trades your stocks the timely opinions and answers to questions." (Div. 107, attached as Ex. 3.)[3]

Communication with traders was standard practice for analysts. (R. Adm. FOF ¶ 57.) Research and trading worked as a team, as partners in a shared goal. (*Id.* ¶ 56.) Best company practices by analysts included blind copying the sales and trading force on their communications with clients. (*Id.* ¶ 58.) Bartlett described the relationship between research and trading as "symbiotic". (*Id.* ¶ 54.) Ruggieri tried to affect a better communication paradigm between sales, trading, and research with all analysts, not just Bolan. (*Id.* ¶ 59.) Analysts learned about the stocks they covered from their trader counterparts; Bolan learned from Ruggieri. (*Id.* ¶ 60; Tr. 1480: 5-8.)

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[3] "Div.", "JR" and "JR-REB" refer to admitted exhibits, and select exhibits are attached hereto.

F. The Direct Evidence Weighs Strongly Against a Finding of a Tip

1. Ruggieri Had a Clear Thesis Supporting His Trade in Parexel (PRXL)

The Division alleges that Ruggieri illegally shorted the stock of PRXL in advance of Bolan's April 7, 2010 downgrade. Contemporaneous documents evidence the following:

- Two weeks prior to the downgrade and Ruggieri's short trade, Ruggieri reported that he hosted a dinner for his most knowledgeable clients. Those clients told him that they were shorting the stocks in the entire CRO sector, which included PRXL. (R. Adm. FOF ¶¶ 172-74.)

- Prior to the downgrade, Ruggieri told many people, including Bolan, that he believed that PRXL's share price would decline. (*Id.* ¶¶ 202, 208-09.)

- After learning that his clients were short in this sector and a week before any alleged tip, Ruggieri shorted PRXL. (*Id.* ¶¶ 178–79.)

- Ruggieri exited his short position because the stock declined, and initiated a new short position when the stock went up. (*Id.* ¶¶ 180, 183, 185-87, 191, 197.)

2. Ruggieri Had a Clear Thesis Supporting His Trade in Covance (CVD)

The Division alleges that on June 14, 2010, Ruggieri illegally purchased CVD in advance of Bolan's June 15, 2010 upgrade. Contemporaneous documents evidence the following:

- Bolan had issued research weeks prior to his upgrade indicating that CVD was too expensive and would be more attractive "in the low 50s." (R. Adm. FOF ¶ 219.)

- Ruggieri purchased CVD in the low 50s, after CVD had dropped below $50 on June 8, 2010. (*Id.* ¶ 220; Tr. 2613:19-2614:17.)

- The day he traded, Ruggieri predicted to clients that CVD would not lower its guidance at an upcoming Goldman Sachs healthcare conference and that the stock would trade higher as a result. (R. Adm. FOF ¶ 227; JR-76, attached as Ex. 4.)

3. Ruggieri Had a Clear Thesis Supporting His Trade in Albany Molecular Research (AMRI)

The Division alleges that on July 2, 2010, Ruggieri illegally purchased AMRI in advance of Bolan's July 6, 2010 upgrade. Contemporaneous documents evidence the following:

- On June 23, 2010 (two weeks prior to the upgrade), Bolan published a report because AMRI had announced a $10 million share buyback program. (R. Adm. FOF ¶ 245.)

- The following day (six trading days before the upgrade), Bolan emailed Brown, Bartlett and Ruggieri informing them that AMRI would be using Wells Fargo's buyback desk to execute its share repurchase. (*Id.* ¶ 248.)

- Ruggieri believed the share buyback program would cause AMRI shares to rise. (R. Adm. FOF ¶¶ 252-53.) He believed that, given the relatively small volume of AMRI shares that traded daily, that "AMRI would be supporting the stock for a while." (Tr. 2514:4-25.)

- That same day, Ruggieri emailed the Wells Fargo buyback desk telling them to alert him when AMRI started to execute its buyback. (*Id.* ¶ 250.) Ruggieri wanted to know when the buyback was beginning in order to determine when AMRI would be supporting its stock. (Tr. 2516:11-18.)

- The day after Ruggieri's trade, on July 6, 2010 – the day of Bolan's upgrade of AMRI – Ruggieri sent an instant message to the trading desk noting that Bolan had upgraded AMRI. He wrote, "We've been an otd [over-the-day] buyer past couple of days, will be around." (JR-93, attached as Ex. 5.) OTD – buying the stock over-the-day – is how a share buyback, like the one AMRI had announced, is usually executed. (R. Adm. FOF ¶ 266; Tr. 2517:6-21.)

Following Bolan's upgrade, Ruggieri did not sell his entire AMRI position. Instead, he held shares for an additional 5 trading days. (Div. Resp. FOF ¶ 267.) This is consistent with a trading thesis based on AMRI's share buyback program. (Tr. 1030:16-1031:12.) Approximately one month after the AMRI trade, on August 12, 2010, Ruggieri and Bolan exchanged instant messages, where Ruggieri observed "I guess AMRI not buying stock anymore?" and Bolan responded, "I know. Stock is just collapsing." (R. Adm. FOF ¶ 270; JR-REB 77, attached as Ex. 6.)

4. Ruggieri Had a Clear Thesis Supporting His Trade in Athenahealth (ATHN)

The Division alleges that on February 7, 2011, Ruggieri illegally purchased ATHN in advance of Bolan's February 8, 2011 upgrade. Contemporaneous documents evidence the following:

- A month prior to his ATHN upgrade, Bolan published research increasing his valuation range for the company and specifically noted that he wanted to see the company add more physician practices. (R. Adm. FOF ¶ 290-91.)

- Mackle was also focused on physician practices as a "key metric" for ATHN. (*Id.* ¶ 291(A)(unnumbered beneath ¶291); Tr. 3273:17-24.)

- Weeks prior to Ruggieri's trade, Bolan informed him that ATHN was the most "crowded short" in the sector, meaning that the stock price would likely increase as shorts look to cover (buy their position back) in the short term on a positive data point. (R. Adm. FOF ¶¶ 292-93; Tr. 2547:21-2552:17.)

- On January 18, nearly three weeks before the alleged tip, Ruggieri sent Mackle instant messages telling him he would not be short on ATHN because: "ATHN mgmt sounds bulled up, have bunch of enterprise physician practice deals in pipeline." (Div. 120, attached as Ex. 7.)

- On February 4, the day before Ruggieri purchased ATHN, the company announced an agreement adding a physician network. (Adm. FOF ¶ 296.)

- That same day, following ATHN's announcement, Bolan sent his supervisors an email requesting permission to upgrade it noting that "we believe the company is experiencing massive success now within the large hospital-owned and independent physical practice arena . . . we now believe the stock could double in value." (Div. 32, attached as Ex. 8, at 4.) At 10:41 a.m., Wickwire granted permission to upgrade. (*Id.*)

- The only call between Bolan and any line associated with Ruggieri near Ruggieri's ATHN trade lasted 41 seconds and took place on February 4, three days before Ruggieri traded. (R. Adm. FOF ¶ 297.)

- On February 7 (the day before the upgrade), ATHN's stock price rose quickly after Ruggieri purchased it, leading his executing broker to note the market move, sending Ruggieri an IM at the time noting "ATHN . . . Wow." (R. Adm. FOF ¶ 298; Div. 74, attached as Ex. 9; Tr. 2569:2-15.)

- In fact, ATHN's stock price rose nearly $1.50 on the day. (Tr. 2569:21-23.)

- Ruggieri did not purchase ATHN on February 4, a Friday. The stock was up nearly a dollar that day, and Ruggieri was concerned that the price increase was caused by short traders covering their shorts to reduce exposure going into the weekend, and that the stock price would decrease on Monday. On Monday, the stock continued to go higher on good volume, which told him "that this move was real and it wasn't just a short squeeze on Friday." (Tr. at 2569:21-2570:23)

Ruggieri decided to retain his position overnight on February 7, because he had made money on the trade and thought the stock would continue to rise. (Tr. 2570:24-2571:1.) On February 8, before the market opened, Bolan upgraded ATHN. In his upgrade, Bolan stated that the "impetus" for the upgrade was "his belief that Athena may be on the cusp of adding a growing number of large group practices". (Div. 60 at 1, attached as Ex. 23.)

Ruggieri forwarded news of the upgrade to Brown and Mackle. (JR-REB 3, attached as Ex. 10.) Just after the market opened, Brown, who already knew that Bolan had upgraded ATHN (Tr. 960:4-9), sent an instant message to Ruggieri asking about his ATHN trade. Ruggieri told him "Bruce and I both long." Brown responded: "Nice. What I wanted to hear." (R. Adm. FOF ¶ 300.) Mackle, who sat with Ruggieri on the desk, also had a long position in ATHN prior to the upgrade. (*Id.* ¶ 301.) Brown understood that both Ruggieri and Mackle liked the ATHN position, and believed that Ruggieri's ATHN trade was a reasonable one. (Tr. 967:14-22; R. Adm. FOF ¶ 303.)

5. Ruggieri Had a Clear Thesis Supporting His Trade in Bruker (BRKR)

The Division alleges that beginning on March 23, 2011, Ruggieri illegally purchased BRKR in advance of Bolan's initiation of coverage on March 29, 2011. About two weeks before his BRKR trade, Ruggieri and Bolan had attended a toxicology conference on March 10 and 11. (Tr. 2589:8-2592:2.) During a client dinner, what stood out in discussions with clients was that BRKR was their favorite stock. (*Id.*) Following that dinner, Ruggieri did some follow up work on BRKR. (*Id.* at 2589:8-2591:10.) Beginning on March 23, he purchased 5,000 shares of BRKR for five consecutive trading days. (R. Adm. FOF ¶ 311.)

Before Bolan initiated coverage of BRKR, he had never issued a research report about any Life Sciences company (BRKR's sector). (*Id.* ¶ 308.) At that time, Bolan's research was "virtually irrelevant" in the Life Science tool sector according to people he worked with, including Ruggieri and Evans. (Tr. 1284:14-20, 2600:7-2601:18.) An initiation of coverage by an analyst who had never covered the space is not impactful. (*Id.* at 1056:6-9.) In an instant message to Evans on April 1, Bolan expressed surprise at the rise in BRKR's share price and attributed it to "technical momentum" – not his initiation of coverage. (*Id.* at 2604:2-23.)

6. Ruggieri Had a Clear Thesis Supporting His Trade in Emdeon (EM)

The Division alleges that on August 13, 2010, Ruggieri illegally purchased EM in advance of Bolan's August 16, 2010 upgrade. August 13 was a very slow trading day (Tr. 2666:13-2668: 12), and Brown encouraged Ruggieri to make principal trades when the market was slow. (R. Adm. FOF ¶ 278.)

On that day, Ruggieri bought 10,000 shares of EM and held it overnight. (R. Adm. FOF ¶ 279.) He made this trade because the stock had been down nearly 25% following an earnings report the previous week, and he saw it as an outlier. (Tr. 2668:9-2670:9.) Stocks in that sector had decreased but not to such a great extent as EM, and he thought the market would correct and EM would increase in value. (*Id.*) Sorted by gross cost of position, Ruggieri held larger overnight risk than he did on EM on 178 other occasions. (JR-REB 66, attached as Ex. 11.)

The next trading day, Wells Fargo published Bolan's report. (JR 105.) In that report, Bolan also *lowered* his 2010 EPS estimate for the company, and *dropped* his valuation range by 17%. (R. Adm. FOF ¶ 276.) Ruggieri forwarded news of Bolan's upgrade to his supervisor. (*Id.* ¶ 282.) Brown testified that sometimes the marketplace disregards analyst reports and the stock price will not be affected. (Tr. 990:19-25.) As for the EM upgrade specifically, Brown called it "meaningless", explaining that if "you are upgrading it on nothing and you're lowering estimates, they usually don't like that." (Tr. 1047:7-15; 1049:1-10.)

The day of the EM upgrade, in the afternoon, Bolan described it as having the significance of a "mouse fart in the wind" and Ruggieri and Bolan had the following Wells Fargo instant message exchange: Bolan: "EM sux![]" Ruggieri: "Ha ha, nice u/g [upgrade] bro." (R. Adm. FOF ¶¶ 283, 285; JR 109, attached as Ex. 12; Tr. 2678:10-2679:5.)

Ruggieri made an identical 10,000-share purchase of EM on behalf of Wells Fargo, not in advance of a Bolan research report, nine months earlier. (Adm. FOF ¶ 363.)

G. The Circumstantial Evidence Weighs Strongly Against a Finding of A Tip

1. Ruggieri Had No Motive to Make the Purported Trades

Ruggieri's 2010 total compensation was guaranteed at $1.8 million, making him the highest paid trader on the trading floor. (Adm. FOF ¶ 75.) This type of guarantee was a rarity at Wells Fargo. (Tr. 1147:2-7.) Ruggieri was a top performer, and doubled the commissions on the healthcare desk in 2010. (R. Adm. FOF ¶¶ 20-21.) Even before his promotion to managing director, he was regarded as one of the best sales and sector traders, who "ran circles around" some managing directors. (Tr. 1503:7-14; 1161:8-1162:2.)

Ruggieri did not make any of the trades in any personal account, and Wells Fargo's total return on the four trades left at issue (AMRI, EM, ATHN, and BRKR) was 1.54 %, or less than $75,000 in profit. (R. Adm. FOF ¶ 27; JR-REB 65, attached as Ex. 13.) This had an impact of less than 1% on Ruggieri's loss ratio. (Div. Resp. ¶ 19.) During the relevant time period, Ruggieri lost over $400,000 on a single unrelated intraday trade, and there were no repercussions to his compensation or his promotion to managing director. (R. Adm. FOF ¶ 26; Tr. 2417:8-12.)

2. Ruggieri's Trading Was Transparent and There Was No Cover Up

Ruggieri's direct supervisor could see all aspects of Ruggieri's trading at all times and monitored his traders' overnight positions. (R. Adm. FOF ¶ 115; Tr. 987:11-17.) Short, who sat next to Ruggieri, could see Ruggieri's trading positions on his own computer screen. (R. Adm. FOF ¶ 116.) Bartlett, as part of risk monitoring, monitored all of the traders' positions and their profit and loss on his screens. (*Id.* ¶¶ 113-14.) Ruggieri forwarded each of the Bolan research reports to Brown after he received them. (*Id.* ¶¶ 213, 239, 269, 282, below 299(unnumbered), 313.)

The Division did not offer any evidence that Ruggieri or Bolan attempted to hide any of their activity from anyone at Wells Fargo. Brown testified "there was no hiding of positions." (Tr. 1116:15-17.) In April 2011, when Wells Fargo began its internal investigation in connection with the channel checks that led to Bolan's termination, Ruggieri interceded on Bolan's behalf asking Wickwire if he had spoken with Bolan. (Div. 29.) When Bolan and Ruggieri spoke after Ruggieri was terminated, they did not discuss getting their stories straight, but instead Ruggieri expressed shock at the termination, and the two discussed their frustration and disappointment with how they were treated by Wells Fargo at the end of their tenure. (*Id.* ¶ 110; Bolan Tr. at 214-215.)[4]

3. The Phone Records Do Not Permit an Inference of a Tip

Wells Fargo used a turret phone system that allowed multiple people to pick up a single call. (Tr. 973:22-974:5.) The phone number for Wells Fargo's Trading Desk was 212-214-6201, and Ruggieri also had his own separate line – 212-214-6210. (R. Adm. FOF ¶¶ 30-31.) Bolan called both lines. (JR-REB 67.) Ruggieri's line also rang on Short's turret. (Tr. 3368:21-369:4; R. Adm. FOF ¶¶ 36-38.) Short covered for Ruggieri and communicated with Bolan to educate himself about stocks Ruggieri covered. (*Id.*) Short also spoke to Bolan if Short happened to pick up the phone, or if Ruggieri was absent, traveling, off the desk or on vacation. (*Id.*)

When Ruggieri was unavailable to pick up his ringing line, someone else answered it "very quickly". (Tr. 974:19-25.) If Bolan called the desk and Ruggieri was not available, it would not be unusual for him to speak to someone else. (R. Adm. FOF ¶ 44.) Anyone on the floor could pick up Ruggieri's line. (Tr. 3279:24-3280:6.) When Ruggieri was out of the office, Bolan spoke with someone other than Ruggieri on Ruggieri's line at least 41 times. (R. Adm. FOF ¶ 34; JR-REB 67, attached as Ex. 14.)

It was also common for Mackle and Short to pick up Ruggieri's line and listen in on his calls with Bolan. (Tr. 3393:4-3394:7.)

[4] "Bolan Tr." refers to citations to Bolan's investigative testimony, which was admitted into evidence as Div. 110. All excerpts of the Bolan Tr. are attached as "Ex. 2".

4. Ruggieri Did Not Trade in Front of Half of Bolan's Ratings Changes and He Traded in the Opposite Direction of Bolan's Research

During the time period that Ruggieri and Bolan overlapped, Ruggieri only traded in front of half of the ratings changes that Bolan issued. (R. Adm. FOF ¶ 65.) Bolan issued ten ratings changes, and Ruggieri did not trade in front of five of them. (*Id.*) Similarly, Ruggieri only traded in front of half of Bolan's two initiations of coverage with an outperform rating. (*Id.* ¶ 70.) The trades here were not the only times Ruggieri happened to trade in front of Bolan's research. (R. Adm. FOF ¶ 66.) On two occasions, Ruggieri's position was directly opposed to Bolan's research, i.e. he was long when Bolan's report was short or *vice versa*. (*Id.* ¶¶ 67-68.) On September 30, 2010, Ruggieri held a 17,500-share overnight short position in CVD before Bolan increased his valuation range by more than 5%. (*Id.* ¶ 67.) On February 24, 2011, at the market close, Ruggieri held a 66,052-share overnight long position in ICLR before Bolan decreased his estimates by 19%. (R. Adm. FOF ¶ 68.) Pursuant to Wells Fargo policy, these were "material research changes". (Div. Resp. ¶ 90.)

5. For Half of the Trades, the Timing of the Trades Belies a Tip

The expert report of Dr. Edward O'Neal, the Division's expert, concluded that: "The most profitable way to trade in relation to an analyst ratings change would be to buy the stock the day before the change and sell it the day after the change. Of course, such a strategy would only be possible with advance information about the ratings change announcement." (Div. 177 at 5.) Two of the remaining four trades did not follow this pattern (and neither did PRXL). Ruggieri held BRKR for five trading days leading up to Bolan's initiation of coverage, and he held AMRI shares for five trading days after Bolan upgraded. (R. Adm. FOF ¶¶ 311, 267.)

6. The Division's Expert Arrived at a False Conclusion Using Cherry-Picked Data

O'Neal's report was dependent on the data that he was provided by the Division. (R. Adm. FOF ¶ 91.) He only considered overnight risk, not intraday risk. (*Id.* ¶ 92.)

The market does not always pay attention to analyst reports. (R. Adm. FOF ¶ 84.) The content is important: the stronger the justifications provided in the report, the larger the market's reaction to the report. (*Id.* ¶ 94.) More than 50% of rating changes are a reaction to a company announcement. (*Id.* ¶ 82.) Evans testified that at the time Bolan issued his initiation of coverage of Bruker, Bolan's views of the entire life sciences sector that included that stock were "virtually irrelevant." (Tr. 1284:14-20.)

O'Neal never read Bolan's research reports so their content had no impact on his findings. (R. Adm. FOF ¶ 95.) He also gave no consideration to Bolan's status in the analyst community. (*Id.* ¶ 96.) He based his statistical conclusions only on Bolan's ratings changes, not his valuation range changes or earning estimate changes. (Div. 177 at 4-15.) Valuation range changes and earnings estimate changes are also material. (R. Adm. FOF ¶ 88; Tr. 1477:13-18; JR Reb 103 at 2.) A research report changing valuation can be more important or material than a ratings change. (R. Adm. FOF ¶ 89.) These three categories, the third being ratings changes, are "the most material on the spectrum of materiality." (Tr. 1477:13-18.)

While he and Ruggieri overlapped at Wells Fargo, Bolan published at least 94 equity research reports containing at least 106 material events including initiation of coverage of a stock, a rating change, or a valuation range or estimated earnings change. (R. Adm. FOF ¶ 108.) During the shorter time period analyzed by O'Neal (March 30, 2010 through March 31, 2011), Bolan published at least 61 reports where he changed an earnings estimate or valuation range. (Div. Resp. ¶ 107.) During his approximately 415 day tenure at Well Fargo, Ruggieri held overnight positions 325 times. (R. Adm. FOF ¶ 98.)

7. Moskowitz's Trades Are Not Probative

Moskowitz did not work in the securities industry during the relevant time period. Bolan and Moskowitz spoke on June 9, 2010, in advance of the publication of his CVD upgrade, but

Moskowitz did not buy CVD prior to the upgrade. (R. Adm. FOF ¶¶ 77-78.) Bolan and Moskowitz spoke six times prior to the February 8, 2011 ATHN upgrade, but Moskowitz did not buy ATHN prior to the upgrade. (*Id.* ¶¶ 77, 79.) Bolan denied tipping Moskowitz about upcoming ratings reports, and Moskowitz had experience trading the stocks Bolan covered. (Bolan Tr. at 113-115, 120-122, 147-48, 167-69.)

During oral argument, on a pre-trial motion to exclude evidence regarding trades by non-party Moskowitz, the ALJ stated that evidence regarding Moskowitz was not likely to be relevant as to Ruggieri because such evidence "doesn't really prove anything about [Ruggieri's] conduct" although it might be relevant in a limited way, such as to Bolan's credibility. (Transcript of Pre-Hearing Conference, dated March 17, 2015, at 49-51.)

8. Whether Bolan Violated Wells Fargo Policy On Channel Checks Is Irrelevant

a. The Purported Violation of Wells Fargo Policy Had Nothing to Do With Insider Trading

The channel check information that Bolan disseminated and for which he was terminated (along with Ruggieri for failing to escalate the issue) happened *after* the last trade at issue. (Div. 15 at 7.) Bolan and Ruggieri were not terminated for insider trading. (Adm. FOF ¶¶ 618-19, 621.) Wells Fargo's internal investigation did not conclude that Ruggieri violated *any* Wells Fargo policies and procedures. (R. Adm. FOF ¶ 147.) At the time Ruggieri forwarded Bolan's channel check research to his clients, he did not know that Bolan would later publish it. (*Id.* ¶¶ 148-49.) Bolan decided belatedly to publish the information in a "squawk" (a short note containing a short-term research view). (Tr. 1444:2-1446:10.) He did so only after clients reacted to the information. (Adm. FOF ¶ 595; Div. 15 at 4.) An analyst can determine after communicating information, that the information already communicated is material. (Tr. 1366:20-1367:14.)

b. Sharing Information Gained from Channel Checks Was Widespread

No one at Wells Fargo had ever expressed any compliance concern to Ruggieri about Bolan's channel checks. (R. Adm. FOF ¶ 150.) Wells Fargo's Global Head of Research had praised Bolan for sending his channel check research to platinum accounts. (Bolan Tr. at 194-96.) Prior to Ruggieri's tenure at Wells Fargo, Bolan forwarded to Short and Graichen information gathered from channel checks that he had sent to clients. (*Id.* ¶ 151; *see, e.g.*, JR-REB 220.) In Ruggieri's absence, Short forwarded to clients Bolan's channel check information after Bolan had sent it to clients. (Div. Resp. ¶152.) Mackle also disseminated Bolan's channel checks to clients. (R. Adm. FOF ¶ 153.)

c. Wells Fargo Did Not Have a Clear Channel Check Policy in Place

None of the policies or training materials during the time in question mentioned channel checks. (*See, e.g.* Div. 5, 30, 69.) The first Wells Fargo policy to mention channel checks was disseminated in August 2011, after Bolan and Ruggieri left Wells Fargo. (Div. 105 (Compliance Bulletin titled, "WFS Research Department Policies and Procedures Governing Research Surveys and Channel Checks", attached as Ex. 15).) Wells Fargo issued this policy as a result of its internal investigation. (Tr. 402:13-403:9.) This policy recognizes that not all information collected through channel checks is material. (Div. Resp. ¶ 142; Div. 105 at 3.)

Wells Fargo policies in place during Bolan's and Ruggieri's tenure dictated that material research needed to be published via a squawk or a note. (Tr. 1446:11-16.) Deciding whether research is material or not is often a gray area. (R. Adm. FOF ¶ 139.) Whether information derived from a channel check is material depends on its content. (*Id.* ¶ 132.) An analyst may not think a particular piece of research is material but can change his mind about it and subsequently publish it. (Tr. 1366:20-67:14.) Evans, who described himself as a very cautious analyst who tended to interpret rules strictly, testified that the channel checks were not even meaningful. (Tr. 1295:25 – 1296:22.)

H. Bolan Did Not Receive a Personal Benefit

1. Ruggieri and Bolan Did Not Have a Meaningfully Close Relationship

Ruggieri and Bolan's social interactions related exclusively to work. (R. Adm. FOF ¶ 325.) The two met in person approximately 15 times. (*Id.* ¶ 326.) Ruggieri never visited Bolan in Tennessee, where Bolan worked, and Bolan never met Ruggieri's wife. (*Id.* ¶¶ 328, 332.) Although they communicated "quite a bit" for the first few months after Wells Fargo because Bolan was trying to get a job at ISI where Ruggieri worked, their communications "died off" after that. (*Id.* ¶¶ 331-334; Bolan Tr. at 31:7-32:9.)

Evans described Bolan as a loner who does not maintain close relationships. (R. Adm. FOF ¶ 335.) In contrast, Ruggieri's closest friends were childhood friends and not work colleagues (whom he did not even invite to his wedding); and even at Wells Fargo, he maintained closer relationships with ten to fifteen other colleagues than he did with Bolan. (*Id.* ¶ 327; Tr. 2055:8-2056:12.)

2. There Was No Evidence of a *Quid Pro Quo* Between Ruggieri and Bolan

a. <u>Bolan Received Widespread Positive Feedback</u>

There was no direct evidence that Ruggieri provided positive feedback about Bolan in exchange for tips. Evidence regarding feedback about Bolan included the following:

- Bolan had a "meteoric" rise at Wells Fargo in 2010. (R. Adm. FOF ¶ 353.)
- Wickwire testified that everyone, including himself, had great things to say about Bolan. (Tr. 1559:9-16.)
- Sales trading, position trading, directors of research and clients all gave Wickwire positive feedback about Bolan. (R. Adm. FOF ¶ 353; Tr. 1547:17-25.)
- Ruggieri's two bosses held Bolan out as the standard among analysts. (R. Adm. FOF ¶ 365; Tr. 1189:17-1190:11.) Bartlett gave positive feedback about Bolan to Wickwire, and this feedback was based – in part – on his own impressions of Bolan. (Tr. 1189:17-1190:11.)

- Ruggieri's predecessor told Bartlett, Wickwire, and Schumacher, that Bolan was the most trader friendly analyst he had ever worked with. (*Id.* ¶ 343.)

- Short described Bolan as a cash cow for Wells Fargo. (R. Adm. FOF ¶ 342.) He gave Bartlett and Wickwire positive feedback about Bolan. (Tr. 1188:11-14, 1391:4-11.) In June 2010, Short encouraged clients to vote for Bolan, among other analysts, for the All America II Research Team. (R. Adm. ¶ 345.)

- Ruggieri provided feedback about Bolan in response to quarterly requests from Bolan's supervisors. (JR 7, 63, 97, 115, attached as Exs. 16-19).

- Ruggieri met with Wickwire to discuss best practices among analysts that would help build the healthcare franchise, and he used Bolan as a model. (Tr. 2458:13-2459:13; JR-REB 85, attached as Ex. 20.) Bolan was not the only analyst Ruggieri spoke with Wickwire about. (Tr. 1494:10-1496:14.) Ruggieri reached out to Wickwire because he wanted other analysts to enter into the same type of enhanced communications that he and Bolan shared. (*Id.* at 1496:15-1497:17.) The model of communication that Ruggieri encouraged was something that Wickwire understood the entire trading department hoped to replicate across the research department. (*Id.* at 1498:22-1499:6, 1571:10-22.)

- Although it was not typical for Wickwire to meet with traders individually, (Tr. 1493:12-18), Wickwire did so with Ruggieri because upper management told him that Ruggieri "was the guy that [he] needed to give some airtime to". (Adm. FOF ¶ 549; Tr. 1498:22-1501:8.) Wickwire testified that communications between research and trading was a subject "near and dear to Ruggieri's heart." (Tr. 1478:23-1479:5.) Ruggieri even assisted Wickwire in recruiting and interviewing analysts to Wells Fargo's research department. (*Id.* at 1474:24-1475:20.)

b. <u>Ruggieri's Feedback Had No Impact on Bolan's Compensation</u>

Bolan's annual bonus was determined by a ranking relative to his peers using a scorecard; analysts with a higher rank received a higher bonus. (Adm. FOF ¶¶ 529-530.) Analysts were ranked pursuant to nine main categories. (Tr. 1526-1529; JR-REB 106, attached as Ex. 21.) Ruggieri, along with Short, Brown and Bartlett, had input into only one of these nine categories – "trading impact" rank. (Tr. 1520, 1535-36.) Trading impact referred to the feedback received from trading, indicating how well the analyst is working with traders and helping to impact their business. (Tr. 1518:6-13.) Feedback from trading was not a material part of the scorecard, and virtually all of the top analysts had trading impact ranks far below their overall rank. (Tr. 1414:12-1415:7, 1527:11-1528:25; JR REB

106.) Bolan's trading impact rank accounted for only 5% of his overall weighted score and from 2009 to 2010. (JR REB 106.) Rather, his change in rank was due to improvements in five of the other categories, including his sales survey impact, his rank in client votes and internal sales, and in stock picking. (*Id.*)

c. Bolan Would Have Been Promoted Regardless of Ruggieri's Feedback

In November 2010, Wickwire nominated Bolan for a promotion to director. (Adm. FOF ¶ 546.) Bolan's nomination form listed four managing director level references who supported his promotion, and none were from the trading department or had any dotted line connection to Ruggieri. (R. Adm. FOF ¶ 358; Div. 27, attached as Ex. 22, at 1.) Ruggieri did not know anything about the promotion process. (Tr. 2484:14-21.) Even without the increase in his trading ranking, Bolan still would have been promoted. (Tr. 1549:7-19.)

I. The Initial Decision

In the Decision, the ALJ correctly dismissed the proceeding. (Decision at 1.) He did so because the Division failed to show that Bolan tipped Ruggieri for a personal benefit within the meaning of *Dirks v. SEC*, 463 U.S. 646 (1983), and *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, No. 15-137, 2015 U.S. Lexis 6104 (Oct. 5, 2015). (*Id.*)[5]

1. The Decision Correctly Held that the Division Failed to Prove Benefit

The ALJ considered all of the possible theories of personal benefit. First, the ALJ found that the "'friendship' and working relationship between Bolan and Ruggieri was not a meaningful, close, or personal one." (Decision at 35.) This was based on a number of facts including: (1) their relationship was purely professional (*id.* at 43); (2) it was their job to speak as part of a "constant dialogue between analysts and traders" (*id.* at 46); and (3) "Ruggieri maintained closer relationships

[5] The ALJ rejected all of Ruggieri's constitutional arguments. We preserve those arguments should an appeal to the Circuit be necessary. (Decision at 2-4.)

with ten to fifteen other Wells Fargo employees, several with whom he socialized outside of the work context" and his closest friends were not work colleagues, but were friends from childhood. (*Id.* at 43, and n.32.)

Second, the ALJ correctly held that the Division failed to establish a q*uid pro quo* between Bolan and Ruggieri. (Decision at 36-46.) He rejected each of the Division's theories. He rejected the Division's claim that Ruggieri provided Bolan with career mentorship in exchange for tips. (*Id.* at 36.) The only witness to even use the word "mentor" testified that Ruggieri mentored Bolan (as well as another younger analyst). (*Id.*) This was consistent with Wells Fargo's industry reputation for mentoring. (*Id.*)

The ALJ also dismissed the Division's theory that Ruggieri gave positive feedback about Bolan in exchange for tips. He noted "Ruggieri provided positive feedback about Bolan in October 2009, just a few weeks after Ruggieri joined Wells Fargo and before any of the alleged tips took place." (Decision at 36-37.) Ruggieri's positive feedback of Bolan was objectively reasonable given that his predecessor on the trading desk, wrote to both his own boss *and* Bolan's boss praising him for his "solid work" and describing him as "the most trader friendly analyst" he had ever worked with. (*Id.* at 38.) Ruggieri's feedback was solicited in the normal course of business by the head of sales, and he provided positive feedback about others too. (*Id.* at 37.) Although Ruggieri also gave Wickwire positive feedback about Bolan when they met, Ruggieri did not arrange these meetings for the purpose of praising Bolan. (*Id.*) Moreover, Ruggieri was just one of many who spoke highly of Bolan; "numerous constituencies" praised him as a "cash cow," an "up-and-comer," a "rising star" and "the standard among analysts," among other superlatives. (*Id.* at 37-38.)

The ALJ also considered whether Ruggieri's positive feedback could have had an effect on Bolan's bonus or promotion prospects. He concluded that it could not have. Ruggieri's positive feedback had a negligible effect on Bolan's bonuses, which were determined based on a scorecard used by Wells Fargo to rate analysts. Feedback from all members of the trading desk, not just Ruggieri, accounted for a mere 5% of Bolan's overall score on his Wells Fargo Scorecard. (Decision at 40.) This was the lowest weighted value compared to the other factors, including sales survey impact, client votes, internal sales rank, external rank and stock picking. (*Id.* at 40-41.) The ALJ noted that Ruggieri's feedback constituted only a part of this 5%, and that it would have made no sense for Bolan to agree to or even hope for positive feedback from Ruggieri in exchange for tips where "Bolan had no way of controlling for the accomplishments of other analysts or the feedback from others." (*Id.* at 40, n. 28.) As the ALJ highlighted, since Bolan knew he ranked within the top five in trading impact and that this rank counted for only 5% of his score, "Bolan would have known that he had reached a point where taking risks to boost his trading impact rank would have gained him nothing. . . . [and] to take risks to improve that score would have been against his self-interest." (*Id.* at 41.) The ALJ credited Bolan's supervisor's testimony that he "did not believe the Division's theory that Ruggieri provided positive feedback about Bolan in exchange for tips." (*Id.* at 37.)

The ALJ also rightly rejected the Division's theory that Ruggieri's positive feedback "helped" Bolan be promoted to director. He noted that the director nomination form required references from four managing directors (a level above Ruggieri at that time), none of whom were from the trading department. (Decision at 42.) He also credited testimony from Wickwire that Bolan would have been promoted regardless of his trading impact rank improvement. (*Id.*)

Finally, with respect to benefit, the ALJ found that the Division waived any argument that Bolan intended to benefit Ruggieri with a gift of confidential information. (Decision at 47.) However, regardless of whether it was waived, the ALJ noted that the Division elected not to call Bolan to testify, which hindered its ability to prove personal benefit. (*Id.* at 35-36.)

2. The Decision Wrongly Held that Ruggieri Traded Based on Tips for Four of the Six Trades

As to whether Ruggieri traded based on any tips received from Bolan, the ALJ noted that there was no direct evidence of any tips. (Decision at 9.) Instead, he inferred the existence of tips for four trades based on supposed circumstantial evidence that "Bolan had the means and opportunity to tip Ruggieri with respect to each trade in question." (*Id.* at 10.) But for two of the trades (PRXL & CVD), the ALJ rightly concluded that Ruggieri had a good reason to trade. (*Id.* at 12-19.) For these two trades, the ALJ concluded that it was not by chance that Ruggieri traded in a manner consistent with Bolan's rating change but instead it was because "the same event that motivates an analyst to publish may also motivate an experienced trader to benefit from trading in relation to the event." (*Id.* at 10-11.)

With respect to the four other trades, the ALJ incorrectly concluded that Ruggieri traded based on Bolan's tips. (Decision at 9.) This finding was premised on a reversal of the burden of proof, requiring Ruggieri to explain the reasons for these six trades:

> Thus, for each trade at issue, I considered Ruggieri's explanation as to why he held a position before Bolan's rating changes. Where Ruggieri has a clear, contemporaneous thesis for his position and the timing for that position, the evidence weighs toward finding that there was no tip. . . . However, where Ruggieri's thesis fails to plausibly explain his position preceding Bolan's report, given the statistical implausibility of such a position occurring by chance, the evidence weighs toward finding that Ruggieri traded based on Bolan's tip.

(*Id.* at 11.) Thus, the ALJ improperly burdened Ruggieri with providing a "convincing explanation" for why he traded, *id.* at 28, rather than holding the Division to its burden to prove by a preponderance of the evidence that he traded based on inside information. The ALJ then improperly disregarded the "convincing explanations" that Ruggieri provided.

ARGUMENT

I. Bolan Did Not Tip Ruggieri

The Commission should find that Ruggieri did not trade based on any tips because Ruggieri had a clear, contemporaneous thesis for each of the four trades. The ALJ's undisputed finding for PRXL and CVD undermines the Division's theory that Ruggieri engaged in a pattern of insider trading. Moreover, the circumstantial evidence supports a finding that Ruggieri did not trade based on any tips.

A. The PRXL and CVD Finding Eliminates Any Pattern of Insider Trading

The ALJ found Bolan did not tip Ruggieri about his upcoming PRXL downgrade, because the evidence was that Ruggieri had a sound basis for believing that PRXL's share price would likely decline – thereby justifying his short position on April 7, 2010. Ruggieri's external and internal communication evidenced his trading thesis for PRXL and preceded any possible tip from Bolan. (*See supra* Section ("Sec.") F.1.)

Similarly, with respect to CVD, Ruggieri's contemporaneous communications showed why he bought the stock, and his thesis preceded any possible tip from Bolan. (Sec. F.2.) The ALJ found no tip for PRXL or CVD, and in spite of the fact that its expert opined that this result was statistically impossible, the Division did not appeal this finding. (Decision at 16; Div. 177 at 17-18.)

B. Ruggieri Traded Pursuant to Clear, Contemporaneous Theses

1. <u>AMRI</u>

Like PRXL and CVD, the contemporaneous record supporting Ruggieri's reason for buying AMRI is voluminous and consistent. It proves that Ruggieri purchased AMRI because he believed that a pending company buyback by AMRI of its stock would increase the company's stock price. (Sec. F.3.)

On or about June 23, 2010, AMRI, a microcap company, announced a $10 million share buyback program. Bolan published this news in a short note. The following day, he learned that AMRI would be using Wells Fargo's trading desk in New York City to execute the repurchase program, and he alerted Ruggieri, Brown, Wickwire and Bartlett. The following day, Ruggieri emailed the Wells Fargo buyback desk to ask them to keep an eye out for AMRI because he planned to trade the stock. This is direct evidence that as of Friday, June 25, Ruggieri believed that the commencement of AMRI's buyback would increase the share price making it a good time to buy. That thesis was fully formed before he made the trade at issue the following week, on Friday, July 2. (Sec. F.3.) Thus, the AMRI repurchase program motivated Ruggieri's trade and it defies logic to conclude in the face of the above that he *instead* traded in AMRI on July 2 because Bolan tipped him about his upcoming rating change.

Nonetheless, the ALJ rejected as "not credible" that Ruggieri had a contemporaneous thesis for his trade. (Decision at 21.) To reach this conclusion, the ALJ cited to only two exhibits, DIV 194-A, a demonstrative exhibit merely showing Ruggieri's trading activity in AMRI, and JR 91, an instant message dated July 2 in which Ruggieri stated at about 1:21 pm, "AMRI 25k to buy". From this single line – which meant that Ruggieri was looking for a seller of AMRI – the ALJ inferred that "Ruggieri began building the long position two hours before any evidence suggests that he *knew* the buyback had commenced." (Decision at 21 (emphasis added).) The evidence contradicts this inference. On Tuesday, July 6, the first trading day after the Friday, July 2 trade in question before the Fourth of July holiday, Ruggieri informed his colleagues and clients in a Bloomberg instant message:

> Bolan upgrading micro-cap AMRI to outperform this morning . . . We've been an OTD buyer *the past couple of days*, will be around.

(JR 93 (emphasis added).)

JR 93 proves that Ruggieri knew that the buyback had commenced days earlier, because "OTD" refers to Wells Fargo buying back the stock over-the-day during the past "couple of days", and "will be around" shows Ruggieri's understanding that the program would continue. The ALJ ignored this contemporaneous record, and wrongly attributed Ruggieri's instant message on July 2 as evidence of when Ruggieri *first* learned about the buyback program beginning, but *nothing* in JR 91 reflects that Ruggieri had only just learned that fact. Instead, his instant message on July 6 (one trading day later) shows that he knew it *before* July 2 because he announced that Wells Fargo's buyback desk had been an OTD buyer for "the past couple of days". (JR 93.)

The ALJ also ignored several other key pieces of evidence. First, Ruggieri did not sell out of his AMRI position following the upgrade, but instead held the stock for an additional 5 trading days after it was announced. (Sec. F.3.) If Ruggieri had purchased AMRI in anticipation of the Bolan ratings change, he would not have held them for days after it was published. (Sec. G.5.) Ruggieri's trading was not consistent with an insider-trading scheme; it dovetailed seamlessly with a thesis that an ongoing share buyback would cause the shares of AMRI to continue to rise. This thesis was reiterated about a month after his AMRI trade, when Ruggieri and Bolan exchanged instant messages where they observed that the stock price was collapsing because AMRI was no longer buying back its stock. (Sec. F.3.)

Finally, as with PRXL and CVD, the evidence also supports an inference that Bolan timed his upgrade of AMRI to the news of the buyback so that he could "garnish attention and influence with clients." (Decision at 10 ("short-term events ... may nonetheless inform the analyst's decision about when to publish ... in order to garnish attention and influence with clients.").) This reasoning, which the ALJ applied in his analysis of the PRXL and CVD trades, is equally persuasive here: Bolan knew of the buyback program for weeks, he more than likely learned about the commencement of the repurchase program from Ruggieri, and he timed the release of his upgrade to that event. Accordingly, the Commission should find that Ruggieri did not buy AMRI based on any tip.

2. ATHN

Ruggieri's ATHN trade matched his well-recorded thesis about that stock. Ruggieri purchased ATHN on Monday, February 7, 2011, because he believed that ATHN was proving successful at adding large group physician practices to its pipeline, which was the key metric for the success of the company's share price. (Sec. F.4.) Indeed, on the previous trading day, Friday, February 4, ATHN issued a press release announcing the addition of physician practices. (*Id.*) But the ALJ faulted Ruggieri for not making the purchase on the day of that announcement. (Decision at 25.) He found that Ruggieri must have been tipped because he traded the day following ATHN's press release (which was the day before Bolan's upgrade). This was pure speculation.

In fact, Ruggieri did not purchase ATHN on that Friday, because the stock (the most crowded short in the sector) was up nearly a dollar. Ruggieri was concerned that the price increase that day was caused by short traders covering their shorts to reduce exposure going into the weekend, and that the stock price would decrease on Monday. However, on Monday, when the stock price had not decreased, this indicated to him it was not just a short squeeze on Friday, and that ATHN would likely continue to increase thereby justifying his stock purchase, which he continued to build over the day. (Sec. F.4.) ATHN's price move also motivated Ruggieri to hold onto the position overnight. Indeed, the market move for ATHN was so dramatic that day – ***the day before*** Bolan's upgrade – that Ruggieri's executing broker sent him an IM that morning noting "ATHN … Wow." (Div. 74.) Quite likely, the market – including traders like Ruggieri – were reacting to Friday's announcement from the company. That announcement even influenced the timing of Bolan's upgrade: on the very day of the company's announcement, Bolan sent his supervisors an email requesting permission to upgrade it noting that "we believe the company is experiencing massive success now within the large hospital-owned and independent physical practice arena . . . we now believe the stock could double in value." (Div. 32 at 4.) This was the precise "impetus" for his upgrade. (Sec. F.4.)

The ALJ also based his decision on the timing of a telephone call that Bolan made to the 6210 line that rang on Ruggieri and Short's desks. (Decision at 24.) But that call took place *on February 4*, the day Ruggieri did *not* trade. The ALJ wrongly suggests that Bolan made the call only after Wickwire granted his approval to upgrade the stock, noting that "*later that day*, Wickwire granted Bolan's request to upgrade ATHN and Bolan *then* called Ruggieri." (Decision at 25 (emphasis added).) But that is not consistent with the facts. Wickwire granted Bolan's request to upgrade the stock at 10:41 that Friday morning, within minutes of Bolan's request. (Sec. F.4.) If the two were scheming, why wouldn't Bolan call Ruggieri immediately, rather than hours later at 3:10 p.m.? And why wouldn't Ruggieri trade on the day he supposedly received the tip?

Furthermore, even if the Division could definitively establish that Bolan and Ruggieri actually spoke during the 41 second call, it is far more reasonable to infer that they spoke about the ATHN announcement. The contemporaneous record shows that Ruggieri purchased ATHN because he and the rest of the desk had been focused on the issue of adding physician practices for ATHN; the company had been bullish on this issue just weeks before and it issued a press release on this very issue the day before. This is therefore a clear example of both analyst and trader reacting to the same public news. To arrive at the opposite conclusion, and infer an improper basis for Ruggieri's trade, not only disregards the clear weight of the evidence, but it defies the basic premise that analysts and traders talk about, learn from, and react to public company announcements – there is nothing illegal about the coincidence of both trader and analyst reacting to ATHN's news. Indeed, the market reacted the day of the news *before* Bolan's upgrade.

3. BRKR

Ruggieri was very familiar with BRKR, having traded it on a proprietary basis on approximately 100 days while at Wells Fargo. (Sec. F.5.) Ruggieri traded in BRKR beginning on March 23, 2011, based on client feedback about the stock. (*Id.*) There was substantial evidence crediting his testimony that he would *not* have traded multiple days in advance of an initiation of coverage with an outperform rating by a mid-level analyst who had never before covered any stock in that sector.

Despite this, the ALJ faulted Ruggieri for failing to raise evidence "suggesting that an initiation of coverage with an outperform/buy rating would have any effect other than increasing the price." (Decision at 27.) This is not true. First, Evans testified that Bolan's research was "virtually irrelevant" in the Life Science sector, which included BRKR. (Sec. F.5.) Second, Ruggieri's supervisor testified that an initiation of coverage by an analyst who had never covered the space is not impactful on the market. (*Id.*) Third, even Bolan did not credit his initiation of coverage as the cause of BRKR's increase in stock price, and expressed surprise at the rise in share price following his report and attributed it to "technical momentum." (*Id.*)

Furthermore, the ALJ disregarded testimony from Ruggieri's supervisor that the BRKR trades did not resemble insider trading because "if Ruggieri were planning to trade based on the release of the BRKR initiation of coverage, he would have had bigger positions and he would not take the market risk days ahead of time." (Decision at 27.) Instead of reaching the logical conclusion that Ruggieri's trading pattern undermined the Division's tipping theory, the ALJ surmised that "Ruggieri *may* have structured the building of his position so it did not resemble insider trading, *perhaps* in an attempt to avoid detection." (*Id.* (emphasis added).) This speculation was unsupported. As Brown testified: "there was no hiding of positions." (Sec. G.2.) This is the only time that the

Decision suggests such deceptive conduct by Ruggieri, which is inconsistent with the overwhelming testimony as to Ruggieri's character. (Sec. A.)

Finally, the ALJ ignored the logic of his own finding in his benefit analysis: the BRKR trade took place *after* the promotion process, thereby demolishing the Division's *quid pro quo* theory on its face. (Decision at 38 n.23.)

4. EM

The documentary record with respect to the EM trade at issue was less substantial. What is clear is that Bolan's August 16, 2010 upgrade of EM was extremely weak, and no experienced trader would have believed that it would have any effect on EM's share price. (Sec. F.6.) Although Bolan upgraded his rating, in the same report, he also lowered his earnings per share estimate and dropped his valuation by 17%, a material decrease. Ruggieri could not possibly have thought that such a report would positively impact EM's share price. Indeed, the contemporaneous record shows that Ruggieri even made fun of Bolan for upgrading EM the day it came out. (*Id.*) Instead, on that slow August trading day, Ruggieri bought a small amount of EM because the stock had been down nearly 25% following an earnings report the previous week, and he saw it as an outlier in the sector. Stocks in that sector had decreased but not to such a great extent as EM, and Ruggieri thought the market would correct and increase its value, thereby justifying his purchase. (*Id.*) Furthermore, the trade was not atypical: Ruggieri had placed an identical, overnight 10,000-share trade in EM the previous November, which was not made before any Bolan report. (*Id.*) Finally, this trade was insignificant by any measure: the profit to Wells Fargo was a mere $266. (*Id.*)

Ignoring this evidence, the ALJ relied almost entirely on a purportedly parallel trade by Moskowitz. (Decision at 23; Sec. G.7.) As argued *infra* in Section I.C.8, Moskowitz's trades should be accorded no weight. Finally, although the ALJ acknowledged that – similar to the situation in PRXL – Ruggieri had made an identical overnight trade in EM the year before, he counted the fact *against* Ruggieri with respect to the EM trade, even though he highlighted it as further evidence of no tipping with respect to PRXL. (*Compare* Decision at 16 ("it was not so unusual for Ruggieri to carry overnight positions in PRXL") to 22-23 (noting one other overnight position in EM but dismissing it as "only once" and oddly emphasizing that it was made "immediately following" a research report by Bolan).)

C. Circumstantial Evidence Negates the Division's Tip Theory

In addition to the direct evidence showing no tip, the circumstantial evidence also supports a finding that Ruggieri did not trade based on any tips.

1. Ruggieri Had No Motive to Trade Illegally

Ruggieri's compensation for 2010 was fully *guaranteed* at $1.8 million, making him the highest paid trader on the Wells Fargo trading desk. (G.1.) Notably, the ALJ found the following:

- Any purported profits from the tips at issue would have had a negligible impact on Ruggieri's loss ratio ... even to the minute extent that those trades could marginally improve his overall loss ratio, it would have had no impact on his compensation for that year. (Decision, at 45-46 n.34.)

- However, there's no rational indication that either [Ruggieri or Bolan] believed that they could ... advance their careers by tipping and trading ahead of Bolan's ratings changes. The size of Ruggieri's overnight positions in advance of the ratings changes could never reasonably have been expected to result in a meaningful advantage. (*Id.* at 45.)

In other words, as the ALJ held, the circumstantial evidence of Ruggieri's financial motive to trade based on tips was non-existent. These findings contradict his holding that Ruggieri traded based on tips for four of the six trades at issue.

2. Bolan Had No Motive to Tip

Bolan similarly had no motive to provide tips. He was a rising star at Wells Fargo, who was held in extremely high regard by virtually everyone at the company. (Sec. H.2.a.) As the ALJ found, the Division's theory that there was a *quid pro quo* relationship between him and Ruggieri where

Bolan provided tips in exchange for positive feedback makes no sense. As the Decision makes clear in painstaking detail, Ruggieri's feedback about Bolan did not affect his promotion to director. (Sec. H.2.c.) Thus, as the ALJ himself found, tipping would have run counter to Bolan's interests. (Decision at 41.)

3. Ruggieri's Trading Was an Open Book

All of Ruggieri's trades were made in Wells Fargo's trading book, not a personal account, *i.e.*, on behalf of his employer and in heavily monitored accounts. (Sec. G.2.) There was no evidence of any deceptive conduct that is typical in insider trading cases. In fact, on the morning after *each* purported insider trade, Ruggieri even highlighted the ratings change by forwarding it to Brown. (*Id.*) If Ruggieri was in fact trading on the basis of those very ratings changes, why would he invite scrutiny of his trades?

Furthermore, in April 2011, when Wells Fargo began its internal investigation in connection with the channel checks that led to Bolan's termination, Ruggieri interceded on Bolan's behalf asking Wickwire if he had spoken with Bolan. If Bolan and Ruggieri had been conspiring in an insider-trading scheme, why would Ruggieri have done this when it would have been in his best interest to maintain a low profile? Furthermore, when Bolan and Ruggieri spoke after Ruggieri was terminated, they did not discuss getting their stories straight, but instead Ruggieri expressed shock at the termination, and the two discussed their frustration and disappointment with how they were treated by Wells Fargo at the end of their tenure. (Sec. G.2.) Thus, the lack of any deceptive conduct supports a finding by the Commission that he did not engage in insider trading. *See SEC v. Rorech*, 720 F. Supp. 2d 367, 416, ¶ 90 (S.D.N.Y. 2010)("The wholesale lack of any deceptive conduct in this case by Negrin or Rorech underscores that the SEC has failed to establish the necessary elements of its section 10(b) and Rule 10b–5 claim against the defendants.").

4. The Phone Records Do not Evidence a Tip

The Division's case relied on Bolan's cell phone records purportedly showing that Bolan called Ruggieri on the Wells Fargo trading floor prior to his trades.[6] The ALJ concluded that "Bolan had the means and opportunity to tip Ruggieri with respect to each trade in question" and that "this is *generally* established by phone calls that Bolan made to Ruggieri in advance of the trades and publication of the ratings changes." (Decision at 10 (emphasis added).) But the evidentiary issue is not *whether* such a tip *could* have happened generally, but whether the Division showed by a preponderance of the evidence that it happened specifically. "Potential 'access' to material nonpublic information, without more, is insufficient to prove that [the tippee] actually possessed any such information." *Rorech*, 720 F. Supp. 2d at 410, ¶51. The ALJ's finding that Bolan "had the means and opportunity" to tip Ruggieri would apply wholesale to all traders and analysts; especially those at an institution such as Wells Fargo, which encouraged regular dialogue between the two groups. (Sec. E.)

Indeed, Ruggieri demonstrated that there was no reliable basis for the Division to prove *by a preponderance of the evidence* that (1) Ruggieri and Bolan spoke and (2) that a tip was communicated. The ALJ reversed the burden of proof, finding "no evidence that any call at issue, between the numbers associated with Bolan and Ruggieri, involved *anyone but the two of them*." (Decision at 10.) This tasked Ruggieri with an insurmountable burden of affirmatively establishing that someone other than he spoke with Bolan on the 6210 line for the calls in question. First, there is no way to infer from phone records alone that it was more likely than not that Bolan spoke to Ruggieri, because Ruggieri's number rang on at least Short's phone turret. (Sec. G.3.) An incomplete analysis of Bolan's phone records proved that, on *at least* 41 occasions, Bolan spoke with *someone other than Ruggieri* on the main trading line or Ruggieri's designated line, often for several minutes, suggesting a

[6] Ruggieri and Bolan lived in different states during the relevant time period, so any purported tip had to have been remotely.

substantive discussion. (JR REB 67.)[7] This demonstrative exhibit was prepared by comparing Wells Fargo phone records with emails or other documents (such as credit card statements and travel records) that proved that Ruggieri was out of town. Not only was there no complete record of Ruggieri's absences from the office for long periods of time, there was also a complete absence of any documentation detailing when Ruggieri was away from his desk or unable to pick up his line because he was on the phone, at lunch, at a meeting, or simply away from the desk.[8]

Second, even if Ruggieri was on with Bolan for any of the calls in question, it was common for others to join the line and listen to the call, which would not have been conducive to communicating tips. (Sec. G.3.) Thus, the weight of the direct and circumstantial evidence did not support the following inference by the ALJ: "Although a handful of other individuals could have answered Ruggieri's phone at Wells Fargo if he was absent, Ruggieri was the primary user of his 6210 Line, and he was *almost certainly* at the New York office at the time of the calls in question." (Decision at 10 (emphasis added).) This misses the point. The factual question is not whether Ruggieri was in the office, but whether, for specific calls, he was on the phone with Bolan. This was never established. The ALJ wrongly gave the Division the benefit of the doubt for the lack of complete phone records in this case, which flies in the face of the Division's burden. (*Id.* at 21 ("The lack of a record of the call is not troubling given that there were no records from Ruggieri's phone and grossly incomplete records from Bolan's phone for that period.").)[9]

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[7] The ALJ wrongly described JR REB 67 as an exhaustive list of when Ruggieri was not in the New York office. Instead it is a demonstrative of examples of Bolan calls to 6210 or 6201 when Ruggieri was definitely out of the office. Not only was it not an exhaustive list of when Ruggieri was out of the office, it is also not probative to the issue of whether Ruggieri answered a call on the 6210 line *when he was in the office.*

[8] It is undisputed that Short answered Ruggieri's line when he was on another phone line or away from his desk. (Adm. FOF ¶231.)

[9] The Division admits that the "relevant phone records appear to be incomplete." (Br. at 12 n.7.)

Finally, even if the Division could establish that Bolan and Ruggieri spoke at a particular date and time, the calls must be viewed in context. It was their job to speak daily. Bolan and Ruggieri were both great at their jobs, in large part because they had great communication, both internally and externally. Thus, they knew their stocks, the market and their clients. Indeed, the ALJ noted that if he found Ruggieri's trading thesis persuasive, then he did not infer a tip because "it bears to reason that, although Bolan could have tipped Ruggieri by virtue of their phone calls, such calls do not necessarily mean that Bolan tipped him. Bolan and Ruggieri presumably had other subjects to discuss, since they were not just expected, but directed, to be in 'constant dialogue' by Wells Fargo." (Decision at 11.) However, the ALJ did not consistently apply his own reasoning, and instead simply guessed that a tip had been communicated for those trades for which he did not think Ruggieri's trading thesis was strong. This amount to speculation rather than a reasonable inference. *See Rorech*, 722 F. Supp. 2d at 371 (after bench trial in insider trading case, refusing to draw an inference based on the pattern of phone calls and trades, and holding that "[w]hile the SEC attempts to attribute nefarious content to those calls through circumstantial evidence, there is, in fact, no evidence to support this inference and ample evidence that undercuts the SEC's theory that the defendants engaged in insider trading"); *see also SEC v. Schvacho*, 991 F. Supp. 2d 1284, 1299-1302 (N.D. Ga. 2014) ("*Even if it was not, for some reason, available to the SEC in this case*, the fact still is there is not any evidence of the content of any communication between Enterline and Schvacho to support any communication of insider information—deliberately or carelessly—from Enterline and Schvacho and to conclude otherwise would require the Court to improperly speculate that there was.") (emphasis added).

5. <u>Ruggieri Did Not Trade Ahead of Half of Bolan's Ratings Changes</u>

The Division arbitrarily shortened the time period from the full tenure of Ruggieri's Wells Fargo career (August 2009 through March 2011) to March 2010 through March 2011. This skewed the statistics. In fact, Bolan issued ten ratings changes during Ruggieri's Wells Fargo career - double the five the Division focused on. (Sec. G.4.) Significantly, Ruggieri did not trade in front of *any* of the five reports that the Division left out. This means that Ruggieri *did not trade in front of half of all of Bolan's rating changes.* This undercuts the Division's theory that Ruggieri engaged in a scheme to profit on Bolan's ratings changes. There is no pattern evidencing such a scheme.[10]

6. Ruggieri Traded Ahead of Bolan's Research that Hurt His Position

The six trades strategically selected by the Division were a small subset of Ruggieri's trades in advance of a material Bolan research report about that stock. The undisputed evidence demonstrated that rating changes are not the only material category of analyst research. A change in earning estimates and/or valuation of a stock by an analyst are equally material. (Sec. G.6.) Analyzing *all* material reports issued by Bolan reveals that Ruggieri also traded in the opposite direction as Bolan's guidance. Thus, Ruggieri held a large overnight short position in CVD right before Bolan *increased* his valuation of that stock by 5%. He also held one of his largest overnight long positions in ICLR ahead of a report in which Bolan downgraded his estimate by nearly 20%. (Sec. G.4.) The fact that Ruggieri traded in the opposite direction of Bolan's material research – during a time period when Bolan was supposedly tipping Ruggieri about his reports – defeats any theory of an ongoing scheme. This broader analysis provides further evidence that Ruggieri did not trade based on inside information. By confining his analysis to only the six reports chosen by the Division, the ALJ wrongly inferred that Ruggieri traded based on tips for four of the six trades. (Decision at 12 ("he never traded in the opposite direction of Bolan's ratings changes *at issue.*") (emphasis added).)

[10] By limiting the time period analyzed, the Division also omitted a 2009 Bolan report where he initiated coverage in a stock with an outperform rating – the identical traits as BRKR. (Sec. G.4.) Ruggieri did not trade in front of this 2009 Report. As with the ratings changes, Ruggieri only traded in front of half of these initiations.

7. <u>The Division's Statistical Analysis is Fatally Flawed</u>

In the absence of direct evidence, the Division relied heavily on its expert, O'Neal, who opined that it was statistically impossible for Ruggieri not to have traded on tips. O'Neal compared the number of times Ruggieri held a position before any Bolan report with the number of times Ruggieri traded prior to a ratings change in the limited time period given to him by the Division. He created an equation to opine that "*[s]tatistical analysis points to Mr. Ruggieri purposefully trading ahead of the ratings change announcements.* ... the statistical probability that Mr. Ruggieri happened to trade overnight by chance in six of eight stocks with a Mr. Bolan rating change is virtually zero." (Div. 177 at 4 (emphasis in original).) His opinion is fatally flawed in a number of ways. First, the fact that two of the six trades did not involve "purposely trading ahead of ratings changes" shows that his report cannot withstand scrutiny. These trades destroy any alleged pattern.

Second, by falsely assuming that rating changes are *uniquely* material, O'Neal failed to include all of Bolan's *material* research in his analysis. Wells Fargo's own internal policies as well as reputable research in the field dictates that O'Neal should have included Bolan's changes in estimates and valuation changes. (Sec. G.6.) Thus, he disregarded at least 61 materially significant reports by Bolan for the Division's arbitrary time period, and 106 during Ruggieri's full tenure. (*Id.*) This created a misleading equation.

Third, O'Neal misunderstood Ruggieri's trading. He assumed that overnight risk is unique, and disregarded intraday risk. The Division never established a meaningful distinction between the two. In fact, Ruggieri's greatest loss during his Wells Fargo tenure was an intraday trade. (Sec. G.1.) Moreover, even focusing solely on overnight trades, he falsely assumed that Ruggieri rarely held overnight positions at Wells Fargo. During his approximately 415-day tenure at Wells Fargo, Ruggieri held overnight positions most nights – approximately 325 times – and they were all gross positions over $25,000. (Sec. G.6.)

The ALJ concluded that O'Neal's opinion "does not fully address the issue" and was not "an indictment of Ruggieri's explanation for the trades", but proceeded to rely on it anyway, stating that where "Ruggieri's thesis fail[ed] to plausibly explain his position preceding Bolan's report, given the statistical implausibility of such a position occurring by chance, the evidence weighs toward finding that Ruggieri traded based on Bolan's tip." (Decision at 10-11.) The Commission should disregard O'Neal's opinion in its entirety.

8. The ALJ Improperly Impugned Ruggieri with Speculation About Trading by Moskowitz

The ALJ also improperly speculated about purportedly similar trading by Moskowitz – even after stating before trial that such evidence "doesn't really prove anything about [Ruggieri's] conduct". (Sec. G.7.) The Division did not even establish by a preponderance of the evidence that Bolan tipped Moskowitz. Nonetheless, the ALJ credited Moskowitz's trades as evidence of Ruggieri's culpability, finding that when the trades were in "symbiosis" it was "probative of a common tipping scheme" and that there were "three specific occasions" where Moskowitz and Ruggieri had "parallel trades". (Decision at 11.)

In fact, the evidence demonstrated that the trading of Moskowitz and Ruggieri were not "symbiotic". First, one of the three purportedly "symbiotic" trades was PRXL. The finding that PRXL was a legitimate trade demonstrates that Moskowitz's trading has no probative value as to Ruggieri. That conclusion alone dictates that using the remaining two Moskowitz trades against Ruggieri is unsound.

Also, as noted by the ALJ, Moskowitz traded in front of only half of the reports. (Decision at 11; Sec. G.7.) What about the others? During the trial, the ALJ asked this very question of the Division's witness: "You're saying there were not trades, right, for three of them. Did you look to see if there were calls for those three, independent of trades?" (Tr. 1805:6-13.) In fact, Bolan and Moskowitz spoke multiple times prior to both the CVD and the ATHN upgrades, but Moskowitz did not trade. (Sec. G.7.) Moreover, there was no evidence that Moskowitz traded in front of the five other rating changes by Bolan that the Division left out.

This all suggests that Bolan did not tip Moskowitz and that the two spoke for other reasons. The ALJ dismissed this logical inference, speculating instead that "Moskowitz suffered from a debilitating disease that left him confined to his home, trading relatively modest sums in his personal accounts. He simply *may* not have had the wherewithal to trade on each tip he received." (Decision at 11 (emphasis added).) There was no evidence that Moskowitz's disease limited his ability to make phone calls to his broker (or even what that disease was), and it is illogical to surmise that when Moskowitz got off the phone with Bolan on the many times that they spoke prior to Bolan's ratings change in CVD and ATHN, he did not have the "wherewithal" to make a short call to his broker to follow through on an alleged tip. In sum, all evidence regarding the Moskowitz trades is irrelevant.

9. The Evidence Regarding Channel Checks Is Irrelevant

The Division raises Bolan's purported history of non-compliance with Wells Fargo policies as a way to improperly tarnish Ruggieri. It wants the Commission to conclude that Bolan and Ruggieri had a propensity to violate the federal security laws prohibiting insider trading, but such an inference is inappropriate. (*See* Fed. R. Evid. 404(b)(1) (prohibiting "evidence of a crime, wrong, or other act" to prove conformity of character).) Moreover, there is no prior bad act or even "other act" here. Wells Fargo's internal investigation did not concern insider trading, and Wells Fargo did not terminate Ruggieri for violating any internal policy. (*See* Div. 134 at 14 (describing Wells Fargo's reason for termination of Mr. Ruggieri as "loss of confidence" for "failure to escalate issues regarding the inappropriate dissemination of information").) It also does not prove Ruggieri's "motive, opportunity, intent..." to commit insider trading. (Fed. R. Evid. 404(b)(2).) The fact that Bolan sent channel check research to clients and later decided to publish the contents of that research is not probative as to Ruggieri. And it certainly does not evidence some kind of propensity to tip by Bolan. In fact, an analyst can change his mind and subsequently decide that information is more important than he initially thought and should be published. (Sec. G.8.a.)

Furthermore, the Commission should not credit the Division's portrayal of Bolan as a serial violator of Wells Fargo's policies through his emailing of unpublished channel check research to select "platinum" clients. Wells Fargo did not have a clear channel check policy in place at that time, and sharing information from channel checks was widespread. (Sec. G.8.b-c) In fact, the Global Head of Research had praised Bolan for sending his channel checks to "platinum" clients. (Sec. G.8.b.) Thus, this Court should disregard all evidence regarding Bolan's dissemination of channel check research.[11]

II. Ruggieri Did Not Provide a Personal Benefit to Bolan in Exchange for Any Tips

The Commission can dismiss this case for the independent reason that the Division has failed to meet its evidentiary burden under any of its various benefit theories. Ruggieri and Bolan did not share a "meaningfully close personal relationship." There was also no *quid pro quo* exchange whereby Ruggieri gave anything to Bolan *in exchange for* a tip. On this point, the Division did not produce a single fact supporting its thesis. Not only did the Division fail to offer any direct evidence that Bolan traded tips for positive job feedback, but the circumstantial evidence showed this theory of personal benefit to be an absurdity. Ruggieri's positive feedback had a negligible impact on Bolan's bonus, and the undisputed evidence was that Bolan would have been promoted regardless of any feedback from the trading desk, let alone from Ruggieri directly. Finally, there was no evidence that Bolan intended to benefit Ruggieri by gifting him with inside information.

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[11] The Division suggests that Ruggieri knowingly disseminated material unpublished research from one of Bolan's channel checks. (Br. at 10-11.) In fact, Ruggieri – who had been working at Wells Fargo for a matter of weeks at that time – was blind copied on an email from Bolan to Wells Fargo's "platinum" clients. (JR 5.) As stated in *supra* Sec. 8.c, Bolan's channel check practices were praised within Wells Fargo and pre-dated Ruggieri's arrival. Moreover, the Division admits that Ruggieri did not knowingly disseminate research prior to its publication. (Sec. 8.a.)

A. Bolan and Ruggieri Did Not Have a Meaningfully Close Relationship Sufficient to Establish Personal Benefit

To prevail in any insider trading case, the Division must prove that the tipper disclosed "non-public material information to the tippee for a personal benefit." (Decision at 28 (citing *Dirks v. SEC*, 463 U.S. 646 (1983); *Newman*, 773 F.3d at 438)). To establish benefit, there must be "proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Newman*, 773 F.3d at 452. In other words, an inference of benefit is inappropriate unless there is evidence of a *quid pro quo* that is material. *Id.*; *see also SEC v. Payton*, 14 Civ. 4644 (JSR), 2015 WL 1538454, at *4 n.2 (S.D.N.Y. Apr. 6, 2015) (noting that "the *Newman* decision suggests that the latter type of relationship (i.e. mere friendship) can lead to an inference of personal benefit only where there is evidence that it is generally akin to *quid pro quo*"); *see also United States v. Riley*, 13 Cr. 339 (VEC), 2015 U.S. Dist. LEXIS 26400, at *4 (S.D.N.Y. Mar. 3, 2015) ("The existence of some *quid pro quo* is the *sine qua non* of tipper liability for insider trading.").

Despite clear language requiring an "exchange"[12], the Division contends that *Newman* really only "requires no more than a 'meaningfully close personal relationship' . . . to prove the tipper's intention to benefit the tippee and therefore personal benefit." (Br. at 26.) The Division relies on six cases purportedly in support of this interpretation. (*Id.* at 26-27.) In fact, in each case there was either a *quid pro quo* or direct evidence that the tipper intended to benefit the tippee. *See United States v. Whitman*, 12 Cr. 125 (JSR), 2015 U.S. DIST. Lexis 96242, at *13-14 (S.D.N.Y July 22, 2015) ("testimony illustrated that the wheels of this inside information machine needed grease to run" including substantial amounts of money and competitor information "classic examples of an actual

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[12] *See also U.S. v. Newman*, 773 F.3d at 442 ("the Government must prove beyond a reasonable doubt that the tippee knew that an insider disclosed confidential information and that he did so in exchange for a personal benefit"); 447-448, 449, 450, 452, 453, 455 (same).

or potential *quid pro quo*"); *United States v. Salman*, 792 F.3d 1087, 1094 (9th Cir. 2015) (tipper testified that he intended the tip to benefit a close family member); *SEC v. Megalli*, No. 1:13-cv-3783-AT, slip op., 18-21 (N.D. Ga. Sept. 24, 2015) (tipper received stock tips and inside information about other companies in exchange for his own tips); *SEC v. McGinnis*, No. 5:14-cv-6, 2015 WL 5643186, at *31 (D. VT. Sept. 23, 2015) (tipper conceded that evidence "show[ed] the sharing of information went both ways"); *SEC v. Holley*, 11-0205 (DEA), 2015 WL 5554788, at *8 (D.N.J. Sept. 21, 2015) ("proof of personal benefit to Defendant exists in Defendant's repeated *admission* that he shared confidential information with his 'companion' and his first cousin with the intent to confer a benefit upon them.") (emphasis added); *In re Thomas D. Melvin, C.P.A.*, Rel. No. 3682, 2015 WL 5172974, at *5 n.38 (Sept. 4, 2015) (settlement in civil action required respondent not to contest that he benefited from providing tips).[13]

With respect to *Salman*, the U.S. Supreme Court recently granted *certiorari* review of the decision. The narrow question presented there is whether it is "enough that the insider and the tippee shared a close family relationship" in order to prove the personal benefit. *See* Question Presented, *available at* http://www.supremecourt.gov/qp/15-00628qp.pdf. This limited review of the benefit analysis underscores the Division's misinterpretation of *Newman*, and in fact, the resolution of *Salman* will not impact this case. Even if the Supreme Court were to carve out a category of "close family" relationships that could substitute for an exchange, Ruggieri and Bolan do not fall into that category. Not only is there no familial relationship at issue here, but as the ALJ found, after exhaustive briefing and a hearing, the work relationship between Ruggieri and Bolan was not a "meaningful, close or personal one." (Decision at 35; *see also* Sec. H.1.) Ruggieri and Bolan were

[13] *See also* Ruggieri's Motion for Summary Affirmance, dated October 26, 2015, at 9-10 (distinguishing cases cited by the Division in its Petition for Review); Ruggieri's Reply Motion in Further Support of Motion for Summary Disposition, dated February 18, 2015 at 9-12 (distinguishing cases cited in the Second Circuit *amicus* brief in *Newman*).

nothing more than work colleagues and work friends, and therefore, pursuant to both *Dirks* and *Newman*, a benefit may not be *inferred*. Accordingly, because the Division failed to prove that the relationship between Ruggieri and Bolan was sufficiently close to justify an inference of a benefit, the Commission should affirm the Decision.

B. There Was No Evidence of a *Quid pro Quo*

The Division contends that Ruggieri provided positive feedback about Bolan that "helped Bolan obtain a promotion and could have helped him obtain a higher bonus." (Br. at 33.) The Division cites to its purported "five key facts" in support of its theory. (*Id.* at 33-34.) But none of these facts – or, for that matter, *any* facts – in this case evidence an actual exchange. Thus, after hundreds of pages of briefing on the question of personal benefit and an eleven-day trial, the ALJ found "nothing comes close to arguably suggesting a *quid pro quo* between the two." (Decision at 46.)

The facts did not support a finding that Bolan tipped Ruggieri in exchange for anything at work. In fact, Bolan received widespread and virtually universal positive feedback from colleagues, including Ruggieri's predecessor. (Sec. H.2.a.) Moreover, Ruggieri's feedback had no impact on Bolan's compensation, and Bolan would have been promoted regardless of Ruggieri's feedback. (Sec. H.2.b-c.)[14]

The Division's theory lacks merit for another reason: Ruggieri had given positive feedback about Bolan, more than once, months before Bolan supposedly broke the law by tipping him to get that same feedback. Thus, on October 22, 2009, nearly nine months before the first trade (AMRI in

[14] The Division disputed this fact in Ruggieri's Proposed Findings of Fact, without basis. (Div. Resp. ¶ 370.) The Division appears to argue that but for the positive feedback from the trading desk – which included Ruggieri's feedback – Bolan would not have been promoted in two years, but rather in three. The testimony cited by Ruggieri in support of his proposed finding contradicts this. The ALJ expressly asked Wickwire "how much of a difference would it have made to the director nomination if Mr. Bolan had remained at the number 3 in trading impact" and Wickwire responded that it would have had very little impact, and that Bolan would "still have gotten promoted". (Tr. 1549:7-19.)

July 2010), in response to a quarterly request to all traders for analyst feedback, Ruggieri praised several analysts and described Bolan as "in a league of his own – great dialogue with clients and gets it." (JR 7.) Again, on April 16, 2010, the next quarter, Ruggieri praised three analysts including Bolan as the "most helpful". (JR 63.) This feedback about Bolan remained consistent after the purported tips for the other two quarters for which Ruggieri provided feedback at Wells Fargo. (JR 97, 115.) The only reasonable conclusion given these facts is that the feedback was genuine, and Bolan would never have tipped for it under these circumstances.[15]

C. There Is No Evidence that Bolan Intended to Benefit Ruggieri

The Division asks the Commission to simply infer that Bolan intended to tip Ruggieri, and it takes issue with the *dicta* in the Decision that it waived this issue. (Br. at 30.) But whether this issue was waived is not important, because the Division failed to prove that Bolan intended to benefit Ruggieri by gifting him with inside information.

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

> [a]lthough I had issued a subpoena ordering Bolan's appearance as a witness, the Division revealed – to the surprise of Ruggieri's counsel – that Bolan had returned to Nashville and objected to testifying [shortly after reaching a settlement with the Division]. . . . Bolan would have been uniquely situated to offer testimony on the issues, as I had expressed to the parties. Tr. 1341-42. Given the lack of sufficient evidence on personal benefit, the Division's failure to elicit Bolan's testimony further hindered its ability to meet its burden of proof.

[15] Perhaps in an effort to account for this decisive time line, the Division now suggests that Ruggieri's positive feedback in October 2009 was not in exchange for tips but rather in exchange for receiving Bolan's "very sensitive" channel check information that he had distributed to a "platinum" client. (Br. 17.) Even if that were accurate (which Ruggieri denies), it is undisputed that Bolan's channel check information was not inside information.

(Decision at 35-36.) In sum, the Division strategically chose not to call Bolan as a witness, even though the ALJ noted the obvious relevance of his testimony.[16] Thus, this case stands in contrast to cases where the intention to benefit via a tip was proven. *See, e.g.*, *Holley*, 2015 WL 5554788, at *8 (repeated admissions by tipper that he tipped with the intent to confer a benefit); *Salman*, 792 F.3d at 1094 (tipper *testified* that he intended the information to be a gift to a close family member).[17]

Finally, the Division faults the ALJ for speculating that Bolan tipped Ruggieri because he could not keep his mouth closed. (Br. at 36.) But the Division is merely asking the Commission to replace the ALJ's speculation with speculation that it prefers. The basis for all this speculation is the absence of a tip. This is is consistent with the Division's woeful failure to prove benefit under any of its multiple theories.

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[16] The Division's recitation of the facts with respect to Bolan's absence at trial is not accurate. (Br. at 22 n.10.) The Division announced "to the surprise of Ruggieri's counsel" that Bolan had left New York and returned to Nashville after settling with the Division, and was unavailable to testify given his refusal to travel back to New York City. (Decision at 36; Tr. 1616:23-1623:25.)

[17] The Division cites to *U.S. v. Gupta*, 11 Cr. 907 (JSR), 2015 WL 4036158, at *3 (S.D.N.Y. July 2, 2015) (S.D.N.Y. 2015), for the proposition that proof of intent to provide a *potential* benefit may substitute for a *quid pro quo*. (Br. at 31.) As discussed, there was no evidence that Ruggieri's positive feedback even had the potential to alter Bolan's trajectory at Wells Fargo, and there was certainly no proof of Bolan's intent to provide any benefit – whether potential or not.

CONCLUSION

For the above reasons, Ruggieri respectfully requests that the Commission find that he did not engage in insider trading, and dismiss this action against him.

Dated: New York, New York
February 10, 2016

Respectfully submitted,

SERPE RYAN LLP

By: ____________

Paul W. Ryan
Silvia L. Serpe
Beth Kressel Itkin
1115 Broadway, 11th Floor
New York, New York 10010
(212) 257-5011
pryan@serperyan.com

Attorneys for Respondent Joseph C. Ruggieri

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16178

In the Matter of Gregory T. Bolan, Jr. and Joseph C. Ruggieri, Respondents.

CERTIFICATE OF COMPLIANCE

I hereby certify that, as per the Commission Rule of Practice 450(d), Respondent's brief in support of its cross-petition for review of the initial decision and in opposition to the Division's brief on review of the initial decision, complies with the 16,000-word limit set forth in the Commission's Order Denying Motion for Summary Affirmance, Grating Petitions for Review, and Scheduling Briefs, dated December 10, 2015. Exclusive of the table of contents, table of authorities, and exhibits, Respondent's brief contains 15490 words, based on Microsoft Word's word count.

Dated: New York, New York
February 10, 2016

SERPE RYAN LLP

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

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16178

In the Matter of

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

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of 1) Respondent Joseph C. Ruggieri's brief in support of his cross-petition for review and in opposition to the Division's of Enforcement's brief on review of the initial decision; 2) Exhibits 1 through 23; and 3) Respondent's certificate of compliance upon the following parties on February 10, 2016 either by electronic mail in accordance with the parties' agreement, or as otherwise specified:

By Facsimile and Fed Ex:
Brent J. Fields, Secretary
Office of the Secretary
Securities and Exchange Commission
100 F Street N.E., Mail Stop 3628
Washington, DC 20549
Facsimile: (202) 772-9324

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

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

Dated: New York, New York
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SERPE RYAN LLP

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