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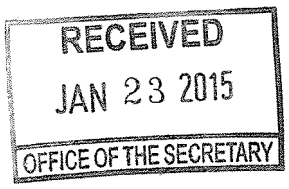

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16178

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In the Matter of

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

Respondents.

THE DIVISION OF ENFORCEMENT'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTIONS FOR SUMMARY DISPOSITION

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January 22, 2015

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The Division of Enforcement (the "Division") respectfully submits this memorandum in opposition to the motions for summary disposition filed by Respondents Gregory T. Bolan, Jr. ("Bolan") and Joseph C. Ruggieri ("Ruggieri") (collectively, "Respondents"). For the reasons set forth below, the Commission respectfully submits that Respondents' motions for summary disposition should be denied.

PRELIMINARY STATEMENT

Respondents seek a holding from this Court that insider trading does not violate the securities laws unless, in return for his inside tip, a tipper receives a monetary payment or some other direct pecuniary benefit from his tippee. If Respondents had their way, insiders would be free to tip all their friends and relatives with inside information as long as they received no monetary benefit. If that were the law, insider trading would run rampant in the United States securities markets, to the detriment of the investing public. But that is not the law. There is no personal benefit requirement in this misappropriation case and, even if there were, Respondents' conduct satisfied the correct personal benefit standard. This Court should therefore reject Respondents' unprecedented arguments and promptly deny their motions for summary disposition.

As background, from March 2010 to March 2011, Bolan, an influential research analyst at Wells Fargo Securities, LLC ("Wells Fargo"), repeatedly tipped his friends about his forthcoming analyst reports so that they could profit by trading ahead of his reports. On at least six occasions, Bolan tipped Ruggieri, Bolan's friend and a Wells Fargo trader, with his forthcoming ratings changes on different stocks. Each time, Ruggieri traded ahead of the ratings changes: he purchased stock just before five upgrades and sold stock short just before a downgrade. With Bolan's tips, Ruggieri generated over $117,000 in gross profits in an account in which he traded on Wells Fargo's behalf. As Bolan and Ruggieri knew, Wells Fargo's compliance policies strictly prohibited analysts from tipping traders (or anyone else) to forthcoming ratings changes. Yet Bolan nevertheless tipped

Ruggieri to help his friend make profitable stock trades with material non-public information: the timing and content of Bolan's research reports. He also tipped Ruggieri in return for Ruggieri's glowing reports on Bolan's performance, which later helped Bolan obtain a job promotion and raise. Bolan similarly tipped Trader A three times with some of the same information. Bolan sought to give Trader A — a close, long-time friend and professional securities trader who was then unemployed and suffering from a debilitating chronic disease — inside information that was as good as a gift of money.

Against this background, Respondents each move for summary disposition based on the recent opinion by a panel of the United States Court of Appeals for the Second Circuit in *United States v. Newman*, __ F.3d __, 2014 WL 6911278 (2d Cir. Dec. 10, 2014).[1] Respondents move on a single ground: that, under *Newman,* the Commission's Order instituting these proceedings (the "OIP") fails to adequately plead that Bolan received a personal benefit for tipping Ruggieri and Trader A. Respondents cite no instance in which a Commission administrative law judge has granted summary disposition to respondents on any ground. Indeed, the Commission has noted that summary disposition should rarely be used to resolve administrative proceedings in which respondents contest their liability. In any event, Respondents' motions should be denied on their merits for four separate reasons.

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[1] The Second Circuit's opinion in *Newman* is not final, because the mandate has not been issued. *See* Fed. R. App. P. 41(c), advisory committee's note on 1998 amendments ("A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed."); *Tafari v. Weinstock*, 2012 WL 1067810, at *3 n.4 (W.D.N.Y. 2012); *Jones v. Goord*, 2007 WL 2903779, at *3 n.3 (W.D.N.Y. 2007). The United States Department of Justice has publicly stated that it is reviewing its appellate options in the case. A petition for rehearing *en banc* would stay the mandate and "suspend the finality of the court of appeals' judgment." *See* Fed. R. App. P. 41(d)(1) & advisory committee's note on 1998 amendments. If the Second Circuit grants any such petition, "the court [would] enter[ ] a new judgment after the rehearing." *See* Fed. R. App. P. 41, advisory committee's note on 1998 amendments.

First, Respondents wrongly assume that in insider trading cases based on the misappropriation theory, such as this one, the Division must prove that the tipper received a personal benefit. In fact, as several courts have concluded, personal benefit is an element only of a classical theory insider trading case, not a misappropriation theory case. These courts have reasoned — based on the Supreme Court's rationale for requiring personal benefit in classical theory cases, in *Dirks v. SEC*, 463 U.S. 646 (1983) — that the distinct breach of duty at issue in misappropriation cases can be proven without any showing of personal benefit to the tipper. Therefore, on this ground alone, Respondents' motions should be denied.

Second, even if personal benefit were an element in this misappropriation theory case, Bolan's friendship with Ruggieri and Trader A alone should suffice to establish Bolan's personal benefit from tipping them. Respondents' narrow, contrary reading of *Newman* cannot be reconciled with *Dirks*. *Dirks'* personal benefit requirement looks to the tipper's motive for the tip. It prohibits disclosures of confidential information made for an improper, self-dealing purpose, but not disclosures properly intended to benefit the tipper's employer or for some other non-nefarious purpose. Indeed, *Dirks* expressly holds that a tipper's gift of confidential information to a trading friend constitutes a personal benefit to the tipper, as if the tipper himself illegally traded and then gave his friend the profits. If, as Respondents contend, *Newman* holds that friendship alone is no longer enough to establish personal benefit, this Court should reject *Newman,* which binds neither this Court nor the Commission. Such a narrow reading would contradict not only *Dirks* but also the Commission's own prior opinion and the decisions of the five other United States Courts of Appeals to have considered the issue.

Third, even if the Court were to apply a narrow reading of *Newman* here, the OIP alleges facts beyond mere friendship of a social or casual nature that suffice to establish personal benefit. Beyond their clear friendship, Bolan tipped Ruggieri at least in part because he wanted Ruggieri to

assist with Bolan's own career. Bolan's plan succeeded, and he ultimately received a tangible, pecuniary benefit for tipping Ruggieri: Ruggieri's praise of Bolan, filtered through Ruggieri's supervisors, eventually helped Bolan obtain a promotion to director and a corresponding raise. Even a narrow reading of *Newman* requires nothing more.

Finally, public policy weighs heavily in favor of denying Respondents' motions. Analysts should not be allowed to tip their friends and relatives to their forthcoming analyst reports with impunity. Not only does such proprietary information belong to the tippers' employers, as Wells Fargo's own prohibitions on such conduct demonstrate, but allowing analysts to do so would give employees of securities firms and those with whom they share material non-public information a windfall at the expense of honest securities markets. For all these reasons, the Court should promptly deny Respondents' motions and allow the Division to prove its claims at the hearing.

STATEMENT OF FACTS

I. BACKGROUND: BOLAN, RUGGIERI, AND TRADER A

In June 2008, over two years after beginning his analyst career, Bolan joined Wells Fargo, a registered broker-dealer, as an equity research analyst and registered representative. (Ex. 39 at 8–9; Ex. 110 at 10–12.)[2] Bolan focused his research on three niche sub-sectors of the health care industry: pharmaceutical services or contract research organizations, health care information technology, and life science tools. (Ex. 110 at 15–18.) Wells Fargo published Bolan's research reports. (Exs. 3, 46, 53, 60, 63 & 90.)

In August 2009, after about eight years of working as an equity trader, Ruggieri joined Wells Fargo as a trader of health care stocks and a registered representative. (Ex. 111 at 10, 15–16.) Ruggieri executed customer transactions and placed principal trades on Wells Fargo's behalf. (*Id.* at

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[2] All exhibit citations refer to the exhibits attached to the Declaration of Sandeep Satwalekar, filed in support of this opposition memorandum.

17–21.) Wells Fargo paid him a salary and approximately 6% of the monthly net profit and commissions in his Wells Fargo trading account. (*Id.* at 23–25.) As the Division anticipates proving at the hearing, Ruggieri typically held his stock positions (both long and short positions) for less than a day. Ruggieri very rarely held stock positions overnight. Holding positions overnight would have exposed his trades to the risk of stock prices moving against him the next day based on news or events that occurred after the securities markets closed.

While at Wells Fargo, Bolan and Ruggieri became "pretty good friends," as Ruggieri has admitted. (Ex. 111 at 51–52.) Bolan and Ruggieri spoke with each other "on a daily basis" and "[o]ften multiple times a day." (Ex. 111 at 51, 75.) They talked not only about work but also about "stuff outside of work." (*Id.* at 51–52; Ex. 110 at 56.)

Similarly, Bolan and Trader A were "old," "close" friends, as Bolan has admitted. (Ex. 110 at 112–13; Ex. 119.) Trader A, who had previously worked in the securities industry, suffered from a debilitating chronic disease that rarely permitted him to leave his apartment. (Ex. 110 at 110–12; Ex. 136.) From June 2009 through November 2010, Trader A was unemployed. (Bolan Mem. 3 ("Trader A's unemployment is confirmed on his Brokercheck report.").)[3] During that time, Trader A actively traded in his personal brokerage accounts. In May 2013, Trader A died.

II. BOLAN'S RESEARCH REPORTS AND RATINGS CHANGES

Wells Fargo published research reports under Bolan's name that detailed his research about public companies in the health care sub-sectors he covered. (Exs. 3, 46, 53, 60, 63 & 90.) These reports typically included one of three recommendations about the prospects of the covered company's stock: "outperform," "market perform," or "underperform." (*Id.*) As the reports' appendices made clear, "outperform" meant investors should "buy" the stock, "market perform"

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[3] "Bolan Mem." refers to Respondent Gregory T. Bolan, Jr.'s Motion for Summary Disposition Against All Claims and Memorandum in Support. "Ruggieri Mem." refers to Respondent Joseph C. Ruggieri's Motion for Summary Disposition.

meant investors should "hold" the stock, and "underperform" meant investors should "sell" the stock. (*Id.*)

At times, Bolan's research reports changed Wells Fargo's prior rating on a particular company's stock — for instance, from "market perform" to "outperform," or from "hold" to "buy." (Exs. 3, 53, 60 & 63.) When Bolan changed his rating, he typically included the word "upgrade" or "downgrade" in the research report's title. (*Id.*) For example, on April 17, 2010, Wells Fargo issued a report about Parexel International Corporation ("Parexel"), traded under the ticker PRXL, that downgraded Parexel to a "market perform" or "hold" rating from its previous rating of "outperform" or "buy." (Ex. 46.) The report's title was "PRXL: Downgrading to Market Perform: Optimism Running High and Valuations Running Even Higher." (*Id.*) On occasion, Bolan similarly initiated coverage on a stock for the first time by rating it as outperform/buy or underperform/sell, rather than as market perform/hold. (Ex. 90.)

III. BOLAN'S INFLUENTIAL ANALYST REPORTS MOVED STOCK PRICES.

Bolan's clients were "major institutional investors, including large mutual funds and hedge funds" that followed his reports and ratings. (Ex. 27 at 3.) In the niche sub-sectors he covered, Bolan had a reputation as an influential, up-and-coming analyst. (Ex. 110 at 25–26 (Bolan testimony that clients had told him he was one of the best analysts covering the contract research organizations sub-sector); Ex. 111 at 51–52 (Ruggieri testimony that Bolan was "an up and comer in his analyst group").) Indeed, Ruggieri often emailed Bolan's published ratings changes to Wells Fargo clients. (Ex. 113.)

Bolan's reports garnered praise from others inside and outside Wells Fargo. For example, in 2010, Bolan's supervisor praised Bolan in his director nomination form: "Greg [Bolan] is viewed by most within the department as a rising star." (Ex. 27 at 3.) Also in 2010, a prestigious publication,

Institutional Investor, named Bolan the "Best up and Comer" equity analyst that year in the health care technology and distribution sectors. (Ex. 40.)

Consistent with his reputation, Bolan's ratings changes consistently moved the stock prices of the companies he covered. (Ex. 128.) For example, after Bolan rated a company's stock as outperform/buy, the stock price consistently rose. (*Id.*)

Both Bolan and Ruggieri knew that Bolan's reports moved stock prices. For instance, after Wells Fargo published his report upgrading a stock, Bolan emailed a friend: "[G]onna be some unhappy folks today (aka shorties)" — in other words, those holding a short position in the stock would lose money as the stock price rose following Bolan's upgrade. (Ex. 43.) In another instance, after Bolan emailed one of his recently-published research reports to Ruggieri, Ruggieri replied: "Still moving stocks." (Ex. 114.)

IV. BOLAN AND RUGGIERI KNEW THAT WELLS FARGO PROHIBITED TIPPING AND TRADING AHEAD OF RATINGS CHANGES.

Wells Fargo's compliance polices prohibited employees from tipping or trading on material nonpublic information. (Ex. 17.) The compliance policies also specifically prohibited research analysts from sharing the timing and contents of forthcoming research reports with anyone outside the research department. (Ex. 30 at 21–22; Ex. 69 at 34–35.) In fact, Wells Fargo held annual compliance meetings for its research department. (Exs. 31 & 106.) Before each such meeting, Wells Fargo circulated a PowerPoint presentation to research department employees, including Bolan. (Exs. 30 & 69.) In 2009 and 2010, the annual compliance presentation informed research analysts that there should be "no previewing research/opinion/estimates," and that research analysts should have "no discussions on timing and views of reports with anyone outside of [the] research [department]." (Exs. 30 & 69.) Bolan received the 2009 and 2010 presentations by email and verified that he had dialed into the annual compliance meetings. (Exs. 31 & 106.)

In April 2009, to reinforce the importance of this policy, Wells Fargo sent Bolan a compliance bulletin. (Ex. 7.) The bulletin, entitled "Trading Ahead of Research Reports – FINRA Rule 5280," informed Bolan that Wells Fargo "maintain[ed] Information Barriers to prohibit the flow of information about pending research reports outside of the Global Research Department so as to prevent [Wells Fargo's] Trading Departments from front-running the publication of a research report for the benefit of the firm or its clients." (*Id.*) The bulletin further advised Bolan that Wells Fargo research analysts "MAY NOT preview changes in research opinions or estimates, or contradicting or signaling a change from your published views." (*Id.*) In October 2009, Bolan's supervisor reiterated Wells Fargo's policy by reminding Bolan and others: "Obviously, if you are contemplating or in the process of changing your rating; [sic] valuation range and/or estimates, you are required to first publish a note before you can discuss those changes with anyone." (Ex. 107.)

Similarly, Wells Fargo annually reminded its trading desk employees that it prohibited them from trading ahead of its research reports. In 2009 and 2010, Wells Fargo's annual compliance presentation informed Ruggieri and other traders that "[i]t is the responsibility of each employee and Supervisory Principal of each trading desk to ensure that W[ells] F[argo] S[ecurities] trading team members do not buy or sell positions in anticipation of the dissemination of written research." (Exs. 5 at 18; Ex. 108 at 49.) In 2009 and 2010, Ruggieri received these presentations and signed attendance sheets verifying that he attended the annual compliance meetings. (Exs. 79 & 109.)

As Bolan has admitted, he understood that he was prohibited from communicating the contents of his research reports before they were published. (Ex. 110 at 179–87.) Similarly, Ruggieri has admitted that he understood he was prohibited from trading with knowledge of a forthcoming research report. (Ex. 111 at 165–66.)

V. BOLAN REPEATEDLY TIPPED RUGGIERI AND TRADER A, WHO THEN TRADED ON THE INFORMATION.

From March 2010 through March 2011, Bolan published eight research reports changing his rating of the covered stock, including one initiation of coverage with an outperform/buy or underperform/sell rating. (Ex. 133.) Before six of those eight ratings changes, Bolan tipped Ruggieri to his forthcoming ratings change before Wells Fargo published the report, as described in detail below. Before three of the same ratings changes, Bolan tipped Trader A to his forthcoming ratings change. Each time they were tipped, Ruggieri and Trader A either purchased the relevant stock ahead of Bolan's upgrades or sold the relevant stock short ahead of Bolan's downgrade. (Exs. 130 & 131.) Ruggieri and Trader A then held these positions at least overnight, although Ruggieri otherwise held overnight positions only very rarely. (*Id.*) Once Wells Fargo issued Bolan's reports, the stock prices of the companies Bolan upgraded rose, while the stock price of the company Bolan downgraded sank. (Ex. 128.) All six times, Ruggieri and Trader A closed out their positions with profitable trades. (Exs. 130 & 131.)

From his trades on Bolan's six tips, Ruggieri generated over $117,000 in illegal profits in his account at Wells Fargo.[4] (Ex. 130.) Ruggieri personally received 6% of the monthly net profit and loss and commissions in his Wells Fargo trading account. (Ex. 111 at 23–25.) Ruggieri's illegal trades allowed him to gain an edge based on material, non-public information and decrease the losses in his trading account while trading in volumes small enough to stay under Wells Fargo's compliance radar. In addition, Trader A generated illegal profits of over $10,000 from his trades on Bolan's three tips. (Ex. 131.)

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[4] Wells Fargo has agreed to place the amount it received from Ruggieri's trading in reserve pending the adjudication of this matter and has agreed to pay that amount if the Court orders Ruggieri or Bolan to disgorge ill-gotten gains. (Ex. 115.)

A. Bolan Tipped Ruggieri and Trader A to His Downgrade of Parexel.

On or around March 29, 2010, Bolan began drafting a forthcoming research report that would downgrade Parexel. (Ex. 47, attachment; Ex. 110 at 84–85.) Before the market opened on March 30, 2010 and again on the morning of March 31, Bolan spoke with Ruggieri by phone. (Ex. 121.) On both March 30 and 31, Ruggieri sold more Parexel shares than he bought in his Wells Fargo trading account, and he ended March 31 short 10,550 Parexel shares. (Ex. 130 at 1.) On April 5, Ruggieri once again sold more Parexel shares than he bought and ended the day short 27,750 shares. (*Id.*) On the evening of April 5, Ruggieri and Bolan spoke again. (Ex. 121.) The same evening, Bolan spoke with Trader A. The next day, Ruggieri sold more Parexel shares short and ended the day short 52,500 shares.[5] (*Id.*) The same day, although he had not traded Parexel shares in at least the preceding six months, Trader A sold 2,000 Parexel shares short. (Ex. 131 at 1.)

On April 7, 2010, before the market opened, Wells Fargo published Bolan's research report, entitled "PRXL: Downgrading to Market Perform Optimism Running High and Valuation Running Even Higher." (Ex. 46.) The report downgraded Wells Fargo's rating on Parexel from outperform/buy to market perform/hold. (*Id.*) When the market opened, Parexel's stock price sank 3.2%. (Ex. 128.) Over the course of the day, Parexel's trading volume increased 163% relative to the stock's average daily trading volume on the thirty days before and after the downgrade. (Ex. 129 at 6.) When the market closed on April 7, Parexel's stock price had dropped 4.34% from the previous day's closing price. (Ex. 128.) On April 7, Ruggieri covered his entire short position in Parexel and generated gains of $24,944, while Trader A covered his short position in Parexel for a profit of $1,007. (Ex. 130 at 1; Ex. 131 at 1.)

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[5] Although Ruggieri had previously traded Parexel shares, he had held only three overnight positions in Parexel stock in the prior six months and each position was significantly smaller — ranging from 54 shares to 10,000 shares — than his final overnight position of 52,500 shares.

B. Bolan Tipped Ruggieri to His Upgrade of Covance Inc.

On Sunday, June 13, 2010, Bolan obtained approval from his supervisor to upgrade Covance Inc. ("Covance"), traded under the ticker CVD. (Ex. 54.) The next morning, on June 14, Bolan spoke with Ruggieri by phone. (Ex. 122.) Later that day, Ruggieri purchased 40,000 shares of Covance stock in his Wells Fargo account and held the position overnight. (Ex. 130 at 2.) Although Ruggieri had previously traded Covance stock, he had only once held an overnight position in Covance — consisting of merely 76 shares — in the previous six months.

On June 15, 2010, before the market opened, Wells Fargo published Bolan's research report, entitled "CVD: Opportunities Multiply as CVD Seizes Them – Upgrading Rating Revising Estimates – Increasing Valuation Range." (Ex. 53.) Bolan had upgraded his rating from market perform/hold to outperform/buy. (*Id.*) When the market opened, Covance's stock price increased 2.19%. (Ex. 128.) Over the course of the day, Covance's trading volume increased 58% relative to Covance's average daily trading volume on the thirty days before and after Bolan's upgrade. (Ex. 129 at 4.) When the market closed on June 15, Covance's stock price had risen 0.55% from the previous day's closing price. (Ex. 128.) On June 15 and 16, Ruggieri sold all the 40,000 Covance shares he had accumulated for a profit of $17,445 in his Wells Fargo account. (Ex. 130 at 2.)

C. Bolan Tipped Ruggieri and Trader A To His Upgrade of Albany Molecular Research, Inc.

By at least July 1, 2010, Bolan had begun drafting a report to upgrade Albany Molecular Research, Inc. ("Albany"), traded under the ticker AMRI. (Ex. 56.) On the evening of July 1, 2010, Bolan called Ruggieri, who emailed Bolan, "Call u right back." (Ex. 57.) Bolan replied: "Cool – call my home." (*Id.*) The next day, July 2, Ruggieri made net purchases of 35,050 shares of Albany stock in his Wells Fargo trading account and held the position over the next four nights. (Ex. 130 at 4.) Although Ruggieri had previously traded Albany stock, he had held only three overnight

positions in Albany stock in the previous six months. Those positions consisted of 1 share, 79 shares, and 48 shares of Albany, respectively.

On June 30, 2010, after the market had closed, Bolan spoke with Trader A. (Ex. 123.) Over the next two days, July 1 and 2, Trader A began purchasing Albany shares. (Ex. 131 at 2.) By the market's close on July 2, Trader A had amassed 24,252 Albany shares. (*Id.*) In at least the six months before these trades, Trader A had not traded Albany shares.

Before the market opened on July 6, 2010, the next trading day, Wells Fargo published Bolan's research report, entitled "AMRI: Upgrade R[a]t[in]g & Raise Est[imate] on Three Recent Developments Upgrading to Outperform." (Ex. 3.) Bolan had upgraded his rating from market perform/hold to outperform/buy. (*Id.*) When the market opened, Albany's stock price increased 5.36%. (Ex. 128.) Over the day's course, Albany's trading volume increased 40% relative to Albany's average daily trading volume on the thirty days before and after the upgrade.[6] (Ex. 129 at 1.)

On July 6, Ruggieri sold most of his Albany position. (Ex. 130 at 4.) He sold the remainder within a week. (*Id.*) In total, his trades generated a profit of $9,334 in his Wells Fargo account. (*Id.*) Similarly, on July 6, Trader A sold his entire long position in Albany for a profit of $8,400. (Ex. 131 at 2.)

D. Bolan Tipped Ruggieri and Trader A to His Upgrade of Emdeon Inc.

On August 12, 2010, Bolan requested approval from his supervisor to upgrade Emdeon, Inc. ("Emdeon"), traded under the ticker EM. (Ex. 64.) Shortly after the market opened on Friday, August 13, Bolan spoke with Ruggieri. (Ex. 124.) The same morning, Bolan also spoke with Trader A. (*Id.*) That day, after he and Bolan spoke, Ruggieri purchased 10,000 shares of Emdeon stock in

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[6] When the market closed on July 6, Albany's price had fallen 0.18% from the previous day's closing price. That day, the stock prices of Albany's entire health care subsector declined, but Albany's price declined less than the average of its peers.

his Wells Fargo trading account. (Ex. 130 at 3.) The same day, Trader A purchased 5,000 shares of Emdeon stock. Trader A had not traded Emdeon shares in at least the preceding six months. (Ex. 131 at 3.) Although Ruggieri had previously traded Emdeon stock, he had held no overnight positions in Emdeon stock in at least the preceding six months. Yet Ruggieri held his 10,000-share Emdeon position over the next three nights. (Ex. 130 at 3.)

On August 16, 2010, Wells Fargo published Bolan's research report, entitled "EM: Valuation, Sentiment At Depressed Levels – Upgrading to OP [Outperform]...." (Ex. 63.) Bolan had upgraded his rating from market perform/hold to outperform/buy. (*Id.*) When the market opened that morning, Emdeon's stock price rose 1.10%. (Ex. 128.) Over the day's course, Emdeon's trading volume increased 107% relative to Emdeon's average daily trading volume on the thirty days before and after the upgrade. (Ex. 129 at 5.) When the market closed on August 16, Emdeon's price had risen 1.38% from the previous day's closing price. (Ex. 128.)

On August 16, Ruggieri sold his entire position in Emdeon stock for a profit of $266. (Ex. 130 at 3.) The same day, Trader A sold his Emdeon position for a profit of $835. (Ex. 131 at 3.)

E. Bolan Tipped Ruggieri to His Upgrade of athenahealth, Inc.

By January 18, 2011, Bolan and Ruggieri had discussed Bolan's bullish (or positive) views of athenahealth, Inc. ("Athena"), traded under the ticker ATHN. In fact, on January 18, Ruggieri sent an instant message about Bolan's views on Athena to another Wells Fargo employee: "ATHN m[ana]g[e]m[en]t sounds bulled up ... [B]olan getting bullish ... would not be short." (Ex. 120.)

On Friday, February 4, 2011, Bolan obtained approval from his supervisor to upgrade Athena. (Ex. 61.) Less than two hours later, Bolan called Ruggieri but was unable to reach him. (Ex. 125.) Later that afternoon, Bolan spoke to Ruggieri. (*Id.*)

On Monday, February 7, 2011, the next trading day, Ruggieri purchased Athena shares for a net long position of 13,500 shares. (Ex. 130 at 5.) Ruggieri held his 13,500-share net position

overnight. (Ex. 130 at 5.) Although Ruggieri had previously traded Athena stock, he had held only one overnight position in Athena stock (lasting two weeks) during the preceding six months.

On February 8, 2011, before the market opened, Wells Fargo published Bolan's research report, entitled "ATHN: Soaring Into The Clouds – Upgrading to Outperform Significantly Lifting Estimates and Valuation Range." (Ex. 60.) Bolan had upgraded his rating from market perform/hold to outperform/buy. (*Id.*) When the market opened that day, Athena's stock price rose 5.66%. (Ex. 128.) Over the day's course, Athena's trading volume increased 116% relative to Athena's average daily trading volume on the thirty days before and after the upgrade. (Ex. 129 at 2.) When the market closed on February 8, Athena's price had risen 4.05% from the previous day's closing price. (Ex. 128.) On February 8, Ruggieri sold his entire Athena position for a profit of $40,686. (Ex. 130 at 5.)

F. Bolan Tipped Ruggieri to His Positive Initiation of Coverage on Bruker Corp.

On March 22, 2011, Bolan obtained approval from his supervisor to initiate his coverage of Bruker Corp. ("Bruker"), traded under the ticker BRKR, with an outperform/buy rating. (Ex. 127.) The next day, shortly after the market opened, Bolan spoke with Ruggieri by phone.[7] (Ex. 126.) That day, March 23, Ruggieri purchased Bruker shares for a net long position of 5,000 shares. (Ex. 130 at 6.) From March 24 through March 29, Ruggieri continued to purchase Bruker stock and amassed a long position of 25,000 shares. (*Id.*) Although Ruggieri had previously traded Bruker stock, he had not held any overnight positions in Bruker stock in at least the preceding six months.

On March 29, 2011, after the market closed, Wells Fargo initiated coverage of Bruker by publishing Bolan's research report, entitled "BRKR: Initiating Coverage With An Outperform Rating One of the BEST Ways To Harvest Value In A Growing Industry." (Ex. 90.) Bolan rated

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[7] The OIP mistakenly alleges that this conversation occurred before the market opened. (OIP ¶ 29.)

Bruker as outperform/buy. (*Id.*) The next day, when the market opened, Bruker's stock price rose 2.56%. (Ex. 128.) Over the day, Bruker's trading volume increased 42% relative to Bruker's average daily trading volume on the thirty days before and after the report. (Ex. 129.) When the market closed on March 30, Bruker's stock had risen 3.36% from its closing price the previous day. (Ex. 129 at 3.) On March 30, Ruggieri sold his entire position in Bruker for a profit of $24,452 in his Wells Fargo account. (Ex. 130 at 6.)

VI. BOLAN BENEFITTED FROM TIPPING RUGGIERI AND TRADER A.

Bolan tipped Ruggieri repeatedly not only to help his friend but also to curry favor with Ruggieri in a mutual arrangement in which each helped boost the other's career. Indeed, Bolan and Ruggieri viewed themselves as "partners" trying to improve the standing of Wells Fargo's health care research and trading departments to benefit their own careers.[8] (Ex. 44.) The profits Ruggieri generated from his illegal, under-the-radar trades boosted the performance of the Wells Fargo account he oversaw (by decreasing its losses) and provided him with a corresponding boost to his bonus.

As Bolan has admitted, Ruggieri was Bolan's primary contact on Wells Fargo's trading desk. (Ex. 110 at 57.) Of all the traders on Wells Fargo's trading desk, Bolan spoke most frequently with Ruggieri. (Ex. 111 at 54-55.) Based in part on Bolan's illegal tips — but without disclosing the tips — Ruggieri gave his manager glowing reports of Bolan's performance. (Ex. 27 at 5.) Ruggieri's managers in turn provided positive feedback to Bolan's manager when he considered Bolan for a

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[8] Bolan wrongly asserts that the Division's December 15, 2014 letter to the Court "misquoted" this email. (Bolan Mem. 5.) The Division accurately quoted the word "partner" from the email and included brackets around the suffix, "-ship," to show that the Division had added this suffix. (*Compare* Ltr. from P. Krishnamurthy to Judge Patil, dated Dec. 15, 2014, at 2, *with* Ex. 44.) In the rest of its sentence, free of any quotation marks, the Division summarized the inference the Court should draw from this email and other facts. (*Id.*) The Division does not — and did not — contend that this email itself shows nefarious activity but rather that it demonstrates Respondents' mutual arrangement to benefit each other's career.

promotion to a director position. (*Id.*) In late 2010 or early 2011, reflecting the trading desk's glowing reviews of Bolan, Bolan's supervisor wrote in Bolan's director nomination form: "Greg [Bolan] is among the best analysts in the department in terms of his dialogue with trading. We consistently hear from trading that Greg [Bolan] provides great information flow to the desk and they are able to monetize his efforts. They often hold [him] out as the standard." (*Id.*; Ex. 132 at 69–70.) This feedback helped Bolan achieve the promotion and the accompanying raise of $50,000 in approximately March 2011. (Ex. 118.) Contrary to Bolan's assertion that the "undisputed evidence" shows his promotion was based solely on input from clients, Bolan's supervisor, Todd Wickwire, testified that the positive feedback from the Wells Fargo trading desk favorably factored into Bolan's promotion. (Bolan Mem. 9–10; Ex. 132 at 79–80.)

Bolan tipped Trader A to help a trusted friend — who had worked in the securities industry but was then unemployed and suffering from a debilitating disease — with a gift of inside information as good as cash. (Ex. 110 at 110–12 (describing his friendship with Trader A and Trader A's illness); Bolan Mem. 3 (Trader A was unemployed); Ex. 136.) Bolan had similarly helped Trader A on another occasion, when Trader A was looking for a job, by recommending Trader A to Wells Fargo's trading desk. (Ex. 119.)

VII. Wells Fargo Terminated Ruggieri and Bolan Resigned After Wells Fargo Questioned Them About Bolan's Disclosure of Unpublished Research Findings.

In April 2011, Wells Fargo terminated Ruggieri after it uncovered an email in which Bolan had sent unpublished research findings to Ruggieri and Ruggieri had in turn forwarded this proprietary information to select Wells Fargo clients. (Ex. 15 at 19; Ex. 134 at 14.) Bolan later published a note incorporating this information. (Ex. 15 at 21–22.) Ruggieri is (or recently was) a trader at International Strategy & Investment Group LLC, with his primary office in Raleigh, North Carolina. (Ex. 134 at 3.)

In April 2011, Bolan resigned from Wells Fargo after Wells Fargo questioned him about emailing his research findings to Ruggieri and Wells Fargo customers before publishing the findings. (Ex. 135 at 12.) Bolan is (or recently was) a research analyst at Sterne Agee Group, Inc. in Nashville, Tennessee. (*Id.* at 3; Ex. 39 at 8.)

SUMMARY DISPOSITION STANDARD

Under Commission Rule of Practice 250, the OIP's factual allegations "shall be taken as true, except as modified by stipulations or admissions made by [the Division], by uncontested affidavits, or by facts officially noted." 17 C.F.R. § 201.250. The Court cannot grant Respondents' motions unless there is "no genuine issue with regard to any material fact" and Respondents are "entitled to a summary disposition as a matter of law." *Id.* As the Commission explained in its Revision Comment to Rule 250: "Typically, Commission proceedings that reach litigation involve basic disagreement as to material facts. Based on past experience, the circumstances when summary disposition prior to hearing could be appropriately sought or granted will be comparatively rare." Rule 250, Revision Comment, Rel. No. 35833, 1995 WL 368865, at *68 (June 9, 1995).

Respondents cite no decision granting summary disposition in a Commission proceeding where respondents contest their liability. The only context the Division has found in which administrative law judges have granted summary disposition is in follow-on proceedings solely to determine the appropriate sanction after a respondent's injunction or conviction in state or federal court. *See Toby G. Scammell,* Commission Opinion, Rel. No. 3961, 2014 WL 5493265, at *9 n.17 (Oct. 29, 2014) ("We have repeatedly upheld the use of summary disposition in circumstances where a respondent has been enjoined or convicted and the sole determination concerns the appropriate sanction."); *Cf. BDO China Dahua CPA Co.,* Order on Motions for Summary Disposition as to Certain Threshold Issues, A.P. Rulings Rel. No. 763, A.P. File No. 3-15116 (Apr. 30, 2013) (Elliot, A.L.J.) (denying respondents' summary disposition motions made on procedural grounds, including

adequacy of service); *OptionsExpress, Inc.*, Order on Motions, A.P. Rulings Rel. No. 710, A.P. File No. 3-14848 (July 11, 2012) (Murray, C.A.L.J.) (denying respondents' summary disposition motion made on procedural, factual, and legal grounds). The Division can find no case in which an administrative law judge has granted summary disposition dismissing a Commission OIP based on a substantive issue of law or fact.

ARGUMENT

The Commission's OIP alleges that Respondents violated anti-fraud prohibitions of the federal securities laws by trading or tipping on inside information under the misappropriation theory. Respondents move for summary disposition on only one ground: that, under *Newman*, the OIP fails to allege that Bolan received a personal benefit in return for his tips. Respondents' argument fails for four separate reasons: (1) in a misappropriation case such as this one, the Division is not required to show a personal benefit; (2) even if a benefit is required, the personal friendship between Bolan and the tippees suffices under Supreme Court and Commission precedent, other case law, and even *Newman*; (3) even if *Newman* could be read to require more than personal friendship and this Court follows *Newman*, the Division's allegation that Ruggieri helped Bolan obtain a promotion and raise establishes the requisite benefit; and (4) public policy heavily weighs against dismissal of the OIP's claims.

I. THE DIVISION NEED NOT PROVE BOLAN RECEIVED A PERSONAL BENEFIT TO PROVE ITS CASE.

Respondents simply assume, with virtually no discussion, that the "personal benefit" element of a classical theory insider trading case such as *Newman* applies to misappropriation theory cases such as this one. (Ruggieri Mem. 4–5 (two sentences); Bolan Mem. 1, 6–7 (no discussion).) Yet several courts have held, following the logic of the Supreme Court's decision in *Dirks*, that misappropriation theory insider trading cases require no showing of a personal benefit to the tipper. This Court should follow suit.

The absence of a personal benefit requirement in misappropriation theory cases, in contrast to classical theory cases, arises from the different duties breached in each case. As background, in the first insider trading cases, the Commission and federal courts held that insider trading violated the anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 thereunder. *See United States v. Whitman*, 904 F. Supp. 2d 363, 365–66 (S.D.N.Y. 2012) (Rakoff, J.) (explaining history of insider trading cases and resulting classical and misappropriation theories and citing cases). The first wave of cases typically involved corporate executives "who, upon learning of confidential information about their companies that would cause its stock price to rise, purchased shares from their own shareholders before the information was publicly announced, thereby breaching their fiduciary duty to their own shareholders." *Id.* at 366. This breach of duty gave rise to the fraud or deception required for liability under Section 10(b) and Rule 10b-5. This type of case involving corporate insiders, whose insider trading liability (whether as tippers or traders) stemmed from their breach of fiduciary duties to their employer's shareholders, became known as a "classical theory" case. *Whitman*, 904 F. Supp. 2d at 366.

Early on, the Supreme Court faced a classical theory case involving the unusual circumstance of a tipper with a benevolent motive: a whistleblowing insider who had tipped confidential, corporate information to expose his employer's accounting fraud. *Dirks v. SEC*, 463 U.S. 646, 648–50 (1983). The Supreme Court concluded that an insider does not breach his fiduciary duty to shareholders by tipping confidential information unless "the insider personally will benefit, directly or indirectly, from his disclosure." *Id.* at 662. Whether a given disclosure will trigger insider trading liability in a classical case therefore "depends in large part on the *purpose* of the disclosure." *Id.* at 664 (emphasis added). For an insider to breach a fiduciary duty to shareholders by tipping, "[t]he element of self-dealing, in the form of a personal benefit — whether immediate or anticipated, and whether substantial or very modest — must be present." *Whitman*, 904 F. Supp. 2d

at 371; *cf. SEC v. Maio*, 51 F.3d 623, 632 (7th Cir. 1995) ("An insider's disclosure is improper when corporate information, intended to be available only for corporate purposes, is used for personal advantage.").

Soon after federal courts established insider trading liability under the classical theory, they recognized a second type of insider trading case, known as "misappropriation theory" cases. *Whitman*, 904 F. Supp. 2d at 366–67 (citing cases). These cases involved "employees who tipped or traded on the basis of market-sensitive information that they purloined from their employers but that pertained to the stock, not of their employers' companies, but of other companies." *Id.* In such cases, courts held that the employee breaches his duty to his employer by effectively stealing his employer's confidential information for the unauthorized purpose of trading on it or tipping someone else to trade on it. *Id.* (citing cases); *United States v. Libera*, 989 F.2d 596, 600 (2d Cir. 1993) ("This fraud has been analogized to embezzlement...and may simply be thought of as the misuse, by trading, of stolen information.").

For example, in *United States v. Carpenter*, 791 F.2d 1024, 1026, 1036 (2d Cir. 1986), *aff'd*, 484 U.S. 19 (1987), the Second Circuit affirmed the insider trading convictions of a *Wall Street Journal* reporter and the stockbroker he tipped under Section 10(b) and Rule 10b-5. The reporter had written an influential column providing information and "a point of view with respect to investment in the stocks" he covered — much like Bolan's analyst reports. *Carpenter*, 484 U.S. at 22 (internal quotation marks and citation omitted). The reporter had given the stockbroker advance notice of the confidential contents of the reporter's forthcoming columns, and the stockbroker had then traded on those tips. *Carpenter*, 791 F.2d at 1027. The Second Circuit held that the reporter had "misappropriated" the *Wall Street Journal*'s "confidential schedule of forthcoming publications," including their "timing and content," by tipping the stockbroker. *Carpenter*, 791 F.2d at 1031.

As this discussion shows, the distinct duties underlying the classical and misappropriation theories give rise to different types of breaches of those duties. In a classical theory case, a breach of duty exists only when the tipper discloses confidential information for a personal, rather than corporate, purpose. A use of confidential information to benefit the corporation (or for some other benevolent purpose consistent with the employee's duties to his employer) cannot logically breach a fiduciary duty to the corporation's shareholders. Put another way, *Dirks* requires a benefit in classical cases to differentiate between an insider's improper and proper use of confidential information. In contrast, the breach of duty in a misappropriation case requires no showing of a personal benefit to the tipper, because such a breach is inherent in the tipper's theft of confidential information. The theft alone, in violation of the employer's property right to the information, is a breach of the employee's duty to his employer. *See Libera*, 989 F.2d at 600; *SEC v. Materia*, 745 F.2d 197, 202 (2d Cir. 1984).

Against this backdrop, the Second Circuit has twice strongly suggested that personal benefit is not an element of a misappropriation case. In *Libera*, the Second Circuit listed the elements of tippee liability under the misappropriation theory without including personal benefit. 989 F.2d at 600 ("[T]he misappropriation theory requires the establishment of two elements: (i) a breach by the tipper of a duty owed to the owner of the nonpublic information; and (ii) the tippee's knowledge that the tipper had breached the duty. We believe that these two elements, *without more*, are sufficient for tippee liability.") (emphasis added); *cf. SEC v. Sargent*, 229 F.3d 68, 77 (1st Cir. 2000) (noting that, in *Libera*, the "Second Circuit strongly implied . . . in dicta[ ] that there was no need to make an affirmative showing of benefit in cases of misappropriation"). Later, in *United States v. Falcone*, the Second Circuit reiterated that standard. 257 F.3d 226, 234 (2d Cir. 2001) ("[T]o support a conviction of the tippee defendant, the government was simply required to prove a breach by, [ ] the tipper, of a duty owed

to the owner of the misappropriated information, and the defendant's knowledge that the tipper had breached the duty.").

Following this precedent, several district courts in the Second Circuit have rightly concluded that there is no personal benefit requirement in misappropriation cases. *See Whitman*, 904 F. Supp. 2d at 370 ("[T]he tippee's knowledge that disclosure of the inside information was unauthorized is sufficient for liability in a misappropriation case."); *SEC v. Lyon*, 605 F. Supp. 2d 531, 548 (S.D.N.Y. 2009) (Stein, J.) (rejecting argument that misappropriation liability requires the receipt of personal benefit and noting that "the Second Circuit has declined to impose a 'benefit' requirement in misappropriation theory cases"); *SEC v. Willis*, 777 F. Supp. 1165, 1172 n.7 (S.D.N.Y. 1991) (Conner, J.) ("[T]he misappropriation theory does not require a showing of a benefit to the tipper."); *SEC v. Musella,* 748 F. Supp. 1028, 1038 n.4 (S.D.N.Y. 1989) (Wood, J.) (same).

The Second Circuit's decision in *SEC v. Obus*, 693 F.3d 276 (2d Cir. 2012), does not hold otherwise. In *Obus*, the Second Circuit noted that the tipper in *Dirks*, a classical case, needed to have personally benefitted in order to incur liability under Section 10(b). *Id.* at 285 (citing *Dirks*, 463 U.S. at 660–64). It then concluded that while the "Supreme Court's tipping liability doctrine was developed in a classical case, *Dirks*, [ ] the same analysis governs in a misappropriation case." *Id.* at 285–86. Although *Obus* then listed personal benefit as an element of tipper liability in a misappropriation case, it suggested that such a personal benefit is inherent when a tipper misappropriates inside information:

> Because the act of misappropriation itself is deceitful, [*United States v.*]*O'Hagan*, 521 U.S. [642,] 653 [1997], evidence that the tipper knowingly misappropriated confidential information will support an inference that the misappropriator had a 'mental state embracing intent to deceive, manipulate, or defraud.'

id. at 286–87; *cf. Whitman*, 904 F. Supp. 2d at 371 n.6 (noting that *Obus* was "somewhat Delphic" as to whether the tipper's personal benefit is an element of a misappropriation theory case).[9]

Nor does *Newman* hold that personal benefit is an element of a misappropriation case. Unlike *Obus*, *Newman* is a classical insider trading case whose reference to misappropriation theory was *dictum*. Before pronouncing its holdings, *Newman* mentioned and explained in passing the "alternative, but overlapping, theory of insider trading liability, commonly called the 'misappropriation' theory." *Newman*, 2014 WL 6911278, at *4. While articulating the concept of liability for downstream tippees and following its explanation of the misappropriation theory of liability, the opinion remarked, without discussion, that "[t]he elements of tipping liability are the same, regardless of whether the tipper's duty arises under the 'classical' or the 'misappropriation' theory." *Id.* at *4 (citing *Obus*, 693 F.3d at 285–86). This observation simply restates the well-settled law that under both theories, a breach of duty, followed by the misuse of information in connection with the purchase or sale of securities, is required. But as the discussion above makes clear, the operative breach differs under the two theories of liability. This one-sentence *dictum* in *Newman* should not be read to mean that a showing of personal benefit is required in misappropriation cases.

To the Division's knowledge, the Eleventh Circuit is the only federal appellate court that has explicitly held that misappropriation cases, like classical cases, require a showing of personal benefit.[10] Although the Commission had argued that "the rationale behind *Dirks*'s tipper benefit

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[9] To the extent the Commission's briefing to the Second Circuit in *Obus* discussed personal benefit under the misappropriation theory, it did so only because there was no dispute there that the tipper personally benefited from his tips. *See* Reply Brief of the S.E.C., Appellant at 14, *SEC v. Obus*, 693 F.3d 276 (2d Cir. 2012) (No. 10-4749), 2011 WL 3436236, at *14. In a prior Commission opinion, the Commission had declined to decide the issue. *See Robert Bruce Lohmann*, Commission Opinion, SEC Rel. No. 2141, 2003 WL 21468604, at *6 n.16 (June 26, 2003) ("In light of our finding that Lohmann received a benefit, we need not reach the question of whether such a showing was necessary to establish his liability.").

[10] The First Circuit, for example, has repeatedly declined to decide the issue. *See Sargent*, 229 F.3d at 77; *SEC v. Rocklage*, 470 F.3d 1, 7 n.4 (1st Cir. 2006) (declining to decide the issue because

requirement demonstrates that the benefit requirement has no application in misappropriation cases," the Eleventh Circuit, based on flawed reasoning, rejected that argument. *See SEC v. Yun*, 327 F.3d 1263, 1274–80 (2003). Explicitly disagreeing with the Second Circuit's approach to misappropriation cases in *Libera*, *see Yun*, 327 F.3d at 1277 n.31, the Eleventh Circuit instead held that misappropriation theory cases require a showing of benefit largely to "synthesize, rather than polarize, insider trading law" — essentially, for the sake of simplicity. *Id.* at 1276, 1277 n.31. As the discussion above demonstrates, however, the classical and misappropriation theories involve breaches of different duties owed to different principals. *See id.* at 1275. They are essentially different forms of fraud, so different standards make sense.

This Court should follow the decisions of several district courts in the Second Circuit to have carefully considered the issue and decline to require a showing of personal benefit in misappropriation cases such as this one. Importing a personal benefit requirement into misappropriation cases, where breach of duty is inherent in the tipper's misappropriation, would defy the logic of *Dirks* and decades of insider trading law. For this reason alone, Respondents' motions should be denied.

II. EVEN IF THE COURT REQUIRES A SHOWING OF PERSONAL BENEFIT, BOLAN'S FRIENDSHIP WITH THE TIPPEES SUFFICES.

Respondents contend that the OIP's allegations of Bolan's friendship with Ruggieri and Tipper A fail to satisfy the personal benefit definition the Second Circuit articulated last month in *Newman*. (Bolan Mem. 6–8; Ruggieri Mem. 6–7.) Respondents contend that, under *Newman*, a tipper's gift of confidential information for the pecuniary benefit of his tippee friend no longer suffices to establish the tipper's personal benefit. (Bolan Mem. 6–8; Ruggieri Mem. 6–7.) To the extent *Newman* stands for such a proposition, however, its holding contradicts the Supreme Court's

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even if personal benefit was required, the tipper's gift of information "to a relative or friend" satisfied the standard).

decision in *Dirks*, a prior Commission opinion, and the decisions of each of the five other Circuit Courts that have considered the issue. Indeed, for decades, virtually uniform precedent has held that a tipper's gift of inside information for the pecuniary benefit of his friend constitutes a sufficient personal benefit to the tipper to establish criminal and civil insider trading liability. To the extent *Newman* holds otherwise, this Court should decline to follow it. The OIP's allegations that Bolan tipped his friends, Ruggieri and Trader A, by giving them gifts of confidential information that they could then trade on for profits suffices to allege Bolan's personal benefit.

As described above in Part I, the Supreme Court first required a showing of personal benefit in *Dirks*, when it hinged liability on proof that "the insider personally will benefit, directly or indirectly, from his disclosure." *Dirks*, 463 U.S. at 662. While *Dirks* noted that a *quid pro quo* between the tipper and the trader satisfied that requirement, it required no such *quid pro quo*. *Id.* at 664. Instead, *Dirks* explicitly held that a personal benefit "*also exist[s]* when a [tipper] makes a gift of confidential information to a trading relative or friend. The tip and trade resemble trading by the [tipper] himself followed by a gift of the profits to the recipient." *Id.* at 664 (emphasis added); *see also id.* at 659 ("[I]nsiders...may not give such [undisclosed corporate] information to an outsider for the same improper purpose of exploiting the information for their personal gain.") (citing Exchange Act Section 20(b), 15 U.S.C. § 78t(b)). As discussed in Part I, *Dirks*' personal benefit requirement sought to distinguish between disclosures of confidential information for a proper, corporate purpose and disclosures for an improper, self-dealing purpose.

Following *Dirks*, the Commission has held that, in the absence of any "economic benefit" to a tipper resulting from his tip, a tipper's office friendship with his tippee satisfies any personal benefit requirement. *See Lohmann*, 2003 WL 21468604, at *4. In *Lohmann*, a former registered representative of a broker-dealer and investment adviser appealed an administrative law judge's initial decision barring him from associating with a broker-dealer or investment adviser after finding

him liable as a tipper for insider trading. *Id.* at *1, 4. The tipper's "sole contention" on appeal was that he did not violate Exchange Act Section 10(b) and Rule 10b-5 because he received no benefit from his tip to a co-worker. *Id.* at *4. Rejecting his argument, the Commission concluded:

> Here, Lohmann received no economic benefit from the tip he provided to [the tippee]. . . . Lohmann claims that [the tippee] was a mere acquaintance rather than a friend and that therefore their relationship was too attenuated for his tip to constitute a gift to a friend under the *Dirks* benefit test. . . . We reject Lohmann's contention. . . . It is sufficient, as the law judge found, that Lohmann and [the tippee] were 'friendly, if casual, office acquaintances.' [The tippee] sought Lohmann's advice and found Lohmann to be helpful. Lohmann offered the tip to help the young [tippee]. In return, Lohmann received the personal satisfaction of his generosity and the admiration of [the tippee]. We believe this is one type of benefit envisioned by *Dirks*.

Id.

Similarly, the Second Circuit has repeatedly held that a "personal benefit to the tipper" includes "not only 'pecuniary gain,' such as a cut of the take or a gratuity from the tippee, but also a 'reputational benefit' or the benefit one would obtain from simply 'mak[ing] a gift of confidential information to a trading relative or friend.'" *Obus*, 693 F.3d at 285 (quoting *Dirks*, 463 U.S. at 663–64); *see also id.* at 291 ("*Dirks* defined 'personal benefit' to include making a gift of information to a friend. . . . [T]he undisputed fact that [the tipper] and [tippee] were friends from college is sufficient to send to the jury the question of whether [the tipper] received a benefit from tipping."); *United States v. Jiau*, 734 F.3d 147, 153 (2d Cir. 2013) (concluding that a tipper obtains a personal benefit if he has "an intention to benefit the [recipient]," such as by "'mak[ing] a gift of confidential information to a trading relative or friend'") (quoting, directly and indirectly, *Dirks*, 463 U.S. at 664); *SEC v. Warde*, 151 F.3d 42, 48–49 (2d Cir. 1998) ("[T]he Supreme Court has made plain that to prove a § 10(b) violation, the SEC need not show that the tipper expected or received a specific or tangible benefit in exchange for the tip. . . . Rather, the 'benefit' element of § 10(b) is satisfied when the tipper 'intend[s] to benefit the. . .recipient' or 'makes a gift of confidential information to a

trading relative or friend.'") (citing and quoting *Dirks*, 463 U.S. at 664). As the Second Circuit noted in *Jiau*, "The proof required to show personal benefit to the tipper is modest." 734 F.3d at 153.

Since then, every other Circuit court to have considered the issue has also held that a tipper's gift of confidential information to a trading friend confers a personal benefit on the tipper. *See Rocklage*, 470 F.3d at 7 n.4 ("Even if there is a requirement that the tipper receive a personal benefit [in a misappropriation case], the mere giving of a gift to a relative or friend is a sufficient personal benefit."); *SEC v. Cuban*, 620 F.3d 551, 558 n. 38 (5th Cir. 2010) ("[A] gift to a trading friend or relative" could "suffice to show the tipper personally benefitted.") (quoting *Yun*, 327 F.3d at 1277); *United States v. Evans*, 486 F.3d 315, 321 (7th Cir. 2007) ("[T]he concept of gain is a broad one, which can include a 'gift of confidential information to a trading relative or friend.'") (quoting *Dirks*, 463 U.S. at 664); *SEC v. Clark*, 915 F.2d 439, 454 (9th Cir. 1990) ("(1) [E]nriching a friend or relative; *or* (2) tipping others with the expectation of reciprocity" gives rise to Rule 10b-5 liability) (emphasis added); *Yun*, 327 F.3d at 1275 ("[T]he gain does not always have to be pecuniary.... [A] gift to a trading friend or relative [can] suffice to show that the tipper personally benefitted.") (summarizing *Dirks*).

Some federal courts have even held that a benefit should be *presumed* when a tipper intentionally discloses material, non-public information. As the Seventh Circuit put it, "[a]bsent some legitimate reason for [the tipper's] disclosure . . . the inference that [his] disclosure was an improper gift of confidential corporate information is unassailable. After all, he did not have to make any disclosure, so why tell [the tippee] anything?" *Maio*, 51 F.3d at 632; *see also SEC v. Blackwell*, 291 F. Supp. 2d 673, 692 (S.D. Ohio 2003) ("A mere allegation that the insider has disclosed material non-public information is sufficient to create a legal inference that the insider

intended to provide a gift to the recipient of the information, thereby establishing the personal benefit.").[11]

Against this backdrop, the Second Circuit issued the *Newman* decision last month. In *Newman*, the Second Circuit vacated and dismissed with prejudice the criminal convictions of two hedge fund managers who were downstream tippees several tipping levels removed from the corporate insider tippers. 2014 WL 6911278, at *1–2. In part, the court found the trial evidence insufficient to prove beyond a reasonable doubt that the two tippers, who had never been criminally charged, received a personal benefit from their tips.[12] *See id.* at *2, 9–11. The court held that the "[t]he circumstantial evidence...was simply too thin to warrant the inference that the corporate insiders received any personal benefit in exchange for their tips." *Id.* at *10. In the court's view, the trial evidence established that the first tipper and his tippee were "not close friends," although they had attended business school and worked together, and that the second tipper and his tippee were "family friends" who "had met through church and occasionally socialized together." *Id.* at *2, 10. The court held that these relationships were not enough to infer, beyond a reasonable doubt, a personal benefit to the tippers. *See id.* at *9–13.

Instead, the *Newman* court articulated the following standard for personal benefit:

> We have observed that '[p]ersonal benefit is broadly defined to include not only pecuniary gain, but also, *inter alia,* any reputational benefit that will

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[11] While some opinions find a particular tipper-tippee relationship factually inadequate to infer a benefit to the tipper, those cases do not involve the personal relationships present here between Bolan, on the one hand, and Ruggieri and Trader A, on the other hand. For example, in *SEC* v. *Maxwell*, 341 F. Supp. 2d 941 (S.D. Ohio 2004), the tipper disclosed information to his barber, with whom he "did not socialize" and "[was] not close personal friends." *Id.* at 944; *see also id.* at 947 ("[T]he relationship between the two [d]efendants was no more than the relationship between a barber and his client."). Similarly, in *SEC v. Anton*, No. 06 Civ. 2274, 2009 WL 1109324 (E.D. Pa. Apr. 23, 2009), the evidence established that the tipper and tippee "were not friends." *Id.* at *9.

[12] The *Newman* panel also overturned the tippee defendants' convictions on the grounds that the downstream tippees had to "know" of the personal benefit to the tipper from the first-level tippee and that the trial evidence was insufficient to prove such knowledge beyond a reasonable doubt. *Newman*, 2014 WL 6911278, at *7–8, 11–13. That holding has no bearing on this case.

> translate into future earnings and the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend.' *Jiau*, 734 F.3d at 153 (internal citations, alterations, and quotation marks deleted) [(quoting, in substantive part, *Dirks*, 463 U.S. at 663, 664)]. This standard, although permissive, does not suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature. If that were true, and the Government was allowed to meet its burden by proving that two individuals were alumni of the same school or attended the same church, the personal benefit requirement would be a nullity. To the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee's trades 'resemble trading by the insider himself followed by a gift of the profits to the recipient,' *see* 463 U.S. at 664, ...we hold that such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature. In other words, as Judge Walker noted in *Jiau,* this requires evidence of 'a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the [latter].' *Jiau*, 734 F.3d at 153 [(quoting *Dirks*, 463 U.S. at 664)].

Newman, 2014 WL 6911278, at *10. Although this language initially suggests that the "mere fact of a friendship" is not enough, as Respondents emphasize (Bolan Mem. 6; Ruggieri Mem. 5), several sentences later, in quoting *Jiau*, the court holds that evidence of "an intention to benefit the [tippee]," as *Dirks* permits, is sufficient. Respondents do not quote this latter language in their motions. (Bolan Mem. 1, 6–8, 10; Ruggieri Mem. 5–8, 10.)

At a minimum, *Newman*'s standard is unclear. It is ambiguous about whether fact-finders in the Second Circuit may rely on the tipper and tippee's friendship to infer the tipper's "intention to benefit" from his tip. For that reason alone, even if the Court were to apply *Newman*, it should wait to evaluate the Division's hearing evidence of Bolan's friendship with Ruggieri and Trader A to decide whether Bolan intended to benefit them. Furthermore, particularly in light of its ambiguity, *Newman* should not be read to overturn the Second Circuit's settled law, as set forth most recently by another Second Circuit panel in *Jiau*, holding that friendship alone can be sufficient evidence of the tipper's personal benefit. *Jiau*, 734 F.3d at 153; *Piesco v. Koch*, 12 F.3d 332, 345 (2d Cir. 1993) ("[A] panel of the [Second Circuit] lacks the authority to overrule the prevailing law of the circuit.").

Even if *Newman* could be read to hold that friendship alone between the tipper and tippee never permits the inference of a personal benefit to the tipper, this Court should not apply any such holding to this administrative proceeding. Such a holding cannot be reconciled with the Supreme Court's holding in *Dirks*, the Commission's own precedent, the uniform view of the five other Circuits to have reached the question, or the prior Second Circuit decisions, as described above. As those cases hold, a tipper derives a personal benefit by disclosing inside information to a trading friend, because the tip is equivalent to the tipper himself profitably trading on the information and then giving the trading profits to his friend — obviously illegal conduct. *See, e.g., Dirks* at 664; *Warde*, 151 F.3d at 48–49; *Jiau*, 734 F.3d at 153. A lone Second Circuit panel's decision to the contrary would bind neither this Court nor the Commission.

The OIP's allegations of Bolan's friendship with Ruggieri and Trader A therefore adequately allege Bolan's personal benefit. (OIP ¶¶ 1, 35.) Indeed, Respondents' own admissions, which the Division will offer into evidence at the hearing, demonstrate that Bolan and Ruggieri were "pretty good friends," who spoke "daily" and "[o]ften multiple times a day," including about both work and personal matters. (Ex. 111 at 51–52, 75 (Ruggieri).) Similarly, Bolan's admissions demonstrate that he and Trader A were "old," "close" friends. (Ex. 110 at 112–13.) Based on these admissions, the Court should ultimately conclude that Bolan received a personal benefit under *Dirks* by giving his friends the gift of material, nonpublic information — in violation of Wells Fargo's compliance policies — that his friends could use to make profits. Respondents' motions for summary disposition should therefore be denied.

III. EVEN IF FRIENDSHIP ALONE WERE INSUFFICIENT, THE ALLEGATIONS OF PECUNIARY CAREER BENEFITS WOULD SUFFICE.

Even if the Court were to conclude that Bolan's friendship with Ruggieri and Trader A cannot alone suffice to establish Bolan's personal benefit as a matter of law, the OIP sufficiently alleges personal benefit of a "pecuniary *or* similarly valuable nature." *Newman*, 2014 WL 6911278, at

*10 (emphasis added). Bolan tipped Ruggieri at least in part to curry favor with him so that he would help boost Bolan's career. (OIP ¶ 36.) In fact, Ruggieri helped Bolan obtain a promotion and salary raise. This benefit is certainly sufficient even under a narrow reading of *Newman* and at least requires the Court to make a factual determination after a full hearing, rather than dismissing the OIP as a matter of law.

As *Newman* makes clear, there are at least two possible ways to satisfy its standard: (1) "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,*" or (2) "a relationship between the insider and the recipient that suggests…an intention to benefit the [latter]." *Newman*, 2014 WL 6911278, at *10 (emphasis added) (brackets in original). Nowhere does *Newman* suggest that a direct, pecuniary *quid pro quo* is required to show a personal benefit. *Id.*

The OIP's allegations satisfy this standard. (OIP ¶ 36.) In fact, as the Division's hearing evidence will show, Bolan both "inten[ded]" to benefit Ruggieri *and* received a "potential[ly]… pecuniary" gain from his own tips. *Newman*, 2014 WL 6911278, at *10. Bolan tipped Ruggieri, who used the information to execute illegal profitable trades in his Wells Fargo account, as described above in Section VI of the Statement of Facts. In return, Ruggieri praised Bolan to Ruggieri's supervisor, without disclosing the tips. Ruggieri's supervisor in turn conveyed Ruggieri's praise to Bolan's supervisor when Bolan was nominated for a promotion to a director position. Ruggieri's praise, filtered through his and Bolan's supervisors, helped Bolan obtain the promotion and a corresponding raise. This type of gain is more than sufficient even under *Newman*.

Respondents' contention that this benefit is "theoretical," "too far removed," or "unquantifiable" (Bolan Mem. 9; Ruggieri Mem. 8) finds no support in *Newman* or *Dirks*.[13] *Dirks*'

[13] Nor does it find any support in *SEC v. Rorech*, 720 F. Supp. 2d 367 (S.D.N.Y. 2010), which Bolan also cites. (Bolan Mem. 9.) In *Rorech*, after a bench trial, the court concluded that, among

personal benefit inquiry addresses the tipper's "intention," a term *Newman* itself quotes, and requires no resulting, direct pecuniary exchange from the tippee to the tipper. *See Dirks*, 463 U.S. at 664; *Newman*, 2014 WL 6911278, at *10. Nor would it be appropriate to require Bolan to receive some direct pecuniary benefit in exchange for a disclosure that had no pecuniary cost. Tipping is costless (other than the risk of detection). Making a gift of inside information is unlike making a gift of cash or personal property, because unlike physical property that can ordinarily be enjoyed by only one person at a time, many people — including the tipper and multiple tippees — may be able to simultaneously have and profitably trade on the same information, as both Ruggieri and Trader A did here. *See, e.g., SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (involving trading by multiple insiders and tippees). The ●IP therefore sufficiently alleges — and the Division's hearing evidence will show — not only Bolan's intention to benefit from Ruggieri's praise to Bolan's supervisor, which alone suffices, but also Bolan's resulting, "potential[ly]...pecuniary" gain in the form of a promotion and raise based in part on Ruggieri's praise. *Cf. Whitman*, 904 F.Supp.2d at 372 n.7 ("T]he benefit...could include, for example, maintaining a useful networking contact, improving the reputation or power within the company, [or] obtaining future financial benefits.").

Respondents' comparison of the tangible benefit here of a promotion and raise to the career advice that *Newman* found wanting is even more flawed. (Bolan Mem. 8–9, 10; Ruggieri Mem. 9.) In *Newman*, one tippee provided career advice that the Second Circuit described as "little more than

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other things, the tipper did not have a "motive" to provide inside information to the tippee where the tipper and tippee "had a purely professional working relationship [and] were not friends." 720 F. Supp. 2d at 373, 415–16. *Rorech* is inapposite for two reasons. First, the *Rorech* court did not require a showing of personal benefit as an element of the misappropriation case before it. *Id.* at 408–09 (reciting elements of misappropriation case with no mention of personal benefit). Second, the court used the phrase "quantifiable or direct financial benefit," which Bolan quotes, in a different context: to determine whether the defendant tipper had a plausible motive, absent any friendship between him and the tippee, for providing an illegal tip. *Id.* at 373, 415–16. In contrast, the hearing evidence of the friendship and work "partner[ship]" between Bolan and Ruggieri and the close friendship between Bolan and Trader A will demonstrate why Bolan tipped Ruggieri and Trader A. *See supra* Statement of Facts Sections I & VI.

the encouragement one would generally expect of a fellow alumnus or casual acquaintance." 2014 WL 6911278, at *11. The court noted some examples: "minor suggestions on a resume" and "advice prior to an informational interview." *Id.* (internal quotation marks and citations omitted). The court also summarized its view of the testimony of this first-level tippee, the prosecution's cooperating witness: "[H]e would have given [the tipper] advice without receiving information because he routinely did so for industry colleagues." *Id.* at *10. Unlike this sort of general career advice that any business acquaintance might give another business acquaintance, the OIP alleges a more particularized career benefit that Ruggieri provided Bolan: praising Bolan to supervisors to help him obtain a promotion and raise. (OIP ¶ 36.) These allegations — which the Division will prove at the hearing — are more than sufficient to withstand *Newman*, even if this Court applies it and reads it narrowly, which it should not.

Finally, the Court should resist Respondents' arguments to decide any personal benefit element, if it decides one exists, before a full factual hearing. Under *Dirks*, personal benefit is "a question of fact." 463 U.S. at 664. Similarly, the *Newman* panel addressed personal benefit only while evaluating the sufficiency of the trial evidence. 2014 WL 6911278, at *9–11. Respondents' attempts to dispute the Division's inferences from documents and testimony not yet in evidence should be rejected. (Ruggieri Mem. 8–9; *compare* Bolan Mem. 10 *with* Ex. 132 at 79–80.) The Court should assess the personal benefit to Bolan upon a full factual record in order to assess the witnesses' credibility and the meaning and context of disputed documents and testimony. Summary disposition cannot be granted where "a genuine issue" exists as to "any material fact."[14] 17 C.F.R. § 201.250.

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[14] As described in Section II above, Bolan tipped Trader A, a close friend who was unemployed and ill, for a personal benefit. If the Court decides that personal benefit is required, this should suffice. Even if the Court further decides *Newman* applies and should be read to preclude the Division from proving that Bolan tipped Trader A for a personal benefit, the Court

IV. PUBLIC POLICY STRONGLY WEIGHS AGAINST SUMMARY DISPOSITION.

Bolan devotes almost a quarter of his brief to a policy argument. (Bolan Mem. 10–13.) Bolan contends that the Court should dismiss the OIP's claims for lack of an exchange of money or some other direct pecuniary benefit from the tippees to Bolan, because otherwise research analysts would be "chill[ed]" from "communicating with anyone." (*Id.*) Bolan has it exactly backwards: public policy weighs heavily against dismissal of the claims and in favor of a finding of liability.

Federal law prohibits insider trading because it undermines "honest securities markets" and "investor confidence" when an investor's "information disadvantage" vis-à-vis the tippee "stems from contrivance, not luck; it is a disadvantage that cannot be overcome with research or skill." *O'Hagan*, 521 U.S. at 658–59. Allowing research analysts at large financial firms to freely tip their trader colleagues, as long as no pecuniary benefit later changes hands from the trader to the analyst, would open the floodgates and allow rampant insider trading for the benefit of large securities firms, their clients, and their employees and to the detriment of the rest of the investing public. Honest securities markets and the public interest demand more.

Furthermore, Wells Fargo — and likely every other financial institution that publishes research reports on stocks — already prohibits its analysts from leaking the contents of reports before they are published, as Wells Fargo did during the relevant period. *See supra* Statement of Facts § IV. The very purpose of the misappropriation theory is to prevent employees from misusing their employer's material, proprietary information to benefit themselves or their friends and family.

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should still admit evidence at the hearing of Bolan's tips to Trader A. If the Court decides the tips cannot substantively establish Bolan's liability, evidence of the tips (1) circumstantially demonstrates that Bolan tipped Ruggieri and that Bolan had the requisite scienter and (2) directly demonstrates that Bolan's conduct was egregious, recurrent, and therefore warrants the maximum sanctions. *See, e.g., Obus*, 693 F.3 at 286–87 (describing scienter requirements for tipper liability); *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981) (listing "the egregiousness of the defendant's actions" and "the isolated or recurrent nature of the infraction" as factors to be considered by the Commission in imposing appropriate administrative sanctions).

Bolan did exactly that: he misused Wells Fargo's proprietary information about his forthcoming analyst reports to give his friends the opportunity to make illegal profits based on important, secret information that was unavailable to other investors, conduct that he knew violated Wells Fargo's compliance policies. The outcome of this case cannot therefore improperly "chill" communications that financial institutions such as Wells Fargo already prohibit. No public policy supports the misuse of a securities firm's proprietary information by its employees for the exclusive benefit of their friends and relatives. The Court should promptly deny Respondents' motions and allow the Division to prove its claims.

CONCLUSION

For these reasons, the Division respectfully requests that Respondents' motions for summary disposition be denied.

DIVISION OF ENFORCEMENT

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January 22, 2015

BY HAND DELIVERY & UPS OVERNIGHT DELIVERY

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

Dear Mr. Fields:

Please find enclosed for filing the Division of Enforcement's papers opposing Respondents' motions for summary disposition, specifically: (1) the Division of Enforcement's Memorandum in Opposition to Respondents' Motions for Summary Disposition; (2) the Declaration of Sandeep Satwalekar in Support of the Division's Opposition to Respondents' Motions for Summary Judgment and exhibits thereto; and (3) a certificate of service. The hand delivery contains one copy, and the overnight delivery contains an original and three copies for filing.

Respectfully submitted,

SMS

Sandeep Satwalekar
Division of Enforcement

cc: The Honorable Jason S. Patil (by UPS w/encls. and by email w/o encls.)
Paul Ryan, Esq. (by hand w/encls. and by email w/o encls.)
Sam Lieberman, Esq. (by hand w/encls. and by email w/o encls.)