HARD COPY

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

In the Matter of Gregory T. Bolan, Jr. and Joseph C. Ruggieri, Respondents.	Admin. Pro. File No. 3-16178

PRE-HEARING BRIEF OF RESPONDENT GREGORY T. BOLAN, JR.

Samuel J. Lieberman
Michelle Tanney
Sadis & Goldberg LLP
551 Fifth Avenue, 21st Floor
New York, New York 10176
(212) 573-8164

Attorneys for Gregory T. Bolan, Jr.

March 9, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

PRELIMINARY STATEMENT

Having found that the issue of summary disposition against all claims was "exceedingly close" on personal benefit, this Court will also learn at the hearing that the Division cannot show (i) the communications and trading at issue were unusual or suspicious, (ii) statistically reliable evidence that the analyst reports at issue were material, or (iii) *scienter*. Specifically:

- Bolan's phone calls with Ruggieri are not suspicious because it is undisputed Wells Fargo asked Bolan to call Ruggieri "at least once a day" since Ruggieri was the trader assigned to trade all stocks Bolan covered as an analyst. (BX1 at WFC1003791.)

- Indeed, Wells Fargo demanded that Bolan call Ruggieri every morning and "right then" when a news article, competitor analyst report, or public announcement was made regarding any stock Bolan covered – even if Bolan was working on a rating change. Thus, there was a legitimate reason for every call at issue in this case.

- The Division is wrong in alleging Ruggieri held overnight positions ahead of six out of eight Bolan rating changes or coverage initiations. In fact, *Bolan published 90 reports* initiating coverage or changing Bolan's rating, valuation or earnings estimates during Ruggieri's tenure – *and Ruggieri had an overnight position in the opposite direction of the report at least five times.* This contradicts any claim of a suspicious pattern.

- The six analyst reports were not material as a matter of law, because experts for both the Division and Bolan failed to find any statistically significant price impact. The lack of a statistically significant price impact renders the reports immaterial, under *Daubert* and generally-accepted economic methodology.

- There is no "meaningfully close personal relationship" generating "an exchange that is objective, consequential and" a "gain of a pecuniary or similarly valuable nature," as required under *U.S. v. Newman*, 773 U.S. 438, 453 (2d Cir. 2014). Trader A, who was unemployed, gave nothing of value to Bolan, and only occasionally socialized with him.

- Bolan also received no objective personal benefit from Ruggieri, who was no more than a casual work friend. The "positive feedback" the Division cites was (i) identical to feedback given well before any alleged trading; (ii) echoed by managers not implicated in insider trading; and (iii) not objectively valuable to Bolan's career.

- The Division cannot show *scienter* since its theory makes no sense: Bolan and Ruggieri sought to maximize Wells Fargo's $12-plus million commissions from Ruggieri client trading. Yet Ruggieri trading ahead of Bolan reports would risk harming those clients and causing them not to trade with Wells Fargo. Bolan had no motive to take such a risk since he received no financial benefit, and Ruggieri's compensation was guaranteed.

FACTUAL BACKGROUND

A. Relevant Parties

1. Gregory T. Bolan, Jr.

Gregory T. Bolan, Jr. ("Bolan") worked as an Equity Research Analyst at Wells Fargo Securities ("Wells Fargo") from June 2008 to April 25, 2011. (Bolan Exhibit (hereinafter "BX") 81 at p.4).)[1] Bolan has not been the subject of any securities regulatory proceeding or regulatory disciplinary action except for this case, even though he continued to work in the securities industry for several years after leaving Wells Fargo. (*Id.*) Prior to his work in the securities industry, Bolan served in the United States Army, and received an honorable discharge.

Over the course of his entire tenure at Wells Fargo, Bolan covered sixteen stocks in the Healthcare Industry – all of which Ruggieri actively traded. Starting in September 2008, Bolan covered the "Pharmaceutical Services" sector – also referred to as "CRO." (BX45 at WF284305). This included the stocks Albany Medical Research Inc. ("AMRI"), Covance ("CVD"), Parexel ("PRXL"), CRL, ICLR, KNDL, PDGI, and PPDI. Starting in September 2009, Bolan began covering the Healthcare Information Technology ("Healthcare IT") sector, which included Emdeon ("EM"), CERN, MDAS, MDRX, and QSII, and athenahealth ("ATHN"), which Bolan started covering on July 15, 2010. (*Id.*) Bolan initiated coverage on the Life Science Tools sector, including Bruker ("BRKR") and WAT, on March 29, 2011. (*Id.*)

Both Bolan and Wells Fargo ranked very low in industry ratings for influence. The premier rankings for analyst influence, published by *Institutional Investor* Magazine in October 2010, ranked Bolan "19" out of "28" Wall Street Analysts in the "Health Care Technology & Distribution" category. (BRX16 at WF670677-729.) For the same category, Wells Fargo was

[1] Bolan was hired by Wachovia Securities, LLC in June 2008, but Wells Fargo acquired Wachovia in August 2008, and the name of the firm was changed to Wells Fargo Securities, LLC.

ranked "19" out of "22" Wall Street Firms. (*Id.*) Further, since Bolan did not even begin covering the Life Science Tools sector (which contained stock BRKR) until March 29, 2011, neither he nor Wells Fargo was even ranked in this category. (*Id.*)

Bolan had little market influence because he had less than three years' experience publishing analyst reports during the relevant period. Although the Division notes that Bolan received a "best up and comer" recognition from *Institutional Investor* in October 2010 for the CRO/Pharmaceutical area, this was for "very junior people" whose reputations were "not enough to get voted and ranked." (Div. Ex. ("DX") 132 Wickwire Tr. at 65:12-20.) Further, it is undisputed that Bolan's reputation in the Health Care IT sector was "Far less relevant" than in the CRO sector. (DX112 Evans Tr. at 23:19-23.) And his opinion was "virtually irrelevant" in the Life Science Tools sector. (*Id.* at 24:7-8.)

2. Joseph Ruggieri

Joseph Ruggieri ("Ruggieri") was a senior position trader who traded a Wells Fargo account from September 2009 through April 25, 2011. (OIP ¶5.) It is undisputed that Ruggieri's job involved actively trading all of the sixteen stocks that Bolan covered. (BX 82-99 (Trading Spreadsheets).) On a daily basis, he made hundreds of trades either in an agency capacity (for customers), or in a principal capacity (putting Wells Fargo money at risk) (*Id.*)

As a trader, Ruggieri worked in Trading, an entirely different department than Bolan, who worked in Wells Fargo's Equity Research department. He was not Bolan's supervisor. And he did not have the power to decide whether Bolan would be promoted or paid more.

During Ruggieri's Wells Fargo tenure, Bolan published at least 283 analyst reports. (BX45, WF284305.) Yet Ruggieri's Wells Fargo tenure spanned just 414 trading days.[2] This

[2] This number is derived from subtracting two out of every seven days for weekends, and also subtracting the 15 days of market holidays from September 1, 2009 through April 25, 2011. *See, e.g.*, Nasdaq OMX Market Holiday

means Bolan published a report every 1.5 trading days Ruggieri worked. And each day, Ruggieri actively traded the same stocks that Bolan covered.

C. Trader A

Trader A "died in May 2013." (OIP ¶6) As the Division admits, Trader A was unemployed from "June 2009 through November 2010," and suffered from a debilitating disease (*Id.*) Thus, he was in no position to provide Bolan with *quid pro quo*, objective pecuniary or similarly valuable benefit to Bolan for alleged insider trading. And the Division has no evidence that Bolan received anything of value or consequence from Trader A.

Trader A's records reveal that he actively traded at least ten of the stocks that Bolan covered as an analyst. This includes the securities of ATHN, AMRI, CVD, EM, ICLR, KNDL, MDAS, PRXL, PPDI and QSII. And Trader A actively followed Bolan's published research. Indeed, Trader A engaged in hundreds of transactions in PRXL, AMRI, and EM besides the three transactions at issue. Thus, his trades are neither unusual nor suspicious.

The Division has identified no witness to support its Trader A allegations, and thus its claims have no factual or legal support. The assertion that Bolan and Trader A were particularly close is rebutted by (i) unrebutted testimony that they only occasionally socialized, and (ii) the fact that Bolan was neither directly notified of Trader A's death nor invited to his funeral.

B. As a Healthcare Analyst, Bolan's Job Involved Calling Ruggieri, Wells Fargo's Healthcare Trader, "At Least Once a Day" for Legitimate Purposes

1. Wells Fargo Asked Bolan to Speak to Ruggieri Once or More a Day About Any News on His Stocks, Including While He Worked on Rating Changes

It is undisputed that there are legitimate reasons for every phone call cited by the Division in the OIP, because Bolan was instructed by his supervisors to contact Ruggieri "at least

---

Schedules 2009-2011, *available at* http://www.nasdaqtrader.com/TraderNews.aspx?id=dn2010-030 (2011); https://www.nasdaqtrader.com/TraderNews.aspx? id=dn2009-041 (2010); https://www.nasdaqtrader.com/TraderNews.aspx?id=nva2008-083 (2009).

once a day to exchange information." (BX2 at WFC-1003791.) In an email entitled "Have you called your trader today?," Bolan's supervisor instructed him "to be in constant dialogue with your trading counterpart[]," who was Ruggieri. (*Id.*) Wells Fargo emphasized that "NOTHING ELSE you can do will impact revenues more directly than providing the person who trades your stocks with timely opinions and answers to questions." (*Id.*)

Wells Fargo told Bolan it was his "responsibility to call the desk every morning and check in" with Ruggieri. (*Id. at* WFC-1003791-92.) Wells Fargo also told Bolan "[w]hen news breaks" on any of his stocks, he should "be certain to call" Ruggieri "right away," including:

- "if there is a news article on one of your stocks,"
- "if a competitor" of Wells Fargo "changes a rating,"
- "if a merger is announced,"
- "if the company files an 8-K [SEC form for press release], etc., etc., etc." (*Id.* at WFC-1003792; Ex. 1 ("Stay in touch with your trader.").)

Wells Fargo's requirement that Bolan speak to Ruggieri at least once a day was on top of its "Best Practices" for analysts at Wells Fargo (then-Wachovia). (BX1.) They instructed analysts to "stay in touch with your trader," speak with "the sales/trading floor to get the word out," and have "150-200 calls per month" with clients about his analysis. (BX at WF508355, pp. 8, 12-13.) Wells Fargo urged Bolan to widely distribute his analysis to increase his influence.

Importantly, Wells Fargo required Bolan to speak to Ruggieri even while he was working on a report changing his "rating or estimates" of valuation or earnings. (BX2 at WFC-001003792.) *Wells Fargo demanded that when writing a rating change, "do not get so caught up in writing your note/squawk that you fail to communicate with the trading desk in a timely manner."* (*Id.*) It wanted "constant dialogue" with Ruggieri. (*Id.* at WFC-001003791.)

Indeed, it is evident from Bolan's record of research reports (BX45), emails and judicially noticeable releases and articles that there are valid reasons for every call at issue. For example, the Division cites a 7:10 a.m. March 30, 2010 phone call where Bolan dialed the 6210 number as a suspicious phone call. Yet the document trail shows that just three minutes earlier, at 7:07 A.M., Ruggieri sent Bolan a copy of a ratings upgrade of PRXL by Raymond James, a Wells Fargo competitor. (Bolan Rebuttal Exhibit 1 at WFC660162.)[3] Thus, the document trail confirms Bolan validly calling Ruggieri when "a competitor" of Wells Fargo "changes a rating." (BX2 at WFC-1003792). This is much more plausible than the Division's suggestion, because Bolan did not even request to downgrade Parexel until 2:23 p.m. on March 30, 2010. (DX48.)

Similarly, the Division falsely cites as suspicious an 18-minute call from Ruggieri to Bolan at 7:39 p.m. on the evening of April 5, 2010. Yet documentary evidence shows that from 7:54-7:55 p.m. – while this call was ongoing – Bolan forwarded the "Vcf" file VCard contact information for four industry contacts for a California business trip. (BX7 at WFC463079; BX8 at WFC463080; BX9 at WFC465508; BX10 at WFC475158.) Ruggieri's expense records show he travelled for "SAN FRAN & SAN DIEGO MTGS" that week. (BX103B line 386 ("Cab to Airport" April 4, 2010), line 384 ("Cab to San Fran Hotel" April 9, 2010)).

In addition, the Division falsely cites as suspicious a June 14, 2010 phone call at 10:43 a.m. from Bolan to Ruggieri lasting 3 minutes and 24 seconds. But the documentary evidence shows this call was roughly an hour after Bolan published a Squawk Analyst Report entitled "BMY Chooses ICLR and PRXL as Strategic Partners." (BX26 at WFC-2362398; BX45 at WF284305, line 250.) This is a prime example of Bolan acting to "call the desk" shortly after

[3] Bolan Rebuttal Exhibits are hereinafter referenced as "BRX__")

publishing an analyst report – to explain the report to Ruggieri as he interacted with clients. (BX2 at WFC-1003792.)

And the documentary shows there is no record of any call between Bolan and Ruggieri before Bolan issued the July 6, 2010 AMRI upgrade report. None of the phone records identified by the Division identifies any call between Bolan and Ruggieri from June 25 through the end of the day, July 6, 2010 – after the AMRI report was issued. (DX 121-26, 144-46). Instead, the Division cites a July 1, 2010 email exchange entitled "You heard anything on KNDL?" in which a client asked Bolan about a different stock Bolan covered, Kendle. (DX57 at WFC-472248.) After the client email, Ruggieri wrote to Bolan "Call u right back." But this email says nothing about AMRI, and instead addresses six other companies, making it legitimate. (*Id.*) With no record this call ever occurred, the evidence shows the Division is alleging a tipless trade.

Further, the record shows Bolan did not get approval to change AMRI's rating until 3:55 p.m., on Friday, July 2, 2010 – *after Ruggieri bought all of his shares of AMRI.* (BRX7 at WFC-829669.) In fact, Ruggieri bought his principal position of 35,050 between 9:42:48 a.m. and 3:42 p.m. on July 2, 2010. (BX95, lines 4683-9071 (filter chart by ticker).) Yet there was no phone call between Bolan and Ruggieri on July 2 after Bolan got approval. Further, Ruggieri would not have had time to unwind his position if Bolan's report got delayed, or rejected, because approval was given 5 minutes before market close into July 4th weekend.

Ruggieri's trading pattern is also inconsistent with insider trading. He held at least 15,267 shares at the end of the day on July 6, 2010 after Bolan's report came out – rather than liquidating his entire position. (BX95, lines 9071-12185.) And Ruggieri did not principally trade any shares of AMRI on July 7. (*Id.*, lines 12185-200.) Further, Ruggieri continued to hold 10,000 shares of AMRI at the end of the day on July 8, and 5,000 shares at the end of the day

July 9. It was not until the afternoon of July 12 – almost a week after Bolan's report – that Ruggieri finally liquidated his early-July 2010 AMRI position. (*Id.*, line 24582-25861.) Such trading is not consistent with trying to trade based on prior knowledge of a research report.

In addition, documentary evidence corroborates legitimate reasons for Bolan's calls with Ruggieri near the time of his EM, ATHN and BRKR reports. For EM, a press release on August 13, 2010, announced that a Bolan-covered company, Allscripts (MDRX), approved a merger to acquire Eclypsis. (BX63 (press release).). This merger was the subject of a prior Bolan squawk on June 9, 2010. (BX45, line 249 ("Allscripts-Misys to Merger with Eclypsis").) And there was also prior-published research on August 11, and an ongoing August 12 discussion about increasing business for Wells Fargo, among legitimate topics discussed by Bolan and Ruggieri. (BX59 at WF677126-27, BX60 at WFC483158-61.)

As to discussions before the ATHN February 8, 2011 report, a major topic for Bolan and Ruggieri to discuss was AMRI's February 7, 2011 morning announcement of Fourth Quarter and Full Year 2010 results. (BX70.) And documents show that before the BRKR report, Bolan and Ruggieri on March 23 discussed setting up a dinner for Wells Fargo healthcare traders, analysts, and salespeople (BRX17 at WFC2303-07). And leading up to and including March 28, Bolan asked for Ruggieri's help in tracking down a March 24, 2011 public report on Debtwire.com that Kendle International (KNDL) had "placed itself on the auction circuit," (BRX18, WFC47771-6).

2. Bolan Received "Great Feedback" for Speaking Daily to Wells Fargo Traders for Legitimate Purposes Even Before Ruggieri Was Hired

Consistent with Wells Fargo's instructions, Bolan was well-known for his constant dialogue with Wells Fargo Healthcare Traders for legitimate purposes, for at least a year before the alleged insider trading – and even before Ruggieri was hired. For example, on April 22, 2009, Bolan wrote his supervisors that "I call my trader as often as possible to make sure he is

apprised of any research calls that I have made and just to get a general update on trading activity in my names" as well as to update on which clients Bolan spoke with and which are interested in trading "my stocks." (JR3, WFC-960036.) Similarly, on July 1, 2009, Bolan's ultimate superior, Diane Schumaker, told Bolan "BTW, I've gotten great feedback on you from dave graichen," – the Healthcare trader that Ruggieri was hired to replace. (BRX2 at WF-891552.)

And in October 2009, six months before the alleged insider trading at issue, Ruggieri cited Bolan as the "most practice and helpful" analyst at Wells Fargo. (BX3 at WF1594764.) In particular, Ruggieri stated "Bolan's in a league of his own - great dialogue with clients and gets it." (*Id.*) There is no allegation of insider trading or benefit related to this comment.

3. Almost All of the Phone Calls Cited by the Division Involve a Phone Number Wells Fargo Says Does Not Exist, for Which There is No Set of Phone Records, and Which Was Accessible to at Least 17 Wells Fargo Traders

A major problem regarding the phone calls at issue is that all but three or four calls at issue involve the telephone number 212-214-6210 (DX121-26, 144-46), which is a telephone number that (i) Wells Fargo says does not exist, (ii) has no set of phone records obtained by the Division or otherwise, and (iii) appears to have been accessible by Wells Fargo's entire trading floor, *i.e.*, at least 17 different traders. For example, Wells Fargo told the Division that "it searched its records and cannot locate any record" of "212-214-6210" "ever having been a WFS number." (BRX3, November 25, 2014 letter from M. Missal to S.E.C.'s S. Satwalekar; *accord* BRX4, November 17, 2014 letter from M. Missal to SEC's S. Satwalekar (same).) Indeed, the Division's own exhibit proves that Wells Fargo "looked up telephone number 212 214 6210 and said it didn't exist....at all...." (DX142.)

Strikingly, the Division issued at least two subpoenas to Verizon (the external, regional service provider identified for 212-214-6210), but never followed up on them. Yet when Bolan

himself issued a subpoena for the records of 212-214-6210, Verizon responded that there were "no subscribers, documents, records, or other materials" for that number. (BRX5 at 2.)

Instead of 212-214-6210, Wells Fargo identified "212-214-6201" as the "telephone number associated with Mr. Ruggieri," which is just a generic "number for the WFS Trading Desk, of which Mr. Ruggieri was a member." (BRX3.) Indeed, ***Mr. Ruggieri was one of at least 17 Wells Fargo traders who are listed for that telephone number on Wells Fargo contact lists***. (BRX6, 551031-56, Wells Fargo Trading Phone List and Trading Map.) Yet even for this telephone number, the Division has no original phone company records. (BRX3.) Instead, there are only internal records retained by Wells Fargo, which themselves are incomplete because its 6201 "telephone records only list outgoing calls." (*Id.*)

Accordingly, it appears the 6210 extension was just a number dialed that forwarded directly to the Wells Fargo trading desk – and was not a separate phone number at all. When Bolan dialed the 6210 extension, a person other than Ruggieri picked up roughly half the time. Bolan spoke to several others at the trading desk using that extension, including Bruce Mackle and Chip Short (a healthcare trader and specialist), or other traders on the Trading Desk who picked up the phone if Ruggieri was not available or out of the office.

C. The Division's Allegations of a Pattern of Suspicious Trading Are False Because They Fail to Address at Least Five Times that Ruggieri Traded in the Opposite Direction of a Report Changing his Valuation or Earnings Estimates

The Division distorts data by isolating trading near five Bolan Rating Changes and a Coverage Initiation without ever addressing the five times when Ruggieri held large overnight positions in the opposite direction of a Bolan valuation or earnings estimate change. But Wells Fargo's own policies equate a change of "valuation range and/or estimates" with a report "changing your rating." (BX2 at WFC-1003791.) Indeed, even the Division's own expert relied

on a paper that analyzed "analysts' changes in target prices," *i.e.*, valuation range based on estimates of future earnings, as relevant to his opinion. (Div. Ex. 177 at 6.) Thus, the Division is plainly trying to hide bad facts by leaving this information out.

In fact, when Bolan's valuation and earnings estimate changes are taken into account, Ruggieri had overnight positions in the opposite direction of a Bolan report *at least* five times during the March 2010 to March 2011 time period:

Report Date	Stock	Bolan Value/Earnings Change	Ruggieri Overnight Position
8/11/10[4]	PRXL	Downgrade Valuation $1.50/share	Long 1,379 Shares – Wrong
9/30/10	CVD	Upgrade Valuation $4-5/share	Short -17,500 Shares – Wrong
11/29/10	ICLR	Downgrade Earnings $0.13/share	Long 5,000 Shares – Wrong
2/2/11	PRXL	Downgrade Valuation $1.00/share	Long 1,876 Shares – Wrong
2/25/11	ICLR	Downgrade Valuation $1.00/share	Long 66,052 Shares – Wrong

Indeed, when Bolan's valuation and earnings estimate changes during Ruggieri's Wells Fargo tenure are included with rating changes and coverage initiations, the Division's allegations amount to this: *Out of 90 reports, Ruggieri allegedly had a prior overnight position in the same direction six times, but held an overnight position in the wrong direction five times.* And 79 times – for 88% – he had no overnight position. That is a pattern entirely consistent with chance.

By way of illustration, listing the times Ruggieri is alleged to have an overnight position in the same direction vs. instances in which he traded in the wrong direction as a Bolan rating change or valuation or earnings change reveals the following pattern:

[4] These reports are identified at BX45 at 284305, lines 291, 306, 338, 372, and 390. They are also BRX8 at WF677128-34, BRX9 at WF544411-17; BRX10 at WF539728-36; BRX 11 at WF511149-56; BRX12 at WF 511028-36. Ruggieri's overnight positions are based on reviewing the trade spreadsheets for Ruggieri's Wells Fargo account at BX82, 87-89, 95-97, and BX100, which lists many "adjustments" or changes to the trading records made by Wells Fargo at the Division's request. Ruggieri likely had other overnight positions that went the other way of valuation and earnings estimate changes -- which makes an ongoing discovery dispute between Bolan and Wells Fargo that much more important.

Report Date	Stock	Bolan Value/Earnings Change	Ruggieri Overnight Position
4/7/10	PRXL	Downgrade Rating to Market Perf.	Same Direction
6/15/10	CVD	Upgrade to Outperform	Same Direction
7/6/10	AMRI	Upgrade to Outperform	Same Direction
8/11/10[5]	PRXL	Downgrade Valuation $1.50/share	Wrong Direction
8/16/10	EM	Upgrade to Outperform	Same Direction
9/30/10	CVD	Upgrade Valuation $4-5/share	Wrong Direction
11/29/10	ICLR	Downgrade Earnings $0.13/share	Wrong Direction
2/2/11	PRXL	Downgrade Valuation $1.00/share	Wrong Direction
2/7/11	ATHN	Upgrade to Outperform	Same Direction
2/25/11	ICLR	Downgrade Valuation $1.00/share	Wrong Direction
3/29/11	BRKR	Initiate at Outperform	Same Direction

This is not a pattern, but consistent with chance – particularly since this is just 11 of 90 reports initiating coverage or changing a rating, valuation or earnings estimate during Ruggieri's tenure.

In addition, there is a *sixth time* Ruggieri had an overnight position in the wrong direction of a ratings, valuation or earnings estimate change, because the August 16, 2010 EM rating change also downgraded EM's valuation by $3.00 per share. (BX42 at 1 (reducing valuation range to "$15.00 to $16.00 from $18.00 to $19.00").) The Division omits this key fact from its description of the EM report. Yet this negative aspect of the EM report was clear from its title: "EM-Valuation, Sentiment at Depressed Levels...." (*Id.*) This shows Ruggieri was just as likely to have an overnight position in the wrong direction as he was in the right direction.

Moreover, the Division has distorted the facts by falsely referring to the March 29, 2011 Bruker Report as a "ratings change[]" (Div. Summ. D. Opp. Br. at 9; Div. Supp. Submission ¶ 19 (same).) This was not a "ratings change" at all. Rather, the Bruker Report was an "Initiating of Coverage," which means it was the *first time* Wells Fargo issued a report on Bruker. (BX45 at

[5] These reports are identified at BX45 at 284305, lines 291, 306, 338, 372, and 390. They are also BRX8 at WF677128-34, BRX9 at WF544411-17; BRX10 at WF539728-36; BRX 11 at WF511149-56; BRX12 at WF 511028-36. The Court can isolate the ratings change, initiating (and resuming) coverage, valuation range change, and earnings estimate revised charge by using the "Filter" function in Column "D" of BX45. Ruggieri's overnight positions are based on reviewing the trade spreadsheets for Ruggieri's Wells Fargo account at BX82, 87-89, 95-97, and BX100, which lists many "adjustments" or changes to the trading records made by Wells Fargo at the Division's request. Ruggieri likely had other overnight positions that went the other way of valuation and earnings estimate changes – which makes an ongoing discovery dispute between Bolan and Wells Fargo more important.

WF 284305 (line 400).) It did not "change" anything about Wells Fargo's prior published opinion on Bruker – since there was none. Thus, it is not equivalent to a rating change.

Notably, the Wells Fargo email regarding analyst-trader phone calls did not identify a coverage initiation as similar to "changing your ratings; valuation range and/or estimates." (BX2 at WF-1003791.) And Bolan's Bruker coverage initiation was necessarily less meaningful, because it is undisputed that Bolan's opinion was "virtually irrelevant" in Bruker's sector, Life Science Tools. (DX 112 at 24:7-8.) Excluding coverage initiations from the sample leaves Ruggieri trading overnight in the wrong direction six times, and allegations of trading in the right direction five times – out of 82 reports changing a rating, valuation or earnings estimate. (BX45 at WF284305.) Separately, it leaves Ruggieri trading overnight in the right direction just once out of eight coverage initiations. Neither result is consistent with suspicious trading activity.

Finally, the overnight positions issue highlights yet another attempt by the Division to manipulate the data: The Division falsely suggests it was rare for Ruggieri to hold an overnight position when he actually held stock overnight *at least* 329 times in the 414 trading days he worked at Wells Fargo. (BX82-100.) Thus, Ruggieri's overnight positions were a not uncommon occurrence – especially given the millions of trades he made each year.

D. The Six Reports at Issue Are Not Material Because Both Sides' Experts Failed to Find the Reports Were Associated with a Statistically Significant Price Impact, Which is Not Surprising Because the Division's Expert Discussed Serving as an Expert for Bolan in this Case – Raising Serious Ethical and Credibility Issues

A fatal flaw in the Division's case is that the experts for both sides in the case conducted event studies on the analyst reports at issue and failed to find that any of them caused a statistically significant price impact. Both experts agree that event studies are generally accepted methods for evaluating materiality, using the generally-accepted standard of seeking price movements that "are statistically significant at the 95% level." (DX177 at 11, note.) And both

experts failed to find that any of the six reports at issue was associated with a statistically significant price movement. This rare agreement of experts warrants judgment as a matter of law in the Respondents' favor.

First, the expert for Bolan, Dr. Stephen Prowse of FTI Consulting, found that none of the six analyst reports was associated with a statistically significant price movement. (BX80 ¶¶ 9-11 at 5-6.) Dr. Prowse is an economist who has worked for the Federal Reserve Bank and has previously been hired by the S.E.C. itself to examine materiality and conduct an event study in an insider trading case. (*Id.* ¶¶ 3-4 at 3.) Applying standard event study methodology, Dr. Prowse analyzed the price movement following each analyst report and found that no report was associated with a statistically significant price movement. (*Id.* ¶¶ 19, 21, 22, 24, 26-27.)

In addition, Dr. Prowse found that four of the six reports (PRXL, CVD, EM, ATHN) were issued simultaneously with confounding information – information related to the company that became public near the time the report was issued. (*Id.* ¶¶ 9, 17-18, 20, 23, 25.) This would render "problematic any attempt to attribute" the entire "stock price movement to the analyst report." (*Id.* ¶ 9.) Even with such confounding information, however, Dr. Prowse found that no statistically significant price movement for the six stocks following Bolan's analyst report.

Second, even the expert hired by the Division, Edward S. O'Neal, Ph.D, failed to find that any of the six analyst reports at issue was associated with a statistically significant price movement. Dr. O'Neal analyzed the stock price movements for four of the reports (PRXL on April 7, 2010, AMRI on July 6, 2010, ATHN on February 8, 2011, and BRKR on March 30, 2011), and found the price movements fell well short of the statistically significant threshold. (DX177 at 11 & note.) As Dr. O'Neal noted, a statistically significant price movement involves

"T-statistics greater than 1.96 absolute value," yet the greatest t-statistic he found for any of these four reports was 1.25. (*Id.*)

Further, Dr. O'Neal concluded that two of the reports at issue (CVD and EM) "had confounding information" released near the time of each report. (*Id.* at 8-9.) As with Dr. Prowse, he concluded that an event study analysis "might wrongly attribute the stock price movement to the ratings change announcement when in fact it was due to the release of other material information." (*Id.* at 9.) Thus, Dr. O'Neal was unable to conclude that they were associated with any statistically significant price movement. (*Id.* at 8-9, 11.)

Given the agreement of the experts on the lack of a statistically significant price movement related to the six reports, the Court is free to rule that these reports are not material as a matter of law. Courts have held that event studies provide the best evidence of no materiality.

Third, it is not surprising that Dr. O'Neal agrees with Dr. Prowse on the lack of statistically significant price movements, because Dr. O'Neal himself discussed serving as an expert for Bolan. Dr. O'Neal had email and phone conversations with Bolan's counsel about serving as Bolan's expert – and made an unsolicited "offer" to meet in person. (BRX13.) Dr. O'Neal met Bolan's counsel in person and discussed Bolan's counsel's plan to use event studies to disprove materiality in this case, given the lack of clear academic research on the issue. Dr. O'Neal agreed with this approach and gave Bolan's counsel a budget for this case.

Yet Bolan's counsel chose a different expert than Dr. O'Neal. So Dr. O'Neal turned around and accepted a role as expert for Bolan's adversary – notwithstanding his prior position.

Dr. O'Neal's actions in seeking employment on *both sides of this case* raise profound issues about his credibility. If Dr. O'Neal was prepared to opine both that the analyst reports were not material and were material, it is difficult to reasonably find his opinion credible. Dr.

O'Neal's actions also raise serious question of ethics, and possibly disqualification – which are also the subject of a separate motion *in limine*.

Dr. O'Neal's credibility is suspect because he discussed employment as Bolan's expert to disprove materiality based on event studies, without regard to academic research. Yet here he offers the opposite opinion: that Bolan's analyst reports should be material based on academic studies, regardless of event studies showing no statistically significant price movement. It is not credible to seriously entertain both of these opposing viewpoints.

F. Bolan Never Received any "Exchange that is Objective, Consequential and" a "Gain of a Pecuniary or Similarly Valuable Nature," and Thus Did Not Receive an Actionable Personal Benefit Under *U.S. v. Newman*

Although the personal benefit issue has already been extensively briefed with the Court on summary disposition (which arguments are incorporated here), below are some key highlights of the Division's failure to show a concrete, objectively valuable benefit.

- Bolan's history of great positive feedback for speaking with traders dated back at least a year before the alleged insider trading – before Ruggieri was hired by Wells Fargo – and included Ruggieri feedback in October 2009, six months before the allegation here. (*E.g.*, BX3 at WF-1594764) Under *Newman*, it "would not be possible" to prove a personal benefit where such career assistance was given long "before [a tipper] began providing any" alleged "insider information." 773 F.3d at 453.

- Indeed, at trial Bolan will prove the obvious fact that flows from this: The positive feedback Bolan received for trader dialogue was due to him actually performing legitimate work of speaking to Ruggieri about legitimate topics every day. The wealth of feedback preceding any alleged trading disproves it as a personal benefit for tipping.

- Bolan's positive feedback was confirmed both by Ruggieri's and Bolan's managers, who are not alleged to be involved in any alleged insider trading scheme. This thus breaks any link between the feedback and any claimed benefit for tipping. Further, it proves that Ruggieri did not have the power to give an objective *quid pro quo* to Bolan through feedback – as Ruggieri did not have the power to promote Bolan.

- Bolan's supervisor testified that Ruggieri's feedback did not play any quantifiable role in his promotion. Instead, he testified it was "client votes, sales force review and external rankings," that "will ultimately determine where you end up" for a promotion as an analyst – not trader input. (DX132 at 19:1-6.). Nowhere in Wickwire's testimony did he

ever quantify what impact Ruggieri's feedback had on Bolan's prospects for promotion.

- That Bolan and Ruggieri were pretty good friends is insufficient as a matter of law under *Newman*, which rejected "mere friendship" and extensive phone conversations as insufficient to support an "inference" of personal benefit. 773 F.3d at 452.

- The sparse evidence that Bolan and Ruggieri occasionally socialized outside the office is nothing more than testimony that they socialized four-to-seven times during the three-year period from "2009" through "2011." (Div. Ex. 110, 110A at 30-31). But "typically" this sparse socializing involved "Other colleagues from Wells Fargo." (*Id.* at 30.) This is insufficient as a matter of law under *Newman*. 773 F.3d at 452.

- That Bolan stayed at Ruggieri's New York City apartment one time after leaving Wells Fargo in late April 2011 is insufficient to show a personal benefit, and was plainly not an inducement to tip information. *See, e.g., S.E.C. v. Anton*, 2009 WL 1109324, at *9 (E.D. Pa., Apr. 23, 2009) (rejecting personal benefit where tipper visited "home only once").

- It is undisputed that Bolan and Ruggieri did not maintain a significant relationship after Wells Fargo, as shown by undisputed testimony that their communication "kind of died off after [Bolan] went to Madison Williams" in June 2011, and "It's been extremely infrequent since then." (DX 110 at 31.)

G. The Trader A Allegations Suffer from Even Greater Defects than the Ruggieri Allegations

The Division's sparse Trader A allegations suffer from greater defects than the Ruggieri allegations, particularly with the lack of personal benefit:

- There is no evidence that Bolan received anything of objective pecuniary or similar value from Trader A for alleged tipping. Nothing of value is alleged to have been given from Trader A to Bolan. This is fatal under *Newman*. 773 F.3d at 452-53.

- Bolan and Trader A worked together for just nine months in 2005, and since then socialized just "Four times since 2005" and spoke "a couple of times a month." (DX 110 at 112-13.) This disproves any suggestion that Bolan and Trader A had any especially "close" friendship – and the Division has utterly failed to give any content to its bald quotation of the words "close" and "trusted"

- *Critically, Bolan was not even invited to Trader A's funeral.* Bolan only learned of his death at a later date from others who were not members of Trader A's family.

- Bolan and Trader A lived in different states – Bolan worked in "Nashville," Tennessee, (OIP ¶ 4), and Trader A stayed New York City. (Brokercheck Rept.)

Moreover, the same factual defects in the Ruggieri AMRI claim apply to the Trader A AMRI claim – which comprises over 80% of the alleged ill-gotten Trader A profit. Bolan did not get approval for the AMRI upgrade until 3:55 p.m. on July 2, 2010. (BRX7 at WFC-829669.) Yet Trader A began buying AMRI shares at 9:41 a.m. on July 1, 2010, almost two trading days before Bolan was approved to upgrade AMRI. (BX79, line 65446.) Trader A bought the majority of his shares that day (13,726 shares.) (*Id.*, lines 65238-66309.) Trader A bought all but a few hundred shares of his 24,252-share AMRI position before Bolan was authorized to upgrade AMRI. (*Id.*, lines 65238-66309.)

Importantly, the Division fails to identify any communication between Bolan and Trader A on July 2, 2010 near 3:55 p.m., when Bolan was approved to upgrade AMRI. Instead, the closest phone call the Division identifies occurred on June 30, 2010 – *two days before Bolan even requested permission to upgrade AMRI.* This is inconsistent with the alleged pattern of tipping after obtaining approval to upgrade alleged in the rest of the OIP (*e.g.*, ¶¶ 17, 23, 26, 29). Further, this call was related to Bolan being was out of the office that week for an emergency appendectomy he had on June 27, three days earlier.

Also inconsistent with suspicious trading is the fact that Trader A held part of his AMRI position well after Bolan issued his report. Trader A retained 4,000 shares of AMRI stock at the end of trading on July 6, 2010, after a full day of trading after Bolan's report. (BX79, lines 66791-67031.) He continued to retain 3,600 shares at the end of the day on July 7, 2010. (*Id.*, lines 67053-57.) And he retained 2,853 shares at the close of trading on July 8, 2010. Trader A did not fully liquidate his AMRI position until July 9, 2010 – more than three full trading days after Bolan issued his report.

Similarly, the Division ignores the clear evidence that Bolan and Trader A did not have a substantive conversation before Bolan's April 6, 2010 Parexel downgrade. The Division cites a Bolan call to Trader A's cell phone on April 5, 2010 at 5:53 p.m. lasting two minutes. But it ignores the documentary evidence indicating that Bolan and Trader A did not talk on that call – but rather Bolan left a message asking Trader A to call Bolan back. (BRX13 at WFC437948.) This is corroborated by an email less than two hours later, in which Trader A wrote Bolan an email containing Bolan's home phone number and a "?," which indicates Trader A was asking if that was the number to use to call Bolan back, after getting the message. The Division's phone records show that there was no subsequent phone call between Bolan and Trader A – and thus no tip could have been communicated at this time.

Indeed, the circumstances surrounding the April 5 call are innocent, because Bolan was merely calling Trader A back after the latter sent an email to Bolan that generated an "Out of Office AutoReply" on April 1, 2010. (BRX14 at WFC810248.) Merely returning a call and failing to connect with someone is not consistent with tipping them.

Moreover, the Division ignores that Trader A's April 6, 2010 trading is inconsistent with merely trading on the PRXL upgrade (which addressed PRXL only), because Trader A's primary investment position that day was a $93,465 short position in Covance. (BX79, lines 58280-86.) Trader A was short 1500 shares of Covance at a price of $62.20, whereas his PRXL short position that day was worth just $49,277.12. (*Id.*, lines 58342-43.) Trader A's CVD-PRXL short position was consistent with Bolan's previously-published March 22, 2010 Squawk "CRO's: Stronger USD Creates Headwind," which opined that falling Euro rates would cause PRXL to lose $22 million and CVD to lose $20 million in revenue. (BX4 at WF765700-01.) Trading on published research is not insider trading.

The documentary evidence proves this motivation behind Trader A's April 6 trading. Publicly-available Euro-USD price data shows that the Euro was dropping significantly on from April 4-6, 2010. (BX17.) And Trader A sent Bolan an email on March 31, 2010 regarding ICLR, which was the company Bolan identified in his March 22, 2010 Squawk as having the third largest impact from falling Euro rates, with a revenue impact of "$10MM." (BX4 at WF765700-01.) Thus, Trader A's trading records and document trail undermine an inference of trading based on the April 7, 2010 Parexel downgrade.

Finally, Trader A's trading on August 13, 2010 trading is inconsistent with betting on a Bolan Emdeon upgrade, because Trader A traded both Emdeon and a significant $30,400 position in MedAssets ("MDAS"). (BX79, line 69435-46.) It is well-known that MDAS and EM are two top companies in revenues from Revenue Cycle Management ("RCM").[6] Bolan issued a report on MDAS on August 10, 2010, which noted that MDAS's RCM revenue was "up 14% yr/yr," driven by "robust late-stage RCM pipeline that was at least 50% larger on a year-over-year basis." (BRX15 at WF544430.) This was a favorable indication for MDAS and EM.

Similarly, Emdeon issued a press release on August 12, 2010 after the market closed announcing progress in developing a Clinical Lab Data Exchange product. (EX56).[7] This press release and MDAS's increased RCM revenue discussed in Bolan's August 10, 2010 report provide an explanation for Trader A's trading that did not involve an EM upgrade. And the documentary evidence shows the August 13 call was not about EM at all. (BX56.)

Indeed, Trader A's pattern of Emdeon trading shows he was bullish on the stock for a much larger period than the August 13 trading day before Bolan's upgrade. Trader A continued

---

[6] *See, e.g.*, Modern Healthcare "Largest Revenue Cycle Management Firms," (Sept. 2014) (citing Emdeon and MDAS as top two Revenue Cycle Management firms by revenue), *available at* http://www.medassets.com/_assets/pdf/modern-healthcare-largest-rev-cycle-firms-sept-2014.pdf

[7] See also PR Newswire, http://www.prnewswire.com/news/emdeon%20inc.&page=1&pagesize=200, for 4:01 p.m. time stamp.

to trade EM heavily after that, including September 1-2, 7-10, 14, 17, 20-21, 28-30, and October 4, 19 and 21. Such trading is flatly inconsistent with the Division's allegations.

ARGUMENT

Insider trading claims against a tipper require that the Division prove that an alleged tipper (1) had a fiduciary duty to his employer, (ii) breached that fiduciary duty by disclosing (iii) material nonpublic information (iv) to a tippee who traded on that information, and (v) "in exchange for a personal benefit." *Newman*, 773 F.3d at 450. To meet the personal benefit standard, requires "proof" of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," or at least a "proof of a meaningfully close personal relationship that generates" such "an exchange." *Id.* at 452.

In addition, claims of insider trading arise under § 10(b), and thus requires a showing of *scienter*, which requires that "the tipper must know that the information that is the subject of the tip is non-public and material for securities purposes or act with reckless disregard of the nature of the information." *S.E.C. v. Obus*, 693 F.3d 276, 289 (2d Cir. 2012). *Scienter* requires "a mental state embracing intent to deceive, manipulate, or defraud." *Id.* at 287.

I. THERES IS NO DIRECT EVIDENCE THAT BOLAN TIPPED ANY MATERIAL NON-PUBLIC INFORMATION, AND THE DIVISION'S CIRCUMSTANTIAL EVIDENCE IS INSUFFICIENT BECAUSE BOLAN WAS REQUIRED TO SPEAK TO RUGGIERI ON AT LEAST A DAILY BASIS, WHICH PROVIDES A LEGITIMATE REASON FOR ALL THE PHONE CALLS AT ISSUE

The Division's case fails to meet the standard of proving insider trading by a preponderance of the evidence, because it has no direct evidence that Bolan tipped Ruggieri (or Trader A) with any material information. Indeed, the Division cannot point to the content of any single communication as tipping the fact of an upcoming rating change at all. Instead, the Division relies on evidence of "records of times of telephone calls and text messages" and the

"purchase and sale of [] stock during these periods," that has repeatedly been rejected as insufficient to prove insider trading in federal court. *S.E.C v. Schvacho*, 991 F. Supp. 2d 1284, 1299 (N.D. Ga. 2014). As Courts have repeatedly held, such alleged "pattern" evidence may be "facially interesting," but does not prove, by a preponderance of the evidence, that [Bolan] misappropriated insider information to" tip his rating changes. *Id.* at 1299; *S.E.C. v. Jensen*, 2013 WL 6499699, at *24 (C.D. Cal. Dec. 10, 2013) (rejecting insider trading claim based on former CEO's stock sale three days before press release).

Most importantly, Bolan has a legitimate reason for every phone call with Ruggieri since Wells Fargo policy demanded that he speak to Ruggieri at least once a day, and again whenever there was a "news article," "a competitor changes a rating" or any other public information came out on a stock Bolan covered. (BX2 at WFC-1003792.) Where, as here, there is "unrebutted" evidence that the alleged tipper and tippee "spoke with each other with enormous frequency about matters that," purported evidence of suspiciously-timed phone calls "does not meet the SEC's burden of proof." *Schvacho*, 991 F. Supp. 2d at 1299 (N.D. Ga. 2014); *accord Jensen*, 2013 WL 6499699, at *24 (C.D. Ca. Dec. 10, 2013) (rejecting circumstantial insider trading claim where defendant offered testimony from broker giving innocent explanation for trade).

Further, Bolan has identified specific, legitimate reasons for virtually all of the phone calls at issue, based not only on his prior pattern of frequent phone calls with Ruggieri and Trader A but also on specific, "reasonable explanation[s]" for each call. *Freeman v. Decio*, 584 F.2d 186, 197 & n. 44 (7th Cir. 1978) (finding no inference of wrongdoing where, among other reasons, defendant had reasonable explanations for conduct); *S.E.C. v. Moran*, 922 F. Supp. 867, 893 (S.D.N.Y. 1996); *accord S.E.C. v. Rorech*, 722 F. Supp. 2d at 414-14 (S.D.N.Y. 2010) (citing defendant's "innocent explanation" for conduct in finding no insider trading).

Moreover, Bolan has shown above – in Section C – that the Division's alleged "pattern" is no pattern at all but instead a distortion of data that shows Ruggieri was just as likely to hold an overnight position in the wrong direction of a Bolan report as he was in the right direction. ***On at least five (and in fact, six) occasions, Ruggieri held substantial overnight positions in the wrong direction of a Bolan rating, valuation or earnings estimate change report.*** This entirely neutralizes the Division's allegations of six overnight positions in the same direction of similar reports. There is no pattern here. There is only the Division skewing the data to conjure up a false "pattern" to distract from its lack of evidence meet its burden of proof.

This showing proves that there are legitimate reasons for each of the overnight positions by Ruggieri in this case. In fact, Ruggieri held an overnight position in a stock at least 329 times during his 414 trading days working at Wells Fargo. (BX82-100.) This includes over 40 additional overnight positions for the six stocks at issue during his tenure, on top of the six overnight positions cited by the Division in this case. (*Id.*) Ruggieri's history of heavily trading all of the stocks covered by Bolan throughout his tenure at Wells Fargo – including many overnight positions – weighs heavily against any suggestions of insider trading. *See SEC v. Heartland Advisors, Inc.*, No. 03 Civ. 1427, 2006 WL 2547090, at *1-4 (E.D. Wisc. Aug. 31, 2006) (rejecting insider trading claim based on portfolio manager's lunch with insider just before liquidating holdings where defendant had previously sold the same security in similar quantities); *Rorech*, 722 F. Supp. 2d at 414-15. (rejecting insider trading claim where defendant established legitimate explanation based on belief that company was undervalued due to its high leverage); *Moran*, 922 F. Supp. At 893 (S.D.N.Y. 1996) (defendant's history of purchasing large quantities of similar stocks weighed against finding of insider trading).[8]

[8] The same goes for Trader A's trading pattern. The Division cannot dispute that Trader A repeatedly traded the securities of at least ten of the stocks that Bolan covered: This includes the securities of ATHN, AMRI, CVD, EM,

Given the *five times* Ruggieri held overnight positions in the wrong direction of key Bolan reports, the Division's case does "little more than establish that [Ruggieri] had [six] successful trades over the course of" twelve months and "that nonpublic information was available to him." *S.E.C. v. Horn*, 2010 WL 5370988, at *5 (N.D. Ill. Dec. 16, 2010) (rejecting S.E.C. insider trading claim based on "five successful trades" over "eight-and-a-half months"). Such allegations are insufficient to prove insider trading by a preponderance of the evidence. Accordingly, the Division has failed its burden to prove that Bolan tipped inside information.

II. THE SIX ANALYST REPORTS AT ISSUE WERE NOT MATERIAL BECAUSE THEY DID NOT CREATE ANY STATISTICALLY SIGNIFICANT PRICE MOVEMENT IN THE VALUE OF THE STOCKS

The Division also cannot satisfy its burden of proving that Bolan's six analyst reports contained material non-public information because both the experts for Bolan and the Division failed to find that any of those reports caused a statistically significant price movement. As Judge Rakoff held in *DeMarco v. Lehman Brothers, Inc.*, an analyst report is only material information if there is a showing that it moved prices "in any material way that is not simply speculative." 222 F.R.D. 243, 247 (S.D.N.Y. 2004). The reason is that compared to information from the company itself, "a statement of opinion emanating from a research analyst is far more subjective and far less certain, and often appears in tandem with conflicting opinions from other analysts as well as new statements from the issuer." *Id.* Thus, a securities fraud claim based on an analyst report is actionable only upon "a showing that the analyst's statements materially impacted the market price in a reasonably quantifiable respect." *Id.*

ICLR, KNDL, MDAS, PRXL, PPDI and QSII. (BX79.) Nor can it dispute that Trader A actively traded each of the three stocks at issue on many occasions besides the three trades at issue here. Trader A engaged in dozens of trades of PRXL from April 2008 through February 2009; and he had a virtually identical position to his April 6 position on April 23, 2010 – shorting 1200 shares of PRXL (BX79, lines 60587-89). He also heavily traded EM from October 2009 through February 2010, and from August through October 2010. (*Id.*, lines 48542-55018.) And he actively traded AMRI in 2011 and 2012.

Such a showing requires addressing:

- analyzing the price movements of stocks in response to analyst reports using a large enough sample to have "statistical significance." *Id.* at 248-49.
- Whether the analyst's reports were "different than similar recommendations of many other analysts at the time." *Id.* at 247-48.
- Whether there is "confounding news" from the issuer or other analysts that might be an alternative explanation for any market impact; and
- general market movements that may have also affected the prices.

Each these issues are addressed in a properly-run event study, like the ones run by each of the experts here. And each expert found no statistically significant market price movement associated with any of the six reports at issue. Accordingly, the event-study consensus between the experts establishes that the reports at issue are not material as a matter of law.

Indeed, Courts have found that an "event study" is "reliable and the best measure of materiality." *S.E.C. v. Berlacher*, 2010 WL 3566790, at *8 (E.D. Pa., Sept. 13, 2010). And the S.E.C. itself has relied upon event studies as the basis for establishing materiality in many cases. *See, e.g., S.E.C. v. Leslie*, 2010 WL 2991038, at *29 (N.D. Cal., July 29, 2010) ("SEC offers the expert report of Mr. Davis" who "performed an event study and concluded" a statement "was material because there was a statistically significant decrease in the share price"). Further, Courts in the Second Circuit have repeatedly noted that analyst reports may not be actionable under the securities law where there is strong evidence that they did not "actually affect[] the price of securities traded in the open market" *Hevesi v. Citigroup, Inc.*, 366 F.3d 70, 79-80 (2d Cir. 2004); *accord In re IPO Secs. Litig.*, 471 F.3d 24, 43 (2d Cir. 2006) (noting that it is "doubtful" a presumption of market impact can be extended to "analysts' reports"); *In re Credit Suisse First Boston (Latronix, Inc.) Analyst Secs. Litig.*, 250 F.R.D. 137, 143 (S.D.N.Y. 2008)

(rejecting argument that analyst report-related price increases of "roughly 3.6% and 2%" were material because price movement likely was "just random fluctuations in the stock price").[9]

Bolan's expert, Dr. Prowse, analyzed the price changes related to all six analyst reports and found that, even if you consider them with confounding information, they were not associated with any statistically significant price movement. (BX80 ¶¶ 19, 21, 22, 24, 26-27.) Further, he also found that four of the six reports (PRXL, CVD, EM, ATHN) were issued simultaneous with confounding information related to each company, which was an additional factor preventing a finding of materiality as to those four reports. *See, e.g., Bricklayers and Towel Trades Int'l Pension Fund v. Credit Suisse Secs. (USA) LLC*, 752 F.3d 82, 95-96 (1st Cir. 2014) (rejecting expert event study for failing to "address confounding information that entered the market on the event date"). And the Division's expert, Dr. O'Neal, has confirmed Dr. Prowse's findings by himself concluding that four of the six reports were not associated with any statistically significant price movement – and that the two others were issued with confounding information that precluded any finding of materiality. (DX177 at 11 & note.) Thus, there is no "battle of the experts" on this issue – all event studies here find no statistical significance. This warrants judgment as a matter of law in Bolan's favor.

---

[9] Although *DeMarco* and *Latronix* were private actions decided class certification, the decisions were made based on lack of materiality, the same element at issue in an insider trading case. *See Latronix*, 250 F.R.D. at 144 (noting that issue was whether analyst reports "were material"). Thus, *Latronix* and *DeMarco* govern here. *See also id.* at 141 & n.5, 142 & n. 8 (collecting cases, including *Fogarazzo v. Lehman Bros., Inc.*, 232 F.R.D. 176, 184, 190 (S.D.N.Y. 2005) (holding that the fraud-on-the-market presumption depended on whether statement was material); *In re PolyMedica Corp. Sec. Litig.*, 432 F.3d 1, 13, 19 (1st Cir.2005) (vacating district court's certification of the class and rejecting definition of market efficiency that "allows some information to be considered 'material' and yet not affect market price"); *See also Ray v. Citigroup Global Markets, Inc.*, 482 F.3d 991, 995 (7th Cir.2007) (affirming a grant of summary judgment and requiring plaintiffs to show that "defendants' alleged misrepresentations artificially inflated the price of the stock and that the value of the stock declined once the market learned of the deception" to engage the fraud-on-the-market presumption); *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 659, 663 (5th Cir.2004) (affirming grant of partial summary judgment for defendants as to alleged misstatements that did not lead to "actual movement" in market price of the stock); *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1425, 1435 (3rd Cir.1997) (affirming the district court's dismissal and stating that "because the market ... was 'efficient' and because ... the disclosure had no effect on [the stock's] price, it follows that the information disclosed ... was immaterial as a matter of law.").

Because the Division cannot show a statistically significant price movement, it desperately tries to save its case by having Dr. O'Neal cite some (mostly old) academic papers concluding that analyst reports can be associated with a price impact. But as Dr. O'Neal himself concedes, there is no consensus on this issue, and a recent paper by leading authorities found "that analyst recommendation changes themselves do not lead to abnormal returns," *i.e.*, do not lead to statistically significant material price movements. (DX177 at 6.)

More importantly, none of the articles cited by Dr. O'Neal endorse a conclusion that every analyst report is material – and none of them focus on analyst reports from a middling analyst like Bolan, who had less than three years' experience and ranked 19 out of 28 Health Care distribution analysts. (BRX16 at WF670677-729.) Instead, each article cited by Dr. O'Neal did an event study-type economic analysis of a set of analyst reports to draw general conclusions about analyst reports generally. In so doing, each article reinforces the point that event-study methodology is necessary to draw conclusions about the materiality of the reports being analyzed by an economist. Here, all of the economic analyses have found that the six analyst reports are not associated with a statistically significant price movement, and thus are not material. Thus, even the articles cited by Dr. O'Neal support Bolan's position.

As the Seventh Circuit has held, "the spirit of Daubert" and its principle of reliability based on scientific validity "is applicable" to administrative proceedings, because "'Junk science' has no more place in administrative proceedings than in judicial ones." *Niam v. Ashcroft*, 354 F.3d 652, 660 (7th Cir. 2004). And this Court has held that *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993) applies to assess the reliability of expert testimony in an administrative proceeding. *See In the Matter of WSF Corp.*, 2002 WL 917293, at *3-*4 (S.E.C., May 8, 2002) (applying *Daubert* to disregard expert testimony); *In re H.J.*

Meyers & Co., 2002 WL 1828078, at *46 (Aug. 9, 2002) (applying *Daubert*). Indeed, the Division itself has argued that *Daubert* applies to these proceedings. *See, e.g., In re Matter of BDO China Dahua CPA Co., Ltd.*, File Nos. 3-14872, 15116, Div.' Mot. in Limine 7-14 (June 26, 2013), *available at* http://www.sec.gov/litigation/apdocuments/3-15116-event-86.pdf.

Under *Daubert*, Dr. O'Neal's opinion of materiality should be disregarded because it is not based on any actual economic analysis of the six analyst reports at issue here. Further, it is not supported by any analysis at all. Instead, he merely cites disputed academic papers that provide general statements about analyst reports generally. These papers say nothing about the materiality of Bolan's reports, or the circumstances under which they impacted the market.

Accordingly, Dr. O'Neal's opinion is not reliable and should not be credited here, and the Court should adopt Dr. Prowse's opinion and rule that the analyst reports at issue in this case are not material under the securities laws.

III. AS SHOWN IN RESPONDENTS' SUMMARY DISPOSITION BRIEFING, THE DIVISION IS NOT ABLE TO PROVE AN OBJECTIVE PECUNIARY OR SIMILARLY VALUABLE PERSONAL BENEFIT UNDER *NEWMAN*

All of the Division's claims against Bolan involving are insufficient under *Newman* because mere "friendship" is insufficient to show a personal benefit for tipper liability. *Newman* held that it is "impermissible" to infer a personal benefit from "the mere fact of a friendship" absent "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. *First*, the Division has failed to allege anything more than a friendship with Trader A – and call it "close" without any context – but still fails to identify any objectively valuable exchange from Trader A to Bolan under that relationship, which is insufficient under the direct holding of *Newman*.

Moreover, the allegations of "pretty good" casual work friendship with Ruggieri fail under the direct facts of Newman, where

- Tipper Ray and Tippee Goyal "had known each other for years, having both attended business school and worked at Dell together." *Newman*, 773 F.3d at 452.

- Goyal and Ray "knew each other's wives, talked about going on vacation together, and spoke frequently, often for long periods of time, late at night while each of them was at home." Br. for U.S., *U.S. v. Horvath, Newman, et al.*, 2013 WL 6163307, at *85 (Nov. 14, 2013) (hereinafter "Newman Brief").

- Tipper Choi and Tippee Lim "were 'family friends' that had met through church and occasionally socialized together." *Newman*, 773 F.3d at 452.

- "Lim described Choi as a 'family friend' he had known for years." *Newman Brief*, 2013 WL 6163307, at *89 (Nov. 14, 2013).

In stark contrast, the OIP's meager examples of friendship are that (i) Bolan asked Wells Fargo to consider Trader A for a job, calling him a trusted friend; and (ii) Ruggieri gave Bolan keys to his apartment when Bolan was interviewing *after* leaving Wells Fargo. (¶¶ 35-36.) But *Newman* specifically rejected an attempt to help someone get a job as insufficient to state a personal benefit. 773 F.3d at 452 (rejecting "editing resume and sending it to a Wall Street recruiter"); *Newman Brief*, 2013 WL 6163307, at *89 ("Goyal 'put in a good word' for Ray with a potential employer").

Moreover, that Ruggieri gave Bolan access to his apartment during interview *after Bolan left Wells Fargo* is not a "pecuniary or similarly valuable" gain. 773 F.3d at 452. As the OIP concedes, this occurred well after the alleged tipping of information, and thus was not a *quid pro quo* exchanged for allegedly tipping information starting over a year earlier. Further, Bolan stayed over at Ruggieri's house only once, defeating the impact of this allegation. *Id.* at 453. (rejecting career advice that alleged tippee provided for other "industry colleagues"); *see also S.E.C. v. Anton*, 2009 WL 1109324, at *9 (E.D. Pa., Apr. 23, 2009) (rejecting personal benefit

where tipper had been to tippee's "home only once"). This falls well short of the detailed vacation planning and family relationships rejected in *Newman*. *Id.*

As *Newman* concluded, if such a minimal showing of friendship "was a 'benefit,' practically anything would qualify." *Newman*, 2014 6911278 at *10. This applies *Dirks v. S.E.C.*, which requires facts showing that a relationship "suggests a *quid pro quo* from the" tippee, 463 U.S. 646, 664 (1983), to satisfy *Dirks*'s holding that "Absent some personal gain, there has been no breach of duty" triggering liability. 463 U.S. at 662. Thus, the Division's failure to provide proof that a friendship generated a "pecuniary or similarly valuable" gain to Bolan renders those allegations insufficient as a matter of law. 773 F.3d at 452.

Second, the evidence shown above proves once and for all that Bolan did not get any positive feedback in return for tipping from Ruggieri – but rather earned that feedback from actively and legitimately speaking with traders under Wells Fargo Best Practices. Bolan's actions in this regard date back to April 22, 2009, well before Ruggieri was hired. (JR3, WFC-960036.) And he got "great feedback" for this from Ruggieri's predecessor, "dave graichen" even before July 1, 2001 (BRX2 at WF-891552.) And in October 2009, six months before the alleged insider trading at issue, Ruggieri cited Bolan as the "most practice and helpful" analyst at Wells Fargo. (BX3 at WF1594764.) In particular, Ruggieri stated "Bolan's in a league of his own - great dialogue with clients and gets it." (*Id.*) There is no allegation of insider trading or benefit directly related to this comment. And Bolan's great feedback for trader dialogue dating back prior to July 2009 proves this was not a quid pro quo for insider trading. *See Newman*, 773 F.3d at 452-53 (rejecting personal benefit based on similar "career...assistance" that began approximately a year before any alleged tipping of inside information).

The Division does not allege a quantifiable benefit from such feedback because it cannot

do so. The undisputed evidence is that Bolan's promotion relied on "client votes, sales force review and external rankings," – the "client facing piece." (DX 132 at 19:1-6.) Under Wells Fargo guidelines, the "client facing piece" "will ultimately determine where you end up" for a promotion as an analyst. (*Id.*) And Wickwire never objectively quantified what impact such feedback had. Thus, this feedback fails the "objective, consequential...pecuniary or similarly valuable" test under *Newman*. *Newman*, 773 F.3d at 452.

Finally, *Newman* must be applied strictly to be consistent with the facts of *Dirks* itself, which itself rejected tipper liability based on an alleged unreciprocated "gift," intent to benefit a recipient, and a vague, unquantified "enhanced reputation." *Dirks*, 463 U.S. at 676 n. 13 (Blackmun, J. (dissenting)). *Dirks* itself held that a tipper did not violate the securities law when he received no objective personal benefit, but absolutely did act "with the intention that Dirks would cause his clients to trade on that information." *Id.* at 666 n.27. As the *Dirks* dissent pointed out, the tipper did obtain a subjective "benefit," both "the good feeling of exposing a fraud and his enhanced reputation." *Id.* at 676 n.13 (Blackmun, J. (dissenting)). Similarly, the tipper "surely gave Dirks a gift of the commissions Dirks made on the deal in order to induce him to disseminate the information." *Id.* Yet the speculative benefits and an unreciprocated gift were insufficient to meet the "objective criteria" for an actual "personal benefit" *Id.* at 665-67.

Dirks's holding was based on a specific standard: the "disclosure" of information must be a breach of duty that "itself deceive[s], manipulate[s], or defraud[s]" – which is a breach of the fiduciary duty of loyalty. *Id.* at 663. The leading authority on fiduciary duties – Delaware – holds that a breach of the duty of loyalty requires more than a statement that a friend is "close." Rather, it requires evidence showing that the alleged friends "are as thick as blood relations." *In re MFW S'holders Litig.*, 67 A.3d 496, 509 n.37 (Del. Ch. 2013) (Strine, C.). And this standard

may not be satisfied where the only evidence of the friendship is that the friends "occasionally had dinner over the years, go to some of the same parties and gatherings annually, and call themselves friends." *Id.* at 509 n. 37 (emphasis added).

The Division's evidence falls well short of the facts of *Newman*, the requirements of *Dirks*, and the facts necessary to allege a common-law breach of the duty of loyalty. Accordingly, there is no actionable personal benefit and the Division's claims should be rejected.

IV. BOLAN DID NOT ACT WITH SCIENTER

Bolan should not be held liable for insider trading because he did not act with *scienter*. The Division's lack of a showing that Bolan received a personal benefit also undermines its claim that Bolan acted with *scienter*. *See Obus*, 693 F.3d 276, 288-89. Moreover, the Division cannot show *scienter* because its theory makes no sense: If, as it claims, Bolan and Ruggieri sought to maximize Wells Fargo's commissions from client trading, then they would not risk that for a small amount of dollars for Ruggieri – particularly since his compensation was guaranteed.

In particular, the Division alleges that Bolan and Ruggieri both sought to maximize Wells Fargo's client trading commissions. The evidence shows Ruggieri made over $12.2 million in commissions in 2010, and this was roughly 10 times higher than his profit/loss from trading positions. (JRX160 (commission detail).) Thus, the commissions from client trading in Ruggieri's Wells Fargo account were much more important than his profit on principal trading.

Accordingly, the last thing Bolan would ever want is Ruggieri (or Trader A) trading ahead of his research reports, because that would result in Ruggieri having trades ahead of Bolan's and Ruggieri's customers on those stocks, and thus harming them. And if Bolan's and Ruggieri's clients found out, they would not want to trade with Wells Fargo, and thus not give the millions of commissions that Bolan and Ruggieri wanted most. So it does not make sense

that Bolan would risk that commission revenue for a few trades that would – at most – make Ruggieri $7,020 (Ruggieri's 6% share of the $117,000 Wells Fargo profit here).

Moreover, this theory particularly does not make any sense given that neither Bolan nor Ruggieri made any money off of this. Bolan did not get any pecuniary benefit from the alleged insider trading – and there is no allegation that he did. And Ruggieri's compensation was subject to a guarantee (Div. Supp. Submission at 4-5 n.2), which deprived him of a financial reason to get Bolan to tip him inside information. Ruggieri's guarantee undermines any suggestion that Bolan tipped information to benefit Ruggieri – since a guaranteed salary meant Ruggieri would not incrementally benefit from the alleged insider trading. Accordingly, neither Respondent had a credible motive to engage in the alleged insider trading – and thus the Division has failed to show Bolan acted with *scienter*.

V. EVEN IF, CONTRARY TO LAW AND FACT, MR. BOLAN COULD BE HELD LIABLE, SANCTIONS ARE UNWARRANTED AND NOT IN THE PUBLIC INTEREST

Even if the Division could prove its claims, there is no sound basis for sanctioning Bolan, as the imposition of sanctions would be contrary to the public interest. *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981) (factors considered include likelihood of future violations; egregiousness of actions; isolated or recurrent nature; degree of *scienter* involved; sincerity of assurances against future violations; and recognition of the wrongful nature of its conduct; and no one factor is controlling).

In his entire career in the financial services business, Bolan has no record of any other regulatory action taken against him. Notably, Bolan continued to work as an analyst for over three years after leaving Wells Fargo. And, as Robert Hoehn of Sterne Agee will confirm, Bolan has been an upstanding financial services professional acting in compliance with the securities

laws. Bolan's prior and subsequent record provides significant assurance against the likelihood of future violations and provides a track record of assurance against future violations.

In addition, Mr. Bolan has received no profit from the alleged wrongdoing. And the Division has not alleged otherwise. This diminishes both the degree of *scienter* and egregiousness of his conduct. This is particularly so given the novelty of the claim alleged – given the Division's inability to cite a federal case imposing liability on these facts.

Mr. Bolan's life has been marked by service to his country in the Army, and he has received an honorable discharge. He has also dedicated himself to his wife and child, and relies on his profession to help raise his child and support his family.

Finally, given the absence of any financial gain for Mr. Bolan, the Court should not impose any significant sanction against Mr. Bolan to avoid an "inhibiting influence on the role of market analysts, which the SEC itself recognizes is necessary to the preservation of a healthy market." *Dirks*, 463 U.S. at 658. Bolan's job required him to constantly speak with Ruggieri about the stocks at issue, and to widely disseminate his research to others. If a maximal penalty or bar is imposed where an analyst did not directly profit, it would send a message to all analysts on Wall Street that the only way to avoid the constant risk of an industry bar is to go into self-imposed solitary confinement whenever they get close to publishing an analyst report.

Yet given the number of reports typically generated by analysts (as Bolan's 1 report every 1.5 trading days shows), this would mean silence at all time. And ultimately, this would only stop the flow of valuable information into the market, and harm market efficiency. Thus, it is necessary to avoid a significant sanction not just because of the facts of this case, but also to avoid the serious potential chilling effect on all analysts warned against in *Dirks*.

CONCLUSION

For the foregoing reasons, Respondent Gregory T. Bolan, Jr. respectfully requests that the Court enter judgment rejecting all claims and awarding judgment in his favor after the hearing in this matter.

Dated: March 9, 2015

Respectfully submitted,

Samuel J. Lieberman, Esq.
Sadis & Goldberg LLP
551 Fifth Avenue, 21st Floor
New York, New York 10176
slieberman@sglawyers.com