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

MOTION TO VACATE THE MAY 28, 2015 ORDER DUE TO THE COMMISSION'S SUBSEQUENT CONTRADICTORY FINDING THAT RESPONDENT BOLAN DID NOT PROVIDE A TIP THAT LED TO INSIDER TRADING BY RUGGIERI

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

Attorneys for Gregory T. Bolan, Jr.

October 20, 2017

TABLE OF CONTENTS

PRELIMINARY STATEMENT

Respondent Gregory T. Bolan, Jr. ("Bolan") moves to vacate the May 28, 2015 Order (the "Order") finding that Bolan tipped co-Respondent Ruggieri about a PRXL ratings change and Ruggieri traded on that tip. The Commission has since dismissed all claims that Bolan tipped co-Respondent Joseph Ruggieri ("Ruggieri") to trade before Bolan's rating changes. An ALJ's ruling that Ruggieri did not trade ahead of Bolan's PRXL research report based on a Bolan tip is now final. This refuted the Order's finding that "Bolan, provided notice to Ruggieri about Bolan's ... downgrade of ... PRXL[] before that downgrade was made public," and Ruggieri traded on that tip and "generated profits." (Order ¶¶ 6-7.) Accordingly:

- The Order should be vacated because the Commission's own subsequent finding that Ruggieri did not trade PRXL based on any Bolan tip has removed the statutory basis for the Order under § 8A of the Securities Act, which requires that the Commission "find[]" a securities law violation to impose such an order. 15 U.S.C. § 77h-1(a).

- Vacating the Order is consistent with decades of S.E.C. precedent vacating settled and litigated orders due to subsequent legal proceedings eliminating the statutory basis for the order. This spans from at least *In the Matter of James Swink, Jr.*, 1995 WL 467600 (Aug. 1, 1995), to *In the Matter of Sandeep Goyal*, IA Rel. 4339 (Feb. 23, 2016).

- This precedent applies with greater force here, because *the Commission itself* dismissed all litigated claims that Bolan tipped Ruggieri about his analyst reports due to finding insufficient evidence. Thus, vacating the Order is necessary both because the statutory basis has been removed, and to eliminate contradictory Commission findings.

- The Order's conflict with the Commission's dismissal of all litigated claims that Bolan tipped Ruggieri renders it arbitrary and capricious. Vacating the Order is necessary to meet the Commission's obligation of "treating like cases alike," *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989), and coming "to grips with conflicting precedent." *Jicarilla Apache Nation v. U.S. Dept. of Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010).

- It offends the rule of law for the same government entity to make one set of findings for one Respondent, and the exact opposite findings for another. Issue preclusion principles also support vacating the Order due to the contradictory rulings. Thus, vacating the Order is warranted to avoid a *Kafkaesque* impact on Bolan's career, where his Form U-4 and other records would report a set of "findings" that the Commission itself rejected.

Accordingly, Bolan respectfully requests that the Commission vacate the Order.

RELEVANT FACTUAL BACKGROUND

On September 29, 2014, the Commission issued an Order Instituting Administrative and Cease and Desist Proceedings against Respondents Bolan and Joseph Ruggieri. *In the Matter of Gregory T. Bolan, Jr. and Joseph C. Ruggieri*, Secs. Rel. No. 9659 (Sept. 29, 2014) (the "OIP"). The OIP alleged an "insider trading scheme involving Bolan, a research analyst at Wells Fargo Securities, LLC ..., who provided advance notice of forthcoming ratings changes to Ruggieri, a trader at Wells Fargo." (OIP ¶ 1.) The OIP alleged "Ruggieri generated over $117,000 in gross profits for Wells Fargo by trading ahead of six ratings changes authored by Bolan." (*Id.* ¶ 2.)

The OIP suffered from serious legal and factual defects. Bolan filed a motion for Summary Disposition against all of the OIP's claims. On February 12, 2015, Administrative Law Judge ("ALJ") Patil issued an Order granting Bolan's motion "in part," and requiring the Division of Enforcement (the "Division") to make a supplemental proffer of facts alleging that Bolan received an objective personal benefit to be held liable for tipping. (Order, Ad. Pro. Rulings Rel. No. 2309 (Feb. 12, 2015).) After the Division's proffer, ALJ Patil held that summary disposition was an "exceedingly close matter," but deferred ruling until the final ALJ hearing. Order on Mots. For Summ. Disp., Ad. Pro. Ruling Rel. No. 2350 (Feb. 25, 2015).

On the eve of a final hearing, the Division settled with Bolan. The Order significantly reduced the OIP's claims to just one claim of negligence. The Order states that "the Commission finds" that "Bolan ... provided notice of at least one forthcoming ratings change to [] Ruggieri." (Order ¶ 1.) The finding was that "in March of 2010, Bolan ... provided notice to Ruggieri about Bolan's ratings change downgrade of ... PRXL[] before that downgrade was made public," and Ruggieri traded on that tip to "generate[] profits." (*Id.* ¶¶ 6-7.) Bolan received a $75,000 civil penalty and Wells Fargo paid $29,231.66 in disgorgement and interest. (*Id.* pp. 5-6.)

But just months later, the Commission made the exact opposite finding. An Initial Decision by ALJ Patil found that Ruggieri "did not trade based on any tips" when he "traded in PRXL," and one other stock, CVD. *In the Matter of Bolan & Ruggieri*, S.E.C. Init. Dec. Rel. No. 877 at 28 (Sept. 14, 2015). ALJ Patil dismissed the remaining four – non-PRXL – trades because the Division failed to prove that Bolan tipped for a personal benefit as required for insider trading liability. The Division did not even appeal the ruling that Ruggieri did not trade based on any advance notice of Bolan's PRXL research report. Thus, the Initial Decision as to PRXL has "become the final decision of the Commission." Rule of Practice 360(d)(1).[1]

Instead of appealing the ALJ's finding of no improper tipping and trading as to PRXL, the "Division ... appealed only with respect to four of the six trades at issue in the OIP" for which ALJ Patil found no Bolan personal benefit. *In the Matter of Joseph C. Ruggieri*, Secs. Rel. No. 10389, at 1 (July 13, 2017). On Appeal, the Commission split on the remaining four, non-PRXL claims, with one of two Commissioners involved concluding that "the Division has not met its burden of establishing that Bolan tipped Ruggieri." (*Id.* (Piwowar, C. op. at 2).) Thus, the Commission dismissed the remaining four claims. (*Id.*)

Accordingly, the Commission has now reached a final decision that Bolan did not tip Ruggieri as to PRXL and CVD. And it has dismissed all other claims of Bolan tipping Ruggieri. Yet the May 28, 2015 Order with the exact opposite findings as to PRXL remains outstanding. On October 17, 2017, Bolan asked the Division Staff who litigated the Bolan and Ruggieri for the Division's position, and the Staff stated they oppose the motion. Bolan has asked to speak with one of the Division Co-Heads to confirm its position, but they both refused to meet or discuss this motion with Bolan's counsel.

[1] The Commission's public docket does not show an order of finality as to the Initial Decision, per Rule of Practice 360(e). But Rule 360(d) is plain that the failure to appeal a portion of a decision renders that portion final.

ARGUMENT

I. THE ORDER SHOULD BE VACATED UNDER COMMISSION PRECEDENT VACATING ORDERS BASED ON FINDINGS THAT ARE LATER REJECTED

The Order should be vacated under a long line of Commission precedent vacating Commission orders when subsequent legal proceedings that reject their findings. In these cases, the later findings have removed the basis for the Commission's order. Here, the Commission's final decision that Ruggieri did not trade PRXL based on any Bolan tip, has removed the statutory basis for the Order, which was issued under Section 8A of the Securities Act.

Under Section 8A of the Securities Act, the Commission is only authorized to issue a cease and desist order imposing remedial sanctions, like the Order, "If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated or is about to violate" the securities laws. 15 U.S.C. § 77h-1. But here, the Commission's final decision on the merits is that Bolan did not tip Ruggieri as to PRXL to trade in violation of the securities laws. (Initial Decision at 28.) Indeed, the Commission has now dismissed all claims that Bolan tipped Ruggieri in a scheme to violate the insider trading laws. Accordingly, the Commission itself has eliminated the statutory basis for Bolan's May 28, 2015 Order.

This motion should be governed by the Commission's order vacating a settled bar order in *In the Matter of Sandeep Goyal*, IA Rel. No. 4339 at 1-2 (Feb. 23, 2016), *available at* https://www.sec.gov/litigation/opinions/2016/ia-4339.pdf ("Goyal Vacatur Order"). In *Goyal*, Mr. Goyal pled guilty to a criminal insider trading charge. *In the Matter of Sandeep Goyal*, IA Rel. No. 3607 ¶ 4 (May 9, 2013), *available at* https://www.sec.gov/litigation/admin/2013/ia-3607.pdf ("Goyal Settlement Order"). He then agreed to a Commission "consent" order permanently enjoining him from violating the securities laws. *Id.* ¶ 2. Next, he reached a "Settlement," which imposed an Order in which "the Commission f[ou]nd[]" that Goyal engaged

in insider trading, and barred him from the securities industry. *Id.* pp. 1-2.

Almost three years after Mr. Goyal's S.E.C. settlement order barring him from the industry, the Commission vacated its order against Mr. Goyal. On October 27, 2015, the U.S. Attorney's Office filed an order of *nolle prosequi* dismissing its criminal conviction of Mr. Goyal based on the decision in *United States v. Newman.* (Goyal Vacatur Order at 1.) Over two months later, the Commission agreed to vacate Goyal's consent order. (*Id.*) Accordingly, the Commission vacated the Goyal Settlement Order, accepting his argument "that the basis for the bar order against him no longer exists." (*Id.*)

Bolan's Order should be vacated under the *Goyal* precedent. Just like in *Goyal*, Bolan reached a settlement with the Commission resulting in an order finding facts and imposing remedial sanctions against him. And just like in *Goyal*, subsequent legal proceedings undermined the findings forming the statutory basis for the Order against Bolan. In fact, there is a stronger case for vacating Bolan's Order, because his was a "neither admit nor deny" settlement (Order at 1), whereas Goyal's settlement Order was not a no-admit-no-deny settlement. (Goyal Settlement Order at 1.) Accordingly, Bolan's Order should be vacated just like the order in *Goyal*.[2]

In addition, the Commission has repeatedly vacated settlement orders in similar situations where subsequent proceedings undermined the statutory basis for Commission's order. For example, the Commission vacated a settlement order, including its factual findings, when a subsequent legal proceeding reached a result contradicting the statutory basis for the order. *In*

[2] Bolan's Order cannot be distinguished from Goyal as being a finding based on Bolan's offer of settlement. Goyal's Order was also based on his settlement. Further, Bolan's Order cannot be distinguished from Goyal by arguing that factual findings in the Initial Decision should only apply to Ruggieri, because the subsequent legal proceeding that led to vacating Goyal's order also involved findings in a proceeding involving a different party, *U.S. v. Newman*, 773 F.3d 439 (2d Cir. 2014). Here, the Commission has made a final decision that Ruggieri did not trade PRXL based on any Bolan tip, which entirely eviscerates the Order's "findings."

the Matter of James Swink, Jr., 1995 WL 467600 (Aug. 1, 1995) (vacating settlement order findings and administrative bar based on appellate court ruling in related criminal case). Similarly, the Commission has consistently vacated settled orders where a subsequent legal proceeding found that similar relief ordered in a different case exceeded the Commission's statutory authority. *See, e.g., In the Matter of William Masucci*, Sec. Exch. Act Rel. No. 53121 (Jan. 13, 2006), *available at* https://www.sec.gov/litigation/admin/34-53121.pdf (vacating settled investment adviser and investment company bars); *In the Matter of Peter F. Comas*, 2004 WL 139179, at **1-2 (June 18, 2004) (same).

In an analogous context, the Commission vacated an Order Making Findings and Imposing Remedial Sanctions by Default" where the respondent failed to answer the Order Instituting Proceedings, causing the "allegations" to "be deemed to be true." *In the Matter of Gregg Becker*, Sec. Exch. Act. Rel. No. 49244 (Feb. 13, 2004), *available at* https://www.sec.gov/litigation/admin/34-49244.htm. Several years later, the respondent's related criminal conviction was vacated on constitutional grounds, and a *nolle prosequi* was filed dismissing the criminal case. *In the Matter of Gregg Becker*, Sec. Exch. Act. Rel. No. 67795 (Sept. 6, 2012), *available at* https://www.sec.gov/litigation/opinions/2012/34-67795.pdf. Despite the respondent's prior default, the Commission decided to vacate his order, agreeing that the findings in the criminal case "invalidate[d] the basis for the Order." (*Id. at 2.*)

Indeed, the Commission recently confirmed that vacating an order is warranted where a subsequent proceeding undermines the order's in its statement regarding *Bartko v. S.E.C.*, 845 F.3d 1217, 1226 (D.C. Cir. 2017). *See Commission Statement Regarding Bartko v. S.E.C.*, (Feb. 23, 2017), *available at* https://www.sec.gov/news/statement/commission-statement-regarding-bartko-v-sec.html. The Commission announced that it would consider vacating a large number

of collateral bars – including settled orders – based on conduct preceding the July 22, 2010 effective date of the Dodd-Frank Act due to the *Bartko* findings.

In sum, significant Commission precedent weighs in favor of vacating Bolan's Order based on the Commission's later findings that contradict the statutory basis for the Order.

II. THE PRECEDENT FOR VACATING ORDERS BASED ON SUBSEQUENT FINDINGS APPLIES WITH GREATER FORCE WHERE THE COMMISSION MAKES FINDINGS THAT CONTRADICT A PRIOR ORDER

The Commission's precedent for vacating settled orders when subsequent proceedings make findings that undermine the statutory basis for those orders should apply with greater force when the Commission's own findings contradict findings in its prior order. If a state or federal prosecutor decides to dismiss a related criminal case after the Commission has imposed an order based on similar conduct, the disparate outcomes are explainable based on the higher standard for proving criminal liability and based on different agencies reaching different conclusions. Yet the Commission's precedent still favors vacating an order in such circumstances.

But where, as here, the Commission later makes findings that contradict the findings in its own prior settled order, there is a greater imperative to vacate the prior order to ensure consistency in the Commission's rulings. As a government agency, the Commission is charged with applying the law and facts equally to all parties, and to avoid inconsistent outcomes. The essence of the rule of law is to reach consistent legal outcomes based on the same facts. Accordingly, Bolan's Order should be vacated to ensure that the Commission is applying its findings equally and consistently.

In fact, vacating Bolan's Order is consistent with the Commission's own policy to "avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction

imposed, when the conduct alleged did not, in fact occur." 17 C.F.R. § 202.5(e).[3] Having made a final determination that Ruggieri did not trade based on any Bolan tip as to PRXL, the Commission itself risks creating the impression that Bolan's Order was entered when the conduct alleged did not, in fact occur, unless it vacates Bolan's Order. Such contradictory findings only serve to create the appearance of arbitrariness and promotes skepticism towards the law. Thus, the Commission should vacate the Bolan Order to avoid contradictory findings.

Moreover, vacating Bolan's Order is warranted to avoid the risk that maintaining the Order will render it arbitrary and capricious because the Commission's later ruling based on the same facts is that Ruggieri did not trade PRXL based on any Bolan tip. The law is well-settled that the Commission's statutory obligation to engage in "reasoned decisionmaking requires treating like cases alike." *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989). Where an agency fails to do so, its decision is "arbitrary and capricious and, therefore, unsustainable. *Water Quality Ins. Syndicate v. U.S.*, 225 F. Supp. 3d 41, 79 (D.D.C. 2016), *appeal dismissed*, No. 17-5027, 2017 WL 2332634 (D.C. Cir. Feb. 27, 2017). Treating like cases alike requires reaching the consistent findings about Bolan not tipping Ruggieri about PRXL for Mr. Bolan just as the Commission has made for Mr. Ruggieri.

Accordingly, Bolan's Order should be vacated to avoid an arbitrary and capricious result. The Commission is required to come "to grips with conflicting precedent," to avoid having its decisions vacated as arbitrary and capricious. *Jicarilla Apache Nation v. U.S. Dept. of Interior*, 613 F.3d 1112, 1120 (D.C. Cir. 2010). The final decision as to Ruggieri not trading based on a Bolan tip – and the dismissal of all claims that Bolan tipped Ruggieri – has created conflicting precedent that the Commission should reconcile by vacating Bolan's Order. The Commission's

[3] This Motion is consistent with this policy, since it is based only on the Commission's own later findings as to Bolan's conduct that contradict the findings in Bolan's order.

own policy and principles of administrative law both justify vacating the Order.

III. THE ORDER SHOULD BE VACATED TO AVOID AN ARBITRARY AND CAPRICIOUS RESULT THAT WOULD ALSO FRUSTRATE ISSUE PRECLUSION PRINCIPLES BY REQUIRING THE REPORTING OF "FINDINGS" THAT THE COMMISSION LATER REJECTED

Bolan's Order should also be vacated to avoid an unnecessary negative impact on his career by requiring him (and any employer) to report the findings from his Order on a Form U-4 or similar disclosure form, when those findings conflict with the Commission's later findings. This disclosure requirement risks confusing employers and customers about the Commission's own ultimate finding that the Division failed to prove that Ruggieri traded PRXL based on any Bolan tip. Bolan's career should not face an ongoing risk of impairment by Division allegations that the Commission ultimately found to lack merit.

The Commission's obligation of reasoned decisionmaking, discussed above, requires that it should only have one set of findings as to the same set of facts for the respondents in a case. But the current state of inconsistent Commission findings means one set of Commission findings about Bolan and the opposite findings for Ruggieri about the same exact facts. Neither the investing public nor Mr. Bolan are well-served by such a contradiction.

Indeed, the precedent of vacating Bolan's Order would serve as a check to correct the damage done to the careers of securities professionals by the Division bringing allegations before the Commission's ALJ's that are ultimately dismissed. When the Division brings such allegations, it immediately ruins a securities professional's career. The Division, using the Commission's megaphone and federal government credentials, puts out a national press release circulated to press and wire services in which Senior Commission officers publicly accuse the

individual of a wide array of fraudulent conduct.[4] This renders the employee effectively unemployable so long as an S.E.C. action is pending.

It is well-known that "Firms overseen by the S.E.C. appear wary of employing someone in a dispute with it." J. Eaglesham, "S.E.C. Wins with In-House Judges," Wall St. J. (May 6, 2015) (noting that James Hopkins "hasn't worked since charges were filed more than four years ago" while the case he ultimately won against the S.E.C. was pending). Notably, neither Mr. Ruggieri, James Hopkins nor John Flannery regained permanent positions in the securities industry – despite prevailing against the Division in proceedings before Commission ALJs. *See Flannery v. S.E.C.*, 810 F.3d 1, 15 (1st Cir. 2015). This well-known history creates tremendous pressure to settle Division claims, regardless of their merit. Accordingly, when the Commission ultimately makes findings that contradict its own prior Order arising out of the same facts in its own Enforcement proceeding, it should vacate the prior Order, both to set the record straight and to provide a helpful check against ongoing harm from Division allegations that are later rejected.

Indeed, principles of issue preclusion also support vacating Bolan's Order. It is well settled that when "an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply" issue preclusion. *U.S. v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). This principle of uniformity applies "equally when the issue has been decided by an administrative agency," *Univ. of Tenn. v. Elliott,* 478 U.S. 788, 798 (1986), which acts in a judicial capacity. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107–08, (1991). This applies to "factfinding of administrative bodies," such as the ALJ's finding (now final) that Ruggieri did not trade PRXL based on any Bolan tip. *Elliott*, 478 U.S. at 797.

[4] "Two Former Wells Fargo Employees Charged with Insider Trading In Advance of Research Reports Containing Ratings Changes," (S.E.C. Sept. 29, 2014) *available at* https://www.sec.gov/news/press-release/2014-221.

Further, issue preclusion may be "asserted by parties who were not present in the initial" S.E.C. proceeding. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 325-28(1979) (defendant in stockholders class action suit is precluded from re-litigating issues decided against it in an earlier action brought by SEC). Accordingly, Bolan may raise issue preclusion against the Division to seek to have his Order vacated.[5]

Issue preclusion should be applied here: The ALJ's decision was based on exactly the same facts as Bolan's Order (whether Bolan tipped Ruggieri about PRXL and Ruggieri traded based on that). And Bolan's liability as to PRXL is based on the same legal elements decided as to Ruggieri. *See Dirks v. S.E.C.*, 463 U.S. 646, 661 (1983) ("Tipping thus properly is viewed only as a means of indirectly violating the *Cady, Roberts* disclose-or-abstain rule.") Thus, issue preclusion principles should apply here, and weigh strongly in favor of vacating the Order.

In sum, Bolan urges the Commission to take a stand for the rule of law, the obligation of reasoned decisionmaking, and principles of uniformity, and vacate his Order.

CONCLUSION

For the foregoing reasons, Respondent Gregory T. Bolan, Jr. respectfully requests that the Commission vacate its May 28, 2015 Order as to Mr. Bolan, based on the Commission's own later finding that Bolan did not tip Mr. Ruggieri about PRXL in an insider trading scheme.

Respectfully submitted,

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

[5] Issue preclusion "does not apply" to Bolan's Order, because Bolan's Order was entered by an administrative settlement, in which "none of the issues" was "actually litigated." *Arizona v. California*, 530 U.S. 392, 414 (2000).

Certificate of Service

I hereby certify that on October 20, 2017, I served a copy of the above Motion to Vacate the May 28, 2015 Order Based on the Commission's Subsequent Contradictory Findings, by emailing a copy to counsel for the Division of Enforcement.

/s Samuel J. Lieberman

Samuel J. Lieberman
SADIS & GOLDBERG LLP
551 Fifth Avenue, 21st Floor
New York, NY 10176
Tel: (212) 573-8164
Fax: (212) 573-8149