SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Release No. 70044 / July 26, 2013

Admin. Proc. File No. 3-14208

In the Matter of

TZEMACH DAVID NETZER KOREM

OPINION OF THE COMMISSION

TRANSFER AGENT PROCEEDING

Grounds for Remedial Action

Civil Injunction

Former controlling principal of unregistered transfer agent was permanently enjoined from violating the antifraud provisions of the federal securities laws. *Held*, it is in the public interest to bar respondent from association with any transfer agent, broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or nationally recognized statistical rating organization.

APPEARANCES:

Tzemach David Netzer Korem, pro se.

James M. Carlson, for the Division of Enforcement.

Appeal filed: September 6, 2011
Last brief received: October 24, 2011

I.

Respondent Tzemach David Netzer Korem has been enjoined from violating the antifraud provisions of the federal securities laws[1] and criminally convicted of conspiracy to commit securities fraud.[2] Korem appeals from a follow-on administrative proceeding in which an administrative law judge barred him from associating with any transfer agent.[3] Korem asserts that the bar is unwarranted. The Division of Enforcement cross-appealed, arguing that Korem also should be barred from association with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or nationally recognized statistical rating organization.

We base our findings on an independent review of the record, except with respect to those findings not challenged on appeal. Consistent with our recently issued decision in *John W. Lawton*,[4] we find that it is in the public interest, based on the facts of this case, not only to bar Korem from associating with any transfer agent but also to bar him from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or nationally recognized statistical rating organization.

II.

A. The Market Manipulation Scheme and the Civil Injunctive Action that Followed

Korem was the controlling principal of First Public Securities Transfer Corp., an unregistered transfer agent. First Public Securities Transfer Corp. served as the transfer agent for ZNext Mining Corporation, Inc., an international mining company engaged in the exploration and development of new and underdeveloped mine sites. ZNext's common stock was quoted in the "Pink Sheets."[5]

Korem owned or controlled over one million shares of ZNext's penny stock. In December 2009, he and Jean R. Charbit, a stock promoter who also owned shares of ZNext, devised a classic "pump and dump" scheme.[6] Their plan was to falsely generate the appearance of market interest in the company's stock, induce the unsuspecting public to invest at ever increasing prices, and sell their own shares into the rising market.

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1 *SEC v. Charbit*, Civil Action No. 10-CV-23604 (S.D. Fla. Dec. 17, 2010).

2 *United States v. Korem*, No. 1:10-cr-20732-UU (S.D. Fla. Feb. 10, 2011).

3 *Tzemach David Netzer Korem*, Admin. Proc. File No. 3-14208, 2011 WL 3407850, at *5 (Aug. 5, 2011).

4 Investment Advisers Act Release No. 3513, 2012 WL 6208750 (Dec. 13, 2012).

5 The Pink Sheets, now known as OTC Markets Group, Inc. with three operating systems that include OTCQX, OTCQB, and OTC Pink, is an electronic inter-dealer quotation system. http://www.otcmarkets.com/about/otc-markets-history (last visited Feb. 14, 2013).

6 *See, e.g.*, *SEC v. Cavanagh*, 445 F.3d 105, 107 (2d Cir. 2006); *United States v. Salmonese*, 352 F.3d 608, 612 (2d Cir. 2003).

As part of that scheme, Korem and Charbit agreed in January 2010 to pay a kickback of cash and ZNext stock to a purportedly corrupt stock broker. In exchange, the stock broker agreed to buy $300,000 worth of ZNext stock through client accounts over which he had discretionary trading authority. Those purchases were to take place over the course of several weeks. Unbeknownst to Korem and Charbit, however, the stock broker was an undercover agent with the Federal Bureau of Investigation working a "sting" operation.

Also unbeknownst to Korem and Charbit, an FBI informant posed as an intermediary for the stock broker. The informant told the two that "there would be a problem if the broker's superiors or the Commission discovered the kickback."[7] So to make it less detectable, Korem and Charbit decided to disguise the payments. On January 8, 2010, Charbit handed $3,000 in cash to the intermediary, who was to pay the stock broker. That same day, Korem, acting on behalf of First Public Securities Transfer Corp., issued a stock certificate for $100,000 worth of ZNext stock in the name of the stock broker's purported girlfriend. Charbit also gave the intermediary a ZNext press release that Korem "designed . . . to mask any spike in trading volume caused by the broker's [upcoming] purchase."[8] The press release stated that ZNext would be fast-tracking its gold mining activities to take advantage of rising gold prices.

On January 14, ZNext issued a press release that was nearly identical to the one Korem designed. On January 15, the FBI agent posing as a stock broker bought 25,000 shares of ZNext stock for $1,000. On January 16, the intermediary told Charbit that the stock broker would no longer participate in the scheme, ostensibly because his compliance officer had questioned the trade. Law enforcement ended the sting operation shortly thereafter.

In October 2010, the Commission filed a complaint against Korem and Charbit in the United States District Court for the Southern District of Florida.[9] The complaint, as amended on November 18, 2010, alleged that Korem violated § 17(a) of the Securities Act of 1933, § 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder.[10] Korem agreed to settle the matter, and on December 17, the court enjoined him from violating the antifraud provisions of the federal securities laws, barred Korem from participating in any offering of penny stock, and imposed a civil penalty (the amount of which was to be determined by the court at a later date).[11]

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7 *SEC v. Charbit*, Civil Action No. 10-CV-23604, First Am. Injunctive Compl. at 5 (S.D. Fla. Nov. 18, 2010).

8 *Id*.

9 *SEC v. Charbit*, Civil Action No. 10-CV-23604, Injunctive Compl. (S.D. Fla. Oct. 7, 2010). Subsequently, Charbit consented to an injunction against violating the antifraud provisions of the federal securities laws, and agreed to a penny stock bar and a civil monetary penalty. *Id*. (S.D. Fla. Feb. 22, 2011). Pursuant to SEC Rule of Practice 323, 17 C.F.R. § 201.323, we take official notice of this order, all other final orders issued by the district court in this proceeding, and the related criminal action discussed below.

10 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5.

11 *SEC v. Charbit*, Civil Action No. 10-CV-23604 (S.D. Fla. Dec. 17, 2010). Although the amount of the civil penalty was to be determined by the court "upon motion of the Commission," *id*. at 3, the Commission subsequently

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As part of that settlement, Korem expressly agreed not to contest the factual allegations of the complaint in any later disciplinary proceeding based on the injunction.[12] He also expressly acknowledged that the permanent injunction could have collateral consequences.[13]

B. Korem's Criminal Conviction

On November 12, 2010, Korem signed a plea agreement in connection with a parallel criminal case pursued by the United States Attorney's Office for the Southern District of Florida.[14] In that agreement, Korem admitted that he conspired with Charbit to manipulate the publicly quoted price of ZNext stock from four cents to fifty cents per share.[15] Korem, Charbit, and others made or planned to make timed press releases to give the investing public the false and misleading impression that the broker's buying activity was induced by positive news about ZNext, rather than the undisclosed kickback.[16] While the conspiracy was halted by law enforcement officials before it resulted in actual losses to victims, Korem and the others acted with the specific intent of defrauding investors out of more than $300,000.[17]

On February 10, 2011, a federal district court found Korem guilty of conspiracy to commit securities fraud.[18] It sentenced Korem to twenty-four months in prison, to be followed by three years of supervised release.[19] As a condition of his supervised release, Korem must obtain written

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filed a notice of voluntary dismissal of its claims for civil penalties against Korem and Charbit. *Id*. (S.D. Fla. June 14, 2011).

12 *SEC v. Charbit*, Civil Action No. 10-CV-23604, Consent of Defendant Tzemach David Netzer Korem at ¶¶ 11-12 (S.D. Fla. Dec. 10, 2010). Specifically, his consent stated that,

> in any disciplinary proceeding before the Commission based on the entry of the injunction in this action, Korem understands that he shall not be permitted to contest the factual allegations of the Amended Complaint in this action. . . . Korem understands and agrees to comply with the Commission's policy "not to permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegation in the complaint or order for proceedings." 17 C.F.R. § 202.5. In compliance with this policy, Korem agrees . . . not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any allegation in the Amended Complaint or creating the impression that the Amended Complaint is without factual basis . . . .

Id.

13 *Id.* at ¶ 11.

14 *United States v. Korem*, Crim. Action No. 10-20732-CR-UU (S.D. Fla. Nov. 18, 2010).

15 *Id.* at 10.

16 *Id.*

17 *Id.*

18 *United States v. Korem*, Crim. Action No. 10-20732-CR-UU (S.D. Fla. Feb. 10, 2011).

19 *Id*. at 2-3.

approval from the court before entering into any self-employment, and he is prohibited from penny stock trading.[20]

C. The Follow-On Administrative Proceeding

On January 28, 2011, we initiated this follow-on administrative proceeding against Korem, pursuant to Exchange Act § 17A(c)(4)(C), to determine whether he had been enjoined from, among other things, violating the antifraud provisions of the securities laws and, if so, what (if any) remedial action was appropriate in the public interest.[21] On August 5, 2011, the law judge granted the Division of Enforcement's motion for summary disposition pursuant to Commission Rule of Practice 250,[22] agreeing there was no dispute that Korem had been enjoined from violating various provisions of the federal securities laws.[23] The law judge found that Korem's conduct "was egregious and recent, but short-lived, having been stopped by law enforcement."[24] She also found that Korem's antifraud violations and criminal conviction evidenced a "high degree of scienter."[25] Although the law judge found that "Korem has acknowledged the wrongful nature of his conduct and vowed not to repeat it or to work in the securities industry again," she determined that Korem "would be free to resume association with a transfer agent absent a bar."[26] Accordingly, the law judge found it to be in the public interest to bar Korem from associating with any transfer agent. She rejected the Division's request to impose collateral bars from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or nationally recognized statistical rating organization. In so doing, she noted that the conduct upon which the injunction was based occurred before Congress authorized the Commission to impose collateral bars under § 925 of the Dodd-Frank Act. Because at the time the law judge entered her order "[n]either the Commission nor the courts ha[d] approved such retroactive application of [Section 925's] provisions in any litigated case," she declined to impose collateral bars on Korem.[27]

Korem appealed the sanction imposed. The Division cross-appealed the law judge's decision not to impose a full collateral bar.

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20 *Id.*

21 *Tzemach David Netzer Korem*, Exchange Act Release No. 63788, 2011 WL 281606 (Jan. 28, 2011).

22 17 C.F.R. § 201.250.

23 *Korem*, 2011 WL 3407850, at *1.

24 *Id.* at *5.

25 *Id.*

26 *Id.*

27 *Id.* at *4 n.6.

III.

A. The Imposition of a Bar in All Capacities Is Appropriate.

Exchange Act § 17A(c)(4)(C) authorizes us to censure, place limitations on, suspend, or bar any person who is permanently enjoined from engaging in any conduct or practice in connection with the purchase or sale of securities and who was associated with or seeking association with a transfer agent "at the time of the alleged misconduct."[28] The record establishes—and Korem does not contest—that Korem is enjoined from engaging in fraudulent conduct in connection with the purchase or sale of securities. During the events at issue, Korem was also the controlling principal of First Public Securities Transfer Corp. and directly engaged in the performance of its functions as a transfer agent. He therefore was an associated person of a transfer agent at the time of his misconduct.[29] We find that the statutory requirements for the imposition of remedial sanctions have been satisfied.

We next turn to assessing what additional sanctions, if any, are in the public interest. Among other things, we consider the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the respondent's occupation will present opportunities for future violations.[30] Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive."[31] Based on these factors, and under the facts of this case, we conclude that a bar from association with any transfer agent, broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or NRSRO is warranted.

Korem's actions were egregious. Market manipulation—which Korem was intent on achieving—is one of the most egregious securities law violations.[32] It "'attacks the very foundation

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[28] 15 U.S.C. § 78q-1(c)(4)(C). The same sanctions may also be imposed against such person if he has been convicted of a felony or misdemeanor within the past ten years, if the Commission also finds that the offense involved (among other things) the purchase or sale of a security. *Id*. Korem's criminal conviction occurred after the issuance of the OIP, which relied only upon the civil injunctive action as its predicate.

[29] Exchange Act § 3(a)(49), 15 U.S.C. § 78c(a)(49) (defining the terms "person associated with a transfer agent" and "associated person of a transfer agent" as any person directly engaged in the management, direction, supervision, or performance of any of the transfer agent's activities with respect to transfer agent functions, and any person directly or indirectly controlling such activities or controlled by the transfer agent in connection with such activities).

[30] *Steadman v. SEC*, 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981).

[31] *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 WL 4481515, at *15 (Dec. 21, 2007), *petition denied*, 334 F. App'x 334 (D.C. Cir. 2009) (per curiam).

[32] *See Robert J. Prager*, Exchange Act Release No. 51974, 2005 WL 1584983, at *14 & n.63 (July 6, 2005) (noting that manipulation is a "very grave violation," and that its elimination is "one of the central goals of the federal securities laws") (citing *R.B. Webster Inv., Inc.*, Exchange Act Release No. 34659, 51 SEC 1269, 1994 WL 512475, at *6 (Sept. 13, 1994)).

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and integrity of the free market system'" and "'runs counter to the basic objectives of the securities laws.'"[33]

Market manipulation is "virtually a term of art [when] used in connection with securities markets, [and] connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."[34] It refers to practices that are intended to mislead investors—such as "rigged prices"—by artificially affecting market activity.[35] It subverts the goals of the Exchange Act, which are intended to "insure the maintenance of fair and honest markets"[36]—that is, "markets where prices may be established by the free and honest balancing of investment demand with investment supply."[37] Where trading injects elements of artificiality into the market, the market has been fabricated. As we have previously stated:

> Actual buying with the design to create activity, prevent price falls, or raise prices for the purpose of inducing others to buy is to distort the character of the market as a reflection of the combined judgments of buyers and sellers, and to make of it a stage-managed performance.[38]

Having consented to a permanent injunction, and pleaded guilty to parallel criminal charges, Korem cannot challenge the injunction or criminal conviction in this proceeding.[39] We

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Exchange Act § 9(a)(2), which prohibits the manipulation of prices of securities listed for trading on a national exchange, was considered by Congress to be "the very heart of the act," and its purpose was to outlaw every device "used to persuade the public that activity in a security is the reflection of a genuine demand instead of a mirage." *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 794 (2d Cir. 1970) (citing 3 L. LOSS, SECURITIES REGULATION 1549-55 (2d ed. 1961)). The manipulative activities expressly prohibited by § 9(a) for listed securities are violations of Exchange Act § 10(b) [15 U.S.C. § 78j(b)], and Rule 10b-5 promulgated thereunder [17 C.F.R. § 240.10b-5], when done with respect to an over-the-counter security. *See, e.g., United States v. Charnay*, 537 F.2d 341, 350-51 (9th Cir.1976); *SEC v. Resch-Cassin & Co.*, 362 F. Supp. 964, 975 (S.D.N.Y. 1973); *Edward J. Mawod & Co.*, Exchange Act Release No. 13512, 46 SEC 865, 1977 WL 173385, at *4 (May 6,1977), *aff'd sub nom. Edward J. Mawod & Co. v. SEC*, 591 F.2d 588 (10th Cir. 1979).

[33] *Terrance Yoshikawa*, Exchange Act Release No. 53731, 2006 WL 1113518, at *8 (Apr. 26, 2006) (quoting *Pagel, Inc*., 1985 WL 548387, at *7).

[34] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1975).

[35] *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977). Put another way, market manipulation is "the creation of deceptive value or market activity for a security, accomplished by an intentional interference with the free forces of supply and demand." *Swartwood, Hesse, Inc.*, Exchange Act Release No. 31212, 50 SEC 1301, 1992 WL 252184, at *5 (Sept. 22, 1992). *Accord Pagel, Inc.*, 1985 WL 548387, at *3.

[36] 15 U.S.C. § 78b.

[37] *Secs. Exch. Bill of 1934*, H.R. REP. No. 73-1383, at 11 (1934).

[38] *Halsey, Stuart & Co.*, Exchange Act Release No. 4310, 30 SEC 106, 1949 WL 36458, at *4 (Sept. 21, 1949). *Accord Pagel, Inc.*, 1985 WL 548387, at *3.

[39] *Joseph P. Galluzzi*, Exchange Act Release No. 46405, 55 SEC 1110, 2002 WL 1941502, at *3 (Aug. 23, 2002) (finding that a party cannot challenge his injunction or criminal conviction in a subsequent administrative proceeding); *Ted Harold Westerfield*, Exchange Act Release No. 41126, 54 SEC 25, 1999 WL 100954, at *4 n.22 (Mar. 1, 1999)

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have previously held that "antifraud injunctions merit the most stringent sanctions and that our 'foremost consideration must . . . be whether [the] sanction protects the trading public from further harm.'"[40] To that end, we have said that an antifraud injunction "has especially serious implications for the public interest."[41] Ordinarily, and in the absence of evidence to the contrary, it is in the public interest to bar a respondent who is enjoined from violating the antifraud provisions.[42]

Korem asserts that "this case falls short of the meaning of egregious" because "there was no harm or loss, nor could there have been," given that the scheme was "one short-lived event" and part of a "sting operation."[43] We disagree. Although the record does not contain evidence of direct investor harm, "our focus is on the welfare of investors generally and the threat one poses to investors and the markets in the future."[44] Korem participated in a fraudulent scheme to falsely generate the appearance of market interest in ZNext's stock and to obtain personal financial gain by selling his shares in the company at an artificially inflated price. His failure to achieve the goals of that fraud does not mitigate the fact that he attempted to perpetrate a serious crime that was thwarted only because law enforcement intervened.

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(same); *Demitrios Julius Shiva*, Exchange Act Release No. 38389, 52 SEC 1247, 1997 WL 112328, at *2 (Mar. 12, 1997) (rejecting attempts to challenge basis for injunction, noting "we have long refused to permit a respondent to re-litigate issues that were addressed in a previous civil proceeding against the respondent"); 17 C.F.R. § 202.5(e) (stating that respondent who consents to judgment may not deny allegations of the complaint).

We may consider Korem's criminal conviction in assessing sanctions even though it was not charged in the OIP. *Don Warner Reinhard*, Exchange Act Release No. 63720, 2011 WL 121451, at *5 & n.21(Jan. 14, 2011) (considering in a follow-on administrative proceeding respondent's criminal conviction, which was not included in the OIP, in assessing the public interest) (citing *Robert Bruce Lohmann*, Exchange Act Release No. 48092, 56 SEC 573, 2003 WL 21468604, at *5 & n.20 (June 26, 2003) (finding that matters "not charged in the OIP" may nevertheless be considered "in assessing sanctions")).

[40] *Sherwin Brown*, Advisers Act Release No. 3217, 2011 WL 2433279, at *6 & n.18 (June 17, 2011) (citing *James C. Dawson*, Advisers Act Release No. 3057, 2010 WL 2886183, at *6 (July 23, 2010)).

[41] *Marshall E. Melton*, Advisers Act Release No. 2151, 56 SEC 695, 2003 WL 21729839, at *9 (July 25, 2003).

[42] *Id*.

[43] Korem's Opp'n Br. at 10; Korem's Pet. for Review at 1; Korem's Br. in Supp. at 1, 2. Korem objects to the "version of the facts" in his criminal plea agreement regarding the FBI's undercover operation and suggests that we instead consider the facts presented in the criminal complaint, "which makes more clear that there were no real stock brokers with 'discretionary clients' involved in the sting operation." Korem's Pet. for Review at 2. Korem is collaterally estopped from attacking the facts underlying his conviction. *See supra* note 39. He also expressly waived his right to collaterally attack the conviction. *United States v. Korem*, Crim. Action No. 10-20732-CR-UU, ¶ 14 (S.D. Fla. Nov. 18, 2010). Moreover, we do not find that the two documents differ on this point to any significant degree. In any event, we have relied primarily on the facts set forth in the injunctive complaint as the basis for our findings. To the extent that Korem disputes the facts in the injunctive complaint, he is collaterally estopped from doing so. *Supra* note 39.

[44] *Gary M. Kornman*, Exchange Act Release No. 59403, 2009 WL 367635, at *9 n.41 (Feb. 13, 2009) (citing *Christopher A. Lowry*, Advisers Act Release No. 2052, 55 SEC 1133, 2002 WL 1997959, at * 6 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003); *Arthur Lipper Corp.*, Exchange Act Release No. 11773, 46 SEC 78, 1975 WL 163472, at *15 (Oct. 24, 1975), *aff'd*, 547 F.2d 171 (2d Cir. 1976)).

Solely because of this intervention, Korem's misconduct was short-lived. Though we consider "the isolated or recurrent nature of the infraction" when deciding whether it is in the public interest to order additional sanctions, we have repeatedly declined to credit a respondent whose misconduct stopped only after it was detected by regulators.[45] Thus, the fact that Korem's misconduct was of limited duration carries little weight given that law enforcement ended the scheme. Had it not been a sting operation, Korem could have seen the scheme through to its conclusion with great harm to the investing public. Moreover, while Korem's misconduct took place during a compressed period of time, the various steps Korem took within that period to advance the scheme demonstrate that it was not the product of a momentary lapse in judgment, nor done without deliberate thought.[46]

Korem's role in the plot also demonstrates that he acted with a high degree of scienter. The Securities Act § 17(a)(1), Exchange Act § 10(b), and Rule 10b-5 charges underlying the judgment to which Korem consented, required knowing, willful, or, at the very least, reckless conduct.[47] His efforts to conceal his misconduct further demonstrate that he acted with intent.[48] Upon learning of the stock broker's concerns about receiving the stock portion of kickback directly, Korem disguised that payment by issuing $100,000 worth of ZNext stock in the name of the broker's purported girlfriend. Korem then designed a false press release, which ZNext issued, to mask any spike in trading volume caused by the broker's purchase.

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[45] *Cf. Gregory O. Trautman*, Exchange Act Release No. 61167A, 2009 WL 6761741, at *20 (Dec. 15, 2009) (considering the nature of the infraction and finding against respondent where misconduct stopped only after it was detected by regulators); *Joseph John VanCook*, Exchange Act Release No. 61039, 2009 WL 4005083, at *15 (Nov. 20, 2009) (same) *petition denied*, 653 F.3d 130 (2d Cir. 2011); *Ofirfan Mohammed Amanat*, Exchange Act Release No. 54708, 2006 WL3199181, at *10 (Nov. 3, 2006) (same).

[46] *See United States v. Chaplin's, Inc.*, 646 F.3d 846, 853 (11th Cir. 2011). After devising the overall scheme, Korem and Charbit devoted significant effort towards the logistics of making it work. This included kickback payments to the perceived accomplice, and modifications to those payments to better avoid detection (such as issuing $100,000 worth of stock certificates in the name of the stock broker's purported girlfriend and the preparation of a bogus press release to justify the purchases).

[47] *Aaron v. SEC*, 446 U.S. 680, 695-97 (1980). A finding of recklessness satisfies the scienter requirement. *Disraeli*, 2007 WL 4481515, at *5 (finding that "violations of Section 17(a)(1), Section 10(b), and Rule 10b-5 require scienter" and that " [s]cienter may be established by recklessness, defined as … an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the [actor] or is so obvious that the actor must have been aware of it") (citing *SEC v. Dain Rauscher, Inc*., 254 F.3d 852, 856 (9th Cir. 2001); *SEC v. Rubera*, 350 F.3d 1084, 1094 (9th Cir. 2003); *accord Rockies Fund, Inc. v. SEC*, 428 F.3d 1088, 1093 (D.C. Cir. 2005); *SEC v. Infinity Group Co.*, 212 F.3d 180, 192 (3d Cir. 2000); *SEC v. McNulty*, 137 F.3d 732, 741 (2d Cir. 1998); *Meadows v. SEC*, 119 F.3d 1219, 1226 (5th Cir. 1997); *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir. 1982)). Korem also agreed to be enjoined from future violations of Securities Act §§ 17(a)(2) and 17(a)(3), 15 U.S.C. §§ 77q(a)(2) and 77q(a)(3), where proof of scienter is not an element. *Aaron*, 446 U.S. at 695-97.

[48] *See Phillip J. Milligan*, Exchange Act Release No. 61790, 2010 WL 1143088, at *5 & n.20 (Mar. 26, 2010) (citing *Justin F. Ficken*, Exchange Act Release No. 58802, 2008 WL 4610345, at *3 (Oct. 17, 2008) (finding that concealment of improper trading demonstrated scienter)).

Korem acknowledged the wrongful nature of his past conduct and took responsibility for it by settling the earlier parallel case pursued by the U.S. Attorney's Office.[49] And although Korem vowed never to repeat his misdeeds or work in the securities industry again, his past criminal history, the degree of scienter involved in the misconduct at issue, and his efforts to conceal his misconduct cause us concern about the sincerity of Korem's assurances.[50] Korem's statement that his "track record of exiting an industry after being convicted in it, demonstrates that [he] will not enter into the securities industry in the future since he has been convicted in that industry"[51] does little to dispel that concern. If, however, Korem's promise to remain out of the securities industry is sincere, a bar imposes no substantial burden on him while prophylactically protecting the investing public.

Given the nature of Korem's misconduct, we believe that an appropriate sanction should include a bar from associating with any transfer agent and collateral bars from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or NRSRO. Korem's deliberate attempt to deceive the investing public by manipulating the market for his own personal gain and concealing his fraudulent actions raises significant doubts about his integrity and his fitness to remain in the securities industry in any capacity.[52] As we have stated, "[t]he securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence."[53] A fundamental purpose common to all federal securities laws and, in turn, applicable to all securities professionals bound by them, is "to substitute a philosophy of full disclosure for the philosophy of caveat emptor and thus to achieve a high standard of business ethics in the securities industry."[54] It is therefore essential that the "highest ethical standards prevail in every facet of the securities industry."[55]

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49 *See, e.g.*, Korem's Br. in Supp. at 1; Korem's Pet. for Review at 2.

50 Courts have held that the existence of a past violation, without more, is not a sufficient basis for imposing a bar. *Lawton*, 2012 WL 6208750, at *9 & n.42 (citing *McCarthy*, 406 F.3d 179, 189 (2d Cir. 2005); *PAZ Sec., Inc. v. SEC*, 566 F.3d 1172, 1175-76 (D.C. Cir. 2009)). In this proceeding, however, we consider past conduct as evidence in a "broader inquiry into whether a person presents a future risk to the public interest because, as the Supreme Court has recognized, the 'degree of intentional wrongdoing evident in a defendant's past conduct' is an important indication of the defendant's propensity to subject the trading public to future harm." *Id*. (citing *Aaron v. SEC*, 446 U.S. 680, 701 (1980)). "[T]he existence of a violation raises an inference that it will be repeated." *Geiger v. SEC*, 363 F.3d 481, 489 (D.C.Cir. 2004).

51 Korem's Opp'n Br. at 7.

52 *See Dawson*, 2010 WL 2886183, at *6 (finding that respondent's antifraud injunction, which was based on allegations involving efforts to conceal misconduct, raised "significant doubts about his integrity and his fitness to remain in the securities industry").

53 *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *7 (Sept. 26, 2007); *see also Paul K. Grassi, Jr.*, Exchange Act Release No. 52858, 2005 WL 3199274, at *3 (Nov. 30, 2005); *Frank Kufrovich*, Exchange Act Release No. 45437, 55 SEC 616, 2002 WL 215446, at *5 (Feb. 13, 2002); *William F. Lincoln*, Exchange Act Release No. 39629, 53 SEC 452, 1998 WL 80228, at *7 (Feb. 9, 1998); *Philip S. Wilson*, Exchange Act Release No. 23348, 48 SEC 511, 1986 WL 626145, at *5 (June 19, 1986); *Walter H. T. Seager*, Exchange Act Release No. 20831, 47 SEC 1040, 1984 WL 589596, at *3 (Apr. 6, 1984).

54 *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963).

55 *Id*. at 186-87 (internal citation omitted).

Korem's violations were neither technical in nature nor based solely on his status as a transfer agent. The antifraud provisions that he violated apply broadly to the conduct of all participants in the securities industry. Broker-dealers and municipal securities dealers, like transfer agents, "routinely gain access to sensitive financial and investment information about investors and other market participants."[56] Investment advisers, municipal advisors, and NRSROs "routinely learn confidential and potentially market-moving information about securities, issuers, and potential transactions."[57] Securities professionals have a heightened responsibility to safeguard such information and not to misuse their access to sensitive or confidential information for their own financial gain.[58] The deliberate manner in which Korem flouted this responsibility suggests that he is likely to engage in future misconduct that "strikes at the heart of the pricing process on which all investors rely."[59]

B. Imposing a Full Collateral Bar Is Not Impermissibly Retroactive.

The law judge's pre-*Lawton* ruling that barring Korem from associating with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or NRSRO would be impermissibly retroactive is erroneous for the reasons we explained in *Lawton*.[60] The Dodd-Frank Act amended Exchange Act § 17A(c)(4)(C) to authorize us to bar persons associated with or seeking association with a transfer agent from association with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or NRSRO—bars that were not previously available under the securities laws.[61] Although Congress enacted the Dodd-Frank amendment after Korem committed his misconduct, we held in *Lawton* that such collateral bars "are not impermissibly retroactive as applied in follow-on proceedings addressing pre-Dodd-Frank conduct because such bars are prospective remedies whose purpose is to protect the investing public from future harm."[62] Korem's conduct, as detailed above, "demonstrates that allowing him

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56 *Lawton*, 2012 WL 6208750, at *11.

57 *Id*.

58 *Id*.

59 *Michael J. Markowski*, Exchange Act Release No. 43259, 54 SEC 830, 2000 WL 1264292, at *6 (Sept. 7, 2000) (citation omitted) (holding that deliberate manipulation of the market is "serious" misconduct that "strikes at the heart of the pricing process on which all investors rely"), *aff'd*, 274 F.3d 525 (D.C. Cir. 2001). Moreover, Korem, by his own admission, has a criminal history dating back to the 1980s that compounds our concerns about his integrity and fitness and demonstrates that he poses a substantial threat to investors.

60 *Lawton*, 2012 WL 6208750, at *5-10.

61 Prior to the Dodd-Frank Act, in an administrative proceeding pursuant to Exchange Act § 17A(c)(4)(C), the Commission could suspend or bar respondents only from association with a transfer agent. Dodd-Frank expanded the relief available under Exchange Act § 17A(c)(4)(C), 15 U.S.C. § 78q-1(c)(4)(C).

62 *Lawton*, 2012 WL 6208750, at *10.

to enter the securities industry in *any capacity* would create too great a risk that future efforts to detect securities violations would be impaired, causing harm to the public."[63]

C. Korem's Remaining Objections Have No Merit.

Korem asserts that the Commission lacks the authority to bar him—in any capacity—because his "past association never involved registered securities, nor any role that required registration" as a transfer agent.[64] Exchange Act § 17A(c)(4)(C) authorizes the Commission to proceed against "any person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with the transfer agent" without reference to whether the associated person or transfer agent is registered with the Commission.[65] When Congress amended Exchange Act § 17A to include paragraph (c)(4)(C), it vested the Commission with "administrative adjudicatory authority [over transfer agents in follow-on administrative proceedings] comparable to that applicable to brokers, dealers, municipal securities dealers, and investment advisers."[66] As a result,

> [t]he grounds for instituting proceedings against, and imposing sanctions on, associated persons of transfer agents [are] the same as those applicable to other securities professionals, including violations of the securities laws and convictions and injunctions relating to financial services industry activities. The available sanctions also [are] the same—bar, suspension, censure, and placing of limitations on the activities of the transfer agent professional.[67]

It is well established that we are authorized to sanction an associated person of an unregistered broker-dealer or investment adviser in a follow-on administrative proceeding.[68] We

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[63] *Id.* at *12 (emphasis in original) (imposing bar in a follow-on proceeding against investment adviser from association with investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization).

[64] Korem's Pet. for Review at 1-2.

[65] 15 U.S.C. § 78q-1(c)(4)(C).

[66] *SEC Authorization Act of 1987, Report of the Senate Comm. on Banking, Housing, and Urban Affairs*, S. REP. NO. 105, 100th Cong., 1st Sess. 19 (1987) (citing Exchange Act §§ 15(b)(4) and (6), 15 U.S.C. §§ 78o(b)(4) and (6); Exchange Act §§ 15B(c)(2) and (4), 15 U.S.C. §§ 78o-4(c)(2) and (4); and §§ 203(e) and (f) of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-3(e) and (f)).

[67] *Id*. at 20.

[68] *See, e.g.*, *Martin A. Armstrong*, Advisers Act Release No. 2926, 2009 WL 2972498, at *3 & n.7 (Sept. 17, 2009) (barring, pursuant to Investment Advisers Act §§ 203(e) and (f), an associated person of an unregistered investment adviser from associating with any investment adviser, based on conviction and injunction regarding securities laws violations) (citing *Teicher v. SEC*, 177 F.3d 1016, 1017 (D.C. Cir. 1999)); *Vladislav Steven Zubkis*, Exchange Act Release No. 52876, 2005 WL 3299148, at *6 (Dec. 2, 2005) (barring, pursuant to Exchange Act § 15(b)(6)(A), an associated person of an unregistered broker-dealer from associating with any broker-dealer and from participating in any penny stock offering, based on injunction prohibiting securities laws violations); *Alexander V. Stein*, Advisers Act Release No. 1497, 52 SEC 296, 1995 WL 358127, at *2 & n.10 (June 8, 1995) (finding that the Commission's authority to institute follow-on administrative proceedings under § 203(f) of the Investment Advisers Act rests on

(continued…)

find, based on the plain language of the statute, its legislative history, and longstanding analogous precedent, that we are authorized to do the same with respect to persons associated with, or seeking association with, a transfer agent (and those who, at the time of the alleged misconduct, were associated with, or were seeking to become associated, with a transfer agent) regardless of the registration status of the transfer agent or respondent.

There also is no merit to Korem's contention that the securities at issue must be registered with the Commission for us to impose a sanction. Exchange Act §§ 17A(c)(4)(C) and 15(b)(4)(C) authorize the Commission to sanction an associated person of a transfer agent if that person has been permanently enjoined from engaging in any conduct or practice in connection with the purchase or sale of "*any* security."[69] Congress's use of such broad language shows its intent that the security in question need not be registered with the Commission. Moreover, Exchange Act § 3(a)(10) defines the term "security" to include any "stock" and contains no requirement that the stock be registered with the Commission.[70] We have also routinely imposed sanctions in follow-on proceedings, which have been affirmed by federal Courts of Appeals, where the violative conduct at issue involved unregistered securities.[71] Accordingly, the registration status of the security at issue in the underlying proceeding has no bearing on our authority under the statute.

Korem also appears to assert that a bar of any kind is redundant because he already is enjoined from engaging in any conduct related to the purchase or sale of any security, and the penny stock bar imposed by the district court precludes him from serving as an unregistered transfer agent given that "all of the securities in that arena are penny stocks."[72] The injunctive and criminal judgments, however, are not as broad as Korem suggests. While they bar him from participating in penny stock transactions, the injunction is otherwise limited to prohibiting him from violating certain antifraud provisions of the federal securities laws. Korem asserts that he does not intend to re-enter the securities industry or commit further violations. But we find that Korem's assertions do not outweigh the significant risk that he would commit additional misconduct in the future if we permitted him to remain in the securities industry in any capacity.

(…continued)
whether the respondent acted as an investment adviser regardless of respondent's registration status) (internal citations omitted); *John Kilpatrick*, Exchange Act Release No. 23251, 48 SEC 481, 1986 WL 626187, at *4 (May 19, 1986) (noting that § 15(b)(6) of the Exchange Act authorizes the Commission to sanction "any person associated . . . with a broker or dealer" without being limited to registered broker-dealers).

69 15 U.S.C. §§ 78q-1(c)(4)(C); 78o(b)(4)(C) (emphasis added).

70 15 U.S.C. § 78c(a)(10).

71 *Cf. James E. Franklin*, Exchange Act Release No. 56649, 2007 WL 2974200, at *8 (Oct. 12, 2007) (barring respondent, in a proceeding under Exchange Act § 15(b)(6), from participating in any penny stock offering based on, among other things, a finding that respondent was enjoined from any conduct or practice in connection with the purchase or sale of a security where at least one of the underlying securities was not registered), *petition denied*, 2008 U.S. App. LEXIS 15246 (D.C. Cir. 2008) (per curiam); *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 WL 2790633, at *1 & n.6 (Sept. 26, 2007) (barring respondent from association with any investment adviser based on injunction from violating federal securities laws where underlying securities were not registered or required to be registered), *petition denied*, 548 F.3d 129 (D.C. Cir. 2008).

72 Korem's Pet. for Review at 2.

Korem further objects to "any additional bar" because "it could serve as a tipping point against his ability to earn a living in a non-securities related-business" due to the effects of "greater tarnishment to his name."[73] However, the collateral bars we find warranted are not punitive but are imposed "to protect the public interest from future harm at his hands."[74] A bar from association with any transfer agent, broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or NRSRO is remedial and will protect the public interest by deterring Korem and others from violating the provisions of the federal securities laws, misleading investors, and manipulating the market.

Korem additionally argues that *res judicata* prohibits the institution of this administrative proceeding because his case "was already wrapped up in settlement" in the federal court system.[75] We have rejected such arguments in the past because the Exchange Act expressly authorizes us to institute administrative proceedings based on an injunction.[76] Moreover, Korem does not satisfy the elements of a *res judicata* defense. *Res judicata*, or claim preclusion, "bars litigation of any claim for relief that was available in a prior suit between the same parties or their privies, whether or not the claim was actually litigated."[77] To sustain the defense, a party must establish: (i) a final judgment on the merits in a prior suit, (ii) an identity of the cause of action in both the earlier and the later suit, and (iii) an identity of parties or their privies in the two suits.[78] While a final judgment was entered in the injunctive action, the cause of action in that proceeding was predicated on Korem's fraudulent conduct whereas this proceeding was instituted on the basis of

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[73] Korem's Pet. for Review at 1. For example, Korem asserts that "the term 'transfer agent' is found outside the securities business." *Id*. He argues that restricting him from association with "'any' transfer agent, would go beyond the SEC's jurisdiction." *Id*. Our authority to bar Korem from association with a transfer agent extends only so far as the relevant sections of the Exchange Act permit. *See* Exchange Act § 3(a)(25), 15 U.S.C. ' 78c(a)(25) (defining transfer agent as any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer of securities in (i) countersigning such securities upon issuance; (ii) monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar; (iii) registering the transfer of such securities; (iv) exchanging or converting such securities; or (v) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates); Exchange Act § 3(a)(49), *supra* note 29. The bars we are imposing extend only to activity within our statutory authority.

[74] *Leo Glassman*, Exchange Act Release No. 11929, 46 SEC 209, 1975 WL 160418, at *2 (Dec. 16, 1975).

[75] Korem's Pet. for Review at 1. Korem attached to his opposition brief a notice filed by the Division in the district court in which it voluntarily dismissed its claims for civil penalties against Korem and Charbit. *See supra* note 11. Korem states that "the SEC therein stated that ALL ISSUES ARE NOW RESOLVED" and that, as a result, "the doctrine of res judicata comes into full force and effect." Korem's Opp'n Br. at 1.

[76] 15 U.S.C. ' 78q-1(c)(4)(C); *see, e.g., Michael T. Studer*, Exchange Act Release No. 50411, 57 SEC 890, 2004 WL 2104496, at *3 (Sept. 20, 2004) (rejecting respondent's *res judicata* claim regarding the institution of administrative proceedings following a district court's entry of a permanent injunction where the Commission's authority to institute proceedings based on an injunction was expressly authorized in the Exchange Act).

[77] *Kornman*, 2009 WL 367635, at *13 & n.83 (citing *Transaero, Inc. v. La Fuenza Aerea Boliviana*, 162 F.3d 724, 731 (2d Cir. 1998) (internal quotation marks and citation omitted)); *see also Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326-27 n.5 (1979).

[78] *Kornman*, 2009 WL 367635, at *13 & n.84 (citing *Jones* v. SEC, 115 F.3d 1173, 1178 (4th Cir. 1997) (internal quotation marks and citations omitted)).

the injunction itself.[79] Indeed, the present proceeding is expressly authorized by Exchange Act § 17A(c)(4)(C).[80] Additionally, Korem acknowledged the possibility of an administrative proceeding when he consented to the entry of a permanent injunction. The consent, among other things, explicitly prohibits Korem from contesting the factual allegations of the complaint in the injunctive action "in any disciplinary proceeding before the Commission based on the entry of the injunction."[81]

Finally, Korem challenges the Commission's authority to bring this action based on the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[82] The Supreme Court has "held that the Double Jeopardy Clause does not protect against all additional sanctions 'that could, in common parlance, be described as punishment,' but 'only against . . . multiple criminal punishments for the same offense.'"[83] We have held that a bar imposed in an administrative proceeding is not a criminal punishment within the meaning of the Double Jeopardy Clause.[84]

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[79] *See id*. at *13 & n.85 (finding that the basis for the criminal proceeding that resulted in a conviction was respondent's misconduct while the basis for the follow-on administrative proceeding was the criminal conviction itself, concluding that the two cause of actions differed) (citing *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 327-28 (1995) (holding that *res judicata* does not apply where claim advanced in the second suit did not exist at time of first suit)). *Accord Studer*, 2004 WL 2104496, at *3.

[80] 15 U.S.C. § 78q-1(c)(4)(C).

[81] *SEC v. Charbit*, Civil Action No. 10-CV-23604, Consent of Defendant Tzemach David Netzer Korem at ¶¶ 11-12 (S.D. Fla. Dec. 10, 2010), *supra* n.12.

[82] U.S. Const. Amend. V.

[83] *Kornman*, 2009 WL 367635, at *12 & n.73 (citing *Hudson v. United States*, 522 U.S. 93, 98-99 (1997) (internal quotation marks omitted)).

[84] *See id*. & n.75 (rejecting application of Double Jeopardy Clause to investment adviser bar following a criminal conviction on the basis that "no scienter finding is required, the sanction is remedial because it is designed to protect the public, and the sanction is not historically viewed as punishment," and that Congress intended to provide for a civil sanction given that it "confers authority solely on the Commission to institute follow-on administrative proceedings under" the Exchange Act) (citing *Cox v. CFTC*, 138 F.3d 268, 272 (7th Cir. 1998) (internal citations omitted)); *William F. Lincoln*, Exchange Act Release No. 39629, 53 SEC 452, 1998 WL 80228, at *4, 5 (Feb. 9, 1998) (concluding that a broker-dealer bar and penny stock bar are civil in nature and rejecting respondent's claim that the bars were criminal punishments within the meaning of the Double Jeopardy Clause)).

In sum, a bar from association with any transfer agent, broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or NRSRO is remedial and will protect the public interest by deterring Korem and others from violating the provisions of the federal securities laws, misleading investors, and manipulating the market.

An appropriate order will issue.[85]

By the Commission (Chair WHITE and Commissioners WALTER and AGUILAR); Commissioner GALLAGHER, concurring in part and dissenting with respect to the bar from association with municipal advisors and nationally recognized statistical rating organizations; Commissioner PAREDES not participating.

Elizabeth M. Murphy
Secretary

[85] We have considered all of the parties' contentions. We have rejected or sustained them to the extent that they are inconsistent or in accord with the views expressed in this opinion.

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 70044 / July 26, 2013

Admin. Proc. File No. 3-14208

In the Matter of

TZEMACH DAVID NETZER KOREM

ORDER IMPOSING REMEDIAL SANCTIONS

On the basis of the Commission's Opinion issued this day, it is

ORDERED that Tzemach David Netzer Korem be barred from association with any transfer agent, broker, dealer, investment adviser, municipal securities dealer, municipal advisor, or nationally recognized statistical rating organization.

By the Commission.

Elizabeth M. Murphy
Secretary