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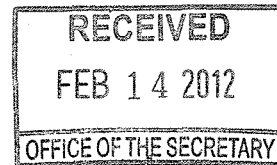
**UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING
File No. 3-14355**

In the Matter of

**DONALD L. KOCH and
KOCH ASSET MANAGEMENT LLC,**

Respondents.



**DIVISION OF ENFORCEMENT'S
PROPOSED FINDINGS OF FACT
AND POST-HEARING BRIEF**

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The Division of Enforcement (“Division”) respectfully submits its proposed Findings of Fact and Post-Hearing Brief pursuant to the Court’s direction on January 20, 2012 and Rule of Practice 340.

PROCEDURAL HISTORY

1. The Division instituted this proceeding against Respondents Donald L. Koch (“Koch”) and Koch Asset Management LLC (“KAM”) (collectively, “Respondents”) on April 25, 2011, pursuant to Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”), Sections 203(e), 203(f) and 203(i) of the Investment Advisers Act of 1940 (“Advisers Act”) and Section 9(b) of the Investment Company Act of 1940 (“Company Act”).

2. The hearing in this matter was conducted on six days starting January 10, 2012 and ending January 20, 2012. The first four days of the hearing (January 10 to 13) were held in the Mel Carnahan Courthouse, 1114 Market Street, Room 500, St. Louis, MO 63101. The last two days of the hearing (January 17 and 20) were held at the Securities and Exchange Commission, 100 F Street, NE, Hearing Room 2, Washington, DC 20549.

3. During the hearing, the Division called three fact witnesses (Catherine Marshall, Eli Straeter and Jeffrey Christanell) and one summary witness (Stephen Glascoe). Respondents called a total of four fact and character witnesses (Donald Cayce, James Ewoldt, Faith Heidtbrink, and Donald Koch) and two expert witnesses (John Schneider and Gregg Jarrell).

4. The Order Instituting Proceedings (“OIP”) alleges that Respondents instructed a trader at a St. Louis-based broker-dealer (Huntleigh Securities Corporation (“Huntleigh”)) to execute trades in the stock of (i) High Country Bancorp Inc. (“HCBC”) on September 30, October 30 and November 30, 2009 and (ii) HCBC, Cheviot Financial Corp. (“CHEV”) and Carver Bancorp, Inc. (“CARV”) on December 31, 2009, in order to artificially affect the closing price of those stocks on those days. OIP ¶ 5. Specifically, the OIP alleges that:

- On September 30, 2009, Koch instructed the trader to purchase an unspecified number of HCBC shares just before the market close at a price “as near to \$25 [per share] as possible without manipulative.” OIP ¶ 7.
- He gave similar instructions to the trader regarding obtaining a closing price for HCBC on October 30 and November 30, 2009. OIP ¶¶ 10, 13.
- Beginning December 23, he gave the trader a series of specific instructions to obtain a December 31 closing price for HCBC above \$20 per share or in the \$20 to \$25 per share range. OIP ¶ 16.
- On December 31, 2009, Koch also instructed the trader to get a closing price for CARV between \$8 and \$8.25 per share and to pop the price of CARV at the end of the day. OIP ¶¶ 18, 19.

The trader followed Koch’s instructions on each occasion and routed orders to the street late in the trading day (as limit orders above \$20 per share or as market orders for HCBC and as limit orders at or above the then-current offer price for CHEV and CARV) in an effort to obtain Koch’s desired closing price for HCBC, CHEV and CARV. OIP at ¶¶ 7, 10, 13, 16, 18, 19.

These trades occurred on the last trading date of the affected months. These trades – with the exception of the December 31 trade in CHEV – established the closing price of the stocks on the mentioned dates. OIP ¶¶ 8, 12, 14, 17, 18, 19. Although the trades at issue were allocated to the accounts of only two of KAM’s clients, many other clients of KAM held positions in these stocks; thus, the trades not only elevated the prices paid by the two clients but also elevated the performance metrics that were reported in monthly account statements to all KAM’s clients who held those stocks in their portfolios and elevated the price reported to the market at large. OIP ¶¶ 6, 9, 12, 15, 20. The OIP also alleges that Koch failed to implement KAM’s policy against “transactions intended to raise, lower or maintain the price of any security” and that Respondents failed to maintain required communications relating to the placement and execution of orders. OIP ¶¶ 22, 24.

5. The OIP alleges that, as a result of the foregoing conduct: (i) Respondents willfully violated Section 10(b) of the Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder; (ii) Respondents willfully violated Sections 206(1) and 206(2) of the Advisers Act; (iii) KAM willfully violated and Koch willfully aided and abetted and caused KAM’s violations of Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder; and (iv) KAM willfully violated and Koch willfully aided and abetted KAM’s violations of Section 204 of the Advisers Act and Rule 204-2(a)(7).

PROPOSED FINDINGS OF FACT (“SOF”)

I. Respondents

6. Donald L. Koch (“Koch”), age 65, resides in Town & Country, Missouri. Tr. at 760.

7. Koch is the President, Chief Compliance Officer, founder, and sole owner of Koch Asset Management LLC (“KAM”), a Missouri limited liability company and investment adviser located in St. Louis, Missouri. KAM has been registered with the Commission since 1992. Answer at ¶¶ 1, 2; Tr. at 760, 786-787, 822 (Koch); Div. Trial Ex. 253-2 (Form ADV dated 8/31/2011) at Item 2, Schedules A and B, and Part IIA, Item 4.

8. During the relevant period, KAM managed only discretionary accounts. Div. Trial Ex. 253-2 (Form ADV dated 8/31/2011) at Part IIA, Item 4.

9. KAM managed approximately 40 discretionary accounts for clients containing approximately \$40 million in assets. Koch determined the specific securities bought or sold for each client’s account and the amount bought or sold. But, as a general matter, he employed the same investment strategy across all accounts and, thus, many of KAM’s client accounts and Koch’s personal and family accounts held the same securities. Answer at ¶¶ 2, 6; Div. Trial Ex. 253-2 (Form ADV dated 8/31/2011) at Part IIA, Item 4, 16.

10. Before allowing a prospective client to invest with KAM, Koch would meet with the person several times to explain his investment strategy, including that KAM invested in small financial institutions and that his strategy was for long-term investment. The person needed to be goal congruent with Koch in order for Koch to accept them as a client, or, in his words, “you can’t watch the paint dry,” “you can’t watch the grass be cut,” “you can’t start using this as a checking account,” because KAM invests for the long-term. Koch Tr. at 795-801 (Koch).

11. KAM charged its clients a standard annual fee of 1% of assets under management (“Base Fee”), plus 20% of all realized gains in a client’s portfolio during the year if the portfolio had an overall 5% cumulative annual return (“Performance Fee”). KAM collected the Base Fee on a quarterly basis. Koch waived these fees in certain circumstances. Div. Trial Exh. 253-2 (Form ADV dated 8/31/2011) at Part IIA, Item 4; see also Div. Trial Exhs. 258, 259, 260 (respectively, the monthly account statements for all KAM accounts holding HCBC on 9/30, 10/30, 11/30 and 12/31/2009, holding CHEV on 12/31/2009, and holding CARV on 12/31/2009).

12. Section III.A. of KAM’s Written Policies and Procedures Manual (entitled “Prohibited Transactions”) includes a number of prohibitions against manipulative trades. With respect to trades that “mark the close,” the section provides, in pertinent part, that:

- A. No Access Persons shall, in connection with the purchase or sale, directly or indirectly, by such person of a Security Held or to be Acquired by a Client:
 - (6) Engage in any transactions intended to raise, lower or maintain the price of any Security or create a false appearance of active trading.

Div. Trial Exh. 279 at SEC-KOCH 7148 (KAM Policies and Procedures Manual – 2008 Edition); Tr. at 724-725 (Heidtbrink).

13. KAM is still registered with the Commission today and Koch is still affiliated with KAM. Today Koch manages his and his family's funds through KAM. Tr. at 760, 786-787, 922-923 (Koch).

II. Huntleigh Securities

14. Huntleigh Securities Corporation ("Huntleigh"), a Missouri corporation with its primary place of business in St. Louis, Missouri, is a broker-dealer registered with the Commission and FINRA since 1977. Answer at ¶ 3.

15. Huntleigh was a self-clearing firm until mid-2008. Tr. at 46 (Marshall).

16. KAM was a customer of Huntleigh since 1993. Tr. at 43-45, 173 (Marshall).

17. Until the spring or summer of 2010, Huntleigh was the custodian for the majority of KAM's accounts (including KAM client accounts and Koch personal and family accounts), all of which were classified in the Huntleigh system under the same rep code, "SL03." Tr. at 41-42, 44 (Marshall). Division Trial Exhibit 48 is spreadsheet identifying all accounts under the SL03 rep code as of December 2009. Div. Trial Exh. 48; Tr. at 141-142 (Marshall).

18. KAM was permitted to place orders directly with Huntleigh's trading desk. Tr. at 50-53 (Marshall); Tr. at 457-458 (Christanell).

19. Huntleigh executed orders upon KAM's instruction and then awaited further instruction from KAM before allocating the executed trades to particular accounts. Huntleigh had no visibility as to whose account any trade was for until after it executed KAM's order and KAM forwarded it an allocation sheet identifying the particular KAM client or Koch personal or family account that should get the shares. Tr. at 41-42, 50-51, 124-125, 132-134 (Marshall); Tr. at 458 (Christanell); Div. Trial Exhs. 51, 53, 195 (allocations sheets for 2008, 2009, 2010 trades).

20. Huntleigh sent KAM's clients a trade confirmation after allocating trades pursuant to KAM's instructions. Tr. at 174-175 (Marshall).

21. Huntleigh sent monthly account statements to all accounts under the SL03 rep code. The monthly account statements reported various performance metrics for each account based on the value of each account holding as of the last trading day of each month and provided a value for each security held by the client. Answer at ¶ 6; Tr. at 174. Values were derived in one of two ways: (i) if a stock traded on the last trading day of the month, the monthly account statements valued the holding at the publicly-reported closing price, which reflected the last trade of the day during market hours; (ii) if a stock did not trade on the last trading day of the month, the monthly account statements valued the holding at the last bid of the day. Tr. at 139-140, 215-216 (Marshall).

22. Catherine Marshall ("Marshall") was the broker for KAM (including KAM clients and Koch's personal and family accounts) from 1994 to 1999 and June or July 2009, until KAM moved its accounts from Huntleigh in 2010. Tr. at 43-45 (Marshall). Marshall was also Huntleigh's Compliance Director from 1998 to the present. Tr. at 39 (Marshall).

23. From at least 2001 until mid-September 2009, Bill Utz was the Huntleigh trader assigned to KAM and the person who Koch called to place orders. Utz was laid off in mid-September 2009 during a period when Huntleigh was downsizing. Tr. at 52-53 (Marshall); Tr. at 447-448 (Christanell). The last order that Utz executed for KAM prior to being laid off was on September 14, 2009. Div. Trial Ex. 336 (Huntleigh LAVA Trade Blotter for 9/2009 @ 9/14/2009, Column D).

24. Christanell was the only equity trader at Huntleigh that survived the downsizing and, by default, he became the trader assigned to KAM in mid-September 2009 and thus the

person through whom Koch placed all of KAM's orders. Tr. at 53 (Marshall); Tr. at 447-449 (Christanell). The first order that Christanell executed for KAM after Utz's departure was on September 16, 2009. Div. Trial Exh. 336 (Huntleigh LAVA Trade Blotter for 9/2009 @ 9/16/2009, Column D).

III. Koch Had A Close Relationship With Huntleigh And A Long History Of Expressing Opinions On And Seeking To Exercise Control Over Huntleigh's Business Decisions

25. Huntleigh's Compliance Director – who was a member of Huntleigh's Board of Directors and, at various times, was also KAM's broker – occasionally received calls from Koch in which he expressed opinions and offered direction on Huntleigh business decisions. Tr. at 45-49 (Marshall).

26. For example, on a Friday night in 2008, Koch called Huntleigh's Compliance Director to express concern that Huntleigh had decided to move from being a self-clearing firm to clearing trades through an external firm affiliated with Wachovia, First Clearing Corp. ("FCC"). Huntleigh had not consulted with Koch prior to making the decision to move and Koch expressed dissatisfaction that he had not been consulted about the move in advance. Koch also expressed concern that, with a larger clearing firm, there would be more beaurocracy and less flexibility for him. Tr. at 46-48 (Marshall).

27. Koch also routinely expressed his views on Huntleigh's statement stuffers – notices that accompanied the monthly account statements that were sent to Huntleigh's customers – and, as to one statement stuffer in particular, he asked that it be removed: In 2007 or 2008, when Huntleigh started to offer its clients online access to their accounts, Koch told Huntleigh's Compliance Director that he did not want KAM's clients to receive the statement stuffer announcing the availability of online account access. Tr. at 47-48 (Marshall).

28. This was the first of many times in which Koch expressed the view to Huntleigh's Compliance Director that he did not want his clients having online access to their accounts. Koch told the Compliance Director that he did not want KAM's clients having online account access because he wanted to be his clients' principal source of information about their accounts. Tr. at 48, 54, 71-72 (Marshall).

29. Huntleigh offered online access to Koch's clients anyway because statement stuffers went to all Huntleigh customers and could not be tailored to a sub-group of customers. Tr. at 47-48 (Marshall).

30. Huntleigh's Compliance Director testified that Koch was pushy and persistent and there were no other institutional clients of Huntleigh that called to weigh in on management decisions and the direction of Huntleigh's business. Some at Huntleigh considered him to be high maintenance. Tr. at 45-49, 67-68, 179 (Marshall).

IV. Koch Became Increasingly Agitated About His Clients' Online Access And, In August 2009, Calls From Clients Prompted Koch To Try To Find Out Who Was Accessing Their Online Accounts And How Frequently

31. KAM's clients had been able to sign up for online access to their accounts since 2007 or 2008. By August 2009, the vast majority of clients whose accounts were custodiated at Huntleigh had signed up for online access to their Huntleigh accounts. Tr. at 47-48, 72; Div. Trial Exh. 101 (8/26/2009 email attaching then-current list of accounts under the SL03 rep code with online access).

32. KAM's clients could access the following information online: (i) a list of their positions, (ii) balances, (iii) historical trading activity, and (iv) certain minimal research. Tr. at 55-56 (Marshall).

33. Koch too had the ability to access his client's accounts online. Tr. at 59, 179 (Marshall).

34. In late August 2009, approximately one month prior to the trades at issue in this proceeding, Koch repeatedly asked Huntleigh's Compliance Director (who, by then, was also the broker assigned to KAM's accounts) to provide him with names of KAM customers who had online access to their accounts and details about how frequently those clients were inspecting their accounts. Koch made this request no fewer than four times over a three day period in late August 2009 despite being told repeatedly that the information he sought was not available. Div. Trial Exhs. 96, 103, 112, 113, 121; Tr. at 53-76 (Marshall).

35. Koch provided Huntleigh's Compliance Director and others at Huntleigh with a variety of reasons as to why he wanted to know this information, all of which suggested that certain clients were concerned and complaining about the balances reflected in their accounts and were calling him:

a. Koch told Huntleigh's Compliance Director that some clients had questions and concerns about their accounts and that Koch preferred his clients speak to him directly rather than learn information about their accounts (like account balances) online. Tr. at 54, 74 (Marshall).

b. In an email dated August 26, 2009, Koch told the Compliance Director that he continues to get calls from clients who have checked their online balances at Huntleigh and that he "never designed the KAM business for clients to seek daily activity through on line access." Koch asked the Compliance Director to tell him how frequently KAM's clients access their online accounts so he could "anticipate who is going to call" and "anticipate their questions." Div. Trial Exh. 96 (8/26/2009 email); Tr. at 55 (Marshall).

c. Later on the same day, and although Koch had the ability to check the balances of his client accounts, Koch told Huntleigh's Compliance Director that he needed to

know which KAM clients were accessing their online accounts – and how frequently – because “I hate to get blindsided when a client calls and tells me what the value of their account is from their on line access to Huntleigh.” Div. Trial Exh. 100 (8/26/2009 email).

d. On August 28, 2009, unable to obtain the information he wanted from Huntleigh’s Compliance Director, Koch contacted Huntleigh’s Information Technology (“IT”) Manager – Eli Straeter – and asked him to identify “which specific clients access high traffic on account balances.” Koch suggested that this information would help him prepare for future client calls. He explained to the IT Manager that “I never designed my business for my clients to what the ‘grass grow,’ but since Huntleigh has given on line data access to all clients without any regard for former account relationships or who brought in the client on a managed account basis, this situation provides a real problem for me and people like me in trying to stay up to the minute on the value of an account while the client is watching the ‘paint dry’” Div. Trial Exh. 117 (8/28/2009 email @ 11:52:30 a.m.). Koch asked Huntleigh’s Compliance Director to follow-up with the IT Manager on this because he wanted to “know exactly who I need to be prepared for to discuss their account when they call.” Div. Trial Exh. 113 (8/28/2009 email @ 2:23 GMT).

36. After a minimum of four failed attempts in late August 2009 to obtain from Huntleigh the identity of KAM clients who were accessing their online accounts frequently – and the frequency of their access -- Koch reiterated to Huntleigh’s Compliance Director that he did not like his KAM’s clients having online access and stated, among other things, that:

My style is not to watch the grass grow or the paint dry. We do solid indepth research before we ever purchase a security and stay with the program until something changes. Most of my old time clients understand that. Some of the newer and younger clients, especially the women are more sensitive to market moves and want to watch the paint dry. You really cannot do that with meaningful long term investing. It will drive you crazy.

* * * * *

I always tell my clients that my plan is a five plus year plan. The long term clients appear very satisfied, however, sometimes, especially in the recent period that we just went through in the first half of 2009, some clients, mistakenly, get glued to the fall in price as the general market was going down. That would be the time to buy not sell.

Div. Trial Exh. 121 (8/28/2009 email @ 6:50 p.m. Greenwich Mean Time).

37. Bank stocks in general, including the stocks KAM invested in, had not performed well in 2008 and 2009. Tr. at 73-74 (Marshall).

38. Indeed, KAM placed more orders to sell its client stockholdings in August 2009 than to buy. Admitted into evidence in this case are trading records that reflect all trades executed by Huntleigh for KAM in August 2009. Trial Exh. 335 (September 2009). Those records show that:

a. On August 10, 2009, 84,546 shares of TierOne Corp. common stock (Ticker: TONE) were sold from fifteen KAM accounts at an average price of \$2.3554 per share (Trial Exh. 335 (LAVA Trade Blotter) at 8/10/2009, Columns K and M; Trial Exh. 53 (allocation sheets) at SEC-HUNTLEIGH 3320; Trial Exh. 48 (clients listed by account number)); and

b. On August 11, 2009, 83,000 shares of Sterling Financial Corp. (Ticker: STSA) were sold from nine KAM accounts at an average price of \$3.1003 per share (Trial Exh. 335 (LAVA Trade Blotter) at 8/11/2009, Columns K and M; Trial Exh. 53 (allocation sheets) at SEC-HUNTLEIGH 3322; Trial Exh. 48 (clients listed by account number)).

Both stocks – TONE and STSA – had experienced significant price drops beginning in 2008 and continuing throughout 2009.¹

¹ The Court can take judicial notice of publicly-traded stock prices. See *SEC v. Bilzerian*, 814 F. Supp. 116, 123 n.19 (D.D.C. 1993) (citing cases), *aff'd*, 29 F.3d 689 (D.C. Cir. 1994); see also *Pugh v. Tribune Co.*, 521 F.3d 686, 691 n.2 (7th Cir. 2008); *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 600 & n.3 (3rd Cir. 2000).

39. Based on her long-standing relationship and experience with Koch, Huntleigh's Compliance Director believed that Koch found calls from clients to be an interruption for him. Tr. at 72 (Marshall).

40. The inferences that should be drawn from the communications Koch had with Huntleigh on this subject in late August 2009, as reflected in Paragraphs 34 to 39 above, are the following: (a) Koch had a long-term view on investments and was strongly of the view that clients should not be looking at their account balances with a short-term view; (b) certain KAM clients became focused on the short-term in this time-period and particularly on the fall in prices in 2009 as the general market was going down; (c) certain KAM clients called Koch to express dissatisfaction with the performance of their accounts in the first half of 2009; (d) KAM sold stocks from its clients' portfolios in August 2009; (e) Koch was continuing to receive calls from clients expressing concern and dissatisfaction and expected to receive calls of that nature in the future; (f) Koch did not identify by name which clients were calling him but he told Huntleigh that the clients were newer and younger clients that had not been clients of KAM since KAM's inception and that were more sensitive to market moves; (g) Koch could not prevent his clients from accessing their accounts or reacting emotionally to the price declines, so, he wanted to figure out which clients were checking their balances frequently so that he pre-empt their call and put his own spin on their account's performance; and (h) this was annoying to Koch, who had met with each client before agreeing to take them on as a client and had explained his long-term views on investments.

**V. Jeff Christanell Becomes KAM's Trader
And Executes First Trades on September 16, 2009**

41. In mid-September 2009, the Huntleigh trader that handled the KAM account was laid off and, by default, Christanell became the trader assigned to KAM. Christanell was the

trader through whom Koch placed the orders at issue in this proceeding. Tr. at 53 (Marshall); Tr. at 447-449 (Christanell).

42. Koch spoke to Christanell on or about September 15, 2009 – after Utz was laid off – and asked why Utz had been let go, whether there were reasons other than financial reasons that Utz had been let go and questions relating to Huntleigh’s viability as a firm. Tr. at 456 (Christanell).

43. On September 16, 2009, Christanell executed his first order for KAM after becoming the principal Huntleigh trader assigned to KAM. Christanell executed a cross-trade in which a KAM client sold 10,298 shares of CHEV, and 9,900 of the 10,298 shares were allocated to other KAM accounts, while 398 shares were sold in the open market. Div. Trial Exh. 336 (Huntleigh LAVA Trade Blotter for 9/2009 @ 9/16/2009, Columns D, K and O). Those trades – including the 398 shares – took place at approximately 13:21:29 p.m. and 13:21:41 p.m. Eastern time. Div. Trial Exh. 336 (Huntleigh LAVA Trade Blotter for 9/16/2009, Rows 6-10 and 14, Column F); Div. Trial Exh. 53 at SEC-HUNTLEIGH 3333-3334 (allocation sheet showing that one KAM client sold 10,298 shares and 11 KAM accounts (client and Koch personal and family accounts) purchased a total of 9,900 shares, meaning 398 shares were sold to the street); Div. Trial Exh. 48 (list of client names by account number).

44. After Christanell executed the trades in CHEV that are described in Paragraph 43, Koch emailed Christanell and asked Christanell to use the email as a “recommendation to give you the payout on KAM commissions that Bill [Utz] received for future trades.” Div. Trial Exh. 131 (9/16/2009 email).

45. In the same September 16 email, Koch told Christanell that “[o]ne of the main reasons that Koch Asset Management continues to stay with Huntleigh is the ability to chat with

a trader directly and obtain good executions and understand the direction of the market.” He told Christanell that it was his intent to continue the commission split that had been in place “so you are a direct beneficiary of good executions.” Div. Trial Exh. 131 (9/16/2009 email). Christanell testified that it was his job to get good executions and he could not recall any other client articulating this in such a direct manner. Tr. at 455 (Christanell). It was also unusual for Christanell to discuss commissions with a client. Tr. at 452-453 (Christanell).

46. Christanell felt, as a result of these early conversations and communications with Koch, that he was under pressure to make Koch happy and keep Koch as a customer. Tr. at 456-457 (Christanell).

**VI. Koch Instructed Christanell To Get A Closing Price
On The Last Trading Day Of September, October, November And December 2009**

47. While Christanell was assigned to be KAM’s trader, Koch instructed Christanell to get a closing price on certain stocks at the end of September 2009, and again at the end of October, November and December 2009. The focus of Koch’s instructions was always on getting a closing price on the last trading day of the month. Koch gave Christanell a price or a price range that he wanted Christanell to try to obtain and Christanell executed trades consistent with those instructions. Tr. at 459-460, 464-465, 493-94, 497-501, 524-526 (Christanell).

48. Christanell had been in the business for 15 or 16 years at the time of these trades and could not recall any client (other than Koch) requesting him to increase the price on a stock or to try to get a particular closing price. Tr. at 476 (Christanell).

49. Other than for the six trades at issue in this proceeding, Koch generally sought to acquire stock at the best price possible. Tr. at 515-524 (Christanell); Div Trial Exhs. 204-207, 209-210, 214.

50. Koch did not instruct Christanell to try to get a closing price on any stock on the last trading day of January 2010. Before the end of that month, Huntleigh was contacted by regulators about the December 31 CHEV trade and Christanell brought the HCBC trades to the Huntleigh Compliance Director's attention. By January 29, 2010, Huntleigh formally asked Koch to explain the HCBC trades and why they should not be considered "marking the close." Div. Trial Exh. 22 (1/29/2010 letter); Tr. at 116-118 (Marshall).

51. The inference that should be drawn from Paragraph 50, concerning the absence of marking the close instructions from Koch on the last trading day of January 2010, is that Koch knew his actions were wrong and ceased his attempts to mark the closing price of shares in the KAM accounts only after he was confronted by Huntleigh's Compliance Director and was aware that regulators were looking at certain of his trades.

A. The September 30, 2009 Trade In HCBC

52. Sometime on September 29 or September 30, 2009, Koch called Christanell and placed an order to purchase HCBC shares. Christanell could not recall if Koch gave him a specific price or a price range but he had a specific recollection that, while the order was pending, Koch instructed Christanell to increase the price and to try to get a closing price for HCBC above \$20 or in the \$20 to \$25 range. The price that Koch gave to Christanell was, at the time, above the then-current bid and ask. Tr. at 464-466 (Christanell).

53. At 1:12 p.m. Central time on September 30, 2009, Christanell gave Koch a mid-day status report on an open order to purchase shares of HCBC. He let Koch know that he had purchased 580 shares of HCBC thus far that day at an average price of \$16.6897 and had only an odd lot of 20 shares left to buy. He also noted that odd lots do not "show" (i.e., the price and volume on an odd lot trade does not get reported to the market). He reported to Koch that the

current bid and ask was \$11.70 and \$20 and asked what Koch wanted to do from there. Div. Trial Exh. 144 (9/30/2009 email) (Div. Trial Exh. 144 is in Eastern time, but, Div. Trial Exh. 148 reflects same email in Central time); Tr. at 466-472 (Christanell).

54. Also on September 30, and while the HCBC order was open, Koch asked Christanell how Huntleigh prices stock on the last day of the month. Christanell did not know the answer to the question and, at 1:19 p.m. Central time, he emailed the person at Huntleigh who handled Huntleigh's pricing systems to get an answer. In Christanell's words:

Don Koch is asking if stocks are priced at the bid or last trade at the end of the day/month? He's looking at HCBC.

Div. Trial. Exh. 145 (9/30/2009 email). Ten minutes later, at 1:30 p.m. Central time, Christanell emailed Koch with an answer to his question, and told him that:

[I]f a stock trades on a day, it's priced at the last trade. If it doesn't trade, say no trading volume for a couple of days, it gets priced on the bid. In the case of HCBC today, it will get priced on the last trade.

Div. Trial Exh. 146 (9/30/2009 email) (Div. Trial Exh. 146 is in Eastern time, but, Div. Trial Exhs. 148 and 149 reflect same email in Central time.); Tr. at 460-464 (Christanell).

55. At 1:43 p.m. Central time on September 30, 2009, and in response to learning that HCBC would be priced at the last trade, Koch emailed Christanell and told him this was "good" and to "move last trade right before 3 p.m. up to as near to \$25 as possible without appearing manipulative." Div. Trial Exh. 148 (9/30/2009 email) (Div. Trial Exh. 148 is in Greenwich Mean time, but, Div. Trial Exh. 149 reflects same email in Central time); Tr. at 472-475, 476-477 (Christanell).

56. The markets close at 3 p.m. Central time, which is 4 p.m. Eastern time. Tr. at 472-475, 476-477 (Christanell).

57. Records from Huntleigh's trade order system – LAVA – reflect exactly how Christanell initially entered Koch's order into the system on September 30, 2009, when changes were made to the order, when trades were routed to the street and at what price and when they were executed (see Tr. at 478-487 (Christanell) for explanation of LAVA report columns and Tr. at 130-131 (Marshall) for explanation of what a LAVA report is):

- At 11:25:52 a.m. Eastern time, Christanell entered a limit order into the Huntleigh trading system to purchase 400 shares of HCBC at up to \$18 per share.² Div. Trial Exh. 278 (HCBC 9/30/09 heading) at page 5, Row114, Columns F, H, I, L, Y.
- Christanell routed the order to the street almost immediately. At 11:29:42 a.m. Eastern time he purchased 200 shares of HCBC at \$18 and at 11:41:38 a.m. Eastern time he purchased 200 shares of HCBC at \$16 per share. Div. Trial Exh. 278 (HCBC 9/30/09 heading) at page 5, Rows 118 and 122, Columns F, H, L, O.
- At 11:57:59 a.m. Eastern time, Christanell entered a new limit order into the system to purchase an additional 200 shares of HCBC at up to \$16 per share. Div. Trial Exh. 278 (HCBC 9/30/09 heading) at page 5, Row123, Columns F, H, I, L, Y.
- Christanell routed that order to the street almost immediately and, at 12:03:18 p.m. Eastern time, he purchased 180 shares of HCBC for \$16 per share. Div. Trial Exh. 278 (HCBC 9/30/09 heading) at page 5, Rows 127, Columns F, H, L, O.
- At 14:15:28 p.m. Eastern time, Christanell entered a new limit order into the system to purchase an additional 1,400 shares of HCBC at up to \$25 per share. Div. Trial Exh. 278 (HCBC 9/30/09 heading) at page 5, Row131, Columns F, H, I, L, Y. The bid-ask spread that was reflected on Huntleigh's system at the time he entered this order was \$11.71 - \$20.00. Div. Trial Exh. 278 (HCBC 9/30/09 heading) at page 5, Row131, Column S.
- Seconds later, Christanell purchased the remaining 20 shares of HCBC that had been routed to the street earlier, for \$20 per share. Div. Trial Exh. 278 (HCBC 9/30/09 heading) at page 5, Rows 132, Columns F, H, L, O.

² The market does not have visibility to orders that are entered into the system until the trader routes the trade to the street. Tr. at 481-482 (Christanell).

- Christanell did not immediately route the 1,400 share order to the street. Instead, at 14:47:07 p.m. Eastern time, he routed another 200 shares to the street at a price of \$16 per share but did not get any executions. Div. Trial Exh. 278 (HCBC 9/30/09 heading) at page 5, Rows 133-135, Columns F, H, J, L.
- At 15:31:32 p.m. Eastern time, Christanell cancelled the \$25 per share limit order and put in a new order for \$24.50 per share. By 15:56:13, he routed 1,000 shares of HCBC to the street at a price of \$24.50. Within minutes, he purchased 480 shares at a price of \$20 per share, then 400 shares at a price of \$22 per share and 120 shares at a price of \$23.99 per share. Div. Trial Exh. 278 (HCBC 9/30/09 heading) at page 5, Rows 136-142, Columns F, H, J, L, O.
- At 15:59:21 p.m. Eastern time, Christanell routed the remaining 400 shares to the street at a price of \$24 per share and, at 15:59:43 p.m. – 17 seconds before the close of the market – he purchased 400 shares at \$23.50 per share. Div. Trial Exh. 278 (HCBC 9/30/09 heading) at page 5, Rows 143-146, Columns F, H, J, L, O.

58. The 2,000 shares of HCBC that Christanell purchased at Koch's instruction on September 30, 2009 represented 100% of the trading volume reported to the markets that day. The last trade executed by Christanell – at \$23.50 per share – was the reported closing price. Div. Trial Exhs. 258, 263, 277, 305, Tr. at 228-229, 234 (Glascoe). Nearly two-and-half years have passed since these trades, yet, since September 30, 2009, the shares of HCBC shares have never again traded at a price as high as the high price paid by KAM that day (\$23.99), or, for that matter, as high as \$23.50, which was the closing price established by KAM's HCBC trade that day. Div. Trial Exhs. 316 (composite), 320 (see chart called HCBC Composite Data); Tr. at 281-283 (Glascoe).

59. Although Christanell could not recall the specific time of day on September 30 that Koch instructed him to get a closing price for HCBC, the inference from the evidence referenced in Paragraphs 53 to 58 is that Koch gave Christanell a verbal instruction to get a closing price above \$20 or in the \$20 to \$25 range sometime between 1:12 p.m. Central time (when, as reflected in Div. Trial Exh. 144, Christanell gave Koch a mid-day status report on the

pending HCBC trade and asked Koch what he wants to do) and 1:15 p.m. Central time (when, as reflected in Div. Trial Exh. 278, Christanell replaced the initial order in the Huntleigh system to increase the price to \$25 per share). The inference is also that Koch's email to Christanell at 1:43 p.m. Central time, as reflected in Div. Trial Exh. 148, merely confirmed the prior verbal instruction and was a response to Christanell's information regarding how trades are priced on the last day of the month.

60. At 3:36 p.m. Central time, Christanell emailed Koch a status report at the end of the day, telling him that he purchased a total of 2,000 shares of HCBC that day at an average price of \$20.3794. Div. Trial Exh. 150 (9/30/2009 email) (Div. Trial Exh. 150 is in Greenwich Mean time, but, Div. Trial Exh. 151 is in Central time); Tr. at 492-493 (Christanell).

61. At 4:11 p.m. Central time on September 30, 2009, KAM faxed to Huntleigh instructions to allocate all 2,000 shares of HCBC purchased that day to the Alice Smith Revocable Living Trust Account, Acct. No. 1976-2999. Div. Trial Exh. 53 (allocation sheet) at SEC-HUNTLEIGH 3336; Div. Trial Exh. 48 (list of client names by account number); Tr. at 134-135 (Marshall).

62. The Alice Smith Revocable Living Trust Account was charged an average price of \$20.3794 per share (or \$40,758.80), plus \$100 in commissions and \$4.75 in transaction fees for these shares of HCBC. Div. Trial Exh. 8 (trade confirmation slip); Tr. at 137-138 (Marshall).

63. Huntleigh sent the Alice Smith Revocable Living Trust Account (Acct. No. 1976-2999) a monthly account statement for the period ended September 30, 2009. The statement valued the account's HCBC holdings (5,900 shares) at \$23.50, the closing price established by the above trades on September 30. Div. Trial Exh. 258, Binder 1 of 2 at SEC-KOCH 362

(September 30, 2009 statement for Smith Acct. No. 1976-2999) (binder is in account number order, which is also same order as Div. Trial Exh. 306).

64. All accounts under the SL03 rep code that held shares of HCBC as of the last trading day of September 2009 received a monthly account statement from Huntleigh that valued their HCBC holdings at \$23.50 per share. Div. Trial Exh. 258 (Binders 1 and 2).

65. If KAM had not purchased HCBC shares on September 30, 2009, Huntleigh's monthly account statements would have reported to KAM's clients a per share value for HCBC of \$11.70. There was no other trading volume that day and \$11.70 was the last best bid price for HCBC prior to KAM's trading on September 30, 2009. Div. Trial Exhs. 277 (at Event Date 9/30/2009 and Event Start TM 8:09:53) and 305; Tr. at 139-140 (Marshall), 229-231 (Glascoe).

66. KAM accounts (including client and Koch personal and family accounts) held a total of 132,962 shares of HCBC as of September 30, 2009 and Huntleigh's monthly account statements for the period ended September 30, 2009 reflected a total value of \$3,124,607 for those HCBC holdings. If KAM had not traded HCBC shares on the last trading date of October 2009 – and Huntleigh's monthly account statements instead reflected a price of \$11.70 – these holdings instead would have been valued at \$1,555,655.40 in the monthly account statements. KAM's September 30 trades in HCBC caused the month-end valuations that were reported to KAM's clients and Koch's family to be inflated by \$11.80 per share or an aggregate \$1,568,951.60. Div. Trial Exhs. 258 (monthly account statements for all KAM accounts holding HCBC on 9/30/2009, 10/30/2009, 11/30/2009, 12/31/2009), 305 (trade and volume summaries), 306 (summary of KAM account HCBC holdings as of 9/30/2009); Tr. at 234-235, 256-260 (Glascoe).

67. KAM's trades in HCBC on September 30, 2009 led to a maximum potential increase in KAM's Base Fee for the third quarter of 2009 of \$3,922.38, before taking into consideration KAM accounts that were not charged fees. Div. Trial. Exhs. 305 (reflecting KAM accounts that held HCBC on 9/30/2009) and 311 (calculating maximum increase assuming all KAM accounts, including Koch personal and family accounts, were charged a quarterly fee). Not all KAM accounts were charged a Base Fee. Tr. at 678-683 (Heidtbrink). After taking into consideration accounts that were not charged a Base Fee that quarter, the increase in Base Fees received by Koch for the third quarter of 2009 was \$2,929.35. Div. Trial Exh. 305 and 311 (subtracting out accounts where no fee was charged and basing calculation on 99,300 shares).

B. The October 30, 2009 Trade In HCBC

68. Koch also instructed Christanell to get a closing price for HCBC on October 30, 2009 in the range of \$20 to \$25 per share. Tr. at 493-494 (Christanell).

69. Records from Huntleigh's trade order system – LAVA – reflect exactly how Christanell initially entered Koch's order into the system on October 30, 2009, when changes were made to the order, when trades were routed to the street and at what price and when they were executed (see Tr. at 478-487 (Christanell) for explanation of LAVA report columns):

- At 10:55:33 a.m. Eastern time, Christanell entered a limit order into the Huntleigh trading system to purchase 1,000 shares of HCBC at up to \$24 per share. Div. Trial Exh. 278 (HCBC 10/30/09 heading) at page 3, Row 98, Columns F, H, I, L, Y; Tr. at 496 (Christanell).
- Christanell did not attempt to fill the order until the last 15 minutes of the trading day.
- At 15:45:48 p.m. Eastern time, Christanell replaced the limit order with a market order and immediately routed 600 shares to the street. Within minutes, he purchased 200 shares of HCBC at \$14 per share, 200 shares at \$18 per share and 200 shares at \$19.75 per share. Div. Trial Exh. 278 (HCBC 10/30/09 heading) at page 3,

Rows 103-108, Columns F, H, J, L, O; Tr. at 496-497
(Christanell).

70. The 600 shares of HCBC that Christanell purchased at Koch's instruction on October 30, 2009 represented 42.9% of the trading volume reported to the markets that day. The last trade executed by Christanell – at \$19.75 per share – established the reported closing price for HCBC and it was also the high trading price of the day for HCBC. Div. Trial Exhs. 258, 263, 277, 305; Tr. at 235-241 (Glascoe). Since October 30, 2009, HCBC shares have rarely traded at a price as high as high as \$19.75 per share. Div. Trial Exhs. 313, 320; Tr. at 276-278 (Glascoe).

71. At 3:47 p.m. Central time on October 30, 2009, KAM faxed to Huntleigh instructions to allocate all 600 shares of HCBC purchased that day to the Alice Smith Revocable Living Trust Account (Acct. No. 1976-2999). Div. Trial Exh. 53 (allocation sheet) at SEC-HUNTLEIGH 3344; Div. Trial Exh. 48 (list of client names by account number); Tr. at 135 (Marshall).

72. The Alice Smith Revocable Living Trust Account (Acct. No. 1976-2999) was charged an average price of \$17.25 per share (or \$10,350), plus \$100 in commission and \$4.75 for a transaction fees for these shares of HCBC. Div. Trial Exh. 13 (trade confirmation slip); Tr. at 137-138 (Marshall).

73. Huntleigh sent the Alice Smith Revocable Living Trust Account (Acct. No. [REDACTED]) a monthly account statement for the period ended October 31, 2009. The statement valued the account's HCBC holdings (6,500 shares) at \$19.75 per share, the closing price established by the above trades on October 30. Div. Trial Exh. 258, Binder 1 of 2 at SEC-KOCH 370 (10/31/3009 statement for Smith Acct. No. [REDACTED]) (binder is in Huntleigh account number order).

74. All accounts under the SL03 rep code that held shares of HCBC as of the last trading day of October 2009 received a monthly account statement from Huntleigh that valued their HCBC holding at \$19.75 per share. Div. Trial Exh. 258 (Binders 1 and 2).

75. If KAM had not purchased HCBC shares on October 30, 2009, Huntleigh's monthly account statements would have reported a per share value for HCBC of \$14.00, which was the price of the last non-KAM trade that day. Div. Trial Exhs. 277 (at Event Date 10/30/2009 and Event Start Tm 15:46:43) and 305; Tr. at 139-140 (Marshall), 236-237 (Glascoe).

76. KAM accounts (including client and Koch personal and family accounts) held a total of 133,562 shares of HCBC as of October 31, 2009 and Huntleigh's monthly account statements for the period ended October 31, 2009 reflected a total value of \$2,637,849.50 for those HCBC holdings. If KAM had not traded HCBC shares on the last trading day of October 2009 – and Huntleigh's monthly account statements instead reflected a price of \$14.00 – the monthly account statements would have reflected a value for these holdings of \$1,869,868. KAM's October 30 trades in HCBC caused the month-end valuations that were reported to KAM's clients and Koch's family members to be inflated by \$5.75 per share or an aggregate \$767,981.50. Div. Trial Exhs. 258 (monthly account statements for all KAM accounts holding HCBC on 9/30/2009, 10/30/2009, 11/30/2009, 12/31/2009) 305 (trade and volume summaries), 307 (summary of KAM account HCBC holdings as of 10/30/2009); Tr. at 239, 260-261 (Glascoe).

C. The November 30, 2009 Trade In HCBC

77. Koch placed an order to purchase HCBC on November 30, 2009. His instructions to Christanell were focused on getting a closing price in the \$20 to \$25 per share

range and, as with the trades on September 30 and October 30, Koch instructed Christanell to trade in the last 20 minutes of the trading day. Tr. at 497-498 (Christanell).

78. Records from Huntleigh's trade order system – LAVA – reflect exactly how Christanell initially entered Koch's order into the system on November 30, 2009, when changes were made to the order, when trades were routed to the street and at what price and when they were executed (see Tr. at 478-487 (Christanell) for explanation of LAVA report columns):

- At 11:14:20 a.m. Eastern time, Christanell entered a limit order into the Huntleigh trading system to purchase 2,000 shares of HCBC at up to \$20 per share. Div. Trial Exh. 278 (HCBC 11/30/09 heading) at page 3, Row 84, Columns F, H, I, L, Y.
- Christanell did not attempt to fill the order until the last 10 minutes of the trading day.
- At 15:52:05 p.m. Eastern time, Christanell replaced his initial order with a new limit order to purchase 2,000 shares of HCBC at up to \$21 per share. Div. Trial Exh. 278 (HCBC 11/30/09 heading) at page 3, Row 86, Columns F, H, J, L, O.
- At 15:56:47 p.m. Eastern time, Christanell routed 1,000 shares to the street at \$21 per share and he obtained a fill for 200 shares and then 800 shares at a price of \$17. Div. Trial Exh. 278 (HCBC 11/30/09 heading) at page 3, Rows 89-90, Columns F, H, J, L, O.
- At 15:58:29 p.m. Eastern time, Christanell routed another 1,000 shares to the street at \$21 per share and, one minute later, he obtained a fill at a price of \$17.49 per share. Div. Trial Exh. 278 (HCBC 11/30/09 heading) at page 3, Rows 91-93 Columns F, H, J, L, O.

79. The 2,000 shares of HCBC that Christanell purchased at Koch's instruction on November 30, 2009 represented 100% of the trading volume reported to the markets that day. The last trade Christanell executed for Koch – at \$17.49 per share – established the reported closing price for HCBC that day and it was also the high trading price for the day. Div. Trial Exhs. 258, 263, 277, 305; Tr. at 239-242 (Glascoe). From November 30, 2009 through December 31, 2010, HCBC shares traded at a price as high as high as \$17.49 on only four days,

one of them being December 31, 2009, a day when Koch is alleged to have marked the close of HCBC shares. Div. Trial Exhs. 314, 320; Tr. at 278-279 (Glascoe).

80. When Christanell gave Koch a status report at the end of the day – and reported in an email sent at 3:03 p.m. Central time that he had purchased 2,000 shares of HCBC at an average price of \$17.245 per share – he apologized to Koch for his inability to get a higher price. Div. Trial Exh. 15.

81. Although Christanell obtained all 2,000 shares that Koch had ordered that day, Christanell acknowledged to Koch one month later – while executing HCBC trades on December 31, 2009 – that he had waited too long to route the HCBC orders to the street on November 30 and was unable to move the price up to where Koch had wanted it. Div. Trial Exh. 189 (audio recording from 12/31/2009); Tr. at 387-389 (Straeter).

82. At 5:03 p.m. Central time on November 30, 2009, KAM faxed to Huntleigh instructions to allocate all 2,000 shares of HCBC purchased that day to the Philip H. Smith Family Trust Account, Acct. No. 8671-4873. Div. Trial Exhs. 53 at SEC-HUNTLEIGH 3368 (allocation sheet) and Exh. 48 (list of client names by account number); Tr. at 135-136 (Marshall).

83. The Philip H. Smith Family Trust Account (Acct. No. [REDACTED]), of which Alice C. Smith and Koch were co-Trustees, was charged an average price of \$17.245 per share (or \$39,490), plus \$75 in commissions and \$4.75 in transaction fees for these shares of HCBC. Div. Trial Exh. 14 (trade confirmation slip); Tr. at 137-138 (Marshall).

84. Huntleigh sent the Philip H. Smith Family Trust Account (Acct. No. [REDACTED]) a monthly account statement for the period ended November 30, 2009. The statement valued the account's HCBC holdings – a total of 4,500 shares, including the 2,000 shares acquired on

November 30 – at \$17.49 per share, the closing price established by the above trades on November 30, 2009. Div. Trial Exh. 258, Binder 2 of 2, at SEC-KOCH 266 (11/30/2009 account statement for Smith Acct. No. [REDACTED]) (binder is in Huntleigh account number order).

85. All accounts under the SL03 rep code that held shares of HCBC as of the last trading day of November 2009 received a monthly account statement from Huntleigh that valued their HCBC holding at \$17.49 per share. Div. Trial Exh. 258 (Binders 1 and 2).

86. If KAM had not purchased HCBC shares on November 30, 2009, Huntleigh's monthly account statements would have reported to KAM's clients a per share value for HCBC of \$14.00. There was no other trading volume that day and \$14.00 was the last best bid price for HCBC prior to the commencement of KAM's trading that day. Div. Trial Exhs. 277 (at Event Dt 11/30/2009 and Event Start Tm 8:43:02) and 305; Tr. at 139-140 (Marshall), 240-241 (Glascoe).

87. KAM accounts (including client and Koch personal and family accounts) held a total of 135,562 shares of HCBC as of November 30, 2009 and Huntleigh's monthly account statements for the period ended November 30, 2009 reflected a total value of \$2,370,979.38 for those holdings. If KAM had not traded HCBC shares on the last trading day of October 2009 – and Huntleigh's monthly account statements instead reflected a price of \$14.00 – the monthly account statements instead would have reflected a total value for these holdings of \$1,897,868. KAM's November 30 trades in HCBC caused the month-end valuations that were reported to KAM's clients and family members to be inflated by \$3.49 per share or an aggregate \$473,111.38. Div. Trial Exhs. 258 (monthly account statements for all KAM accounts holding HCBC on 9/30/2009, 10/30/2009, 11/30/2009, 12/31/2009) 305 (trade and volume summaries),

308 (summary of KAM account HCBC holdings as of 11/30/2009); Tr. at 242, 262-263 (Glascoe).

D. The December 31, 2009 Trades In HCBC, CHEV and CARV

1. HCBC

88. On December 23, 2009, at 10:58 a.m. Central time, Koch emailed Christanell and put him on notice that he wanted to purchase HCBC on December 31, 2009, the last trading day of the year. The email stated, with respect to HCBC:

I also will want to move up HCBC the last day of the year before things close down ... so, please be mindful of that if you are there or your backup is around Should be a busy day

Respondents Trial Ex. R-33; Tr. at 626-627 (Christanell).

89. On December 28, 2009, at 10:10 a.m. Central time, Koch emailed Christanell and gave him a specific instruction to get a closing price for HCBC on December 31, in the \$20 to \$25 per share range. The email stated, in full:

Dear Jeff,
Please put on your calendar to buy HCBC 30 minutes to an hour before the close of the market for the year. I would like to get a closing price in the 20-25 range, but certainly above 20. Thanks.
DLK.

Div. Trial Ex. 186 (12/28/2009 email) (Div. Trial Ex. 186 is in Greenwich Mean time, but, Div. Trial Ex. 187 reflects the same email in Central time); Tr. at 499-500, 610-611, 627-628 (Christanell).

90. A Huntleigh audio recording of the trading desk on December 31, 2009 reveals that, at 7:46 a.m. Central time, Koch called Christanell at the office to reiterate his pricing instructions on HCBC that day and to authorize Christanell to buy up to 5,000 shares if he needed to get that price. Koch stated, among other things:

My parameters are ... if you need 5,000 shares do whatever you have to do ... I need to get it above 20, you know 20 to 25 I'm happy ... you figure out if you want to do it the last half hour ... and just create prints."

Christanell told Koch that he might route the trade to the street earlier because "last time" (i.e. November 30) he waited too long and the price did not move. Koch then warned Christanell not to come into the market too early because Koch was aware of a seller. Div. Trial Exh. 189 (12/31/2009 audio recording from 1:46 Greenwich Mean time); Tr. at 387-389 (Straeter); Tr. at 107-109 (Marshall). Christanell testified that the instructions he received in October and November 2009 were similar to the conversations he had had with Koch in the previous months of September, October, and November. Tr. at 515 (Christanell).

91. Christanell understood Koch's reference to 5,000 shares to mean that Christanell was authorized to purchase up to 5,000 shares of HCBC in an effort to hit Koch's target closing range but that he should purchase as few shares as necessary to attain that price level. Tr. at 503-505 (Christanell).

92. Christanell also understood that Koch wanted Christanell to avoid the seller because a seller could push out the trading volume and create liquidity, which could result in a lower price and defeat their efforts to get a closing price above \$20 per share. Tr. at 505-506 (Christanell).

93. Records from Huntleigh's trade order system – LAVA – reflect exactly how Christanell initially entered Koch's order for HCBC into the system on December 31, 2009, when changes were made to the order, when trades were routed to the street and at what price, and when they were executed (see Tr. at 478-487 (Christanell) for explanation of LAVA report columns):

- At 9:06:00 a.m. Eastern time, Christanell entered a limit order into the Huntleigh trading system to purchase 5,000 shares of HCBC at

up to \$25 per share. Div. Trial Exh. 278 (HCBC 12/31/09 heading) at page 1, Row 3, Columns F, H, I, L, Y.

- At 15:55:12 p.m. Eastern time, with less than 5 minutes to go before the markets closed, Christanell routed 3,000 shares to the street at a price of \$25 per share. Div. Trial Exh. 278 (HCBC 12/31/09 heading) at page 1, Row 5, Columns F, H, J, L.
- Between 15:55:52 p.m. Eastern time and 15:58:43 p.m. Eastern time, Christanell obtained 6 executions for a total of 3,000 shares ranging in price from \$16.80 to \$19.50 per share. Div. Trial Exh. 278 (HCBC 12/31/09 heading) at page 1, Rows 6-11, Columns F, H, J, L, O.
- At 15:58:53 p.m. Eastern time, Christanell routed another 2,000 shares to the street at a price of \$25 per share, and, less than one minute later, he obtained an execution for 200 shares at a price of \$19.50 per share. Div. Trial Exh. 278 (HCBC 12/31/2009 heading) at page 1, Row 12, Columns F, H, J, L, O.

94. Christanell gave Koch an end-of-the-day status report regarding HCBC verbally and in writing and he again apologized for not getting the closing price that Koch wanted for HCBC, just as he had apologized on November 30. A Huntleigh audio recording of the trading desk on December 31, 2009 captured the apology. “The HCBC ... sorry ... umm ... it closed at \$17.50³ ... I know you wanted it higher and I tried....” Consistent with his understanding that he should try to get the closing price above \$20 per share using as few of the 5,000 authorized shares as possible, he explained to Koch that he didn’t “want to blow it all at once ... and then ... I don’t have any fire power. So I’ve just got to wait and see what they do.” Except, this time, he had “put a market order to buy 2,000 in with like 3 minutes left and ... I got 200 shares.” Div. Trial Exh. 192 (12/31/2009 audio recording); Tr. at 392-393 (Straeter); Tr. at 113-114 (Marshall).

³ HCBC actually closed at \$19.50 per share on December 31, 2009, not \$17.50 per share, as Christanell verbally stated to Koch. But, as the evidence in this case demonstrates, if KAM did not trade in HCBC on December 31 (if the manipulative trades are extracted from the trading record), the closing price for HCBC would have been \$17.50 per share. See Paragraph 97.

95. Christanell's apology was also reflected in an email, wherein Christanell reported that he had acquired 3,200 shares of HCBC at an average price of \$17.3291, but prefaced the report with the words, "Sorry, but it was difficult with a lot going on for the end of the year—" Div. Trial Exh. 194 (12/31/2009 email).

96. The 3,200 shares of HCBC that Christanell purchased at Koch's instruction on December 31, 2009 represented 88.9% of the trading volume reported to the markets that day. The last trade executed by Christanell in HCBC – at \$19.50 per share – established HCBC's reported closing price and was also the high trading price for the day. Div. Trial Exhs. 258, 263, 277, 305; Tr. at 242-245 (Glascoe). Since December 31, 2009, HCBC shares have traded as high as \$19.50 per share on only a few days. Div. Trial Exhs. 315, 320.

97. If KAM had not purchased HCBC shares on December 31, 2009, Huntleigh's monthly account statements would have reported a per share value for HCBC of \$17.50, which was the price of the last non-KAM trade that day. Div. Trial Exhs. 277 (at Event Dt 12/31/2009 and Event Start Tm 15:57:53) and 305; Tr. at 139-140 (Marshall); Tr. at 242-243 (Glascoe).

2. CHEV

98. Another audio recording of Huntleigh's trading desk on December 31, 2009 reveals that, at 11:41 a.m. Central time, Koch called Christanell at the office to inquire about the trading spread on CHEV. After Christanell told Koch that the bid was \$7.20 and the ask \$7.48, Koch placed an order to purchase an unspecified number of shares of CHEV and instructed him to get a closing price in the range of \$8 to \$8.25 per share. The instruction is captured in the following passage on the tape:

"Let's see if by the end of the day you move it above 8 ... 8, 8 and a quarter ... and that should be pretty easy (laughter) ... so whatever you need to do there ... move it up to about 8, 8 and a quarter on the Cheviot, do what you need to do there."

Div. Trial Exh. 191 (12/31/2009 audio recording from 5:41 Greenwich Mean time); Tr. at 500-501, 508-509 (Christanell); Tr. 390-391 (Straeter); Tr. at 110-111 (Marshall).

99. Records from Huntleigh's trade order system – LAVA – reflect exactly how Christanell initially entered Koch's order for CHEV into the system on December 31, 2009, when changes were made to the order, when trades were routed to the street and at what price and when they were executed (see Tr. at 478-487 (Christanell) for explanation of LAVA report columns):

- At 13:01:14 p.m. Eastern time – approximately 20 minutes after Huntleigh's recording system captured the audio of Koch's order -- Christanell entered a limit order into the Huntleigh trading system to purchase 5,000 shares of CHEV at up to \$8.25 per share. Div. Trial Exh. 278 (CHEV 12/31/09 heading) at page 1, Row 21, Columns F, H, I, L, Y.
- Christanell routed the orders to the street with only 20 minutes remaining until the close of the markets. He routed orders five times – once at 15:40:12 p.m. Eastern time, again at 15:57:56 p.m. Eastern time, again at 15:59:20 p.m. Eastern Time, and at 15:59:53 p.m. Eastern time and, finally, at 16:00:09 p.m. Eastern time. He consistently routed the orders at a price of \$8.25 per share. Div. Trial Exh. 278 (CHEV 12/31/09 heading) at page 1, Rows 22-23, 41-42, 50-51, 56-57, 66-67, and Columns F, H, J, L.
- Christanell obtained executions throughout the day, however, his executions did not establish the closing price for the day. His last execution prior to the close was at 15:59:53 p.m. Eastern time at a price of \$7.99. Div. Trial Exh. 278 (CHEV 12/31/09 heading) at page 3, Row 65, Columns F, H, L, O; Tr. at 255 (Glascoe).
- Seconds after the close – at 16:00:09 p.m. Eastern time -- Christanell also obtained executions for 667 shares of CHEV at prices ranging from \$8 to \$8.19 per share. Div. Trial Exh. 278 (CHEV 12/31/09 heading) at page 3, Rows 68-70, Columns F, H, L, O; Tr. at 255 (Glascoe).

100. The 6,667 shares of CHEV that Christanell purchased at Koch's instruction on December 31, 2009 represented approximately 70.7% of the total reported market volume in CHEV on December 31, 2009. Though KAM's trades were executed just seconds before and

after the market close, they did not establish the closing price of CHEV, which was \$7.39 per share that day. Div. Trial Exhs. 265, 305; Tr. at 250-256 (Glascoe). Another buyer was in the market at exactly the same time as KAM and was able to purchase shares of CHEV at a much lower price than KAM. Tr. at 512-513 (Christanell).

101. Christanell was nervous about giving Koch an end-of-day report. Tr. at 513 (Christanell).

102. Christanell gave Koch a verbal and written end-of-the-day status report on CHEV. A Huntleigh audio recording of the trading desk that day captured the verbal communication, in which Koch asked, with respect to CHEV, "What's your final print?" Christanell reported that he purchased some shares of CHEV "at the bell ... at like 4 o'clock and 3 seconds, 9 seconds after ... at 8" but that he is seeing a closing price of \$7.65. The tone of Koch's voice expressed disappointment -- "Really?" "Oh." -- and he asked if the market was closed yet. Div. Trial Exh. 192 (12/31/2009 audio recording); see also Div. Trial Exh. 194 (12/31/2009 email) (apologizing and reporting that 6,667 shares of CHEV were purchased at an average price of \$7.8367); Tr. at 513-514 (Christanell).

3. CARV

103. Koch also placed an order to buy shares of CARV via phone on December 31, 2009 in which he asked Christanell to get a closing price for CARV of \$9.05. Koch did not specify a particular volume for the trade as the focus was on getting a closing price. Tr. at 510-511 (Christanell).

104. An audio recording of Huntleigh's trading desk on that day reveals that, during the same call in which Koch placed an order for CHEV at 11:41 a.m. Central time, Koch inquired about CARV. He specifically asked what the price and volume was on CARV.

Christanell told him the current bid was \$8.10 and the current ask \$9.05, that there had been no trades yet that day, and that at least 2,000 shares were offered at \$9.05. Koch then placed an order with the following instruction to Christanell: “What you do at the end of the day ... pop that one ... to \$9.05 ... if you have to.” Koch did not ask Christanell to purchase all 2,000 shares at were available at \$9.05. Instead, as Koch acknowledged when asked by Christanell, the purpose of the order was to “make a print” (i.e. get a closing price) not acquire a particular volume of CARV shares. Div. Trial Exh. 191 (12/31/2009 audio recording from 5:41 Greenwich Mean time); Tr. at 500-501, 508-511 (Christanell); Tr. at 390-391 (Straeter); Tr. at 110-111 (Marshall).

105. Koch called Christanell about the CARV trade one more time on December 31, 2009. An audio recording of Huntleigh’s trading desk on that day reveals that, at 2:09 p.m. Central time, Koch called to check on Christanell’s progress and Christanell asked if it was okay to purchase just 300 shares at \$9.05. Koch responded, “that’s perfect ... just make sure you get a print.” Div. Trial Exh. 190 (12/31/2009 audio recording from 8:09 Greenwich Mean time); Tr. at 111-112 (Marshall); Tr. 391-392 (Straeter).

106. Records from Huntleigh’s trade order system – LAVA – reflect exactly how Christanell initially entered Koch’s order for CARV into the system on December 31, 2009, when changes were made to the order, when trades were routed to the street and at what price and when they were executed (see Tr. at 478-487 (Christanell)) for explanation of LAVA report columns):

- At 13:01:32 p.m. Eastern time – approximately 20 minutes after Huntleigh’s recording system captured the audio of Koch’s order -- Christanell entered a limit order into the Huntleigh trading system to purchase 1,000 shares of CARV at up to \$9.05 per share. Div. Trial Exh. 278 (CHEV 12/31/09 heading) at page 3, Row 76, Columns F, H, I, L, Y.

- At 15:58:36 p.m. Eastern time – with less than a minute and a half to close – Christanell routed 200 shares of CARV to the street at a price of \$9.05 per share. Div. Trial Exh. 278 (CHEV 12/31/09 heading) at page 3, Row 77, Columns F, H, J, L.
- At 15:58:37 p.m. Eastern time, Christanell obtained a 100 share fill at \$9.045 per share and another 100 share fill at \$9.05 per share. He then cancelled the remainder of his 1,000 share order. Div. Trial Exh. 278 (CHEV 12/31/09 heading) at page 3, Rows 78-80, Columns F, H, L, O.

107. A Huntleigh audio recording of the trading desk on December 31, 2009 captured Christanell's verbal end-of-the-day report to Koch, in which Christanell reported that "Carver closed about 905" and Koch replied, "good." Div. Trial Exh. 192 (12/31/2009 audio recording); Tr. at 392-393 (Straeter).

108. In his email report, sent at 3:11 p.m. Central time, Christanell reported that he purchased 200 shares of CARV at an average price of \$9.0475. Div. Trial Exh. 194 (12/31/2009 email).

109. The 200 shares of CARV that Christanell purchased at Koch's instruction on December 31, 2009 represented 100% of the trading volume reported to the markets that day. The last trade executed by Christanell – at \$9.05 per share – established the reported closing price for CARV that day and it was also the high trading price for the day. Div. Trial Exhs. 260, 264, 275, 305; Tr. at 248-249 (Glascoe). Since December 31, 2009, CARV shares have never traded at a price as high as \$9.05 per share. Div. Trial Exhs. 317, 320 (chart entitled CARV Data); Tr. at 284-287 (Glascoe).

110. If KAM had not purchased CARV shares on December 31, 2009, Huntleigh's monthly account statements would have reported a per share value for CHEV of \$7.40. There was no other reported trading volume that day and \$7.40 was the last best bid price for CHEV

prior to KAM's trading on December 31, 2009. Div. Trial Exhs. 275 (at Event Start Tm 9:25:54.400) and 305; Tr. at 139-140 (Marshall), 246-248 (Glascoe).

4. Allocation of the HCBC, CHEV and CARV Shares Acquired on December 31

111. At 4:57 p.m. Central time on December 31, 2009, KAM faxed to Huntleigh instructions to allocate all HCBC, CHEV and CARV shares purchased that day to the Tampsco Partnership II Account (Acct. No. [REDACTED]). Div. Trial Exh. 53 (allocation sheet) at SEC-HUNTLEIGH 3379; Div. Trial Exh. 48 (list of client names by account number); Tr. at 136-137 (Marshall).

112. The Tampsco Partnership II account, owned by Tampsco Enterprises Inc., was charged (i) an average price of \$17.3291 per share (or \$55,453.12), plus \$100 in commissions for the HCBC shares; (ii) an average price of \$7.8367 per share (or \$52,247.28), plus \$125 in commissions for the CHEV shares; and (iii) an average price of \$9.0475 per share (or \$1,809.50), plus \$35 in commissions for the CARV shares. Div. Trial Exh. 17 (trade confirmation slip).

5. Effect of the December 31 Trades

113. Huntleigh sent the Tampsco Partnership II Account (Huntleigh Acct. No. [REDACTED]) a monthly account statement for the period ended December 31, 2009. The statement valued the account's HCBC and CARV holdings at the closing price established by the above trades on December 31, 2009 (\$19.50 per share for HCBC and \$9.05 per share for CARV) and it valued the account's CHEV holdings at \$7.39 per share. Div. Trial Exh. 258, Binder 1 of 2, at SEC-HUNTLEIGH 41600 (12/31/2009 statement for Tampsco II Acct. No. [REDACTED]) (binder is in Huntleigh account number order).

114. Tampsco Partnership II had other holdings of CHEV and CARV that were custodiated at UMB Bank, N.A. (Acct. No. 104041) on December 31, 2009 and those shares – 400 shares of CHEV and 12,000 shares of CARV – were also valued at \$7.39 and \$9.05 per share, respectively. Div. Trial Exh. 258, Binder 2 of 2, at SEC-KOCH 4312 (non-Huntleigh statements are at back of binder).

115. KAM accounts (including client and Koch personal and family accounts) held a total of 138,762 shares of HCBC as of December 31, 2009 and Huntleigh's monthly account statements for the period ended December 31, 2009 valued those holdings at \$2,705,859. If KAM had not traded HCBC shares on the last trading day of the month – and Huntleigh's monthly account statements instead reflected a price of \$17.50 – the value of these HCBC holdings instead would have been \$2,419,020. KAM's December 31 trades in HCBC the month-end valuations that were reported to KAM's clients and family to be inflated by \$2.00 per share or an aggregate \$286,839. Div. Trial Exhs. 258 (monthly account statements for all KAM accounts holding HCBC on 9/30/2009, 10/30/2009, 11/30/2009, 12/31/2009) 305 (trade and volume summaries), 309 (summary of KAM account HCBC holdings as of 12/31/2009); Tr. at 245, 263-264 (Glascoe).

116. KAM accounts (including client and Koch personal and family accounts) held a total of 291,816 shares of CARV as of December 31, 2009 and Huntleigh's monthly account statements for the period ended December 31, 2009 reflected a total value of \$2,640,934.80 for those holdings. If KAM did not trade CARV shares on the last day of the month – and Huntleigh's monthly account statements instead reflected a price of \$7.40 – the CARV holdings would have had a reported value of \$2,159,438.40. KAM's trading in CARV on December 31, 2009 caused the month-end valuations that were reported to KAM's clients and Koch's family to

be inflated by \$1.65 per share or an aggregate \$481,496.40. Div. Trial Exhs. 260 (monthly account statements for all KAM accounts holding CARV on 12/31/2009) 305 (trade and volume summaries), 310 (summary of KAM account CARV holdings as of 12/31/2009); Tr. at 250, 264-265 (Glascoe).

117. KAM's trades in HCBC and CARV on December 31, 2009 led to a maximum potential increase in KAM's Base Fee for the fourth quarter of 2009 of \$693.81 and \$1,203.74, respectively, before taking into consideration KAM accounts that were not charged fees. Div. Trial. Exhs. 309 (reflecting KAM accounts that held HCBC on 12/31/2009), 310 (reflecting KAM accounts that held CARV on 12/31/2009), and 311 (calculating maximum increase assuming all KAM accounts, including Koch personal and family accounts, were charged a Base Fee that quarter).

118. Not all KAM accounts were charged a Base Fee for the fourth quarter of 2009. Tr. at 678-683 (Heidtbrink). After taking into consideration accounts that were not charged a Base Fee that quarter, the increase in Base Fees that quarter was \$525.50 (resulting from the HCBC trade) and \$833.23 (resulting from the CARV trade), or \$1,358.73. Div. Trial Exh. 305 and 311 (subtracting out accounts where no fee was charged and basing calculation on 105,100 shares of HCBC and 214,116 shares of CARV).

VII. KAM's Prior History In Trading HCBC, CHEV and CARV

119. Koch admitted that other than on the dates in issue – September 30, October 30, November 30 and December 31, 2009 – there are no other times in 2009 when KAM purchased shares of HCBC, CHEV or CARV on the last trading day of a month. Tr. at 909-910 (Koch).

120. Admitted into evidence in this case are Huntleigh trading records that reflect all trades executed by Huntleigh for KAM from June 1, 2008 through December 31, 2009. Trial

Exhs. 321 to 339 (each exhibit is a Lava trade report for each month from June 2008 through December 31, 2009). Those trading records demonstrate that, from June 1, 2008 through December 31, 2009:

a. KAM did not purchase shares of HCBC, CHEV or CARV on the last trading day of any month during that time period.

b. Other than on the four days at issue in this proceeding – September 30, October 30, November 30 and December 31, 2009 – KAM placed orders to purchase HCBC on only two days during that 18-month period, September 8 and September 29, 2009, and those trades were made mid-day, at or close to the bid. Div. Trial Exh. 336 at 9/8/2009, Rows 176-180 and 182, Columns F, H, K, L, O, S (Huntleigh LAVA Trade Blotter for 9/8/2009); Div. Trial Exh. 53 (allocation sheets) at SEC-HUNTLEIGH 3328 (showing 12,000 shares sold from KAM accounts and 10,000 shares purchased in KAM accounts); Div. Trial Exh. 48 (list of client names by account number).

121. John Schneider, the U.S. Lead Partner of KPMG's Investment Management Regulatory Practice, reviewed Huntleigh's trading records going back to at least 1998, and he found that KAM historically did not trade HCBC, CHEV or CARV on the last trading day of year, quarter or month:

- For the period January 7, 1998 through December 28, 2010, KAM traded HCBC on the last trading day of the month only six times, four of which are at issue in this case, and two of which occurred in 1998. Resp. Trial Exh. R-36 at 20; Tr. at 1226-1227 (Schneider).
- For the period January 7, 2004 through December 28, 2010, KAM traded CHEV on the last trading day of the month only once, on December 31, 2009. Resp. Trial Exh. R-36 at 17; Tr. at 1219-1220 (Schneider).
- For the period August 7, 2007 through December 20, 2010, KAM traded CARV on the last trading day of the month only once, on

December 31, 2009. Resp. Trial Exh. R-36 at 14; Tr. at 1214 (Schneider).

VIII. Christanell's Reaction To Being Confronted By Huntleigh's Compliance Director

122. On or about January 20, 2010, NYSE Arca Equities Inc. – a subsidiary of the self-regulatory organization NYSE ARCA, Inc. which regulates the activities of Equity Trading Permit holders such as Huntleigh – contacted Huntleigh's Compliance Director (Cathy Marshall) regarding the CHEV trades that Christanell had executed for KAM on December 31, 2009 and January 4 and 6, 2010. NYSE Arca asked Huntleigh to provide details about the trades, including, but not limited to: (i) the account names and numbers associated with the trades, (ii) the name of the trader who executed the trades, and (iii) Huntleigh's written procedures "concerning trading that attempts to manipulate the closing price of a security (or in other words 'mark the close')." Div. Trial Exh. 33 (1/20/2012 NYSE Arca Ltr. to Huntleigh).

123. Huntleigh's Compliance Director quickly determined that the trades at issue were KAM trades that had been executed by Christanell and, shortly after receiving the letter, she spoke to Christanell and provided him with a copy of the NYSE Arca letter. She observed that Christanell was upset when he read the letter and she did not press him for an explanation in that conversation. Tr. at 81, 186-189 (Marshall).

124. Even though the NYSE Arca inquiry related solely to trades in CHEV, within days of his first discussion with Huntleigh's Compliance Director, Christanell alerted the Compliance Director to a trade in HCBC that he had performed for Koch on December 31, 2009. He provided the Compliance Director with a copy of the December 28 email in which Koch gave Christanell the following instructions:

Dear Jeff,
Please put on your calendar to buy HCBC 30 minutes to an hour before the close of the market for the year. I would like to get a

closing price in the 20-25 range, but certainly above 20. Thanks.
DLK.

Div. Trial Exh. 187 (12/28/2009 email). Christanell admitted to the Compliance Director in subsequent discussions that Koch had asked him to get a particular closing price on a number of HCBC trades and that he had assisted Koch in doing so. Tr. at 524-526 (Christanell); Tr. at 81-85, 187-188, 191 (Marshall)

IX. Huntleigh's Investigation And Respondents' Response

125. By letter dated January 29, 2010, and without giving Koch any advanced notice, Huntleigh's Compliance Director asked Koch to explain why the purchase transactions that he directed in HCBC on September 30, October 30, November 30 and December 31, 2009 should not be considered "marking the close." Appended to the letter was a list of other month-end trades by Respondents since December 31, 2008 to December 31, 2009, including the HCBC trades identified in the letter, as well as the December 31, 2009 purchases of CHEV and CARV. Koch was asked to respond to Huntleigh no later than February 12, 2010. Div. Trial Exh. 22 (1/29/2010 letter); Tr. at 116-118 (Marshall).

126. Koch called Huntleigh's Compliance Director after receiving the letter and asked, among other things where the questions were coming from. He was patronizing to Huntleigh's Compliance Director. Tr. at 116-119 (Marshall).

127. Koch also spoke to Christanell and Christanell told him that NYSE Arca was questioning the CHEV trade. Koch made disparaging remarks about Huntleigh's Compliance Director and told Christanell the CHEV trades were for his grandchildren, which they were not. Tr. at 527, 531-532 (Christanell); Div. Trial Exhs. 48 (client list in account number order) and 53 at SEC-HUNTLEIGH 3379 (allocation sheet for 12/31/2009 showing all shares went to Tampsco Partnership II, Acct. No. [REDACTED]).

128. On or about February 1, 2010, Koch provided Huntleigh's Compliance Director (Cathy Marshall) with a draft response. The draft addressed only the HCBC trades that had been allocated to accounts owned/controlled by Alice Smith, i.e., the HCBC trades on September 30, October 30 and November 30. With respect to those trades, Koch stated that Alice Smith "always asks me about High Country Bank as she has been inside the bank and asks me to make sure that I use available cash to buy shares in the institution. She thinks it is well run and plans to leave the common stock of High Country Bank to her adopted daughter when she is gone." He claimed the stock was "purchased within the range of the bid and ask of the market" and that the purchase order was placed in the morning and the closing price was "above" the price at which he purchased the stock. The draft was silent concerning Koch's instructions to Huntleigh's trader (Christanell) regarding how to execute the trades. It did not provide a reason as to why Koch only sought to purchase the HCBC shares on the last trading day of each month or why he instructed the trader to get a closing price. Koch subsequently called Huntleigh's Compliance Director and asked if this is what she was looking for. Div. Trial Ex. 34 (undated draft letter); Tr. at 118-122 (Marshall).

129. Koch also sent Christanell a copy of his draft letter. Div. Trial Ex. 221 (2/1/2010 email with undated draft letter); Tr. at 528 (Christanell).

130. Koch formally responded to Huntleigh's January 29 letter on February 5, 2010 but, here too, his response was silent concerning Koch's instructions to Christanell regarding how to execute the trades.

- With respect to the September 30, October 30 and November 30 purchases of HCBC for accounts owned by Alice Smith, Koch told Huntleigh that Alice and Phil Smith "are long time neighbors with an adopted daughter in Fairplay, Colorado where High Country Bank is located. Her daughter works there part time. This fall Mrs. Smith asked me to use available cash at each month end to

buy HCBC stock into her two accounts so that she can eventually leave it to this daughter.”

- With respect to the December 31, 2009 purchase of HCBC stock for the Tamspco Partnership account, Koch told Huntleigh that “[a] few days before the end of 2009, I received a call from an unfamiliar broker who had some HCBC stock for sale” and “rather than setting up an account with [the unfamiliar broker], I instead placed an order through Huntleigh Securities on December 31, 2009, to buy shares in the open market, between the bid and ask.”

Koch also stated in his February 5, 2010 response that these purchases were simply “fulfilling” his clients’ requests “to put their cash to work so their accounts are more fully invested” and that when a security becomes available below its tangible book value it is a “clear ‘buy’” and he “eagerly obtain[s] all the stock he can for those clients who have ready cash.” Div. Trial Exh. 24 (2/5/2010 letter).

131. Alice Smith was 92 years old at the time of the September 30 and October 30, 2009 trades and she was 93 years old at the time of the November 30, 2009 trades. Div. Trial Exh. 286 (account opening document reflecting birth date in 1916). Alice is now deceased. She passed away in July 2010 and her husband, Phil, passed away sometime in the mid-2000s. Tr. at 802 (Koch).

132. Although Koch communicated verbally and in writing with Huntleigh’s Compliance Director on multiple occasions regarding her request for an explanation of the HCBC trades, at no point did Koch attempt to blame Christanell for the trades or assert, as he did at trial, that Christanell simply did not understand Koch’s instructions. Tr. at 902-903 (Koch); Tr. at 118-119 (Marshall); Div. Trial Exhs. 34 (undated draft letter) and 24 (2/5/2010 letter).

X. Christanell’s Termination As A Huntleigh Employee

133. Huntleigh terminated Christanell’s employment effective February 8, 2010. Div. Trial Exh. 3 (2/9/2010 letter); Tr. at 89 (Marshall).

134. Huntleigh filed Christanell's Uniform Termination Notice for Securities Industry Registration (Form U-5) on March 3, 2010. Huntleigh stated in the U-5 that, based on an internal investigation conducted by Huntleigh starting February 1, 2010 and ending February 8, 2010, Huntleigh concluded that Christanell had placed trades that violated Huntleigh's trading policies and procedures on marking the close and specifically that Christanell had "ASSIST[ED] A CLIENT IN 'MARKING THE CLOSE.'" Div. Trial Exhs. 4 (3/4/2010 letter with attached U-5) and 37 (Huntleigh Policies and Procedures) at SEC-TEXTEX 243 ("Marking-the-Close" section of the policy); Tr. at 87-91 (Marshall).

XI. KAM's Termination As A Huntleigh Client

135. Around the same time that Huntleigh terminated Christanell, it also asked KAM to move its accounts to another brokerage firm. KAM was asked to move all accounts under the SL03 rep number, meaning all client accounts and Koch personal and family accounts. Tr. at 124-125 (Marshall).

136. From the time of being asked to move, until KAM moved its accounts, Huntleigh placed restrictions on KAM's ability to trade through Huntleigh. Huntleigh's in-house counsel had to approve all orders before Huntleigh's trading desk could execute on any orders from KAM. Tr. at 126 (Marshall).

XII. Respondents' Efforts to Make Sure Christanell Was On The Same Page

137. Koch made several attempts – both before and after Christanell was terminated – to coordinate his story with Christanell, including by (i) repeatedly assuring Christanell that neither Koch nor Christanell did anything wrong; (ii) stating "[w]e both have a strong-interest in being on the same side of this issue and having the SEC wrap up any issue with you or me quickly"; (iii) offering Christanell to consider a business opportunity (a joint partnership) where

Koch would provide the capital and Christanell would trade and receive a portion of the profits; and (iv) suggesting, for reasons not explained, that Huntleigh is engaged in an unrelated cover-up involving bank stock owned by Huntleigh's owner. Div. Trial Exhs. 221 (2/1/2010 email attaching draft response to Marshall); 26 (2/5/2010 email), 27 (2/5/2010 email), 28 (5/4/2010 email); Tr. at 527-535.

XIII. Koch's Investment Adviser Representative Report

138. On May 10, 2011, fifteen days after this proceeding was commenced, Koch's investment adviser representative (IAR) report was updated by the Securities and Exchange Commission to reflect the allegations and charges against Koch. Div. Trial Exh. 253-3 (IAR Report) at 1, 6-8.

139. On October 14, 2011, Koch updated his IAR report to add the following narrative:

KOCH PURCHASED VALUED STOCKS THROUGH TRADER, WITHIN BID & ASK, AT BELOW BOOK VALUE PRICES, FOR LONG TERM INVESTMENT. STOCK ARE STILL OWNED, GENERATE GOOD DIVIDENDS FOR CLIENT. KOCH HAS NO CUSTOMER COMPLAINTS, HAD NO SCHEME TO INFLATE PRICE TO SELL FOR PERSONAL BENEFIT OF ADVISOR OR TRADER. THE ALLEGATION IS ENTIRELY BECAUSE THE SEC COMPUTER FLAGGED A TRANSACTION PATTERN IT DID NOT RECOGNIZE BECAUSE OF THE NEED FOR ADVANCED MARKET ECONOMICS WHEN PURCHASING THINLY TRADED STOCKS.

* * * * *

THE ISSUE OF BUYING GOOD STOCK, WITH GOOD DIVIDENDS, AT GOOD PRICE, IN A THINLY TRADED MARKET IS STILL PENDING. WITHOUT AN UNDERSTANDING OF ADVANCED MARKET ECONOMICS, THE SEC COMPUTERS PICKED UP A TRADE PATTERN IT DID NOT RECOGNIZE AND COULD NOT INTERPRET, THEREFORE IT FLAGGED THE TRANSACTIONS. THERE HAVE BEEN NO CUSTOMER COMPLAINTS, NO SALE OF THOSE SECURITIES FOR GAIN TO ADVISOR OR TRADER, NO FALSE INFLATION OF PRICE. ALSO, KOCH, TRADE,

BROKER'S COMPLIANCE OFFICER FOUND THE TRADES TO BE GOOD. THE STOCK CONTINUES TO BE A GOOD INVESTMENT FOR CLIENT ACCOUNT.

* * * * *

WITHOUT UNDERSTANDING MARKET ECONOMICS, THE SEC COMPUTER FLAGGED A PURCHASE OF A THINLY-TRADED STOCK THAT WAS BOUGHT FOR LONG-TERM INVESTMENT, CLEARLY WITHIN THE BID & ASK AND BELOW BOOK VALUE. THIS STOCK IS STILL OWNED, PAYS A GOOD DIVIDEND, AND WAS AN EXCELLENT PURCHASE FOR CLIENT. THE PRUCHASE DID NOT FALSELY INFLATE THE MARKET PRICE, AND NEITHER KOCH NOT TRADER BENEFITTED BY SELLING AFTERWARD.

* * * * *

IT'S TIME TO RETIRE WHEN SEC COMPUTERS DO NOT UNDERSTAND MARKET ECONOMICS IN THE NICHE OF THINLY TRADED STOCKS, AND THEREFORE FLAG GOOD TRADES – WHICH LEADS TO THE FILING OF A COMPLAINT AGAINST AN ADVISOR WITH 30 YEARS EXPERIENCE IN CREATING INVESTMENT WEALTH FOR SATISFIED CLIENTS. RETIREMENT LOOKS GREAT.

Div. Trial Exh. 253-4 (IAR Report) at 1, 8, 9-10 (all caps used in original). This update was made while the Koch and KAM Offers of Settlement were pending before the Commission. See Stay Order dated 9/13/2011; Dorsey & Whitney Ltr. To Court dated 11/15/2011.

140. The statements made by Koch in his IAR Report were not accurate and also are evidence that Koch does not accept responsibility for his actions. Koch never asked Marshall for her views on the trades at issue and she certainly never told him she thought they were “good.” Tr. at 146-148 (Marshall). Moreover, it was NYSE Arca that flagged the CHEV trades and Huntleigh that flagged the HCBC and CARV trades, after Christanell told Huntleigh's Compliance Director that Koch had instructed him to get a closing price for HCBC. Tr. at 148-149 (Marshall); Tr. at 524-526 (Christanell). Furthermore, Koch testified that he sold all CARV

shares from his clients' accounts in 2010. Tr. at 850-854 (Koch). He also admitted at trial that he did not know what happened to the HCBC shares purchased for the Alice Smith Revocable Living Trust Account (Acct. No. [REDACTED]) or the Philip H. Smith Family Trust Account (Acct. No. [REDACTED]) because those accounts were transferred to the Smith's grandson in 2010. Tr. at 802-804, 884-885 (Koch). He also did not know what happened to the HCBC, CHEV and CARV shares purchased for the Tampsco Partnership II Account (Acct. No. [REDACTED]) because the fiduciary for that account transferred the account after the Division commenced this proceeding in April 2011. Tr. at 807-808 (Koch). Koch also testified that he has not retired and, in fact, continues to manage investments (albeit his own and his family's) under the KAM name. Tr. at 922-923 (Koch). These statements by Koch were made without regard to accuracy.

XIV. KAM's Destruction Of Records

141. Paragraphs 54 to 60 above refer to Division Trial Exhibits 148, 149 and 150, all of which contain Koch's email instruction to Christanell on September 30, 2009 regarding how to execute the HCBC trade that day. Koch's instruction to Christanell, in pertinent part, was: "move last trade right before 3pm up to as near to \$25 as possible without appearing manipulative." Division Trial Exhibits 148, 149 and 150 were produced to the Division by Huntleigh.

142. Respondents did not produce from their files the emails that correspond to Division Trial Exhibits 148 and 149. Such emails were required to be maintained under the Investment Advisers Act of 1940 ("Advisers Act") and were responsive to the Division's requests for documents and its investigative subpoena. Div. Trial Exhs. 303 and 304 (request for documents and subpoena); Tr. at 290-293 (Glascoe).

143. Respondents produced from their files the email that corresponds to Division Trial Exhibit 150, but, the version that was produced contained only Christanell's end-of-day status report to Koch. Everything else, including the instruction to "move last trade right before 3pm up to as near to \$25 as possible without appearing manipulative," was physically redacted from the email. Compare Div. Trial Exh. 151 (produced by Respondents) with Div. Trial Exh. 150 (produced by Huntleigh). Furthermore, the version that was produced by Respondents came from the email account of Fay Heidtbrink, Koch's assistant, not from Koch's email account. Div. Trial Exh. 151 (heading reflects Heidtbrink email account).

144. Heidtbrink did not have access to the email account that Koch used to conduct KAM's business and, thus, she did not have access to email communication Koch had with Huntleigh unless she was cc'd on the email or Koch gave her his password. She did not review Koch's emails in compiling KAM's response to the Division's request for documents or investigative subpoena; Koch reviewed his own emails in response to those requests. Tr. at 717-719 (Heidtbrink).

145. The inference that should be drawn from Paragraphs 141 to 144 is that (i) Respondents recognized the incriminating nature of the emails reflected in Division Trial Exhibits 148, 149 and 150 and deleted the corresponding emails from Koch's personal email account and (ii) Respondents recognized that Heidtbrink was cc'd on the emails reflected in Division Trial Exhibits 148 and 150 and caused her copy of the email that corresponded to Division Trial Exhibit 148 to be deleted and then made redactions to her copy of the email that corresponded to Division Trial Exhibit 150, leaving only the trade execution data that she entered into KAM's books.

ARGUMENT

I. Respondents Marked The Close Of HCBC, CHEV and CARV And Thereby Willfully Violated Exchange Act § 10(b) and Advisers Act § 206(1)

Respondents violated Section 10(b) of the Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder, and Section 206(1) of the Investment Advisers Act of 1940 (“Advisers Act”) by manipulating the closing price of three thinly-traded bank stocks on the last trading day of the months of September, October, November and December 2009.

A. Marking-The-Close Is A Form Of Market Manipulation

Market manipulation is “[i]ntentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the prices of securities.” Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976). The trading practice known as “marking-the-close” is a well recognized form of manipulation. Marking-the-close “is the practice of attempting to influence the closing price of a stock by executing purchase or sale orders at or near the close of the market.” In the Matter of Thomas C. Kocherhans, Exchange Act Rel. No. 34-36556, 160 SEC Docket 2589, 1995 WL 723989, at *2 (Dec. 6, 1995). Marking the close conveys false information as to a stock’s real price level and the demand for it free of manipulative influences.

Id.

Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) makes it unlawful for any person, directly or indirectly:

(b) To use or employ, in connection with the purchase or sale of any security...any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.”

15 U.S.C. § 78j(b); see also 15 C.F.R. 240-10b-5(a), (c). Like Exchange Act Section 10(b), Section 206(1) of the Advisers Act prohibits an investment adviser from employing “any device, scheme, or artifice to defraud any client or prospective client.” 15 U.S.C. § 80b-6(1).⁴

A respondent that engages in marking-the-close activity violates Exchange Act Section 10(b) and Advisers Act Section 206(1) when he acts with scienter,⁵ which has been defined as “a mental state embracing an intent to deceive, manipulate or defraud” Ernst & Ernst v. Hochfelder, 425 U.S. at 193-94, n.12 (1976), and can be established through a showing of recklessness. Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990) (en banc), cert. denied, 499 U.S. 976 (1991); Michaels v. Michaels, 767 F.2d 1185, 1199 (7th Cir. 1985), cert. denied, 106 S. Ct. 797 (1986); SEC v. Blavin, 760 F.2d 706, 711 (6th Cir. 1985); In the Matter of John P. Flannery, and James D. Hopkins, Release No. 438, 2011 WL 5130058, at *36 (Oct. 28, 2011) (“Scienter may be established by indirect evidence and may extend to a form of extreme recklessness.”); In the Matter of David W. Baldt, Release No. 418, 2011 WL 1506757, at *19 (Apr. 21, 2011 (same)). Put differently, in the marking-the-close context, an otherwise legitimate activity such as placing a trade can violate Exchange Act Section 10(b) or Advisers Act Section 206(1) if placed for the purpose of affecting a stock’s closing print. See, e.g., In the Matter of

⁴ Koch may be held directly liable under Section 206 of the Advisers Act because he satisfies the broad definition of “investment adviser.” Section 202(a)(11) of the Advisers Act defines an investment adviser, in part, as “any person who, for compensation, engages in the business of advising others ... as to the value of securities or as to the advisability of investing in, purchasing, or selling securities....” 15 U.S.C. § 80b-2(11). Moreover, Koch is the President, Chief Compliance Officer and sole owner of KAM and he controls all aspects of KAM’s operations. In the Matter of John J. Kenny and Nicholson/Kenny Capital Management, Inc., Advisers Act Release No. 2128 (May 14, 2003) (associated person who was the adviser's chairman and chief executive and, with his wife, owner of the adviser's holding company, held primarily liable).

⁵ Violations of Exchange Act Section 10(b) require a showing of scienter. Aaron v. SEC, 446 U.S. 680 (1980). Violations of IAA Section 206(1) also require proof of scienter. Steadman v. SEC, 603 F.2d 1126, 1134 (5th Cir.1979), aff'd on other grounds, 450 U.S. 91, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981).

Adrian C. Havill, Exchange Act Rel. No. 34-40726, 68 SEC Docket 1934, 1998 WL 823070, at *4-5 (Nov. 30, 1998); In the Matter of Sharon M. Graham, Stephen C. Voss, and James J. Pasztor, Release No. 82, 1995 WL 769011, at *7-13 (Dec. 28, 1995); see also, e.g., SEC v. Kwak, 2008 WL 410427 (D. Conn. Feb. 12, 2008); SEC v. Lauer, 2008 WL 4372896, *17, 19 (S.D. FL 2008), SEC v. Masri, 523 F. Supp.2d 361, 372 (S.D.N.Y. 2007). Scienter may be established through circumstantial evidence and inferences drawn from the surrounding circumstances. Kocherhans, 1995 WL 723989, at *2 (Dec. 6, 1995).

B. For Four Consecutive Months, Respondents Gave The Huntleigh Trader Instructions On How To Execute Trades To Get A Closing Price

On the last trading day of four consecutive months – September, October, November and December 2009 – Koch engaged in marking-the-close transactions in four thinly traded bank stocks that were held by numerous clients of his investment advisory firm, KAM, and that he and his family members held in their personal accounts as well. Although the trades were executed by a trader at Huntleigh Securities, it was Koch who placed the orders and who gave the trader specific instructions as to how those orders should be executed; the focus of Koch’s instructions was always on getting a particular closing price and the trader merely followed Koch’s instructions.

Specifically, the record shows that:

- On September 30, 2009, while an order for HCBC was pending, Koch instructed the trader to purchase an unspecified number of HCBC shares “right before 3 p.m.” (i.e. right before the market close) at a price “as near to \$25 [per share] as possible without manipulative.” The order was given verbally and followed-up in writing and the trader immediately replaced the order that was in the Huntleigh system with a limit order to purchase shares up to \$25. That price greatly exceeded the then-current ask. In the last 30 minutes of the day, the trader replaced the \$25 limit order with a limit order for \$24.50 and routed the order to the street, paying as much as \$23.99 for some shares. The trades represented 100% of

the reported trade volume that that day and established the day's closing price of \$23.50. SOF ¶¶ 47, 52-64.

- Koch gave similar instructions to the trader regarding obtaining a closing price above \$20 for HCBC on October 30, 2009. The trader entered a \$24 limit order into Huntleigh's system in the morning and replaced it with a market order in the last 15 minutes of trading, paying as much as \$19.75 for some shares. The trades represented 42.9% of the trade volume that day and established the day's closing price of \$19.75. SOF ¶¶ 47, 68-74.
- Koch gave similar instructions to the trader regarding obtaining a closing price above \$20 for HCBC on November 30, 2009. The trader entered a \$20 limit order into Huntleigh's system in the morning but did not route anything to the street until the last 10 minutes of the day, when he replaced it with a limit order for \$21, then routed it, paying up to \$17 per share. The trades represented 100% of the reported trade volume that day and established the day's closing price of \$17.49. SOF ¶¶ 47, 77-85.
- Beginning December 23, Koch gave the trader a series of specific instructions to obtain a December 31 closing price for HCBC above \$20 per share or in the \$20 to \$25 per share range. Indeed, this time, Koch put the instructions in writing and a subsequent conversation that he had with the trader (wherein he reiterated the instruction) was captured in an audio recording of the trader's office phone. The trader entered a \$25 limit order into Huntleigh's system in the morning and routed the order to the street in the last 5 minutes of the trading day, paying up to \$19.50 per share. The trades represented 100% of the reported trade volume that day and established the day's closing price of \$19.50. SOF ¶¶ 47, 88-96, 111-112.
 - a. On December 31, 2009, Koch instructed the trader to get a closing price for CARV between \$8 and \$8.25 per share. The order and instruction was captured in an audio recording of the trader's office phone and reflected a price well above the then-current ask. Koch gave the trader this order in the early afternoon and, shortly thereafter, the trader entered a limit order into the system for \$8.25 per share. He routed the order to the street in the last 20 minutes of the trading day, paying up to \$7.99 per share before the markets closed and up to \$8.19 per share seconds after the markets closed. The trades represented 70.7% of the reported trade volume that day, but, someone else set the closing price that day, and it was much lower than what KAM paid. SOF ¶¶ 47, 98-102, 111-112.

- b. On December 31, 2009, Koch also instructed the trader to “pop” the price of CARV up to \$9.05 if he needed to at the end of the day. The order and instruction was captured in an audio recording of the trader’s office phone. The trader entered a limit order into the system for \$9.05 per share shortly after Koch placed the order. The trader routed the order to the street in the last 2 minutes of the trading day, paying up to \$9.05 per share. The trades represented 100% of the reported trade volume that day and established the closing price of \$9.05. SOF ¶¶ 47, 98-102, 111-112.

Respondents’ efforts to mark the close of HCBC on September 30, October 30 and November 30, 2009 succeeded, as did their efforts to mark the close of HCBC and CARV on December 31, 2009. SOF ¶¶ 58, 70, 79, 96, 109. Respondents’ efforts to establish the closing price of CHEV on December 31, 2009 did not succeed, but it was not for lack of trying, as evidenced by the fact that the trader purchased shares of CHEV seconds before the close at \$7.99, and seconds after the close at prices ranging from \$8 to \$8.19. SOF ¶¶ 99-100.

C. Respondents Acted With Scienter

Numerous KAM clients – and Koch and his family members – held shares of HCBC, CHEV and CARV in their accounts. SOF ¶¶ 11, 66, 76, 87, 115-116. When Koch instructed the trader to get a closing price that represented an increase over the then-current bid and ask prices for these securities, Koch did so with the intention of bolstering the account values that were reported to KAM’s clients each month in monthly account statements.

The record shows that 2008 and the first half of 2009 were a difficult time for financial company stocks including the stocks that KAM traded in. SOF ¶¶ 36-37. Though Koch claimed during the trial that KAM was only a buyer (not seller) of stocks, the record shows that, in August 2009, KAM was a net seller -- TONE and STSA were not performing well and KAM sold its clients out of their positions in those stocks. SOF ¶ 38; Tr. at 844 (Koch) (“I’ve never sold – I’m a buyer.”) Certain KAM clients – whose identity is not known but who Koch described as “the newer and younger clients, especially the women” – were concerned about the

performance of their accounts and were calling Koch and discussing with him things that they were seeing online. SOF ¶ 36. Koch revealed in an email to Huntleigh's Compliance Director that some of his clients had become sensitive to market moves and were "watch[ing] the paint dry" and the "grass grow." SOF ¶¶ 35-36. Of course, had these clients expressed a tendency to watch the paint dry or the grass grow at the outset – terms Koch uses to refer to persons with a "short term view" – he would not have accepted them as clients because he only wanted clients that shared his long-term view of investing. SOF ¶ 10. By August 2009, however, existing clients that once shared Koch's long-term view were becoming concerned and looking at performance in the more near-term. SOF ¶¶ 35-36. Koch tried to find out from Huntleigh which clients were reviewing their online accounts, and how frequently, in an effort to identify clients that might be developing a short-term view so that he could anticipate their concerns and presumably contact them and refocus them on the long-term. SOF ¶¶ 31-40. Huntleigh was not able to provide Koch with the information he sought. SOF ¶ 34.

One month later, Koch started to give Huntleigh's trader – who was new to the relationship as of mid-September 2009 – instructions on how to execute trades in order to obtain a specific closing price. SOF ¶ 47. First, however, Koch asked the trader how Huntleigh prices stock at the end of the month – i.e. how it reports prices in the monthly account statements that are mailed to KAM's customers. SOF ¶ 54. As reflected in an email from Huntleigh's trader to the person that handled Huntleigh's pricing systems, Koch specifically asked if stocks are priced at the bid or at the price of the last trade. SOF ¶ 54. The trader told Koch that, if there is no trading volume on the last day of the month, the stock is priced at the bid, but if there is trading volume, the price of the last trade is what gets reported. SOF ¶ 54. Immediately upon learning this information Koch gave the trader his first instruction to get a closing price on HCBC on

September 30. Considering what was happening in the marketplace in 2009 -- and the timing of Koch's attempts to learn which of his clients were focusing on short-term results and the timing of his inquiries about Huntleigh's pricing practices -- it is reasonable to infer that Koch hatched this idea to mark-the-close of certain stocks held by many of his clients in order to improve the short-term results that were reported to clients in Huntleigh's monthly account statements and online. He did it to distract his clients from short-term performance, which he did not feel was relevant anyway, since he was investing his clients' money for the long-term.

Koch not only had the motivation to improve what was reported to his clients in the short-term, but also, the record shows that he had intended to manipulate the prices that were reported to his clients:

- Huntleigh's trader testified that Koch's focus at the end of each month was always on getting a closing price, not just on acquiring as many shares as possible below his tangible book value calculation. SOF ¶¶ 47, 52, 55, 59, 68, 77, 89-90, 98, 103-104.
- For two of the trading days -- the September 30 and December 31 -- there is documentary evidence in addition to testimony from the Huntleigh trader, that supports a finding that Koch was principally focused on getting a closing price.
- For the September 30 HCBC trade, Koch specifically instructed to move the "last trade" up to 3 p.m., which is when the markets close in the Central time zone. SOF ¶¶ 55-56, 59.
- For the December 31 HCBC trade, Koch explicitly stated in an email that "I would like to get a closing price" and, in a follow-up phone conversation he not only was adamant that "I need to get it above 20, you know 20 to 25 I'm happy" but also that, whatever the trader does it should "just create prints." SOF ¶¶ 89-90.
- There were no audio recordings or emails for the October or November HCBC trades, but, the trader said that the conversations on those days were similar in content and tone to what was heard on the December 31 audio recording for HCBC. SOF ¶ 90.
- For the December 31 CHEV trade, after learning that the spread on CHEV was \$7.20 to \$7.48, he told the trader, "let's see if by the

end of the day you move it above 8 ... 8, 8 and a quarter,” again focusing on getting a closing and moving the price up. SOF ¶ 98.

- For the December 31, CARV trader, after learning that there had been no trades that day – meaning that Huntleigh’s monthly account statements would price CARV at the bid – Koch instructed the trader to “pop that one ... to \$9.05 ... if you have to” and to do so “at the end of the day.” The trader told Koch that 2,000 shares of CARV were available at \$9.05, but, Koch did not authorize the trader to purchase all the shares even though \$9.05 was below Koch’s tangible book value calculation for CARV. Instead Koch just wanted to make sure that the trader got “a print.” SOF ¶ 104-105.

The foregoing evidence clearly demonstrates Koch’s intent to affect the closing price of HCBC on September 30, October 30 and November 30, 2009 and to affect the closing price of HCBC, CHEV and CARV on December 31, 2009.

Respondents’ scienter is further evidenced by the fact that, on certain days when the trader was unable to get a closing price in the range Koch wanted, the trader openly apologized to Koch. For example, with respect to the December 31 HCBC trade, an audio recording of the trader’s office phone captured the trader saying to Koch “I know you wanted it higher and I tried.” SOF ¶ 94; see also SOF ¶ 80-81, 94-95, 101-102. If, indeed, Koch’s instructions were not focused on getting a particular closing price, that presented an opportunity for Koch to correct the trader’s understanding, but he did not. Moreover, on at least one day when the trader obtained the closing price Koch wanted, the trader reported to Koch only the closing price, not the volume of shares acquired, and Koch responded favorably. SOF ¶ 109.

In addition, the court should infer that Respondents knew Koch’s instructions to the trader were improper because (i) Koch stopped giving the trader instructions to obtain a closing price on the last trading day of the month as soon as he learned that NYSE Arca and Huntleigh were investigating his trades (SOF ¶¶ 50-51, 125-127); (ii) Koch reached out to the trader on multiple occasions in order to let the trader know his side of the story and an effort to convince

the trader to adopt the same story; and (iii) Respondents destroyed all evidence of Koch's September 30 instruction to move the "last trade" in HCBC to "right before 3 p.m." (i.e. right before the market close) at a price "as near to \$25 [per share] as possible without manipulative" (SOF ¶¶ 141-145).

**D. Respondents' Trades Materially Affected
The Prices And Performance Metrics Reported To KAM's Clients**

As a result of Respondent's instructions to the Huntleigh trader, and the trader's success in implementing those instructions, the monthly account statements that were sent to KAM's clients reflected values for client holdings that been materially inflated.

Huntleigh's monthly account statements would have valued client positions in HCBC, CHEV and CARV at the bid if there were no trades in those stocks on the last day of the month, or, at the price of the last trade if there were trades. SOF ¶¶ 21, 54-55, 59. If Respondents had not engaged in improper marking-the-close transactions on the last trading day of September, October, November and December 2009, the values reported to KAM's clients would have been materially lower:

- Respondents' HCBC trades on September 30, 2009 represented 100% of the reporting trading volume that day and established a closing price for HCBC of \$23.50. HCBC shares have never again traded that high of a price. Moreover, if Respondents had not purchased any shares of HCBC that day – i.e. if they had not undertaken activity to affect HCBC's closing price – the monthly account statements instead would have reported a price of \$11.70 for clients' HCBC shares, which was the last best bid before Respondents started trading that day. Not only were clients' HCBC holdings inflated by \$11.80 per share but, because many KAM accounts held HCBC on September 30, KAM accounts in the aggregate were inflated by \$1,568,951.60. SOF ¶¶ 58, 61-66.
- Respondents' HCBC trades on October 30, 2009 represented 42.9% of the reported trading volume that day and established a closing price for HCBC of \$19.75 per share. HCBC have rarely traded above \$19.75 since October 30. If Respondents had not purchased any shares of HCBC that day – i.e. if they had not

undertaking activity to affect HCBC's closing price – HCBC shares would have been priced at \$14 per share, which is the price of the last non-KAM that day. Respondents' marking-the-close activity not only caused HCBC's shares to be inflated by \$5.75 per share but also, because many KAM accounts held HCBC shares on October 30, KAM accounts in the aggregate were inflated by \$767,981.50. SOF ¶¶ 70, 72-76.

- Respondents' HCBC trades on November 30, 2009 represented 100% of the reported trading volume that day and established a closing price of \$17.49 per share. HCBC traded as high as \$17.49 on only 4 days between November 30, 2009 and December 31, 2009. If Respondents had not purchased any shares of HCBC that day – i.e. if they had not undertaking activity to affect HCBC's closing price – HCBC shares would have been priced at \$14 per share, which is the price of the last best bid before Respondents started trading that day. Respondents' marking-the-close activity not only caused HCBC's shares to be inflated by \$3.49 per share but also, because many KAM accounts held HCBC shares on November 30, KAM accounts in the aggregate were inflated by \$473,111.38. SOF ¶¶ 79, 83-87.
- Respondent's HCBC trades on December 31, 2009 represented 88.9% of the reported trading volume that day and established a closing price of \$19.50 per share. As mentioned, since that date, HCBC shares have rarely traded above \$19.50 per share. If Respondents had not purchased any shares of HCBC that day – i.e. if they had not undertaking activity to affect HCBC's closing price – HCBC shares would have been priced at \$17.50 per share, which is the price of the last non-KAM trade that day. Respondents' marking-the-close activity not only caused HCBC's shares to be inflated by \$2.00 per share but also, because many KAM accounts held HCBC shares on December 31, KAM accounts in the aggregate were inflated by \$286,839. SOF ¶¶ 96-97, 113-115.
- Respondent did not succeed in setting the closing price for CHEV on December 31, 2009. SOF ¶¶ 100.
- Respondent's CARV trades on December 31, 2009 represented 100% of the reported trading volume that day and established a closing price of \$9.05 per share. Koch ultimately sold his clients' positions in CARV due to poor performance. If Respondents had not purchased any shares of CARV that day – i.e. if they had not undertaking activity to affect CARV's closing price – CARV shares would have been priced at \$7.40 per share, which is the last best bid for CHEV prior to KAM's trading that day. Respondents' marking-the-close activity not only caused CARV's shares to be

inflated by \$1.65 per share but also, because many KAM accounts held CARV shares on December 31, KAM accounts in the aggregate were inflated by \$481,496.40. SOF ¶¶ 109-110 113-114, 116.

Respondents' improper marking-the-close activity, thus, had a material impact on the prices that were reported to KAM clients in their monthly account statements. Moreover, their activities had a material impact on prices that were reported to the public. On days when there are no trades in a stock the markets report no information. Accordingly, for HCBC on September 30 and December 30, 2009, no price or volume would have been publicly reported; whereas, instead, the marketplace received price and volume data derived from Respondents' improper trades. Also, on days where Respondents were not 100% of the volume, the publicly reported price and volume data would have reflected only non-KAM trades, and prices would have been reported at lower levels.

II. Respondents Marked The Close Of HCBC, CHEV And CARV And Thereby Willfully Violated Advisers Act § 206(2)

Respondents also violated Section 206(2) of the Advisers Act by manipulating the closing price of three thinly-traded bank stocks on the last trading day of the months of September, October, November and December 2009 and also by failing to seek best execution on those trades.

Section 206(2) of the Advisers Act makes it unlawful for any investment adviser, directly or indirectly:

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

15 U.S.C. § 80b-6(2). Scierter is not required to establish a violation of Section 206(2) of the Advisers Act; negligence is sufficient and the Division only needs to show that Respondents failed to disclose or omitted material facts in their dealings with clients. SEC v. Capital Gains

Research Bureau, Inc., 375 U.S. 180, 195; Steadman v. SEC, 603 F.2d 1126, 1133 (5th Cir.1979), aff'd on other grounds, 450 U.S. 91 (1981).

For the reasons articulated in Part I, supra, the Court should find Respondents KAM and Koch violated Section 206(2) of the Advisers Act. Contrary to the duty of their position, Respondents knowingly, recklessly or negligently mislead KAM clients about their month-end account performance.

III. Respondents Failed to Seek to Obtain Best Execution And Thereby Willfully Violated Exchange Act § 10(b) And Advisers Act §§ 206(1) and (2)

“[A]n investment adviser’s fiduciary duty includes the requirement to seek the best execution of client securities transactions where the adviser is in a position to direct brokerage transactions. In the Matter of Fleet Investment Advisors, Inc., Advisers Act Rel. No. 1821, 70 SEC Docket 1217, 1999 WL 695211, at *7 (Sept. 9, 1999) (investment adviser’s failure to “seek” to obtain best execution violates Sections 206(1) and 206(2) of the Advisers Act); see also In the Matter of Sage Advisory Services LLC, Advisers Act Re. No. 1954, 75 S.E.C. Docket 1073, 2001 WL 849405 at *7 (July 27, 2001) (investment adviser’s failure to “seek” to obtain best execution violates Section 10(b) of the Exchange Act). The duty requires that a market intermediary “seek” to obtain for its customer’s order “the most favorable terms reasonably availability under the circumstances.” Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 135 F.3d 266, 270 (3d Cir. 1998).

KAM and Koch, as investment advisers, violated Section 10(b) of the Exchange Act and Sections 206(1) and 206(2) of the Advisers Act when they placed trades with the intention of marking the close. It is axiomatic that purchasing securities with the intent of obtaining a particular closing price is a failure to seek best execution. The best terms reasonably available constitute the lowest price for which the stock reasonably could be purchased under the

circumstances. Here, KAM and Koch placed orders with full knowledge of the best price reasonably available, but nonetheless instructed Christanell to purchase at prices well above the then-available offer price. SOF ¶¶ 53-55, 98. Other times, despite the fact that KAM and Koch had no knowledge of the best reasonably available price, KAM and Koch still placed orders seeking purchases above a particular price. SOF ¶¶ 88-89. These trades demonstrate that KAM and Koch placed trades with no regard to the best available price for the securities being purchased. Such trading violates an investment adviser's fiduciary duty to seek best execution on behalf of its clients.

Based on the foregoing, the Court should find that Respondents' failure to seek best execution of the trades at issue violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Section 206(1) of the Advisers Act.

**IV. KAM Violated Advisers Act § 204 and Rule 204-2
And Koch Willfully Aided And Abetted The Violation**

Section 204(a) of the Advisers Act requires registered investment advisers to keep such records as the Commission, by rule, prescribes as necessary. 15 U.S.C. § 80b-204(a). Advisers Act Rule 204-2(a)(7)(iii) requires registered investment advisers to keep "originals of all written communications received and copies of all written communications sent" by an investment adviser relating to "the placing or execution of any order to purchase or sell any security." 17 C.F.R. § 275.204-2(a)(7)(iii).

Koch's email to Huntleigh's trader on September 30, 2009, instructing him "move last trade right before 3 p.m. up to as near to \$25 as possible without appearing manipulative" is a written communication sent by Koch relating to the placing or any execution of an order to purchase HCBC. The email was produced to the Division by Huntleigh and is in evidence in this proceeding as Division Trial Exhibit 148. Respondents, however, did not maintain the

email even though (i) it was required to be maintained pursuant to Rule 204-2(a)(7)(iii) of the Advisers Act and (ii) according to Respondents' own description of their record-keeping practices, the email should have been downloaded and maintained both on Koch's computer and his assistant Heidtbrink's computer. SOF ¶¶ 55, 141-145. Furthermore, though the communication reflected in Division Trial Exhibit 148 was subsumed in another email reflecting the trader's end-of-the-day report to Koch on September 30, Respondents did not maintain the other email in its original form and deleted the instruction. SOF ¶¶ 143, 145. Respondent KAM thus failed to maintain books and records required by Section 204(a) of the Advisers Act and Rule 204-2(a)(7) thereunder and Respondent Koch willfully aided and abetted the violation.

V. KAM Violated Advisers Act § 206(4) And Rule 206(4)-7 And Koch Willfully Aided And Abetted The Violation

Section 206(4) of the Advisers Act makes it unlawful for any investment adviser, directly or indirectly, to “engage in any act, practice or course of business which is fraudulent, deceptive or manipulative. 15 U.S.C. § 80b-206(4). Advisers Act Rule 206(4)-7(a) makes it unlawful for a registered investment adviser to provide investment advice if they do not “[a]dopt and implement written policies and procedures reasonably designed to prevent violation, by [the adviser], of the Act and the rules the Commission has adopted under the Act.” 17 C.F.R. § 275.206(4)-7(a).

KAM had a Written Policies and Procedures Manual (“Manual”) in place in 2009 when Respondents were engaging in improper marking-the-close activity. Section III.A. of the Manual (entitled “Prohibited Transactions”) included a number of prohibitions against manipulative trades. With respect to trades that “mark the close,” the section stated in pertinent part that:

B. No Access Persons shall, in connection with the purchase or sale, directly or indirectly, by such person of a Security Held or to be Acquired by a Client:

(6) Engage in any transactions intended to raise, lower or maintain the price of any Security or create a false appearance of active trading.

SOF ¶ 12. Though KAM had a policy and procedure against marking-the-close transactions, Respondents nonetheless failed to implement the policy and procedure, as evidenced by the fact that they marked the closing price of HCBC on September 30, October 30 and November 30, 2009 and the closing price of HCBC, CHEV and CARV on December 31, 2009. Accordingly the Court should find that KAM violated Rule 206(4)-7(a) by failing to implement procedures reasonably designed to prevent marking-the-close transactions and Koch willfully aided and abetted those violations.

V. Respondents' Misconduct Requires Imposition Of A Cease-And Desist Order And Censure, An Order of Disgorgement and Pre-Judgment Interest, Imposition Of A Civil Penalty And Permanent A Bar From Association With Any Investment Adviser and Collateral Industry Bars

KAM is registered with the Commission as an investment adviser and Koch is the President, Chief Compliance Officer and sole owner of KAM. As set forth above, during the relevant period, KAM and Koch willfully violated the Exchange Act and the Advisers Act. There is a risk that they will continue to violate these rules in the future. As a result, the Division seeks an order (i) requiring KAM and Koch to cease and desist from violating Exchange Act Section 10(b) and Rule 10b-5 thereunder and Sections 204, 206(1), 206(2), and 206(4) of the Advisers Act and Rules 204-2(a)(7) and 206(4)-7 thereunder, (ii) censuring KAM, (iii) requiring KAM and Koch, jointly and severally, to disgorge, with prejudgment interest, the amount by which KAM's advisory fees increased due to the improper trading activity, (iv) requiring that KAM and Koch, jointly and severally, pay a third-tier civil penalty; and (v) permanently barring

Koch from (a) association with any investment adviser, broker, dealer, municipal securities dealer, or transfer agent and (b) from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter.⁶

A. KAM And Koch Should Be Subject To A Cease-And-Desist Order

The Court should enter a cease-and-desist order against KAM and Koch. Section 203(k) of the Advisers Act authorizes the Commission to impose a cease-and-desist order against any person who “is violating, has violated, or is about to violate any provision of” the Advisers Act or any rule or regulation thereunder. 15 U.S.C. § 80b-3(i). Although the imposition of a cease-and-desist order requires “some” showing of a future risk of violations, “it need not be very great.” In the Matter of KPMG Peat Marwick LLP, 74 SEC Docket 357, 2001 WL 47245, at *24 (Jan. 19, 2001). Indeed, “[a]bsent evidence to the contrary, a finding of a violation raises a sufficient risk of future violation. To put it another way, evidence showing that a Respondent violated the law once probably shows a risk of repetition that merits our ordering him to cease and desist.” Id.

Here, Respondents engaged in repetitive conduct in providing KAM clients with falsely-inflated valuations for certain stockholdings, they have failed to acknowledge their wrongdoing,

⁶ Section 203(e) of the Advisers Act authorizes the Commission to impose sanctions against any investment adviser who has willfully violated any provision of the Securities Act, Exchange Act, Advisers Act or Investment Company Act, or any rule thereunder. Similarly, Section 9(b) of the Investment Company Act and Section 203(f) of the Advisers Act authorize the Commission to impose sanctions against any person associated with an investment adviser who has willfully violated any provision of the above four Acts or any rule thereunder.

destroyed evidence, and remain in the business as investment advisers.⁷ This presents sufficient risk of future violations to warrant imposition of a cease-and-desist order.

B. KAM Should Be Censured

The Court should censure KAM. Section 203(e) of the Advisers Act authorizes the Commission to censure any investment adviser if it is in the public interest and the investment adviser or any person associated with the investment adviser willfully violated any provision of the Advisers Act. 15 U.S.C. §§ 80b-3(e) and 80b-3(e)(5). A censure is nothing more than a formal reprimand for specific conduct. See Black's Law Dictionary, 216 (7th ed. 1999). Here KAM's inability to police the activities of its President, Chief Compliance Officer and sole owner reveals the absence of an internal system for ensuring that the regulatory obligations of the firm are met. An effective internal system protects investors. A censure is therefore appropriate and in the public interest.

C. Respondents Should Be Ordered To Disgorge Advisory Fees

The Court should order Respondents to disgorge the \$4,288.08 incremental increase in advisory fees that KAM received as a result of Respondents' improper marking-the-close activity. Section 203(j) of the Advisers Act authorizes the disgorgement, including reasonable

⁷ Koch testified, during the trial, that KAM no longer has any paying clients. Tr. at 808-810, 922 (Koch). He "invited" his clients to leave at some point after this proceeding was filed and his clients moved in the October to December 2011 timeframe. Tr. at 809-810. That is the same approximate timeframe in which the Koch and KAM Offers of Settlement were pending. See Order Staying Proceeding dated 9/13/2011; Order Setting Hearing Dates dated 11/23/2011. The fact that Respondents, in effect, voluntarily restructured their business while this proceeding was pending and trial was approaching should not affect the decision to enter a cease-and-desist order because, having voluntarily exited the business, Respondents can still voluntarily get back into the business. It should also be noted that, though Koch claimed at trial to have no clients, he also claimed that he is still managing the personal account for John McFarland, which is somewhat contradictory to the assertion that he has not clients, and he continues to manage his and his family's funds. Tr. at 808, 922-923.

prejudgment interest,⁸ in a cease-and-desist proceeding and in a proceeding in which a civil money penalty may be imposed. 15 U.S.C. § 80b-3(j). Disgorgement is an equitable remedy “designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the securities laws.” SEC v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989). “[T]he amount of disgorgement should include all gains flowing from the illegal activities.” David Henry Disraeli, Exchange Act Rel. No. 57027 (Dec. 21, 2007), 92 SEC Docket 852, 879, aff’d, 2009 WL 1791547 (D.C. Cir. 2009) (slip copy). Disgorgement “need only be a reasonable approximation of profits casually connected to the violation.” First City, 890 F.2d at 1231.⁹

KAM charged a Base Fee each quarter of .25% based on the quarter-end values of each account. SOF ¶ 11. The Division has shown, through documentary evidence, that Respondents’ improper marking-the-close activities on September 30, 2009 inflated the value client holdings of HCBC, which, in turn, incrementally increased the Base Fee that KAM charged clients for the

⁸ The Division requests pre-judgment interest on any order of disgorgement. Prejudgment interest is routinely added to disgorgement to ensure that a defendant does not profit from his unlawful securities transactions by retaining the time value benefit of his ill-gotten gains from the time of the fraud to the date of the judgments in the Division’s action. SEC v. First Jersey Securities, Inc., 101 F.3d 1450, 1476-77 (2d Cir. 1996); SEC v. Moran, 944 F. Supp. 286, 295 (S.D.N.Y. 1996) (pre-judgment interest prevents a defendant from obtaining the benefit of his illegal activity); SEC v. O’Hagan, 901 F. Supp. 1461, 1473 (D. Minn. 1995) (same). If Respondents are permitted to benefit from the time value of the unlawful gains they made from the unlawful trades, they will essentially have received an interest-free loan and a substantial reward for delaying the day of judgment. The Division calculates prejudgment interest using the IRS underpayment rate. First Jersey, 101 F.3d at 1476. The Division will include a prejudgment interest calculation when it files its reply papers, to ensure that the calculation is as up-to-date as possible at the time briefing is complete.

⁹ Once the Division shows that its disgorgement figure is a reasonable approximation of the amount of unjust enrichment, the burden shifts to the respondent to demonstrate that the Division’s estimate is not a reasonable approximation. See SEC v. Lorin, 76 F.3d 458, 462 (2d Cir. 2006); First City Fin. Corp., 890 F.2d at 1232. “[A]ll doubts concerning the determination of disgorgements are to be resolved against the defrauding party.” SEC v. Great Lakes Equities Co., 775 F. Supp. 211, 214 (E.D. Mich. 1991) (internal quotations omitted), aff’d, 12 F.3d 214 (6th Cir. 1993)).

third quarter of 2009 by \$2,929.35. SOF ¶ 67. Similarly, Respondents' improper marking-the-close activities on December 31, 2009 inflated the value of client holdings of HCBC and CARV, which, in turn, led to an incremental increase in the Base Fee that KAM charged clients for the fourth quarter of 2009 by \$1,358.73. SOF 117-118. KAM thus received total excess advisory fees of \$4,288.08 as a result of Respondents' unlawful marking-the-close activity.¹⁰

This amount is a reasonable approximation of the amount of KAM's unjust enrichment: the \$4,288.08 reflected under the Division's methodology is causally connected to Respondents' unlawful conduct and, unlike Respondents' proposed methodology,¹¹ appropriately captures the ill-gotten gains the respondents actually reaped from Koch's unlawful trading activities.

D. The Court Should Impose Third-Tier Penalties

The Court should impose a third-tier civil monetary penalty against Koch and KAM under Section 203(i) of the Advisers Act. Under this section, the Commission may impose a civil penalty if a respondent has willfully violated, or willfully aided and abetted any violation of, any provision of the Advisers Act or the rules and regulations thereunder. 15 U.S.C. § 80b-3(i). A third-tier penalty may be imposed where, as here, the conduct at issue involves fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement and the act or omission directly or indirectly resulted in substantial losses or created a risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed the

¹⁰ Plaintiff's Exhibit 311 calculates the total increase in base fee as \$5,819.93. Based on the testimony of respondents' witness Faith Heidtbrink (Tr. at 677-83), the Division has subtracted from that amount any excess fees it had attributed in Exhibit 311 to non-fee-paying KAM clients (e.g., all of Koch-related accounts) and it has also removed accounts for which it appears fees were waived. SOF ¶ 67, 118.

¹¹ Respondents' expert's calculation of increased fees, Respondent Trial Exh. R-36 at 69-71, is flawed. Respondents' expert testified that he calculated a "theoretical additional investment advisor fee" for only 3 clients of KAM and he did not use the quarter-end value of their holdings, but rather, used actual trading day data, which is not how KAM calculated its quarterly Base Fee. Respondent Trial Exh. R-36 at 71; SOF ¶ 11.

act or omission. 15 U.S.C. § 80b-3(i)(2). The maximum third-tier penalty for Teach violative act or omission occurring after March 3, 2009 is \$150,000 for a natural person and \$725,000 for any other person. See 17 C.F.R. § 201.1004.

The record here shows that KAM, through Koch, engaged improper marking-the-close activity on six occasions: (i) HCBC on September 30, October 30, November 30, and December 31, 2009, (ii) CHEV on December 31, 2009, and (iii) CARV on December 31, 2009. This conduct warrants substantial third-tier penalties. If the maximum third-tier penalties were imposed for each violative transaction in each stock, the penalties would total \$900,000 against Koch individually and \$4,350,000 against KAM.

The court should order Respondents to pay third-tier penalties against Koch and KAM. As discussed above, Koch’s misconduct – marking-the-close and failing to seek to obtain best execution – involved deliberate fraud, deceit, and manipulation. In addition, his misconduct created a risk of substantial losses to other persons. For example, by artificially inflating the closing prices of the securities at issue, Koch overstated the value of KAM accounts by a total amount of \$3,578,379.88:

Security	Date	Total Increase	Source
HCBC	09/30/2009	\$1,568,951.60	SOF ¶ 66
HCBC	10/30/2009	\$767,981.50	SOF ¶ 76
HCBC	11/30/2009	\$473,111.38	SOF ¶ 87
HCBC	12/31/2009	\$286,839.00	SOF ¶ 115
CARV	12/31/2009	\$481,496.40	SOF ¶ 116

	TOTAL	\$3,578,379.88	
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Moreover the prices paid for HCBC, CHEV and CARV shares on the affected dates were extremely high prices. HCBC has never again traded as high as it did on September 30, 2009. SOF ¶ 58. HCBC has rarely traded as high as it did on October 30, November 30, and December 31, 2009. SOF ¶¶ 70,79, 96. Other investors paid much less for CHEV on the same day that Koch purchased CHEV. SOF ¶ 100. Nor has CARV ever again traded as high as it did on December 31, 2009. SOF ¶ 109. Indeed, as Koch testified, Koch eventually decided that CARV was not right for his program and he sold his clients' positions in CARV in 2010. Tr. at 853 (Koch).

Specifically, Koch marked the close of HCBC on September 30, 2009 at \$23.50 – incredibly, a price that has never again even been approached in HCBC trading. SOF ¶ 58. The next highest HCBC closing price was \$20.00, for a few days in mid-2011, see Div. Trial Exh. 320, and even that next “high” was nearly 15% lower than Koch’s artificial \$23.50. Moreover, HCBC’s \$20.00 closing price for those few days in mid-2011 was plainly aberrational; for the most part, its closing prices since Koch’s trading have hovered in the \$15.00 and \$20.00 range (and occasionally even dipped below \$15.00), representing, at times, a whopping 36% decline in price from the artificial \$23.50 close Koch achieved on September 30, 2009. See Div. Trial Exh. 320. Koch’s other unlawful trading activities in HCBC in October, November, and December 2009 likewise achieved never-seen-again, or almost never-seen-again, closing prices in those securities. See Div. Trial Exhs. 313, 314, 315, 316 and 320. Similarly, and even more starkly than with HCBC, Koch’s marking the CARV close on December 31, 2009 at \$9.05 proved to be the stock’s nadir. See Div. Trial Exhs. 317 and 320. CARV closed above \$9.00 on only on other

day (in April 2010) and then began a precipitous decline. In each of these six instances in which Respondents marked the close or sought to mark the close and communicated the false information to the market about the value of each of these securities, market participants risked buying HCBC, CARV, and CHEV on the basis of that false information and sustaining substantial losses when, as in fact occurred, these securities nearly immediately returned to their actual, and significantly lower, prices.

A third-tier penalty is in the public interest. In considering whether a penalty is in the public interest, the court may consider six factors: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) previous violations; (5) deterrence; and (6) such other matters as justice may require. See 15 U.S.C. § 203(i)(3); New Allied Dev. Corp., 63 S.E.C. Docket 650, 1995 WL 683705 (Nov. 26, 1996); First Sec. Transfer Sys., Inc., 60 SE.C. Docket 359, 1995 WL 542184 (Sept. 1, 1995); see also Jay Houston Meadows, 61 S.E.C. Docket 2085, 1996 WL 218638 (May 1, 1996). Here, Respondents committed fraud, caused harm to others, and was unjustly enriched. In addition, penalizing Respondents is crucial both specifically given the deliberate and recurrent nature of their fraud and breach of fiduciary duty, and, more generally, to deter other investment advisers from engaging in similar conduct to artificially inflate client portfolios. Because the only mitigating factor is Koch's lack of previous violations, the penalty factors, taken together, weigh strongly in favor of the court ordering Koch and KAM to pay substantial civil penalties. The Division therefore requests, without specifying dollar amounts or units of violation, that Koch and KAM be ordered to pay third-tier penalties.

E. Koch Should Be Permanently Barred From Association With An Investment Adviser And Subject To Collateral Industry Bars

Koch's conduct was egregious and created a substantial risk of loss for his clients. Further, he has accepted no responsibility for the wrongfulness of his conduct. Therefore, Koch

should be barred from association with an investment adviser and subject to the following associational bars: broker, dealer, municipal securities dealer, and transfer agent and subject to bars prohibiting him from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter. See 15 U.S.C. § 80a-9(b) and 80b-3(f).

In addition to the egregiousness of Koch's conduct, the creation of a substantial risk of loss, and Koch's failure to accept responsibility, an industry bar against Koch is appropriate to deter future misconduct in the investment adviser industry. The selection of an appropriate sanction includes an assessment of the deterrent effect it will have in upholding an enforcing the standards of conduct in the securities business. See Schield Mgmt Co., 87 SEC Docket 704, 2006 WL 4730604 at *35 & n.46 (Jan. 31, 2006); Arthur Lipper Corp., 46 SEC 78, 100 (1975). Moreover the Commission treats violations occurring within the context of fiduciary relations with particular seriousness and due regard for the relationship of trust and confidence. James C. Dawson, 98 SEC Docket 3500, 2010 WL 2886183, at *3, 8-9 & n.16 (2010); Don Warner Reinhard, 2011 SEC LEXIS 158, at *21 n.27 (“[T]he importance of honesty for a securities professional is so paramount that we have barred individuals even when the conviction was based on dishonest conduct unrelated to securities transactions or the securities business.”)

Here, Koch is an investment adviser, who owed his clients “an affirmative duty of utmost good faith ... as well as an obligation to employ reasonable care to avoid misleading his clients.” Dawson, 2010 WL 2886183, at *8. The evidence in this case demonstrates not only that Koch intentionally deceived his clients about their investment performance for four consecutive months in 2009 – at a time when certain clients were concerned about short-term performance of

their accounts – but also he destroyed evidence of his wrongdoing (the September 30 instruction to Huntleigh’s trader), was elusive when asked questions about emails in which he specifically used the words “closing price,” continues to deny that he did anything wrong, all the while continuing to assert that short-term results are meaningless in his universe, and he remains in the business, continuing to work for KAM and manage money. Under these circumstances he should be permanently barred. Steadman v. SEC, 603 F.2d 1126, 1137 (5th Cir. 1979). A lack of a disciplinary history is not an impediment to imposing a bar for a Respondent’s first adjudicated fraud violation. In the Matter of Jaimie L. Solow, AP File No. 3-13066, 2008 WL 4222151, at *4 (Sept. 16, 2008) (citing Robert Bruce Lohmann, 56 S.E.C. 573, 582 (2003) and Martin R. Kaiden, 54 S.E.C. 194, 209 (1999)).

CONCLUSION

For the reasons stated above, the Division respectfully requests that the ALJ:

- (i) Make findings that KAM and Koch willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities. (
- (ii) Make findings that KAM and Koch willfully violated Sections 206(1) and 206(2) of the Advisers Act, which prohibit fraudulent conduct by an investment adviser;
- (iii) Make findings that KAM willfully violated, and Koch willfully aided and abetted and caused violations of, Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, which requires investment advisers to implement written policies and procedures reasonably designed to prevent violation of the Advisers Act and the rules that the Commission has adopted thereunder
- (iv) Make findings that KAM willfully violated Section 204 of the Advisers Act and Rule 204-2(a)(7) thereunder, which require the maintenance of certain books and records; and

that Koch willfully aided and abetted and caused KAM's violations of Section 204 of the Advisers Act and Rule 204-2(a)(7) thereunder;

(v) Based on such findings, issue an order requiring KAM to cease and desist from violating Exchange Act Section 10(b) and Rule 10b-5 thereunder and Advisers Act Sections 204, 206(1), 206(2), and 206(4) and Rules 204-2(a)(7) and 206(4)-7;

(vi) Based on such findings, issue an order requiring Koch to cease and desist from violating Exchange Act Section 10(b) and Rule 10b-5 thereunder and Advisers Act Sections 204, 206(1), 206(2), and 206(4) and Rules 204-2(a)(7) and 206(4)-7;

(vii) Based on such findings, issue an order censuring KAM;

(viii) Based on such findings, requiring KAM and Koch, jointly and severally, to pay disgorgement of \$4,288.08, plus prejudgment interest;

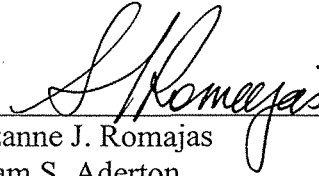
(ix) Based on such findings, requiring KAM and Koch to pay third-tier civil penalties;

(x) Based on such findings, ordering that Koch be barred (i) from association with any investment adviser, broker, dealer, municipal securities dealer, or transfer agent and (ii) from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter; and

(xi) Based on such findings, imposing such other remedial relief as the ALJ deems appropriate.

Dated: February 13, 2012

Respectfully submitted,



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