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UNITED STATES OF AMERICA
Before The
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-14355

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In the Matter of DONALD L. KOCH and KOCH ASSET MANAGEMENT LLC, Respondents.	

DIVISION OF ENFORCEMENT'S
POST-HEARING REPLY BRIEF

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Dated: March 8, 2012

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The Division of Enforcement ("Division"), pursuant to the Court's direction on January 20, 2012 and Rule of Practice 340, respectfully submits this brief in reply to Respondents' Post-Hearing Memorandum of Law dated February 29, 2012.[1]

PRELIMINARY STATEMENT[2]

Throughout this proceeding – including in their post-hearing brief – Respondents have ignored the core allegation of the OIP that Respondents marked the close in HCBC, CHEV and CARV in order to boost the account values that were reported to KAM's clients at the end of the month, the purpose of which was to placate those KAM clients that had developed a short-term focus on their investments during the market downturn of late 2008 and 2009.

Specifically, beginning in late 2008 and continuing throughout 2009, the markets were in turmoil. Financial institution stocks (including the regional and community banks in which KAM invested) were not performing well. KAM was a net seller, not buyer, of stocks during some months in 2009. Certain clients -- particularly the newer and younger clients and women (not the clients who came to testify as character witnesses at trial) – had become concerned about the performance of their investments and they were complaining to Koch. These clients may

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[1] Throughout this reply brief, citations to Respondent Donald L. Koch and Koch Asset Management, LLC's Proposed Finding of Fact and Conclusions of Law dated February 29, 2012, shall appear as "Resp. SOF ¶ __." Citations to Respondents' Post-Hearing Memorandum of Law, dated February 29, 2012, shall appear as "Resp. Br. at __". Citations to the Division of Enforcement's Proposed Findings of Fact and Post-Hearing Brief dated February 13, 2012, shall appear as "Div. SOF ¶ __ or "Div. Br. at __."

[2] The Division notes that Respondents' opposition papers run to more than 150 pages. Given the length of Respondents' submissions, and the compressed time frame in which the Division has had to respond, this brief responds only to Respondents' key arguments relating to the trades at issue. The fact that the Division does not repeat every argument contained in its post-hearing moving brief – such as the extensive evidence the Division pointed to showing why Respondents began to mark-the-close when they did (Div. SOF ¶ 31-40) – or does not respond to each and every mischaracterization or inaccuracy contained in Respondents' papers (of which there are many) should not be interpreted to suggest that the Division is conceding anything. The Division's moving and reply papers should be read together.

have been goal-congruent with Koch at the beginning of their relationship with him, but by mid-2009, Koch observed that they were "watch[ing] the paint dry" and the "grass grow," words Koch uses to describe clients who he believes are improperly focused on the short-term. Div. SOF ¶¶ 35-36. Koch did not view short-term performance as relevant to his investment strategy, and, so, to alleviate the short-term concerns of such clients, Koch engaged in activity that, on the last day of the month for four consecutive months in 2009, marked the close of three very thinly-traded stocks that were held by numerous clients of KAM. By trading in these stocks on the last day of the month, Respondents could guarantee that the valuations reported to clients at month-end would be based on the last trade of the month; whereas, if there were no trades on the last day of the month, the month-end valuations reported to clients would be based on the bid. Furthermore, because these stocks had wide bid-ask spreads, large swings in price were expected and Respondents' one day, end-of-the-month, manipulation would be less noticed.

Respondents' suggestion that there can be no finding of manipulation where their actions had a one-day, rather than a long-term, impact on prices misses the point and is intended to distract this Court from the key issues. Respondents sought to influence the prices that were reported to KAM's clients at the end of the month, they succeeded in doing so for four consecutive months, they stopped only when they learned that NYSE ARCA was investigating their trades, and they obtained the precise benefit they sought, which was to reshape client views of their portfolios and distract them from the short-term. Of the top 10 most widely held stocks by KAM clients, these stocks had a widest bid-ask spread and thus were the easiest to manipulate.[3]

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[3] Compare Resp. Trial Exh. R036 at 50 (listing 10 most widely-held stocks among KAM's customers at 12/31/2009) with Resp. Trial Exh. R039 at 25 (reflecting KAM's top 15 illiquid

While the foregoing is the backdrop to why Respondents engaged in this marking-the-close activity in late 2009, as demonstrated below and in the Division's moving papers, even without this backdrop, the Court can and should find that the Division has demonstrated by a preponderance of the evidence that Respondents had the requisite intent to manipulate the closing price of HCBC on September 30, October 30, and November 30, 2009 and the requisite intent to manipulate the closing price of HCBC, CHEV and CARV on December 31, 2009. (Points I.A. through I.E.) The Court can also find that the record supports a finding of negligence necessary to support a violation of Section 206(2) of the Investment Advisers Act of 1940. (Point II.) Additionally, the Court can and should find that (i) Respondents failed to keep and maintain required books and records and their destruction of such records further supports a finding that Respondents acted with the requisite intent to support a finding of market manipulation and (ii) Respondents failed to implement their policies prohibiting precisely the kind of marking-the-close violations that occurred here. (Points III and IV.) Finally, in Point V, the Division describes the relief that is appropriate in light of Respondents' violations, including cease-and-desist orders, censure of KAM, an industry bar against Koch, disgorgement and prejudgment interest, and third-tier civil penalties. (Point V.)

ARGUMENT

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

The Division has met its burden of proof in establishing that Respondents' manipulation of the closing price of three thinly-traded bank stocks on the last trading day of the months of September, October, November and December 2009 violated Section10(b) of the Exchange Act

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investments in 2009 and, showing that of the top 10 most widely held stocks, only HCBC, CHEV and CARV made the list).

of 1934 ("Exchange Act") and Rule 10b-5 thereunder, and Section 206(1) of the Investment Advisers Act of 1940 ("Advisers Act").

A. The Applicable Standards

"Manipulation," in the context of the securities markets, is a term of art that "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." Ernst & Ernst v. Hochfelder, 425 U.S. 185 186 (1976). "Traditional" forms of market manipulation include practices such as "wash sales," "matched orders" and "rigged prices," which serve no purpose other than to transmit false information to the market and artificially affect the reported volume and price. Sante Fe Indus. Inc. v. Green, 430 U.S. 462, 476 (1977). But, market manipulation can also be accomplished through open market transactions when those transactions are accompanied by an intent to manipulate.

For example, as demonstrated (Div. Br. at 48-50), an investment adviser who, with scienter, marks-the-close or attempts to mark-the-close through open market transactions violates Exchange Act Section 10(b) and Advisers Act Section 206(1) because its actions convey false information about the stock's real price level and the demand for it free of manipulative influences. 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) (defining marking the close as "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"); see also In the Matter of Sharon M. Graham, Stephen C. Voss, and James J. Pasztor, Release No. 82, 1995 WL 769011, at *12-13 (Dec. 28, 1995) (marking the close, when done with manipulative intent, violates Exchange Act Section 10(b)); SEC v. Kwak, 2008 WL 410427, at *4-5 (D. Conn. Feb. 12, 2008) (denying defendants' Fed. R. Civ. P. 50 motion for judgment as a matter of law in marking the close case).

Scienter is "a mental state embracing an intent to deceive, manipulate or defraud," Hochfelder, 425 U.S. at 193-94, n.12, and can be established through a showing of recklessness. Div. Br. at 49 (citing cases).[4] Scienter may be established through circumstantial evidence and inferences drawn from the surrounding circumstances. Herman & MacLean v. Huddleston, 459 U.S. 375, 390-91 & n.30 (1983); Pagel, Inc. v. SEC, 803 F.2d 942, 943-48 (8th Cir. 1986); SEC v. U.S. Envtl., Inc., 2003 WL 21697891, at *22 (S.D.N.Y. Jul. 21, 2003); In re Thomas C. Bridge, 96 SEC Docket 2485, 2009 WL 3100582, at *13-14 & n.60 (2009); Terrance Yoshikawa, 87 S.E.C. Docket 2580, 2006 WL 1113518, at *4 (Apr. 26, 2006); Kocherhans, 1995 WL 723989, at *2 (Dec. 6, 1995).

Respondents take issue with the Division's articulation of the standards and, instead, urge this Court to adopt new, never-before-used, standards for an Exchange Act Section 10(b) and Advisers Act Section 206(1) violation. For the reasons that follow, the Court should reject Respondents' articulation of the standards. Furthermore, because Respondents' entire post-hearing brief is structured around the improper standards that they have urged this Court to adopt, the Court should reject Respondents' proposed findings and conclusions.

1. Respondents Misstate The Scienter Standard

With respect to scienter, Respondents contend that the Division must establish "motive and opportunity" or "strong circumstantial evidence of conscious misbehavior or recklessness;" and, if the evidence is circumstantial, they contend "the inference of scienter must be 'more than

4 "Conduct is reckless if it represents 'an extreme departure from the standards of ordinary care ... to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir.), cert. denied, 439 U.S. 1039 (1978).

plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of non-fraudulent intent.'" Resp. Br. at 30-31.

Respondents are thereby urging this Court to incorporate a burden that heretofore has applied only in suits brought under the Private Securities Litigation Reform Act of 1995 ("PSLRA"), not in Commission enforcement proceedings. Specifically, in Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007), the United States Supreme Court interpreted the "strong inference" standard set forth in the PSLRA and held that, in a private suit under the PSLRA, a complaint adequately pleads scienter "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." Id. at 324. No controlling authority holds that the PSLRA's "strong inference" standard governs in Commission enforcement proceedings. Indeed, courts across the land have expressly declined to extend Tellab's interpretation to Commission proceedings. SEC v. Dunn, 587 F. Supp. 2d 486, 499-502 (S.D.N.Y. 2008).[5] Respondents thus urge this Court to apply the wrong standard and the Court should decline their invitation.[6]

The appropriate standard for establishing scienter in a Commission proceeding is a showing, direct or circumstantial, that a respondent acted intentionally or recklessly. Point I.A., supra. Moreover, an action based on circumstantial evidence does not necessitate a higher

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[5] See also SEC v. Landberg, 2011 WL 5116512, at *4 n.4 (S.D.N.Y. Oct. 26, 2011); SEC v. Steffes, 805 F. Supp.2d 601, 617 (N.D. Ill. 2011); SEC v. Mannion, 789 F. Supp.2d 1321, 1334 (N.D. Ga. 2011); SEC v. Czarnik, 2010 WL 4860678, at *6 n.4 (S.D.N.Y. Nov. 29, 2010) (erroneously cited by Respondents at page 31 of their post-hearing brief for the opposing proposition that Tellabs extends to Commission proceedings); In re Reserve Fund Sec. & Deriv. Litig., 732 F. Supp.2d 310, 318-19 (S.D.N.Y. 2010); SEC v. Pentagon Capital Mgmt., PLC, 612 F. Supp.2d 241, 263-64 (S.D.N.Y. 2009).

[6] The Division also notes that Respondents' articulation of the standard derives from decisions on motions to dismiss in private suits brought under the PSLRA. Resp. Br. at 30 (citing In re Centerline Holding Co. Sec. Litig., 380 Fed. Appx. 91, 92 (2d Cir. 2010) (articulating pleading standard); ECA, Local 134 IBEW Jt. Pension Trust of Chicago v. JP Morgan Chase Co., 553 F.3d 187, 198-99 (2d Cir. 2009) (same).

standard of proof. In re Andrew P. Gonchar, 96 SEC Docket 1845, 2009 WL 2488067, at *12-13 & n.64 (Aug. 14, 2009) (citing Steadman v. SEC, 450 U.S. 91 (1981)).

2. Respondents Urge The Adoption Of The Masri Standard Which Has Been Universally Rejected And Makes No Sense

Respondents also assert that, absent the more traditional indicia of a market manipulation,[7] the Court should adopt the approach used by the District Court in SEC v. Masri, 523 F. Supp. 2d 361 (S.D.N.Y. 2007), in deciding whether to hold Respondents' liable here. Specifically, citing Masri, Respondents contend that they cannot be held liable for market manipulation (and, in particular, for marking the close through late-day, end-of the-month stock purchases), unless the Division demonstrates that Respondents' sole reason for placing the trades in HCBC, CHEV and CARV on the affected dates was an intent to affect the price. Resp. Br. at 33, 43-44. The Masri Court held that, "in order to impose liability for an open market transaction, the [SEC] must prove that, *but for* the manipulative intent, the defendant would not have conducted the transaction." Masri, 523 F. Supp. 2d at 372-73.

For the reasons that follow, the Court should decline to adopt the Masri Court's approach, which is not at all binding on these proceedings:

First, even the Masri Court declined to adopt a *per se* rule that open market activity cannot be considered manipulative based solely on manipulative intent. Masri, 523 F. Supp. 2d at 371-72. "It may be argued," the court acknowledged, "that an open-market transaction made with manipulative intent in fact injects inaccurate information into the marketplace" because "a transaction entered with manipulative intent distorts the functioning of the market and sends a false message to its participants." Id. at 372 n.17 (criticizing GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189 (3d Cir. 2001), one of the cases upon which Respondents continue to rely

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[7] See Point I.A.3, infra.

(Resp. Br. at 31)). Accordingly, in Masri, the court concluded that a rule which does not permit liability to be based solely on intent "would unnecessarily and improperly place conduct that intentionally distorts prices outside the scope of Section 10(b)." Id. at 372.

Second, other courts within the same Circuit as Masri have expressed the view that a transaction entered into with mixed motives – including on a potentially legitimate economic basis – can nonetheless be manipulative. For example, in SEC v. Kwak, 2008 WL 410427 (D. Conn. Feb. 12, 2008), the court held that the theory on which Masri is based "loses its applicability if the [defendant's] intent alters the trade in any material respect (e.g., changing the time at which the trade would otherwise have been executed)." Id. at *4 n.10. Stated differently, a defendant might have legitimate reasons for engaging in the transaction, but, its manipulative intent might alter the way in which it conducts the transaction, which, in turn, can constitute market manipulation. See also, e.g., In re Initial Pub. Offering Sec. Litig., 241 F. Supp. 2d 281 (S.D.N.Y. 2003) (concluding there is no special category of open market manipulation cases and no legal basis for requiring the plaintiff to prove in a market manipulation case that the defendant's sole reason for entering into a transaction was to manipulate the stock price); Markowski v. SEC, 274 F.3d 525, 529 (D.C. Cir. 2001) (expressly noting that it "appears to be Congress's determination that 'manipulation' can be illegal solely because of the actor's purpose").

Third, adopting the Masri approach would clash with the well-established principle that reckless behavior may satisfy the scienter element for a manipulation claim under Exchange Act Section 10(b). See, e.g., SEC v. U.S. Envtl., Inc., 155 F.3d 107, 111 (2d Cir. 1998), cert. denied, 526 U.S. 1111 (1999); SEC v. Competitive Technologies, Inc., 2005 WL 1719725, *5 (D. Conn. July 21, 2005). If a person who acts recklessly can be liable for market manipulation then the

Division should not be required to prove that the person's sole intent was to manipulate the stock price. This inference is reinforced by the Second Circuit's comment in U.S. Environmental that "[e]ven if [the broker] were motivated by a desire to obtain compensation rather than by a desire to change USE's market price," he would be liable if he submitted the trades with scienter, which includes recklessness. U.S. Environmental, 155 F.3d at 112.

3. Respondents Erroneously Contend, In The Alternative, That There Must Be Evidence Of A "Plus Factor" Giving The Conduct More Traditional Indicia Of A Manipulation

In reliance on U.S. v. Mulheren, 938 F.2d 364 (2d Cir. 1991) and Markowski v. SEC, 274 F.3d 525 (D.C. Cir. 2001),[8] Respondents also contend that the Division should be required to introduce evidence of a "plus factor," meaning something more than scienter that brings the activity closer to the traditional forms of market manipulation. Resp. Br. at 33. While these Courts have recognized that imposing "[l]iability for manipulation wholly independent of fictitious transaction ... raises interesting questions," Mulheren, 274 F.3d at 528, they also have acknowledged that Congress has determined liability may properly be founded solely on an actor's purpose. Id. at 529 (finding the Commission's interpretation not unreasonable).

The notion that the Division must establish a "plus factor" – something showing the conduct has some traditional indicia of market manipulation – is contrary to the Supreme Court's directive to lower courts to interpret the Exchange Act and Advisers Act "flexibly" and broadly, rather than "technically [or] restrictively." SEC v. Zandford, 535 U.S. 813, 819 (2002) (Exchange Act Section 10(b)); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963) (Advisers Act Section 206(1)). A finding of manipulation should not hinge on the

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[8] Respondents also rely on GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 206 (3d Cir. 2001), but the Third Circuit's approach in GFL has been criticized as it places some intentional conduct that results in a distortion of the market outside of the reach of Exchange Act Section 10(b).

presence or absence of any particular device. SEC v. Resch-Cassin & Co., Inc., 362 F. Supp. 964, 975 (S.D.N.Y. 1973) (antifraud provisions "outlaw[] every device 'used to persuade [the] public that activity in a security is a reflection of a genuine demand instead of a mirage'"); In re Vladlen Larry Vindman, 87 SEC Docket 2311, 2006 WL 985308, at *8 (Apr. 14, 2006).

In sum, a "plus factor" that makes the activity appear to be closer to a "traditional" manipulative device is not required. If a preponderance of the evidence (direct or circumstantial) supports a finding that Respondents' state of mind was to intentionally (or recklessly) manipulate the closing price of HCBC, CHEV or CARV on the affected dates, the Court may find for the Division on its Exchange Act Section 10(b) and Advisers Act Section 206(1) claims.

4. Materiality Is Not An Element Of A Market Manipulation Claim

Lastly, Respondents suggest that the Division's claims should fail because, in their view, Respondents' actions did not materially impact the price of HCBC, CHEV or CARV on the affected dates. Resp. Br. at 34, 40 (arguing that KAM client accounts were inflated by an immaterial amount, and the increase in Koch's advisory fees was immaterial.) Materiality, however, is not an element of a market manipulation claim under Exchange Act Rule 10b-5(a) or (c). Indeed, even the cases relied on by Respondents confirm that, in a market manipulation case, the plaintiff is not required to prove the alleged unlawful activities had any effect (much less a material effect) on the price of the stock. GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 206 (3d Cir. 2001) ("proof of price movement is not necessary to establish a violation of 10(b)"). Accordingly, to the extent Respondents ask the Court inject a materiality requirement into the market manipulation standard, the Court should decline to do so. See also, e.g., In re Vladlen Larry Vindman, 87 SEC Docket 2311, 2006 WL 985308, at *9 (Apr. 14, 2006) ("[w]hile profit is the normal goal of manipulators, their actions are not rendered innocent simply because they fail to achieve the desired result"); Michael J. Markowski, 54 SEC Docket 830, 835 (Sept. 7, 2000), aff'd, Markowski v. SEC, 274 F.3d 525, 529 (D.C. Cir. 2001) ("Just because a manipulator loses money doesn't mean he wasn't trying.")[9]

B. The Division Has Presented Both Direct Evidence And Strong Circumstantial Evidence Of Respondents' Manipulative Intent With Respect To HCBC On The Four Affected Dates

The Division has presented direct evidence of Respondents' scienter – including Trial Exhibits 148, 186, 189-191 – as well as extensive additional evidence from which the Court can infer that Respondents had the requisite intent to manipulate the closing price of HCBC on September 30, October 30, November 30 and December 31, 2009. Div. SOF ¶¶ 52-97; Div. Br. at 52-56. Based on this evidence, none of which Respondents credibly refutes, the Court should find in the Division's favor on the Exchange Act Section 10(b) and Advisers Act Section 206(1) claims.

1. The September 30, 2009 HCBC Trade

The record supports a finding that Koch intended to manipulate the closing price of HCBC on September 30, 2009. Div. SOF ¶¶ 52-67; Div. Br. at 52-56. There is direct and compelling evidence of Koch's intent to manipulate the closing price that day:

- Christanell, the trader, testified that Koch instructed him to obtain a closing price for HCBC on September 30, 2009 and the

[9] Nonetheless, as demonstrated, the record shows that Respondents' actions had a material impact on the prices that were reported to KAM clients in their account statements for the periods ended September 30, October 31, November 30 and December 31, 2009, and, in turn, to the public. Div. SOF ¶¶ 58, 63-66, 70, 73-76, 79, 84-87, 96-97, 113-116; Div. Br. at 56-58. Respondents contend that the average percentage impact of their actions was immaterial (Resp. SOF ¶ 109 and Appx. A at III), but, it is not proper to consider the average, when the evidence is that Respondents engaged in marking-the-close activity to temporarily placate certain customers and draw the attention of those customers away from the short term. The average impact across all customers – which would include non-complaining customers – is not meaningful. The dollar impact of Respondents' manipulation on the holdings of each client is reflected in Division Trial Exhibits 306-310 and is more relevant to an assessment of materiality. The Court may take materiality into consideration when determining the remedy.

instruction stands out in his mind because, in his 16 years in the business, no client had ever instructed him to get a closing price. Tr. at 465, 474-477 (Christanell).

- Koch gave this instruction verbally and in writing. Specifically, immediately after learning that stocks which do not trade on the last day get priced at the bid and stocks that do trade on the last day get priced at the last trade (Div. Trial Exh. 146), Koch told Christanell this news 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 Exhs. 12, 148 (9/30/2009 email) (emphasis supplied).

At trial, Koch offered no credible explanation for the email; nor did he ever deny having instructed Christanell to obtain a closing price on this (or any other) date. With respect to Trial Exhibits 12 and 148, Koch's explanation is nearly incoherent, as highlighted in a block quote in Respondents' post-hearing papers, which is worth repeating here for emphasis. Resp. Br. at 20.

> Q: Okay. What are you telling Mr. Christanell to do right here?
>
> A: Well, you know, I had -- I had not worked with this gentleman that long, so I – and I know he was an institutional trader. He was hired, and most of his activities were large block transactions. The last thing in the world you want is to be the elephant in the room, is to go there and sometime, and get -- say, I'm an institutional player, get 5,000 shares. If he gives that signal to the market, the bid/ask [quotes] – and I'm guessing here -- 30, 35. You destroy the entire market. **So I'm asking him to be as invisible as you can, to be as low key as you can, to do this as small of an increment as you can without jumping up and down in the room, showing who you are, showing that you're an institutional trader.**

Tr. at 879 (Koch) (emphasis supplied). This answer offers no explanation for the words "move [the] last trade right before 3 p.m." and no explanation of why he asked the trader to implement his instructions "without appearing manipulative." Nor could anyone – much less Christanell, who Respondents admit was new to the KAM account – reasonably have understood that the words used in Koch's email meant to trade in "as small of an increment as you can." Koch's instruction contains no information at all about the size of the incremental purchases that Christanell should make; instead, Koch's instructions simply gave Christanell a price target and a time of day (3 p.m. Central time, which is when the markets close) and a specific admonition to make sure not to "appear[] manipulative." The fact that Koch instructed Christanell not to "appear" manipulative is very direct evidence of his manipulative intent, since such an admonition is not necessary unless the parties to the conversation understand that their actions are manipulative.

Other evidence in the record, though less direct, further supports a finding that Koch intended to mark the closing price of HCBC on September 30, 2009.

- Immediately prior to giving the instruction reflected in Trial Exhibits 12 and 148, Koch asked Christanell how Huntleigh determined prices on the last day of the month (i.e. how it determines the prices reflected in Huntleigh's monthly account statements). In making inquiries of a Huntleigh employee, Christanell told the employee that Koch is "looking at HCBC." Div. Trial Exh. 145. Further, when Christanell responded to Koch with an answer, he responded in an email that related to the open HCBC trades. Koch learned from that email how Huntleigh prices stocks on the last day of the month, and, since there had already been trades in HCBC that day, he knew that Huntleigh's monthly account statements would price HCBC well below $25 per share unless he did something to increase the closing price. Div. Trial Exh. 146. Koch reacted favorably to the information and, in the same email string where Christanell provided him the information, Koch instructed Christanell to "move last trade right before 3 p.m. up to as near to $25 as possible without appearing manipulative." Div. Trial. Exh. 148. See also Div. SOF ¶¶ 54-55.

Koch testified at trial that his inquiry about pricing had nothing to do with his HCBC order that day – he claimed he was conducting a survey to see what methodology other brokerages used (Resp. SOF ¶ 285) – but this testimony is simply not credible. The emails on this subject, which were created contemporaneously with Koch's inquiry, reflect on their face that Koch was asking the question in connection with the pending HCBC order. Div. Trial Exhs. 12, 145, 148. Koch knew at the time that HCBC would close lower that day unless Christanell could get a higher closing price because, in these emails, Christanell expressly tells Koch that his trades thus far were at an average price of $16.6897. Div. Trial Exhs. 12, 145, 148. This knowledge, combined with the instruction Koch gave Christanell minutes later, is strong circumstantial evidence of Respondents' intent to manipulate the closing price.

- Christanell clearly understood Koch's instruction to mean that Koch wanted to get a closing price. Christanell immediately revised the pending order for HCBC to increase the price to $25, then $24.50, and he routed the order to the street at prices ranging between $24 and $24.50 in the last 4 minutes of the day. Div Br. at 15-18; Div. SOF ¶ 57; Div. Tr. Exh. 278 at page 5, Rows 137 to 146, Columns F, J , L and O.

Respondents' sole response to this evidence is their factually incorrect assertion that Christanell did not route any orders for HCBC in the last 12.6 minutes of the day, which, they interpret to mean that Christanell was not trying to get a closing price. Resp. Br. at 39. They are wrong. Huntleigh's trading records clearly reflect that Christanell's last route to the street occurred at 15:59:21 p.m. Eastern time (39 seconds before the close) and he obtained his last execution at 15:59:43 p.m. Eastern time (17 seconds before the close); moreover, he did so on a day when KAM was responsible for 100% of the trading volume. Div. Trial Exh. 278, page 5, Rows 145-146, Columns C and F; Div. SOF ¶ 58.

Based on the foregoing, the Court should find that the Division has demonstrated by a preponderance of the evidence that Respondents had the requisite intent to manipulate the closing price of HCBC on September 30, 2009 and should be held liable under Exchange Act Section 10(b) and Advisers Act Section 206(1).

2. <u>The December 31, 2009 HCBC Trade</u>

The record also supports a finding that Koch intended to manipulate the closing price of HCBC on December 31, 2009. Div. SOF ¶¶ 88-97; Div. Br. at 52-56. Here too the evidence of Koch's manipulative intent is direct and compelling:

- Christanell testified that Koch instructed him to obtain a closing price for HCBC on December 31, 2009 and, like the September 30 instruction, this too stands out in his mind because, in his 16 years in the business, no client had every instructed him to get a closing price. Tr. at 475-476, 493-494, 499-500 (Christanell).

- Koch gave this instruction verbally and in writing and at least one of his communications with Christanell was captured in an audio recording. Div. SOF ¶¶ 88-97. On December 28, 2009, three days before the end of the month, Koch emailed Christanell and told him to purchase HCBC on the last day of the year and specifically stated that **"I would like to get a closing price in the 20-25 range, but certainly above 20."** Div. Trial Exhs. 186, 187 (emphasis supplied). Before the markets opened on December 31, Koch called Christanell and told him **"I need to get it above 20, you know 20 to 25 ... just create prints."** He also expressly instructed Christanell to say away from a known seller in the market that day. Div. Trial Exh. 189 (emphasis supplied).

At trial, Koch offered no credible explanation for the email or the phone call; nor did he ever deny having instructed Christanell to obtain a closing price on this (or any other) date. Resp. Br. at 24-27; Resp. SOF ¶¶ 226-242.

With respect to Trial Exhibits 186 and 187, the Division specifically asked Koch what he meant when he instructed Christanell to "get a closing price" and he refused to provide a coherent answer to the question:

> Q: Sir, in that e-mail to Mr. Christanell, why are you referring to a closing price?
>
> A : Well, I'm convinced -- my sense of this is that if we get any kind of notion of stock around those levels, we're going to be able to shake the bushes and have that stock come out. I think I want to see if we can get some stock out. And the only way you can get stock for sale is to walk up the ladder. That's -- That's -- That's

> how I see it. I mean, I don't -- What I'm trying to do is say, Get your stock to see if you can get it out. If you can -- What you're going to do is you're going to shake the bushes, and you're going to get all those people at the end of the year, and that stock's going to come out in the market, but you have to do it through price.
>
> Q: Well, Sir, why would you want -- why would you want it above $20 [if] you have no idea on December 28th what the spread would be like on the 31st?
>
> A: Well, again, let's go -- I've already said, the spreads are very wide, and usually on a 20 to a 10 spread, you can sell your stock at 10 and you buy it at 20, and then that 20 may be for 100 shares and it may not. That's why you always put limit orders on these things.[10]
>
> Q: Sir, on the 28th, you have no idea what the spread will be on the 31st; is that correct?
>
> A: The spreads don't change.[11] I mean, this is a stock that trades 30 days a year, so you have a very good idea. You have a very good idea from past behavior what you're likely to face. And if I'm trying to get the stock, my best opportunity is the last trading day of the year, to take those people who have positions shares over the years, over the last six months or years, in High Country, that I don't know a thing about, they have positions, and they want to clean them out. They want to get out of that stock and take a dollar or two gain. I don't know what these people are called, but they're basically day traders. I don't know.

Tr. at 927-928. Missing from Koch's answer is any explanation for the words "get a closing price." Nor could anyone reasonably have understood the words used by Koch to mean anything but that Koch wanted to mark the close in HCBC on the last day of the year. Indeed,

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[10] Respondents have repeatedly claimed that they only placed limit orders. See, e.g., Resp. SOF ¶¶ 73-74; Tr. at 821, 860. But, this is untrue. For example, an audio recording on December 31, 2009 captures Koch instructing Christanell to purchase HCBC with 100 share market orders. Div. Trial Exh. 189. Similarly, Respondents used a market order to purchase HCBC on October 30, 2009. Resp. Trial Exh. R39 at 48. Respondents' use of market orders, coupled with Koch's testimony demonstrating that he recognized that market orders had the potential to cause the price of thinly-traded securities to run up quickly, bolsters the conclusion that Respondents acted with scienter in purchasing HCBC on October 30 and December 31. The fact that Koch then testified falsely about the orders he use only further bolsters the evidence of Koch's scienter.

[11] Actually, Professor Jarrell's presentation shows that HCBC's spreads do change. Resp. Trial Exh. R39 at 42, 47, 52, 57 (showing the bid-ask spread for four days).

Respondents have repeatedly asserted that Christanell did not understand the working analytics of tangible book value and merely took orders (Resp. Br. at 7; Tr. at 902-903 (Koch)); so, Koch had to understand (and intend) that Christanell would take his instructions literally.

Based on the foregoing, the Court should find that the Division has demonstrated by a preponderance of the evidence that Respondents had the requisite intent to manipulate the closing price of HCBC on December 31, 2009 and should be held liable under Exchange Act Section10(b) and Advisers Act Section 206(1).

3. The October 30 and November 30, 2009 HCBC Trades

The record also supports a finding that Koch intended to manipulate the closing price of HCBC on October 30 and November 30, 2009. Div. SOF ¶¶ 68-87; Div. Br. at 52-56. Although there is no email or audio recording of Koch's instructions to Christanell on how to execute the HCBC orders at the end of October and November 2009, Christanell's testimony is crystal-clear that Koch gave him specific instructions to try to obtain a closing price for HCBC on October 30 and November 30, in the \$20 to \$25 range. Tr. at 493-494 (Christanell). These were unusual instructions that stand out in Christanell's mind. Tr. at 475-476 (Christanell). Moreover, the instructions that Christanell said he received from Koch for these trades were consistent with the instructions Koch gave to Christanell on September 30 and, later, on December 28 and 31; and, as Respondents insist, Christanell was not educated about the strategy and merely followed orders. Div. SOF ¶¶ 81, 90; Tr. at 515 (Christanell); Tr. at 902-903 (Koch).

Respondents' principal argument about these trades is that Koch "probably" had a "standing order" with Christanell for the October trade and he "definitely" had a "standing order" with Christanell for the November trade. Resp. Br. at 22, 24. Koch could not recall the precise details of his standing order except that it was to purchase HCBC within "a certain price limit" if it became available. Resp. Br. at 24. In contrast, Christanell has a specific recollection that Koch's October and November instructions – like the instructions underlying the September 30 and December 30 HCBC trades – was to get a closing price for HCBC on the last day of the month in the $20 to $25 range. Tr. at 492-494 (Christanell). Though the record does not shed light on the precise words used by Koch, Respondents admit that Koch used the "same tactical approach" in October and November as he did in September to purchase HCBC. Resp. Br. at 22. The Court can and should infer, thus, that Koch had a manipulative intent with respect to the October and November HCBC trades and that, consistent with Christanell's recollection, his standing order included an instruction about the timing of the trade (last trading day of the month) and was specifically focused on obtaining a closing price for HCBC in the $20 to $25 range. Having a standing order to manipulate the closing price of a stock is no different than giving an instruction to manipulate the closing price on the day of the trade; nor does it make sense to absolve from liability someone who ratifies a trade executed pursuant to such a standing order. Cf., e.g., SEC v. Sayegh, 906 F. Supp. 939, 946-947 (S.D.N.Y. 1995) (a defendant does not have to buy and sell securities himself for primary liability to be imposed in a market manipulation case).

Respondents suggest that Christanell's testimony about the October 30 and November 30 HCBC trades is not credible because, in their view, Christanell did not enter or execute those trades consistent with an understanding that he was to get a closing price in the $20 to $25 range on those dates. With respect to the October 30 trade, Respondents observe that Christanell's last execution that day was at 15:47:36 p.m. Eastern time (or 12.6 minutes before the close) and that he did not route any trades to the street in those 12.6 minutes in an effort to obtain a higher closing price. Resp. Br. at 39. With respect to the November 30 trade, Respondents observe that Christanell's last execution that day was at 15:59:30 p.m. Eastern time (or 30 seconds before the close) and he did not use the remaining 30 seconds to route additional shares to the street in an effort to obtain a higher closing price. Resp. Br. at 39. Christanell's inaction in the last few seconds or even minutes of the trading day does not cast doubt on the credibility of his testimony. The record is replete with evidence – mostly from Respondents' expert Professor Jarrell – that HCBC is an extremely thinly traded stock and trades in the stock are more like privately negotiated transactions. Resp. SOF ¶ 156; Resp. Br. at 15-16; Tr. at 1083 (Jarrell). Respondents have not introduced any evidence showing there were shares available for sale in the last 12.6 minutes of October 30 or the last 30 seconds of November 30; moreover, at least with respect to the November 30 trade, Christanell knew that his trades were 100% of the volume that day with 30 seconds remaining, and could reasonably assume that no one else would be trying to buy that day. Also, in one of the December 31 audio recordings, Christanell tells Koch that he waited too long to route HCBC shares to the street on November 30 and was unable to move the price up to where Koch wanted it that day, so he told Koch he intended to come in earlier on December 31. Div. SOF ¶ 81; Div. Trial Exh. 189. The Court can infer from this communication that Christanell recognized there was seller in the market that day but he was not succeeding in moving up HCBC's price to the desired levels desired by Koch, and thus, unable to draw interest from other sellers, he found no need to continue trying.

On this record, there is simply no basis for calling Christanell's testimony into question or for concluding that Koch intended to manipulate the closing price of HCBC on September 30 and December 31, but not on October 30 and November 30. Accordingly, and based on the foregoing, the Court should find that the Division has demonstrated by a preponderance of the evidence that Respondents had the requisite intent to manipulate the closing price of HCBC on

October 30 and November 30, 2009 and should be held liable under Exchange Act Section 10(b) and Advisers Act Section 206(1).

4. The Division's Response To Respondents' General Assertions About The Four HCBC Trades

Unable to provide credible explanations for any of the direct or circumstantial evidence of Respondents' manipulative intent with respect to the HCBC trades, Respondents resort to misstating the analysis and testimony of their expert Professor Gregg Jarrell. They contend that KAM's instructions to Christanell to trade late in the day can be explained by the U-shaped trading pattern that exists for most stocks, suggesting that the markets are deeper and more liquid at the end of the day. Resp. Br. at 16, 37. However, while Professor Jarrell concluded that most stocks have a U-shaped trading pattern, he admitted on cross-examination that no such pattern exists for HCBC stock. Resp. Trial Exh. R038 at 17; Tr. at 1154, 1157-1159 (Jarrell) (concluding there is no obvious pattern for HCBC). Moreover, even if there was a U-shaped trading pattern for HCBC – which there was not – that would not explain why Koch instructed Christanell to obtain a closing price, when he instead could have counseled Christanell to look for shares at the end of the day, without specifically setting his sights on establishing a closing price for HCBC.

It is also notable that, as Respondents concede, Respondents have purchased HCBC on the last trading day of the month only twice since 1998, excluding the four dates that are at issue in this case. Resp. Br. at 17; Resp. Trial Exh. R36 at 20 (noting that 20 out of 26 purchases of HCBC were not made on the last trading day of a month, quarter or year). Respondents' trades in HCBC on September 30, October 30, November 30 and December 31, 2009, thus, stand out as extremely unusual in terms of their timing. This bolsters Christanell's credibility and it weakens Koch's. Indeed, Koch's assertion that the end of the month is a good time to purchase HCBC

(Tr. at 860-862 (Koch)) was self-serving, not supported by his own trades in HCBC since 1998, and should be rejected as not credible.

Respondents also did not typically trade HCBC late in the trading day. Div. SOF ¶ 119-121. The only period for which there are complete trading records in this case – records that include time of day stamps reflecting when orders were entered into the system, routed to the street, and executed – is the eighteen-month period commencing June 1, 2008 and ending December 31, 2009. Div. SOF ¶ 120; Div. Trial Exhs. 321 to 339. During that period, excluding the four dates at issue in this case, Respondents purchased HCBC twice. On one day, HCBC trades were executed between 14:06:46 p.m. Eastern time and 14:09:48 p.m. Eastern time (or between 2:06 and 2:09 p.m.) and the execution prices were at or close to the bid; on the other day, HCBC trades were executed between 11:28 a.m. Eastern time and 12:27:40 p.m. Eastern time, albeit the trades were closer to the ask. Div. Trial Exh. 336 (trade data for 9/8/2009, at Rows 176 to 182) (and trade data for 9/29/2009, at Rows 3, 8, 13). Respondents' ability to obtain shares of HCBC by trading in the middle of the day at prices at or near the bid (or certainly not above the ask) is completely contrary to Professor Jarrell's testimony that Respondents' would need to pay at or above the ask and trade at the end of the trading day. It is consistent, however, with Professor Jarrell's finding that there is no U-shaped trading pattern for HCBC. Tr. at 1055-1057, 1127-1129 (Jarrell). This evidence further undermines Koch's assertion that Respondents could only obtain shares of HCBC by buying near the close of the markets on the last day of a month, quarter or year. Tr. at 895-896 (Koch).

C. The Division Has Presented Both Direct Evidence And Strong Circumstantial Evidence Of Respondents' Manipulative Intent With Respect To The CARV Trade

The Division has presented direct evidence of Respondents' scienter – including Division Trial Exhibit 191 – as well as extensive additional evidence from which the Court can infer that

Respondents had the requisite intent to manipulate the closing price of CARV on December 31, 2009. Div. SOF ¶¶ 103-110; Div. Br. at 52-56. Based on this evidence, none of which Respondents credibly refutes, the Court should find in the Division's favor on the Exchange Act Section 10(b) and Advisers Act Section 206(1) claims.

There is direct and compelling evidence of Koch's intent to manipulate the closing price of CARV on December 31, 2009:

- Christanell testified that he had a specific recollection that Koch told him he wanted a closing price for CARV of $9.05 on December 31, 2009. Tr. at 500-501, 509, 510-511. (Christanell).

- Koch's instructions on CARV were captured in a December 31 audio recording time-stamped 11:41 a.m. Central time. Div. Trial Exh. 191. On that call, Koch specifically asked Christanell for an update on the then-current price and trading volume of CARV. Christanell told him the bid-ask range ($8.10 to $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 instructed Christanell on what do that day with respect to CARV: **"What you do at the end of the day ... pop that one ... to $9.05 ... if you have to."** He did not put in an order for the full 2,000 shares; instead, the focus of Koch's instruction to Christanell was to "make a print" (i.e. get a closing price). 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).

Respondents contend that Division Trial Exh. 191 does not qualify as an order and does not reflect Koch giving Christanell a price for CARV. Resp. SOF ¶¶ 92-93; Resp. Br. at 8-11. To the contrary, immediately after learning that there were no shares traded that day – meaning there was a risk that Huntleigh's monthly account statements would price CARV at the bid (of $8.10) -- Koch tells him "what you do at the end of the day ... pop that one ... to $9.05 ... .if you have to." Div. SOF ¶ 104 (citing Div. Trial Exh. 191). The price is reflected on the audio recording. Christanell and Koch are speaking at the same time when the price is mentioned, with Christanell saying "five" while Koch says "to 9-0 ... if you have to." Div. Trial Exh. 191. The price is clearly discussed and is the then-current ask that Christanell had just provided to Koch.

At trial, Koch could not recall what he meant by "pop" but insisted he was not trying to give a signal to Christanell to get a closing price. Tr. at 905-906 (Koch). Koch's testimony on this point is not credible. The audio recording reflects that Christanell specifically asked Koch whether the purpose of the trade was to "get a print" and Koch responded "yeah," which Christanell understood to mean to try to get a closing price of $9.05. 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). Approximately 20 minutes after this call took place, Christanell entered an order into the Huntleigh system to purchase shares of CARV for $9.05, consistent with Koch's instruction, and he routed the trades to the street with less than minutes left until the close of the markets. Div. Trial Exh. 278 (CHEV 12/31/09 heading) at page 3, Rows 76-77, Columns F, H, I, L, Y.

Recognizing that Koch's instructions were captured on audiotape – making it difficult to deny the details – Respondents contend that the CARV trades should not be actionable because another buyer came in at the end of the day and this other buyer pushed out the trading volume to 300 and established the closing price of $9.05. Resp. SOF ¶¶ 97-101; Resp. Br. at 11, 35. The flaw in that response is two-fold: First, a marking the close scheme need not succeed for liability to attach under Exchange Act Section 10(b) and Advisers Act Section 206(1). See, e.g., GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 206 (3d Cir. 2001) ("proof of price movement is not necessary to establish a violation of 10(b)"). Second, the assertion that Respondents did not execute the final trade in CARV on December 31, 2009 is demonstrably wrong and is based on Professor Jarrell's erroneous interpretation of New York Stock Exchange Trade and Quote

("TAQ") data.[12] Professor Jarrell's presentation purports to summarize the underlying TAQ data, but, his summary omits crucial information contained in the underlying documents. It omits the Sales Condition Codes. Resp. Trial Exh. R039 at 36; Resp. Trial Exh. R046 (pending). Specifically, the entry which Professor Jarrell thought represented a purchase of 100 shares of CARV for $9.05 per share at 4:00:03 p.m. Eastern by someone other than Respondents is accompanied by sales condition code "M". Sales condition code "M" is defined as follows: "Market center close price (M) – Aggregated closing trades, informational only. Does not count as separate trade or volume. Does not update high or low." Div. Trial Exh. 340 at 21. Put differently, at 4:00:03 p.m., the market center publicized that the closing price of the day was $9.05; the entry relied on by Professor Jarrell and now Respondents is not a trade.

Based on the foregoing, the Court should find that the Division has demonstrated by a preponderance of the evidence that Respondents had the requisite intent to manipulate the closing price of CARV on December 31, 2009 and should be held liable under Exchange Act Section 10(b) and Advisers Act Section 206(1).

D. The Division Has Both Direct Evidence and Strong Circumstantial Evidence Of Respondents' Manipulative Intent With Respect To The CHEV Trade

The Division has presented substantial direct and circumstantial evidence from which the Court can infer that Respondents had the requisite intent to manipulate the closing price of CHEV on December 31, 2009. Div SOF ¶¶ 98-102; Div. Br. at 52-56. Based on this evidence,

[12] The Huntleigh trading database shows that, on December 31, 2009, at 3:58:36 p.m. Eastern, Christanell routed an order to purchase 200 shares of CARV to the street and, at 3:58:37 p.m. Eastern, he obtained a 100 share execution at $9.0475 per share and another 100 share execution at $9.05 per share. Div. Trial Exh. 278, at page 3, Rows 78-79, Columns F, L, O. Bloomberg and other public reports and the FINRA audit trail demonstrate that the 200 shares constituted the entire reported volume of CARV on December 31, 2009. Div. Trial Exhs. 260, 264, 275, 305; Tr. at 248-249 (Glascoe).

none of which Respondents credibly refutes, the Court should find in the Division's favor on the Exchange Act Section 10(b) and Advisers Act Section 206(1) claims.

There is direct and compelling evidence of Koch's intent to manipulate the closing price of CHEV on December 31, 2009:

- Christanell testified that he had a specific recollection that Koch told him he wanted a closing price for CHEV of $8 and $8.25 on December 31, 2009. Tr. at 500-501, 509 (Christanell).

- Koch's instructions on CHEV were captured in a December 31 audio recording time-stamped 11:41 a.m. Central time. Div. Trial Exh. 191. On that call, Koch specifically asked Christanell for an update on CHEV's trading spread. After Christanell told Koch the bid-ask range ($7.20 to $7.48), Koch then instructed Christanell on what do that day with respect to CHEV: **"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).

Whereas the Division contends that this tape is evidence of Koch asking Christanell to get a closing price for CHEV that is above $8 or $8.25 per share, Respondents contend all it shows is Koch suggesting a price that is $0.52 to $0.77 over the then bid price (they meant "ask"). Resp. Br. at 13. Christanell interpreted Koch's instruction to mean he should attempt to get a closing price in the $8 to $8.25 per share range and, as Respondents' admit, Christanell merely followed instructions. Moreover, the comment that it "should be pretty easy" (followed by laughter), makes no sense unless it refers to getting a closing price. Indeed, the first thing Koch asked when he Christanell gave him a verbal end-of the-day status report on CHEV was, "What's your final print?", which is consistent with a finding that Koch wanted to get a closing price. Div. SOF ¶ 102.

Recognizing that Koch's instructions were captured on audiotape – making it difficult to deny the details – Respondents default to the argument that the CHEV trades should not be actionable because the trades failed to establish the closing price. Resp. SOF ¶ 144-146; Resp. Br. at 14. However, as demonstrated previously, a respondent does not need to have succeeded in his efforts to manipulate the market in order to be held liable under Exchange Act 10(b) and Advisers Act Section 206(1).[13]

Respondents also contend that the HCBC, CHEV and CARV trades that were allocated to Tampsco on December 31, 2009 benefitted KAM's client Tampsco by putting idle funds to work in a valuable investment rather than leaving them in a brokerage sweep account with minimal return. Resp. SOF ¶ 147. However, they conveniently fail to tell the Court how long Tampsco had been sitting on these "idle funds" and fail to provide an explanation as to why these funds were invested on these particular dates as opposed to at other times throughout 2009. The HCBC, CHEV and CARV trades that were allocated to Tampsco on December 31 invested $113,479.13 of Tampsco's cash holdings.[14] But, Tampsco had $322,102.69 in cash available as

[13] Christanell strove hard to obtain a closing price for CHEV on December 31, 2009. The Huntleigh trading records show that his last execution before the close of markets occurred at 15:58:53 p.m. Eastern time (7 seconds before the close) and he had more executions after the close of markets starting at 16:00:09 p.m. Eastern Time (9 seconds after the close). Div. Br. at 31; Div. Trial Exh. 278 (CHEV 12/31/09 heading) at page 3, Rows 65, 68-70, Columns F, H, L, O. The fact that someone else was able to purchase a shares of CHEV and set the closing price that day simply means that there were numerous interested people in the market that day and the stock was more liquid. The fact that the person was able to acquire shares of CHEV for $7.39 per share when Christanell purchased shares at $7.99 before the close and $8 to $8.19 after the close supports a finding that Christanell had been given and was executing on orders to set an artificially high closing price for CHEV that day. It should also be noted that, while Respondents contend that Division Trial Exh. 278 does not reflect KAM's purchase of 667 shares of CHEV after the close on December 31, 2009 (Resp. SOF ¶ 132 n.22), they are wrong. All transactions are reflected in Division Trial Exhibit 278, including those that occurred after the markets closed. See Div. Trial Exh. 278 at page 3 (Rows 68-70, Column O).

[14] Div. Trial Exh. 160 at SEC-HUNTLEIGH 41600 (12/31/2009 monthly account statement for Tampsco Partnership II account 2009-4509 at Huntleigh) (binder is in account no. order).

of December 31, 2009.[15] Moreover, due to sales of stock in that account throughout 2009, the account had high cash balances throughout the year that could have been invested at any point.[16]

Based on the foregoing, the Court should find that the Division has demonstrated by a preponderance of the evidence that Respondents had the requisite intent to manipulate the closing price of CHEV on December 31, 2009 and should be held liable under Exchange Act Section 10(b) and Advisers Act Section 206(1).

E. The Division Has Also Presented Both Direct Evidence And Strong Circumstantial Evidence Of Respondents' Recklessness

Even if the Court were to conclude that the record does not support a finding that Respondents acted with actual intent to manipulate the closing price of HCBC on September 30, October 30, November 30, 2009, or CBC, CHEV and CARV on December 31, 2009, the Court can still conclude that the record supports a finding of recklessness.

It is Respondents' position that "Mr. Christanell did not understand Mr. Koch's investment philosophy or why Mr. Koch traded the way he did; Mr. Christanell simply knew

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[15] Div. Trial Exh. 160 at SEC-KOCH 4310 (12/31/2009 monthly account statement for Tampsco Partnership II account no. [redacted] at UMB Bank) (Tampsco's UMB account is the first non-Huntleigh account in the binder).

[16] Specifically, on the following dates in 2009, Respondents sold stock for the Tampsco account and added to the account's cash balances: (i) 5,000 shares of CFFN were sold on January 27, generating cash proceeds of $202,960; (ii) 13,000 shares of CNB were sold on June 26, 2009, generating cash proceeds of $7,625; (iii) 7,500 shares of TONE were sold on August 10, generating cash proceeds of $17,525.50; (iv) 10,000 shares of STSA were sold on August 11, generating cash proceeds of $31,003; (v) 2,000 shares of WSFB were sold on November 23 for proceeds of $3,949; (vi) 1,000 shares of WSFB were sold on November 25, generating proceeds of $1,925.70. Div. Trial Exh. 53 at SEC-HUNTLEIGH 3285, 3315, 3320, 3322, 3363, 3367 (see entries for Huntleigh Acct. No. [redacted] Not only did this account hold significant amounts of cash that could have been invested at any time prior to December 31, 2009, but also, at least with respect to CARV, the record shows there were significantly more shares of CARV available at $9.05 than what was purchased for this account. Moreover, as demonstrated, Koch did Tampsco no favors by choosing investing their cash at these prices, because HCBC and CHEV have rarely traded at prices this high since December 31, 2009 and CARV never again traded at those prices. Div. SOF ¶¶ 96, 109 Div. Trial Exh. 320.

what stocks Mr. Koch wanted and what his limits were" – he was "taking orders." Resp. Br. at 7; Tr. at 879, 902-903 (Koch). Koch could have mentored his new trader on how to trade these stocks in a non-manipulative fashion; instead, despite knowing Christanell was unfamiliar with Respondents' trading strategy for these stocks, Koch gave orders that were easily interpreted to mean "get a closing price." Thus, even if the Court determines that the record does not support a finding of actual intent, the Court can find that Koch was reckless.

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

The Division has met its burden of proof in establishing that Respondents' manipulation of the closing price of HCBC, CHEV and CARV violated Section 206(2) of the Advisers Act, which makes it unlawful for an investment adviser, directly or indirectly, "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." Div. Br. at 58-59.

Scienter is not required to establish a violation of Section 206(2) of the Advisers Act; negligence is sufficient. The Division needs only 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).

An investment adviser violates its fiduciary duty to its clients – and violates Advisers Act § 206(2) – when it engages in marking the close transactions in client accounts because such conduct misrepresents to clients the value of the securities in their accounts, it does not inform clients that the values that are reported to them are the result of manipulative influences, and it causes the accounts to pay excess account advisory fees. See, e.g., In the Matter of Schultz Investment Advisors, Inc. and Scott Schultz, Advisers Act Release No. 40-2740 (Dec. 28, 2005) (violations of Sections 206(1) and 206(2) of the Advisers Act where registered investment adviser marked the close of advisory accounts); In the Matter of Andrew Parlin, Advisers Act Release No. 40-1967 (Aug. 10, 2001) (same).[17]

The Division has demonstrated by a preponderance of the evidence that Respondents knowingly or recklessly marked the close in securities held in their clients' accounts and thereby breached their fiduciary duty by misleading their clients about the value of the portfolio holdings. Respondents also breached their fiduciary duty by obtaining excessive account advisory fees without disclosing that those fees were based on manipulated securities values. Div. Trial Exh. 311. Because Respondents, investment advisers for purposes of the Advisers Act, breached their fiduciary duty to their clients by failing to disclose material facts, this Court should find that they violated Section 206(2) of the Advisers Act.

III. Respondents Failed To Maintain Required Books And Records

The Division has satisfied its burden of proof in demonstrating that KAM, willfully aided and abetted by Koch, failed to maintain required books and records in violation of Advisers Act Section 204 and Rule 204-2(a)(7) thereunder. Div. Br. at 60-61. Specifically, pursuant to Rule 204-2(a)(7), Respondents were required to maintain all written communications sent to or received from the trader at Huntleigh concerning the placement or execution of orders to purchase securities. 17 C.F.R. § 275.204-2(a)(7). Division Trial Exhibits 148, 149, and 150 – which reflect Koch's September 30 email instruction to Christanell to "move last trade right before 3pm up to as near to $25 as possible without appearing manipulative," Christanell's acknowledgement of the instruction, and Christanell's subsequent confirmation of the executed

[17] An investment adviser also violates Advisers Act Section 206(2) when it fails to seek best execution of its clients' trades. See, e.g., Fleet Investment Advisors, Inc., Adviser Act Rel. No. 1821, 70 SEC Docket 1654, 1663 (Sept. 9, 1999).

trades – are exactly the kinds communications that KAM was required to maintain. Yet, these emails were produced to the Division by Huntleigh, not Respondents, because, for reasons that are highly suspect, Respondents did not maintain them.

Respondents point to nothing in the record that would explain why these emails were not maintained, albeit, given the incriminating nature of the emails and the reference to "manipulative," it is clear why they were not maintained. Respondents instead attempt to distract the Court from these emails by pointing to other, better-maintained records. Resp. Br. at 27-28, 45 (citing Heidtbrink testimony about trade confirmations, the trade log, trade allocation sheets, monthly statements, and other documents). Respondents also note that, even if they have failed to maintain all documents required by the Advisers Act, they did maintain and produce other emails that were admitted into evidence in support of the Division's claims. Resp. Br. at 28, 46-47 (noting, for example, that Respondents produced Div. Trial Exh. 186 which contains Respondents' instruction to get a closing price in HCBC above $20 per share on December 31, 2009).

Respondents' arguments miss the point. The Advisers Act requires the maintenance of particular records; not just some of those records. The fact that the emails were not maintained is all that is needed to demonstrate the violation.[18]

Accordingly, Heidtbrink's testimony concerning the maintenance of trade confirmations, trade logs, trade allocations sheets, account opening documents, and the like, Tr. at 684-89, 695-712 (Heidtbrink), is simply irrelevant. Nothing in her testimony describes a system for maintaining required records like the communications with traders about orders and executions

[18] Given the content of the emails, however, the fact that they were not maintained should bear on the Court's analysis of scienter and to the appropriateness of the Division's requested remedies.

that the Division alleges Respondents' failed to maintain here. Indeed, Heidtbrink testified that she typically would not receive copies of communications between Respondents and traders related to orders, Tr. at 707 (Heidtbrink), which are just the type of documents the Division has shown Respondents failed to maintain.

Schneider's testimony about Respondents' use of the Market Manager Plus system and KPMG's forensic analysis of Respondents' files, Tr. at 1004-09 (Schneider), is similarly irrelevant to the Division's books and records claim. Schneider's efforts were limited to a reconciliation of client account statements to Huntleigh brokerage statements and to a forensic analysis of at least some of Respondents' data storage devices.[19] Id. Schneider offered no testimony demonstrating that Respondents maintained the records the Division alleges they failed to maintain. Because neither Heidtbrink nor Schneider offered any testimony about the records actually at issue in this case, their testimony is irrelevant to the Division's claims that Respondents' failed to maintain required books and records. In fact, the testimony appears to be an effort to distract this Court from Respondents' demonstrated failure to maintain required records by showing that records not at issue were maintained.[20]

Respondents' failure to maintain these required records is particularly egregious for two additional related reasons. First, the emails are direct evidence of Respondents' intent to mark

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[19] Moreover, Schneider did not conduct his forensic analysis until late December 2011, Exh. R36 at 59, just before the hearing in this matter, but the Division had requested the emails in March 2010 and subpoenaed them in June of that year. Tr. at 712-13 (Heidtbrink).

[20] Similarly distracting and irrelevant are both the fact of Schneider's forensic search and the results of that search. See Resp. Br. at 27-28, 46. The Advisers Act contemplates that Respondents will create and maintain required records and make them available to the Division in response to a request on a timely basis. See 15 U.S.C. § 80b-4. Recovery and production via forensic examination during litigation (or, here, at trial) is not consistent with the Advisers Act's requirement that such records be available for inspection at any time. Moreover, the fact that Respondents' claim to have produced every document available to them only underscores their failure to comply with the requirements of the Advisers Act.

the close of HCBC securities on September 30, 2009. Second, Heidtbrink, Respondents' assistant, was copied on two of these emails – Div. Trial Exhs. 148 and 150 – yet neither she nor Koch maintained copies.[21] Moreover, and even more egregious is the fact that someone printed out the version of Division Trial Exhibit 150 that went to Heidtbrink, redacted the incriminating instruction about the September 30 trade in HCBC, and produced the redacted version to the Division. Compare Div. Trial Exh. 151 (redacted version from Huntleigh) with Div. Trial Exh. 150 (original version from Huntleigh).[22]

In sum, it is clear that the versions of the email string contained in Exhibits 148, 149, and 150 were not maintained; indeed, Respondents' expert could not even locate them through "forensic recovery." Instead, Respondents produced a version of the document that contains handwriting, indicating it was produced from a hard copy file, and that deletes the incriminating text. See Div. Trial Exh.151. Thus, not only did Respondents fail to maintain required books and records; it appears that they deliberately destroyed such records because the records evidenced their efforts to mark the close.

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[21] Respondents falsely claim that the email reflected in Division Trial Exhibit 150 was not copied to Heidtbrink. Resp. Br. at 46. The email is clearly copied to "Fay (E-mail) <fayh@juno.com>". The email reflected in Division Trial Exhibit 148 also clearly copies Heidtbrink at fayh@juno.com. Accordingly, Respondents' argument that Heidtbrink, as well as Koch, did not receive Division Trial Exhibits 148 and 150 in their entirety is baseless. Indeed, Respondents' failure to produce these two exhibits, despite the fact that they were sent to two people at KAM, further supports the conclusion that these documents were deliberately destroyed.

[22] In addition to being incredible, Respondents' claim that Division Trial Exhibit 151 was not redacted, Resp. Br. at 46, is irrelevant to their liability for failing to maintain required records. The legal violation arises solely from Respondents' failure to maintain required documents, not whether Respondents altered the documents they did produce – though it appears here that they did. In this context, the apparent destruction of incriminating information helps inform as to why these required communications were not maintained.

IV. Respondents Failed To Implement Required Policies And Procedures

The Division has met its burden of proving that KAM, willfully aided and abetted by Koch, violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder by failing to implement policies and procedures to prevent violation of the Advisers Act and the rules adopted thereunder. In particular, though Respondents adopted a policy explicitly prohibiting marking the close transactions like those alleged in the OIP, Div. Trial Exh. 279 at SEC-KOCH0007148 ("No Access Person 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 … [e]ngage in any transactions intended to raise, lower, or maintain the price of any Security or to create a false appearances of active trading."), Respondents relied solely on Koch to comply with this policy. Respondents did not implement any procedures that would prohibit KAM's violations in the event that, as the evidence demonstrates occurred here, Koch decided to take actions that violated not only KAM's policies but also the Exchange Act and the Advisers Act.

Instead of implementing their policy, Respondents now argue that their failure should be excused because (i) KAM is a small firm that nonetheless drafted its own policies, (ii) they designated Koch as KAM's Chief Compliance Officer ("CCO"), and (iii) they provided investors with transparency into KAM's operations such that KAM's advisory clients therefore had the ability to raise any issues directly with Respondents. Resp. Br. at 48. Respondents' arguments seek to distract this Court from their implementation failure by making a series of irrelevant points.

First, Respondents' drafting of their own policies has no bearing on whether those policies were actually implemented.[23] The Division has never alleged that KAM failed to draft adequate policies. Rather, once those policies were drafted, Respondents did nothing to implement those policies that prohibit precisely the kinds of manipulative trades the Division has proven happened here. Indeed, the fact that KAM and Koch engaged in transactions prohibited by their own policies underscores their failure in implementing those policies.

Respondents' second argument, that they designated Koch as CCO equally misses the point. As an initial matter, an investment adviser is required to designate a CCO in order to register with the Commission. 17 C.F.R. § 275.206(4)-7(c). Thus, KAM's designation of Koch is merely the minimal compliance required by law. Moreover, simple designation of a CCO does nothing to implement policies adopted by the investment adviser. That is particularly true here where Koch, as CCO, was effectively required to police himself because he was also making KAM's trading and business decisions.[24]

Lastly, Respondents' argue that their failure to implement required policies is excused by the purported transparency of Respondents' conduct to their clients. In effect, Respondents

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[23] Respondents cite to a proposed rule for the general proposition that smaller firms will typically have less complex compliance procedures. Resp. Br. at 48. Respondents' argument does not respond to the Division's claim. The Division alleged and has proven that Respondents failed to implement their policies; the Division never alleged that the policies were insufficiently complex. More fundamentally, the proposed rule Respondents cite was intended to address the need for advisers to adopt and implement policies and procedures to prevent violations of the securities laws. See In re Compliance Programs of Investment Companies and Investment Advisers, Advisers Act Rel. No. 2107, 79 S.E.C. Docket 1696, at *3 (Feb. 5, 2003). The rule, ultimately adopted as Advisers Act Rule 206(4)-7, 17 C.F.R. § 275.206(4)-7, is precisely the same rule Respondents' failure to implement procedures violated here.

[24] The Commission has recognized the potential conflicts where an individual is required to police himself. For example, Rule 193 of the Commission's Rules of Practice that governs readmission for barred individuals, notes, among other things, that "where an applicant wishes to become the sole proprietor of a registered entity and thus is seeking Commission consent notwithstanding an absence of supervision, the applicant's burden will be difficult to meet." 17 C.F.R. § 201.193.

argue that they need not implement policies to ensure compliance because, if their clients saw a problem, they could raise the issue with Respondents. Shifting the burden of compliance to clients through a policy of *caveat emptor* is completely antithetical to the fiduciary duty imposed on an investment adviser. Respondents, not their clients, had the responsibility for ensuring that they implemented policies to comply with the Advisers Act. The evidence here is clear that they did not implement such policies as required by the Act; otherwise they would not have executed trades explicitly prohibited by those policies. No disclosure or alleged transparency absolves them of this failure to implement their policies.

V. The Division Seeks Appropriate Relief

The Division has demonstrated that the remedies requested (cease-and-desist orders, censure, disgorgement, civil penalties, and an industry bar) are within the Court's authority and are appropriate here because Respondents have willfully and repeatedly violated multiple antifraud provisions of the federal securities laws and created the potential for substantial losses for their investors and others in the market.

1. Cease-And-Desist Orders Against KAM And An Industry Bar Against Koch Are Justified And Necessary

Respondents argue that a cease-and-desist order and industry bars are inappropriate because KAM and Koch are no longer in the securities industry. Resp. Br. at 49 n. 32. Respondents' claim that they are no longer and unlikely to again be in the securities industry is not credible. Indeed, even if it can be believed that Koch is "retired,"[25] he has made clear that he has only withdrawn from the industry as a result of this proceeding. See, e.g., Div. Trial Exh. 253-4 (IAR Report) at 10 ("It's time to retire when SEC computers do not understand market

[25] Koch's claims of retirement are particularly incredible because he specifically testified that he still manages money for at least one KAM client, John McFarland. Tr. at 806-08 (Koch) ("I still manage for John, I managed his IRA at a partnership...." and "I still manage his personal account.")

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.").[26] In fact, KAM remains registered with the Commission to this day, and Koch continues to be associated with KAM, and, absent a bar, Koch could potentially register with state securities regulators following resolution of this case.[27] Tr. at 786-87. Koch should not be rewarded for his recent, strategic decision to "leave" the industry while the Division's action was pending by avoiding remedial sanctions. Koch waited to file his IAR Report until October 2011, Div. Trial Exh. 253-4, nearly six months after this action was initiated and shortly before the stay in this matter was lifted and a hearing date set. Given these facts, it seems clear that Koch's retirement was simply a strategic maneuver to seek to avoid a bar or cease-and-desist order rather than a genuine withdrawal from the industry.

The Division has shown through the evidence in this case that Koch has violated the securities laws in ways that harm the market as a whole and his investor clients specifically. Koch's substantial experience in the securities industry and the possibility that he will return to that industry further support the necessity of an industry bar. Cf. SEC v. Perez, No. 09-CV-21977, 2011 WL 5597331, at *5 (S.D. Fla. Nov. 17, 2011) (quoting SEC v. Gunn, Civil Action No. 3:08-CV-1013-G, 2010 WL 3359465, at *7 (N.D. Tex. Aug. 25, 2010) for the proposition that "[i]t is well settled that a defendant who works as a securities professional is a defendant who practices an occupation that is likely to present him with the opportunity to commit future

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[26] Koch's updated Investment Adviser Representative Disclosure in which he purports to have retired has no effect on KAM's current registration with the Commission or on Koch's association with KAM. The Investment Adviser Representative Disclosure is not a Commission registration requirement.

[27] Respondents make no argument that KAM should not be censured for its conduct. Such a censure is appropriate here where KAM repeatedly violated the antifraud provisions of the securities laws. See 15 U.S.C. §§ 80b-3(e); see also Div. Br. at 64.

violations of the securities laws" and distinguishing such an individual from the real estate professional defendant in Perez).

A bar is also appropriate to deter future misconduct in the investment adviser industry. In determining appropriate sanctions, the Court should assess the deterrent effect a particular sanction will have in upholding the standards of conduct in the securities industry. See, e.g., In the Matter of Schield Mgmt. Co., 87 S.E.C. Docket 695, 2006 WL 231642, at * 11 (Jan. 31, 2006) (recognizing the need to deter other potential violators). Because of the egregiousness of Respondents' conduct, the potential for additional violations, and the need to deter violations by other investment advisers, both the bar and cease-and-desist orders sought by the Division are appropriate and necessary relief.

2. Disgorgement Of The Excess Management Fees Obtained By KAM Is Proper

Respondents do not argue that the Court cannot or should not order disgorgement if the Court finds Respondents liable; they argue only that such disgorgement would be *de minimis*. Resp. Br. at 49 n.32. Regardless of the amount of disgorgement, it should be ordered and should be paid. In its proposed finding of facts and opening brief, the Division described its calculation of disgorgement based on multiplying the number of shares held in accounts charged management fees times the price inflation resulting from Respondents' trading times Respondents' quarterly asset management fee. Div. SOF ¶¶ 66-67, 115-18; Div. Br. at 64-66. Applying that calculation, the Division calculated the appropriate disgorgement of $4,288.08. As explained in the Division's opening brief, such disgorgement is necessary to deprive Respondents of their unjust enrichment as a result of their wrongdoing and to deter future violations by others. Div. Br. at 64-66.

Though Respondents contend disgorgement is not appropriate, in Appendix A, Part III, of their post-hearing papers, Respondents purport to apply the Division's methodology and determine that the excessive fees due to Respondents' manipulative scheme less waived fees is $4,169.78.[28] Both the Division and Respondents excluded Koch family accounts from their disgorgement calculations submitted to the Court. See Div. Br. at 66 n.10. The difference between Respondents' calculation and the Division's calculation appears to result from the fact that Respondents' calculation excludes waived fees while the Division's calculation does not. In any event, disgorgement "need only be a reasonable approximation of profits causally connected to the violation." SEC v. First City Fin. Corp., Ltd., 890 F.2d 1215, 1231 (D.C. Cir. 1989). Here, Respondents' and the Division's calculations are almost identical. Use of either calculation, plus prejudgment interest, would appear to be adequate to meet the standard for calculating disgorgement. Applying the prejudgment interest calculation to the Division's calculated disgorgement of $4,288.08 results in prejudgment interest of $355.13, for a disgorgement and prejudgment interest total of $4,643.21. See Attachment A, Prejudgment Interest Calculation on Division's Disgorgement Calculation. Applying the prejudgment interest calculation to Respondents' calculated disgorgement of $4,169.78 results in prejudgment interest of $345.33, for a disgorgement and prejudgment interest total of $4,515.11. See Attachment B, Prejudgment Interest Calculation on Respondents' Disgorgement Calculation.

[28] Respondents' witness Schneider calculated an increase in advisory fees of approximately $257. Exh. R36 at 72. Schneider's analysis is fundamentally flawed because it only calculates disgorgement for three accounts whereas Respondents' manipulative schemed increased fees for all accounts that held the subject securities and paid advisory fees. Div. Br. at 66 n.11.

3. Respondents' Egregious And Repetitive Misconduct Created Substantial Risk of Loss To Their Clients And Others And Warrants Third-Tier Penalties

The Division has also shown that imposition of third-tier penalties against both KAM and Koch pursuant to Section 203(i) of the Advisers Act, 15 U.S.C. § 80b-3(i), is appropriate. Respondents engaged in conduct involving fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement, and their conduct led to the risk of substantial losses to other persons sufficient to justify the imposition of third-tier penalties. See 15 U.S.C. § 80b-3(i)(2); Div. Br. at 66-69. In particular, for four consecutive months Respondents deliberately misled their advisory clients about a fact of fundamental importance to KAM's clients, the value of the securities in their accounts, causing those accounts, in the aggregate, to be overvalued by millions of dollars. Div. SOF ¶¶ 66, 76, 87, 115, and 116.[29] This overvaluation created the potential for substantial losses to Respondents' clients because advisory clients purchased shares of HCBC and CARV at prices far above the prices at which those securities typically trade. Div. Br. at 66-68. As demonstrated at trial, Respondents purchases on the days on which they marked the close were at prices far above the high prices at which the securities they purchased traded in subsequent years:[30]

- On September 30, 2009, Respondents purchased HCBC at a high price of $23.99 per share. From September 30, 2009 through January 3, 2012, HCBC never again traded at a price that high. Div. Trial Exhs. 316, 320.

[29] The Division's charts showing the amount by which all KAM accounts were inflated are intended to demonstrate that inflation in the aggregate, as signaled by the column heading "Total Increase." With the minor exception of a purported $460 error, Respondents do not contest that the total inflation calculated for all KAM accounts is approximately $3.6 million, made up of approximately $2.7 million in inflation of client accounts and $895,000 in inflation of Koch family accounts. Resp. Br. App. A, Part I.

[30] Respondents' inaccurately claim that the Division compared intra-day high prices with closing prices. Resp. Br. at 17 n.14. In fact, Division Trial Exhibit 320 compares the high price at which Respondents purchased on each allegation day with the subsequent high trading prices in the security after that date.

- On October 30, 2009, Respondents bought HCBC at a high price of $19.75 per share. From October 30, 2009 through January 3, 2012, HCBC traded above that price (at $20 per share) on only a handful of days. Div. Trial Exhs. 316, 320.

- On November 30, 2009, Respondents bought HCBC at a high price of $17.49 per share. From November 30, 2009 through January 3, 2012, HCBC traded above that price on only approximately one-third of the days on which it traded. Div. Trial Exhs. 316, 320.

- On December 31, 2009, Respondents bought HCBC at a high price of $19.50 per share. From December 31, 2009 through January 3, 2012, HCBC traded above that price (at $20 per share) on only a handful of days. Div. Trial Exhs. 316, 320.

- On December 31, 2009, Respondents bought CARV at a high price of $9.05 per share. From December 31, 2009 through October 31, 2011, CARV only traded that high again on one day in April 2010. By October 2011, CARV's price had dropped precipitously; it was trading at less than $0.50 per share, or barely 5% of the price Respondents paid for the stock on December 31, 2009. Div. Trial Exhs. 317, 320.

Respondents also caused the entire market to be misled concerning the value of the securities that they manipulated through their fraudulent scheme. If Respondents had not traded on the days where their trades made up 100% of the markets volume, no new information about the stock price would have been reported to the market, and if Respondents had traded in a non-manipulative way, lower prices would have been reported to the market. Finally, Respondents' conduct was also ongoing and repetitive; Respondents engaged in identical conduct for four consecutive months and only halted that conduct when regulators began questioning suspicious trades. Div. SOF ¶¶ 50-51, 125-32; Div. Br. at 66-69.

Respondents' only argument against the imposition of third-tier penalties is that such penalties are disproportionate to the excessive fees obtained through Respondents' scheme.

Resp. Br. at 49 n.32. Respondents provide no support for their assertion. In fact, as described above, the standard permits the imposition of third-tier penalties under the facts proven here.

CONCLUSION

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

(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 Court deems appropriate.

Dated: March 8, 2012

Respectfully submitted,

S/ Romajas

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U.S. Securities and Exchange Commission

Division of Enforcement

Prejudgment Interest Report

Koch Asset Management -- Division's Disgorgement Calculation

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$4,288.08
01/01/2010-03/31/2010	4%	0.99%	$42.29	$4,330.37
04/01/2010-06/30/2010	4%	1%	$43.19	$4,373.56
07/01/2010-09/30/2010	4%	1.01%	$44.10	$4,417.66
10/01/2010-12/31/2010	4%	1.01%	$44.54	$4,462.20
01/01/2011-03/31/2011	3%	0.74%	$33.01	$4,495.21
04/01/2011-06/30/2011	4%	1%	$44.83	$4,540.04
07/01/2011-09/30/2011	4%	1.01%	$45.77	$4,585.81
10/01/2011-12/31/2011	3%	0.76%	$34.68	$4,620.49
01/01/2012-02/29/2012	3%	0.49%	$22.72	$4,643.21

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
01/01/2010-02/29/2012	**$355.13**	**$4,643.21**

U.S. Securities and Exchange Commission

Division of Enforcement

Prejudgment Interest Report

Koch Asset Management -- Respondents' Disgorgement Calculation

Quarter Range	Annual Rate	Period Rate	Quarter Interest	Principal+Interest
Violation Amount				$4,169.78
01/01/2010-03/31/2010	4%	0.99%	$41.13	$4,210.91
04/01/2010-06/30/2010	4%	1%	$41.99	$4,252.90
07/01/2010-09/30/2010	4%	1.01%	$42.88	$4,295.78
10/01/2010-12/31/2010	4%	1.01%	$43.31	$4,339.09
01/01/2011-03/31/2011	3%	0.74%	$32.10	$4,371.19
04/01/2011-06/30/2011	4%	1%	$43.59	$4,414.78
07/01/2011-09/30/2011	4%	1.01%	$44.51	$4,459.29
10/01/2011-12/31/2011	3%	0.76%	$33.72	$4,493.01
01/01/2012-02/29/2012	3%	0.49%	$22.10	$4,515.11

Prejudgment Violation Range	Quarter Interest Total	Prejudgment Total
01/01/2010-02/29/2012	**$345.33**	**$4,515.11**