**ADMINISTRATIVE PROCEEDING**
**FILE NO. 3-14355**
**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

| | |
|---|---|
| **In the Matter of** | : |
| | : |
| **DONALD L. KOCH AND** | : |
| **KOCH ASSET MANAGEMENT, LLC** | : |
| | : |
| | : |

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## SURREPLY BRIEF OF RESPONDENTS' DONALD L. KOCH AND KOCH ASSET MANAGEMENT LLC [1]

The Division's claim that Donald Koch and KAM set the closing price for CARV on December 31, 2009 is a misguided effort to finally prove one element of the OIP after having failed to establish its other key points. Again, however, the Division's efforts fail. Whether viewed in the context of recently admitted Exhibit 340, proffered but not admitted Exhibit R46, or both exhibits and Respondents' proffered Exhibits R47, R48, R49, the evidence clearly demonstrates that KAM did not set the closing price for CARV on December 31, 2009 as alleged in the OIP.

First, the Division's claim that Exhibit 340, a 2008 TAQ Manual from the New York Stock Exchange, supports its claim is without foundation. While the Division cites sales condition "M" from the Manual for the proposition that the trade Professor Gregg Jarrell testified set the closing price for CARV on December 31, 2009 does not count,[2]

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1 This Surreply is filed in accord with the Court's order of March 7, 2012.

2 *See* Division of Enforcement's Post-Hearing Reply Brief, dated March 8, 2012 ("Reply"), at 23-24. The last trade which set the market close price was at 16:00:03 according to Professor Jarrell by someone other than KAM. Exh. R039 at 36.

there is no evidence linking that definition to anything else in the record let alone to that transaction. Thus, Professor Jarrell's testimony that the CARV closing price was set by a trade at 16:00:03 by someone other than KAM stands undisputed. Tr. at 1174 (Jarrell); Exh. R039 at 36.

Equally baseless is the Division's contention that Exhibit 340 plus Exhibit R46, a chart from Professor Jarrell's work papers, prove the allegation in the OIP that KAM set the closing price for CARV on December 31, 2009. This supposition tries in vain to link the Division's four-year-old 2008 version of the TAQ Manual to data drawn by Professor Jarrell from the Exchange in late 2011 to somehow establish that the 16:00:03 trade with the sales condition code "M" on the work paper could not have set the closing price. Again the claim is not supported by the record. There is no evidence in the record establishing that a 2008 Manual applies to data from late 2011.

The fallacy of the Division's contention is demonstrated by the fact that it makes no sense. If the 2008 definition is applied to Professor Jarrell's work paper from 2011 it would mean that two separate trades of CARV shares at two separate times [3] for some reason "do not count" – the transactions should simply be discarded without explanation. While the Division has tried to suggest that they duplicate earlier trades, that speculative supposition is completely undercut by the fact that the last two trades were made at times which differ from the last KAM transaction.[4] Thus they could not be the same transactions.

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3 A transaction of 3 shares at 16:00:00 and another of 100 shares at 16:00:03. The earlier trade involving 3 shares was at 9:30:00. Exh. R039 at 36.

4 The last KAM purchase was at 15:58:37, almost two and one half minutes earlier. Exh. R039 at 36.

By contrast, the NYSE Technologies website[5] provides a contemporaneous 2012 TAQ definition of "M." It states that code "M" means "NASDAQ Official Closing Price." This demonstrates not only that a trade coded "M" denotes the exchange closing price but also that the definitions of TAQ codes changes over time. *See* Appendix A. The Division ignores both facts in its zeal to try and prove a point. Yet the current version of TAQ code dictates that the 16:00:03 non-KAM trade coded "M" was the last trade of the day on December 31, 2009 and that it set the closing price. Tr. at 1174 (Jarrell); Exh. R039 at 36.

Third, if the issue is viewed in the context of all of the potential evidence and not just the snippets selected by the Division, it is beyond dispute that its claim not only lacks evidentiary support, but it is simply wrong.

- Exhibit R47 is an email from the NYSE Euronext Service Desk which attaches the December 2011 version of the TAQ Manual.
- Exhibit R47 also incorporates the web link to the 2012 version of the TAQ Manual.
- The 2011 and 2012 TAQ Manuals define sale condition code "M" as "Market Center Close Price."
- The definition of "M" in each current TAQ Manual is the same as that provided by the 2012 NYSE Technologies website quoted above. Exh. R47; Exh. R48.
- Exhibit R49 is an email from the NYSE Euronext Service Desk explaining that its Level 2 Market Data team reported, in response to a question about whether a trade coded "M" could set a closing price, that "[t]he definitive answer from development is that M should be treated as a real trade providing the sequence

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[5] Appendix A is the same document that Respondents submitted for admission as Exhibit R48. Being a screenshot for a website, it is self-authenticating and, as the Division has pointed out, the Court may take judicial notice of such materials. Division of Enforcement's Proposed Findings of Fact and Post-Hearing Brief, dated February 13, 2012 ("Division Brief"), at 11 n.1

numbers are different. If the sequence number is the same then it is the final last sale eligible trade." Exh. R49 at 1.

- Exhibit R49, at 3, provides a chart showing that the 100-share trade in CARV at $9.05 at 16:00:03 has a different sequence number than any of the other last-trade candidates. As the NYSE Euronext Service Desk explained, that different sequence number meant that "*'M' is the market center closing price.*"[6] Exh. R49 at 3 (emphasis added).

The totality of the evidence thus establishes that Professor Jarrell's testimony is correct: KAM did not set the CARV closing price on December 31, 2009. The current versions of the TAQ Manuals, the TAQ website and the NYSE Euronext Service Desk confirm that the 100-share 16:00:03 trade is a different transaction from the earlier KAM purchase and that it set the market closing price. It is for this reason that Professor Jarrell testified that KAM did not set the CARV closing price on December 31, 2009. It is for this reason that Professor Jarrell testified that he and his colleagues "checked carefully the record on this and the actual trade that set the close was the 100 shares [at 16:00:03]." Tr. at 1174 (Jarrell).

Finally, an examination of the record here demonstrates that the Division's incorrect claims about CARV and the closing price on December 31st mirrors its entire case. The OIP issued by the Commission, based on the Division's allegations, defines

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6 Exhibit R49 also demonstrates that it is possible to have different closing prices from different exchanges. Specifically, the NYSE Euronext Service Desk says that "[t]he 'M' is the market center closing price, since both of these securities trade on Arca and Nasdaq you will see two market center closing pricing." Exh. R49 at 3. This is in keeping with Professor Jarrell's testimony that "the two choices for closing prices would be 8.68 and 9.05." Tr. at 1174 (Jarrell). Neither is a KAM purchase. Exh. R039 at 36.

what must be established to prove the mark-the-close claim here.[7] Under the OIP the claim centers on the creation of an artificial price in the marketplace for HCBC stock on four dates and for CHEV and CARV for one date. Artificial prices are ones which are, by definition, false, that is, they are not the product of the market forces of supply and demand. *See US v. Stein*, 456 F.2d 844, 850 (2d Cir. 1972) (activity in stock was a "'mirage' rather than the 'reflection of a true demand'" and therefore ran afoul of securities laws) (citing Senate Comm. on Banking & Currency, Stock Exchange Practices, S. Rep. No. 1455, 73d Cong. 2d Sess. 54 (1934)); *cf. U.S. v. Radley*, 659, 814-15 (S.D. Tex. 2009) (assessing whether, under the Commodities Exchange Act, a price was artificial based on whether it was born of anything other than the "legitimate forces of supply and demand" and finding that no artificial price had been alleged). Rather, artificial prices are the creation of acts other than normal market forces, here, under the OIP, by establishing a fictitious closing price driven by a motive to manipulate and a lack of an investment purpose.[8]

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7 *See* Commission's Rules of Practice, Rule 200(b)(1)-(3) (The order . . . shall (3) contain a short and plain statement of the matters of fact and law to be considered and *determined* . . .")(emphasis added).

8 The definition of mark the close in the OIP is consistent with the case law. *See SEC v. Schiffer*, 1998 WL 226101, at *1 n.3 (S.D.N.Y. May 5, 1998) ("'Marking-the-close' is the practice of repeatedly executing the last transaction of the day in a security in order to affect its closing price."); *In the Matter of Bowen*, Release No. 41, 55 S.E.C. Docket 1711, 1993 WL 518667, at *8 (Dec. 8, 1993) ("Moving the last sale transaction to the ask side of the market to set the closing price is referred to as marking the close."). At their core all of these cases – including those cited by the Division – are based on a finding of an artificial price, that is, one which deceives investors. It is the artificial price which supplies the key element of deception required for a fraud claim. *See In the Matter of Graham*, Release No. 83, 60 S.E.C. Docket 2707, 1995 WL 769011, at *13 (Dec. 28, 1995) (pattern of marking the closing "injected into the marketplace an artificial price for [the at-issue stock], thus operating as a fraud or deceit on the investing public"). Indeed, the Division

Here it is beyond dispute that the Division has failed to prove an artificial price or any deception as required by the OIP and the applicable cases.[9] Respondents' Proposed Findings detail for each purchase of HCBC, CHEV and CARV the evidence which demonstrates that the purchase price paid represents the best execution in the marketplace at the time of the transaction. Stated differently, the KAM purchase in each instance is the product of natural market forces at work, a function of supply and demand. This evidence came not just from Mr. Koch and KAM, not just from Professor Jarrell and not just from Mr. Schneider, but from the Division's key witness – Mr. Christanell. Since the purchase prices are the product of market forces they are by the definition used in the OIP and every case cited by the Division, NOT artificial.[10] It is telling that in its Reply, the Division does not challenge or even mention this fact or any of the supporting evidence. This failure is nothing short of a tacit admission by the Division that it has failed to prove the key artificial price element it reported to the Commission to initiate this proceeding as reflected in the OIP.

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acknowledges this in its Reply. Reply at 4 ("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 price level and the demand for it* . . ." ) (emphasis added).

9 *See* n.8, *supra*.

10 *See Stein*, 456 F.2d at 850; *Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999) ("The gravamen of manipulation is deception of investors into believing that prices at which they purchase and sell securities are determined by the natural interplay of supply and demand, not rigged by manipulators."); *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1360 (N.D. Tex. 1979) ("To state a claim for manipulation under Section 10(b), the plaintiff must at the very least complain of conduct that interferes with the proper functioning of the market.") (interpreting *Santa Fe Inds., Inc. v. Green*, 430 U.S. 462, 97 S.Ct. 1292 (1977).

The Division's default to an argument predicated on an incorrect reading of bits of evidence does not salvage or excuse its failure of proof.[11] Over and over the Division misreads the very evidence it claims supports its position. For example, the Division repeatedly quotes Exhibit 191, one of the Huntleigh tape fragments, claiming that Mr. Koch said "What you do at the end of the day [referring to CARV] . . . pop that one . . . to **$9.05**." Reply at 22; Division Br., ¶ 104; Division Br. at 55 (emphasis added). However, whether the conversation includes the reference to the $9.05 price at this point is at best unclear. On the tape Mr. Koch and Mr. Christanell talk over each other, which the Division does not include in its transcription. On the tape there is no clear, definitive

[11] The Division's efforts to alleviate its burden of proof are not aided by misstating Respondents' position and the law. The Division asserts that Respondents have entirely misstated the scienter standard and that it does not apply in Commission proceedings. Reply at 5-7. Yet Respondents drew their scienter standard from an decision in an SEC enforcement action, *SEC v. Czarnik*, 2010 WL 4860678, at *6 (S.D.N.Y. Nov. 29, 2010). Respondents' Post-Hearing Memorandum of Law, dated February 29, 2012 ("Memo of Law"), at 30-31; Respondents' Proposed Findings of Fact and Conclusions of Law, dated February 29, 2012 ("Proposed Findings"), ¶ 282. The Division's claims about the PSLRA are nothing but misdirection.

Equally unavailing to its position is the Division's effort to twist Respondents' statement that the claimed motive for fraud is immaterial into something else. Reply at 10-11. Respondents' point is clear and beyond dispute. In their Proposed Findings and Memo of Law, Respondents demonstrate that the motive element alleged in the OIP – to enhance the value of client portfolios – has not been established because the impact on each client statement was, if anything, immaterial. As Respondents explained, this is not evident from reviewing Exhibit 310 because that exhibit only shows the amount of increase in the price of the three securities claimed by the Division. The question ignored by the Division is what each KAM client would see as a result of the claimed manipulation. Stated differently, when a KAM client got his or her monthly statement from the brokerage firm, would the increase in price claimed by the Division for HCBC in four months and/or CHEV and CARV for one month have an impact such that it constituted a motive for fraud? The answer is no because even assuming *arguendo* that the Division's calculations are correct, the change each client would have seen on his or her brokerage statement is so small as to not be of any consequence. *See* Respondents' Memo of Law at 40; Respondents' Proposed Findings, ¶ 109.

reference in this segment of the conversation to "$9.05" as repeatedly claimed by the Division. Rather, the best transcription of the passage is that the reference to price is not present.[12]

Likewise, the Division's contention that the September and December e-mails from Mr. Koch to Mr. Christanell support its claim is based on assumptions, not the text of the documents. For example, Exhibit 12 states that at 2:43 in the afternoon after KAM had made several small purchases, Mr. Koch said:

> Good. Move last trade right before 3pm up to as near to $25 as possible without appearing manipulative.

The Division claims that this e-mail, and a similar one on December 28, 2009, prove that Mr. Koch intended to establish a closing price *on the exchange* at or near $25. Yet the phrase "on the exchange" is not in the text of the e-mail. It is perhaps for this reason that the Division defaults to an incorrect claim that "Koch offered no credible explanation for the e-mail." Reply at 12. To the contrary, the evidence demonstrates that:

- Mr. Koch denied any intent to mark the close on any date. Tr. at 893 (Koch).
- Mr. Koch testified that the point of stating "don't appear to be manipulative" was to caution Mr. Christanell not to disturb the market by using large orders like the institutional trader Mr. Koch knew Mr. Christanell to be since it could drive the price up – that is, "don't be the elephant in the room." Tr. at 879 (Koch).
- Mr. Koch testified that the price reference was to the limit price since he thought at this point that he could obtain a block of stock in accord with KAM's long established investment policy.[13] Tr. at 876 (Koch) ("[A]ll I'm saying here is I know I can't get the stock unless I'm paying 20, if I want to get size.").

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[12] Attached as Appendix B is a notarized transcript of Exhibit 191, sworn to on January 9, 2012. The relevant portion of the transcript makes no mention of Mr. Koch asking Mr. Christanell to push the CARV price to "9.05." Appendix B at 3.

[13] The Division's misinterpretation of these emails seems in part to be based on its misapprehension about limit orders. As Respondents noted in their Proposed Findings, the limit order price is not displayed to the market and is not the specified

- Professor Jarrell concurred in Mr. Koch's strategy of setting the limit price over the then-existing ask as the only way to acquire a block of stock. Tr. at 1128-29 (Jarrell).

- Mr. Schneider testified that the purchases here were consistent with KAM's investment strategy. Tr. at 944 (Schneider).

- The block of shares purchased was held for investment, not sold a short while later into the market.[14]

In the end perhaps the best evidence that the December 31, 2009 CARV purchase, as well as the others made on that date and the earlier acquisitions of HCBC, was made for legitimate investment purposes and thus were not manipulative is the testament of the clients who benefited from the transactions, Mrs. Smith and Tampsco. After the OIP was issued neither sold their shares. There is no evidence that either disputed the benefit of the transactions. Indeed, Mrs. Smith's account remained at KAM until after her death; she even left funds to Mr. Koch's foundation in her will. John McFarland, who managed

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price at which the securities will be purchased. Rather, it is a cap which limits market risk and prevents a price run up. Respondents' Memo of Law at 15 n.18; Respondents' Proposed Findings, ¶ 162 n.24.

[14] In its Reply, the Division states that "KAM was a net seller, not buyer, of stocks during some months in 2009." Reply at 1. That suggestion is inaccurate and, like many of its claims, based on a misinterpretation of the evidence. Appendix C provides a chart of KAM's transactions for 2009. In it the transactions are classified in accord with Mr. Koch's testimony and KAM's long established investment policies. Thus, family accounts were eliminated since they are not advisory accounts, and cross trades between accounts are not tabulated as sales since they just move securities from one client to another. Sales are also classified to show where KAM determined a security should no longer be held or where a sale was made to take a profit because the shares had appreciated in accordance with expectations. The chart demonstrates that in 2009 KAM was a net purchaser of securities as Mr. Koch testified and contrary to the Division's claim. It also demonstrates that the Division's claims about the impact of the market crisis on KAM are wrong. The sales of FITB listed on the chart were made to take a profit for KAM clients since the stock appreciated from about $1 per share to about $9 per share. *See* Appendix C; Appendix D (explaining the methodology behind Appendix C). Once these factors are accounted for, as Appendix C demonstrates, it is clear that KAM not a net seller during any month of 2009 and that the market crisis was not the motive for fraud claimed by the Division.

the Tampsco account, moved the Tampsco account as his fiduciary obligations required but his joint account remained at KAM until all of KAM's accounts were moved.

In the end, the Division's efforts to salvage its case by ignoring the OIP and morphing its claims from artificial price and false closing prices to "intent" without market impact should be rejected. In the end, the Division's new claim – contrary to any fair reading of the OIP – that even if there was a legitimate investment purpose the purchases by KAM are illegal because of its speculative interpretation of comments it thinks Mr. Koch made should be rejected. Regardless of the meaning of those comments, one point is clear and beyond dispute: Legitimate investments such as those made here are not market manipulation irrespective of what is said about them. As Congress said long ago when the Exchange Act was passed:

> If a person is merely trying to acquire a large block of stock for investment, or desires to dispose of a big holding, his knowledge that in doing so he will affect the market price does not make his action unlawful.

HR Rep. No. 1383, 73rd Cong. 2d Sess (1934); *see* Louis Loss, Fundamentals of Securities Regulation at 993 (1983).

In the end it is clear that the purchases directed by Donald Koch through KAM were part of a long and very successful investment program that benefited the clients. The Division has failed to establish its claims. Respectfully, this proceeding should be dismissed.

Dated: March 16, 2012

Respectfully submitted,

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Cecilie Howard MacIntyre
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Surreply Brief of Respondents' Donald L. Koch and Koch Asset Management LLC was filed with the Secretary's office at the Securities & Exchange Commission, served on Judge Carol Fox Foelak and Suzanne J. Romajas at 100 F Street, N.E., Washington, D.C. 20549 by hand on March 16, 2012, and by e-mail at RomajasS@sec.gov on March 16, 2012.

/s/ Thomas O. Gorman
Thomas O. Gorman

Appendix A



# TAQ Web

**TAQ Web is an online service that allows subscribers access to historical intraday transactions and quotations for all NYSE-listed and non-listed stocks.**

Information is available for the previous day's trading and for up to one year in history (30 days for quotes). Transaction information includes Time, Price, Volume and Sale Condition for each stock. Quotation information includes Time, Bid, Ask, Size, Market and Sale Condition for each stock. Query results are returned in an Excel spreadsheet.

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TAQ NYSE OpenBook Web Custom TAQ

## Included Data

# TAQ Web

Daily @ 12:15 AM EST

**Specifications**

▾ Trades

| | Field Name | Data Type * | Description |
|---|---|---|---|
| 1 | Symbol | Text (16 (6/10)) | Stock Symbol (root/suffix) |
| 2 | Time | Number (9) | Time of trade (hhmmsslll) |
| 3 | Volume | Number (9) | Volume of trade |
| 4 | Trade Price | Number (11 (7/4)) | Price of trade (dollars/cents) |
| 5 | Exchange | Text (1) | The Exchange where trade took place. Possible Values A = American Stock Exchange B = Boston Stock Exchange C = National (Cincinnati) Stock Exchange D = National Association of Securities Dealers (ADF) E = Market |

# Appendix A

| | | | |
|---|---|---|---|
| | | | Independent (SIP - Generated) I = The Island, ECN M = Chicago Stock Exchange N = NYSE P = Pacific Exchange T/Q = NASDAQ Stock Exchange S = Consolidated Tape System X = Philadelphia Stock Exchange W = CBOE |
| 6 | Sale Condition | Text (4) | A Sale Condition (applies to all exchanges). Up to four codes are displayed per trade. Possible Values A = Cash Only Basis B = Average Price Trade C = Cash Sale D = Next Day Settlement E = Automatic Execution of Limit Orders J = Rule 127 trade (NYSE only) K = Rule 155 trade (AMEX only) L = Sold Last M = NASDAQ Official Closing Price N = Next Day O = Opened Last P = Prior Reference Price (NASD only), R = Seller's Option for delivery S = Split Trade (NASD only) T = Pre- and Post-Market Close W = Avg. Price Trades X = Opened after trading halt Z = Sold Sale 8 = Crossing Session 2-sided 9 = Crossing Session 1-sided Blank = No stated conditions |
| 7 | Condition Description | Text (1) | Description of Sales Condition |
| 8 | Correction Indicator | Number (2) | Indicates a correction has occurred. 00 = Regular trade which was not corrected, changed or signified as cancel or error 01 = Original trade which was late corrected (This record contains the original time - HHMM and the corrected data for the trade) 07 = Original trade which was later signified as error 08 = Original trade which was later signified as error 10 = Cancel record (This record follows '08' records) 11 = Error record (This record follows '07' records) 12 = Correction record (This record follows '01' records and contains the correction |
| 9 | Correction Description | Text (1) | Description of correction |
| 10 | Date of trade | Date (8) | YYYYMMDD-formatted date of trade |

▸ Quotes

## Related Products in Other Markets

ArcaBook Web

Euronext NextHistory Cash EOD

In the Matter of Donald L. Koch and Koch Asset Management, LLC

A.P. file No. 3-14355

Audio Recording

SEC-HUNTLEIGH0018475

(Start of wav '475.)

MR. CHRISTANELL: This is Jeff.

MR. KOCH: Hey, Jeff. Don.

MR. CHRISTANELL: Hi, Don.

MR. KOCH: C-H-E-V.

MR. CHRISTANELL: Let's see here, 720, 748.

MR. KOCH: Okay. Let's see if by the end of the day you move it above 8, 8 and a quarter.

MR. CHRISTANELL: Okay.

MR. KOCH: And that should be pretty easy.

MR. CHRISTANELL: Yeah, it's -- it shouldn't take too much.

MR. KOCH: Yeah. So whatever you need to do there.

MR. CHRISTANELL: Okay. Okay.

MR. KOCH: So we're still -- we're still on HCBC?

MR. CHRISTANELL: Yep.

MR. KOCH: And you got the -- move it up to about 8, 8 and a quarter on the Cheviot.

MR. CHRISTANELL: Okay.

MR. KOCH: Do what you need to do there.

MR. CHRISTANELL: Okay.

MR. KOCH: I may come back with you on Carver. I'll let you know there.

Carver is 9, right?

MR. CHRISTANELL: V is 810 to 905, yeah.

MR. KOCH: Woo.

MR. CHRISTANELL: Yeah.

MR. KOCH: 810 to 905.

MR. CHRISTANELL: Yep.

MR. KOCH: Okay. Well, let's -- any trades today?

MR. CHRISTANELL: No trades. No volume, so...

MR. KOCH: Okay.

MR. CHRISTANELL: There's 2,000 -- at least 2,000 offered at 905.

MR. KOCH: Okay. So what you do at the end of the day, pop that one --

MR. CHRISTANELL: Yeah, five.

MR. KOCH: -- if you have to.

MR. CHRISTANELL: Yeah, to make a print.

MR. KOCH: Yeah. Let me get you a phone number here where you can reach me.

MR. CHRISTANELL: Okay.

MR. KOCH: I'll be in and out. It's [redacted] --

MR. CHRISTANELL: Uh-huh.

MR. KOCH: [redacted] [redacted]

MR. CHRISTANELL: Okay.

MR. KOCH: And if you can't, Fay can always get me.

MR. CHRISTANELL: Okay.

MR. KOCH: Thank you so much.

MR. CHRISTANELL: Sure.

MR. KOCH: Bye-bye.

(End of call.)

REPORTER'S CERTIFICATE

STATE OF MINNESOTA )
) ss.
COUNTY OF HENNEPIN )

I, hereby certify that I transcribed these audio wav files to the best of my ability, in Minneapolis, Minnesota;

That the cost of the original has been charged to the party who noticed the deposition, and that all parties who ordered copies have been charged at the same rate for such copies;

That I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel;

That I am not financially interested in the action and have no contract with the parties, attorneys, or persons with an interest in the action that affects or has a substantial tendency to affect my impartiality;

WITNESS MY HAND AND SEAL THIS 9th day of January, 2012.

Dawn Workman Bounds
Notary Public, Hennepin County, Minnesota
My commission expires January 31, 2014

# Appendix C - Part I (Jan - Jun 2009)

| | Jan-09 | Feb-09 | Mar-09 | Apr-09 | May-09 | Jun-09 |
|---|---|---|---|---|---|---|
| **Total Value: Purchases are shown in red and in parentheses because they represent deductions of cash from the accounts. Sales are shown in black because they represent additions to the accounts.[1]** | $ 1,819,441 | $ (1,169,696) | $ (347,860) | $ (1,259,235) | $ (39,559) | $ (562,786) |
| **Less: DLK and Family accounts** | 1,410,660 | (643,410) | (50,180) | (874,386) | 36,588 | (578,380) |
| **Total Value Purchased (in red and in parentheses) or Sold (in black) related to clients** | 408,781 | (526,286) | (297,680) | (384,849) | (76,147) | 15,594 |
| **Less: Sales in securities determined unattractive (as of 1/1/09)** | 822,833 | - | 5,274 | 6,675 | 40,944 | - |
| **Less: Sales in securities determined unattractive (during 2009)** | 835 | - | - | - | 28,039 | 15,594 |
| **Less: Sales related to cross sales from XTA4** | - | - | - | - | - | - |
| **Less: Sales related to exceptions (FITB2 and STI3)** | - | - | - | - | - | - |
| **Total Sales adjustments** | 823,668 | - | 5,274 | 6,675 | 68,983 | 15,594 |
| **Net Value Purchased (in red and in parentheses) or Sold (in black)** | $ (414,888) | $ (526,286) | $ (302,953) | $ (391,524) | $ (145,130) | $ - |
| **Net Buyer or Net Seller:** | ***Net Buyer*** | ***Net Buyer*** | ***Net Buyer*** | ***Net Buyer*** | ***Net Buyer*** | ***Net zero*** |

[1] For the procedures used to create this chart, see Appendix D.

[2] KAM bought FITB on 2/5/09 at $1.7081 and sold FITB on 10/28/09 at 8.7754, or 5.14 times the book cost.

[3] KAM sold all positions held in this security during 2009.

Appendix C - Part II (Jul - Dec 2009 + Total)

| Jul-09 | Aug-09 | Sep-09 | Oct-09 | Nov-09 | Dec-09 | Total |
|---|---|---|---|---|---|---|
| $ 4,527 | $ (684,632) | $ 1,356,977 | $ 499,689 | $ (41,663) | $ (1,513,283) | $ (1,938,079) |
| 2,610 | (305,597) | 23,406 | 343,958 | (191,178) | (586,313) | (1,412,221) |
| 1,917 | (379,035) | 1,333,571 | 155,731 | 149,515 | (926,970) | (525,858) |
| 1,917 | 300,143 | 1,063,027 | - | - | - | 2,240,814 |
| - | - | - | - | 400,700 | - | 445,168 |
| - | - | 270,543 | - | - | - | 270,543 |
| - | - | - | 166,186 | - | - | 166,186 |
| 1,917 | 300,143 | 1,333,571 | 166,186 | 400,700 | - | 3,122,711 |
| $ - | $ (679,178) | $ - | $ (10,455) | $ (251,185) | $ (926,970) | $ (3,648,569) |
| ***Net zero*** | ***Net Buyer*** | ***Net zero*** | ***Net Buyer*** | ***Net Buyer*** | ***Net Buyer*** | ***Net Buyer*** |

Appendix D

**Procedures for chart shown in Appendix C (based on Koch testimony and KAM investment policy):**

1 Obtain KAM Trading Data for the period 1/1/2009 through 12/31/2009.

2 Determine which securities were traded during the period 1/1/2009 through 12/31/2009.

3 Determine whether KAM was a net buyer or net seller for each month in 2009.

3a. Calculate the net value purchased or sold for each month.

3b. Reduce by activity in DLK and Family accounts.

3c. Reduce by securities deemed unattractive by KAM.

i. For those securities sold during the year, review trading activity during 2009 and identify any trends.

ii. If the trend suggests that KAM is selling the position for all accounts in the position, the security will be deemed unattractive.

*Test 1:* If there are no purchases since the first sale AND no subsequent purchases, the security will be assumed unattractive.

*Test 3:* If there is a purchase prior to the sale in 2009, but subsequent sales in multiple accounts AND no subsequent purchase, the security will be assumed unattractive.

3d. Reduce by sales related to cross trades (Account XTA4).

*Test 2:* If the sale is related to the disposing of positions per client's request. Note that the majority of the positions held in XTA4 were cross traded to other KAM clients.

3e. Reduce by sale of securities that were purchased earlier in 2009 and sold at a price of at least three times book value.

3f. Reduce by sale if resulted in selling all positions held in the security across all clients.