IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD L. KOCH AND KOCH ASSET MANAGEMENT, LLC:	:	
Petitioners,	:	Case No. 14-_____
v.	:	
SECURITIES & EXCHANGE COMMISSION	:	
Respondent.	:	

3-14355

PETITION FOR REVIEW

Pursuant to Section 25(a)(1) of the Securities Exchange Act, 15 U.S.C. § 78y(a)(1), Section 213 of the Investment Advisers Act, 15 U.S.C. § 80b-13, Rule 15(a) of the Federal Rules of Appellate Procedure ("FRAP") and Circuit Rule 15, Donald L. Koch and Koch Asset Management, LLC ("KAM") (collectively, "Petitioners") hereby petition this Court for review of the order issued by the Securities Exchange Commission ("SEC") captioned *In re Koch & Koch Asset Management, LLC*, Initial Decision Release No. 458 (May 24, 2012). *See also In re Koch & Koch Asset Management, LLC*, Securities Exchange Act Release No. 72179, Investment Advisers Act Release No. 3836, Investment Company Act Release No. 31047 (May 16, 2014)(underlying order of the Administrative Law Judge).

Petitioners are a party of record to, and were active participants in, the underlying SEC proceeding in which the orders were issued. Petitioners are aggrieved by the SEC's rulings in these orders.

KAM's Disclosure Statement Pursuant to FRAP 26.1 and Circuit Rule 26.1 is being filed concurrently herewith.

Respectfully submitted,

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July 11, 2014

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DISCLOSURE STATEMENT OF KOCH ASSET MANAGEMENT, LLC

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Koch Asset Management, LLC ("KAM") hereby files this Disclosure Statement in connection with the Petition for Review filed concurrently herewith.

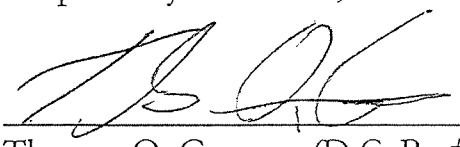
1. KAM is a privately owned a limited liability corporation organized under the laws of the State of Missouri.

2. KAM does not have any parent, subsidiary, controlled or affiliated entity. Nor does it hold any interest in publicly traded securities.

3. KAM was an SEC registered investment adviser. Its clients did hold shares of publically traded entities. KAM's SEC registration was terminated by operation of law under the Dodd-Frank Act. It is not registered with any state. Its

advisory business concluded with the transfer of its clients (save one) to other advisers shortly after the institution of these proceedings. It now acts largely as a family office for the accounts of members of the Koch family.

Respectfully submitted,



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Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondents

On Petition for Review from the
Securities and Exchange Commission

PETITIONERS' MOTION FOR A STAY PENDING APPEAL

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PETITIONERS' MOTION FOR A STAY PENDING APPEAL

Petitioners Koch Asset Management LLC ("KAM") and Donald Koch respectfully request that this Court enter a stay of the order by the Securities and Exchange Commission ("SEC") imposing sanctions on them dated May 18, 2014 ("SEC Opinion") (Attachment A) until the conclusion of these proceedings.

I. BACKGROUND

KAM was founded by Donald Koch as an SEC registered investment adviser. The firm's investment program called for the purchase of only small community bank stocks such as High Country Bancorp, Inc. ("High Country"), Cheviot Financial Institution ("Cheviot") and Carver Bancorp, Inc. ("Carver") in blocks to minimize transaction costs. To profit from these purchases, and protect advisory clients, KAM calculates for each company its "tangible book value" ("TBV"), essentially FDIC liquidation value, as the maximum price at which shares are purchased. This protects investors if the bank fails since it is the amount the shareholders would likely receive; it aids profits since take-overs are typically priced at a multiple of the value. Tr. 880-881.[1] Through the

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1 The approach, well grounded in the academic literature, is an outgrowth of Mr. Koch's career in which he served as the Chief Economist for Barnett Banks, Chief Economist for the Federal Reserve Bank of Atlanta and as a Professor of Economics at Georgia Tech University. Tr. 766-68.

market crisis the program gave clients a return on equity of 42%. R. 36, at Section VII.

The securities purchased by KAM are highly illiquid and can be very difficult to acquire. For example, shares of High Country did not trade on 212 of 252 trading days in 2009, and when they did only at a daily average volume of 212 shares. Similarly, shares of Cheviot and Carver did not trade on, respectively, 26 and 69 days, and when they did the average daily volume was only 5,414 and 1,857 shares, respectively. On NASDAQ in 2009, by contrast, shares trade each day with an average daily volume of 109,981 shares. R. 36 at 23-25.

KAM purchased shares of community bank stocks when available in the fall of 2009, using Huntleigh Securities Inc. ("Huntleigh") trader Jeff Christanell to execute the orders. On September 30, 2009 KAM sought to acquire a block of High Country shares. Initial orders were place in the late morning and early afternoon. Partial fills were obtained. KAM sent two e-mails to the trader within three minutes stating "go head in even 100 share blocks" (Ex. 147) and then "move last trade right before 3 pm [market close] up to as near $25 as possible without appearing manipulative." Ex. 148. Mr. Christanell complied, increasing the order size to 2,000 and placing a limit order at the High Country TBV of $25, which capped the price for the last execution. A series of small executions at slowly laddering prices – any

purchase of these shares causes a price increase as KAM knew, with the last being at $23.99, giving the adviser a block of just under 2,000 shares and the client an average price below that of the last execution price. Ex. 278; R. 39 at 43. In October and November a similar approach was used to acquire additional blocks of High Country stock. Ex. 278; R 39 at 48, 53.

In December the adviser continued to search for additional shares for firm clients. In mid-December KAM searched for a block of Cheviot. Ex. 178; Tr. 601 – 602. On December 22 the adviser tried a strategy crafted by Mr. Christanell, which was the reverse of the September approach, placing a large order for Cheviot at the bid to try and draw out a seller. It failed. Ex. 174; Tr. 602 – 604. The next day KAM reverted to the September approach sending the trader an e-mail stating that on the last trading day of the year it wanted to "move up" High Country. Ex. 33. A December 28 e-mail essentially reiterated the September 30 directive about price. Ex. 187.

On December 31 the trader entered three orders in the Huntleigh system for KAM: 1) At 9:06 a.m. and order to purchase 5,000 shares of High Country with a limit price of $25; (Ex. 278; R. 39 at 58); 2) at 1:01 p.m. for 5,000 shares of Cheviot with a limit price of $8.25 (R. 39 at 30); and 3) at 1:01 p.m. for 1,000 shares Carver with a limit price of 9.05 (R. 39 at 36). Each list price was below TBV for the stock. During the trading day Messrs. Koch and Christanell talked on the phone with Mr. Koch cautioning the trader to seek

small executions – he knew large ones could spike the price. The time to send the High Country and Cheviot orders for execution was left to the trader. Ex. 189.

Mr. Christanell chose to send the High Country order to the market for execution minutes before the close. KAM got a series of small executions and the predictable slowly laddering prices, with the last at $19.50, giving the adviser a partial fill of 3,200 shares. (R. 39 at 58). Later the trader lamented that the price did not reach the cap and the order was not filled because he waited too long to seek execution. Ex. 192.

In contrast, Mr. Christanell sent the Cheviot order to the market for execution at the time he entered it in the Huntleigh system. Again, KAM got a series of small executions at slowly laddering priceswitho the last at $8.09, under the TBV for the stock. A block of 6,667 shares was purchased. Cheviot did not trade all day. In accord with a conversation between the two men, the order was held until just before the close when the spread was $9.00-$9.05. KAM was able to purchase 200 shares at $9.05. (R. 39 at 36). KAM obtained best execution on its purchases of High Country, Cheviot and Carver described here, according to Mr. Christanell. That was confirmed by the analysis of former SEC Chief Economist and Professor Gregg Jarrell. Tr. 1136-1140; R. 39 at 32, 37, 45, 59, 61. Each purchase fit squarely within KAM's investment

program, according to the analysis of KPMG partner John Schnieder. Tr. 945-948; R 36.

The SEC concluded that the September and December transactions constituted "marking the close" but not those in October and November and imposed sanctions.

II. ARGUMENT

A Stay of the SEC's Order should be entered because the Merits Present Significant Issues and It Will Maintain the Status Quo While Avoiding Further Harm to Petitioners and Serve the Public Interest.

A. The legal standards: *Holiday Tours*

Washington Area Transit Commission v. Holiday Tours, Inc., 559 F. 2d 841 (D.C. Cir. 1977) is this Court's seminal ruling on stays. There, the Court focused on assessing the overall case while using four factors as a guide: "(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal . . . (2) Has the petitioner shown that without such relief, it will be irreparably injured? . . . (3) Would the issuance of a stay substantially harm other parties interested in the proceedings? . . . (4) Where lies the public interest? .. ." *Id.* at 843 (internal quotations omitted).

As the Court's analysis and application of the factors in that case made clear, the factors are a guide in an evaluation of the overall situation, not a checklist. Thus, for example, while the first factor regarding the merits is phrased in terms of a "strong showing," even if that showing is not made,

where the other factors favor the entry of a stay that may be sufficient. Accordingly, in *Holiday Tours* the Court entered a stay where the "strong showing" was not made, concluding that "an order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant . . ." *Id.* at 844.

B. Examination of Each *Holiday Tours* Factor Counsels a Stay

1. The merits: Substantial issues warranting further litigation

a. Standard of Review

It is axiomatic that the SEC's findings of fact must be supported by substantial evidence and that its other conclusions may only be set aside if they are contrary to law. *Zacharias v. SEC*, 569 F. 3d 458, 464 (D.C. Cir. 2009). The findings of fact are subject to review for substantial evidence . . . and the other conclusions may be set aside only if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.") (internal quotations omitted). Findings made by selecting snippets of evidence while ignoring critical contradictions and much of the record, as here, are not supported by substantial evidence. *Morall v. DEA*, 412 F. 3d 165, 177 (D.C. Cir. 2005) (decision not supported by substantial evidence if agency fails to consider contradictory evidence and inferences).

b. Marking the close - failure to obtain best execution: Ignoring significant contradictions and the evidence

Relying largely on the e-mails, the tapes and speculation from trader Christanell, the SEC found that KAM and Mr. Koch "marked the close" and failed to get best execution when purchasing shares of High Country, Cheviot and Carver on two dates in 2009 based on its conclusion that "Koch's overriding motivation for the trading at issue was to obtain a particular closing price and not to acquire shares." SEC Opinion at 24. This conclusion ignores a fundamental contradiction in the key evidence relied on by the agency and much of the record. It also fundamentally misinterprets, and largely ignores, much of the record demonstrating that KAM selected closing prices for its last execution – the last purchase in a series of small buys made to acquire a block with as little market impact as possible that fit within its investment program, contrary to the SEC's conclusion and thereby negating any wrongful intent.

First, the SEC ignores a fundamental contradiction. As the SEC stated: "marking the close and failure to seek best execution are closely related. When an investment adviser attempts to raise the price of the securities he is purchasing for the accounts of his clients, *a fortiori*, he is not seeking to obtain best execution for those clients the most favorable terms reasonably available under the circumstances." SEC Opinion at 27 (citations/quotations omitted).

Not only does this passage assume the conclusion reached—setting a closing or last execution price equals manipulation-- it ignores the testimony of Jeff Christanell, on whom the SEC heavily relied to reach its conclusion. He testified that KAM got best execution as the SEC acknowledged. SEC Opinion at 27. KAM could not mark the close and get best execution as the SEC admits: "Christanell's affirmative answer to the question of whether the trades in question represented 'best execution,' Tr. at 591, cannot be squared fully . . ." with his opinion that KAM wanted a closing price, not the stock. *Id.* at n. 189. Rather than analyze this apparent contradiction in view of the record, however, the SEC chose to rely on its assumed conclusion and essentially dismisses it in a footnote based speculation: "It is possible that Christanell understood the concept of 'best execution' differently than obtaining the best available price. In any event, Christanell's opinion about the abstract concept of 'best execution' does not carry the weight of the extensive evidence in the record – including Christanell's own testimony – that Respondents were not trying to obtain the relevant securities for best available price but were seeking to raise the price of the securities through their purchases." SEC Opinion at n. 189.

Not only does the SEC's assumed conclusion, its speculation fails to serve as a substitute for analysis-- it is baseless. There is no evidence that Mr. Christanell had a "different" definition of best execution, that a concept the

SEC defined as the "best available price" is "abstract" or that the trader did not understand it. Indeed, it borders on the disingenuous to posit that a professional securities trader who holds series a 7 brokers license, 63 state license, 55 trader's licenses and 24 principal's license (Tr. 449), who had a duty to seek best execution and who wrote part of the compliance manual for his brokerage firm does not understand the concept. Tr. 543-550. This effort to dismiss testimony which does not fit its assumed thesis only highlights the fact that the SEC's determinations are not supported by substantial evidence. *Siegel v. SEC*, 592 F. 3rd 147 (D.C. Cir. 2010)(the court "'may not find substantial evidence merely on the basis of evidence which in and of itself justified [the agency's decision], without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn,' quoting *Morall v. DEA*, 412 F. 3d 165, 177 (D.C. Cir. 2005)). Rather, such findings must be rejected. *Lakeland Bus Lines, Inc. v. NLRB*, 347 F. 3rd 955, 961-962 (D.C. Cir. 2003)(must consider contrary evidence). This failure of the SEC, standing alone, presents more than a fair question for litigation within the meaning of *Holiday Tours.*

Second, if Mr. Christanell's testimony regarding best price is unreliable and not to be believed, it calls into question the SEC's reliance on his speculation that KAM wanted a price and not the stock. Mr. Christanell, new to KAM accounts,(Tr. 897), never discussed KAM's investment program with

the adviser and thus did not know the reason for targeting a price: Division: Q: Did he [Mr. Koch] tell you why he wanted to get a closing price" "Christanell: A. He did not." Tr. 465.

Not only is the SEC's conclusion that KAM did not want the stock speculation, it is wrong. If KAM only wanted a closing price and the stock was unimportant, there was no need to purchase large blocks of High Country in September and December or a large block of Cheviot in December. A single purchase of each could spike the price. The adviser wanted blocks for its program at or under the target price as Mr. Christanell acknowledged after the close on December 31 when he apologized for entering the market too late to acquire the 5,000 share block the adviser sought. Ex. 192.

The reason the SEC chose to rely on an assumption and unsupported speculation which appears wrong on its face, while summarily dismissing what the trader personally observed in the market about the executions of the trades he placed is not explained by the SEC. This only reflects yet again the fact that the SEC's conclusions are not supported by substantial evidence. *See, e.g.*, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (must consider evidence which fairly detracts from the conclusion).

Third, the SEC claims that the purchases involved here caused an artificial price, deceiving investors in the market place is completely unsupported by the record. No facts are cited to support this claim. No analysis

is offered beyond supposition about intent, which standing alone is not manipulation. Likewise, the Commission offeres no analysis or support for its conclusion that KAM could have obtained more favorable prices beyond its speculation that others "to the extent they were available" obtained more favorable prices.

Baseless speculation is not "substantial evidence." Here, the SEC ignored not just the fact that shares of High Country, Cheviot and Carver do not trade on many days, that when they do volume is quite low making assembling a block difficult and the fact that each purchase causes a price increase, but the markets on the trading days involved here. Shares of Carver did not trade all day on December 31 – KAM purchased at the only offer available. Shares of High Country and Cheviot were available and when the orders were place, according to Division Exhibit 278, KAM made its initial purchases at the market and subsequent buys at the predictable slowly laddering prices available in the market. *See also* R. 39 at 31, 43.

The SEC's speculation also ignores the undisputed testimony of Professor Jarrell. While the SEC quibbled with Professor Jarrell's conclusion about whether KAM's purchase of Carver was the last transaction on December 31 and the fact that he did not review the Koch – Christanell communications despite the fact that they could not alter what happened in the market which was the focus of his analysis, the agency failed to mention his key

conclusions: The purchases of High Country, Cheviot and Carver were each made at prices comparable to other market transactions, echoing Mr. Christanell's best execution testimony. Tr. 1136-1140. This failure by the SEC and its substitution of speculation for evidence cannot be squared with its obligation to support its conclusions with substantial evidence.

Fourth, the SEC misinterpreted key pieces of the evidence in reaching its conclusion. For example, the agency claims that "Koch even instructed Christanell to try to avoid a seller of High Country on December 31, 2009, in order to get a higher closing price." SEC Opinion at 28. This reading of the passage makes little sense because KAM had placed orders in the market and was looking for sellers. Ex. 278; R. 39 at 30, 36, 38. More fundamentally, it misreads the passage which states: "Mr. Koch: If you come in too early, there is a -- there is a seller. Mr. Christanell: Yeah. But once he sees it start trading, then he may --- Mr. Koch: He'll push out the volume. Mr. Christanell: Yeah, he'll load up." Tr. 189. Fairly read, the point of the conversation is not to avoid the seller but to avoid a price run-up. If the volume "pushes out" or increases and if the seller then decides to "load up" or buy rather than sell, the price will run up and could spike. In that event KAM may not be able to get the block of shares it wants since the price could exceed the limit KAM will pay for the stock. Thus, contrary to the SEC's claim, the passage actually shows Mr. Koch trying to avoid a price run-up.

Finally, the Commission's opinion ignores much of the evidence in the record demonstrating that KAM had a legitimate reason for setting a closing price for its last execution. KAM purchased the shares of High Country, Cheviot and Carver in accord with, and as part of, its highly successful, long term investment program at, or under, prices that were key to that program as demonstrated by the testimony of KPMG partner John Schneider. Since KAM knew that each execution would likely cause the price to ladder it set the last execution price high enough to acquire a block but at TBV for the stock to stay within its program. To KAM, assembling a block within the program was important. The closing price in the market was not. And, viewed in this context, the SEC's perceived conflict in Mr. Christanell's testimony vanishes: KAM wanted the closing price, as the trader testified; KAM got best execution as he testified. It resulted from setting the last execution price, buying in small lots and letting the economics of the market bring it the stock for the block necessary for the program. The failure of the SEC to analyze this evidence only serves to highlight the fact that there is more than a fair question here for litigation within the meaning of *Holiday Tours*.

c. Primary liability: Ignoring the Supreme Court and the Statutes

The SEC's conclusion that it can charge Donald Koch as a primary violator under Exchange Act Section 10(b) and Advisers Act Sections 206(d) and (2) rather than as a control person or aider and abettor under Exchange

Act Sections 20(e) and 20(a) and Advisers Act Section 209(d) is, as to the former, contrary to the dictates of the Supreme Court and, as to the latter, contrary to the statutes. Accordingly, the rulings are not in accordance with the law.

First, as to Section 10(b), *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302 (2011) held that the maker of a statement who controls its dissemination is primarily liable. Others are not. The Commission concluded that *Janus* does not apply here because Mr. Koch is not charged with making a statement. SEC Opinion at 28-29. The SEC's conclusion is contradicted by its own determination in this case. The SEC concluded that Petitioners marked the close, causing an artificial price in the market place. That artificial price is a statement which deceives traders as the SEC stated. Since KAM is the adviser and controlled making the statement, under *Janus* only it can be primarily liable.

Second, the SEC's conclusion as to Advisers Act Sections 206(1) and (2) is also incorrect as a matter of law. The SEC's conclusion ignores the statutory scheme. KAM is the adviser registered with the SEC, not Mr. Koch. KAM made filings with the SEC, representing to the public it is the adviser, not Mr. Koch. Ex. 253. Thus under the Advisers Act and the filings KAM is responsible to the clients. The SEC's reliance on what it called the "broader definition" of an investment – a vague and undefined concept - does not trump

the statutes and the filings. This issue, which is one of first impression in the Circuit Courts, presents more than a fair question for litigation under *Holiday Tours.*

d. Cease and desist order: Contrary to the record

The Commission's determination that a cease and desist order is appropriate here also presents more than a fair question for litigation. While the SEC cites this Court's decision in *SEC v. Steadman*, 967 F. 2d 636 (D.C. Cir. (1992), the agency offers little analysis beyond reiterating its assumed conclusion that KAM and Mr. Koch acted intentionally.

Steadman requires more than reciting the factors. There, this Court made it clear that the "'the ultimate test' of whether an injunction should issue is whether the defendant's past conduct indicates . . . that there is a reasonable likelihood of further violation[s] in the future." (citations/internal quotations omitted). To meet this test the Court stressed that there must be "some cognizable danger of recurrent violation, something more than the mere possibility. . . " *Id.* It is for this reason that the Court directed that a careful consideration be made of whether the violation was isolated or a pattern, if it was flagrant or deliberate and opportunities for future violations.

Properly considered these factors demonstrate that a cease and desist order is not only unnecessary, it is inappropriate. Initially, it is clear that there is virtually no likelihood of reoccurrence. What the SEC failed to mention in

questioning the sincerity of KAM's and Mr. Koch's representations of respect for the final decision in this action is that shortly after the case began KAM voluntarily transferred its clients and closed the advisory save one account for a local attorney who is a professional adviser. Tr. 922. The SEC also failed to mention the fact that KAM's registration with the agency terminated by operation of law under the Dodd-Frank Act and it has made no effort to register with state officials. While the SEC speculates that KAM and Mr. Koch could attempt to reopen the advisory, in view of the reputational harm caused by these proceedings and the years out of the business, that is most unlikely. In short, there is virtually no likelihood that KAM or Mr. Koch will violate the law in the future.

The other *Steadman* factors fortify this point. The violations occurred almost five years ago on two dates. While the SEC stresses the gravity of the situation, what it fails to mention is that the transactions were part of a legitimate, successful investment program. And, as the SEC admits, there was little harm to any client or benefit to KAM and Mr. Koch. Thus, when the entire record is considered rather than snippets, *Steadman* dictates that no cease and desist order be entered.

e. Collateral bar: Contrary to the Supreme Court and fairness

The SEC's determination, with two Commissioners dissenting, to

retroactively apply a collateral bar, added to the securities laws in 2010 by Dodd-Frank to conduct that occurred in 2009, also presents more than a fair question for litigation. The determination is based on *John W. Lawton, Advisers Act Release No. 3513*, 2012 SEC LEXIS 3855 (Dec. 13, 2012) in which the SEC concluded that imposing a such a bar on earlier conduct is "not impermissibly retroactive because the decision to impose such a bar is based on a present assessment of' when such a remedy is necessary or appropriate to protect investors and markets from the risk of future misconduct,' quoting *Lawton* at 32. SEC Opinion at 32.

Lawton is simply wrong. As the Supreme Court held in in *Landgraf v. USI Film Pds.*, 511 U.S. 244 (1994) "the presumption against retroactive legislation is deeply rooted in our jurisprudence . . . the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." (internal quotations omitted); *see also PMD Produce Brokerage Corp. v. U.S. Dept. of Agric.*, 234 F.3d 48, 52 (D.C. Cir. 2000).

The Commission's effort to skirt *Landgraf* on the theory that since the decision about the application of the remedy is made currently and the order focuses on the future it is not retroactive, it is nonsense. That same argument can be made about every increased sanction. Using the SEC's rationale, if the maximum prison term for securities fraud was increased from its current 20

years to 40 years today, the 40 year term could be ordered for conduct that occurred years ago because the decision to impose it is made now and it will protect the public in the future. The fundamental unfairness of this reasoning only serves to highlight the unfair nature of the SEC's determinations here which ignore what the agency admits is a critical conflict in the evidence, undisputed testimony, controlling court decisions and the very statutes it is charged with administering. There should be no doubt that these issues – developed at this early stage – present more than fair questions for further litigation here and support a stay.

2. KAM and Mr. Koch Will Suffer Irreparable Injury

The second *Holiday Tours* factor considers the harm of not granting a stay to the Petitioners. KAM and Mr. Koch will likely suffer additional and significant harm if the stay in not granted. While the reputational harm to KAM and Mr. Koch from the institution of these proceedings was inevitable, it need not be multiplied imposing sanctions prior to the conclusion of proceedings before this Court.

Absent a stay, however, that is the likely result. Other authorities and organizations may institute actions based on the SEC's opinion against KAM and Mr. Koch, unnecessarily increasing their injury. For example, the Certified Financial Analyst Society ("CFA") has closely monitored these proceedings. The organization has not instituted proceedings against KAM and Mr. Koch to

date because a stay has been in place. If that stay is not continued, the CFA can be expected to move forward with its own proceedings. The institution of those charges would undoubtedly cause additional harm to KAM and Mr. Koch before there is a complete adjudication of this action. If other professional organizations and state agencies take a similar approach, that harm could be compounded. There is simply no reason to inflict additional harm on Petitioners.

3. No harm to others: A stay maintains the status quo

The third *Holiday Tours* factor centers on assessing the impact of a stay on other parties. This action has been pending since 2011. In the years since it started there is no indication that anyone has been harmed by Petitioners. There is thus nothing to suggest that continuing with the status quo will in any manner harm anyone.

4. The Public Interest: No harm from the status quo

Finally, the public interest –the last *Holiday Tours* factor -- counsels that a stay be entered. In the Administrative Procedure Act and the Federal securities laws Congress provided a process to carefully evaluate the propriety of enforcement actions brought by regulatory agencies as well as any sanctions. A critical component of that process is an appeal to this or another Circuit Court. That right should not be burdened by requiring parties such as KAM and Mr. Koch to suffer additional, and perhaps needless, injury while they exercise

those rights. This is particularly true here where there are very substantial merits questions which require this Court's resolution and since no harm will be caused to the public if the status quo is maintained. Accordingly, the public interest, as well as each of the *Holiday Tours* factors counsels the entry of a stay to maintain the status quo during this action.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, KAM and Mr. Koch respectfully request that the Commission grant a stay of its Order in the above-captioned proceedings.

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July 11, 2014

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SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 72179 / May 16, 2014

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3836 / May 16, 2014

INVESTMENT COMPANY ACT OF 1940
Rel. No. 31047 / May 16, 2014

Admin. Proc. File No. 3-14355

In the Matter of

DONALD L. KOCH and KOCH ASSET MANAGEMENT, LLC
c/o Thomas O. Gorman
Dorsey & Whitney LLP
1801 K Street, NW, Suite 750
Washington, DC 20006

OPINION OF THE COMMISSION

EXCHANGE ACT PROCEEDING

INVESTMENT ADVISER PROCEEDING

INVESTMENT COMPANY ACT PROCEEDING

Grounds for Remedial Action

Manipulation

Failure to Implement Policies and Procedures

Investment adviser and its owner and principal engaged in fraudulent and manipulative conduct by "marking the close" in the purchase of securities. *Held*, it is in the public interest to impose a cease-and-desist order on respondents, order disgorgement of $4,169.78, plus prejudgment interest, assess a $75,000 civil penalty, censure investment adviser, and impose a collateral bar on principal.

APPEARANCES:

Thomas O. Gorman and *Cecilie H. MacIntyre*, of Dorsey & Whitney LLP, for Donald L. Koch and Koch Asset Management, LLC.

Suzanne J. Romajas and *Adam S. Aderton*, for the Division of Enforcement.

Appeal filed: July 6, 2012
Last brief received: October 31, 2012

I.

Koch Asset Management LLC ("KAM") and Donald L. Koch, KAM's founder, sole owner, and principal, appeal from an initial decision of an administrative law judge.[1] The law judge found that Respondents violated antifraud provisions of the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 by "marking the close," a form of market manipulation, in the purchase of securities for advisory clients. The law judge also found that Respondents violated Advisers Act Rule 206(4)-7 by failing to implement written policies and procedures designed to prevent violations of the Advisers Act and rules promulgated thereunder. The law judge ordered Respondents to cease and desist from further violations; disgorge $4,169.78 in ill-gotten gains, plus prejudgment interest; and pay a second-tier civil penalty of $75,000.[2] The law judge also censured KAM and barred Koch from association with an investment adviser. Our findings are based on an independent review of the record except for findings that are not challenged on appeal.

II.

A. Respondents' background

Before founding KAM in 1992, Koch had considerable experience in the banking industry. In the 1970s, he was a senior officer of a regional bank and was involved with the bank's acquisitions of many smaller banks. Koch then served as chief economist with the Federal Reserve Bank of Atlanta and thereafter as a professor of finance and banking at the Georgia Institute of Technology. After this, Koch moved to St. Louis, Missouri, and worked as a consultant to banks on regulatory and compliance issues and assisted the Resolution Trust Corporation in the resolution of financial institutions affected by the savings-and-loan crisis. In the late 1980s, Koch began investing his own money in small bank stocks based on the knowledge and insights he had gained in the industry. After experiencing some initial success through his own investing, Koch founded KAM and began managing the investments of close friends and associates.

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1 *Donald L. Koch*, Initial Decision Release No. 458, 2012 SEC LEXIS 1645 (May 24, 2012).

2 The law judge imposed the disgorgement and civil penalty jointly and severally upon Respondents.

KAM's investment strategy was to buy the stock of small community banks as long-term investments. Based on his experience, Koch believed that the shares of many small banks were undervalued. Koch researched small banks and calculated what he termed the "tangible book value" of the bank. KAM sought to purchase stock of promising banks at or below the tangible book value per share. It was Koch's experience that if a small bank was acquired by a larger bank, the larger bank would pay two or more times tangible book value. In the event of such a sale, shares bought at or below tangible book value would yield a considerable return. Given the consolidation occurring in the banking industry, Koch expected many of the undervalued banks he invested in to be purchased, and in the meantime, some of the banks paid regular dividends.

KAM's first clients were Koch's neighbors and long-time friends who had approached him about helping them invest. KAM did not advertise and did not have a website, but KAM's client list grew over time through word of mouth and personal connections, with most clients being individuals and families Koch had known for a long time. Before accepting a new client, Koch made sure that the potential client understood KAM's investment approach and in particular understood that the investment was for the long-term. Koch was not interested in clients who wanted to use their accounts "as a checking account" or were inclined to "watch the paint dry"—instead he only wanted clients who accepted a long time horizon for their investments and were willing to let Koch pursue KAM's investment approach unhindered.[3] Koch was particularly concerned about investment performance because many of KAM's clients were his friends or people he would interact with regularly. Koch testified that when you know your clients well "the last thing you need is to take money from someone and not perform."[4] Although he had an assistant who helped with clerical duties, Koch was the only employee of KAM involved in advising investors.

KAM charged its clients a quarterly fee of 0.25% of the account's value, which was not charged if the account's value declined. Between 1996 and 2010, KAM waived over $234,000 in quarterly client fees. KAM also charged a yearly fee of 20% of realized net gains that exceeded 5% per year. KAM ultimately had about forty fee-paying advisory accounts held by members of about thirty families. KAM also maintained accounts for Koch and members of his family as well as for Koch's assistant, Fay Heidtbrink; these accounts were not charged fees.

KAM used Huntleigh Securities Corporation, a registered broker-dealer in St. Louis, to execute trades and serve as a custodial institution for client accounts. After Huntleigh began offering account holders online access to their accounts, Koch told his registered representative, Catherine Marshall, who was also Huntleigh's compliance officer, that he wanted KAM's clients to get information about their accounts from him.[5] On August 26, 2009, Koch sent an e-mail to Marshall requesting the names of his clients who had online access to their accounts and who checked their accounts regularly so he could "be prepared to anticipate who is going to call" and

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3 Hearing Transcript ("Tr.") at 796.

4 Tr. at 795.

5 *See* Tr. at 48.

to "anticipate their questions."[6] After learning that he could find out which KAM accounts were enabled for online access (most were) but that Huntleigh could not currently determine how often any particular client accessed his or her account, Koch told Marshall that allowing clients to have online access "really only causes confusion."[7] He explained that in the wake of the market downturn in the first half of 2009, "[s]ome of [KAM's] newer and younger clients, especially the women" had become too concerned with the short term performance of their KAM accounts and "want[ed] to watch the paint dry."[8]

When Koch wanted a trade executed on behalf of KAM, he would contact Huntleigh's trading desk directly rather than going through Marshall, his registered representative. In September 2009, the trader who had been Koch's contact at Huntleigh's trading desk left the firm and Huntleigh assigned another trader, Jeffrey Christanell, to execute trades for KAM.

B. Respondents engaged in end-of-day, end-of-month trading in three securities.

The allegations in this appeal concern trading on two days—September 30, 2009, and December 31, 2009—in three bank stocks—High Country Bancorp, Inc., Cheviot Financial Institution, and Carver Bancorp, Inc.[9] Each is a small community bank with thinly traded and illiquid stock. Before the trading involved in the case, KAM had been investing in each for ten or more years.[10]

1. KAM purchased High Country shares at the end of the trading day on September 30, 2009.

At the end of September 2009, according to Christanell's testimony at the hearing, Koch instructed Christanell to buy shares of High Country in order to get a higher closing price for the stock.[11] This testimony is corroborated by a series of e-mail exchanges between Christanell and Koch on September 30, 2009. Christanell sent an e-mail to Koch shortly after 1:00 p.m., Central time, informing him that he had purchased 580 shares of High Country at an average price of

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[6] Div. Ex. 96. In a follow-up e-mail to Marshall, Koch explained that he "hate[d] to get blind sided when a client calls and tells [him] what the value of their account is from their on line access to Huntleigh." Div. Ex. 100.

[7] Div. Ex. 121.

[8] *Id.*

[9] The Order Instituting Proceedings also alleged violations related to trading High Country stock on October 31, 2009, and November 30, 2009, but the law judge did not find violations for Respondents' trading on those days and the Division did not file a cross-petition for review. Accordingly, our review is limited to the violations that the law judge found and that are challenged by Respondents on appeal. *See* 17 C.F.R. § 201.411(d).

[10] By the time Koch purchased Carver shares on December 31, 2009, he "was worried" about and had lost some confidence in the stock. Tr. at 905. In 2010, because the bank held too many non-performing loans, KAM sold its Carver shares. *Id.* at 850, 852-53.

[11] *See* Tr. 459-77.

$16.6897 and that the current bid-ask spread for the stock was $11.71 to $20.[12] In the last line of the e-mail, Christanell told Koch: "Let me know what to do from here."[13]

Koch then asked Christanell, with reference to High Country, how stocks are priced at the end of the day or month—whether the price is based on the last executed trade or the last bid.[14] Christanell responded to Koch in an e-mail at 1:30 p.m.:

> If a stock trades on a day, it's priced at the last trade. If it doesn't trade, say no trading volume for a couple of days, it gets priced on the bid.
>
> In the case of [High Country] today, it will get priced on the last trade.[15]

Koch responded by email at 1:43 p.m.: "good. move last trade right before 3pm up to as near $25 as possible without appearing manipulative."[16] At 1:45 p.m., Christanell replied: "Will do."[17]

Christanell then took steps to implement Koch's instructions. Approximately four minutes before the market closed, Christanell placed three separate orders for 1,000 shares each of High Country stock with a limit of $24.50.[18] Each order received partial fulfillment—one for 480 shares at $20, one for 400 shares at $22, and one for 120 shares at $23.99.[19] With less than a minute before the close of the market, Christanell then placed another three orders for High Country stock, each for 400 shares with a limit of $24.[20] At seventeen seconds before the market closed, one of those orders was filled at a price of $23.50.[21] This trade established the closing price of High Country on September 30, 2009.[22] The 1,980 shares of High Country purchased by KAM on September 30, 2009, represented all of the trading volume reported that day.[23] All

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12 Div. Ex. 144. All times in this opinion are expressed in Central time, the time zone in which Huntleigh was located. E-mail exhibits in the record reflect a variety of different time zones, including GMT and Eastern. For example, Exhibit 144 bears the time "2:11:41 PM," but it is apparent from the e-mail's inclusion in e-mail chains in other exhibits, *see* Div. Exs. 148, 149, that this time refers to Eastern time, which would mean the e-mail was sent at 1:11 p.m., Central time.

13 *Id.*

14 Div. Ex. 145.

15 Div. Ex. 146.

16 Div. Ex. 148.

17 Div. Ex. 149.

18 Div. Ex. 278. We use the term "placed" here and throughout the opinion to mean when Christanell routed the order to the street—*i.e.*, when he electronically sent the order out from Huntleigh to receive executions in the market.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*; Div. Exs. 263, 277.

23 Div. Ex. 263.

of the High Country shares purchased by KAM on September 30, 2009, were allocated to the account of Alice Smith, an elderly widow and one of KAM's oldest clients.

2. KAM purchased High Country, Cheviot, and Carver shares at the end of the trading day on December 31, 2009.

At the end of December 2009, according to Christanell's testimony, Koch again instructed him to try to set the closing price for High Country as well as for Cheviot and Carver.[24] On December 23, 2009, Koch sent an e-mail to Christanell that included the following: "I also want to move up [High Country] the last day of the year before things close down .....so, please be mindful of that if you are there or your backup is around....should be a busy day."[25] Then, on December 28, 2009, Koch sent Christanell the following e-mail:

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[24] *See* Tr. 498-501.

> Q: Do you also recall that in December 2009 Mr. Koch instructed you to get a closing price on HCBC [*i.e.*, High Country], right?
>
> A: Yes.
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> ...
>
> Q: Do you recall any conversations that you had with Mr. Koch concerning these trades in HCBC on the last day of December?
>
> A: I remember conversations we had that day, the last day of the year, the 31st, concerning HCBC and other stocks that he was active in.
>
> Q: Okay. What other stocks do you recall discussing with him?
>
> A: CHEV [*i.e.*, Cheviot]; Carver, CARV; and the HCBC.
>
> Q: Any other stock you recall?
>
> A: There may have been others but I don't recall.
>
> Q: Okay. Well, what do you recall discussing with him about those stocks, aside from HCBC?
>
> A: That he wanted to get the price up.
>
> Q: Oh, so he wanted to get the price up on other stocks as well?
>
> A: Or he wanted to get it to a certain—a certain level. I don't know if he used the term get the stock price up, but he wanted to get it to a certain price, particular price.
>
> Q: Okay. And he wanted to get a closing price or he just wanted to increase the price; do you recall?
>
> A: He wanted the closing price to be at a certain level.

[25] Resp. Ex. 33 (ellipses in original).

Dear Jeff,

Please put on your calendar to buy [High Country] 30 minutes to an hour before the close of market for the year. I would like to get a closing price in the 20-25 range, but certainly above 20. Thanks, DLK[26]

Five minutes later, Christanell replied that he "[j]ust set an alert" and that he would "work on it on Thursday [December 31]."[27]

On December 31, 2009, Christanell and Koch had several telephone conversations about Koch's requested end-of-year trading. These conversations were captured by a recording system at Huntleigh that recorded calls to and from the trading desk, primarily to resolve possible trade discrepancies.[28] Koch called Christanell in the morning to discuss his instructions for the purchase of High Country stock that day, saying that "my parameters are—if you need 5,000 shares, do whatever you have to do—I need to get it above 20, you know, 20 to 25, I'm happy."[29] Koch added with regard to the timing of the trades: "You figure out if you want to do it the last half hour—and just create prints."[30] Christanell testified that he understood Koch's instruction to create prints as a direction to "get the stock price up" for the last trade of the day.[31] Christanell responded that he may "start in the last hour or so" because last time he thought he "waited too

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[26] Div. Ex. 186.

[27] Div. Ex. 187.

[28] Tr. at 94; *see also* Div. Ex. 36 at 69. Respondents objected to the admission of these recordings (Division Exhibits 188 through 193) before the law judge and mention the issue of the recordings' admissibility and reliability in footnotes in their petition for review and briefs. *See* Pet. for Review at 6 n.5; Resp'ts Br. at 5 n.4; Resp'ts Reply Br. at 1 n.2, 16 n.11. We find no basis to overturn the law judge's admission of the audio recordings and conclude that we may properly rely upon them. There is no dispute concerning the authenticity of the recordings and there is no evidence of any alteration or manipulation. While the fact that Huntleigh had recordings only for December 31, 2009, is not fully explained in the record, we reject Respondents' suggestion that this by itself makes the recordings somehow unreliable. The recorded conversations are highly relevant evidence of Koch's state of mind at the time of the alleged violations. Similarly, we reject the suggestion made by Respondents before the law judge that the doctrine of completeness somehow limits the admissibility of these recordings. The doctrine of completeness allows the party against whom a statement or portion of a statement has been introduced in evidence to introduce additional portions of the statement or another statement when necessary to "eliminate the misleading impression created by taking a statement out of context." *United States v.Costner*, 684 F.2d 370, 373 (6th Cir. 1982). The recordings admitted by the law judge are six entire telephone conversations between Koch and Christanell. The law judge thus admitted complete statements, and the fact that Huntleigh's system did not retain other possible statements by Koch does not affect the admissibility or reliability of the admitted statements under the doctrine of completeness. Finally, Respondents are correct that the time of day assigned to the recordings by Huntleigh's system appears to be incorrect in at least one case: Exhibit 192 is a conversation that takes place after the close of the market, but it is time stamped ten minutes before the market closed. There is no dispute, however, that all of the telephone conversations captured in the recordings occurred on December 31, 2009, and the exact time at which the conversations took place on that day is largely irrelevant. Thus, the fact that there is a slightly incorrect time-stamp on at least one of the recordings does not render the recordings unreliable.

[29] Div. Ex. 189. The telephone conversations were admitted as audio files and there is no transcript of the recordings in the record. The quotations from the recordings in this opinion are based upon our own transcription.

[30] *Id.*

[31] Tr. at 505.

long and then the guy just didn't move."[32] Koch replied, "I don't want to tell you your job, but get it up there."[33] Koch then warned that "if you come in too early, there is a seller" and once the seller is aware of the trading "he'll push out the volume."[34] Before ending the conversation, Koch reiterated that he was willing to "go up to 5,000 shares if you need to," and he told Christanell to "talk if you need more than that."[35]

Later in the morning, Koch called Christanell again. After confirming that the market closed at the regular time that day, Koch told Christanell that "we may give you some more orders here."[36] He said that his assistant, Fay Heidtbrink, was looking to "see what else we want to move up toward the end of the year," and he told Christanell to expect "some more orders on a couple of these thin stocks I want to push up a little bit."[37]

Koch called the trading desk again around mid-day. After Christanell told Koch that the bid-ask spread for Cheviot was $7.20 to $7.48, Koch said, "Let's see if by the end of the day you move it to above 8—8, 8 and a quarter," to which he added, "that should be pretty easy."[38] Koch then turned his attention to Carver. After Christanell told him that the bid-ask spread for Carver was $8.10 to $9.05, Koch asked if there had been any trades that day and Christanell responded, "no trades, no volume."[39] Koch replied, "Okay, so what you do at the end of the day—pop that one—to 9.05, if you have to."[40] Christanell affirmed, "Yeah, to make a print."[41]

About an hour before the market closed, Koch made another call to the trading desk to ask Christanell how he was "coming along."[42] Christanell said that he had not "done anything yet."[43] Koch then began to summarize his instructions: "So we got three [stocks]—we got Cheviot, and . . ."[44] At this point, Christanell interrupted to ask a question about Cheviot: "How much should I buy to get it up there?"[45] Koch responded, "I'd start at the 100, 200 share increment and see how far it moves," adding that "since it trades so little, I think you'll be able to

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32 Div. Ex. 189.

33 *Id.*

34 *Id.*

35 *Id.*

36 Div. Ex. 193.

37 *Id.*

38 Div. Ex. 191.

39 *Id.*

40 *Id.*

41 *Id.*

42 Div. Ex. 190.

43 *Id.*

44 *Id.*

45 *Id.*

get it up pretty fast."[46] Then, after a brief discussion of the existing offers for Cheviot in the market, Christanell asked, "Am I alright taking 5,000 [shares] if I have to?"[47] Koch replied, "absolutely," and added, "you know, on both of them," to which Christanell affirmed, "Yeah, with [High Country] also."[48] Christanell then turned the conversation to Carver: "I was thinking about just buying like 300 shares at 9.05. Is that alright?"[49]

Koch: Sure. That's perfect. Just make sure you get a print.

Christanell: Yep, I was going to wait on that until the very end.[50]

Before the market closed, Christanell attempted to carry out Koch's instructions. With regard to High Country, approximately five minutes before 3:00 p.m., Christanell placed an order for 3,000 shares with a limit of $25.[51] In the next three minutes, he received a variety of executions filling this order ranging from 200 to 900 shares with prices between $16.80 and $19.50.[52] Around the same time, another buyer bought 300 shares of High Country at $17.50.[53] With a little over a minute before the market closed, Christanell placed another order for 2,000 shares with a limit of $25.[54] This order received a partial fulfillment of 200 shares at $19.50 thirty-two seconds before the market closed and set the closing price for High Country that day.[55] The 3,200 High Country shares purchased by KAM on December 31, 2009, represented 88.9% of the trading volume reported that day.

Christanell also attempted to carry out Koch's instructions by buying Cheviot stock at the end of the trading day. At 2:40 p.m., Christanell placed an order for 2,000 shares of Cheviot with an $8.25 limit.[56] This order was quickly filled in over fifteen separate executions with share quantities ranging from four to 533 shares.[57] Although Christanell had purchased some shares in the order for $8.00, the final execution for the order was at $7.50.[58] Starting at about two minutes before the close of the market, Christanell placed orders for 5,000 more Cheviot shares

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46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 Div. Ex. 278.

52 *Id.*

53 Div. Ex. 277.

54 Div. Ex. 278.

55 *Id.*; Div. Exs. 263, 277.

56 Div. Ex. 278.

57 *Id.*

58 *Id.*

with an $8.25 limit.[59] Although Christanell received an execution at $7.99 approximately seven seconds before the market closed, another market participant had the final trade before the close at a price of $7.39.[60] Christanell received some executions just seconds after 3:00 p.m., for as high as $8.19, but these did not set the closing price for the stock because they came after the official close of the market.[61] KAM's purchase of Cheviot shares on December 31, 2009, represented approximately 70.7% of the reported volume that day.

With regard to Carver, at 2:58 p.m., Christanell placed an order for 200 shares with a limit of $9.05.[62] This order was filled in two executions—one for 100 shares at $9.045 and another for 100 shares at $9.05.[63] These 200 shares represented the total volume of trading in Carver stock that day, and Carver closed at $9.05.[64]

When the trading day was over, Christanell called Koch to report.[65] Christanell was apologetic that he was not able to get higher closing prices for High Country and Cheviot.[66] Speaking about High Country, Christanell said, "I'm sorry . . . . I know you wanted it higher and I tried."[67] Concerning Cheviot, Christanell explained that he was "busy with that one too," but despite several executions at $8.00, the closing price was not at the target Koch had requested.[68] Christanell told Koch that he "bought some right at the bell" at $8.00 but that the executions had been too late to set the closing price.[69] Koch responded: "Okay, you did the best you can."[70] Christanell reported that "Carver closed about 9.05," to which Koch replied, "Good."[71] All of the High Country, Cheviot, and Carver shares purchased by KAM on December 31, 2009, were allocated to the account of an institutional client, Tampsco, which was managed by a long-time friend and client of Koch's.

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59 *Id.*

60 *Id.*; Div. Exs. 265, 276.

61 *See* Div. Ex. 278.

62 *Id.*

63 *Id.*

64 Div. Exs. 264, 275.

65 *See* Div. Ex. 192. The time-stamp on this recording from Huntleigh's trading desk put the time at 2:48 p.m., Central time, but because the conversation during the call includes a discussion that the market had closed about ten minutes prior to the call, it appears that the time-stamp was off by approximately twenty minutes.

66 Christanell's e-mail to Koch reporting the total shares bought that day and the average prices also included an apology: "Sorry, but it was difficult with a lot going on for the end of the year." Div. Ex. 194.

67 Div. Ex. 192.

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

C. Huntleigh investigated KAM's trading and ended its relationship with KAM.

On January 20, 2010, an investigator for NYSE Arca sent a letter to Marshall regarding trading activity in Cheviot on December 31, 2009.[72] Among other things, the letter sought a "detailed description of why the trader(s) entered the trades" and information on Huntleigh's policies and procedures to prevent "marking the close." Marshall showed the letter to Christanell and indicated that she would need his help in preparing a response.[73] According to Marshall, Christanell appeared "upset" after reading the letter.[74] Christanell then told Marshall that his trading for KAM in High Country stock raised similar issues—and, in fact, KAM's purchases of High Country stock involved price moves at the end of the day that "were even more flagrant" than those identified in the NYSE Arca letter.[75] Christanell showed Marshall the December 28, 2009 e-mail in which Koch told Christanell to "buy [High Country] 30 minutes to an hour before the close of market for the year" and Koch said he "would like to get a closing price in the 20-25 range, but certainly above 20."[76] Marshall then launched an internal review of KAM's end-of-month trading.[77]

By letter dated January 20, 2010, Marshall requested information from Koch on the purpose of KAM's High Country trades on the last trading days of September, October, November, and December 2009 and asked Koch "why these transactions should not be considered 'marking the close.'"[78] Koch responded on February 5, 2010, disclaiming any intentional or unintentional effort to mark the close. Koch stated that the High Country purchases allocated to Alice Smith's account were made at her request and that the High Country purchases allocated to Tampsco were made to decrease "excess cash" in the account.[79] Koch emphasized his general practice of trying to buy stock if it becomes available at a price below the tangible book value per share.[80] Based upon its inquiry, Huntleigh terminated Christanell's

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72 Div. Ex. 33. The letter also asked about trading activity in Cheviot on January 4 and 6, 2010.

73 Tr. at 81.

74 *Id.*

75 Tr. at 525; *see also* Tr. at 81-82.

76 Tr. at 81-83; Div. Ex. 187.

77 Tr. at 84-85, 116.

78 Div. Ex. 22.

79 Div. Ex. 24. On February 1, 2010, before responding to Marshall, Koch sent a draft of his response to Christanell, with the request "please do NOT forward." Div. Ex. 221. The draft response is substantially similar to the final response he sent to Marshall, except the draft response did not mention the Tampsco account. *Compare* Div. Ex. 221 *with* Div. Ex. 24.

80 *Id.* On February 5, 2010, Koch also sent two e-mails to Christanell. In the first, Koch tells Christanell that "[y]ou have done nothing WRONG, and do not let any one pressure you to admitting a mistake which you did NOT commit." Div. Ex. 26. Koch speculates that, by going after Christanell and KAM, Huntleigh is trying to divert attention away from other potential misdeeds. *Id.* In the second e-mail, Koch says that "[a]fter things settle down, I would be happy to consider some arrangement of a joint partnership where I provide the trading capital." Div. Ex. 27. Koch again tells Christanell that "you did NO wrong" and suggests that "Huntleigh is trying to cover up something." *Id.*

employment for violating its trading policies on marking the close and also terminated its relationship with KAM.

D. Procedural background

In the spring of 2010, the Commission's Division of Enforcement began its investigation into the matter.[81] On April 25, 2011, the Commission instituted proceedings against Respondents pursuant to Exchange Act Section 21C, Advisers Act Sections 203(e), 203(f), and 203(k), and Investment Company Act Section 9(b).[82] The Order Instituting Proceedings alleged that Respondents engaged in a scheme to mark the close of High Country stock on the last trading days of September, October, November, and December 2009 and of Cheviot and Carver stock on the last trading day of December 2009 in violation of Exchange Act Section 10(b), Rule 10b-5 thereunder, and Advisers Act Sections 206(1) and 206(2). The OIP further alleged that as a result of this conduct Respondents breached their fiduciary duty to seek best execution for their clients. The OIP also alleged that Respondents failed to maintain required books and records in violation of Advisers Act Section 204 and Rule 204-2(a)(7) thereunder. Finally, the OIP alleged that Respondents failed to implement policies and procedures reasonably designed to prevent violations of the Advisers Act in violation of Advisers Act Rule 206(4)-7.

A hearing before the law judge took place over six days in January 2012 and included testimony from Koch, Christanell, Marshall, and Heidtbrink. In addition to fact witnesses, Respondents put forward the testimony of two experts: John Schneider and Gregory Jarrell. Schneider, a partner at KPMG and an accounting expert, testified that KAM consistently followed the investment program agreed to by its clients and that the stock purchases at issue in this case were consistent with that investment program. Jarrell, a professor of business and economics at the University of Rochester, testified as an expert on market economics. He based his opinion on his own expertise and trading data for the stocks at issue in the case, but he did not review any of the communications between Koch and Christanell related to the trades.

Jarrell testified that stocks generally trade in a "U-shaped" pattern, *i.e.*, most trading activity occurs at the start and end of the trading day when market liquidity is the greatest. Given that KAM invested heavily in illiquid stocks, Jarrell posited that it made economic sense for KAM to purchase shares at the end of the trading day. Jarrell further testified that KAM's trading in Cheviot and Carver on December 31, 2009, had minimal impacts on the prices of these stocks and did not set their closing price.[83] Based on these conclusions, Jarrell testified that it was his opinion that Respondents' trading in Cheviot and Carver did not represent marking the close. With regard to High Country, Jarrell testified that KAM's trading affected the price of the

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[81] On May 4, 2010, Koch e-mailed Christanell and asked him to "have your attorney call my attorney." Div. Ex. 28. Koch added that "[w]e both have a strong self-interest in being on the same side of this issue and having the SEC wrap up any issue with you or me quickly." *Id.*

[82] On April 25, 2011, Huntleigh and Christanell entered a settlement with the Commission relating to the events at issue here. *Huntleigh Sec. Corp.*, Securities Exchange Act Release No. 64336, 2011 SEC LEXIS 1439 (Apr. 25, 2011).

[83] As discussed more fully below, the weight of the evidence does not support Jarrell's conclusion that KAM's trading did not set the closing price for Carver.

stock because it was extremely illiquid. Although he could not rule out marking the close for KAM's trading of High Country stock, Jarrell opined that KAM's end-of-month, end-of-day High Country purchases were part of a legitimate attempt to acquire an extremely illiquid and therefore difficult-to-obtain stock.

In an initial decision dated May 24, 2012, the law judge found that Respondents violated the antifraud provisions of the Exchange Act and the Advisers Act through marking-the-close transactions in High Country stock on September 30, 2009, and December 31, 2009, and in Cheviot and Carver stock on December 31, 2009. The law judge also found that Respondents violated Adviser Act Rule 206(4)-7 by failing to implement KAM's anti-manipulation policy.[84] The law judge ordered Respondents to cease and desist from violations of Exchange Act Section 10(b), Rule 10b-5 thereunder, Advisers Act Sections 206(1), 206(2), and 206(4), and Rule 206(4)-7 thereunder, to disgorge $4,169.78 plus prejudgment interest, and to pay a second-tier penalty of $75,000. In addition, the law judge censured KAM and barred Koch from association with an investment adviser. Respondents appeal from the law judge's initial decision.

III.

A.

Exchange Act Section 10(b) makes it unlawful to "use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."[85] Rule 10b-5 thereunder makes it unlawful "for any person, directly or indirectly . . . [t]o employ any device, scheme, or artifice to defraud" or "[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."[86] Advisers Act Section 206 contains similar proscriptions specifically applicable to investment advisers. Advisers Act Section 206(1) makes it unlawful for any investment adviser "to employ any device, scheme, or artifice to defraud any client or prospective client,"[87] and Section 206(2) makes it unlawful for any investment adviser "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client."[88]

Manipulation of the market for a security violates Exchange Act Section 10(b) and Rule 10b-5,[89] and an investment adviser engaged in market manipulation also violates Advisers Act

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[84] The law judge found that the Division did not prove marking the close violations for KAM's trading in High Country stock at the end of October and November 2009. The law judge also found that the Division did not prove Respondents violated Advisers Act Rule 204-2(a)(7) regarding the maintenance of books and records.

[85] 15 U.S.C. § 78j(b).

[86] 17 C.F.R. § 240.10b-5(a) & (c).

[87] 15 U.S.C. § 80b-6(1).

[88] 15 U.S.C. § 80b-6(2).

[89] *Terrance Yoshikawa*, Exchange Act Release No. 53731, 2006 SEC LEXIS 948, at *15 (Apr. 26, 2006).

Section 206.[90] Manipulation has been defined as the "'intentional interference with the free forces of supply and demand.'"[91] "Manipulation of the market for securities is at the core of conduct that the securities laws were designed to prevent."[92] We have noted that "[d]etermining whether a person has engaged in a manipulative scheme depends on inferences from a variety of factual detail, patterns of behavior, and, among other things, trading data."[93]

"'Marking the close' is the practice of attempting to influence the closing price of a stock by executing purchase or sale orders at or near the close of the market."[94] We have previously held that "the practice of placing orders at the end of the day to cause a stock to close higher constitutes a manipulative practice."[95] The purchase of a security at the end of the trading day with the purpose of raising its reported price manipulates the market for the security because it "convey[s] false information to the market as to the stock's price level and therefore as to the demand for the stock free of manipulative influences."[96] In order to prove a marking-the-close violation of Exchange Act Section 10(b), Exchange Act Rule 10b-5, and Advisers Act Section 206(1), the Division must show that Respondents (i) engaged in conduct evidencing a scheme to mark the close—*i.e.*, trading at or near the close of the market so as to influence the price of a security—and (ii) acted with scienter, defined as "a mental state embracing intent to deceive, manipulate, or defraud."[97] To find a violation of Advisers Act Section 206(2) requires only a finding of negligence.[98]

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[90] *David Henry Disraeli*, Exchange Act Release No. 57027, 2007 SEC LEXIS 3015, at *33 (Dec. 21, 2007), *petition denied*, 33 F. App'x 334 (D.C. Cir. 2008) (per curiam) ("'Facts showing a violation of . . . [Exchange Act Section] 10(b) by an investment advisor will also support a showing of a Section 206 violation.'" (alteration in original) (quoting *SEC v. Haligiannis*, 470 F. Supp. 2d 373, 383 (S.D.N.Y. 2007))).

[91] *Yoshikawa*, 2006 SEC LEXIS 948, at *16 (quoting *Pagel, Inc.*, Exchange Act Release No. 22280, 48 SEC 223, 1985 SEC LEXIS 988, at *7 (Aug. 1, 1985)).

[92] *Kirlin Sec. Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *42 (Dec. 10, 2009).

[93] *Amr Elgindy*, Exchange Act Release No. 49389, 57 SEC 431, 2004 SEC LEXIS 555, at *13 (Mar. 10, 2004).

[94] *Thomas C. Kocherhans*, Exchange Act Release No. 36556, 52 SEC 528, 1995 SEC LEXIS 3308, at *6 (Dec. 6, 1995).

[95] *Id.* at *7.

[96] *Id.* at *7; *see also Richard D. Chema*, Exchange Act Release No. 40719, 53 SEC 1049, 1998 SEC LEXIS 2592, at *14 (Nov. 30, 1998) (Marking the close "artificially influence[es]" a stock's "price level at the end of the day" and thereby "intentionally distort[s] the stock's market price, conveying false information to investors and the market.").

[97] *See Kirlin*, 2009 SEC LEXIS 4168, at *44-46 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976) and recognizing that manipulation in violation of Rule 10b-5 depends upon "whether the trading and surrounding circumstances suggest an effort to 'interfer[e] with the free forces of supply and demand'"); *Kocherhans*, 1995 SEC LEXIS 3308, at *6-8 (finding marking-the-close violation where registered representative (1) engaged in trading within the last fifteen minutes of the trading day that raised the price of the security and (2) acted with scienter); *Disraeli*, 2007 SEC LEXIS 3015, at *33 (a violation of Advisers Act Section 206(1) requires a finding of scienter).

We do not adopt the standard for market manipulation advanced by the court in *SEC v. Masri*, 523 F. Supp. 2d 361 (S.D.N.Y. 2007). *Masri*'s holding that a marking-the-close violation requires proof "that *but for* the manipulative intent, the defendant would not have conducted the transaction," *id.* at 372, is inconsistent with our

(continued...)

1. Respondents' trading in High Country constituted marking-the-close violations.

We find that Respondents unlawfully manipulated the market for High Country stock through marking-the-close transactions on September 30, 2009, and December 31, 2009. Respondents' trading activity is consistent with a scheme to mark the close of High Country stock on those days. On September 30, 2009, KAM purchased 1,980 shares of High Country, the vast majority in the last four minutes of trading. KAM's purchases represented 100% of the trading volume in High Country that day[99] and set the closing price for the stock at $23.50. The day before (September 29, 2009) High Country had closed at $18 and for the remainder of 2009 the stock never traded above $20.[100] We find, therefore, that KAM's last minute trading in High Country on September 30, 2009, had the effect of raising the price of the stock.[101]

On December 31, 2009, KAM purchased 3,200 shares of High Country, all within the last five minutes of trading. These purchases represented 88.9% of the trading volume in High Country that day and set the closing price of the stock at $19.50. The highest price for a non-KAM transaction in High Country on December 31, 2009, was $17.50, and for over a year, High Country would never trade as high as its closing price on December 31, 2009.[102] We find that

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(...continued)
precedent, *see Kirlin*, 2009 SEC LEXIS 4168, at *58 (rejecting applicants' reliance on *Masri*'s "but for" test), and, to our knowledge, has not been adopted by any other court, *cf., e.g., In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 391-92 (S.D.N.Y. 2003) (rejecting a "sole intent" standard for manipulation in the context of open market transactions as having no basis in case law). The law judge appears to have applied a version of *Masri*'s holding in finding marking-the-close violations here, concluding that Koch "would not have bought [High Country, Cheviot, and Carver] on September 30 and December 31 at the prices at which they were executed but for his purpose of manipulating their closing prices." *Koch*, 2012 SEC LEXIS 1645, at * 37-38. But the Initial Decision applied *Masri*'s "but for" test in a limited way: it found manipulation when "Koch's manipulative intent altered the timing and prices of his trades." *Id.* at *38. The law judge thus appears to have incorporated into her decision criticism of *Masri* by the court in *SEC v. Kwak*, No. 3:04-cv-1331, 2008 U.S. Dist. LEXIS 10201 (D. Conn. Feb. 12, 2008). *See Koch*, 2012 SEC LEXIS 1645, at *30 (citing *Kwak*, 2008 U.S. Dist. LEXIS 10201, at *16 n.10). *Kwak* noted that *Masri*'s "but for" test "may make some sense . . . under the theory that there is nothing deceptive about a transaction if the exact same transaction would have been entered into absent the manipulative intent" but "that theory loses its applicability if the prohibited intent alters the trade in any material respect (*e.g.*, by changing the time at which the trade would have otherwise been executed)." 2008 U.S. Dist. LEXIS 10201, at *15 n.10. Although we do not adopt the test applied by the law judge, we agree that the evidence in the record shows that Respondents' manipulative intent caused them to alter their trading in some material respect.

[98] *Disraeli*, 2007 SEC LEXIS 3015, at *33; *see also SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

[99] Domination of the market for a security by a market participant is a recognized characteristic of manipulation and here further supports the proposition that Respondents' trading was consistent with a scheme to mark the close. *See Kirlin*, 2009 SEC LEXIS 4168, at *45; *Pagel, Inc.*, Exchange Act Release No. 22280, 48 SEC 223, 1985 SEC LEXIS 988, at *13.

[100] *See* Div. Ex. 263. High Country's closing price would not again go above $20 until February 2012.

[101] A finding that Respondents succeeded in raising the price of the stock is not required to prove a marking-the-close violation. *See infra* note 118 and accompanying text.

[102] *See* Div. Ex. 263.

KAM's High Country purchases on December 31, 2009, had the effect of raising the stock's price.[103]

The evidence in the record also shows that Respondents purchased High Country shares on September 30, 2009, and December 31, 2009, with the express purpose of setting a higher closing price and thus acted with scienter. On September 30, 2009, Koch learned that, pursuant to Huntleigh's pricing policy, the last trade would establish the closing price. Koch then sent an e-mail to Christanell telling him to "move last trade right before 3pm up to as near $25 as possible without appearing manipulative."[104] We agree with the law judge[105] that Koch's attempt to explain this e-mail as an instruction to Christanell to avoid driving up the price of the stock by trading in "as small of an increment as you can" is "unconvincing."[106] As the Division points out, "Koch's instruction contains no information at all about the size of incremental purchases that Christanell should make."[107] Instead, the e-mail contains an instruction for Christanell to attempt to raise the price of the stock "right before" the close of the market. As such, it is compelling direct evidence of Respondents' intent to mark the close of High Country stock on September 30, 2009. Indeed, Koch's instruction to Christanell to avoid "appearing manipulative" is evidence that Respondents understood that they were engaging in manipulative trading.[108] In addition to this e-mail, Christanell testified convincingly that Koch instructed him on September 30, 2009, to "get the [High Country stock] price between 20 and 25 at the end of the day" and

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[103] Even Respondents' expert, Jarrell, conceded that KAM's end-of-day purchases of High Country on these dates had the effect of raising the price of the stock. *See* Resp'ts Ex. 39 at 61 ("KAM's trading in HCBC's stock would have impacted the price.").

[104] Div. Ex. 148.

[105] *Koch*, 2012 SEC LEXIS 1645, at *15. The law judge's credibility determinations are "entitled to considerable weight and deference. We reject such determinations only where there is substantial evidence in the record for doing so." *Martin R. Kaiden*, Exchange Act Release No. 41629, 54 SEC 194, 1999 SEC LEXIS 1396, at *22-23 (July 20, 1999). Here, we find no basis to reject the law judge's appraisal of Koch's self-serving testimony. We also do not disturb the law judge's finding that Koch's explanation for why he was asking about Huntleigh's pricing policy—*i.e.*, that he was merely taking a survey of various custodians—was also "not altogether convincing." *Koch*, 2012 SEC LEXIS 1645, at *14 n.9.

[106] Tr. at 879. When asked what he meant by the e-mail, Koch gave the following explanation:

> Well, you know, . . . I had not worked with this gentleman that long, . . . and I [knew] 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 . . . say, I'm an institutional player, get 5,000 shares. If he gives that signal to the market, the bid/ask goes—and I'm guessing here—30, 35. You destroy the entire market. So I am asking him to be as invisible as you can, to be as low keyed as you can, to do this at 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.

Id. Koch's explanation may provide insight on how he thought Christanell should trade so as not to appear manipulative—*i.e.*, attempt to move the stock price up through incrementally higher purchases—but it completely fails to address why he wanted to "move the last trade . . . up to as near $25 as possible."

[107] Div. Br. at 17.

[108] *See, e.g.*, *Phillip J. Milligan*, Exchange Act Release No. 61790, 2010 SEC LEXIS 1163, at *19 (Mar. 26, 2010) ("[A]ttempts to conceal misconduct indicate scienter.").

that he executed trades near the close of the market "to get the price up to where [Koch] asked [him] to get it."[109]

The evidence of Respondents' intent to mark the close of High Country stock on December 31, 2009, is likewise compelling. Over a week before the end of the year, Koch told Christanell in an e-mail that he "want[ed] to move up [High Country] the last day of the year."[110] In another e-mail on December 28, 2009, he told Christanell "to buy [High Country] 30 minutes to an hour before the close of market for the year," explaining that he "would like to get a closing price [for High Country] in the 20-25 range, but certainly above 20."[111] These e-mails offer strong support for Respondents' intent to mark the close of High Country stock on December 31, 2009. In particular, in the December 28, 2009 e-mail Koch states unambiguously the reason for his instruction to buy High Country near the close of the market on December 31—"to get a closing price in the 20-25 range, but certainly above 20."

The recorded telephone conversations between Koch and Christanell on December 31, 2009, bolster the already strong evidence of intent. In one conversation, Koch told Christanell that "my parameters [for High Country] are—if you need 5,000 shares, do whatever you have to do—I need to get it above 20, you know, 20 to 25, I'm happy."[112] Later in the conversation, Koch made clear that the goal of the end-of-day High Country trading was to "just create prints,"[113] which Christanell testified meant to "get the stock price up" for the last trade of the day.[114] In their conversation after the market closed, Christanell apologized that High Country's closing price was not in the range requested by Koch, saying "I know you wanted it higher and I tried."[115] As Christanell explained in his hearing testimony, he understood that Respondents' purpose for trading High Country on December 31, 2009, was to try "to get a particular price," specifically to "get the price between 20 and 25."[116] When Christanell was unable to achieve this goal, he "remember[ed] that [he] was nervous about it because [he] didn't get the price that [Koch] wanted to get."[117] We find that the record establishes that Respondents acted with scienter when they marked the close of High Country stock on December 31, 2009.

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109 Tr. at 474, 477.

110 Resp. Ex. 33.

111 Div. Ex. 186.

112 Div. Ex. 189.

113 *Id.*

114 Tr. at 505.

115 Div. Ex. 192.

116 Tr. at 504, 506.

117 Tr. at 513.

2. Respondents' trading in Cheviot and Carver constituted marking-the-close violations.

The evidence also establishes marking-the-close violations by Respondents on December 31, 2009, with respect to Cheviot and Carver stock. With regard to Cheviot, the record shows that KAM, whose trades represented 70.7% of the reported volume for Cheviot on December 31, 2009, made multiple purchases of the stock in the last twenty minutes of trading. Specifically, Christanell placed orders for several thousand shares of Cheviot in the final three minutes of trading. KAM's last execution from these orders was a purchase of 200 shares at a price of $7.99 just seven seconds before 3 p.m., Central time, but a later non-KAM trade for Cheviot set the closing price for the stock at $7.39. At nine seconds after 3 p.m., Christanell placed another KAM order for additional Cheviot shares, which almost immediately resulted in three executions—two at $8.00 and one at $8.19. These final three trades, however, came after the official close of the market and therefore none of them set the closing price.

Respondents' trading activity is consistent with a scheme to mark the close. Although KAM's Cheviot purchases did not set the closing price for the stock that day, it was not for lack of trying. As we have held, "[s]ucess is not a prerequisite for a finding of manipulation."[118] KAM purchased Cheviot stock near the close of the market for prices significantly higher than other market participants that day. And KAM's final order, placed within seconds of the close of the market, is consistent with an attempt to raise the stock's closing price, even if it proved unsuccessful because it came too late.

Other evidence shows that it was Respondents' goal to set a closing price above $8.00 for Cheviot on December 31, 2009. Early that day, Koch told Christanell that his assistant was looking to "see what else we want to move up toward the end of the year," and that Christanell should expect "some more orders on a couple of these thin stocks [Koch] want[ed] to push up a little bit."[119] On a call later in the day, after hearing from Christanell that the bid-ask spread for Cheviot was $7.20 to $7.48, Koch asked Christanell to "move it to above 8—8, 8 and a quarter" "by the end of the day."[120] Koch thought that getting a closing price above $8.00 "should be pretty easy,"[121] explaining that "since it trades so little, I think you'll be able to get it up pretty fast."[122] On his call reporting the day's trading, Christanell apologized that he was unable to get the closing price that Koch had sought. Christanell told Koch that, although he had "bought some right at the bell" for $8.00, the trade had been too late to set the closing price.[123] Koch expressed disappointment but told Christanell, "Okay, you did the best you can."[124] These

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118 *Elgindy*, 2004 SEC LEXIS 555, at *15; *see also SEC v. Martino*, 255 F. Supp. 2d 268, 287 (S.D.N.Y. 2003) ("[A]n attempted manipulation is as actionable as a successful one.").

119 Div. Ex. 193.

120 Div. Ex. 191.

121 Div. Ex. 191.

122 Div. Ex. 190.

123 Div. Ex. 192.

124 *Id.*

telephone conversations are persuasive direct evidence of Respondents' intent to mark the close of Cheviot stock on December 31, 2009.[125]

Respondents' trading in Carver on December 31, 2009, also evidences a scheme to mark the close. With less than two minutes before the market closed, Christanell placed a KAM order for 200 shares of Carver stock, which was filled in two executions—the first for 100 shares at $9.045 and the second for another 100 shares at $9.05.[126] These executions, at the high end of the bid-ask spread, represented an uptick in the price of the stock. Respondents point to the testimony of their expert, Jarrell, who concluded that KAM's trading did not set the closing price for Carver on December 31, 2009.[127] But Jarrell's position is inconsistent with the weight of the evidence in the record. The evidence shows that the total reported trading volume for Carver on December 31, 2009 was 200 shares[128] and that KAM purchased 200 shares of Carver on that day before the market closed.[129] In addition, KAM's final purchase of Carver stock on December 31, 2009, at approximately one-and-a-half minutes before the market closed was at a price of $9.05,[130] the same as the reported closing price for the stock.[131] Accordingly, we find a preponderance of the evidence establishes that KAM's final Carver trade set the closing price for the stock.[132] But even if KAM's final Carver purchase did not represent the final trade of the day, Respondents' end-of-day trading is still consistent with a scheme to mark the close. As

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[125] In addition, Christanell's hearing testimony confirms that on December 31, 2009, Koch's "instructions were to get the last trade in the 8 to 8.25 range" for Cheviot. Tr. at 512

[126] Div. Ex. 278.

[127] *See* Resp'ts Br. at 25 (citing Resp'ts Ex. 39 (Jarrell's presentation)); Resp'ts Reply Br. at 19-20 (citing Tr. 1098-1102). Jarrell's testimony that KAM's final trade did not set the closing price may come from a misreading of the trading data. Jarrell apparently relied upon the New York Stock Exchange Trade and Quote ("TAQ") database in reaching his conclusion that a trade by someone other than KAM for 100 shares of Carver at $9.05 at three seconds after 3 p.m., Central time, set the closing price on December 31, 2009. *See* Resp. Ex. 39 at 36. The underlying data from the TAQ database upon which Jarrell relied for his opinion is not in the record, but the Division argued before the law judge, pointing to evidence admitted after the hearing, that the line entry in the TAQ database relied upon by Jarrell was "informational only" and did not represent an actual trade in the market. *See* Div. Mot. to Admit Div. Ex. 340 at 3-5; Div. Ex. 340 at 21. Respondents disputed before the law judge the relevance and foundation of the 2008 TAQ manual for countering Jarrell's testimony. *See* Resp'ts Surreply at 1-4. The law judge did not resolve this factual dispute, and because the law judge also declined to admit the underlying data upon which Jarrell relied in reaching his conclusion, it is difficult for us to do so. Nevertheless, we believe that a preponderance of the evidence in the record supports the conclusion that KAM's trading set the closing price for Carver on December 31, 2009. Jarrell's understanding of the TAQ data—that an additional non-KAM trade for 100 shares set the closing price—contradicts the fact that the total reported volume for Carver on that day was 200 shares, the same amount purchased by KAM. Respondents offer no explanation for this conflict between Jarrell's testimony and other evidence in the record.

[128] Div. Ex. 264 (Bloomberg reports); Div. Ex. 275 (FINRA Audit Trail).

[129] Div. Ex. 278.

[130] *Id.*

[131] Div. Ex. 264.

[132] The law judge did not make an explicit finding in this regard.

previously noted, a marking-the-close violation is not predicated upon Respondents' succeeding in their attempted manipulation.[133]

We find further that Respondents acted with scienter in their purchase of Carver stock in the final minutes of the trading day on December 31, 2009. Telephone conversations between Koch and Christanell show that Koch's purpose in purchasing Carver was to set a higher closing price for the stock. Upon learning that the bid-ask spread for Carver was $8.10 to $9.05 and that there had not yet been any trading activity that day in the stock, Koch told Christanell to "at the end of the day ... pop that one [*i.e.*, Carver]—to 9.05, if you have to."[134] Later that day, Christanell told Koch that he intended to carry out Koch's instructions by buying around 300 shares of Carver at $9.05, to which Koch responded: "That's perfect. Just make sure you get a print."[135] Koch's direction to "pop that one" and his insistence on getting a print—*i.e.*, on executing the trade that will set the closing price for the stock—show that his goal in purchasing Carver stock was to mark the close.[136] And the record shows that this is exactly how Christanell understood Koch's direction. In a telephone conversation with Koch, Christanell affirmed that purpose of KAM's purchase of Carver was "to make a print,"[137] and Christanell testified during the hearing that Koch's reason for purchasing Carver stock on December 31, 2009, was that "he wanted it to close at [$]9[.]05."[138]

* * *

Based on the proceeding analysis, we find that Respondents willfully[139] violated Exchange Act Section 10(b) and Rule 10b-5 thereunder, as well as Advisers Act Section 206(1),[140] through a scheme to mark the close of High Country, Cheviot, and Carver stock.

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[133] *Supra* note 118.

[134] Div. Ex. 191.

[135] Div. Ex. 190.

[136] When asked during the hearing what he meant by "pop that one," Koch responded, "I don't recall having meaning to that. I mean, I don't know. Was that—I don't know." Tr. at 906.

[137] Div. Ex. 191

[138] Tr. at 511.

[139] Respondents argue that the law judge did not find that their violations were willful, contending that "there is no finding of willfulness other than the finding that Respondents intended to trade as they did." Resp'ts Br. at 13. As the Division rightly points out, however, such a finding is all that is required to show willfulness here. Div. Br. at 36 (citing *Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.C. Cir. 2000) (interpreting Exchange Act Section 15(b), which directly mirrors the relevant provisions of Advisers Act Section 203)). "'[I]t has been uniformly held that "willfully" in this context means intentionally committing the act which constitutes the violation'" and does not mean that "'the actor [must] also be aware that he is violating one of the Rules or Acts.'" *Wonsover*, 205 F.3d at 414 (alteration in original) (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)). Our finding of scienter, amply supported by evidence in the record, demonstrates that Respondents' violations were willful.

[140] These findings also support of a violation of Advisers Act Section 206(2), which unlike Section 206(1), requires only a showing of negligence. *Supra* note 98. Because we have found that Respondents acted with scienter, the lesser negligence standard of Section 206(2) is also satisfied. Respondents' suggestion that the law

(continued...)

B.

Respondents raise several challenges to the law judge's findings of marking-the-close violations. We find none of them convincing. Respondents argue that the law judge did not find that Respondents were engaged in deception, which they argue is essential to a finding of manipulation.[141] Respondents are correct that deception must be part of any manipulative scheme,[142] but they misconstrue the meaning of this requirement. The Division is not required to show that particular investors were misled by Respondents' conduct, but only that Respondents were "engaged in fraud or deceit as to the nature of the market for the security."[143] As shown above, Respondents entered the market with the intent of raising the price of the securities they were purchasing, which is directly contrary to the intent of a purchaser who is *not* trying to manipulate the market, namely, acquiring the securities at the best available price. By attempting to raise the price of the stocks they were purchasing, Respondents "intentionally interfered with the factors upon which market value depends"[144] and "distorted the stock[s'] market price[s], conveying false information to investors and market participants."[145] Respondents conduct was deceptive because it "conveyed false information to the market as to the stock[s'] price level[s] and therefore as to the demand for the stock[s] free of manipulative influence."[146] By engaging in transactions with the market-distorting intent of pushing up the

(...continued)
judge failed to make a finding that they violated Advisers Act Section 206(2), *see* Resp'ts Reply Br. at 6 n.7, is specious. *See Koch*, 2012 SEC LEXIS 1645, at *27, *35 ("The record shows that Respondents violated . . . Advisers Act Sections 206(1), 206(2) . . . .").

[141] Resp'ts Br. at 9-10, 15. Related to this argument, Respondents insist that the Initial Decision failed to properly articulate the standards upon which it found violations and this failure is inconsistent with *Rapoport v. SEC*, 682 F.3d 98 (D.C. Cir. 2012). Respondents' reliance on *Rapoport* is misplaced. *Rapoport* remanded to the Commission a case in which the court held the Commission did not adequately articulate a rationale for departing from its own precedent involving the interpretation of a Commission rule of practice. *Rapoport* is inapplicable because any failure to articulate the proper standard by the law judge is cured by our *de novo* review. *See Gary M Kornman*, Exchange Act Release No. 59403, 2009 SEC LEXIS 367, at *35 n.44 (Feb. 13, 2009).

[142] *See Ernst & Ernst*, 425 U.S. at 199 (Exchange Act Section 10(b)'s use of "manipulative" "connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities"); *Wilson v. Merrill Lynch & Co.*, 671 F.3d 120, 130 (2d Cir. 2011) ("'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.'" (quoting *Gurary v. Winehouse*, 190 F.3d 37, 45 (2d Cir. 1999))).

[143] *Yoshikawa*, 2006 SEC LEXIS 948, at *16.

[144] *Kocherhans*, 1995 SEC LEXIS 3308, at *7.

[145] *Adrian C. Havill*, Exchange Act Release No. 40726, 53 SEC 1060, 1998 SEC LEXIS 2599, at *12 (Nov. 30, 1998).

[146] *Kocherhans*, 1995 SEC LEXIS 3308, at *7; *see also Swartwood, Hesse, Inc.*, Exchange Act Release No. 31212, 50 SEC 1301, 1992 SEC LEXIS 2412, at *18 (Sept. 22, 1992) ("Basically, the manipulated price of [the stock], which was perceived by investors as the best information on how others valued the security, deceived the marketplace since it was contrary to the value that would otherwise have been dictated by supply and demand."); *Pagel, Inc.*, 1985 SEC LEXIS 988, at *13 ("When individuals occupying a dominant market position engage in a scheme to distort the price of a security for their own benefit, they violate the securities laws by perpetuating a fraud on all public investors.").

price of the stocks that they were purchasing, Respondents deceived other market participants who were "'entitled to assume that the prices they pay and receive are determined by the unimpeded interaction of real supply and real demand so that those prices are the collective marketplace judgments that they purport to be.'"[147]

Respondents argue that manipulation involves "actions such as wash sales and matched orders which are designed to deceive investors by feigning actual market activity,"[148] suggesting that manipulation must involve fictitious trades. Although wash sales, cross trades, and matched orders are often part of manipulative trading,[149] we have consistently held that "[a] finding of manipulation does not hinge on the presence or absence of any particular device usually associated with a manipulative scheme."[150] And while "fictitious trades frequently form the basis of manipulative activity[,] . . . it is not necessary that the transactions in question be fictitious."[151] For this reason, we have recognized that market manipulation can occur in the context of open market transactions.[152] Although the trades Respondents engaged in were real, they artificially distorted the price of the stocks involved because Respondents were not participating in the market to find the best available prices but with the intent to raise the price of the stocks.

Respondents further contend that the law judge erred by basing her finding of manipulation on Respondents' intent, arguing that "[i]ntent standing alone cannot create an artificial price and deception in the market place" and that "intent, thought, thinking or even wishing is not a crime."[153] Respondents' argument misses the mark. The finding of manipulation here is not based solely on their intent to manipulate but also on their conduct (*i.e.*, end-of-day trades designed to raise the stocks' prices) that furthered that manipulative intent. In this context, we have recognized that a market participant's "scienter renders his interference with the market illegal."[154] In other words, although it is Respondents' intent that transforms what might otherwise have been legal trades into illegal manipulation, the violation is not based on intent alone; there must also be trading activity that is consistent with the intent to manipulate.

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147 *Pagel, Inc.*, 1985 SEC LEXIS 988, at *9 (quoting *Edward J. Mawod & Co.*, Exchange Act Release No. 13512, 46 SEC 865, 1977 SEC LEXIS 1811, at *12-13 (May 6, 1977)).

148 Resp'ts Br. at 15.

149 A wash sale is a fictitious sale where there is no change in beneficial ownership. A matched order is when identical orders to buy and sell are entered at the same time. Often related to a matched order, a cross trade occurs when a security of one client is bought by another client. *See* Thomas Lee Hazen, *Law of Securities Regulation* § 14.3[6][B] (1995).

150 *Swartwood, Hesse, Inc.*, 1992 SEC LEXIS 2412, at *17.

151 Hazen, *supra* note 149, § 14.3[6][A] (citing *Markowski v. SEC*, 274 F.3d 525, 529 (D.C. Cir. 2001)).

152 *See Kirlin*, 2009 SEC LEXIS 4168, at *57-58; *see also In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d at 391 (rejecting a "distinction between open-market manipulation and any other market manipulation").

153 Resp'ts Br. at 10.

154 *Kirlin*, 2009 SEC LEXIS 4168, at *57; *see also Markowski*, 274 F.3d at 528-29 (rejecting the argument that manipulation required fictitious transactions and concluding that the Commission's interpretation of Exchange Act Section 10(b) was reasonable in light of "Congress's determination that 'manipulation' can be illegal solely because of the actor's purpose").

If someone intends to manipulate the market for a security *and* engages in trading that furthers that intent (even if such trading might otherwise be lawful or if the manipulation ultimately is unsuccessful), that person has engaged in illegal market manipulation.

Respondents further argue that they had no motive to manipulate and that "[t]he absence of motive . . . undercuts a claim of manipulation."[155] But proof of motive is not required where there is direct evidence of manipulative intent; it is only where direct evidence of scienter is lacking that circumstantial evidence of intent, such as motive, becomes critical.[156] In this case, there is substantial direct evidence of scienter, including multiple statements by Koch unambiguously showing his intent to mark the close of the stocks in question. Accordingly, the Division is not required to prove Respondents' motive for perpetuating the manipulative scheme.

That said, the evidence in the record shows that Respondents had motive to mark the close. Respondents profited financially from the marking-the-close scheme by increasing the advisory fees paid by clients, even if the increase in fees related to these violations was relatively modest. And contrary to Respondents' suggestion,[157] the fact that Respondents waived fees in the past does not mean that they had no motive to inflate client fees in the second half of 2009. In addition, the evidence suggests that Koch was motivated to artificially raise the prices of the stocks held by KAM's clients to maintain his reputation as a skilled investment adviser. Koch testified that he was particularly concerned about KAM's performance because most of his clients were his friends and associates,[158] and the record shows that Koch was frustrated with the attention that certain clients were paying to their account balances in the wake of the 2009 market downturn.[159] This suggests that Koch, in order to maintain his reputation and avoid losing clients' investments, had a motive to try to boost the performance of his clients' accounts through market manipulation, even if the financial benefit to him through increased fees was modest.[160]

Faced with the substantial direct evidence of scienter in the record, Respondents counter that portions of e-mails and telephone conversations have been taken out of context by the law

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[155] Resp'ts Br. at 16, 26-27; *see also* Resp'ts Reply Br. at 4.

[156] *See, e.g., Renovitch v. Kaufman*, 905 F.2d 1040, 1046 (7th Cir. 1990) (noting that where there is no "direct evidence of scienter, the court should examine whether there is indirect evidence of scienter" including examining whether there was motive to commit fraud); *Stumpf v. Garvey*, No. 03-CV-1352-PB, 02-MDL-1335-PB, 2005 U.S. Dist. LEXIS 19154, at *35 (D.N.H. Sept. 2, 2005) ("[S]cienter can be established through direct evidence" or by "'combin[ing] various facts and circumstances indicating fraudulent intent—including those demonstrating motive and opportunity.'" (quoting *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 82 (1st Cir. 2002))); *Kas v. Caterpillar, Inc.*, 815 F. Supp. 1158, 1163 (C.D. Ill. 1992) ("If the plaintiff fails to produce direct evidence, the court should examine whether there is indirect evidence of scienter by considering whether the fraud was in the interest of the defendants or whether the defendants had a motive to defraud.").

[157] Resp'ts Br. at 27.

[158] Tr. at 795.

[159] *See, e.g.*, Div. Ex. 121.

[160] *Cf. Janet Gurley Katz*, Exchange Act Release No. 61449, 2010 SEC LEXIS 994, at *56 (Feb. 1, 2010) (noting that a registered representative "derived a personal benefit by keeping [her] clients . . . happy and retaining their business").

judge and the Division.[161] We find no merit in this contention. Upon our *de novo* review, we find that, in the context of the entire record, the e-mails and telephone conversations are convincing evidence of Respondents' intent to mark the close. We are unpersuaded by Respondents' attempts to cast these e-mails and telephone conversations in a more benign light by obscuring the context out of which they arose. For example, Respondents consistently suggest that the evidence in the record—including the interactions between Koch and Christanell—supports their contention that the relevant trading by KAM was for the purpose of acquiring difficult-to-obtain shares of stock.[162] But contrary to Respondents' suggestion, the evidence shows that Koch's overriding motivation for the trading at issue was to obtain a particular closing price and not to acquire shares. Not only did Christanell repeatedly testify to this during the hearing,[163] but Koch's statements in e-mails and telephone conversations show the same:

- "I would like to get a closing price in the 20-25 range, but certainly above 20."[164]
- "[I]f you need 5,000 shares, do whatever you have to do—I need to get it above 20, you know, 20 to 25, I'm happy."[165]
- "I can go up to 5,000 shares if you need to. . . . Talk if you need more than that."[166]
- Regarding Cheviot, Christanell asked, "How much should I buy to get it up there?" Koch responded, "You know, I'd start at the 100, 200 share increment and see how far it moves. . . . I think, since it trades so little, I think you'll be able to get it up pretty fast."[167]

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[161] *See* Resp'ts Br. at 2, 14; Resp'ts Reply Br. at 1-2.

[162] *See* Resp'ts Br. at 1-2, 14-15, 25; Resp'ts Reply Br. at 2. In one particularly brazen attempt at spin, Respondents unjustifiably added the following bracketed material to Christanell's apology to Koch at the end of the trading day on December 31, 2009: "I know you wanted it higher [which would get more shares], and I tried." *Id.* at 16; *see also* Resp'ts Br. at 25 (suggesting that Christanell apologized because "KAM failed to acquire the 5,000 share block of High Country it sought").

[163] Tr. at 498 ("Q: Okay. For all the trades that we've discussed so far, was Mr. Koch's focus on acquiring a certain number of shares or on getting a particular closing price? A: It was getting—more based on getting the closing price."); Tr. at 504-05 ("Q: So was he trying to acquire 5,000 shares or was he trying to get a particular price? A: He was trying to get a particular price."); Tr. at 511 ("Q: So was the principal focus on acquiring CARV for Mr. Koch, or was the focus on getting a closing price? A: The focus was the closing price, the last trade of the day.").

[164] Div. Ex. 186.

[165] Div. Ex. 189.

[166] *Id.*

[167] Div. Ex. 190.

- Christanell then asked, "Am I alright taking 5,000 [shares] if I have to?", to which Koch replied, "Sure, absolutely . . . you know, on both of them." Christanell affirmed, "Yeah, with [High Country] also."[168]

- On Carver, Christanell asked, "I was thinking about just buying like 300 shares at 9.05. Is that alright?", to which Koch replied, "Sure. That's perfect. Just make sure you get a print."[169]

Considering all the evidence in its proper context, it is apparent that Koch was focused on getting a particular closing price for these securities and not on acquiring shares. It makes no sense for Koch to say "if you need 5,000 shares, do whatever you have to do" and "I can go up to 5,000 shares if you need to" if his goal was to acquire 5,000 shares. His repeated use of such phrases shows that he was authorizing Christanell to purchase up to 5,000 shares only in order to increase the price of the securities at the close of the market—*not* because he wanted that number (or any particular number) of additional shares.[170]

In support of their contention that their trading was for a legitimate investment purpose, Respondents rely heavily upon the testimony of their expert witnesses, particularly Jarrell.[171] But this reliance is misplaced. The thrust of Jarrell's testimony was that KAM's trading can be viewed as part of a legitimate strategy to acquire difficult-to-obtain and illiquid stocks. But Jarrell's testimony has serious limitations. Most significantly, Jarrell did not review any of the communications between Koch and Christanell in forming his opinions about whether the trading at issue was manipulative.[172] Although it might be possible to view some of the trading at issue here, standing alone, as consistent with legitimate attempts to obtain illiquid stocks, such an explanation is not convincing if it fails to take into account the strong evidence of Respondents' intent to manipulate. In addition, although Jarrell uses the illiquid nature of the relevant stocks as part of his explanation for why KAM's trading could be legitimate, his opinion fails to take into account that the market for thinly traded stocks is more easily manipulated and thus more often the target of manipulative schemes.[173]

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168 *Id.*

169 *Id.*

170 Moreover, as the law judge recognized, Koch fails to provide a credible explanation for why he purchased only a few hundred shares of Carver on December 31, 2009, if his goal was to acquire the stock. *Koch*, 2012 SEC LEXIS 1645, at *22.

171 The thrust of the testimony of Respondents' other expert, Schneider, was that the trades in question were consistent with KAM's overall investment program. *See* Resp'ts Br. at 7. That the trades were consistent with KAM's investment program, however, does not mean they were not manipulative. Thus, Schneider's opinion in this regard ultimately is not relevant to the question of Respondents' liability.

172 Tr. at 1151.

173 *See, e.g.*, Steve Thel, *$850,000 in Six Minutes—The Mechanics of Securities Manipulation*, 79 Cornell L. Rev. 219, 231 (1994) ("[M]anipulation by taking advantage of inelastic supply is likely to be easier with thinly traded securities. In fact, such securities are the subject of many allegedly manipulative schemes.").

Many of the details of Jarrell's testimony are also problematic. With regard to High Country, Jarrell could not rule out marking the close and he conceded that KAM's trades had the effect of raising the price of the stock. Jarrell insisted that it made economic sense to purchase illiquid stocks at the end of the day because of a U-shaped trading curve that applies to stocks in general, which means liquidity is the highest at the start and end of the day. But as Jarrell admitted during the hearing, High Country itself did not have a U-shaped trading curve.[174]

Moreover, as the Division points out, Jarrell's explanation does not account for the manner in which KAM acquired High Country stock the vast majority of the time. If it made economic sense for KAM to purchase High Country at the end of the day and end of the month, one would expect to see KAM using such a strategy when acquiring shares. However, as Respondents' expert Schneider testified, between January 7, 1998, and December 28, 2010, KAM purchased High Country on twenty-six separate days but did so on the last trading day of the month only six times—four of which were in 2009 (at issue in this case) and the other two were in 1998.[175] Additionally, trading data from mid-2008 through the end of 2009 show that KAM often purchased High Country shares in the middle of the trading day.[176] Thus, despite Jarrell's opinions about the rationality of KAM's theoretical trading strategy, the evidence shows that KAM did not actually use such a strategy generally for obtaining High Country stock, and Jarrell failed to offer an explanation for this inconsistency.

Furthermore, Jarrell's opinion that KAM's December 31, 2009 trading in Cheviot and Carver did not reflect marking the close is premised on both factual and legal errors. First, Jarrell's opinion relies on his conclusion that KAM's trading did not set the closing price for these stocks on the day in question. But as discussed above, the evidence shows that KAM's trading did set Carver's closing price.[177] More importantly, Respondents can engage in a manipulative scheme to mark the close even if they were ultimately unsuccessful in setting the closing price.[178] And although Jarrell is correct that the price movements with regard to KAM's trading in Cheviot and Carver are smaller than those of High Country, the evidence shows that KAM's trading in these stocks was designed to and did have an impact on the stocks' prices.[179]

Respondents further argue that their trading was not manipulative because they used limit orders and "ladder[ed] up" the price of the shares by making small executions to attract potential sellers of a difficult-to-obtain security.[180] Although Respondents may have had a more immediate impact on price by entering a large market order, the evidence shows that they were

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[174] Tr. at 1157-59; Resp'ts Ex. 39 at 17.

[175] Resp'ts Ex. 36; Tr. at 1226-27.

[176] *See* Div. Exs. 321-39.

[177] *See supra* notes 127-131 and accompanying text.

[178] *See supra* note 118. Jarrell testified during the hearing that his opinion was not based on any knowledge of the *legal* requirements to find a marking-the-close violation. Tr. at 1153.

[179] *See supra* at 18 &19.

[180] *See* Resp'ts Br. at 6, 18. Although Respondents write in their brief that Jarrell called this a "laddering" effect, *id.* at 18, Jarrell's testimony does not include this term.

trying to avoid "appearing manipulative."[181] And contrary to Respondents' suggestion, the use of limit orders is not inconsistent with a manipulative scheme to mark the close.[182] Respondents also suggest that because neither KAM nor its clients sold the shares at issue their trading cannot be manipulative.[183] Selling a manipulated stock in order to reap a short term gain based on an elevated price, however, is not the only reason for manipulating a stock's price. We have recognized that investment advisers can use marking-the-close transactions to manipulate the closing value of a managed account at the end of a reporting period—which is exactly the type of manipulative scheme alleged here.[184] Whether the shares are retained thereafter is not relevant to whether the original purchases were part of such a manipulative scheme. And a client's decision not to sell the stock or complain about the manipulated price at which it was purchased does not mean that there was no manipulation to begin with.[185]

Respondents argue that the Initial Decision's failure to specifically address the allegation that Respondents did not seek best execution for the trades at issue "can only be read as a failure of proof" for the marking-the-close violations.[186] We disagree. Although the Initial Decision does not use the words "best execution," it did find that "Koch's seeking to mark the close by purchases for the accounts of others at higher prices than would have resulted from legitimate market forces violated his fiduciary duty as an investment adviser,"[187] which is another way of saying the same thing.[188] As Respondents recognize, marking the close and failure to seek best execution are closely related. When an investment adviser attempts to raise the price of the securities he is purchasing for the accounts of his clients, *a fortiori*, he is not seeking to obtain for those clients "the most favorable terms reasonably available under the circumstances."[189]

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[181] Div. Ex. 148.

[182] *See Havill*, 1998 SEC LEXIS 2599, at *16-17 (noting that limit orders can be consistent with marking-the-close manipulation when they cause the price of the stock to rise).

[183] *See* Resp'ts Br. at 26; Tr. at 893 (Koch testifying that the allegation of market manipulation was incorrect "because I didn't sell").

[184] *See, e.g., ABN AMRO Inc.*, Exchange Act Release No. 44677, 2001 SEC LEXIS 1621 (Aug. 10, 2001) (settlement of marking-the-close charges); *Parlin*, Exchange Act Release No. 44679, Investment Advisers Act Release No. 1967, 2001 SEC LEXIS 1622 (Aug. 10, 2001) (same).

[185] *Cf. Kevin M. Glodek*, Exchange Act Release No. 60937, 2009 SEC LEXIS 3936, at *27 (Nov. 4, 2009) ("The fact that many of the customers did not lose money and did not complain about the violations does not further mitigate Glodek's misconduct."), *pet. for review denied*, 416 F. App'x 95 (2d Cir. 2011).

[186] Resp'ts Br. at 11.

[187] *Koch*, 2012 SEC LEXIS 1645, at *38.

[188] *See, e.g., Fleet Inv. Advisors, Inc.*, Advisers Act Release No. 1821, 1999 SEC LEXIS 1805, at *24 (Sept. 9, 1999) ("[A]n investment adviser's fiduciary duty includes the requirement to seek the best execution of client securities transactions where the adviser is in a position to direct brokerage transactions.").

[189] *Newton v. Merrill, Lynch, Pierce, Fenner & Smith*, 135 F.3d 266, 270 (3d Cir. 1998). Christanell's affirmative answer to the question of whether the trades in question represented "best execution," Tr. at 591, cannot be squared fully with his testimony that these trades were different from typical trading because they did not involve "try[ing] to purchase them at the best price we can," Tr. at 517. It is possible that Christanell understood the concept of "best execution" differently than obtaining the best available price. In any event, Christanell's opinion about the abstract concept of "best execution" does not carry the weight of the extensive evidence in the record—including

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Thus, marking the close, which here involved attempts to raise the price of a security through end-of-day purchases, is plainly inconsistent with an investment adviser's duty to seek best execution. As the law judge found, the evidence in the record shows that, to the extent they were present, other market participants were obtaining the relevant securities at lower prices than KAM.[190] Koch even instructed Christanell to try to avoid a seller of High Country on December 31, 2009, in order to get a higher closing price.[191] We have recognized such conduct as evidence of a failure to seek best execution.[192] Accordingly, we find that the allegations of failure to seek best execution are supported by the evidence in the record and that the law judge's failure to use the words "best execution" in the Initial Decision in no way undermines the marking-the-close violations.[193]

Respondents further argue that only KAM (and not Koch) could be a primary violator because "KAM, not Mr. Koch[,] is the investment adviser."[194] We find, however, that Koch, whose activities as KAM's principal and sole owner extended to "advising others . . . as to the value of securities or as to the advisability of investing in, purchasing or selling securities," falls under the broad definition of "investment adviser" in the Act.[195] As such, he can be liable as a primary violator under Advisers Act Sections 206(1) and 206(2).[196] Similarly, Respondents'

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Christanell's own testimony---that Respondents were not trying to obtain the relevant securities for the best available price but were seeking to raise the price of the securities through their purchases.

190 *See Koch*, 2012 SEC LEXIS 1645, at *13, *21-22. The record also shows that on September 8, 2009, Koch purchased 10,000 shares of High Country for his personal and family accounts out of the account of one of his other clients for an average of $11.71 per share. *See* Div. Ex. 53 at SEC-HUNTLEIGH 3327-28; *see also* Resp'ts Ex. 39 at 41. Just three weeks later, on September 30, 2009, KAM purchased 2,000 shares of High Country for the account of Alice Smith for an average of $20.3794 per share. *See* Div. Ex. 53 at SEC-HUNTLEIGH 3336. Although Smith paid nearly double the price per share for the stock that Koch had paid earlier in the month, Koch insisted that Smith got a "terrific deal." Tr. at 883.

191 Div. Ex. 189. Koch specifically warned Christanell that "if you come in too early, there is a seller" and once the seller is aware of the trading "he'll push out the volume." *Id.*

192 *See Kirlin*, 2009 SEC LEXIS 4168, at *71-73 (finding a failure to seek best execution where broker, as part of a manipulative scheme, ignored a pending order in the market to prevent a large market transaction from depressing a stock's bid price).

193 We reject Respondents' argument that the issue of best execution was somehow forfeited by the Division under the Commission's Rules of Practice, *see* Resp'ts Reply Br. at 5-6, particularly because it was Respondents who first raised the issue by arguing that the Initial Decision's treatment of the topic constituted a failure of proof for the marking-the-close violations.

194 Resp'ts Br. at 12 n.5.

195 15 U.S.C. § 80b-2(a)(11).

196 *Warwick Capital Mgmt.*, Advisers Act Release No. 2694, 2008 SEC LEXIS 96, at *31 n. 37 (Jan. 16, 2008) ("We have held that an associated person may be charged as a primary violator under Section 206 where his activities cause him to meet the 'broad' definition of 'investment adviser.'" (quoting *John J. Kenny*, Exchange Act Release No. 47847, 56 SEC 448, 2003 SEC LEXIS 1170, at *63 n. 54 (May 14, 2003))); *see also SEC v. Gotchy*, No. 91-1855, 1992 U.S. App. LEXIS 33647, at *6 (4th Cir. Dec. 28, 1992) (per curiam) (holding that president and fifty percent owner of registered investment adviser qualified as an investment adviser "within the meaning of the Act"); *Abrahamson v. Fleschner*, 568 F.2d 862, 870 (2d Cir. 1977) ("[P]ersons who managed the funds of others for compensation are 'investment advisers' within the meaning of the statute."); *SEC v. Juno Mother Earth Asset Mgmt.*,
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reliance on *Janus Capital Group, Inc. v. First Derivative Traders*,[197] for the proposition that Koch cannot be liable as a primary violator is also misplaced.[198] *Janus* limited the scope of primary liability under Rule 10b-5(b) to the entity that was responsible for making the statements alleged to be fraudulent, and focused specifically on the meaning of the word "make" in Rule 10b-5(b).[199] Respondents, however, are not charged with making statements but with engaging in manipulative and deceptive conduct, and thus *Janus*'s holding does not apply.[200] For the same reason, *Janus* does not apply to violations of Advisers Act Sections 206(1) and 206(2), which lack any reference to making statements.[201]

C.

The law judge found that Respondents violated Advisers Act Rule 206(4)-7(a), which requires that investment advisers "[a]dopt and implement written policies and procedures reasonably designed to prevent violations by [the adviser] of the Act and the rules that the Commission has adopted under the Act."[202] In reaching this conclusion, the law judge found, after finding a violation of the Advisers Act, that "[i]nasmuch as KAM was a one-man firm and Koch was its alter ego as well as its Chief Compliance Officer, it is concluded that KAM and Koch did not implement the anti-manipulation policy and thus violated the rule."[203]

We agree that Respondents violated Rule 206(4)-7(a), but on slightly different grounds. Although a violation of the Advisers Act may be evidence that there was a failure to implement a policy against violating the Act, to determine whether there was a Rule 206(4)-7(a) violation, we consider evidence about the steps the adviser took or failed to take to adopt and implement policies and procedures reasonably designed to prevent violations. Upon our *de novo* review of the record, we find that Respondents violated Rule 206(4)-7(a) by failing to implement KAM's policy against manipulative trading.

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LLC, No. 11 Civ. 1778, 2012 U.S. Dist. LEXIS 28114, at *13-15 (S.D.N.Y. Mar. 2, 2012) (holding that individual defendants who were twenty-five percent owners and served as the portfolio manager, CEO and Chief Compliance Officer of a registered investment adviser were "investment advisers" under the Act); *SEC v. Berger*, 244 F. Supp. 2d 180, 192-93 (S.D.N.Y. 2001) (concluding that individual who controlled an investment adviser firm "is also properly labeled an investment adviser within the meaning of the Advisers Act").

197 131 S. Ct. 2296 (2011).

198 *See* Pet. for Review at 20-21; Resp'ts Br. at 12 n.5.

199 131 S. Ct. at 2302.

200 *See, e.g., SEC v. Monterosso*, Nos. 13-10341, 13-10342, 13-10464, 2014 WL 815403, at *5 (11th Cir. Mar. 3, 2014) (declining to extend *Janus* to claims that hinge on deceptive conduct); *SEC v. Pentagon Capital Mgmt., PLC*, 844 F. Supp. 2d 377, 421-22 (S.D.N.Y. 2012) (same), *aff'd in part, vacated in part on other grounds*, 725 F.3d 279 (2d Cir. 2013).

201 We are unaware of any ruling extending *Janus* to Advisers Act Section 206 violations.

202 17 C.F.R. § 275.206(4)-7(a).

203 *Koch*, 2012 SEC LEXIS 1645, at *39.

KAM's policies and procedures manual expressly prohibited "[e]ngag[ing] in any transaction intended to raise, lower or maintain the price of any Security."[204] When asked by his counsel what he did to implement the manual's trading policies, Koch responded, "I made sure that I followed my highest sense of right," and he added that he kept records of "every trade we did."[205] But the evidence in the record, as outlined above, shows that Koch—the only KAM employee responsible for implementing the anti-manipulation policy— engaged in multiple transactions specifically intended to raise the price of the securities KAM was purchasing. The multiple instances of intentionally manipulative trading by Respondents belie Koch's claim that he implemented the policy through ethical behavior and, in fact, demonstrate a complete failure to meaningfully implement KAM's policy against manipulative trading. Moreover, merely keeping records of KAM's trading is insufficient to implement an anti-manipulation policy. For these reasons, we find that Respondents violated Rule 206(4)-7(a).

IV.

A. Censure and collateral bar

The Division requests that we censure KAM and impose a collateral bar upon Koch. Advisers Act Section 203(e), among other things, authorizes us to censure an investment adviser for willfully violating the securities laws.[206] Advisers Act Section 203(f) authorizes us to bar a person associated with an investment adviser from being associated with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization if the person has willfully violated the securities laws.[207]

In determining the need for sanctions in the public interest, we consider, among other things, (i) the egregiousness of the respondent's actions; (ii) the degree of scienter involved; (iii) the isolated or recurrent nature of the infraction; (iv) the respondent's recognition of the wrongful nature of his or her conduct; (v) the sincerity of any assurances against future violations; and (vi) the likelihood that the respondent's occupation will present opportunities for future violations.[208] Our "inquiry into . . . the public interest is a flexible one, and no one factor is dispositive."[209]

Respondents' insistence to the contrary notwithstanding,[210] their conduct was egregious. Market manipulation is one of the most egregious securities law violations.[211] We have held that

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204 Div. Ex. 279.

205 Tr. at 822.

206 15 U.S.C. § 80b-3(e).

207 15 U.S.C. § 80b-3(f).

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

209 *Disraeli*, 2007 SEC LEXIS 3015, at *61.

210 Resp'ts Br. at 28.

211 *See Robert J. Prager*, Exchange Act Release No. 51974, 2005 SEC LEXIS 1558, at *55 (July 6, 2005) (noting that manipulation is a "very grave violation," and that its elimination is "one of the central goals of the federal securities

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"[c]onduct that violates the antifraud provisions 'is especially serious and subject to the severest of sanctions.'"[212] Respondents also acted with scienter. As detailed above, the evidence shows that Respondents engaged in end-of-month, end-of-day trading with the specific intent to manipulate the market by marking the close of the securities they purchased. This conduct was recurrent, with Respondents attempting to mark the close of one or more securities at least twice in the second half of 2009. Respondents' marking-the-close scheme ended after regulators began investigating suspicious end-of-day trades, but we have repeatedly declined to credit a respondent whose misconduct stopped only after it was detected by regulators.[213]

Respondents point to their "unblemished record of years of service to firm clients" and "deep respect for the rule of law" to show that they will not commit future violations.[214] We have concerns, however, about the sincerity of their assurances given the degree of scienter involved. We also find troubling their continued insistence that they have done nothing wrong and that their trading activity was completely legitimate, despite substantial evidence that they intentionally sought to raise the price of the securities they were purchasing to obtain a particular closing price. Respondents also insist there is "little likelihood of reoccurrence" because they "currently have no advisory clients" and Koch is "retired."[215] We note, however, that Koch apparently still manages at least some client accounts,[216] and as the Division argues,[217] absent a bar there is nothing to prevent Koch from coming out of retirement and participating in the industry.

The law judge declined to impose a collateral bar solely on the ground that, in her view, a collateral bar amounted to imposing a "new sanction retroactively."[218] At the time of her decision, the law judge did not have the benefit of our decision in *John W. Lawton*.[219] For the reasons we explained in *Lawton*, the imposition of a collateral bar in this case is not impermissibly retroactive.[220] The Dodd-Frank Act amended Advisers Act Section 203(f) to

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laws" (citing *R.B. Webster Inv., Inc.*, Exchange Act Release No. 34659, 51 SEC 1269, 1994 SEC LEXIS 2868, at *22(Sept. 13, 1994))).

212 *Disraeli*, 2007 SEC LEXIS 3015, at *66 (quoting *Marshall E. Melton*, Exchange Act Release No. 48228, 56 SEC 695, 2003 SEC LEXIS 1767, at *29-30 (July 25, 2003)).

213 *See Gregory O. Trautman*, Exchange Act Release No. 61167, 2009 SEC LEXIS 4173, at *78 (Dec. 15, 2009) (considering the nature of the misconduct and finding bar appropriate where, among other things, misconduct stopped only after it was detected by regulators); *Joseph John VanCook*, Exchange Act Release No. 61039A, 2009 SEC LEXIS 3872, at *61-62 (Nov. 20, 2009) (same), *petition denied*, 653 F.3d 130 (2d Cir. 2011); *Ofirfan Mohammed Amanat*, Exchange Act Release No. 54708, 2006 SEC LEXIS 2545, at *45 (Nov. 3, 2006) (same).

214 Resp'ts Br. at 28-29.

215 Resp'ts Br. at 28.

216 Tr. at 806-08.

217 Div. Br. at 39.

218 *Koch*, 2012 SEC LEXIS 1645, at *48 n.29. The law judge made no determination that a collateral bar would not be in the public interest.

219 Advisers Act Release No. 3513, 2012 SEC LEXIS 3855 (Dec. 13, 2012).

220 *Id.* at *20-38.

authorize us to bar persons associated with an investment adviser from association with an investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, whereas Section 203(f) previously provided only for an investment adviser associational bar.[221] Although Congress enacted the Dodd-Frank amendment after Koch committed his misconduct, we held in *Lawton* that such collateral bars are not impermissibly retroactive because the decision to impose such a bar is based on a present assessment of "whether such a remedy is necessary or appropriate to protect investors and markets from the risk of future misconduct."[222]

Based upon such an assessment, we conclude that it is in the public interest to censure KAM and impose a collateral bar on Koch from associating with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization. Koch's intentional manipulation of the securities market raises significant doubts about his fitness to remain in the securities industry in any capacity. As we have recognized previously, market manipulation "'attacks the very foundation and integrity of the free market system' and 'runs counter to the basic objectives of the securities laws.'"[223] Because "[t]he securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence,"[224] it is essential that the "highest ethical standards prevail in every facet of the securities industry."[225] The antifraud provisions that Koch violated apply broadly to the conduct of all participants in the securities industry. In addition, Koch's violations were neither technical in nature nor based solely on his status as an investment adviser. For all of these reasons, we believe that a collateral bar is in the public interest.

B. Cease-and-desist order

Exchange Act Section 21C and Advisers Act Section 203(k) authorize us to issue a cease-and-desist order against any person who "is violating, has violated, or is about to violate" the

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221 Prior to Dodd-Frank, the Division could seek—under the Exchange Act—to bar a person with an existing investment adviser suspension or bar from associating with a broker, dealer, municipal securities dealer, or transfer agent (but not from associating with a municipal advisor or a nationally recognized statistical rating organization) in a separate proceeding if the person was seeking such an association. *See Lawton*, 2012 SEC LEXIS 3855, at *17. The Division submitted in its brief that that it was not authorized to seek an order barring Koch from association with a municipal advisor or a nationally recognized statistical rating organization, Div. Br. at 41, presumably because such bars were completely unavailable prior to Dodd-Frank. In light of *Lawton*, however, a full collateral bar is an available sanction.

222 *Lawton*, 2012 SEC LEXIS 3855, at *32.

223 *Yoshikawa*, 2006 SEC LEXIS 948, at *32 (quoting *Pagel, Inc.*, 1985 SEC LEXIS 988, at *21).

224 *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 SEC LEXIS 2238, at *28 (Sept. 26, 2007); *see also Paul K. Grassi, Jr.*, Exchange Act Release No. 52858, 2005 SEC LEXIS 3072, at *9 (Nov. 30, 2005); *Frank Kufrovich*, Exchange Act Release No. 45437, 55 SEC 616, 2002 SEC LEXIS 3399, at *17 (Feb. 13, 2002); *William F. Lincoln*, Exchange Act Release No. 39629, 53 SEC 452, 1998 SEC LEXIS 193, at *29 (Feb. 9, 1998); *Philip S. Wilson*, Exchange Act Release No. 23348, 48 SEC 511, 1986 SEC LEXIS 1332, at *14 (June 19, 1986); *Walter H. T. Seager*, Exchange Act Release No. 20831, 47 SEC 1040, 1984 SEC LEXIS 1836, at *8 (Apr. 6, 1984).

225 *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186-87 (1963) (internal citation omitted).

Acts or the rules promulgated thereunder.[226] In determining whether a cease-and-desist order is appropriate, we consider the *Steadman* factors identified above as well as "whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings."[227] In this context, we also consider the risk of future violations.[228] Although "'some' risk is necessary, it need not be very great to warrant issuing a cease-and-desist order. Absent evidence to the contrary, a finding of violation raises a sufficient risk of future violation."[229]

Based on our consideration of the relevant factors, we conclude that a cease-and-desist order is appropriate. As discussed above, Respondents' conduct involved egregious violations of the securities laws, Respondents acted with scienter, the violations were recurrent, and Respondents continue to insist—despite strong evidence to the contrary—that they were not attempting to mark the close and that their trading was completely lawful. The violations occurred in 2009 and the direct harm to Respondents' clients from the manipulative scheme was relatively small, but we believe Respondents' manipulation represented a serious threat to the integrity of the markets for these thinly traded stocks. And although Koch insists that he would "respect and abide by the ruling" of the Commission,[230] we find reasons to question these assurances, particularly in light of Respondents' continued and strenuous insistence that their trading was wholly legitimate. Accordingly, we find there is sufficient risk of future violations to order Respondents to cease-and-desist from committing or causing any violations or future violations of the antifraud provisions.

C. Disgorgement

Exchange Act Section 21C(e) and Advisers Act Section 203(j) authorize the Commission to order the disgorgement of ill-gotten gains.[231] An order for disgorgement "is intended primarily to prevent unjust enrichment."[232] Thus, "the amount of disgorgement should include all gains flowing from the illegal activities," but calculating the amount of disgorgement

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226 15 U.S.C. §§ 78u-3, 80b-3(k).

227 *KPMG Peat Marwick LLP*, Exchange Act Release No. 43862, 54 SEC 1135, 2001 SEC LEXIS 98, at *116 (Jan. 19, 2001), *petition denied*, 289 F.3d 109 (D.C. Cir. 2002); *see also Herbert Moskowitz*, Exchange Act Release No. 45609, 55 SEC 658, 2002 SEC LEXIS 693, at *35-36 (Mar. 21, 2002).

228 *KPMG Peat Marwick LLP*, 2001 SEC LEXIS 98, at *102-03.

229 *Id.* ("To put it another way, evidence showing that a respondent violated the law once probably also shows a risk of repetition that merits our ordering him to cease and desist.").

230 Resp'ts Br. at 29.

231 15 U.S.C. §§ 78u-3(e), 80b-3(j).

232 *Zacharias v. SEC*, 569 F.3d 458, 471 (D.C. Cir. 2009) (quoting *SEC v. Banner Fund Int'l*, 211 F.3d 602, 617 (D.C. Cir. 2000)); *see Michael David Sweeney*, Exchange Act Release No. 29884, 50 SEC 761, 1991 SEC LEXIS 2455, at *17 (Oct. 30, 1991) ("[D]isgorgement is intended to force wrongdoers to give up the amount by which they were unjustly enriched.").

"requires only a reasonable approximation of profits causally connected to the violation."[233] We have held that "[o]nce the Division shows that its disgorgement figure is a reasonable approximation of the amount of unjust enrichment, the burden shifts to the respondent to demonstrate that the Division's estimate is not a reasonable approximation."[234] The law judge ordered Respondents to disgorge $4,169.78. We agree that this is a reasonable approximation of Respondents' ill-gotten gains.

To calculate the disgorgement amount, the Division undertook to quantify the difference between the quarterly fees KAM charged its clients in the third and fourth quarter of 2009 and the amount those fees would have been had Respondents not engaged in manipulation. In making its calculation, the Division relied upon evidence regarding how Huntleigh priced securities at month-end for account holders. If there was no trading on the last trading day of the month, Huntleigh priced the security at the last bid of the day. If there was trading on the last day of the month, Huntleigh valued the holding at the publicly-reported closing price. Thus, when Respondents' trading constituted all of the trading volume on the last day of the month, the Division used the last bid before Respondents began trading, and when Respondents' trading constituted less than all of the trading volume, the Division used the last reported non-KAM trade before the close. Once the Division calculated the difference between the closing price that was established by Respondents' manipulative trades in High Country on September 30 and December 31 and in Carver on December 31 and an estimate of the closing price that would have been reported to Respondents' clients on those days if Respondents had not traded, the Division multiplied that amount by the number of High Country shares held by KAM clients on September 30 and the number of High Country and Carver shares held by KAM clients on December 31.[235] This amount represented the total dollar increase in KAM client holdings caused by Respondents' manipulative trading on September 30 and December 31, 2009. The Division then multiplied this amount by KAM's quarterly advisory fee of 0.25% to determine the increase in advisory fees charged to KAM clients for the two relevant quarters. The Division initially calculated this amount to be $5,819.93. After hearing testimony established that certain accounts (principally Koch personal and family accounts) were not charged an advisory fee, the Division revised its disgorgement calculation to $4,288.08, excluding the non-fee-paying

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[233] *SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1113-14 (9th Cir. 2006) (quotation omitted); *Laurie Jones Canady*, Exchange Act Release No. 41250, 54 SEC 65, 1999 SEC LEXIS 669, at *38 n.35 (Apr. 5, 1999) (noting that "courts have held that '[t]he amount of disgorgement ordered need only be a reasonable approximation of profits causally connected to the violation [and that] any risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created that uncertainty'" (quoting *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1475 (2d Cir. 1996) (alterations in original and internal quotation marks omitted)); *see also SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) (noting that, when calculating disgorgement, "separating legal from illegal profits exactly may at times be a near-impossible task").

[234] *Eric J. Brown*, Exchange Act Release No. 66469, 2012 SEC LEXIS 636, at *50 (Feb. 27, 2012) (citing *SEC v. Lorin*, 76 F.3d 458, 462 (2d Cir. 2006)); *see also Zacharias*, 569 F.3d at 473 (noting that, where disgorgement cannot be exact, the "well-established principle is that the burden of uncertainty in calculating ill-gotten gains falls on the wrongdoers who create that uncertainty"); *SEC v. Calvo*, 378 F.3d 1211, 1217 (11th Cir. 2004) ("Exactitude is not a requirement; '[s]o long as the measure of disgorgement is reasonable, any risk of uncertainty should fall on the wrongdoer whose illegal conduct created that uncertainty.'" (quoting *SEC v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998))).

[235] Div. Br. at 43-44.

accounts that had been identified during the hearing. In their post-hearing brief, Respondents argued that, based on the Division's methodology, the excessive fees should only be $4,169.78. The Division accepted Respondents' lower number, "[r]ecognizing that disgorgement need only reflect a reasonable approximation of the ill-gotten gains."[236] This amount was then adopted by the law judge in the Initial Decision.

Respondents argue that the disgorgement amount ordered by the law judge is incorrect because it "ignores the manner in which KAM actually calculates advisory fees."[237] According to Respondents, when an illiquid stock did not trade on the last day of a quarter, KAM, unlike Huntleigh, did not use the bid price to value the stock for its quarterly fee calculation. Instead, KAM "estimate[d] the value of the security to calculate the fees and disclose[d] that fact to the clients."[238] Neither before the law judge nor before us, however, have Respondents put forward any evidence concerning their methodology for estimating the value of the securities in question, nor have they provided an explanation of how their methodology would differ from the one used by the Division.[239] We believe that the Division's methodology—based on an estimate of values that would have been reported to KAM's clients by Huntleigh—represents a reasonable approximation of Respondents' ill-gotten gains. And Respondents have not met their burden of showing that the Division's estimate is not a reasonable approximation—particularly because it is Respondents' manipulative trading that is the basis for the underlying uncertainty in estimating the value of the securities absent manipulation.[240] Accordingly, we order Respondents, jointly and severally, to disgorge $4,169.78, plus prejudgment interest.[241]

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[236] Div. Br. at 44.

[237] Resp'ts Br. at 14. In their petition for review—but not in their brief—Respondents also argued that the disgorgement amount was incorrect because it included fees for October and November 2009, for which the law judge failed to find violations. Pet. for Review at 10. We agree with Division, however, that his argument is baseless because KAM charged its clients fees only quarterly, not monthly. KAM based its fees on the value of its clients' accounts at the end of the quarter. Thus, the relevant days for determining client fees for the last two quarters of 2009 were the last trading days of September and December.

[238] Resp'ts Br. at 14.

[239] Respondents' brief insists that KAM "does not use [Huntleigh's] methodology to calculate value," but it contains no explanation of how KAM did estimate the price of securities that were not traded on the final day of a quarter. *Id.* at 14 n.6.

[240] *See supra* note 234.

[241] *David R. Lehl*, Securities Act Release No. 8102, 55 SEC 843, 2002 SEC LEXIS 1796, at *52 (May 17, 2002) ("Numerous courts recognize that 'where two or more individuals or entities collaborate or have a close relationship in engaging in the violations of securities laws, they have been jointly and severally liable for the disgorgement of illegally obtained proceeds." (quoting *SEC v. First Pacific Bancorp.*, 142 F.3d 1186, 1191 (9th Cir. 1998)); *Terence Michael Coxon*, Exchange Act Release No. 48385, 56 SEC 934, 2003 SEC LEXIS 2013, at *64 (Aug. 21, 2003) ("[E]xcept in the most unique and compelling circumstances, prejudgment interest should be awarded on disgorgement, among other things, in order to deny a wrongdoer the equivalent of an interest free loan from the wrongdoer's victims."), *aff'd*, 137 F. App'x 975 (9th Cir. 2005); 17 C.F.R. § 201.600(b) (stating that "[i]nterest on the sum to be disgorged shall be computed at the underpayment rate of interest established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. 6621(a)(2), and shall be compounded quarterly").

D. Civil monetary penalty

Advisers Act Section 203(i) authorizes the Commission to impose civil monetary penalties for willful violations of the securities laws.[242] In considering whether a civil penalty is in the public interest, the Commission may consider (i) whether the act or omission involved fraud; (ii) whether the act or omission resulted in harm to others; (iii) the extent to which any person was unjustly enriched, taking into account restitution made to injured persons; (iv) whether the individual has committed previous violations; (v) the need to deter such person and others from committing violations; and (vi) such other matters as justice may require.[243] Second-tier penalties are appropriate if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," and third-tier penalties are appropriate if, in addition to "fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement," the violation "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons or resulted in substantial pecuniary gain to the person who committed" the violation.[244]

We find that the $75,000 second-tier penalty ordered against Respondents by the law judge is appropriate in this case. As elaborated above, Respondents' marking-the-close scheme involved fraud, deceit, and manipulation under the securities laws. Their conduct harmed both their advisory clients (who received higher fees and overvalued securities) as well as other participants in the markets they were manipulating (who received false information about the value of the relevant securities). As the disgorgement analysis demonstrates, Respondents were also unjustly enriched through their misconduct. Given the serious nature of the violations of the antifraud provisions of the Exchange Act and Advisers Act, a second-tier civil penalty is appropriate to deter future misconduct by Respondents and others.

The Division argues that a third-tier penalty is called for because Respondents' "conduct led to the risk of substantial losses to other persons."[245] We disagree. Although Respondents' marking-the-close scheme may have resulted in losses to KAM's advisory clients who purchased shares at inflated prices, the Division has not shown that, to the extent there were such losses, they were substantial. Moreover, the Division has not adequately demonstrated that the risk of substantial losses to these clients or to other market participants is significant enough to warrant third-tier penalties. Accordingly, we order Respondents to pay a $75,000 second-tier penalty, for which they are jointly and severally liable.[246]

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242 15 U.S.C. § 80b-3(i). As we have explained, Respondents' violations were willful in this context. *See supra* note 139.

243 *Id.* § 80b-3(i)(3).

244 *Id.* § 80b-3(i)(2).

245 Div. Br. at 46.

246 Because Koch is the sole owner and principal of KAM, and it is through Koch's conduct that KAM's violations occurred, joint and several liability is appropriate. *See Zion Capital Mgmt. LLC*, Exchange Act Release No. 48904A, 57 SEC 99, 2003 SEC LEXIS 2939, at *35-36 (Dec. 11, 2003) (imposing a joint-and-several civil penalty on an advisory firm and its president and sole owner).

An appropriate order will issue.[247]

By the Commission (Chair WHITE and Commissioners AGUILAR and STEIN; Commissioners GALLAGHER and PIWOWAR concurring in part and dissenting with respect to the bars from association with municipal advisors and nationally recognized statistical rating organizations).

Lynn M. Powalski
Deputy Secretary

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

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 72179 / May 16, 2014

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3836 / May 16, 2014

INVESTMENT COMPANY ACT OF 1940
Rel. No. 31047 / May 16, 2014

Admin. Proc. File No. 3-14355

In the Matter of

DONALD L. KOCH and KOCH ASSET MANAGEMENT, LLC
c/o Thomas O. Gorman
Dorsey & Whitney LLP
1801 K Street, NW, Suite 750
Washington, DC 20006

ORDER IMPOSING REMEDIAL SANCTIONS

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

ORDERED that Koch Asset Management, LLC ("KAM") is censured for violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-7 thereunder; and it is further

ORDERED that Donald L. Koch be barred from association with any investment adviser, broker, dealer, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and it is further

ORDERED that KAM and Koch cease and desist from committing or causing any violations or future violations of Exchange Act Section 10(b) and Rule 10b-5 thereunder, and Advisers Act Sections 206(1), 206(2), and 206(4) and Rule 206(4)-7 thereunder; and it is further

ORDERED that KAM and Koch, jointly and severally, disgorge $4,169.78, plus prejudgment interest of $695.89, such prejudgment interested calculated beginning from October 1, 2009, in accordance with Commission Rule of Practice 600; and it is further

ORDERED that KAM and Koch pay a civil money penalty of $75,000, for which they are jointly and severally liable.

Payment of the amounts to be disgorged and the civil money penalty shall be: (i) made by United States postal money order, certified check, bank cashier's check, or bank money order; (ii) made payable to the Securities and Exchange Commission; (iii) mailed to Enterprises Services Center, Accounts Receivable Branch, HQ Bldg., Room 181, 6500 South MacArthur Blvd., Oklahoma City, OK 73169; and (iv) submitted under cover letter that identifies the respondent and the file number of this proceeding.

By the Commission.

Lynn M. Powalski
Deputy Secretary

ATTACHMENT B ORIGINAL

INITIAL DECISION RELEASE NO. 458
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14355

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of	:	
	:	
DONALD L. KOCH and	:	INITIAL DECISION
KOCH ASSET MANAGEMENT LLC	:	May 24, 2012

APPEARANCES: Suzanne J. Romajas and Adam Aderton for the Division of Enforcement, Securities and Exchange Commission

Thomas O. Gorman and Cecilie Howard of Dorsey & Whitney LLP for Respondents Donald L. Koch and Koch Asset Management LLC

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision (ID) concludes that Donald L. Koch (Koch) and Koch Asset Management LLC (KAM) violated the antifraud provisions of the federal securities laws by "marking the close" in the purchase of securities for advisory clients. The ID orders Respondents to cease and desist from violations of the antifraud provisions, to disgorge ill-gotten gains of $4,169.78, and to pay a civil money penalty of $75,000; imposes an investment adviser bar on Koch; and censures KAM.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission) instituted this proceeding with an Order Instituting Proceedings (OIP) on April 25, 2011, pursuant to Section 21C of the Securities Exchange Act of 1934 (Exchange Act), Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940 (Advisers Act), and Section 9(b) of the Investment Company Act of 1940 (Investment Company Act). The undersigned held a six-day hearing between January 10 and January 20, 2012. Hearing sessions were held in St. Louis, Missouri (January

ATTACHMENT B

10-13, 2012), and Washington, DC (January 17 and 20, 2012). Ten witnesses testified, including Koch, and numerous exhibits were admitted into evidence.[1]

The findings and conclusions in this ID are based on the record. Preponderance of the evidence was applied as the standard of proof. See Steadman v. SEC, 450 U.S. 91, 97-104 (1981). Pursuant to the Administrative Procedure Act, 5 U.S.C. § 557(c), the following post-hearing pleadings were considered: (1) the Division of Enforcement's (Division) February 13, 2012, Proposed Findings of Fact and Post-Hearing Brief; (2) Respondents' February 29, 2012, Proposed Findings of Fact and Conclusions of Law; and (3) the Division's March 8, 2012, Post-Hearing Reply Brief. All arguments and proposed findings and conclusions that are inconsistent with this ID were considered and rejected.

B. Allegations and Arguments of the Parties

This proceeding concerns Respondents' trading on behalf of advisory clients during September through December 2009. The OIP alleges that they engaged in "marking-the-close" transactions so as to artificially increase the reported closing price of one or more securities at month-end on September 30, October 30, November 30, and December 31, 2009, and thus violated the antifraud and other provisions of the securities laws.

The Division is seeking a cease-and-desist order; disgorgement; a third-tier civil money penalty; and bars (of Koch) and a censure (of KAM). Respondents argue that the charges are unproven and no sanctions should be imposed.

II. FINDINGS OF FACT

As discussed below, during September through December 2009, Respondents engaged in marking-the-close transactions in the accounts of advisory clients so as to artificially increase the reported closing price of one or more securities at quarter-end on September 30 and December 31, 2009. The closing prices affected the valuation of all Respondents' advisory clients' accounts that held the securities at the end of those quarters.

A. Respondents and Other Relevant Entities

1. Respondents

Koch has extensive experience in banking, including employment with a regional bank that bought many smaller banks, as an economist with the Federal Reserve, as a professor of finance and banking at Georgia Institute of Technology, and with the Resolution Trust Corporation, dealing with liquidations resulting from the savings and loan crisis of the 1980s; he also had a consulting business that helped banks with compliance issues with state and federal banking regulators. Tr.

[1] Citations to the transcript will be noted as "Tr. __." Citations to exhibits offered by the Division of Enforcement and by Respondents will be noted as "Div. Ex. __" and "Resp. Ex. __," respectively.

766-84. In the late 1980s, Koch began investing for himself in small community banks, drawing on his experience to value them. Tr. 784-86, 826-36. He summarized the factors that he used as "tangible book value" (TBV), which was the basis for the amount he was willing to pay for the shares of such a bank. Tr. 770-75, 785-86. He judged that TBV was the amount for which the bank could be liquidated if it failed. Tr. 821, 827, 841-42. There has been ongoing consolidation in banking. Tr. 775, 827-29. In Koch's experience, bigger banks that buy smaller banks pay at least twice TBV. Tr. 773-74, 865-66, 890. Thus, his strategy was to buy below TBV and wait. Tr. 821, 829, 860, 868. In the meantime, some of the banks, including two of those at issue, paid dividends. Tr. 828, 843, 891, 896.

Koch invested for himself for three years, and eventually yielded to the importunities of friends and associates to invest their money, founding KAM in 1992. Tr. 786-90. KAM invested only in small banks. Tr. 798. Koch did not take as a client anyone whom he had not known for a long time. Tr. 793, 809-10. KAM did not advertise or have a website. Tr. 672-73, 810-11. Koch is personally debt-averse and did not take as a client anyone with debt. Tr. 693, 788, 798. Koch met several times with each prospective client to ensure that the client agreed with his approach to investing. Tr. 798-99. The client must approach investing with him as a long-term investment with a ten-year horizon. Tr. 796-97. Koch was emphatic that the client not view the investment as a checking account to be drawn on at any time. Tr. 796. Although Koch invested only in bank stocks, he tailored each account to the client's circumstances and did not have the same mix of securities and cash for each client. Tr. 855-58.

Koch was essentially KAM's only employee. Tr. 822. Koch spends considerable time and money on his charity, the Koch Foundation, which seeks, through conferences, speakers, courses, and scholarships, to promote among young people civic values derived from the Bill of Rights, the Declaration of Independence, and the Constitution. Tr. 761-65. He is also a member of the Board of Directors of Stanford University's Hoover Institution. Tr. 765.

KAM's fees, per quarter, were 0.25% of the account's value, which was not charged if the account declined in value,[2] and, per year, 20% of realized net gains that exceeded 5% per year during the years that the assets were held. Tr. 689-92, 800, 816-17, 1012-14; Resp. Exs. 3, 5, 6, Resp. Ex. 36 at 59-68. KAM had about forty fee-paying advisory accounts held by members of about thirty families. Tr. 677, 809; Div. Ex. 306. Accounts for Koch and his family and his assistant, Faith Heidtbrink (Heidtbrink) are not charged fees. Tr. 678-83. Koch only placed limit orders, and when he placed an order for a large block of stock that was purchased in smaller lots, every account to which it was allocated paid the average price. Tr. 819-21, 859-60; Div. Ex. 279 at SEC-KOCH0007157. KAM's Policies and Procedures Manual designated Koch as the firm's Chief Compliance Officer; "Prohibited Transactions" included "any transactions intended to raise, lower, or maintain the price of any Security." Div. Ex. 279 at SEC-KOCH0007143, 0007148. KAM's Business Continuity Plan represented that KAM backs up its electronic records and stores the back-up either on-site in a fire safe vault or off-site. Div. Ex. 279 at SEC-KOCH0007170.

[2] The total of fees waived from 1996 to 2010 was over $234,000. Tr. 690-92; Div. Ex. 242.

ATTACHMENT B

Heidtbrink spends 25% of her time on Koch Foundation matters and another 25% on KAM. Tr. 663-67. For KAM, Heidtbrink keeps paper client files from the inception of an account including brokerage statements, confirms, correspondence, IRA withdrawals, any trust documents, and account opening documents. Tr. 684-85. She also keeps electronic records of trading using a product called Market Manager Plus (MMP), as a parallel system to the broker's records of trading. Tr. 694. KAM receives duplicate account statements and confirms of the client's statements and confirms. Tr. 695. Heidtbrink reconciles the account statements to KAM's parallel system of records every month. Tr. 695. As to confirms, KAM keeps the paper copy and also records it in MMP and in a paper logbook. Tr. 695-96; Resp. Ex. 20. KAM runs a second MMP that captures new information while she is working in the other MMP. Tr. 701-02. After trades are executed, Koch informs her as to which accounts the shares should be allocated. Tr. 707.

Because of the instant proceeding, Koch suggested that clients find other investment advisers, and KAM no longer has any fee-paying accounts. Tr. 810, 923. The clients moved within six to nine months after the OIP. Tr. 922. KAM currently only manages Koch's family assets. Tr. 923. KAM was, but no longer has sufficient assets under management to be, a Commission-registered investment adviser. Tr. 760, 787.

2. Banks

The transactions at issue were in the stock of three banks – High Country Bancorp, Inc. (HCBC), Cheviot Financial Institution (CHEV), and Carver Bancorp., Inc. (CARV). Tr. 836-55. Their stocks were illiquid.[3] Tr. 857-59. Koch calculated HCBC's TBV during the time at issue as $25 per share, meaning that he would pay up to $25 a share, which he could theoretically double over the long term. Tr. 841-43, 865-66. HCBC also paid a dividend of 5%. Tr. 843, 891. Koch had been buying HCBC for clients since the late 1990s. Tr. 837, 843-44. CHEV's TBV was between $12 and $15 per share. Tr. 849. CHEV also paid a dividend. Tr. 896. Koch had been investing in CHEV for about ten years. Tr. 846-47. CARV's TBV was above $20 per share. Tr. 851. Koch started investing in CARV in the 1990s. Tr. 851. Subsequent to the events at issue, in 2010, Koch sold out after becoming disenchanted with CARV, due to too many non-performing loans. Tr. 850, 853. The bank stocks, like the stock market generally, performed poorly in the first half of 2009. Tr. 73-74.

3. Huntleigh Securities Corporation

Huntleigh Securities Corporation (Huntleigh) is a Commission-registered broker-dealer in the St. Louis, Missouri, area. Tr. 38. Huntleigh executed transactions for KAM during the time at

[3] HCBC was KAM's most illiquid investment in 2009, with a very wide bid-ask spread of 32.6%. Tr. 1056-57, 1060-62, 1079; Resp. Ex. 39 at 21, 24. CARV and CHEV were also among KAM's fifteen most illiquid investments. Tr. 1080; Resp. Ex. 39 at 24. Of the 252 trading days in 2009, HCBC did not trade on 212, CARV did not trade on 69, and CHEV did not trade on 26. Tr. 1081-83; Resp. Ex. 39 at 25. HCBC and CARV were among the ten most widely held stocks on December 31, 2009, in a random sample of fifteen of KAM's customer accounts. Resp. Ex. 36 at 50-51.

issue.[4] Tr. 41-43. On the monthly account statements Huntleigh sent to KAM customers, the market value of equities was based on the closing price of the last trade in the market on the last day of the month, and if there were no trades in an equity, it would be valued at the bid.[5] Tr. 139-40, 215-16. Huntleigh had a fully-disclosed arrangement as introducing broker with First Clearing, LLC, as the clearing firm.[6] Tr. 46. Koch's method of ordering trades was to telephone the trading desk, not to confer with the registered representative assigned to his account, or to place orders with Huntleigh electronically. Tr. 50-52, 457-58. This was a common practice at Huntleigh. Tr. 52-53, 444-51. Huntleigh trader Jeff Christanell (Christanell) began handling KAM's trades in September 2009.[7] Tr. 53.

B. Koch's Trading in Late 2009

1. Concerned with clients' short-term focus during 2009, Koch asks Huntleigh how stocks are valued and trades HCBC accordingly on September 30

Koch wanted his clients to obtain information only from him and disagreed with Huntleigh's choice to allow clients on-line access to their account information. Tr. 48, 53-72. Koch told Huntleigh's compliance director Catherine Marshall (Marshall) that some clients were following their accounts too closely in the first half of 2009 as the market declined. Div. Ex. 121. In late August 2009, Koch asked repeatedly and insistently for the names of clients who were

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[4] KAM ceased to be a client of Huntleigh in the spring or summer of 2010 after Huntleigh asked it to remove its accounts. Tr. 44, 125-28.

[5] The reason is that an investor who had to liquidate a security would receive the bid price. Tr. 217.

[6] Until 2008, Huntleigh had been self-clearing. Tr. 46. (Although Koch had occasionally expressed concern about Huntleigh's net capital position, the change to the much bigger, well-capitalized firm was not to Koch's liking. Tr. 46-47, 171-72. On being asked to move, he asked Huntleigh for a list of self-clearing brokers in the area. Tr. 127-28; Div. Ex. 234.)

[7] Christanell entered a settlement with the Commission arising out of the events at issue. Huntleigh Securities Corp., Exchange Act Release No. 64336 (Apr. 25, 2011), 100 SEC Docket 40392. Huntleigh fired him, effective February 8, 2010, based on its conclusion that he had violated the firm's policies through what it considered to be marking-the-close transactions in HCBC at Koch's direction; Huntleigh's investigation was triggered by a regulatory inquiry from NYSE Arca Equities, Inc. Tr. 38-39, 79-91, 526-27; Div. Exs. 2, 3, 4, 33, 298, 299. Huntleigh also sought information from Koch concerning HCBC trades. Tr. 116-25; Div. Ex. 33. Koch complained to Christanell about this, offering words of support, speculating that Huntleigh was targeting Christanell to divert attention from some other questionable aspect of its business, suggesting a future partnership in which Koch would supply trading capital, and advising that they coordinate their stories. Tr. 527-28, 531-34; Div. Exs. 26, 27, 28, 221.

viewing their accounts online, saying that he wanted to know who would be calling him.[8] Div. Exs. 96, 98, 100, 101, 102, 103, 109, 112, 113, 117, 121.

Usually Koch tried to buy stocks for the cheapest possible price, as close to the bid as possible. Tr. 517, 620; Div. Exs. 205, 207, 210, 214. However, at the end of September 2009, Koch asked Christanell to achieve a closing price for HCBC, which had a wide bid-ask spread, above the ask. Tr. 465-66. On September 30, Christanell reported that the market for HCBC was $11.71 - $20 and that he had bought 580 shares at $16.6897; and he asked Koch to "Let me know what to do from here." Div. Exs. 144, 146, 148, 149, 150. Koch asked Christanell how stocks were priced at the end of the day or month.[9] Tr. 460-61; Div. Exs. 145, 146. Christanell told him that a stock is priced on the last trade if it traded that day, otherwise, at the bid, adding "In the case of HCBC today, it will get priced on the last trade." Div. Ex. 146, 148, 149, 150. Koch replied, "good. Move last trade right before 3pm up to as near to $25 as possible without appearing manipulative."[10] Div. Exs. 148, 149, 150. Acting on that instruction, Christanell revised his limit order upward to $25; his final purchase of the day was 400 shares at $23.50, which established the closing price. Resp. Ex. 39 at 43. Christanell bought a total of 2,000 shares of HCBC that day at an average price of $20.3794.[11] Div. Exs. 150, 151. KAM's trading was 100% of the trading volume of HCBC on September 30, 2009. Resp. Ex. 39 at 43.

Koch's explanation for his instruction "Move last trade right before 3pm up to as near to $25 as possible without appearing manipulative" is that he was warning Christanell not to bid for a large block of stock because that would drive the asking price up. Tr. 879-80. This interpretation departs so far from the plain meaning of the words he used as to be unconvincing. Koch further explained his limit of $25 after being informed that the ask was $20: any bid for such an illiquid stock could drive the ask up, so $25 was his limit because that was his TBV.[12] Tr. 880-81. Another of Koch's explanations for the instruction to trade "right before 3pm" (at the end of the trading day at the end of the quarter) is that is when those with stock to sell are likely to offer it into the market. Tr. 880-

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[8] The Division theorizes that Koch engaged in the conduct at issue because, having carefully explained his long-term approach to investing to each person who became a client, he was annoyed at receiving calls from clients who were focusing on the short-term performance of their accounts.

[9] Koch's explanation, which is not altogether convincing, for asking how Huntleigh priced illiquid securities was that he was taking a survey after finding that the Bank of Montreal had priced a security at the ask and that every custodian had a different method. Tr. 869-70.

[10] The market closes at 4:00 p.m. ET, which is 3:00 p.m. CT in St. Louis. Tr. 474-75, 480.

[11] Koch allocated all 2,000 shares to the account of a long-time client, ninety-two year old Alice Smith. Tr. 137-38; Div. Exs. 8, 286; Resp. Ex. 5. He said he did this because she liked the company, it paid a dividend, and she had a significant cash position at the time. Tr. 673-75, 872-73, 802, 891. Alice Smith died in July 2010. Tr. 673, 675, 802.

[12] Koch noted that even if he paid $25 for the last purchase of the day, his average price would be lower. Tr. 882.

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81. However, as Koch concedes, he did not buy HCBC (or CHEV or CARV) on the last day of any month in 2009 except those at issue. Tr. 909-10. In Koch's view, he got a "terrific deal" – $5 below TBV – on 2,000 shares in a long-term investment that he knew well.[13] Tr. 883.

2. October 30, 2009 – HCBC

On October 30, 2009,[14] Christanell purchased a total of 600 shares of HCBC,[15] based on a market order, routed to the street in the last fifteen minutes of the trading day. Resp. Ex. 39 at 48. At that time the bid-ask quote was $13.25 - $14.00. Resp. Ex. 39 at 48. Christanell filled the order with 200 shares at $14.00, followed by another buyer's purchase of 800 shares at $14.00, followed by KAM's purchase of 200 shares at $18.00 and a second 200 share purchase at $19.75, which set the closing price. Resp. Ex. 39 at 48. Christanell vaguely recalls that Koch instructed him to get the stock price up somewhere in the range of $20 to $25. Tr. 493-94. However, the record does not contain any additional evidence of communications between the two men.

3. November 30, 2009 – HCBC

On November 30, 2009, KAM placed a 2,000 share limit order at $21.00 when the bid-ask quote was $14.00 - $17.00. Christanell filled it in the last three minutes of the trading day as follows: 200 shares at $17.00, 800 shares at $17.00, and 1,000 shares at $17.49, which established the closing price.[16] Resp. Ex. 39 at 53. KAM's trading was 100% of the trading volume on November 30, 2009. Resp. Ex. 39 at 53. The only contemporaneous communication about the trades was an email from Christanell to Koch: "HCBC – Bot 2000 @ 17.245 – Sorry, just looked like someone had them for sale." Div. Ex. 15. Koch testified that this meant that Christanell had bought the stock without an order from KAM and was seeking Koch's ratification, which he supplied.[17] Tr. 889. However, a month later on December 31, 2009, Christanell told Koch, in response to a suggestion that he might start trading in the last half hour, "I might start in the last hour or so because the last time I think I waited too long." Div. Ex. 189.

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[13] Koch has every share of HCBC he has ever bought. Tr. 884.

[14] Official notice, pursuant to 17 C.F.R. § 201.323, is taken of the fact that October 31, 2009, was a Saturday, so that Friday, October 30, was the last trading day of the month.

[15] The shares were allocated to Alice Smith's account. Tr. 137-38; Div. Ex. 13.

[16] All 2,000 shares were allocated to an Alice Smith account, specifically, the account of the Philip H. Smith Family Trust, of which Alice Smith and Koch were trustees. Tr. 137-38; Div. Ex. 14.

[17] Koch allowed Christanell to buy stock, within Koch's limits, and obtain Koch's approval afterward. Tr. 888-89, 903. However, somewhat inconsistently, Koch also claims Christanell did not really understand him or how to buy blocks of stock in small companies. Tr. 903.

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4. Year End 2009[18] – HCBC, CHEV, and CARV

On December 23, 2009, Koch emailed Christanell, "I also will want to move up HCBC the last day of the year before things close down.....so, please be mindful of that if you are there or your backup is around....should be a busy day." Resp. Ex. 33 at SEC-HUNTLEIGH0004660. On December 28, Koch emailed Christanell: "Please put on your calendar to buy HCBC 30 minutes to an hour before the close of market for the year. I would like to get a closing price in the 20-25 range, but certainly above 20." Div. Ex. 186.

On December 31, 2009, Koch telephoned Christanell several times and discussed purchases of HCBC, CHEV, and CARV.[19] At 7:46 a.m. CST,[20] Koch said, "You're all set. You know what to do with HCBC . . . . My parameters are, if you need 5,000 shares, do whatever you have to do. I need to get it above 20 . . . 20 to 25, I'm happy . . . . You figure out if you want to do it the last half hour . . . ." Christanell replied, "I might start in the last hour or so because last time I think I waited too long." Koch responded, "get it up there . . . . You can go up to 5,000 shares if you need to . . . . talk if you need more than that." Div. Ex. 189. At 9:55 a.m. CST, Koch said, "[Faith] is looking to see what else you want to move up . . . toward the end of the year. . . .We got three – we got Cheviot, [Christanell interrupts] We'll give you some more orders of a couple of these thin stocks I want to push up a little bit." Div. Ex. 193. At 11:41 a.m. CST, Koch asked about CHEV, and Christanell told him it was at $7.20 to $7.48. Koch replied, "Let's see if by the end of the day you move it above 8, 8 and a quarter . . . . We're still on HCBC." When Koch asked about CARV, Christanell told him "CARV is 8.10 to 9.05 . . . . No trades today." Koch responded, "What you do at the end of the day, pop that one."[21] Div. Ex. 191. At 2:09 p.m. CST, Christanell reported, "I

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[18] At the end of 2009, Koch believed that his small banks were particularly undervalued because they were seen in the same questionable light as the big banks. Tr. 895, 904, 906-07.

[19] Huntleigh recorded calls from its trading desk phone lines, and copies of audio recordings of these calls are in evidence as Division Exhibits 188, 189, 190, 191, 192, and 193. At the request of Marshall, who was responding to a regulatory inquiry, in February 2010, Eli Straeter, Huntleigh's IT manager, searched its recording system for files containing calls between Christanell and Koch on the four month-end days at issue. Tr. 91-95, 379-85, 402. He found calls on December 31, 2009, and copied them onto disks. Tr. 384-93, 423-27; Div. Exs. 188, 189, 190, 191, 192, 193, 319. He could find no recordings for any other day in 2009 or 2010. Tr. 382-83. He theorized that he rebooted all the equipment in his server room on December 31 and did not restart the recording equipment; he did not use any forensic tools to find out what might have been overwritten and could be retrieved. Tr. 400-01, 409-17. While there is no explanation in the record as to why there were no records of calls before December 31, there is no evidence, engineering or otherwise, to show that the individual recordings of December 31 were altered or edited.

[20] The times associated with the recordings are in Greenwich Mean Time, which is six hours ahead of CST, local time in St. Louis, on December 31, a fact of which official notice is taken, pursuant to 17 C.F.R. § 201.323.

[21] Koch testified that he did not know what he meant by this. Tr. 905-06.

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haven't done anything yet . . . . Koch said, "We got three – we got Cheviot [Christanell interrupts] . . ." Christanell asked, "What kind of volume should I use on Cheviot?" Koch replied, "start at the 100, 200 share increment . . . see how far it moves . . . since it trades so little . . . [unintelligible] pretty fast." Christanell asked, "Am I all right taking 5,000 if I have to?" Koch replied, "absolutely . . . on both of them . . ." Christanell responded "HCBC also. . . . Carver . . . . I was thinking of just buying . . . 300 shares at 9.05 – is that all right?" Koch replied, "perfect." Div. Ex. 190.

The bid-ask quote for HCBC was $14.05 - $16.80, when Christanell executed the first trade of the day in that stock. Resp. Ex. 39 at 61. He bought a total of 3,200 shares in several transactions, the last of which, within two minutes of the close, was for $19.50 and set the closing price. Div. Ex. 278 at 1; Resp. Ex. 39 at 61. The previous transaction, by another buyer one minute earlier, was at $17.50. Div. Ex. 278 at 1; Resp. Ex. 39 at 61.

At about 2:40 p.m. CST, when the bid-ask quote was $7.20 - $7.48, Christanell routed limit orders for CHEV at $8.25 to the street and obtained several executions at various prices of $8.00 and below. Div. Ex. 278 at 3; Resp. Ex. 39 at 30-31. His last execution, within ten seconds of the close was at $7.99; however, a subsequent purchase at $7.39 by another buyer set the closing price. Div. Ex. 278 at 3; Resp. Ex. 39 at 30-31. KAM purchased a total of 6,000 shares of CHEV before the close. Div. Ex. 278; Resp. Ex. 39 at 30-31.

Within two minutes of the close of trading, Christanell routed an order for 200 shares of CARV to the street and obtained 100 shares at $9.045 and another 100 shares at $9.05.[22] Div. Ex. 278 at 3; Resp. Ex. 39 at 63. CARV closed at $9.05. Resp. Ex. 39. When asked why he tried to acquire such a small block of CARV, in which he was losing confidence, Koch replied with a convoluted explanation that in fact makes no sense. Tr. 904-06, 923-25.

All of the HCBC, CHEV, and CARV shares purchased on December 31, 2009, were allocated to a Tampsco account. Tr. 137-38; Div. Ex. 17. The Tampsco accounts were for a family office managed by lawyer John McFarland, one of KAM's original clients. Tr. 676-77, 806-07. According to Koch, he allocated the trades to Tampsco because it was one of his oldest clients, needed the yield, and had a high cash position of 17-18%. Tr. 907-08.

5. Koch intended to "Mark the Close" on September 30 and December 31

An explanation for KAM's trading patterns at issue was provided by Koch and two expert witnesses whom he called, John Schneider (Schneider)[23] and Greg Jarrell (Jarrell).[24] Tr. 858-906, 927, 943-1005, 1053-1140, 1154-91, 1206-70; Resp. Exs. 36, 39. HCBC, CHEV, and CARV were illiquid, thinly-traded stocks. HCBC was so thinly-traded – having traded on only 40 of the 252

[22] Resp. Ex. 39 erroneously shows both fills at $9.05. Tr. 1101-02.

[23] Schneider was accepted as an expert in investment advisory services, including compliance programs for small advisory firms. Tr. 932-940

[24] Jarrell was accepted as an expert in the economics of markets. Tr. 1043, 1050.

trading days in 2009 – that Jarrell described it as "non-liquid." As such, these stocks had extremely wide spreads between their bid and ask prices. A prospective buyer could not expect to buy at the bid; rather he would have to bid near or at the ask if he wished to obtain the stock. Such a bid might draw out stock from a prospective seller. A trader might follow a process of laddering in filling an order during the trading day, filling portions of the order at increasingly higher prices as the day went on. There is more trading and liquidity at the end of the trading day and a prospective buyer might be more likely to obtain stock by bidding at the end of the day. Likewise, there is more liquidity at the end of a quarter, month, or year, when sellers might want to lock in profits or losses or obtain cash for other reasons. As an indication of a legitimate purpose for the transactions at issue, Koch also emphasized that he did not bid over the TBV for each of the stocks. This explanation would provide a reasonable and non-violative explanation for all the trading at issue if it were not for Koch's email exchanges and telephone conversations with Christanell concerning the September 30 and December 31 trading. Those communications show that Koch's motive for the trades on those days was to affect the closing price by the last transaction of the trading day. Lacking such evidence for the October 30 and November 30 trading and in light of the Division's burden of proof, this motive is not found on those days.

6. Excess Quarterly Fees

The higher prices attained for HCBC and CARV on September 30 and December 31 resulted in higher valuations of account holdings at quarter end, which resulted in higher quarterly fees paid by paying clients. The parties agree that this excess amounts to $4,169.78.

7. Missing Emails

As described above, the record includes emails between Koch and Christanell with incriminating language. Div. Exs. 146, 148, 149, 150, 186, 187. Bates stamps (SEC-HUNTLEIGH000XXX) on these exhibits and correspondence between the Division and Huntleigh indicate that they were produced by Huntleigh in response to a request by the Division. Div. Exs. 303, 304. By contrast, Division Exhibit 151, which is the final email in the string shown on Division Exhibit 150 (which incorporates the previous emails of Division Exhibits 146, 148, and 149), merely contains the innocuous report "Bot 2000 HCBC @ 20.3794." The Bates stamp (SEC-KOCH000098) on Division Exhibit 151 indicates that it originated from Koch. The Division argues that it was produced in response to a Division administrative subpoena and that the emails containing incriminating language were not produced[25] and had presumably been deleted or destroyed in violation of requirements that KAM maintain such records. The Division's subpoena, however, is not in the record of evidence, so it is not possible to evaluate Koch and/or KAM's response.[26] Consequently, it is not possible to find that Respondents deleted or destroyed records.

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[25] A Division staffer who reviewed KAM's document production testified that KAM did not produce the emails that comprise Division Exhibits 146, 148, 149, and 150. Tr. 290-94.

[26] Koch and Heidtbrink conducted an extensive search and produced copies of a large quantity of documents in response to correspondence and a subpoena. Tr. 712-19, 824-25.

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III. CONCLUSIONS OF LAW

The OIP charges that Respondents willfully violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Sections 206(1) and 206(2) of the Advisers Act. Additionally, it charges that KAM willfully violated and Koch caused and willfully aided and abetted KAM's violation of Sections 204 and 206(4) of the Advisers Act and Rules 204-2(a)(7) and 206(4)-7 thereunder. As discussed below, it is concluded that Respondents willfully violated Exchange Act Section 10(b) and Rule 10b-5 and Advisers Act Sections 206(1), 206(2), and 206(4) and Rule 206(4)-7 and that violations of Advisers Act Section 204 and Rule 204-2(a)(7) are unproven.

A. Antifraud Provisions

Respondents are charged with willfully violating the antifraud provisions of the Exchange and Advisers Acts – Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Sections 206(1), 206(2), and 206(4) of the Advisers Act – which prohibit essentially the same type of conduct. United States v. Naftalin, 441 U.S. 768, 773 n.4 & 778 (1979); SEC v. Pimco Advisors Fund Mgmt. LLC, 341 F. Supp. 2d 454, 469 (S.D.N.Y. 2004).

Exchange Act Section 10(b) and Rule 10b-5 make it unlawful "in connection with the purchase or sale of" securities, by jurisdictional means, to:

1) employ any device, scheme, or artifice to defraud;

2) make any untrue statement of a material fact or any omission to state a material fact necessary to make the statement made not misleading; or

3) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Similar proscriptions are contained in Advisers Act Sections 206(1), 206(2), and 206(4).

The specific fraud charged in the instant proceeding is marking the close, a form of market manipulation. Market manipulation is intentional conduct designed to defraud investors by artificially affecting the prices of securities. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976). "An attempted manipulation is as actionable as a successful one." S.E.C. v. Martino, 255 F. Supp. 2d 268, 287 (S.D.N.Y. 2003), aff'd, 94 Fed. Appx. 871 (2d Cir. 2004); accord, Kuehnert v. Texstar Corp., 412 F.2d 700, 704 (5th Cir. 1969); Michael J. Markowski, Exchange Act Release No. 43259 (Sept. 7, 2000), 54 S.E.C. 830, 835, aff'd, 274 F.3d 525 (D.C. Cir. 2001). The Commission has stated, "Manipulation is the creation of deceptive value or market activity for a security, accomplished by an intentional interference with the free forces of supply and demand. A finding of manipulation does not hinge on the presence or absence of any particular device usually associated with a manipulative scheme." Swartwood, Hesse, Inc., Exchange Act Release 31212 (Sept. 22, 1992), 50 S.E.C. 1301, 1307 (footnotes omitted). "Proof of a manipulation almost always depends on inferences drawn from a mass of factual detail. Findings must be gleaned from patterns of behavior, from apparent irregularities, and from trading data." Pagel, Inc., Exchange Act Release No. 22280 (Aug. 1, 1985), 48 S.E.C. 223, 226, aff'd, 803 F.2d 942 (8th Cir. 1986). Manipulative

transactions can appear to be legitimate market transactions if the manipulative motive is disregarded.[27] Markowski, 274 F.3d at 527-28.

Marking the close "is the practice of attempting to influence the closing price of a stock by executing purchase or sale orders at or near the close of the market." Thomas C. Kocherhans, Exchange Act Release No. 36556 (Dec. 6, 1995), 52 S.E.C. 528, 530; accord, Adrian C. Havill, Exchange Act Release No. 40726 (Nov. 30, 1998), 53 S.E.C. 1060, 1062, 1065; Sharon M. Graham, Exchange Act Release No. 40727 (Nov. 30, 1998), 53 S.E.C. 1072, 1074 at n.4. Marking the close conveys false information as to a stock's real price free of manipulative influences. Kocherhans, 52 S.E.C. at 530. A fortiori, such a trade is illegal market manipulation if it would not have occurred but for the manipulative intent. SEC v. Masri, 523 F. Supp. 2d 361, 372 (S.D.N.Y. 2007); accord, SEC v. Kwak, No. 3:04–cv–1331 (JCH), 2008 WL 410427, *4 n.10 (D. Conn. Feb. 12, 2008).

Scienter is required to establish violations of Exchange Act Section 10(b) and Rule 10b-5 and Advisers Act Section 206(1). Aaron v. SEC, 446 U.S. 680, 690-91, 695-97 (1980); SEC v. Steadman, 967 F.2d 636, 641 & n.3 (D.C. Cir. 1992). It is "a mental state embracing intent to deceive, manipulate, or defraud." Aaron, 446 U.S. at 686 n.5; Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 & n.12 (1976); SEC v. Steadman, 967 F.2d at 641. Recklessness can satisfy the scienter requirement. See David Disner, Exchange Act Release No. 38234 (Feb. 4, 1997), 52 S.E.C. 1217, 1222 & n.20; SEC v. Steadman, 967 F.2d at 641-42; Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990). Reckless conduct is "conduct which is 'highly unreasonable' and 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., Inc., 570 F.2d 38, 47 (2d Cir. 1978) (quoting Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977)).

Scienter is not required to establish a violation of Section 206(2) or 206(4) of the Advisers Act; a showing of negligence is adequate. See SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963); SEC v. Steadman, 967 F.2d at 643 & n.5; Steadman v. SEC, 603 F.2d 1126, 1132-34 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

KAM is accountable for the actions of its responsible officer, Koch. See C.E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1435 (10th Cir. 1988) (citing A.J. White & Co. v. SEC, 556 F.2d 619, 624 (1st Cir. 1977)). A company's scienter is imputed from that of the individuals controlling it. See SEC v. Blinder, Robinson & Co., Inc., 542 F. Supp. 468, 476 n.3 (D. Colo. 1982) (citing SEC v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1096-97 nn.16-18 (2d Cir. 1972)). As an associated person of KAM, Koch's conduct and scienter are also attributed to the firm. See Section 203(e) of the Advisers Act.

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[27] As stated in a case involving alleged manipulation by means of short sales, there "must be some circumstances beyond the mere occurrence of short sales to suggest that the short sales were part of a scheme to manipulate the market" and "it is unreasonable to infer unlawful intent from lawful activity alone." GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 198, 207-08, 211 (3d Cir. 2001) (quoting the District Court).

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Material misrepresentations and omissions violate Exchange Act Section 10(b) and Rule 10b-5 and Advisers Act Sections 206(1), 206(2), and 206(4). The standard of materiality is whether or not a reasonable investor or prospective investor would have considered the information important in deciding whether or not to invest. See Basic Inc. v. Levinson, 485 U.S. 224, 231-32, 240 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); SEC v. Steadman, 967 F.2d at 643.

Koch, as owner, sole principal, president, and CEO of KAM, was an associated person of an investment adviser. See Advisers Act Sections 202(a)(17), 203(f). Investment advisers and their associated persons are fiduciaries and are held to a higher standard than broker-dealers and their associated persons. Fundamental Portfolio Advisors, Inc., Securities Act Release No. 8251 (July 15, 2003), 56 S.E.C. 651, 684; see Capital Gains Research Bureau, Inc., 375 U.S. at 191-92, 194, 201; see also Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 17 (1979).

An associated person may be charged as a primary violator, where, as here, the investment adviser is an alter ego of the associated person. John J. Kenny, Securities Act Release No. 8234 (May 14, 2003), 56 S.E.C. 448, 485 n.54. Accordingly, as discussed below, it is concluded that Koch violated Section 206(4) of the Advisers Act and Rule 206(4)-7 thereunder and that Respondents did not violate Advisers Act Section 204 and Rule 204-2(a)(7). Thus, it is unnecessary to address his secondary liability for violating those provisions.

In addition to requesting a cease-and-desist order pursuant to Section 21C of the Exchange Act and Section 203(j) of the Advisers Act, the Division requests sanctions pursuant to Sections 203(e), 203(f) and 203(i) of the Advisers Act and 9(b) of the Investment Company Act. Willful violations by Respondents must be found in order to impose sanctions on them pursuant to Sections 203(e), 203(f) and 203(i) of the Advisers Act and 9(b) of the Investment Company Act. A finding of willfulness does not require an intent to violate, but merely an intent to do the act which constitutes a violation. See Wonsover v. SEC, 205 F.3d 408, 413-15 (D.C. Cir. 2000); Steadman v. SEC, 603 F.2d at 1135; Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965).

B. Antifraud Violations

The record shows that Respondents violated Exchange Act Section 10(b) and Rule 10b-5 and Advisers Act Sections 206(1), 206(2), and 206(4). Koch's actions show at least a reckless degree of scienter – highly unreasonable and an extreme departure from the standards of ordinary care – and a clear violation of the fiduciary duty owed by an investment adviser.

As evidenced by his emails and phone calls, Koch clearly intended and acted to affect the closing price of securities on September 30 and December 31. Informed that the market for HCBC was $11.71 - $20, Koch's September 30 email to Christanell to "[m]ove last trade right before 3pm up to as near to $25 as possible without appearing manipulative" is direct evidence of Koch's intent to manipulate the closing price of HCBC. Koch's unconvincing explanation – that he was warning Christanell not to bid for a large block of stock because that would drive the asking price up – underscores that intent. In fact, he recognized that the trading was manipulative but did not want it to appear as such. KAM's trading was 100% of the trading volume on September 30, and its final

purchase of the day for $23.50 set the closing price. Koch claims that his purchases that day were a "terrific deal" but does not explain why he did not urge Christanell to buy the shares as cheaply as possible rather than to buy "up to as near as $25 as possible without appearing manipulative." In short, but for his manipulative intent, Koch's September 30 HCBC purchases, including the $23.50 purchase that established the closing price, would not have been made.

Likewise, Koch's December 31 purchases of HCBC were made for the purpose of marking the close, as established by his email and telephone communications: "I would like to get a closing price in the 20-25 range, but certainly above 20," "I need to get it above 20 . . . 20 to 25, I'm happy." Further, with reference to CHEV and CARV on December 31, Koch demonstrated his manipulative intent when he said, "We'll give you some more orders of a couple of these thin stocks I want to push up a little bit." Although the last execution of his CHEV order was within ten seconds of the close, it did not succeed in setting the closing price. The purchase of a small number of shares in CARV, with which Koch was becoming disenchanted, at the ask also would not have occurred absent the intent to mark the close.

The evidence is insufficient to establish that Koch intended to manipulate the closing price on October 30 and November 30. While Christanell vaguely recalls Koch instructing him to increase HCBC's closing price on October 30, there is no additional evidence of their communications concerning trading on that day. Christanell's November 30 email to Koch is at best ambiguous and does not show that Koch had instructed Christanell to mark the close. Therefore, it is concluded that manipulative intent for these days is unproven.

Although Koch had previously invested in HCBC, CHEV, and CARV, he would not have bought them on September 30 and December 31 at the prices at which they were executed but for his purpose of manipulating their closing prices. Further, Koch's seeking to mark the close by purchases for the accounts of others at higher prices than would have resulted from legitimate market forces violated his fiduciary duty as an investment adviser.[28] Koch's manipulative intent altered the timing and prices of his trades and, therefore, Respondents violated Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Sections 206(1), 206(2), and 206(4) of the Advisers Act.

C. Rule 206(4)-7(a)

Advisers Act Rule 206(4)-7(a) requires a Commission-registered investment adviser that provides investment advice to "[a]dopt and implement written policies and procedures reasonably designed to prevent violation by [the adviser] of the Act and the rules that the Commission has adopted under the Act." While KAM's Policies and Procedures Manual in fact prohibited "any

[28] There is no merit to Respondents' argument that any increase in the value of assets on account statements resulting from the purchases at issue would have been immaterial for the average KAM client and that any resulting quarterly fee increase would have been immaterial in an arithmetic sense. Under the applicable legal standard of materiality, a reasonable investor would have considered information about Koch's trading tactics to be important in deciding whether or not to invest.

transactions intended to raise, lower, or maintain the price of any Security," the Division reasons that this was not implemented within the meaning of the rule because such transactions did occur. Inasmuch as KAM was a one-man firm and Koch was its alter ego as well as its Chief Compliance Officer, it is concluded that KAM and Koch did not implement the anti-manipulation policy and thus violated the rule.

D. Books and Records

Section 204 of the Advisers Act requires Commission-registered advisers to maintain various records prescribed by the Commission in rules. Advisers Act Rule 204-2(a)(7) requires registered investment advisers to keep "originals of all written communications received and copies of all written communications sent . . . relating to . . . (iii) the placing or execution of any order to purchase or sell any security." Pursuant to Rule 204-2(f), this requirement survives discontinuance of business subject to registration under Section 203 of the Advisers Act.

The Division argues that Respondents did not produce a copy of a September 30, 2009, email from Koch to Christanell in response to a Division subpoena and that this shows that the email had not been maintained, in violation of Advisers Act Section 204 and Rule 204-2(a)(7). As found above, however, the subpoena is not in evidence, so it is not possible to evaluate Respondents' response and make further inferences about records maintained by Respondents. Accordingly, the allegations concerning Advisers Act Section 204 and Rule 204-2(a)(7) are unproven.

IV. SANCTIONS

The Division requests a cease-and-desist order, disgorgement of ill-gotten gains plus prejudgment interest, a third-tier civil money penalty, and that KAM be censured and Koch barred from the securities industry. As discussed below, Respondents will be ordered to cease and desist from violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder, to disgorge $4,169.78 plus prejudgment interest, and to pay a second-tier civil penalty of $65,000, KAM will be censured, and an investment adviser bar will be imposed on Koch.

A. Sanction Considerations

In determining sanctions, the Commission considers such factors as:

> the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Steadman, 603 F.2d at 1140 (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978)). The Commission also considers the age of the violation and the degree of harm to investors and the marketplace resulting from the violation. Marshall E. Melton, Advisers Act Release No. 2151 (July

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25, 2003), 56 S.E.C. 695, 698. Additionally, the Commission considers the extent to which the sanction will have a deterrent effect. Schield Mgmt. Co., Exchange Act Release No. 53201 (Jan. 31, 2006), 87 SEC Docket 848, 862 & n.46. As the Commission has often emphasized, the public interest determination extends to the public-at-large, the welfare of investors as a class, and standards of conduct in the securities business generally. See Christopher A. Lowry, Advisers Act Release No. 2052 (Aug. 30, 2002), 55 S.E.C. 1133, 1145, aff'd, 340 F.3d 501 (8th Cir. 2003); Arthur Lipper Corp., 46 S.E.C. 78, 100 (1975). The amount of a sanction depends on the facts of each case and the value of the sanction in preventing a recurrence. See Berko v. SEC, 316 F.2d 137, 141 (2d Cir. 1963); see also Leo Glassman, 46 S.E.C. 209, 211-12 (1975).

B. Sanctions

1. Cease and Desist

Sections 21C(a) of the Exchange Act and 203(k) of the Advisers Act authorize the Commission to issue a cease-and-desist order against a person who "is violating, has violated, or is about to violate" any provision of those Acts or rules thereunder. Whether there is a reasonable likelihood of such violations in the future must be considered. KPMG Peat Marwick LLP, Exchange Act Release No. 43862 (Jan. 19, 2001), 54 S.E.C. 1135, 1185. Such a showing is "significantly less than that required for an injunction." Id. at 1183-91. In determining whether a cease-and-desist order is appropriate, the Commission considers the Steadman factors quoted above, as well as the recency of the violation, the degree of harm to investors or the marketplace, and the combination of sanctions against the respondent. See id. at 1192; see also WHX Corp. v. SEC, 362 F.3d 854, 859-61 (D.C. Cir. 2004).

Respondents' conduct was egregious and recurrent over a period of three months. The conduct involved at least a reckless degree of scienter. The lack of assurances against future violations and recognition of the wrongful nature of the conduct goes beyond a vigorous defense of the charges. Koch's chosen occupation in the financial industry will present opportunities for future violations. The violations were recent, having ended about two years ago. The degree of harm to the marketplace is quantified in the $4,169.78 of additional quarterly fees that Respondents received as a result of their misconduct. In light of these considerations, a cease-and-desist order is appropriate.

2. Disgorgement

Sections 21C(e) of the Exchange Act and 203(j) of the Advisers Act authorize disgorgement of ill-gotten gains from Respondents. Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. See SEC v. First City Fin. Corp., 890 F.2d 1215, 1230-32 (D.C. Cir. 1989); see also Hateley v. SEC, 8 F.3d 653, 655-56 (9th Cir. 1993). It returns the violator to where he would have been absent the violative activity.

The Division requests that Respondents be ordered to disgorge ill-gotten gains consisting of additional quarterly fees that Respondents received as a result of their misconduct. Accordingly, Respondents will be ordered to disgorge $4,169.78

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Respondents will be held jointly and severally liable for the disgorgement because KAM was Koch's alter ego in the violative activities. See Daniel R. Lehl, Securities Act Release No. 8102 (May 17, 2002), 55 S.E.C. 843, 874-75 & n.65 (citing First Pac. Bancorp, 142 F.3d 1186, 1191 (9th Cir. 1998) (citing SEC v. Hughes Capital Corp., 124 F.3d 449, 455 (3d. Cir. 1997); SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1475 (2d. Cir. 1996); Hateley, 8 F.3d 653, 656 (9th Cir. 1993)).

3. Civil Money Penalty

Section 203(i) of the Advisers Act authorizes the Commission to impose civil money penalties for willful violations of the Exchange or Advisers Acts or rules thereunder. In considering whether a penalty is in the public interest, the Commission may consider six factors: (1) fraud; (2) harm to others; (3) unjust enrichment; (4) previous violations; (5) deterrence; and (6) such other matters as justice may require. See Section 203(i)(3) of the Advisers Act; New Allied Dev. Corp., Exchange Act Release No. 37990 (Nov. 26, 1996), 52 S.E.C. 1119, 1130 n.33; First Sec. Transfer Sys., Inc., Exchange Act Release No. 36183 (Sept. 1, 1995), 52 S.E.C. 392, 395-96; see also Jay Houston Meadows, Exchange Act Release No. 37156 (May 1, 1996), 52 S.E.C. at 787-88, aff'd, 119 F.3d 1219 (5th Cir. 1997); Consol. Inv. Servs., Inc., Exchange Act Release No. 36687 (Jan. 5, 1996), 52 S.E.C. 582, 590-91.

Respondents violated the antifraud provisions, so their violative actions "involved fraud [and] reckless disregard of a regulatory requirement" within the meaning of Section 203(i)(3) of the Advisers Act. Harm to others is quantified in the approximately $4,169.78 in extra fees paid by clients. Deterrence requires penalties against Respondents because of the abuse of the fiduciary duty owed to advisory clients.

Penalties are in the public interest in this case. Penalties in addition to the other sanctions ordered are necessary for the purpose of deterrence. See Section 203(i)(3)(E) of the Advisers Act; see also H.R. Rep. No. 101-616 (1990). The Division requests that Respondents be ordered to pay third-tier penalties without specifying dollar amounts or units of violation. However, second tier penalties are appropriate. While Respondents' actions "involved fraud [and] reckless disregard of a regulatory requirement" within the meaning of Section 203(i)(2)(B) of the Advisers Act, they did not "result[] in substantial losses or create[] a significant risk of substantial losses to other persons or result[] in substantial pecuniary gain to [Respondents]" within the meaning of Section 203(i)(2)(C). For each violative act or omission after March 3, 2009, the maximum second-tier penalty is $75,000 for a natural person and $375,000 for any other person. 17 C.F.R. § 201.1004. The provisions, like most civil penalty statutes, leave the precise unit of violation undefined. See Colin S. Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Colum. L. Rev. 1435, 1440-41 (1979).

The events at issue will be considered as one course of action. Since KAM was essentially a one-man operation and was Koch's alter ego in the violative activities, a second-tier penalty of $75,000 will be ordered against Respondents, jointly and severally.

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4. Censure and Bar

The Division requests that KAM be censured and that Koch be barred from association with an investment adviser and subject to collateral industry bars, as well. The censure and investment adviser bar are authorized pursuant to Sections 203(e) and 203(f) of the Advisers Act and will be ordered.[29] Combined with other sanctions ordered, the censure and bar are in the public interest and appropriate deterrents. The violations involved scienter. Respondents' business provides them with the opportunity to commit violations of the securities laws in the future. The record shows a lack of recognition of the wrongful nature of the violative conduct.

V. RECORD CERTIFICATION

Pursuant to Rule 351(b) of the Commission's Rules of Practice, 17 C.F.R. § 201.351(b), it is certified that the record includes the items set forth in the record index issued by the Secretary of the Commission on May 4, 2012, as corrected on May 18, 2012.[30]

VI. ORDER

IT IS ORDERED that, pursuant to Sections 21C(a) of the Exchange Act and 203(k) of the Advisers Act, Koch Asset Management LLC and Donald L. Koch CEASE AND DESIST from committing or causing any violations or future violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 203(j) of the Advisers Act, Koch Asset Management LLC and Donald L. Koch, jointly and severally, DISGORGE $4,169.78 plus prejudgment interest at the rate established under Section 6621(a)(2) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(2), compounded quarterly, pursuant to 17 C.F.R. § 201.600(b). Pursuant to 17 C.F.R. § 201.600(a), prejudgment interest is due from January 1, 2010, through the last day of the month preceding which payment is made.

IT IS FURTHER ORDERED that, pursuant to Section 203(i) of the Advisers Act, Koch Asset Management LLC and Donald L. Koch, jointly and severally, PAY A CIVIL MONEY PENALTY of $75,000.

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[29] The Division's request includes a collateral bar pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act). However, Respondents' misconduct antedates the July 22, 2010, effective date of the Dodd-Frank Act. Neither the Commission nor the courts have approved such retroactive application of its provisions in any litigated case, and the undersigned declines to impose the new sanction retroactively. See Koch v. SEC, 177 F.3d 784 (9th Cir. 1999); see also Sacks v. SEC, 648 F.3d 945 (9th Cir. 2011).

[30] See Donald L. Koch, Admin. Proc. No. 3-14355 (A.L.J. May 18, 2012) (unpublished) (correcting the record index to reflect the correct filing date of ten pleadings Respondents filed).

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IT IS FURTHER ORDERED that, pursuant to Section 203(e) of the Advisers Act, Koch Asset Management IS CENSURED for violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and Sections 206(1), 206(2), and 206(4) of the Advisers Act and Rule 206(4)-7 thereunder.

IT IS FURTHER ORDERED that, pursuant to Section 203(f) of the Advisers Act, Donald L. Koch IS BARRED from association with any investment adviser.

IT IS FURTHER ORDERED that the allegations that KAM willfully violated, and Koch willfully aided and abetted and caused violations of, Section 204 of the Advisers Act and Rule 204-2(a)(7) ARE DISMISSED.

Payment of penalties and disgorgement plus prejudgment interest shall be made on the first day following the day this Initial Decision becomes final. Payment shall be made by certified check, United States postal money order, bank cashier's check, wire transfer, or bank money order, payable to the Securities and Exchange Commission. The payment, and a cover letter identifying Respondents and Administrative Proceeding No. 3-14355, shall be delivered to: Office of Financial Management, Accounts Receivable, 100 F Street N.E., Washington, DC 20549-6042. A copy of the cover letter and instrument of payment shall be sent to the Commission's Division of Enforcement, directed to the attention of counsel of record.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111(h) of the Commission's Rules of Practice, 17 C.F.R. § 201.111(h). If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct a manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or a motion to correct a manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Carol Fox Foelak

Carol Fox Foelak
Administrative Law Judge

CFF
5/24/2012

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UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Rel. No. 72443 / June 20, 2014

INVESTMENT ADVISERS ACT OF 1940
Rel. No. 3860 / June 20, 2014

INVESTMENT COMPANY ACT OF 1940
Rel. No. 31091 / June 20, 2014

Admin. Proc. File No. 3-14355

In the Matter of DONALD L. KOCH and KOCH ASSET MANAGEMENT, LLC	PARTIAL STAY ORDER

On May 16, 2014, the Commission issued an opinion and order finding that Respondents Donald L. Koch and Koch Asset Management ("KAM") violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder as well as Sections 206(1), 206(2), and 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-7 thereunder.[1] Specifically, the Commission found that Respondents engaged in illegal market manipulation through marking-the-close transactions in three thinly-traded bank stocks. The Commission also found that Respondents violated Advisers Act Rule 206(4)-7 by failing to implement KAM's policy against manipulative trading. After determining that it was in the public interest, the Commission imposed a cease-and-desist order on Respondents, ordered disgorgement of $4,169.78, plus prejudgment interest, assessed a $75,000 civil penalty, censured KAM, and imposed an industry-wide bar on Koch.

Respondents have filed a motion to stay the Commission's May 16, 2014 order. In their motion, Respondents represent that they intend to file an appeal of the Commission's opinion and order "to the appropriate Circuit Court of Appeals," and they seek an order "staying the effect of the sanctions" in the Commission's order pending the outcome of such an appeal.

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[1] *Donald L. Koch*, Securities Exchange Act Release No. 72179, 2014 SEC LEXIS 1684 (May 16, 2014).

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In determining whether to grant a stay, we generally consider (i) whether the party seeking the stay is likely to prevail on appeal; (ii) whether the party seeking the stay is likely to suffer irreparable injury if the stay is not granted; (iii) whether any other party is likely to suffer substantial harm if the stay is granted; and (iv) whether the stay will serve the public interest.[2]

For the reasons detailed in the Commission's May 16, 2014 opinion, Respondents have failed to demonstrate a likelihood that they will prevail on appeal. In their stay motion, Respondents set forth several "representative" issues they submit are "substantial and meritorious." But the Commission's opinion considered each of these issues and determined that they were without merit. Respondents contend that a finding of manipulation is not supported because there is a lack of direct evidence that Respondents' trading resulted in an artificial price. But the Commission's opinion rejected this argument, specifically finding that Respondents "artificially distorted the price of the stocks involved because Respondents were not participating in the market to find the best available prices but with the intent to raise the price of the stocks" and that Respondents' intent to manipulate the stocks' prices "'render[ed] [their] interference with the market illegal.'"[3]

Respondents further submit that there are "significant" and "substantial" questions supporting the merit of their appeal about whether Koch can be liable as a primary violator under Exchange Act Section 10(b) and Advisers Act Section 206. But, as the Commission's opinion held, Koch "falls under the broad definition of 'investment adviser' in the [Advisers] Act" and thus may be liable as a primary violator under Advisers Act Section 206.[4] Moreover, Respondents' reliance on *Janus Capital Group, Inc. v. First Derivative Traders*,[5] is misplaced because Koch is "not charged with making statements but with engaging in manipulative and deceptive conduct, and thus *Janus*'s holding does not apply."[6]

Respondents' argument regarding the "willfulness" of their violations also lacks merit. As well-established precedent provides, "'it has been uniformly held that 'willfully' in this context means intentionally committing the act which constitutes the violation' and does not mean that

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2 *Al Rizek*, Exchange Act Release No. 41972, 1999 SEC LEXIS 2254, at *1-2 (Oct. 1, 1999) (citing *Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985)).

3 *Koch*, 2014 SEC LEXIS 1684, at *54, *55-56 (quoting *Kirlin Sec. Inc.*, Exchange Act Release No. 61135, 2009 SEC LEXIS 4168, at *57 (Dec. 10, 2009)).

4 *Id.* at *74.

5 131 S. Ct. 2296 (2011).

6 *Koch*, 2014 SEC LEXIS 1684, at *74.

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'the actor [must] also be aware that he is violating one of the Rules or Acts.'"[7] Thus, Respondents' market manipulation was willful because they intentionally committed the conduct upon which their violations were based—*i.e.*, the end-of-day, end-of-month trading at issue in the case. Indeed, the Commission's opinion found that Respondents engaged in this trading with the specific intent of manipulating the market.[8]

Additionally, as the Commission's opinion explains, the imposition of a collateral bar in this case is not impermissibly retroactive because it is based on "a present assessment of 'whether such a remedy is necessary or appropriate to protect investors and markets from the risk of future misconduct.'"[9] Thus, Respondents' challenge to the imposition of a collateral bar is not likely to succeed.

Respondents have also failed to show a likelihood of irreparable injury absent a stay. Respondents speculate that other organizations—such as the Certified Financial Analyst Society—and state authorities "may move forward" with their own proceedings against Respondents if a stay is not granted. But speculation about possible collateral proceedings does not satisfy the irreparable injury requirement. To warrant a stay, "the injury must be both certain and great; it must be actual and not theoretical."[10] A stay "'will not be granted [based on] something merely feared as liable to occur at some indefinite time.'"[11] Moreover, even if Respondents could show the initiation of proceedings by professional organizations and state authorities were more than speculative, they have failed to show how the initiation of such proceedings constitutes an injury that is irreparable.

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[7] *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (alteration in original) (quoting *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965)).

[8] Respondents' contention that the Commission's opinion impermissibly "merges two statutory elements—willfulness and scienter" is baseless. The opinion notes that its finding that Respondents' conduct involved the specific intent to manipulate supports the more general finding that their conduct was intentional. *See Koch*, 2014 SEC LEXIS 1684, at *49 n.139.

[9] *Id.* at *84 (quoting *John W. Lawton*, Investment Advisers Act Release No. 3513, 2012 SEC LEXIS 3855, at *32 (Dec. 13, 2012)).

[10] *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[11] *Id.* (quoting *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931)); *see also id.* ("Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.").

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The likely harm to others and the public interest also weigh against granting a stay. As explained in the Commission's opinion, the sanctions imposed on Respondents are in the public interest. In determining whether to bar Koch, censure KAM, and impose a cease-and-desist order on Respondents, the Commission weighed the relevant factors—such as (i) the egregiousness of Respondents' actions; (ii) the degree of scienter involved; (iii) the isolated or recurrent nature of the infraction; (iv) Respondents' recognition of the wrongful nature of their conduct; (v) the sincerity of any assurances against future violations; and (vi) the likelihood that Koch's occupation will present opportunities for future violations—and concluded that these sanctions were necessary and appropriate to protect the investing public. Noting that "absent a bar there is nothing to prevent Koch from coming out of retirement and participating in the industry"[12] and recognizing that "'[t]he securities industry presents continual opportunities for dishonesty and abuse, and depends heavily on the integrity of its participants and on investors' confidence,'" the Commission's opinion concluded that the public interest required barring Koch from the industry.[13] Likewise, the Commission found there "is sufficient risk of future violations to order Respondents to cease-and-desist from committing or causing any violations or future violations."[14] Given these findings, consideration of the public interest supports keeping these sanctions in place during the pendency of any appeal.[15]

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[12] *Koch*, 2014 SEC LEXIS 1684, at *83. This concern is increased because Respondents' previous representations are in tension with those in their present motion. Previously before the Commission, Respondents represented that Koch was "retired," now they represent that "they will not engage in the advisory business *prior to the conclusion of this litigation*" (emphasis added).

[13] *Id.* at *86 (quoting *Conrad P. Seghers*, Advisers Act Release No. 2656, 2007 SEC LEXIS 2238, at *28 (Sept. 26, 2007)).

[14] *Id.* at *90.

[15] This case is distinguishable from *Scattered Corp.*, 52 S.E.C. 1314, 1997 SEC LEXIS 2748 (Apr. 28, 1997), which is cited by Respondents in support of the proposition that not granting a stay "would be fundamentally unfair and would inappropriately burden their right to proceed in court." In *Scattered Corp.*, the Commission granted a partial stay of sanctions imposed by the Chicago Stock Exchange pending review by the Commission, but it noted that "[w]hile we customarily have stayed suspensions less than a bar," granting a stay of a permanent bar pending Commission review was appropriate "only in extraordinary circumstances." *Id.* at *15. Respondents have failed to show any extraordinary circumstances warranting the stay of Koch's bar in this case. Similarly, Respondents cannot properly rely on the Commission's rule of practice providing for an automatic stay of actions made pursuant to delegated authority pending review by the Commission, *see* 17 C.F.R. § 201.431(e), to support a stay. Unlike the situation covered by the rule, the Commission itself—not Commission staff through delegated authority—has determined through its May 16, 2014 opinion that the relevant sanctions imposed here are in the public interest.

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With respect to the disgorgement order and civil penalty, under the circumstances and in our discretion, we will grant a stay of the those sanctions, pending the filing of a petition for review with a United States Court of Appeals and, upon the timely filing of such a petition, pending the determination of that appeal.

Accordingly, IT IS ORDERED that the requirement in the Commission's May 16, 2014 order for KAM and Koch, jointly and severally, to pay disgorgement plus prejudgment interest and to pay a $75,000 civil money penalty is stayed for sixty days from May 16, 2014; it is further

ORDERED that, if KAM and Koch file a timely petition for review with a United States Court of Appeals, the stay of the disgorgement and the civil money penalty shall continue pending the determination of that petition by the Court of Appeals; and it is further

ORDERED that the motion for a stay of the Commission's May 16, 2014 order is in all other respects denied.

For the Commission by the Office of the General Counsel, pursuant to delegated authority.

Jill M. Peterson
Assistant Secretary