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).

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.

'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.").

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.

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