INITIAL DECISION RELEASE NO. 427
ADMINISTRATIVE PROCEEDING
FILE NO. 3-14208

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

In the Matter of	:	
	:	INITIAL DECISION
TZEMACH DAVID NETZER KOREM	:	August 5, 2011

APPEARANCES: James M. Carlson for the Division of Enforcement, Securities and Exchange Commission

Tzemach David Netzer Korem, pro se

BEFORE: Carol Fox Foelak, Administrative Law Judge

SUMMARY

This Initial Decision bars Tzemach David Netzer Korem (Korem) from association with any transfer agent. Korem was previously enjoined from violating the antifraud provisions of the federal securities laws. Additionally, he was convicted of conspiracy to commit securities fraud.

I. INTRODUCTION

A. Procedural Background

The Securities and Exchange Commission (Commission or SEC) instituted this proceeding, pursuant to Section 17A(c)(4)(C) of the Securities Exchange Act of 1934 (Exchange Act), with an Order Instituting Proceedings (OIP) on January 28, 2011. Pursuant to leave granted at the March 1, 2011, prehearing conference and 17 C.F.R. § 201.250, the parties filed cross motions for summary disposition and responsive pleadings.

This Initial Decision is based on (1) the Division of Enforcement's (Division) April 14, 2011, Motion for Summary Disposition, including those attachments admitted into evidence, infra.; (2) Korem's Motion for Summary Disposition, dated April 13, 2011; (3) the Division's May 23, 2011, opposition; (4) Korem's opposition, dated May 3, 2011; (5) Korem's reply, dated June 1, 2011, to the Division's opposition; and (6) Korem's Answer to the OIP, dated February 15, 2011. There is no genuine issue with regard to any fact that is material to this proceeding. All material facts that concern the activities for which Korem was enjoined were decided against him in the case on which this proceeding is based. Any other facts in his pleadings have been taken as true, pursuant to 17

C.F.R. § 201.250(a). All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

B. Allegations and Arguments of the Parties

The OIP alleges that Korem was enjoined on December 17, 2010, from violating the antifraud provisions of the federal securities laws in SEC v. Charbit, No. 1:10-cv-23604-CMA (S.D. Fla. Dec. 17, 2010), based on his wrongdoing from December 2009 through February 2010 (the relevant period) while associated with an unregistered transfer agent. The Division urges that he be barred from association with any transfer agent and also receive a collateral bar under the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).

Korem argues that this proceeding should be dismissed as not authorized under Section 17A(c)(4)(C) of the Exchange Act because he was not associated with any regulated entity, because there has been no post-injunction misconduct, and because it is barred by res judicata.

C. Procedural Issues

1. Exhibits Admitted into Evidence

The following items, of which official notice is taken pursuant to 17 C.F.R. § 201.323, included in the Division's Motion for Summary Disposition, at Exhibits A-C are admitted as Division Exhibits A-C:

November 18, 2010, First Amended Complaint in SEC v. Charbit. (Div. Ex. A);

December 10, 2010, Consent of Defendant Tzemach David Netzer Korem in SEC v. Charbit. (Div. Ex. B); and

December 17, 2010, Judgment of Permanent Injunction and Other Relief as to Defendant Tzemach David Netzer Korem in SEC v. Charbit. (Div. Ex. C).

The following items, of which official notice is taken pursuant to 17 C.F.R. § 201.323, are admitted as Exhibits 1-2:

November 18, 2010, Plea Agreement in United States v. Korem, No. 1:10-cr-20732-UU (S.D. Fla.) (Ex. 1); and

February 10, 2011, Judgment in United States v. Korem. (Ex. 2).[1]

[1] A Second Amended Judgment entered on March 29, 2011, corrected a typographical error in the February 10 Judgment.

2. Collateral Estoppel and Res Judicata

It is well established that the Commission does not permit a respondent to relitigate issues that were addressed in a previous civil proceeding against the respondent. See Michael J. Markowski, Exchange Act Release No. 44086 (Mar. 20, 2001), 55 S.E.C. 21, 26-27, pet. denied, No. 01-1181 (D.C. Cir. 2002) (unpublished); John Francis D'Acquisto, Advisers Act Release No. 1696 (Jan. 21, 1998), 53 S.E.C. 440, 444; Demitrios Julius Shiva, Exchange Act Release No. 38389 (Mar. 12, 1997), 52 S.E.C. 1247, 1249 & nn.6-7 (1997). See also Marshall E. Melton, Advisers Act Release No. 2151 (July 25, 2003), 56 S.E.C. 695, 697-700, 709-13.[2]

Korem, however, argues that this proceeding is barred by the doctrine of res judicata, reasoning that SEC v. Charbit resolved all issues related to the misconduct that was the subject of that injunctive proceeding and that he has not engaged in any misconduct since the date of the injunction. However, this argument is contrary to the specific provisions of the Exchange Act. Sections 15(b)(4)(C) and 17A(c)(4)(C) of the Exchange Act specifically authorize an administrative proceeding such as this one against a person who is enjoined "from engaging in or continuing any conduct or practice in connection . . . with the purchase or sale of any security."

II. FINDINGS OF FACT

Korem[3] was enjoined, on consent, from violating the antifraud provisions of the federal securities laws, Section 17(a) of the Securities Act of 1933 (Securities Act) and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, in SEC v. Charbit, No. 1:10-cv-23604-CMA (S.D. Fla. Dec. 17, 2010). The court also imposed a penny stock bar. The underlying misconduct, as set forth in the complaint, Division Exhibit A, was as follows:[4] From December 2009 through February 2010, Korem and Jean R. Charbit (Charbit), a stock promoter, engaged in a fraudulent kickback scheme involving ZNext Mining Corporation, Inc. (ZNXT) common stock, a penny stock. Korem drafted

[2] Similarly, the Commission does not permit criminal convictions to be collaterally attacked in its administrative proceedings. See Ira William Scott, Advisers Act Release No. 1752 (Sept. 15, 1998), 53 S.E.C. 862, 866; William F. Lincoln, Exchange Act Release No. 39629 (Feb. 9, 1998), 53 S.E.C. 452, 455-56.

[3] Korem has used several aliases, including Mark Wellington, the name by which he had been known to the Bureau of Prisons, as Korem indicated at the March 1, 2011, prehearing conference. Records associated with Korem's conviction in United States v. Korem, No. 1:10-cr-20732-UU (S.D. Fla), of which official notice is taken pursuant to 17 C.F.R. § 201.323, list additional aliases: David Korman, David Netzer Korem Tzemach, David Korem, Mark Pedley, Mark Logan Wellington, and Jack Williams. Branch Vindresser is another alias. Div. Ex. A at 2.

[4] In proceedings, like this one, based on consent injunctions, the Commission relies on, and does not permit a respondent to contest, the factual allegations of the injunctive complaint. Marshall E. Melton, 56 S.E.C. at 711.

press releases for ZNXT and served as ZNXT's transfer agent through his company, First Public Securities Transfer. Charbit paid an illegal kickback to a purported corrupt stock broker (in reality an undercover FBI agent) to induce him to purchase $300,000 of ZNXT stock for his clients' discretionary accounts. The kickback consisted of $3,000 in cash and $100,000 of ZNXT restricted stock. Korem, as transfer agent, issued the stock certificate for the kickback. Korem and Charbit created this scheme to generate market interest in ZNXT, induce public purchases of ZNXT, and ultimately increase the stock trading price with the intent of selling their own shares at an artificially inflated price.

Additionally, arising out of the same course of conduct, Korem was convicted, on his plea of guilty, of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371 in United States v. Korem, No. 1:10-cr-20732-UU (S.D. Fla. Feb. 10, 2011). Exs. 1, 2. He was sentenced to twenty-four months of imprisonment, followed by three years of supervised release. Special conditions of the supervised release include "The defendant shall obtain written approval from the Court before entering into any self-employment" and "Defendant may not engage in any transactions involving penny stock trading." Ex. 2 at 2-4.

The factual summary "adopt[ed] . . . as [Korem's] own statement" in his Plea Agreement in United States v. Korem, Exhibit 1, includes the following additional facts:[5] Korem was ZNXT's transfer agent and a shareholder, owning or controlling over a million shares of ZNXT common stock. The conspiracy was undertaken to manipulate the publicly quoted price of ZNXT stock from four cents to fifty cents per share. Korem, Charbit, and others made or planned to make timed press releases to give the investing public the false and misleading impression that the broker's buying activity was induced by positive news about ZNXT, rather than the undisclosed kickback. While the conspiracy was halted by law enforcement before it resulted in actual losses to victims, the offense was undertaken with the specific intent of defrauding investors out of more than $300,000 entrusted to a broker in discretionary trading accounts. Ex. 1 at 9-10.

Korem recognizes the wrongful nature of his conduct and is remorseful. Korem's opposition at 3-5. He intends not to violate the securities laws or to work in the securities industry in the future. Id.

III. CONCLUSIONS OF LAW

Korem has been permanently enjoined "from engaging in or continuing any conduct or practice in connection . . . with the purchase or sale of any security" within the meaning of Sections 15(b)(4)(C) and 17A(c)(4)(C) of the Exchange Act.

[5] The facts underlying Korem's conviction may be considered in the public interest even though the OIP antedated and did not mention the conviction. Don Warner Reinhard, Exchange Act Release No. 63720 (Jan. 14, 2011), 100 SEC Docket 36940, 36948-49.

The OIP was authorized pursuant to Section 17A(c)(4)(C) of the Exchange Act. Korem argues that this statute is inapplicable because he was not associated with a registered transfer agent or any registered entity. This argument fails. The fact that he was not associated with a registered transfer agent during his wrongdoing does not insulate him from a bar; the Commission has authority under Exchange Act Section 17A(c)(4)(C) to sanction persons, such as Korem, who acted as unregistered transfer agents. See Vladislav Steven Zubkis, Exchange Act Release No. 52876 (Dec. 2, 2005), 86 SEC Docket 2618, 2627, recon. denied, Exchange Act Release No. 53651 (Apr. 13, 2006), 87 SEC Docket 2584 (barring unregistered associated person of an unregistered broker-dealer from association with a broker or dealer).

IV. SANCTION

The Division requests that Korem be barred from association with any transfer agent.[6] This sanction will serve the public interest and the protection of investors, pursuant to Section 17A(c)(4) of the Exchange Act and accords with Commission precedent and sanction considerations set forth in Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979). When the Commission determines administrative sanctions, it considers:

> 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.

Id. (quoting SEC v. Blatt, 583 F.2d 1325, 1334 n.29 (5th Cir. 1978), aff'd on other grounds, 450 U.S. 91 (1981)). 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, 56 S.E.C. at 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).

[6] The Division also requests a collateral bar pursuant to the Dodd-Frank Act. However, Korem's 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, 635 F.3d 1121(9th Cir. 2011).

In proceedings based on an injunction, the Commission examines the facts and circumstances underlying the injunction in determining the public interest. Marshall E. Melton, 56 S.E.C. at 698. "An injunction, by its very nature, is predicated on conduct that . . . violate[s] laws, rules or regulations." Id. at 709. The Commission considers an antifraud injunction to be particularly serious. Id. at 709-10. The public interest requires a severe sanction when a respondent's past misconduct involves fraud because opportunities for dishonesty recur constantly in the securities business. Richard C. Spangler, Inc., 46 S.E.C. 238, 252 (1976).

The unlawful conduct for which Korem was enjoined and convicted was egregious and recent, but short-lived, having been stopped by law enforcement. A high degree of scienter is indicated by his antifraud violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and by his conviction for conspiracy to commit securities fraud. The intended harm to the marketplace can be quantified at $300,000, the amount of the planned ZNXT stock sale. Korem has acknowledged the wrongful nature of his conduct and vowed not to repeat it or to work in the securities industry. Nonetheless, despite his present good intentions, the injunction, and the penny stock bar, he would be free to resume association with a transfer agent absent a bar.

V. ORDER

IT IS ORDERED that, pursuant to Section 17A(c)(4)(C) of the Securities Exchange Act of 1934, 15 U.S.C. § 78q-1(c)(4)(C), TZEMACH DAVID NETZER KOREM IS BARRED from association with any transfer agent.

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 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. 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.

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Carol Fox Foelak
Administrative Law Judge