



### III.

The Commission finds the following:

#### A. Summary

From approximately 2005 through approximately August 2008 (“the relevant period”), KJW Capital Management, LLC (“KJW”)<sup>2</sup> solicited customers—both directly and indirectly through brokers—to open managed accounts in which KJW would trade off-exchange foreign currency contracts (“forex”) on behalf of these customers, using purported proprietary trading methodologies. Through its efforts, KJW was able to obtain more than \$18.4 million from at least 58 customers.<sup>3</sup> KJW traded forex in individual customer accounts at Avidus Trading, LLC (“Avidus”)<sup>4</sup>—where all of KJW’s customers were required to open and maintain forex trading accounts. Customers suffered significant forex trading losses, and, rather than inform customers of these losses, Respondent, an employee and member of both KJW and Avidus, created false bank records and spreadsheets to hide these losses from customers. The information contained in these false bank records and spreadsheets became the basis for numerous oral and written material misrepresentations and omissions made to customers. By virtue of these misrepresentations and omissions, Respondent deceived customers into not withdrawing their funds, and, as a result, customers suffered trading losses of at least \$2.3 million. This conduct violated Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C).

#### B. Respondent

**Mark J. Adrian** is a resident of Delray Beach, Florida. He was an employee and member of both Avidus and KJW. Further, on November 22, 2006, Adrian listed himself as a principal of Avidus and applied to become registered as an associated person of Avidus. He withdrew his principal listing and associated person application with Avidus on January 15, 2007. Adrian currently is not registered in any capacity with the Commission. He, however, has been registered as an associated person and listed as a principal with more than ten different registered entities—the most recent of which was NALA, LLC (a registered commodity pool operator and commodity trading advisor). He withdrew as an associated person and principal with NALA, LLC on September 30, 2009.

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<sup>2</sup> KJW was involuntarily dissolved in September 2009 and never registered with the Commission in any capacity.

<sup>3</sup> More than \$12.8 million was returned to these same customers by Respondents.

<sup>4</sup> On January 8, 2009, certain customers filed an involuntary chapter 7 bankruptcy petition against Avidus, which was involuntarily dissolved in September 2009. Avidus never registered with the Commission in any capacity; although, it applied for registration as a futures commission merchant (“FCM”) on November 2, 2006, it withdrew that application on February 18, 2007.

### C. Facts

As early as approximately 2005 and as recently as approximately August 2008, KJW solicited customers<sup>5</sup> to open individual, managed forex trading accounts.<sup>6</sup> During this time, KJW took in more than \$18.4 million from at least 58 customers and returned more than \$12.8 million back to these customers. KJW entered into a “Management Agreement” with each customer, and each customer executed a limited power of attorney authorizing KJW to purchase and sell forex in that customer’s account. As compensation for its services, each month, KJW would take a percentage of “net new profits” generated in each customer’s account.

As a condition of the “Management Agreement,” each customer was required to open a trading account with Avidus, a self-described “FOREX brokerage firm.” To fund their trading accounts, customers sent funds to various Avidus bank accounts. Avidus would produce daily, monthly, and quarterly trading statements to customers. These statements purported to detail, among other things, deposits, trading activity, trading profits, KJW’s fees, and ending equity. These statements either would be sent directly to customers by Avidus (and, in some instances, Adrian himself) or provided to customers from the KJW advisor responsible for the account. Avidus and Adrian, either directly or indirectly through KJW advisors, provided statements to customers until November 2008, which purport to detail trading activity and customer account balances through October 2008.

In August 2008, certain customers began requesting redemption of their funds from Avidus and KJW, which did not satisfy these redemption requests. This, along with other concerns regarding Avidus’s operations, caused an Avidus employee to become concerned about a possible shortfall of funds at Avidus. Accordingly, in the course of his duties with Avidus, this employee obtained a September 15, 2008 account statement for one of Avidus’s bank accounts directly from Dresdner Bank (“Dresdner”) and compared it to a September 15, 2008 statement Adrian previously had given him. The font, color, account number, and other details of the statements were identical, but the balances were vastly different:

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<sup>5</sup> Some or all of the customers were not “eligible contract participants,” as that term is defined in the Act. *See* Section 1a of the Act, to be codified at 7 U.S.C. § 1a (an “eligible contract participant” is, in relevant part, an individual with total assets in excess of (i) \$10 million, or (ii) \$5 million and who enters the transaction “to manage the risk associated with an asset owned or liability incurred, or reasonably likely to be owned or incurred, by the individual”).

<sup>6</sup> Neither Avidus nor some or all of the counterparties to the forex transactions entered or purportedly entered into by Avidus for and on behalf of the customers were financial institutions, registered broker dealers, insurance companies, bank holding companies, or investment bank holding companies or their associated persons. Further, the forex transactions conducted or purportedly conducted by Avidus for or on behalf of Avidus’s customers were entered or purportedly entered into on a leveraged or margined basis. In addition, the forex transactions conducted by Avidus neither resulted in delivery within two days nor created an enforceable obligation to deliver between a seller and a buyer that had the ability to deliver and accept delivery, respectively, in connection with their lines of business; rather, these forex contracts remained open from day to day and ultimately were offset without anyone making or taking delivery of actual currency (or facing an obligation to do so).

Dresdner Balance per Dresdner:	\$181,000
Dresdner Balance per Adrian:	\$2,488,000

In a September 26, 2008 signed and notarized statement, Adrian admitted to falsifying the September 15, 2008 Dresdner statement, as well as earlier Dresdner statements, to hide customer trading losses. Respondent believed that customers would take their money out of their Avidus accounts if they became aware of the trading losses. Accordingly, Respondent, both directly and through other agents of Avidus and KJW, knowingly provided written and oral statements to customers that were based upon the false information contained in these Dresdner Bank statements and certain spreadsheets prepared by Respondent. In so doing, Avidus and KJW were able to continue their operations through the end of 2008. By deceiving customers into not withdrawing their funds, Respondent caused customers to suffer at least \$2.3 million in trading losses.

**D. Legal Discussion**

**1. Jurisdiction over the Forex Transactions at Issue**

Under Section 2(c)(2)(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2)(C), the Commission has jurisdiction over forex transactions if three criteria are met: (1) the transactions are offered or entered into (i) with a person that is not an eligible contract participant and (ii) on a leveraged or margined basis or financed by the offeror, counterparty, or person acting in concert with either; (2) the transactions do not result in actual delivery within two days or otherwise create an enforceable obligation to make/take delivery in connection with the parties' line of business; and (3) neither the counterparty to the transactions nor the Respondent is one of certain enumerated persons. *See* Section 2(c)(2)(C)(i) and (ii) of the Act, as amended by the CRA. The legislative history to the CRA affirms that if the test in Section 2(c)(2)(C) is met, "courts will no longer have to decide whether forex transactions that meet these requirements are futures contracts in order to permit the Commission to pursue an action for fraud." H.R. REP. NO. 110-627, at 978 (2008) (Conf. Rep.). As discussed below, all three criteria are met with respect to the subject forex solicitations and transactions.

First, some or all of the customers were not "eligible contract participants," as that term is defined in the Act. *See* Section 1a of the Act, to be codified at 7 U.S.C. § 1a (and Section 2(c)(2)(C)(i)(I)(aa) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2)(C)(i)(I)(aa). Second, the forex transactions conducted or purportedly conducted by Avidus for or on behalf of Avidus's customers were entered or purportedly entered into on a leveraged or margined basis. *See* Section 2(c)(2)(C)(i)(I)(bb) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2)(C)(i)(I)(bb). Third, neither Avidus nor some or all of the counterparties to the forex transactions or purported forex transactions were financial institutions, registered broker dealers, insurance companies, bank holding companies, or investment bank holding companies, or their associated persons. *See* Sections 2(c)(2)(C)(i)(I)(aa) and 2(c)(2)(C)(ii)(II) of the Act, as amended by the CRA, to be codified at 7 U.S.C. §§ 2(c)(2)(C)(i)(I)(aa) and 2(c)(2)(C)(ii)(II). Fourth, the forex transactions conducted by Avidus neither resulted in delivery within two days nor created an enforceable obligation to deliver between a seller and a buyer that had the ability to deliver and accept delivery, respectively, in connection with their lines of business; rather, these forex contracts remained

open from day to day and ultimately were offset without anyone making or taking delivery of actual currency (or facing an obligation to do so). *See* Section 2(c)(2)(C)(i)(II)(bb) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2)(C)(i)(II)(bb).

**2. Respondent Engaged in Fraud in Violation of Section 4b(a)(2)(A)-(C), as Amended by the CRA**

Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C), makes it unlawful

for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, or other agreement, contract, or transaction subject to paragraphs (1) and (2) of section 5a(g), that is made, or to be made, for or on behalf of, or with, any other person, other than on or subject to the rules of a designated contract market – (A) to cheat or defraud or attempt to cheat or defraud the other person; (B) willfully to make or cause to be made to the other person any false report or statement or willfully to enter or cause to be entered for the other person any false record; (C) willfully to deceive or attempt to deceive the other person by any means whatsoever in regard to any order or contract or the disposition or execution of any order or contract, or in regard to any act of agency performed, with respect to any order or contract for or, in the case of paragraph (2), with the other person.

Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, applies to the foreign currency transactions, agreements, or contracts offered to or entered into by Avidus for or on behalf of the customers. *See* Section 2(c)(2)(C)(iv) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 2(c)(2)(C)(iv).

As set forth above, from at least June 18, 2008 until at least December 2008, in or in connection with forex transactions made, or to be made, for or on behalf of, or with, other persons, Respondent cheated or defrauded or attempted to cheat or defraud customers; willfully made or caused to be made false reports or statements to other persons; and deceived or attempted to deceive customers by, among other things, knowingly making, causing to be made, providing, and/or causing to be provided to customers reports and statements (both written and oral) containing false material representations and omissions regarding forex trading activity, ending account equity, and other misinformation, all in violation of Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C).

**IV.**

**FINDINGS OF VIOLATIONS**

Based on the foregoing, the Commission finds that Respondent violated Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C).

## V.

### OFFER OF SETTLEMENT

Respondent has submitted the Offer in which he, without admitting or denying the findings herein:

- A. Acknowledges receipt of service of this Order;
- B. Admits the jurisdiction of the Commission with respect to all matters set forth in this Order;
- C. Waives: the filing and service of a complaint and notice of hearing; a hearing; all post-hearing procedures; judicial review by any court; any and all objections to the participation by any member of the Commission's staff in consideration of the Offer; any and all claims that he may possess under the Equal Access to Justice Act, 5 U.S.C. § 504 (2006) and 28 U.S.C. § 2412 (2006), and/or Part 148 of the Regulations, 17 C.F.R. §§ 148.1, *et seq.* (2009), relating to, or arising from, this proceeding; any and all claims that he may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. 104-121, §§ 201-253, 110 Stat. 847, 857-868 (1996), as amended by Pub. L. No. 110-28, 121 Stat. 112, 204-205 (2007), relating to, or arising from, this proceeding; and any claim of Double Jeopardy based upon the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief;
- D. Stipulates that the record upon which this Order is entered shall consist solely of the findings contained in this Order to which the Respondent has consented; and
- E. Consents, solely on the basis of the Offer, to entry of this Order that:
  1. makes findings by the Commission that Respondent violated Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA, to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C);
  2. orders Respondent and his successors and assigns to cease and desist from violating Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, Title VII (the "Dodd-Frank Act"), §§701-774, 124 Stat. 1376 (enacted July 21, 2010), to be codified at 7 U.S.C. § 6b(a)(2)(A)-(C);
  3. orders Respondent to pay a civil monetary penalty in the amount of \$140,000, plus post-judgment interest;
  4. orders that Respondent, from the date of entry of the Order, be prohibited from engaging, directly or indirectly, in trading for or on behalf of anyone other than Respondent, on or subject to the rules of any registered entity (as that term is defined in Section 1a of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 1a); and

5. orders Respondent and his successors and assigns to each comply with the undertakings consented to in the Offer and set forth below in Part VI of this Order.

Upon consideration, the Commission has determined to accept Respondent's Offer.

## VI.

### **Accordingly, IT IS HEREBY ORDERED THAT:**

1. Respondent and his successors and assigns shall cease and desist from violating Section 4b(a)(2)(A)-(C) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 6(b)(a)(2)(A)-(C);
2. Respondent's violations of the Act, as amended by the CRA, merit the award of significant restitution; however, Respondent's Plea Agreement in the criminal action filed against him in the U.S. District Court for the Northern District of Illinois (Case No. 1:10-cr-00754) acknowledges that Respondent will be ordered "to make full restitution to the victims of [his] fraudulent scheme in an amount to be determined by the Court at sentencing, which amount the parties agree shall not be less than \$2.3 million minus any credit for funds repaid prior to sentencing" (the "Criminal Restitution Obligation"). Accordingly, the Commission has elected to forego the inclusion of restitution in this matter;
3. Respondent shall pay a civil monetary penalty in the amount of one hundred forty thousand dollars (\$140,000), plus post-judgment interest (the "CMP Obligation"). Post-judgment interest shall accrue beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961 (2006). Respondent shall pay the CMP Obligation by making electronic funds transfer, U.S. postal money order, certified check, bank cashier's check, or bank money order. If payment is to be made by other than electronic funds transfer, the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

Commodity Futures Trading Commission  
Division of Enforcement  
ATTN: Marie Bateman – AMZ-300  
DOT/FAA/MMAC  
6500 S. MacArthur Blvd.  
Oklahoma City, OK 73169  
Telephone 405-954-6569

If payment by electronic transfer is chosen, Respondent shall contact Marie Bateman or her successor at the above address to receive payment instructions and shall fully comply with those instructions. Respondent shall accompany payment of the civil penalty with a cover letter that identifies the payer, as well as the name and docket number of this proceeding. Respondent shall simultaneously submit copies of the cover letter and the form of payment to: (1) the Director, Division of Enforcement, Commodity Futures Trading Commission, at the following address: 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581; and (2) the Chief, Office of Cooperative

Enforcement, Division of Enforcement, Commodity Futures Trading Commission at the same address;

4. Respondent shall make payment on the CMP Obligation after full satisfaction of his Criminal Restitution Obligation.

5. Respondent is prohibited, from the date of entry of the Order, from engaging, directly or indirectly, in trading for or on behalf of anyone other than Respondent, on or subject to the rules of any registered entity (as that term is defined in Section 1a of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 1a; and

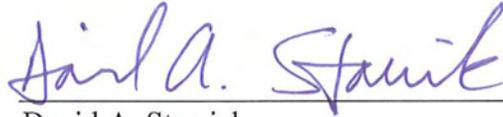
6. Respondent is directed to comply with the following undertakings set forth in the Offer:

- (a) Respondent agrees that neither he nor any of his agents or employees under his authority or control shall take any action or make any public statement denying, directly or indirectly, any findings or conclusions in this Order, or creating, or tending to create, the impression that this Order is without a factual basis; provided, however, that nothing in this provision shall affect Respondent's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondent shall undertake all steps necessary to ensure that all of his agents and employees under his authority or control understand and comply with this agreement.
- (b) Respondent agree that he shall never engage, directly or indirectly, in:
  - i. entering into any transactions involving commodity futures, options on commodity futures, commodity options (as that term is defined in Commission Regulation ("Regulation") 32.1(b)(1), 17 C.F.R. § 32.1(b)(1) (2010)) ("commodity options"), and/or foreign currency (as described in Section 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act, as amended by the CRA and the Dodd-Frank Act, to be codified at 7 U.S.C. § 2(c)(2)(B) and 2(c)(2)(C)(i)) ("forex contracts") for any account, other than his own personal account, in which he has a direct or indirect interest;
  - ii. controlling or directing the trading for or on behalf of any other person or entity, whether by power of attorney or otherwise, in any account involving commodity futures, options on commodity futures, commodity options, and/or forex contracts;
  - iii. soliciting, receiving, or accepting any funds from any person for purposes of purchasing or selling any commodity futures, options on commodity futures, commodity options, and/or forex contracts;
  - iv. applying for registration or claiming exemption from registration with the CFTC in any capacity, and engaging in any activity requiring such registration or exemption from registration with the CFTC, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2010); and/or

- v. acting as a principal (as that term is defined in Regulation 3.1(a)), agent, or any other officer or employee of any person registered, exempted from registration or required to be registered with the CFTC, except as provided for in Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2010).

**The provisions of this Order shall be effective as of this date.**

By the Commission.



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David A. Stawick  
Secretary of the Commission  
Commodity Futures Trading Commission

Dated: June 27, 2011