



approximately \$1.3 million through trading. Defendants misappropriated approximately \$1.8 million for personal uses, including car and mortgage payments and credit card bills, and to make so-called returns to participants in monthly payments that Defendants claimed were the proceeds of their trading activities. By late 2008, Defendants made payments only intermittently, not monthly. Participants received their last payments in early 2009, and have not received a monthly payment or the return of their principal since that time.

3. By virtue of this conduct and the conduct further described herein, Defendants have engaged in conduct in violation of Section 4b(a)(2)(i), (iii) of the Commodity Exchange Act (“Act”), 7 U.S.C. § 6b(a)(2)(i), (iii) (2006), in connection with acts occurring before June 18, 2008, Section 4b(a)(1)(A), (C) of the Act, as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008) (“CRA”), §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008), to be codified at 7 U.S.C. § 6b(a)(1)(A), (B), in connection with acts occurring on or after June 18, 2008, and Sections 4k(2), 4m, and 4o(1)(A), (B) of the Act, as amended by the CRA and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), Pub. L. No. 111-203, Title VII (the Wall Street Transparency and Accountability Act of 2010), §§701-774 (enacted July 21, 2010), to be codified at 7 U.S.C. §§ 6k(2), 6m, and 6o(1)(A), (B).

4. Accordingly, pursuant to Section 6c(a) of the Act, as amended, to be codified at 7 U.S.C. § 13a-1, the Commodity Futures Trading Commission (“Plaintiff”, “CFTC” or “Commission”) brings this action to enjoin the unlawful acts and practices of Defendants. In addition, Plaintiff seeks disgorgement of all benefits received by Defendants, restitution, rescission, civil monetary penalties, and such other equitable relief that the Court may deem necessary or appropriate.

### **Jurisdiction and Venue**

5. The Court has jurisdiction over this action pursuant to Section 6c of the Act, as amended, to be codified at 7 U.S.C. §13a-1, which provides that, whenever it shall appear to the Commission that any person has engaged in, is engaging in, or is about to engage in any act or practice that constitutes a violation of any provision of the Act or any rule, regulation, or order promulgated thereunder, the Commission may bring an action against such person to enjoin such practice or to enforce compliance with the Act.

6. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, as amended, to be codified at, 7 U.S.C. §13a-1(e), because Defendants are found in, inhabit, or transact business in this District, or the acts and practices in violation of the Act occurred, are occurring, or are about to occur within this District, among other places.

7. Unless restrained and enjoined by this Court, Defendants are likely to engage in the acts and practices alleged in this Complaint or in similar acts and practices, as described more fully below.

### **Parties**

8. The U.S. Commodity Futures Trading Commission is an independent federal regulatory agency charged by Congress with the responsibility for administering and enforcing the provisions of the Act, as amended, to be codified at 7 U.S.C. §§ 1 *et seq.*, and the Commission's Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.* (2011).

9. Oscar Hernandez resides in Miami, Florida. He has never been registered with the Commission in any capacity.

10. Midway Trading Company, LLC is a Florida company formed by Hernandez in 2003, with a principal place of business in Miami, Florida. It has never been registered with the

Commission in any capacity. Hernandez is the sole managing member of Midway and controlled its bank and trading accounts.

11. Conquest Investment Group, Inc. is a Florida company formed by Hernandez in 2005, with a principal place of business in Miami, Florida. It has never been registered with the Commission in any capacity. Hernandez is the sole officer and director of Conquest and controlled its bank and trading accounts.

### **Statutory Background**

12. Section 1a(11) of the Act, as amended, to be codified at 7 U.S.C. § 1a(11), defines a Commodity Pool Operator (“CPO”) as any person engaged in the business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility.

13. Commission Regulation 1.3(aa)(3), 17 C.F.R. §1.3(aa)(3) (2011), defines an Associated Person (“AP”), with certain qualifications, as a natural person associated with any CPO as a partner, officer, employee, consultant, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves: (i) the solicitation of funds, securities, or property for a participation in a commodity pool; or (ii) the supervision of any person or persons so engaged.

### **Facts**

14. In or about 2005, Hernandez began to set up commodities trading accounts in the names of Midway and Conquest, companies that he had previously formed, upon information and belief, in connection with construction work in which he had been engaging. At about the

same time, Hernandez began telling friends and acquaintances that he had developed a successful day trading futures program, and he began soliciting investments for this trading program.

15. One of the earliest participants was Omar Aguilera (“Aguilera”). Hernandez told Aguilera that the investments Hernandez was making in the Midway and Conquest commodities trading accounts in futures and overseas stock markets were returning 180% annually and were risk-free. Hernandez told Aguilera that he was seeking additional funds for his investment program.

16. In 2005, Aguilera invested \$50,000 with Hernandez. Hernandez told Aguilera that he would use those funds to invest in the futures market through the Midway and Conquest commodities trading accounts. Hernandez promised Aguilera that the funds would be repaid in sixty days, and guaranteed that Aguilera would receive 40-50% profits on that investment. Hernandez commenced paying Aguilera monthly returns on his investment.

17. In March 2007, Aguilera and his wife borrowed \$1 million and invested that money with Hernandez. Hernandez began to make monthly payments to Aguilera on that investment equivalent to an annual return of 20-30%. Those payments were made in the form of checks drawn from bank accounts set up in the names of Midway and Conquest. Those payments were purportedly from profits generated by the futures trading done in Midway’s and Conquest’s accounts.

18. Aguilera began to recommend the investments that Hernandez was making through Midway and Conquest to many of his friends and relatives, showing them copies of the checks he had received as proof of the profits he was earning. Aguilera repeated what Hernandez had told him—that he would use any funds they invested for futures day trading, and that the investment carried no risk.

19. Aguilera and other customers of Midway and Conquest understood that Hernandez, acting by and through Midway and Conquest, would pool customers' funds, that their pooled funds would be used to trade commodity futures, among other financial instruments, and that they would share in the profits generated by of the trading in the accounts.

20. In fact, the checks that Hernandez sent to Aguilera from the Midway and Conquest bank accounts were not profits from futures trading, but were funds that Hernandez had received from other participants and deposited in the Midway and Conquest bank accounts. Hernandez used only a portion of the funds he obtained from participants to trade futures in the Midway and Conquest trading accounts, losing approximately \$1.3 million in the process, and used the remainder either to pay off obligations to other participants, or to pay for his own personal living expenses.

21. Because Defendants' scheme relied on word-of-mouth marketing, some participants invested without ever talking to Hernandez. Early participants in the scheme received considerable "returns" and Hernandez's reputation as a successful futures trader attracted more participants. When Hernandez did talk directly with participants, he emphasized how much money the investments were making and said he had developed a system that would maximize winners, minimize losers, and guarantee a profit.

22. Hernandez's statements were false because he knew that significant losses were possible with all futures trading, and that his trading in particular was generating significant losses, and that the "returns" Defendants were paying to participants came from funds Defendants received from new participants, not from trading profits.

23. Aguilera's referrals resulted in about eight individuals investing a total of at least \$1 million with Defendants in the years 2006 though 2009, in addition to more than \$1 million

invested by Aguilera, and many of them received promissory notes signed by one or more of the Defendants. These notes promised monthly interest payments representing 20-30% annual returns, with a balloon payment of the principal upon maturity.

24. In addition to Aguilera and the participants he introduced, Defendants received at least \$1 million from at least ten other participants, for a total of over \$3 million invested by all participants throughout the course of the scheme.

25. Hernandez pooled these funds and deposited most of them in futures trading accounts that he owned or controlled. Far from engaging in successful futures trading, these accounts lost approximately \$1.3 million through trading activities. Hernandez withdrew approximately \$1.8 million, often withdrawing funds shortly after they were deposited in those accounts and before they were used for any actual futures trading.

26. Hernandez used that \$1.8 million to pay “returns” to participants and to pay for his own personal expenses, including mortgage loans on several properties, luxury car payments, and American Express bills.

27. Participants regularly received their promised monthly “interest” payments until about November 2008, when Defendants began to skip payments or send checks that were returned for insufficient funds.

28. At several points in 2009, participants confronted Hernandez about what had happened to their investments. Hernandez told them a variety of false stories, including that he had lost the money through bad investments, that he had used some of the money to purchase real estate, and that he had used some of the money to help his family through financial difficulties.

29. Defendants have failed to make any additional payments to participants during 2010 and 2011.

**VIOLATIONS OF THE COMMODITY EXCHANGE ACT**

**Count One**

**Violations of Section 4b(a)(2)(i), (iii) of the Act and  
Section 4b(a)(1)(A), (C) of the Act, as amended:  
Fraud by Misappropriation, Misrepresentation and Omission**

30. Paragraphs 1 through 29 are re-alleged and incorporated herein.

31. Prior to being amended, Section 4b(a)(2)(i), (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i), (iii) (2006), made it unlawful for any person to (i) cheat or defraud or attempt to cheat or defraud; or (iii) willfully deceive or attempt to deceive by any means whatsoever other persons in or in connection with orders to make, or the making of, contracts of sale of commodities, for future delivery, made, or to be made, for or on behalf of such other persons where such contracts for future delivery were or may have been used for (a) hedging any transaction in interstate commerce in such commodity, or the products or byproducts thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped or received in interstate commerce for the fulfillment thereof, in connection with acts occurring before June 18, 2008.

32. Similarly, Section 4b(a)(1)(A), (C) of the Act, as amended, to be codified at 7 U.S.C. § 6b(a)(1)(A), (C), prohibits any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce or for future delivery that is made, or to be made, on or subject to the rules of a designated contract market, for or on behalf of any person (A) to cheat or defraud or attempt to cheat or defraud the other person; or (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 the other person, in connection with acts occurring on or after June 18, 2008.

33. As set forth above, beginning in approximately 2005 and continuing through 2009, in or in connection with futures contracts made, or to be made, for or on behalf of other persons, Hernandez, acting by and through Midway and Conquest, cheated, defrauded or attempted to cheat or defraud other persons and willfully deceived or attempted to deceive other persons in connection with offering of, or entering into the commodity transactions alleged herein, for or on behalf of such persons, by (a) making material misrepresentations including but not limited to, telling Aguilera and other participants that all of their funds would be invested in trading futures here in the United States and stocks on overseas exchanges using a safe, risk free trading system, when he knew that most investors' funds would in fact be misappropriated; (b) assuring participants that the investment program was risk-free with guaranteed profits; and (c) misappropriating funds invested by participants.

34. Hernandez, acting by and through Midway and Conquest, engaged in the acts and practices described above knowingly, willfully or with reckless disregard for the truth.

35. By this conduct, Defendants violated Section 4b(a)(2)(i), (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i), (iii) (2006), with respect to conduct before June 18, 2008, and Defendants violated Section 4b(a)(1)(A), (C) of the Act, as amended, to be codified at 7 U.S.C. § 6b(a)(1)(A), (C) with respect to conduct on or after June 18, 2008.

36. The acts, omissions and failures of Hernandez, as described in this Count One, were committed within the scope of his employment with Midway and Conquest and, therefore, Midway and Conquest are liable for his acts, omissions and failures constituting violations of

Section 4b(a)(2)(i), (iii) of the Act (with respect to conduct prior to June 18, 2008) and Section 4b(a)(1)(A), (C) of the Act, as amended (with respect to conduct on or after June 18, 2008), pursuant to Section 2(a)(1)(B) of the Act, as amended, to be codified at 7 U.S.C. § 2(a)(1)(B), and Commission Regulation 1.2, 17 C.F.R. § 1.2 (2011).

37. During the relevant time, Hernandez directly and indirectly controlled Midway and Conquest, and did not act in good faith or knowingly induced, directly or indirectly, the acts constituting Midway's and Conquest's violations described in this Count One. Pursuant to Section 13(b) of the Act, as amended, to be codified at 7 U.S.C. § 13c(b), Hernandez is therefore liable for Midway's and Conquest's violations described in this Count One to the same extent as Midway and Conquest.

38. Each misappropriation of funds and each misrepresentation or omission of material fact, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 4b(a)(2)(i), (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i), (iii), with respect to acts before June 18, 2008, and as a violation of Section 4b(a)(1)(A), (C) of the Act, as amended, to be codified at 7 U.S.C. § 6b(a)(1)(A), (C), with respect to acts on or after June 18, 2008.

## **COUNT TWO**

### **Violations of Section 4o(1)(A), (B) of the Act: Fraud by a CPO and its APs**

39. Paragraphs 1 through 29 are realleged and incorporated herein by reference.

40. Section 4o(1) of the Act, in relevant part, prohibits CPOs and their APs, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly (A) to employ any device, scheme or artifice to defraud any participant; or (B) to engage in any transaction, practice or course of business that operates as a fraud or deceit upon any participant.

41. Beginning in approximately 2005 and continuing through 2009, Hernandez, while acting as an AP of a CPO, and Midway and Conquest, while acting as CPOs, violated Section 4o(1) of the Act, as amended, to be codified at 7 U.S.C. § 6o(1), in that they employed schemes or artifices to defraud pool participants or prospective pool participants or engaged in transactions, practices or a course of business which operated as a fraud or deceit upon pool participants or prospective pool participants by using the mails or other means or instrumentalities of interstate commerce. In particular, Hernandez (a) make material misrepresentations including but not limited to, telling Aguilera and other participants that all of their funds would be invested in trading commodity futures here in the United States and stocks on overseas exchanges using a safe, risk free trading system, when they knew that most investors' funds would in fact be misappropriated; (b) assured participants that the investment program was risk-free with guaranteed profits; and (c) misappropriated funds invested by participants.

42. The use of the mails or other instrumentalities of interstate commerce included, but are not limited to (a) making wire transfers to and from Midway's and Conquest's bank accounts and trading accounts, and (b) using the U.S. Mail to send "returns" to participants, all in violation of Sections 4o(1)(A), (B) of the Act.

43. Hernandez, acting by and through Midway and Conquest, engaged in the acts and practices described above knowingly, willfully or with reckless disregard for the truth.

44. The acts, omissions and failures of Hernandez, as described in this Count Two, were committed within the scope of his employment with Midway and Conquest and, therefore, Midway and Conquest are liable for his acts, omissions and failures constituting violations of

Section 4o(1) of the Act, pursuant to Section 2(a)(1)(B) of the Act, as amended, to be codified at 7 U.S.C. § 2(a)(1)(B), and Commission Regulation 1.2, 17 C.F.R. § 1.2 (2011).

45. During the relevant time, Hernandez directly and indirectly controlled Midway and Conquest, and did not act in good faith or knowingly induced, directly or indirectly, the acts constituting Midway's and Conquest's violations described in this Count Two. Pursuant to Section 13(b) of the Act, as amended, to be codified at 7 U.S.C. § 13c(b), Hernandez is therefore liable for Midway's and Conquest's violations described in this Count Two to the same extent as Midway and Conquest.

46. Each misappropriation of funds and each misrepresentation or omission of material fact, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Sections 4o(1)(A) and (B) of the Act.

### **COUNT THREE**

#### **Violation of Section 4m(1) of the Act: Acting as a CPO without Registration**

47. Paragraphs 1 through 29 are realleged and incorporated herein by reference.

48. Section 4m(1) of the Act, as amended, to be codified at 7 U.S.C. § 6m(1), prohibits anyone acting as a CPO from making use of the mails or any means or instrumentality of interstate commerce in connection with its business unless registered with the Commission as a CPO.

49. Midway and Conquest acted as CPOs by engaging in the business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and, in connection therewith, soliciting, accepting, or receiving from others, funds for the purpose of trading commodity futures. Midway and Conquest used the mails or other instrumentalities of interstate

commerce in connection with its activities as CPOs without the benefit of registration as CPOs, in violation of Section 4m(1) of the Act, as amended, to be codified at 7 U.S.C. §6m(1).

50. Hernandez directly or indirectly controlled Midway and Conquest and did not act in good faith or knowingly induced, directly or indirectly, the acts constituting Midway's and Conquest's violations alleged in this Count Three. Hernandez is therefore liable for Midway's and Conquest's violations of Section 4m(1) of the Act, as amended, to be codified at 7 U.S.C. § 6m(1), pursuant to Section 13(b) of the Act, as amended, to be codified at 7 U.S.C. § 13c(b).

51. Each use by Defendants of the mails or any means or instrumentality of interstate commerce in connection with their business as a CPO without proper registration during the relevant time period, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 4m(1) of the Act, as amended, to be codified at 7 U.S.C. § 6m(1).

#### **COUNT FOUR**

**Violation of Section 4k(2) of the Act:  
Failure to Register as APs and  
Allowing Unregistered APs to Remain Associated with a CPO**

52. Paragraphs 1 through 29 are realleged and incorporated herein by reference.

53. Section 4k(2) of the Act, as amended, to be codified at 7 U.S.C. § 6k(2), requires that APs of CPOs be registered with the Commission. Further, a CPO violates Section 4k(2) of the Act, as amended, to be codified at 7 U.S.C. § 6k(2), when it allows an unregistered AP to become or remain associated with the CPO when the CPO knew or should have known that the AP was not registered as such with the Commission.

54. Hernandez acted as an AP when he engaged in his solicitation activities for Midway and Conquest. Because he engaged in his AP activities without the benefit of

registration as an AP of a CPO, Hernandez violated Section 4k(2) of the Act, as amended, to be codified at 7 U.S.C. § 6k(2).

55. Midway and Conquest violated Section 4k(2) of the Act, to be codified at 7 U.S.C. § 6k(2), by allowing Hernandez to act as an unregistered AP of the company when they knew or should have known that he was not registered with the CFTC.

### **RELIEF REQUESTED**

WHEREFORE, Plaintiff respectfully requests that this Court, as authorized by Section 6c of the Act, as amended, to be codified at 7 U.S.C. §13a-1, and pursuant to its own equitable powers enter:

A. An order finding Defendants violated: Section 4b(a)(2)(i), (iii) of the Act, 7 U.S.C. § 6b(a)(2)(i), (iii) (2006) (with respect to conduct before June 18, 2008); Section 4b(a)(1)(A), (C) of the Act, as amended, to be codified at 7 U.S.C. § 6b(a)(1)(A), (C) (with respect to conduct on or after June 18, 2008); and Sections 4k(2), 4m and 4o(1)(A), (B) of the Act, as amended, to be codified at 7 U.S.C. §§ 6k(2), 6m, and 6o(1)(A), (B);

B. An order of permanent injunction prohibiting Defendants and any other persons or entities in active concert with them from engaging in conduct in violation of Sections 4b(a)(1)(A), (C), 4k(2), 4m, and 4o(1)(A), (B) of the Act, as amended, to be codified at 7 U.S.C. §§ 6b(a)(1)(A), (C), 6k(2), 6m, and 6o(1)(A), (B) ;

C. An order of permanent injunction prohibiting Defendants and any of their affiliates, agents, servants, employees, successors, assigns, attorneys and persons in active concert with them who receive actual notice of such order by personal service or otherwise, from engaging, directly or indirectly, in:

1. trading on or subject to the rules of any registered entity, as that term is defined in Section 1a(29) of the Act, as amended, to be codified at 7 U.S.C. § 1a(29);
2. entering into any transactions involving commodity futures, options on commodity futures, swaps, commodity options (as that term is defined in Commission Regulation 32.1(b)(1), 17 C.F.R. § 32.1(b)(1) (2011)) (“commodity options”), and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act, as amended, to be codified at 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i)) (“forex contracts”) for their own personal account or for any account in which they have a direct or indirect interest;
3. having any commodity futures, options on commodity futures, swaps commodity options, and/or forex contracts traded on their behalf;
4. 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;
5. soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity futures, options on commodity futures, commodity options, and/or forex contracts;
6. applying for registration or claiming exemption from registration with the Commission in any capacity, and engaging in any activity requiring such registration or exemption from registration with the Commission, except as provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2011);
7. acting as a principal (as that term is defined in Commission Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2011)), agent or any other officer or employee of any person

or entity registered, exempted from registration or required to be registered with the Commission, except as provided for in Commission Regulation 4.14(a)(9), 17 C.F.R. § 4.14(a)(9) (2011);

D. An order directing Defendants to pay civil monetary penalties under Section 6c of the Act, as amended, to be codified at 7 U.S.C. §9a, to be assessed by the Court separately against each of them, in amounts not more than the higher of \$130,000 for each violation occurring from October 24, 2004 through October 21, 2008 and \$140,000 for each violation occurring after October 22, 2008, or triple the monetary gain to Defendants for each violation of the Act;

E. An order directing Defendants to disgorge, pursuant to such procedure as the Court may order, all benefits received from the acts or practices that constitute violations of the Act, as described here, and prejudgment interest thereon from the date of such violations;

F. An order directing Defendants to make restitution by making whole each and every participant in Midway and Conquest whose funds were received or used by them in violation of the provisions of the Act as described herein, including pre-judgment interest;

G. An order directing Defendants, and any successors thereof, to rescind, pursuant to such procedures as the Court may order, all contracts and agreements, whether implied or express, entered into between them and any of the participants whose funds were received by them as a result of the acts and practices which constituted violations of the Act, as amended, as described herein;

H. An order requiring Defendants to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412 (2006); and

I. Such further relief as the Court deems appropriate.

Dated: September 30, 2011

Respectfully submitted,

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Jennifer E. Smiley

/s/ Joseph A. Konizeski  
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/s/ Rosemary Hollinger  
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