

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA

U.S. COMMODITY FUTURES TRADING  
COMMISSION,

Plaintiff,

v.

CHRISTOPHER SMITHERS,

Defendant.

Civil Action No. \_\_\_\_\_

**COMPLAINT FOR  
PERMANENT INJUNCTION,  
CIVIL MONETARY  
PENALTIES, AND OTHER  
EQUITABLE RELIEF**

Plaintiff, U.S. Commodity Futures Trading Commission (the “Commission” or “CFTC”),  
alleges as follows:

**I. SUMMARY**

1. From at least October 2008 to March 2009, Christopher Smithers (“Smithers” or “Defendant”) committed fraud in connection with contracts of sale of a commodity for future delivery by misrepresenting to customers that his commodity futures trading was profitable when it actually resulted in \$220,000 of losses (the “2008-09 Fraud”). Over two years later, from June 22, 2011, through November 2011, Smithers falsely represented to various futures commission merchants (“FCMs”) the identity of the person who opened and controlled commodity trading accounts. Smithers made such misrepresentations to circumvent prior court orders that prohibited him from trading commodity futures contracts (“2011 False Representations”). Also in 2011, Smithers committed fraud in connection with contracts of sale of a commodity in interstate commerce by misappropriating \$162,980 of a retail customer’s funds that were provided to Smithers for the purchase of gold bullion (the “2011 Retail Customer Fraud”). The

misappropriated funds from the 2011 Retail Customer Fraud were used by Smithers for personal expenditures, including Smithers' personal commodity futures trading. Finally, during 2011, Smithers fraudulently solicited a manager of a bullion dealer for funds with which to trade commodity futures and used some funds misappropriated during his Retail Customer Fraud to pay the bullion dealer manager purported profits ("NAAM Manager Fraud").

2. Smithers' commodity futures trading during the 2008-09 Fraud, 2011 False Representations, and the NAAM Manager Fraud was in violation of two previous orders of permanent injunction entered against him by the Court in *CFTC v. Matrix Trading Group, Inc., David Weeden, and Christopher Smithers*, Civil Action No. 00-8880-CIV-ZLOCH (S.D. Fla. Oct. 3, 2002) (the "2002 Order") and *CFTC v. Christopher Smithers, Prosperity Consultants, Inc., and Jack Smithers*, Case No. 05-80592-CIV-Hurley (S.D. Fla. Nov. 6, 2006) (the "2006 Order"). Both the 2002 and 2006 Orders permanently enjoined Smithers from engaging in commodity-related activity, including soliciting new customers. The 2002 Order permanently enjoined Smithers from trading commodity futures and options on futures on behalf of any other person, and the 2006 Order permanently enjoined Smithers from violating the 2002 Order.

3. By dint of this conduct and the conduct further described herein, Defendant has engaged, is engaging, or is about to engage in acts and practices in violation of the Commodity Exchange Act ("Act"), 7 U.S.C. §§ 1 *et seq.* (2006 & Supp. IV 2011), as amended by the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, Title XIII (the CFTC Reauthorization Act of 2008), §§ 13101-13204, 122 Stat. 1651 (enacted June 18, 2008), and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act"), Pub. L. No. 111-203, §§ 701-774, 124 Stat. 1376, 1641 *et seq.* (effective July 16, 2011), and the Commission's Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.* (2012)

(“Commission Regulations”). Specifically, Smithers violated Sections 4b(a)(1)(A), (C), 6(c)(1), and 6c(a) of the Act, as amended, 7 U.S.C. §§ 6b(a)(1)(A), (C), 9, 15, and 13a-1(a) (2006 & Supp. IV 2011), and Commission Regulation 180.1(a), 17 C.F.R. § 180.1(a) (2012).

4. Accordingly, pursuant to Section 6c of the Act, as amended, 7 U.S.C. § 13a-1 (2006 & Supp. IV 2011), the Commission brings this action to enjoin Defendant’s unlawful acts and practices and compel compliance with the Act, Commission Regulations, and the Court’s prior orders. In addition, the Commission seeks civil monetary penalties and remedial ancillary relief, including, but not limited to, trading and registration bans, restitution, disgorgement, rescission, pre- and post-judgment interest, and such other relief as the Court may deem necessary and appropriate.

## **II. JURISDICTION AND VENUE**

5. This Court possesses jurisdiction over this action pursuant to Section 6c of the Act, as amended, 7 U.S.C. § 13a-1 (2006 & Supp. IV 2011), which authorizes the Commission to seek injunctive and other relief against any person whenever it shall appear to the Commission that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of the Act or any rule, regulation, or order thereunder.

6. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2006), because Smithers resides in and transacted business within this District and the acts and practices in violation of the Act occurred, are occurring, or are about to occur within this District.

### III. THE PARTIES AND OTHER RELEVANT PERSONS

#### A. Parties

7. Plaintiff **U.S. Commodity Futures Trading Commission** is an independent federal regulatory agency that is charged by Congress with the administration and enforcement of the Act, as amended, 7 U.S.C. §§ 1 *et seq.* (2006 & Supp. IV 2011), and the Commission Regulations promulgated thereunder, 17 C.F.R. §§ 1.1 *et seq.* (2012). The Commission maintains its principal office at Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

8. Defendant **Christopher Smithers** is an individual whose last known residence was in Jupiter, Florida. From July 22, 1998, to December 6, 2000, Smithers was registered with the Commission as an Associated Person (“AP”) of an Introducing Broker (“IB”), Matrix Trading Group, Inc. He is not currently registered with the Commission. In 2002, Smithers was sanctioned by the United States District Court for the Southern District of Florida for commodity options fraud and for supervisory failures in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2000), and Commission Regulations 33.10 and 166.3, 17 C.F.R. §§ 33.10, 166.3 (2002). Pursuant to the 2002 Order, Smithers and two other defendants were ordered to pay \$299,129.90 in restitution to 16 customers and were permanently enjoined from engaging in commodity-related activity. In 2006, Smithers, his father, and an entity they owned, Prosperity Consultants, Inc., were sanctioned by the Court for commodity futures fraud in violation of Section 4o(1) of the Act, 7 U.S.C. § 6o(1) (2000), and for violating the Court’s 2002 Order in violation of Section 6c of the Act, 7 U.S.C. § 13a-1(a) (2000). Pursuant to the 2006 Order, Smithers was permanently enjoined from: (a) engaging in commodity-related activity; (b) further violations of the Court’s 2002 Order; and (c) further violations of Sections 4o(1) and 6c of the Act, 7 U.S.C. §§ 6o(1) and 13a-1 (2000), and Commission Regulation 4.30, 17 C.F.R. § 4.30 (2004). Smithers was

subsequently ordered to disgorge \$206,046.61 in ill-gotten gains and to pay a civil monetary penalty of \$206,046.61 in *Commodity Futures Trading Commission v. Christopher Smithers, Prosperity Consultants, Inc., and Jack Smithers*, Case No. 05-80592-CIV-Hurley (S.D. Fla. Aug. 18, 2009) (Order Adopting Magistrate’s Report and Recommendation & Final Judgment of Disgorgement and Assessment of Civil Monetary Penalties). From approximately August 2010 to October 2011, Smithers was employed by Lloyds Commodities, LLC (“Lloyds”), a firm that claims to be a precious metals dealer in Palm Beach Gardens, Florida.

**B. Other Relevant Persons**

9. **John Zirpolo** (“Zirpolo”) resides in Jupiter, Florida and was employed as Smithers’ personal assistant from approximately June 2011 to November 2011. Zirpolo was listed as the sole managing member of Zirpolo Consulting, LLC (“Zirpolo Consulting”), a Florida limited liability company that was incorporated on August 3, 2011, and whose principal place of business shares the same address as Zirpolo’s residence according to filings with the State of Florida. Zirpolo Consulting has never been registered with the Commission. Zirpolo has little or no experience in trading commodity futures, and has never been registered with the Commission.

**IV. STATUTORY BACKGROUND**

10. The S&P 500 Stock Price Index and gold are commodities within the meaning of Section 1a(9) of the Act, as amended, 7 U.S.C. § 1a(9) (2006 & Supp. IV 2011).<sup>1</sup> The E-mini

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<sup>1</sup> The S&P Stock Price Index 500, or the “S&P 500,” is an index that is based upon the common stock prices of 500 top publicly traded United States companies. The S&P Stock Price Index is distinguishable from mutual funds or exchange of securities indexed to the S&P 500 or an exchange-traded fund that consists of a portfolio of securities comprising the price index. The former is a commodity as defined by Section 1a(9) of the Act, as amended, 7 U.S.C. § 1a(9) (2006 & Supp. IV 2011), and the latter two are security products regulated by the Securities and Exchange Commission.

S&P 500 futures contract (“E-mini”) is a futures contract traded on the Chicago Mercantile Exchange, which settles to the value of the S&P 500 Stock Price Index.

11. A Futures Commission Merchant (“FCM”) is defined under Section 1a(28) of the Act, as amended, 7 U.S.C. § 1a(28) (2006 & Supp. IV 2011), in relevant part, as an individual, association, partnership, corporation, or trust that is engaged in soliciting or in accepting orders for the purchase or sale of a commodity for future delivery that accepts any money, securities, or property to margin, guarantee, or secure any trades or contracts that result or may result therefrom or that is registered with the Commission as an FCM.

12. An “introducing broker” is defined in Commission Regulation 1.3(mm)(1), 17 C.F.R. § 1.3(mm)(1) (2012), in relevant part, as any person who, for compensation or profit, whether direct or indirect, is engaged in soliciting or in accepting orders (other than in a clerical capacity) for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market who does not accept any money, securities, or property (or extend credit in lieu thereof) to margin, guarantee, or secure any trades or contracts that result or may result therefrom.

13. An “associated person” of an IB is defined in Commission Regulation 1.3(aa)(2), 17 C.F.R. § 1.3(aa)(2) (2012), as any natural person who is associated with an IB as a partner, officer, employee, or agent (or any natural person occupying a similar status or performing similar functions), in any capacity which involves the solicitation or acceptance of customers’ or option customers’ orders (other than in a clerical capacity) or the supervision of any person or persons so engaged.

## V. FACTS

### A. **The 2008-09 Fraud: Smithers Made False and Misleading Representations**

14. Smithers traded E-minis from approximately October 2008 to March 2009 on behalf of, and through, two customers, “Customer JM,” and an entity Customer JM controlled, M318, LLC (collectively “M318”), and Lawyers Realty, LLC (“Lawyers Realty”).

15. In soliciting M318, Smithers made false statements, including that his trading had been profitable. This statement was false because, on information and belief, he was not trading profitably at the time he solicited M318. In soliciting Lawyers Realty, Smithers also falsely represented that his trading had been profitable. This statement was false because at that time he made the statement, he was trading the M318 funds and was losing money. Based upon Smithers’ misrepresentations, M318 and Lawyers Realty deposited \$195,000 and \$25,000, respectively, into futures trading accounts controlled by Smithers.

16. In addition to making false statements to M318, Smithers created a “dummy” account, in which Smithers was trading fictional money, which Smithers misrepresented as a real trading account and from which Smithers showed trading activity that contained false profit representations. Smithers created this dummy account and showed it to M318 for the purpose of hiding trading losses of M318’s combined initial deposits of \$115,000, and to encourage M318 to provide additional funds for Smithers to use for the purpose of trading futures on M318’s behalf.

17. Based upon Smithers’ earlier misrepresentations and the false profit representations contained in the dummy account, M318 provided Smithers with an additional \$80,000 in funds to use for the purpose of trading futures on M318’s behalf. Smithers lost this additional \$80,000 in subsequent trading.

18. With regard to Lawyers Realty, in addition to making the false statements described above in paragraph 15, in February 2009, Smithers misrepresented to Lawyers Realty that its February 9, 2009 deposit of \$25,000 had been profitable. In fact, after two weeks of trading these funds, Smithers had lost the entire \$25,000 deposit.

19. In November 2010, M318 and Lawyers Realty filed an arbitration claim with the National Futures Association (“NFA”) asserting that Smithers and his purported employer, Options 2 Futures, LLC, had defrauded them.

20. In a May 27, 2009 sworn affidavit, and in September 20, 2011 sworn testimony before NFA, Smithers admitted to making misrepresentations to M318 and Lawyers Realty during the period of October 2008 to March 2009. Smithers also admitted in his sworn affidavit and testimony that when Lawyers Realty attempted to withdraw its \$25,000 deposit from the FCM where its account was traded, he cancelled the withdrawal through a phone call to the FCM shortly thereafter. Smithers subsequently misrepresented to Lawyers Realty that withdrawing the funds would take several days due to account activity but that the funds were “guaranteed.”

**B. The 2011 False Representations: Smithers Made False and Misleading Representations to Establish and Trade Six Commodity Futures Trading Accounts at Five Registered FCMs**

21. From approximately June 2011 through November 2011, Smithers employed Zirpolo as his personal assistant. Zirpolo’s duties as Smithers’ personal assistant generally consisted of running personal errands, wiring funds, and making deposits and withdrawals from bank accounts controlled by Smithers. Smithers told Zirpolo that he would teach him to trade commodity futures but never did so. While Zirpolo was employed as Smithers’ personal assistant, Smithers traded E-minis through Zirpolo Consulting by impersonating Zirpolo.

22. On August 3, 2011, Smithers incorporated Zirpolo Consulting with Zirpolo listed as its managing member. Zirpolo signed the documents forming Zirpolo Consulting but had little knowledge of its trading activities during this period.

23. From June 22, 2011, through November 2011, Smithers made material misrepresentations in the account opening applications of six commodity futures trading accounts that he opened using Zirpolo's personal information at five registered FCMs: TradeStation Securities, in the name of John Zirpolo, which Smithers opened on or about June 22, 2011 and closed on or about August 15, 2011; Open E Cry in the name of Zirpolo Consulting, which Smithers opened on or about August 15, 2011, and closed on or about August 24, 2011; MF Global, Inc. in the name of Zirpolo Consulting, which Smithers opened on or about August 15, 2011, and closed on or about September 2, 2011; Velocity Futures, LLC, the first account which Smithers opened in the name of Zirpolo on or about August 24, 2011, and closed on or about September 22, 2011, and the second account which Smithers opened in the name of Zirpolo Consulting on or about October 5, 2011, and closed on or about November 28, 2011; and Dorman Trading LLC, which Smithers opened in the name of Zirpolo Consulting on or about October 6, 2011, and closed on or about October 12, 2011.

24. Among other material misrepresentations Smithers made in the account opening applications on behalf of Zirpolo and Zirpolo Consulting were that Zirpolo was the sole authorized person permitted to trade and manage the account and that Zirpolo had a liquid net worth of at least \$500,000. These were false because at that time Smithers intended to trade the accounts and, on information and belief, Zirpolo's liquid net worth was at or near the federal poverty threshold.

25. Smithers misrepresented the identity of who opened and who was to control the trading of these commodity trading accounts in an effort to conceal his identity. Smithers sought to conceal his identity for the purpose of deceiving the FCMs into allowing him to open, and trade in, these commodity trading accounts because such trading violated the permanent injunctions contained within the 2002 and 2006 Orders that prohibited him from engaging in any commodity-related activity.

**C. The 2011 Retail Customer Fraud: Smithers Made False and Misleading Representations to Misappropriate \$162,980**

26. Beginning on or about August 2010 through October 2011, Smithers was employed at Lloyds, a firm claiming to be a precious metals dealer. Smithers' duties at Lloyds consisted of recruiting telemarketing firms, known as "retail dealers," to solicit retail customers to purchase metals through Lloyds.

27. The "retail dealers" transmitted funds provided by their retail customers to Lloyds, which subsequently deposited the funds at Hunter Wise, a firm holding itself out to be a wholesaler of physical metals specializing in leveraged metals transactions.

28. North American Asset Management LLC ("NAAM"), which commenced operations in April 2011, was a Lloyds retail dealer and had two managers ("NAAM Managers 'One' and 'Two'"). NAAM Managers One and Two had dealt almost exclusively with Smithers as a representative of Lloyds when establishing new accounts for their retail customers. On information and belief, NAAM Managers One and Two were unaware that Smithers had been permanently enjoined from engaging in commodity-related activity and commodity futures trading in the 2002 and 2006 Orders.

29. By mid-September 2011, Smithers sought funds to support his surreptitious commodity futures trading activities, described above in paragraphs 21 through 25. During this

same period of time, a retail customer (the "Retail Customer") deposited \$180,000 with NAAM for the purchase and physical delivery of gold bullion through Lloyds.

30. On or about mid-September 2011, NAAM Managers One and Two contacted Smithers concerning the \$180,000 deposit by the Retail Customer. Smithers persuaded NAAM Managers One and Two to provide him with \$162,980 of the \$180,000 deposit (\$180,000 minus \$17,020 in commissions), instead of Lloyds, to purchase the gold bullion from Zirpolo Consulting. Smithers misrepresented to NAAM Managers One and Two that Zirpolo Consulting was a gold refinery in Texas and was a new source of gold bullion for Lloyds, and that the purchased gold bullion would then be shipped to NAAM for physical delivery to the Retail Customer.

31. On September 30, 2011, at Smithers' instructions, NAAM wired \$162,980 to a bank account in the name of Zirpolo Consulting ("First Bank Account"), which was controlled by Smithers, for the purpose of Smithers purchasing the gold bullion from Zirpolo Consulting for shipment to the Retail Customer.

32. On or about October 4, 2011, Smithers ordered Zirpolo to withdraw most of the \$162,980 from the First Bank Account. Smithers directed Zirpolo to deposit \$118,792.87 of these funds into a bank account Smithers had previously established at another bank on behalf of Zirpolo Consulting ("Second Bank Account"), leaving \$44,187.13 in the First Bank Account. The \$118,792.87 deposited in the Second Bank Account was subsequently dissipated by Smithers through his commodity futures trading, used by Smithers for debit card purchases for his personal expenses, or was withdrawn in cash increments of \$8,000 or \$9,800 at Smithers' direction.

33. Most of the remaining \$44,187.13 in misappropriated funds contained within the First Bank Account were later withdrawn by Zirpolo at Smithers' direction in cash increments of

\$8,000 and/or were used to pay fictitious profits to NAAM Manager Two, who had previously provided Smithers with funds to trade on his behalf in mid-September 2011.

34. Shortly after misappropriating the funds that were intended for purchasing gold bullion on behalf of the Retail Customer, Smithers repeatedly misrepresented to NAAM that the gold bullion, which had never been purchased, had been purchased and shipped, ultimately providing a phony United Parcel Service tracking number to NAAM for the purpose of supporting his misrepresentation that the gold had been shipped.

**D. The 2011 NAAM Manager Two Fraud: Smithers Misrepresented the Profitability of his Trading and Used Misappropriated Funds to Pay Personal Expenses and Provide Fictitious Profits**

35. On or about mid-September 2011, Smithers solicited NAAM Manager Two for funds so that Smithers could trade commodity futures on his behalf. As part of his solicitation of NAAM Manager Two, Smithers orally misrepresented that his commodity futures trading at the time was profitable when, in fact, it was not profitable. The account statement that Smithers provided to NAAM Manager Two in order to support his misrepresentation that Smithers' commodity futures trading was profitable at the time was for an account that had previously been closed.

36. In response to Smithers' solicitation, on or about September 14, 2011, NAAM Manager Two provided Smithers with \$20,000 for the purpose of trading in commodity futures on his behalf. Smithers subsequently orally misrepresented to NAAM Manager Two that Smithers had made profits by trading his funds and funds Smithers had received from others.

37. Instead of using NAAM Manager Two's funds for commodity futures trading, Smithers used them to pay for his personal expenses.

38. On or about early October 2011, Smithers provided NAAM Manager Two with \$11,000, stating that this was NAAM Manager Two's share of the purported profits from the funds NAAM Manager Two had provided to Smithers for commodity futures trading on his behalf. Instead, the \$11,000 "profit" was actually \$11,000 of the funds Smithers had misappropriated from the Retail Customer through NAAM for the purchase of gold on the Retail Customer's behalf.

**E. Smithers' Trading in Violation of the Court's 2002 and 2006 Orders**

39. By order entered October 3, 2002, the Court permanently enjoined Smithers from engaging in commodity-related activities. Subsequently, by order entered November 6, 2006, the Court again permanently enjoined Smithers from engaging in commodity-related activity, including soliciting new clients. The 2006 Order also permanently enjoined Smithers from violating Sections 4o(1) and 6c of the Act, 7 U.S.C. §§ 6o(1) and 13a-1 (2000), and Commission Regulation 4.30, 17 C.F.R. § 4.30 (2004), and from further violations of the Court's 2002 Order.

40. In a sworn affidavit dated May 27, 2009, and in sworn testimony at an NFA arbitration hearing on September 20, 2011, Smithers admitted that he had engaged in commodity-related activity by trading E-mini S&P 500 futures contracts on behalf of M318 and Lawyers Realty from October 2008 to March 2009.

41. From June 2011 through November 2011, Smithers again engaged in commodity-related activity by trading in E-mini S&P 500 futures contracts under the name of Zirpolo and/or through Zirpolo Consulting. As alleged above, Smithers intentionally violated the Court orders in that he impersonated another in order to open and trade the commodity trading accounts.

42. By engaging in commodity-related activity in 2008 through 2009 and 2011, Smithers violated the 2002 and 2006 Orders. Additionally, Smithers' commodity-related activity violated the 2006 Order enjoining him from any further violations of the Court's 2002 Order.

**VI. VIOLATIONS OF THE COMMODITY EXCHANGE ACT AND COMMISSION REGULATIONS**

**COUNT I**

**Violations of Section 4b(a)(1)(A), (C) of the Act, as Amended, 7 U.S.C. § 6b(a)(1)(A), (C) (2006 & Supp. IV 2011): Fraud By Misrepresentations, Misappropriation, and False Statements in Connection With Commodity Futures**

43. Paragraphs 1 through 42 are re-alleged and incorporated herein by reference.

44. Section 4b(a)(1)(A), (C) of the Act, as amended, 7 U.S.C. § 6b(a)(1)(A), (C) (2006 & Supp. IV 2011), makes it unlawful:

(1) for 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 other 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

45. *The 2008-2009 Fraud:* In 2008 and 2009, Smithers violated Section 4b(a)(1)(A), (C) of the Act, as amended, 7 U.S.C. § 6b(a)(1)(A), (C) (2006 & Supp. IV 2011), in that he cheated or defrauded, or attempted to cheat or defraud, and willfully deceived, or attempted to deceive customers by knowingly: (i) misrepresenting the profitability of customer commodity futures trading accounts, (ii) overriding a customer's attempt to withdraw its funds from trading, and (iii) falsely guaranteeing a customer's principal funds.

46. *The NAAM Manager Fraud:* In September and October 2011, Smithers violated Section 4b(a)(1)(A), (C) of the Act, as amended, 7 U.S.C. § 6b(a)(1)(A), (C) (2006 & Supp. IV 2011), in that he cheated or defrauded or attempted to cheat or defraud, and willfully deceived, or attempted to deceive a customer by knowingly: (i) misrepresenting the profitability of his trading in commodity futures, (ii) misappropriating the customer's funds to pay personal expenses, and (iii) paying the customer a purported profit with funds that he had misappropriated from funds intended for the purchase of gold.

47. Each misappropriation or misrepresentation, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 4b(a)(1)(A), (C) of the Act, as amended, 7 U.S.C. § 6b(a)(1)(A), (C) (2006 & Supp. IV 2011).

## COUNT II

### **Violations of Section 6(c)(1) of the Act, as Amended, 7 U.S.C. §§ 9, 15 (2006 & Supp. IV 2011), and Commission Regulation 180.1(a): Fraud by Manipulative or Deceptive Devices or Contrivances Concerning Contracts of Sale of a Commodity in Interstate Commerce**

48. Paragraphs 1 through 42 are re-alleged and incorporated herein by reference.

49. During September and October 2011, Smithers used or employed manipulative or deceptive devices or contrivances, in connection with a contract of sale of a commodity in

interstate commerce by, including but not limited to, making false or misleading statements of material fact by:

- a. Misappropriating \$162,980 in funds intended for the purchase of gold on behalf of the owner of the funds by using the funds to trade in commodity futures for Smithers' own benefit, as well as for Smithers' personal use and to pay fictitious profits to a Smithers' customer;
- b. Misrepresenting to the owner of the funds intended for the purchase of gold that Zirpolo Consulting was a gold refinery; and
- c. Misrepresenting to the owner of the funds intended for the purchase of gold that the gold had already been purchased.

50. Defendant engaged in the acts and practices described above willfully, knowingly, or with reckless disregard for the truth.

51. Each misappropriation or misrepresentation, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 6(c)(1) of the Act, as amended, 7 U.S.C. §§ 9, 15 (2006 & Supp. IV 2011), and Commission Regulation 180.1(a), 17 C.F.R. § 180.1(a) (2012).

52. Each manipulative or deceptive device or contrivance used or employed on or after August 15, 2011, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 6(c)(1) of the Act, as amended, 7 U.S.C. §§ 9, 15 (2006 & Supp. IV 2011), and Commission Regulation 180.1(a), 17 C.F.R. § 180.1(a) (2012).

### **COUNT III**

#### **Violations of Section 6c(a) of the Act, as amended, 7 U.S.C. § 13a-1(a) (2006 & Supp. IV 2011): Violation of Orders Issued by a United States District Court under the Act**

53. Paragraphs 1 through 42 are re-alleged and incorporated herein by reference.

54. By the conduct described in paragraphs 1 through 42 above, Smithers violated the Court's 2002 and 2006 Orders by engaging in commodity-related activity from October 2008 to March 2009 and again from June 2011 through November 2011.

55. Smithers' conduct that violated the Court's 2002 and 2006 Orders also violated Section 6c(a) of the Act, as amended, 7 U.S.C. § 13a-1(a) (2006 & Supp. IV 2011), in that Smithers has engaged, is engaging, or is about to engage in any act or practice constituting a violation of an order issued under the Act and Regulations.

56. Each act constituting a violation of the 2002 and 2006 Orders is alleged as a separate and distinct violation of Section 6c(a) of the Act, as amended, 7 U.S.C. § 13a-1(a) (2006 & Supp. IV 2011).

## **VII. RELIEF REQUESTED**

**WHEREFORE**, the Commission respectfully requests that this Court, as authorized by Section 6c of the Act, as amended, 7 U.S.C. § 13a-1 (2006 & Supp. IV 2011), and pursuant to its own equitable powers, enter:

A. An order finding that Defendant violated Section 4b(a)(1)(A), (C) of the Act, as amended, 7 U.S.C. § 6b(a)(1)(A), (C) (2006 & Supp. IV 2011);

B. An order finding that Defendant violated Section 6(c)(1) of the Act, as amended, 7 U.S.C. §§ 9, 15 (2006 & Supp. IV 2011);

C. An order finding that Defendant violated Commission Regulation 180.1(a), 17 C.F.R. § 180.1(a) (2012);

D. An order finding that Defendant violated Section 6c(a) of the Act, as amended, 7 U.S.C. § 13a-1(a) (2006 & Supp. IV 2011);

E. An order of permanent injunction prohibiting Defendant, and any other person or entity associated with him, from engaging in conduct in violation of Section 4b(a)(1)(A), (C) of the Act, as amended, 7 U.S.C. § 6b(a)(1)(A), (C) (2006 & Supp. IV 2011);

F. An order of permanent injunction prohibiting Defendant, and any other person or entity associated with him, from engaging in conduct in violation of Section 6(c)(1) of the Act, as amended, 7 U.S.C. §§ 9, 15 (2006 & Supp. IV 2011);

G. An order of permanent injunction prohibiting Defendant, and any other person or entity associated with him, from engaging in conduct in violation of Commission Regulation 180.1(a), 17 C.F.R. § 180.1(a) (2012);

H. An order of permanent injunction prohibiting Defendant, and any other person or entity associated with him, from engaging in conduct in violation of Section 6c(a) of the Act, as amended, 7 U.S.C. § 13a-1(a) (2006 & Supp. IV 2011);

I. An order of permanent injunction prohibiting Defendant, and any other person or entity associated with him, from directly or indirectly:

1. Trading on or subject to the rules of any registered entity, as that term is defined in Section 1a of the Act, as amended, 7 U.S.C. § 1a (2006 & Supp. IV 2011);

2. Entering into any transactions involving commodity futures, swaps, options on commodity futures, commodity options (as that term is defined in Commission Regulations 1.3(hh) and 32.1(b)(1), 17 C.F.R. §§ 1.3(hh) and 32.1(b)(1) (2012)) (“commodity options”), security futures products, and/or foreign currency (as described in Sections 2(c)(2)(B) and 2(c)(2)(C)(i) of the Act, as amended, 7 U.S.C. §§ 2(c)(2)(B) and 2(c)(2)(C)(i) (2006 & Supp. IV 2011)) (“forex contracts”), for his own personal or proprietary accounts or for any account in which he has a direct or indirect interest;

3. Having any commodity futures, swaps, options on commodity futures, commodity options, security futures products, and/or forex contracts traded on his 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, swaps, options on commodity futures, commodity options, security futures products, and/or forex contracts;

5. Soliciting, receiving, or accepting any funds from any person for the purpose of purchasing or selling any commodity futures, swaps, options on commodity futures, commodity options, security futures products, 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) (2012); and

7. Acting as a principal (as that term is defined in Commission Regulation 3.1(a), 17 C.F.R. § 3.1(a) (2012)), agent, or any other officer or employee of any person 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) (2012);

J. An order directing Defendant, as well as any of his successors, 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 and Commission Regulations, as described herein, plus pre-judgment interest thereon from the date of such violations, plus post-judgment interest;

K. An order requiring Defendant, as well as any of his successors, to make full restitution, pursuant to such procedure as the Court may order, to every person or entity whose

funds were received or utilized by him in violation of the provisions of the Act and/or Commission Regulations, as described herein, plus pre-judgment interest thereon from the date of such violations, plus post-judgment interest;

L. An order directing Defendant, as well as any of his successors, to rescind, pursuant to such procedures as the Court may order, all contracts and agreements, whether implied or express, entered into between him and any persons whose funds were received by Defendant as a result of the acts and practices which constitute violations of the Act and/or Commission Regulations, as described herein;

M. An order directing Defendant, as well as any of his successors, to pay civil monetary penalties under the Act, to be assessed by the Court, in amounts of not more than the higher of: (1) triple the monetary gain to Defendant for each violation the of the Act and/or Commission Regulations; or (2) \$140,000 for each violation of the Act committed on or after October 23, 2008, plus post-judgment interest; and (3) \$130,000 for each violation committed on or before October 22, 2008, plus post-judgment interest;

N. An order requiring Defendant, as well as any of his successors, to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2) (2006); and

O. Such other and further relief as the Court deems proper.

Dated: October 22, 2012

Respectfully submitted,

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