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10
11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13 SECURITIES AND EXCHANGE
14 COMMISSION,

15 Plaintiff,

16 vs.

17 EARTHLY MINERAL SOLUTIONS, INC.,
18 NATURAL MINERALS PROCESSING
COMPANY, ROY D. HIGGS, FRANK L.
SCHWARTZ, and RICK LAWTON,

19 Defendants.

Case No. 2:07-CV-

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21
22 **COMPLAINT**
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1 Plaintiff Securities and Exchange Commission (“Commission”) alleges as follows:

2 **JURISDICTION AND VENUE**

3 1. The Court has jurisdiction over this action pursuant to Sections 20(b), 20(d)(1),
4 and 22(a) of the Securities Act of 1933 (“Securities Act”), 15 U.S.C. §§ 77t(b), 77t(d)(1), and
5 77v(a), and Sections 21(d)(1), 21(d)(3)(A), 21(e), and 27 of the Securities Exchange Act of 1934
6 (“Exchange Act”), 15 U.S.C. §§ 78u(d)(1), 78u(d)(3)(A), 78u(e), and 78aa. The defendants,
7 directly or indirectly, made use of the means or instrumentalities of interstate commerce, or of
8 the mails, or of the facilities of a national securities exchange, in or in connection with the
9 transactions, acts, practices, and courses of business alleged in this Complaint.

10 2. Venue is proper in this district pursuant to Section 22(a) of the Securities Act,
11 15 U.S.C. § 77v(a), and Section 27 of the Exchange Act, 15 U.S.C. § 78aa, because certain of the
12 transactions, acts, practices, and courses of business constituting violations of the federal
13 securities laws occurred within this district.

14 **SUMMARY**

15 3. This case involves a Ponzi scheme perpetrated by Earthly Mineral Solutions, Inc.
16 (“EMS”), Natural Minerals Processing Company (“NMPC”), and their three principal officers,
17 Roy D. Higgs, Frank L. Schwartz, and Rick Lawton (collectively, “the defendants”). Between
18 2003 and 2006, EMS sold investors securities in the form of investment contracts relating to
19 interests in mining claims located on federally owned land near Las Vegas, Nevada. By January
20 2006, EMS had raised approximately \$20 million from over 100 investors nationwide, many of
21 whom had been saving for retirement and liquidated their Individual Retirement Accounts
22 (“IRAs”) to invest in EMS’ offering.

23 4. EMS enticed investors with misrepresentations about the exceptional returns that
24 they could receive by investing in its mining claims. Specifically, EMS offered investors a
25 guaranteed annual return of 7% to 9% on their investment, paid monthly over a period of five
26 years, if investors purchased interests in the mining claims and granted NMPC a right of first
27 refusal to mine the claims. Higgs, Schwartz, and Lawton, as officers of both EMS and NMPC,
28 told investors that the returns on their investment would be paid out of the operating revenue

1 from EMS' purported fertilizer business, which they claimed would use minerals mined by
2 NMPC from the claims to produce a highly profitable, environmentally friendly fertilizer for
3 retail sale.

4 5. Defendants, however, were operating a Ponzi scheme. Contrary to the
5 defendants' assertions, neither EMS nor NMPC ever extracted minerals or produced fertilizer
6 from the mining claims owned or sold to investors by EMS. Indeed, EMS and NMPC never
7 operated a mining and fertilizer business, and EMS received money from only one source: the
8 sale of interests in the mining claims to investors. As in all Ponzi schemes, the monthly returns
9 that EMS initially transferred to investors (before the scheme collapsed in late 2006) came solely
10 from funds invested by new investors.

11 6. By engaging in the conduct described in this Complaint:

- 12 a. Defendants EMS, Higgs, Schwartz, and Lawton violated the registration
13 provisions of Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§
14 77e(a) and (c);
- 15 b. All defendants violated the antifraud provisions of Section 17(a) of the
16 Securities Act, 15 U.S.C. § 77q(a);
- 17 c. All defendants violated the antifraud provisions of Section 10(b) of the
18 Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. §
19 240.10b-5; and
- 20 d. Defendants Higgs, Schwartz, and Lawton violated the broker-dealer
21 registration provisions of Section 15(a) of the Exchange Act, 15 U.S.C. §
22 78o(a).

23 7. The Commission seeks a permanent injunction, disgorgement with prejudgment
24 interest, and civil penalties against all defendants.

25 **DEFENDANTS**

26 8. **Earthly Mineral Solutions, Inc.** is a Nevada corporation formed in 2003 with its
27 principal place of business in Henderson, Nevada. EMS' officers are Higgs (treasurer), Schwartz
28 (president), and Lawton (secretary).

1 9. **Natural Minerals Processing Company** is a Nevada corporation formed in 2004
2 with its principal place of business in Las Vegas, Nevada. NMPC's officers are Higgs
3 (president), Schwartz (treasurer), and Lawton (secretary).

4 10. **Roy D. Higgs**, age 65, resides in Henderson, Nevada. Higgs is a founder and the
5 treasurer of EMS and the president of NMPC. Higgs sold at least \$920,000 of EMS' mining
6 claims to investors.

7 11. **Frank L. Schwartz**, age 43, resides in Henderson, Nevada. Schwartz is president
8 of EMS and the treasurer of NMPC. Schwartz sold at least \$10,000 of EMS' mining claims to at
9 least one investor.

10 12. **Rick Lawton**, age 60, resides in Reno, Nevada. Lawton is secretary and in house
11 counsel for both EMS and NMPC. Lawton is licensed to practice law in Nevada and has no
12 disciplinary history with the Nevada State Bar.

13 THE FRAUDULENT SCHEME

14 A. The Defendants Offer of the Mining Claim Interests

15 13. In late 2003, EMS began offering interests in its mining claims to investors
16 nationwide. EMS initially charged investors approximately \$2,000 per acre and eventually
17 raised the price to \$30,000 per acre. Between 2003 and 2006, EMS sold approximately \$20
18 million in mining claims.

19 14. In its offering materials, EMS represented to investors that the capital generated
20 from the sale of its mining claims would be used for "business expansion and to extend the
21 company's mineral processing operation." EMS claimed that NMPC would mine the claims and
22 that EMS would use the minerals extracted from the land to produce a chemical-free fertilizer
23 that it would offer for retail sale. EMS projected a yearly output of 62,400 tons of fertilizer and
24 revenue of \$80 per ton after costs, or an operating profit of approximately \$5 million per year.
25 EMS did not disclose that the offering costs, including commissions and the costs of giving
26 seminars to potential investors, would be paid from the offering proceeds.

27 15. An integral part of EMS' offering was its promise to pay investors a guaranteed
28 annual return on their investment of 7% to 9%, paid monthly for five years, if the investors

1 granted NMPC a right of first refusal to mine the investors' claims. Higgs, Schwartz, and
2 Lawton, as officers of both EMS and NMPC, told investors that these returns would be paid from
3 the profits of NMPC's mining operation and EMS' fertilizer business. Investors could earn the
4 higher 9% return by allowing NMPC to pay the funds directly out of EMS' operating revenue
5 from the purported fertilizer business. Alternatively, investors would earn 7% if they required
6 EMS to place the funds for the income payments with a title company. Both rates of return were
7 to be paid by monthly payments deposited directly into investors' bank accounts. Most, if not
8 all, of EMS' investors granted NMPC the right of first refusal to mine their claims in exchange
9 for these returns.

10 16. The right of first refusal agreement was the lever that EMS used to convince
11 investors that the mining claims were valuable and, therefore, a legitimate investment. Investors
12 could only receive a return on their investment if they agreed to the right of first refusal.

13 **B. The Defendants Solicit Investors**

14 17. EMS solicited investors through a nationwide print and television advertising
15 campaign, as well as through prior contacts, referrals, and word of mouth. EMS also had a
16 national network of sales agents who actively sought out new investors. EMS did not disclose to
17 investors that its sales agents received commissions of between 7% and 15%.

18 18. EMS and its sales staff solicited investments from individuals who were saving
19 for retirement. EMS provided potential investors who sought to liquidate their personal IRAs
20 forms to establish new IRAs with EMS and offered to pay the transfer or rollover fees charged
21 by the prior custodian.

22 19. EMS gave potential investors offering and promotional materials, including its
23 business plan and a videotaped infomercial. These promotional materials described the
24 company's business plan to mine the land for fertilizer. Higgs, Schwartz, Lawton, and others
25 appeared on EMS' promotional infomercial and touted the earnings that investors could reap by
26 investing in the mining claims. EMS also maintained three websites, now inactive, and sent
27 investors monthly newsletters that touted their purported fertilizer products. In addition, EMS
28 advertised its mining claims in newspapers nationwide and through local television

1 advertisements, often targeting senior investors who were unhappy with the returns of their IRA
2 and 401(k) accounts.

3 20. EMS' advertisements and sales representatives invited investors to attend sales
4 seminars held weekly at EMS' Las Vegas facility and to tour the land on which the mining
5 claims sat. EMS paid potential investors' airfare to, and hotel and transportation expenses in,
6 Las Vegas. At the seminars, EMS solicited investments by promoting the annual income that
7 EMS would pay investors for granting NMPC the right of first refusal to mine the claims. Higgs,
8 Schwartz, and Lawton, as officers of both EMS and NMPC, participated in these seminars, at
9 which EMS misrepresented to potential investors that NMPC had already started mining the
10 claims and that the monthly returns that EMS would pay to investors would come from the
11 profits of its fertilizer business.

12 **C. The Defendants Make Material Misrepresentations to Investors**

13 **1. The Defendants Misrepresent Their Use of Investor Capital**

14 21. EMS raised approximately \$20 million from investors from the sale of its mining
15 claims between 2003 and 2006. Contrary to their representations that investors' funds would be
16 used to expand EMS' fertilizer business, the proposed defendants never used any of the funds for
17 that purpose. Indeed, neither EMS nor NMPC had mined or produced or sold any fertilizer from
18 the mining claims. Moreover, neither EMS nor NMPC earned income from any source other
19 than the sale of the mining claims. All defendants knew that EMS and NMPC were not operable
20 businesses and that EMS' sole source of income was the sale of mining claims.

21 **2. The Defendants Use Investor Capital to Pay Returns to Other**
22 **Investors**

23 22. Instead of using the offering proceeds to expand its purported mining and
24 fertilizer businesses, EMS used the funds to pay returns to existing investors. All defendants
25 knew that EMS paid investor returns with offering proceeds rather than revenue from the
26 purported mining and fertilizer businesses.

27 23. EMS also used the offering proceeds to pay its employees. EMS paid Higgs,
28 Schwartz, and Lawton each a monthly salary of \$20,000 and provided them a monthly \$3,000

1 housing stipend, a company car, and a credit card. In addition, EMS used the offering proceeds
2 to pay sales representatives undisclosed commissions that ranged between 7% and 15% of the
3 sale price of the interests in the mining claims. EMS did not disclose to investors in its offering
4 materials that it paid officers' salaries and employees' commissions using offering proceeds. All
5 defendants knew that EMS used offering proceeds, and not operating revenue from the purported
6 mining and fertilizer business, to pay its officers and employees.

7 **D. The Ponzi Scheme Collapses**

8 24. In February 2006, the Nevada state securities authorities issued a cease-and-desist
9 order against EMS, Higgs, Schwartz, and Lawton, and the FBI, Bureau of Land Management
10 ("BLM"), and Nevada Secretary of State executed a search warrant at EMS. EMS stopped
11 selling interests in mining claims in March 2006.

12 25. In August and September 2006, EMS stopped paying investor returns. In October
13 2006, EMS notified investors by letter that NMPC could no longer make its monthly payments.

14 26. In November 2006, the Oklahoma state securities authorities issued a cease-and-
15 desist order against EMS, NMPC, Higgs, Schwartz, and Lawton.

16 27. Despite having stopped paying returns to investors in September 2006, EMS
17 continues to periodically send letters to investors claiming that additional financing will be
18 forthcoming and stating that it will soon be in a position to resume making payments.

19 **FIRST CLAIM**

20 **Unregistered Offer And Sale Of Securities**

21 **Violations of Sections 5(a) and 5(c) of the Securities Act**

22 **(Against Defendants EMS, Higgs, Schwartz, and Lawton)**

23 28. The Commission realleges and incorporates by reference paragraphs 1 through 27
24 above.

25 29. Defendants EMS, Higgs, Schwartz, and Lawton, by engaging in the conduct
26 described above, directly or indirectly, made use of means or instruments of transportation or
27 communication in interstate commerce or of the mails, to offer to sell or to sell securities, or to
28 carry or cause such securities to be carried through the mails or in interstate commerce for the

1 purpose of sale or for delivery after sale.

2 30. No registration statement has been filed with the Commission or has been in
3 effect with respect to any of the offerings or sales alleged herein.

4 31. By engaging in the conduct described above, defendants EMS, Higgs, Schwartz,
5 and Lawton violated, and unless restrained and enjoined will continue to violate, Sections 5(a)
6 and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) and (c).

7 **SECOND CLAIM**

8 **Fraud in the Offer or Sale of Securities**

9 **Violations of Section 17(a) of the Securities Act**

10 **(Against All Defendants)**

11 32. The Commission realleges and incorporates by reference paragraphs 1 through 27
12 above.

13 33. The defendants, by engaging in the conduct described above, directly or
14 indirectly, in the offer or sale of securities by the use of means or instruments of transportation or
15 communication in interstate commerce or by use of the mails:

- 16 a. with scienter, employed devices, schemes, or artifices to defraud;
- 17 b. obtained money or property by means of untrue statements of a material
18 fact or by omitting to state a material fact necessary in order to make the
19 statements made, in light of the circumstances under which they were
20 made, not misleading; or
- 21 c. engaged in transactions, practices, or courses of business which operated
22 or would operate as a fraud or deceit upon the purchaser.

23 34. By engaging in the conduct described above, the defendants violated, and unless
24 restrained and enjoined will continue to violate, Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a).

1 **THIRD CLAIM**

2 **Fraud in Connection with the Purchase or Sale of Securities**

3 **Violations of Section 10(b) of the Exchange Act and Rule 10b-5 Thereunder**

4 **(Against All Defendants)**

5 35. The Commission realleges and incorporates by reference paragraphs 1 through 27
6 above.

7 36. The defendants, by engaging in the conduct described above, directly or
8 indirectly, in connection with the purchase or sale of a security, by the use of means or
9 instrumentalities of interstate commerce, of the mails, or of the facilities of a national securities
10 exchange, with scienter:

- 11 a. employed devices, schemes, or artifices to defraud;
- 12 b. made untrue statements of a material fact or omitted to state a material fact
13 necessary in order to make the statements made, in light of the
14 circumstances under which they were made, not misleading; or
- 15 c. engaged in acts, practices, or courses of business which operated or would
16 operate as a fraud or deceit upon other persons.

17 37. By engaging in the conduct described above, the defendants violated, and unless
18 restrained and enjoined will continue to violate, Section 10(b) of the Exchange Act, 15 U.S.C. §
19 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

20 **FOURTH CLAIM**

21 **Violations of the Broker-Dealer Registration Provisions**

22 **Violations of Section 15(a) of the Exchange Act**

23 **(Against Defendants Higgs, Schwartz, and Lawton)**

24 38. The Commission realleges and incorporates by reference paragraphs 1 through 27
25 above.

26 39. Defendants Higgs, Schwartz, and Lawton by engaging in the conduct described
27 above, directly or indirectly, made use of the mails or means or instrumentalities of interstate
28 commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of

1 securities, without being registered as a broker or dealer in accordance with Section 15(a) of the
2 Exchange Act, 15 U.S.C. § 78o(a), 15 U.S.C. § 78o(a).

3 40. By engaging in the conduct described above, defendants Higgs, Schwartz, and
4 Lawton violated, and unless restrained and enjoined will continue to violate, Section 15(a) of the
5 Exchange Act, 15 U.S.C. § 78o(a).

6 **PRAYER FOR RELIEF**

7 WHEREFORE, the Commission respectfully requests that the Court:

8 **I.**

9 Issue findings of fact and conclusions of law that the defendants committed the alleged
10 violations.

11 **II.**

12 Issue a judgment, in a form consistent with Fed. R. Civ. P. 65(d), permanently enjoining
13 defendants EMS, Higgs, Schwartz, Lawton, and those persons in active concert or participation
14 with them who receive actual notice of the judgment by personal service or otherwise, from
15 violating Sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) and (c).

16 **III.**

17 Issue a judgment, in a form consistent with Fed. R. Civ. P. 65(d), permanently enjoining
18 all defendants, and those persons in active concert or participation with them who receive actual
19 notice of the judgment by personal service or otherwise, from violating Section 17(a) of the
20 Securities Act, 15 U.S.C. § 77q(a).

21 **IV.**

22 Issue a judgment, in a form consistent with Fed. R. Civ. P. 65(d), permanently enjoining
23 all defendants, and those persons in active concert or participation with them who receive actual
24 notice of the judgment by personal service or otherwise, from violating Section 10(b) of the
25 Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

26 **V.**

27 Issue a judgment, in a form consistent with Fed. R. Civ. P. 65(d), permanently enjoining
28 defendants Higgs, Schwartz, and Lawton, and those persons in active concert or participation

1 with them who receive actual notice of the judgment by personal service or otherwise, from
2 violating Section 15(a) of the Exchange Act, 15 U.S.C. § 78o(a).

3 **VI.**

4 Order all of the defendants to disgorge all ill-gotten gains from their illegal conduct,
5 together with prejudgment interest thereon.

6 **VII.**

7 Order all of the defendants to pay civil penalties pursuant to Section 20(d) of the
8 Securities Act, 15 U.S.C. § 77t(d), and Section 21(d)(3) of the Exchange Act, 15 U.S.C. §
9 78u(d)(3).

10 **VIII.**

11 Retain jurisdiction of this action in accordance with the principles of equity and the
12 Federal Rules of Civil Procedure in order to implement and carry out the terms of all orders and
13 decrees that may be entered, or to entertain any suitable application or motion for additional
14 relief within the jurisdiction of this Court.

15 **IX.**

16 Grant such other and further relief as this Court may determine to be just and necessary.

17
18 DATED: August 9, 2007

/s/ Morgan B. Ward Doran
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