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**UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION**

SECURITIES AND EXCHANGE  
COMMISSION,

PLAINTIFF,

v.

BLACKBIRD CAPITAL PARTNERS, LLC,  
ANDREW D. KELLEY, and PAUL H.  
SHUMWAY,

DEFENDANTS.

Case No. 2:16-cv-01199-TC

**[PROPOSED]  
DISTRIBUTION PLAN**

Judge Tena Campbell

**I. Background**

This matter involves the fraudulent offer and sale of securities by Blackbird Capital Partners, LLC (“Blackbird”) and its principals, Andrew D. Kelley (“Kelley”) and Paul H. Shumway (“Shumway”) (collectively, the “Defendants”).

Beginning in March 2014 and continuing through November 2018, Kelley and Shumway solicited investors to place their money with Blackbird where Kelley would use his “proprietary

algorithms” to trade investor funds. Both Kelley and Shumway touted Kelley’s trading success to potential investors. All of the investments were solicited by Kelley and/or Shumway, were managed by Kelley and/or Shumway, and were pooled and traded by Kelley.

From the time Blackbird began operations, there were several “accounts” in which investor funds were traded, including the “Friends and Family” account, Blackbird accounts, accounts in Kelley’s name, and the X-1 Technologies account.

From at least September 2014 through November 2016, the Defendants fraudulently collected at least \$3.1 million from more than two investors through the use of material misrepresentations and omissions and a scheme to defraud investors.

On August 20, 2018, the Court entered a final judgement against Shumway ordering him to pay \$355,882.60 (disgorgement of \$297,880.60, prejudgment interest of \$8,002.00 and a civil penalty of \$50,000). On March 29, 2019, the Court also entered final judgements against Kelly and Blackbird ordering them to pay, jointly and severally \$9,775,492.89 (disgorgement of \$8,307,256 and prejudgment interest of \$1,468,236.89). The final judgements required the Defendants to pay the monies ordered to the SEC. To date, the Commission has received funds from financial institutions that were previously frozen when this case was filed. Kelley and Blackbird have been credited with payments of \$2,358,346.75 of the monies ordered; Shumway has been credited with payments of \$3,912.57. The total of \$2,362,259.32 from these frozen accounts, together with payments of \$10,000 by two respondents pursuant to SEC Orders entered in related administrative proceedings comprises the Distribution Fund of \$2,372,259.32. The Distribution Fund is invested at the Bureau of Fiscal Service of the United States Treasury Department (“Treasury”).

The Commission has separately proposed Miller Kaplan Arase LLP (“MKA”), as the Tax Administrator (“Tax Administrator”) to execute all the tax reporting and filing requirements for the Distribution Fund.<sup>1</sup> The Tax Administrator fees and expenses and the tax liabilities of the Distribution Fund will be paid from the Distribution Fund.

The judgments entered in this action providing for monetary relief states that the Commission may propose a plan to distribute the funds collected subject to the Court’s approval. They further provide that “[s]uch a plan may provide that Fund shall be distributed pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002.” The Commission now moves the Court to approve the Plan, so that the Distribution Fund can be distributed to the sixty-seven (67) investors harmed by the Defendants’ conduct.

## **II. Definitions**

1. “Distribution Agent” shall mean Noel Gittens, a Commission employee appointed by the Court to handle the administration and distribution of the Distribution Fund in accordance with the terms of this Plan and the Court’s orders.

2. “Distribution Fund” consists of the \$2,372,259.32 – the amounts received from financial institutions, as well as the \$10,000 paid by two respondents in SEC-related administrative proceedings. Any additional funds received or collected pursuant to the Final Judgments will be added to the Distribution Fund.

3. “Eligible Investor” means investors identified by Commission staff during its investigation who purchased securities from the Defendants and were defrauded by the Defendants conduct as alleged in this case.

4. “Net Distribution Fund” means the Distribution Fund, plus accrued interest, less

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<sup>1</sup> See Dkt. No. 116.

any payments and reserves for tax obligations, fees of the Tax Administrator, BFS fees, and expenses of the Third-Party. The Net Distribution Fund will be distributed to the Eligible Investors, pursuant to the methodology herein.

5. "Net Loss" means an Eligible Investor's investment amount less any recovery on the investment. The Commission has determined from its investigation the Net Loss for each Eligible Investor and these amounts are listed in Exhibit B.

6. "Tax Administrator" shall mean Miller Kaplan Arase LLP, the firm to be appointed by the Court.

7. "Third-Party" will assist the Distribution Agent with certain tasks, such as verification of names and addresses, certain tax compliance services on behalf of the Distribution Fund, and processing of checks for distribution to harmed investors.

### **III. Responsibilities of the Distribution Agent**

8. Noel Gittens is the Distribution Agent for the Distribution Fund. As a Commission employee, the Distribution Agent shall receive no compensation for his services in administering the Distribution Fund, other than his regular salary as a Commission employee. The Distribution Agent may be removed at any time by order of the Court.

9. The Distribution Agent will, among other things: oversee the administration of the Distribution Fund; obtain contact and mailing information for the Eligible Investors; distribute money from the assets of the Distribution Fund to Eligible Investors in accordance with the Plan; resolve payment issues, prepare a final accounting; and provide the Tax Administrator with funds to pay tax liabilities and tax compliance fees and costs.

10. To facilitate a more timely and efficient distribution, the Distribution Agent will engage the services of a Third-Party, at a fixed fee of \$16,950 to perform some of the

administrative tasks associated with the administration and distribution of the Distribution Fund.

**IV. Responsibilities of the Tax Administrator**

11. The Net Distribution Fund is a “Qualified Settlement Fund” within the meaning of the regulations issued under Section 468B(g) of the Internal Revenue Code of 1986, as amended. The Tax Administrator is the administrator of such Qualified Settlement Fund, for purposes of Treas. Reg. § 1.468B-2(k)(3)(I), and shall satisfy the tax-related administrative requirements imposed by Treas. Reg. §§ 1.468B-1 through 1.468B-5, including, but not limited to:

- a) Obtaining a taxpayer identification number;
- b) Timely requests for funds necessary for the timely paying of all applicable taxes, the timely payment of taxes for which the Tax Administrator has received funds, and the filing of applicable tax returns; and
- c) Fulfilling any information reporting or withholding requirements required for distributions from the Net Distribution Fund.

12. The Distribution Agent and the Third-Party shall cooperate with the Tax Administrator in providing any information necessary to ensure income tax compliance.

**V. Methodology for Calculating *Pro Rata* Share**

13. The methodology for calculating the distribution amount involves the following:
- a) Determine each Eligible Investor’s Net Loss; and calculate the total Net Losses of all Eligible Investors by calculating the sum of all Eligible Investors’ Net Losses (“Total Net Losses”).
  - b) The “Eligible Investor’s Proportional Net Loss” is then calculated by dividing each Eligible Investor’s Net Loss by the Total Net Losses. This fractional result represents the Eligible Investor’s proportion of Net Loss

to the Total Net Losses.

- c) Each Eligible Investor's Proportional Net Loss is then multiplied by the Net Distribution Fund. The resulting figure represents the amount of the Net Distribution Fund to be distributed to that Eligible Investor ("Eligible Investor's *Pro-Rata* Share"). See the "Pro-Rata Share Calculation Chart" attached hereto as Exhibit B.<sup>2</sup>

## **VI. Distribution Procedure**

14. The Net Distribution Fund will be distributed *pro rata* among the Eligible Investors based upon the calculations in paragraphs 13(a) through 13(c) above, with the payment amounts as set forth in Exhibit B.

15. Based on information obtained by the Commission staff during its investigation and the review and analysis of applicable records, the Commission staff has reasonably concluded that it has all records necessary to calculate harm as described in the Plan. As a result, the Distribution Fund is not being distributed according to a claims-made process, so procedures for making and approving claims are not applicable.

16. Following approval of the Plan by the Court, the Third-Party at the direction of the Distribution Agent will send a notice ("Notice") (attached hereto as Exhibit C) to each Eligible Investor by U.S Postal Service. The Notice will provide each Eligible Investor with a copy of the Plan, including Exhibit B, which sets forth Eligible Investors' payment amounts and requests confirmation of contact information sufficient to issue the distribution payment. The Third-Party will send the Notice within fourteen (14) days of the date of the Order approving the

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<sup>2</sup> The *Pro Rata Share* amounts and "Recovery Rate" will change when the final reserve for administrative costs (which includes the fees and costs for the Tax Administrator, the tax liability of the Fund, and costs of the Third-Party) is determined. The Tax Administrator has not yet calculated a final reserve and the SEC has therefore conservatively estimated a reserve amount for the purposes of the Exhibit.

Plan.

17. Eligible Investors will have thirty (30) days from the postmark date of the Notice to submit the requested information to ensure an efficient and accurate delivery of the full distribution payment as described in the Notice. After receipt of the information from the Eligible Investors, the Third-Party will prepare a final payee list containing the names, amounts, and other information required for funds to be disbursed to the Eligible Investors.

18. After receipt of the final payee list, the Distribution Agent will petition the Court for an order directing the SEC's Office of Financial Management to cause a check for the total amount to be distributed to be issued to an "Escrow Account" established by the Third-Party assisting the Distribution Agent.

19. The Third-Party shall establish with a commercial bank, not unacceptable to the SEC, an Escrow Account pursuant to an escrow agreement (the "Escrow Agreement") to be provided by the Commission staff, in the name of and bearing the Employer Identification Number ("EIN") of the Qualified Settlement Fund ("QSF"). The Third-Party shall also establish with the bank a separate "Deposit Account" for the purpose of funding distribution payments to be distributed to Eligible Investors by the Distribution Agent pursuant to this Plan. The name on the account shall be in the following form: Blackbird Capital Partners Distribution Fund (EIN XX-XXXXXXX), as custodian for the benefit of investors allocated a distribution pursuant to the Plan in *SEC v. Blackbird Capital Partners et al.* – Civ. Act. No. 2:16-cv-01199-TC (D. Utah).

20. The assets of the Distribution Fund will be held in the Escrow Account, separate from Bank assets, until the presentation of checks. All Distribution Fund checks presented for payment or electronic transfers will be subject to "positive pay" controls before they are honored by the Bank. The "positive pay" system provides protection against fraud arising from counterfeit

or altered checks. The “positive pay” system will require, at a minimum, confirmation by the Bank that all checks presented for payment match the identifiers and amounts on the payee list prior to honoring such checks. In each instance, funds will be transferred from the Escrow Account to the Deposit Account upon the Bank’s confirmation that a presented check matches the relevant “positive pay” criteria.

21. The Third-Party will issue a check to each Eligible Investor in the amount of each Eligible Investor’s *Pro Rata* Share. Each check issued to the Eligible Investors will state on the face of the check that it is valid for ninety (90) days.

22. After ninety (90) days from the date on the distribution check, the Third-Party will notify the Distribution Agent of the amount of all uncashed checks. Checks that are not negotiated within this period shall be voided and the issuing financial institution shall be instructed to stop payment on those checks. Where an Eligible Claimant’s check has not been negotiated within the ninety (90) day period and has been voided by the Bank, that Eligible Claimant’s claim shall be extinguished upon the occurrence of the stale date. All such funds will remain in the Distribution Fund.

23. All Distribution Payments shall be preceded or accompanied by a communication, submitted to the Commission staff and the Tax Administrator for review and approval that includes, as appropriate:

- a) A statement characterizing the distribution;
- b) A statement that the tax treatment of the distribution is the responsibility of each recipient and that the recipient should consult his or her tax advisor for advice regarding the tax treatment of the distribution;
- c) A statement that checks will be void after ninety (90) days; and



- d) The name of a person or entity to contact, if the Eligible Claimant has any questions regarding the distribution.

24. The Distribution Payment checks, on their face or the accompanying mailbag, shall clearly indicate that the money is being distributed from a Distribution Fund established by the Commission to compensate investors for harm as a result of Defendants' conduct.

## **VII. Post Distribution**

25. One hundred eighty (180) days following the distribution, all approved final fees and expenses shall be paid, all outstanding checks shall be voided, and any remaining funds shall be paid to the Commission for transfer to the Treasury, upon receipt of written instructions by the Distribution Agent.

26. The Distribution Agent will destroy all documents, including documents in any media, six (6) years after the transfer of any remaining funds to the Commission. In addition, the Distribution Agent will shut down the website established specifically for the administration of the Distribution Fund six (6) months after the transfer of any remaining funds to the Commission.

27. Upon final distribution of the funds, the Distribution Agent shall make arrangement for the final payment of taxes and tax-related fees. The Distribution Agent shall also provide to Commission staff, who shall in turn file with the Court, a final accounting to the Court in an SEC standard accounting format provided by the Commission staff. The final report shall include, among other things, a final accounting of all monies received, earned, spent, and distributed in connection with the administration of the Plan and shall be compiled in coordination with the Tax Administrator.

**VIII. Payment of Costs, Fees, and Taxes, and Filing Report and Accountings**

28. All taxes and the reasonable fees and expenses of the Tax Administrator, and the Third Party incurred in the performance of its duties, will be paid from the Distribution Fund, subject to the review and approval of the Court.

29. The Distribution Agent will submit a final report to the Court for approval. The final report shall include, among other things, a final accounting of all monies received, earned, spent, and distributed in connection with the administration of the Plan,

30. The Distribution Fund shall be eligible for termination, and the Distribution Agent eligible for discharge, after all of the following have occurred: (a) the final accounting has been submitted and approved by the Court, (b) all taxes and fees have been paid, and (c) all remaining funds have been paid to the Commission for transfer to the United States Treasury.

**IX. Other Rights and Powers**

31. To carry out the purposes of this Plan, the Distribution Agent is authorized to make non-material changes to the Plan if agreed upon by the Commission staff. Material changes to this Plan may only be implemented by the Distribution Agent after consultation with, and consent of, Commission staff and approval by the Court.

32. The Distribution Agent in consultation with Commission staff may extend the procedural deadlines herein for good cause shown.

33. All proceedings with respect to the administration and the determination of all related controversies, shall be subject to the exclusive jurisdiction of this Court. Any dispute or objection to the Plan by any investor shall be submitted, in writing, to the Court no later than thirty (30) days from the date of filing of the Plan with the Court.

34. The Court reserves the right to amend this Plan from time to time, and retains jurisdiction over this matter for this purpose and for any and all other matters that may arise under or relate to this Plan.

**EXHIBIT B****PRO RATA SHARE CALCULATION CHART<sup>3</sup>**

<b>Eligible Investor</b>	<b>Calculated Net Loss</b>	<b>Proportional Net Loss</b>	<b>Pro Rata Share</b>
Investor # 1	\$ 39,653.02	0.41%	\$ 9,499.95
Investor # 2	\$ 16,852.53	0.18%	\$ 4,037.48
Investor # 3	\$ 24,783.14	0.26%	\$ 5,937.47
Investor # 4	\$ 19,826.51	0.21%	\$ 4,749.97
Investor # 5	\$ 13,758.66	0.14%	\$ 3,296.26
Investor # 6	\$ 5,000.00	0.05%	\$ 1,197.88
Investor # 7	\$ 9,913.26	0.10%	\$ 2,374.99
Investor # 8	\$ 14,869.88	0.16%	\$ 3,562.48
Investor # 9	\$ 39,752.15	0.41%	\$ 9,523.70
Investor # 10	\$ 14,869.88	0.16%	\$ 3,562.48
Investor # 11	\$ 7,000.00	0.07%	\$ 1,677.04
Investor # 12	\$ 74,349.40	0.78%	\$ 17,812.40
Investor # 13	\$ 19,826.51	0.21%	\$ 4,749.97
Investor # 14	\$ 17,444.72	0.18%	\$ 4,179.35
Investor # 15	\$ 17,843.86	0.19%	\$ 4,274.98
Investor # 16	\$ 108,728.59	1.13%	\$ 26,048.86
Investor # 17	\$ 64,436.15	0.67%	\$ 15,437.42
Investor # 18	\$ 49,566.27	0.52%	\$ 11,874.93
Investor # 19	\$ 1,910,933.78	19.93%	\$ 457,815.65
Investor # 20	\$ 44,609.64	0.47%	\$ 10,687.44
Investor # 21	\$ 34,696.39	0.36%	\$ 8,312.45
Investor # 22	\$ 616,845.22	6.43%	\$ 147,781.89
Investor # 23	\$ 151.16	0.00%	\$ 36.21
Investor # 24	\$ 74,349.40	0.78%	\$ 17,812.40
Investor # 25	\$ 69,454.08	0.72%	\$ 16,639.60
Investor # 26	\$ 297,397.59	3.10%	\$ 71,249.60
Investor # 27	\$ 644,361.43	6.72%	\$ 154,374.13
Investor # 28	\$ 9,913.26	0.10%	\$ 2,374.99
Investor # 29	\$ 2,500.00	0.03%	\$ 598.94

<sup>3</sup> The *Pro Rata Share* amounts and “Recovery Rate” will change when the final reserve for administrative costs (which includes the fees and costs for the Tax Administrator, the tax liability of the Distribution Fund, and costs of the Third-Party) is determined. The Tax Administrator has not yet calculated a final reserve and the SEC has therefore conservatively estimated a reserve amount for the purposes of this Exhibit.

<b>Eligible Investor</b>	<b>Calculated Net Loss</b>	<b>Proportional Net Loss</b>	<b>Pro Rata Share</b>
Investor # 30	\$ 9,913.26	0.10%	\$ 2,374.99
Investor # 31	\$ 5,000.00	0.05%	\$ 1,197.88
Investor # 32	\$ 173,372.88	1.81%	\$ 41,536.14
Investor # 33	\$ 2,000.00	0.02%	\$ 479.15
Investor # 34	\$ 297,422.37	3.10%	\$ 71,255.54
Investor # 35	\$ 19,626.04	0.20%	\$ 4,701.95
Investor # 36	\$ 58,427.70	0.61%	\$ 13,997.93
Investor # 37	\$ 61,604.85	0.64%	\$ 14,759.10
Investor # 38	\$ 196,425.09	2.05%	\$ 47,058.92
Investor # 39	\$ 409,180.43	4.27%	\$ 98,030.19
Investor # 40	\$ 161,728.71	1.69%	\$ 38,746.47
Investor # 41	\$ 148,345.82	1.55%	\$ 35,540.24
Investor # 42	\$ 109,492.55	1.14%	\$ 26,231.89
Investor # 43	\$ 10,325.65	0.11%	\$ 2,473.79
Investor # 44	\$ 1,177,496.34	12.28%	\$ 282,100.96
Investor # 45	\$ 25,774.46	0.27%	\$ 6,174.97
Investor # 46	\$ 24,783.14	0.26%	\$ 5,937.47
Investor # 47	\$ 49,566.27	0.52%	\$ 11,874.93
Investor # 48	\$ 586,368.90	6.12%	\$ 140,480.46
Investor # 49	\$ 106,071.81	1.11%	\$ 25,412.36
Investor # 50	\$ 215,530.85	2.25%	\$ 51,636.22
Investor # 51	\$ 60,191.32	0.63%	\$ 14,420.45
Investor # 52	\$ 28,511.58	0.30%	\$ 6,830.72
Investor # 53	\$ 44,000.00	0.46%	\$ 10,541.39
Investor # 54	\$ 55,000.00	0.57%	\$ 13,176.73
Investor # 55	\$ 200,000.00	2.09%	\$ 47,915.39
Investor # 56	\$ 245,000.00	2.56%	\$ 58,696.35
Investor # 57	\$ 50,000.00	0.52%	\$ 11,978.85
Investor # 58	\$ 150,000.00	1.56%	\$ 35,936.54
Investor # 59	\$ 81,970.00	0.86%	\$ 19,638.12
Investor # 60	\$ 25,000.00	0.26%	\$ 5,989.42
Investor # 61	\$ 50,000.00	0.52%	\$ 11,978.85
Investor # 62	\$ 230,000.00	2.40%	\$ 55,102.69
Investor # 63	\$ 50,000.00	0.52%	\$ 11,978.85
Investor # 64	\$ 100,000.00	1.04%	\$ 23,957.69
Investor # 65	\$ 50,000.00	0.52%	\$ 11,978.85
Investor # 66	\$ 30,000.00	0.31%	\$ 7,187.31

<b>Eligible Investor</b>	<b>Calculated Net Loss</b>	<b>Proportional Net Loss</b>	<b>Pro Rata Share</b>
<b>Investor # 67</b>	<b>\$ 25,000.00</b>	<b>0.26%</b>	<b>\$ 5,989.42</b>
<b>Totals</b>	<b>\$ 9,586,816.50</b>	<b>100.00%</b>	<b>\$ 2,296,780.08</b>