

1 John H. Mulhern, IL. Bar No. 6257148  
mulhernj@sec.gov  
2 James A. Scoggins, CO. Bar No. 28094  
3 scogginsj@sec.gov  
4 Securities and Exchange Commission  
1801 California Street, Suite 1500  
5 Denver, Colorado 80202  
6 Telephone: (303) 844-1000  
7 Fax: (303) 844-1068

8 Attorneys for Plaintiff United States  
9 Securities and Exchange Commission

E-filing

ORIGINAL  
FILED  
AUG 27 2012  
RICHARD W. WIERING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JSC

10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **SAN FRANCISCO/OAKLAND DIVISION**

CV 12 4486

13 SECURITIES AND EXCHANGE )  
14 COMMISSION, ) Case No.:  
15 )  
16 Plaintiff ) COMPLAINT  
17 vs. )  
18 )  
19 GARY R. MARKS, )  
20 )  
21 Defendant. )

20 Plaintiff Securities and Exchange Commission ("Commission"), for its  
21 complaint, alleges:

22 **SUMMARY**

23  
24 1. This enforcement action arises out of negligent misrepresentations  
25 and lack of disclosure by Gary R. Marks ("Marks" or "Defendant") to investors in  
26 various fund-of-funds hedge funds he managed and recommended through Sky  
27 Bell Asset Management, LLC ("Sky Bell"), including the Agile Sky Alliance  
28

1 Fund (“Alliance Fund”) that was co-managed with the Agile Group, PipeLine  
2 Investors (“PipeLine”), Night Watch Partners (“Night Watch”), and Sky Bell  
3 Offshore Partners (“Offshore Fund”) (collectively “Sky Bell Hedge Funds”).  
4 These Sky Bell Hedge Funds were funds of funds, and Sky Bell was a formerly  
5 registered investment adviser owned and controlled by Defendant. Between at  
6 least 2005 and September 2007, Defendant negligently misrepresented the level  
7 of correlation and diversification among the Sky Bell Hedge Funds. Furthermore,  
8 between at least 2005 and 2008, Defendant also: a) made unsuitable investment  
9 recommendations to certain advisory clients to invest most of their investment  
10 portfolio in Sky Bell Hedge Funds, b) negligently failed to disclose that PipeLine  
11 invested significantly in a purported subadviser’s fund, and c) negligently  
12 provided misleading information to certain investors about the liquidity problems  
13 at the Alliance Fund.  
14  
15  
16  
17  
18

19 **Defendant**

20  
21 2. Defendant was at all relevant times the Chief Executive Officer  
22 (“CEO”) and owner of Sky Bell and a key member of the portfolio team for the  
23 Sky Bell Hedge Funds. At all relevant times, Defendant held a Series 65  
24 securities licenses. During a portion of the relevant period, Marks was an  
25 associated person of a broker-dealer. Defendant no longer manages any Sky Bell  
26 Hedge Funds. Defendant, 61 years old, is a resident of Kihei, Hawaii.  
27  
28

1  
2  
3  
4  
5  
6  
7  
8

**Other Relevant Entities**

3. Sky Bell, located in Kihei, Hawaii, registered with the Commission as an investment adviser in 2004. Marks was the CEO and owner of Sky Bell, which provided investment advice to high net worth clients as well as managed the Sky Bell Hedge Funds. Sky Bell withdrew its registration as an investment adviser with the Commission on October 23, 2008.

9  
10  
11  
12  
13  
14  
15

**Jurisdiction and Venue**

4. The Commission brings this action pursuant to the authority conferred upon it by Section 209(d) and (e) of the Investment Advisers Act of 1940 [15 U.S.C. § 80b-9(b) and (d)] and Section 20(b) and (d) of the Securities Act of 1933 (“Securities Act”) [15 U.S.C. §77t(b) and (d)].

5. This Court has jurisdiction over this action pursuant to Investment Advisers’ Act Section 214 [15 U.S.C. § 80(b)-14] and Securities Act Section 22(a) [15 U.S.C. § 77v].

6. In connection with the transactions, acts, practices, and courses of business described in this Complaint, the Defendant, directly and indirectly, has made use of the means or instrumentalities of interstate commerce, of the mails, and/or of the means and instruments of transportation or communication in interstate commerce.



1           11. In October 2008, Sky Bell withdrew its registration from the  
2 Commission as an investment adviser. In 2012, Marks resigned from his duties  
3 managing the Sky Bell Hedge Funds. An independent firm was hired to handle  
4 the liquidation of the funds, and an Investor Advisory Committee was formed to  
5 oversee that process.  
6

7  
8           12. To date, no additional redemptions have been allowed since 2008 by  
9 the Alliance Fund and the Offshore Fund. PipeLine has distributed 50% of its  
10 capital back to investors, and Night Watch has distributed 30%. Investors likely  
11 have lost a significant portion of their investments in each of these funds.  
12

13           **B. Negligent Misrepresentations Relating to the Correlation among**  
14           **the Sky Bell Hedge Funds**  
15

16           13. Marks made oral representations to certain investors that the returns  
17 of certain Sky Bell Hedge Funds were non-correlated to each other. These  
18 statements were made to certain investors who invested in multiple hedge funds  
19 managed by Sky Bell.  
20

21           14. At least some investors considered these statements in deciding to  
22 invest in multiple Sky Bell Hedge Funds in order to achieve a diversified  
23 investment portfolio. Until at least September 2007, these investors were led to  
24 believe that they substantially increased their diversification by investing in a  
25 portfolio of several Sky Bell Hedge Funds.  
26  
27  
28

1           15. Despite making these statements, Marks never did any formal  
2 correlation analysis to support those claims. Marks did not even know how to  
3 properly perform such an analysis.  
4

5           16. Marks' representations were misleading because some of the Sky  
6 Bell Hedge Funds were correlated to each other and they invested in many of the  
7 same hedge funds as well as in funds that pursued the same strategies. As a  
8 result, when these underlying funds or strategies suffered losses, many Sky Bell  
9 Hedge Funds were similarly affected with large losses.  
10

11           17. These significant correlations resulted in a lack of diversification  
12 among certain Sky Bell Hedge Funds and thus meant that investors holding  
13 multiple positions in these certain Sky Bell Hedge Funds were significantly less  
14 diversified than certain of them were led to believe by Marks at least through  
15 September 2007.  
16

17  
18  
19           **C. Unsuitable Investment Recommendations**  
20

21           18. Marks served as an investment advisor to a limited number of Sky  
22 Bell investors. Sky Bell's Form ADV disclosed that Sky Bell provided  
23 investment advisory services to high net worth individuals. In monthly  
24 newsletters to Sky Bell investors, Marks told investors that he offered "free"  
25 financial planning assistance and investment advisory services. For those clients  
26 who accepted his offer, Marks would meet with them to discuss their goals,  
27  
28

1 objectives, and risk tolerance, and would provide advice regarding their  
2 investment portfolio.

3  
4 19. Marks understood that although he was not being paid separately for  
5 investment advice, he was being compensated for this work through the  
6 management and performance fees he was earning from the Sky Bell Hedge  
7 Funds. Marks also understood that some of these clients considered him to be  
8 functioning as their adviser.  
9

10  
11 20. Marks aggressively recommended the Sky Bell Hedge Funds to his  
12 advisory clients. Marks told clients that certain Sky Bell Hedge Funds  
13 represented an ideal investment for conservative investors, and in some cases  
14 recommended that a number of these clients invest significant amounts of their  
15 investment portfolio in his Sky Bell funds.  
16

17  
18 21. With regard to certain clients, Marks' advice was unsuitable given  
19 the client's investing goals and risk tolerance. While it may have been  
20 appropriate in certain instances to recommend that a client invest a portion of his  
21 assets into Sky Bell Hedge Funds, Marks' advice to these clients to invest a  
22 significant amount of their investment portfolio into Sky Bell Hedge Funds was  
23 unsuitable in light of those clients' conservative investing goals, low risk  
24 tolerance and/or significant current income needs.  
25  
26  
27  
28

1           **D. Inadequate Disclosure Concerning PipeLine**

2           22. PipeLine was marketed as a fund that would primarily invest in  
3  
4 PIPES funds. The PPM did not disclose that the fund had any subadvisers.  
5 However, in various written materials and in oral discussions with investors, Sky  
6 Bell and Marks disclosed that the fund had a subadviser. Marks claimed that this  
7 purported subadviser gave them an edge in the PIPES world because of his  
8 knowledge of the industry.  
9

10  
11           23. The subadviser did not receive any separate compensation from Sky  
12 Bell, Marks or PipeLine and his recommendations were not always followed by  
13 them. However, PipeLine made substantial investments in this subadviser's fund  
14 between 2006 and 2008, investing between 31%-50% of the fund's total assets in  
15 this subadviser's PIPES fund. This material fact was never disclosed to investors.  
16  
17

18           24. The subadviser had an incentive to recommend that PipeLine invest  
19 in his fund while discouraging investments in other funds in order to his increase  
20 his fees, a fact that would have been material to investors in evaluating the quality  
21 and independence of the investment advice guiding the fund's strategy.  
22

23  
24           **E. Misleading Information Relating to Liquidity Problems at the Alliance Fund**

25           25. In late 2007, the Alliance Fund was experiencing significant liquidity  
26 issues. 29% of the fund was seeking redemptions, and the fund was having  
27 difficulty meeting those redemption requests because of liquidity issues in its  
28



1 portfolio. Specifically, two major funds that the Alliance Fund had invested in  
2 were either gated or in a slow-pay mode, and a third fund had been partially side  
3 pocketed. Together, these investments comprised 17% of total capital, and 40%  
4 of investor capital. Moreover, 37% of the remaining assets in the fund (i.e. after  
5 the 12/31/07 redemptions were paid out) were expected to be in redemption for  
6  
7 March 31, 2008 based upon redemption requests the Alliance Fund had received.

9       26. To deal with the liquidity crisis, in late December 2007 or early  
10 January 2008 Sky Bell started asking investors who had made 12/31/07  
11 redemption requests to either partially or fully rescind those redemption requests.  
12 Some of those investors were told that the fund would have to be gated unless  
13 they rescinded those redemption requests because of the serious liquidity issues in  
14 the fund. These investors understood that they would be able to obtain their full  
15 redemption the following quarter if they rescinded their redemption requests.  
16 Investors who had not made redemption requests were not provided this  
17 information about the serious liquidity issues in the fund.  
18

19       27. Some investors did ultimately rescind their redemption requests  
20 allowing the fund to meet its redemption requests. Sky Bell entered into side  
21 letter agreements with some of those investors waiving future fees on their  
22 investment holdings. However, to meet the redemption request, the Alliance  
23 Fund had to make a small "in-kind" distribution representing 2% of each  
24  
25  
26  
27  
28

1 investor's redemption request attributable to a particular fund. It sent a letter in  
2 February 2008 explaining that in-kind distribution only to investors who had not  
3 withdrawn their December 31, 2007 redemption requests.  
4

5 28. During this period, Marks and Sky Bell failed to make adequate  
6 disclosure of the liquidity challenges of the Alliance Fund to those investors who  
7 had already made redemption requests. First, when asking investors to rescind  
8 their redemption request, they did not provide investors with any underlying  
9 information relating to the other underlying funds having serious liquidity issues  
10 or the amount of the Alliance Fund that would be in redemption as of 3/31/08.  
11 Those facts together would have raised real concerns about whether the fund  
12 would have to be gated as of 3/31/08.  
13  
14  
15

16 29. In addition, before the in-kind distribution letter was sent out to  
17 investors, Marks sent an email to another Sky Bell employee telling him to "call[]  
18 each investor ahead of time and let them know this is ONLY a 2% position and  
19 NOT a big deal." Marks' direction to downplay the significance of the letter and  
20 in-kind distribution, while knowing that the fund was continuing to face severe  
21 liquidity issues, negligently misled investors about the financial condition of the  
22 Alliance Fund.  
23  
24  
25  
26  
27  
28



1 **PRAYER FOR RELIEF**

2  
3 The SEC respectfully requests that this Court:

4 1. Find that Defendant committed the violations alleged;

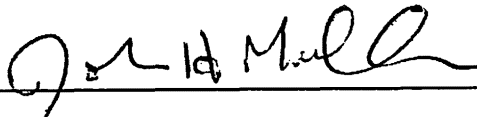
5 2. Enter injunctions, in a form consistent with Rule 65(d) of the Federal  
6 Rules of Civil Procedure, permanently restraining and enjoining Defendant from  
7 violating, directly or indirectly, or aiding and abetting violations of the law and  
8 rules alleged in this Complaint;  
9

10 3. Order Defendant to disgorge all ill-gotten gains in the form of any  
11 benefits of any kind derived from the illegal conduct alleged in this Complaint,  
12 plus pre-judgment interest;  
13

14 4. Order Defendant to pay civil penalties, including post-judgment  
15 interest, pursuant to Investment Advisers Act Section 209(e) [15 U.S.C. § 80b-  
16 9(e)] and Securities Act Section 20 (d) [15 U.S.C. §77t(d)] in an amount to be  
17 determined by the Court; and  
18

19 5. Order such other relief as is necessary and appropriate.  
20  
21  
22  
23  
24  
25  
26  
27  
28

Respectfully submitted, August 27, 2012.



John H. Mulhern, Esq.  
James A. Scoggins, Esq.  
Securities and Exchange Commission  
1801 California Street, Suite 1500  
Denver, Colorado 80202  
Telephone: (303) 844-1000  
Fax: (303) 844-1068

Attorneys for Plaintiff United States  
Securities and Exchange Commission

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28