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

13 SECURITIES AND EXCHANGE )  
14 COMMISSION, ) Case Number: CV-12-4486-WHA  
15 )  
16 Plaintiff, ) DISTRIBUTION PLAN  
17 )  
18 vs. )  
19 )  
20 GARY R. MARKS, )  
21 )  
22 )  
23 Defendant )  
24 )  
25 )  
26 )  
27 )  
28 )

29 [PROPOSED] PLAN OF DISTRIBUTION

30 The United States Securities and Exchange Commission (the "SEC" or "Commission")  
31 submits this motion to approve this Plan of Distribution of the Fair Fund established in this  
32 matter, consisting of the disgorgement, prejudgment interest, and civil penalty paid by the  
33 Defendant in this action, less any taxes and fees. Plaintiff's counsel has consulted with counsel  
34 for the Defendant who does not oppose this motion.

35 **I. Background**

36 1. On August 27, 2012, the SEC filed this action alleging that, from at least 2005 to  
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1 September 2007, Defendant Gary R. Marks made misrepresentations and failed to disclose  
2 information to investors in various fund-of-funds hedge funds he managed and recommended  
3 through Sky Bell Asset Management, LLC (“Sky Bell”), including the Agile Sky Alliance Fund  
4 (“Alliance Fund”), PipeLine Investors (“Pipeline”), Night Watch Partners (“Night Watch”), and  
5 Sky Bell Offshore Partners (“Offshore Fund”) (collectively, the “Sky Bell Hedge Funds”).  
6 According to the complaint, between at least 2005 and September 2007, Defendant negligently  
7 misrepresented the level of correlation and diversification among the Sky Bell Hedge Funds.  
8 Further, between at least 2005 and 2008, Defendant also: a) made unsuitable investment  
9 recommendations to certain advisory clients to invest most of their investment portfolio in the  
10 Sky Bell Hedge Funds; b) negligently failed to disclose that PipeLine invested significantly in a  
11 purported subadviser’s fund; and c) negligently provided misleading information to certain  
12 investors about the liquidity problems at the Alliance Fund.

13 2. On October 25, 2012, this Court entered a Final Judgment against Defendant,  
14 holding him liable for disgorgement of \$321,702, representing profits gained as a result of the  
15 conduct alleged in the Complaint together with prejudgment interest in the amount of \$82,866.  
16 [Dkt. #10]. A civil penalty of \$100,000 was also imposed pursuant to Section 209(e) of  
17 Investment Advisers Act of 1940 [15 U.S.C. § 80b-9(e)] and Section 20(d) of the Securities Act  
18 of 1933 [15 U.S.C. § 77t(d)], for a total of \$504,902.

19 3. On May 2, 2014, this Court entered an Order to Establish a Fair Fund and Appoint a  
20 Tax Administrator in this matter. [Dkt. #13]. Damasco & Associates LLP (“Damasco”) was  
21 appointed as Tax Administrator to execute all income tax reporting requirements, including the  
22 preparation and filing of tax returns, with respect to funds under this Court’s jurisdiction in this  
23 case.

24 4. On July 9, 2014, the Court entered an Order appointing Gilardi & Company LLC  
25 (“Gilardi”) to serve as Distribution Agent for the Fair Fund. Consistent with the Fund  
26 Administrator’s duties, an Escrow Account will be established from which the funds will be  
27 distributed to eligible investors.

1 **A. Definitions**

2 As used herein, the following definitions shall apply:

3 4. "Allocation Plan" shall mean the methodology by which a Potentially Harmed  
4 Investor's Recognized Claim is calculated.

5 5. "Related Class Action" shall refer to the case styled as *Tuttle v. Agile Sky Alliance*  
6 *Fund, LP, et al.*, Case No. 1:13-cv-00802-RGA in the United States District Court for the  
7 District of Delaware.

8 6. "Potentially Harmed Investors" shall mean those persons identified by the  
9 Distribution Agent as having possible claims to recover from the Net Available Fund under this  
10 Distribution Plan, or persons asserting that they have possible claims to recover from the Net  
11 Available Fund under this Distribution Plan.

12 7. "Net Available Fund" shall mean Defendants' payments in satisfaction of the  
13 Final Judgment, plus accrued interest thereon, minus any payments or reserves for taxes and  
14 fees and expenses of the Tax Administrator and Distribution Agent.

15 8. "Harmed Investors" shall mean persons who, as of December 31, 2007, invested in  
16 four hedge funds managed and recommended through Sky Bell and/or Gary Marks (collectively  
17 "Defendants"), including the Alliance Fund, PipeLine, Night Watch, Offshore Fund.

18 9. The following are excluded from the definition of Harmed Investors, and therefore  
19 shall not be entitled to Distribution Payments or any recovery under this Distribution Plan: (i)  
20 all Defendants in this action; (ii) Sky Bell and any Sky Bell related entities, including the  
21 Alliance Fund, PipeLine, Night Watch, and Offshore Fund; (iii) all current or former parents  
22 subsidiaries, and affiliates of any Defendant and any Sky Bell related entity; (iv) all members of  
23 the immediate families of any Defendant (including parents, spouses, siblings, and children);  
24 (v) any entity currently or formerly affiliated with any Defendant or Sky Bell related entity,  
25 including, without limitation any entity in which any defendant or Sky Bell related entity has a  
26 controlling interest; and (vi) the legal representatives, heirs, successors-in-interest, and assigns  
27 of any of the foregoing.

1           10. “Recognized Loss” shall be the Harmed Investor’s compensable loss pursuant to the  
2 Allocation Plan, attached hereto as Exhibit A.

3           11. “Distribution Payment” shall mean the pro-rata amount of funds allocated to a  
4 Harmed Investor pursuant to their Recognized Loss.

5 **B. Allocation Plan**

6           12. Plaintiff requests that the Disbursement Fund of \$504,902.00 be distributed, on a  
7 *pro rata* basis, to 141 investor accounts that were invested in Alliance Fund, PipeLine, Night  
8 Watch, and Offshore Fund as of December 31, 2007, when the losses were recognized. The  
9 list of investors was provided to the SEC by the Defendants. A copy of that list is can be  
10 provided to the clerk, under seal, pursuant to a final disbursement order, or filed with the clerk  
11 in redacted form. Plaintiff believes that a *pro rata* allocation to the Harmed Investors is the  
12 most reasonable, equitable, and feasible method of allocation the Distribution Fund to the  
13 Harmed Investors. *See Liberte Capital Group, LLC v. Capwill*, 148 Fed. Appx. 426, 434-37  
14 (6<sup>th</sup> Cir. 2005) (affirming district court’s decision to adopt *pro rata* method of disbursement of  
15 investor funds from receivership), *rev’d on other grounds*, 248 Fed. Appx. 650 (6<sup>th</sup> Cir. 2007);  
16 *United States v. Durham*, 86 F.3d 70, 72-73 (5<sup>th</sup> Cir. 1996) (affirming district court order  
17 requiring distribution of funds to fraud victims on *pro rata* basis).

18 **C. Rights and Duties of the Distribution Agent**

19           13. The Court has appointed Gilardi & Co. as Distribution Agent to oversee all aspects of  
20 the Distribution Fund, in accordance with the terms of this Distribution Plan.

21           14. It is the Distribution Agent’s responsibility, after consultation with the Court and the  
22 SEC, to distribute the Distribution Fund in accordance with this Distribution Plan.

23           15. The Distribution Agent is entitled to compensation and reimbursement from the  
24 Distribution Fund for the reasonable costs, fees, and other expenses, provided however that all  
25 such reimbursement and compensation requests must be approved by the Court before payment  
26 from the Distribution Fund.

27           16. As there is significant overlap between the group of harmed investors in this action and  
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1 those harmed in the Related Class Action, to make this distribution more efficient and cost-  
2 effective, the Distribution Agent shall leverage investor contact information and banking  
3 information obtained in the Related Class Action.

4 17. The Distribution Agent shall cooperate with Damasco & Associates, LLP, the Tax  
5 Administrator appointed in this matter, in providing any information necessary to ensure  
6 income tax compliance.

7 18. Pursuant to an escrow agreement (the "Escrow Agreement") to be provided by the staff  
8 of the Commission, the Distribution Agent shall establish an escrow account in the name of the  
9 SEC v. Marks Fair Fund, and bearing the Employer Identification Number ("EIN") of the  
10 Qualified Settlement Fund ("QSF"), as custodian for the distributees of the Distribution Plan.  
11 The name the account shall be in the following form: QSF, SEC v. Marks Fair Fund, bearing  
12 its EIN Number, as custodian for the benefit of investors allocated a distribution from the  
13 Marks Distribution Plan (the "Fair Fund Escrow Account").

14 19. To facilitate the distribution, upon motion of the SEC and approval of the Court, the  
15 Distribution Fund shall be transferred to the Escrow Account.

16 **D. General Administrative Provisions and Distribution Payments**

17 20. The Distribution Agent shall oversee the administration of the distribution as provided  
18 for in this Distribution Plan.

19 21. The Net Available Fund shall be distributed to the Eligible Claimants as provided for in  
20 this Distribution Plan.

21 22. To the extent that an Eligible Claimant, his or her representative, heir, or assign requests  
22 a distribution check to be issued in a different name than the Eligible Claimant (e.g., as the  
23 result of a name change because of marriage or divorce, or as the result of death), the  
24 Distribution Agent shall honor such request upon receipt of documentation which the  
25 Distribution Agent in its sole discretion deems appropriate to substantiate the request.

26 23. To carry out the purposes of this Distribution Plan, the Distribution Agent is authorized  
27 to make adjustments or clarifications to the Distribution Plan that are consistent with the  
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1 purposes of this Distribution Plan, if agreed upon by the Distribution Agent and the staff of the  
2 Commission and approved by the Court. Non-material changes to the Distribution Plan may  
3 be implemented by the Distribution Agent after consultation with, and consent of, Commission  
4 staff.

5 24. Upon entry of the Court's Order approving this plan of distribution, the Distribution  
6 Agent shall prepare a list of Eligible Claimants, together with the amount of the approved  
7 claims and payment amount with respect to each Eligible Claimant (the "Final Payee List").  
8 The Distribution Agent shall provide the Final Payee List to the Commission staff with a  
9 reasonable assurance certification as to the completeness and accuracy of the payment file. The  
10 Final Payee List shall, upon request, be made available to the Court. The distribution amount  
11 specified to the Court will have already taken into account reserves for taxes, as requested by  
12 the Tax Administrator and approved by the Commission staff, and reserves necessary for  
13 reasonably anticipated expenses.

14 25. All checks issued to Eligible Claimants by the Distribution Agent shall bear a stale date  
15 of 120 days. Accordingly, checks that are not negotiated within this period shall be voided and  
16 the issuing financial institution shall be instructed to stop payment on those checks. Where an  
17 Eligible Claimant's check has not been negotiated within the 120 day period and has been  
18 voided by the Distribution Agent, that Eligible Claimant's claim shall be extinguished upon the  
19 occurrence of the stale date. All such funds will be returned to the SEC v. Marks Fair Fund. If  
20 the Eligible Claimant submits a valid, written request for reissue during the 90 days following  
21 the issuance of the check, such reissued checks will be void after 90 days from issuance and in  
22 no event will a check be reissued after 90 days post-distribution. The Distribution Agent shall  
23 use all reasonable commercially available resources to locate all Eligible Claimants whose  
24 checks are returned to the Distribution Agent as undeliverable by the U.S. Postal Service.  
25 However, the claimant has the burden of providing the Distribution Agent with any changes to  
26 his or her mailing.

27 26. All payments to Eligible Claimants shall be accompanied by a letter that includes, as  
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1 appropriate: (a) a statement characterizing the distribution; (b) a statement that the checks will  
2 be void after 120 days; and (c) the name of a person to contact, to be used in the event of any  
3 questions regarding the distribution. Any such information letter or other mailing recipients  
4 characterizing their distributions shall be submitted to the Commission for prior review and  
5 approval. Distribution checks, on their face or in the accompanying mailing, will clearly  
6 indicate that the money is being distributed from a Fair Fund established by the Commission.  
7 All checks shall bear a stale date of 120 days.

8 27. If, after making all distribution payments, and all fees and expenses have been paid, and  
9 all tax obligations have been satisfied, there are remaining funds, those funds shall be  
10 transferred to the United States Treasury.

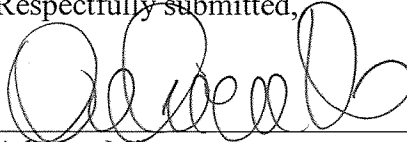
11 28. Upon final distribution of the funds, the Distribution Agent shall make arrangement for  
12 the final payment of taxes and tax-related fees and shall submit a final accounting to the Court.  
13 The Distribution Fund shall be eligible for termination and the Distribution Agent eligible for  
14 discharge, after all of the following have occurred: (a) the final accounting has been submitted  
15 and approved by the Court; (b) all taxes and fees have been paid; and (c) all remaining funds or  
16 any residual have been transferred to the United States Treasury.

1           **II. Conclusion**

2           WHEREFORE, for all the foregoing reasons, the Commission respectfully requests that  
3 this Court enter the attached Order for Approval of Distribution Plan and grant such other relief  
4 as the Court deems just and proper.

5 Dated: 5/27/2015

6           Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 27, 2015, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

All other parties will be served by regular U.S. mail:

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Date: May 27, 2015