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

13	SECURITIES AND EXCHANGE COMMISSION,	)	
14	Plaintiff,	)	Case Number: CV-12-4486-WHA
15	vs.	)	PLAINTIFF’S NOTICE OF MOTION,
16	GARY R. MARKS,	)	UNOPPOSED MOTION FOR APPROVAL
17	Defendant	)	OF A DISTRIBUTION PLAN, AND
18		)	SUPPORTING MEMORANDUM
19		)	Date: July 23, 2015
20		)	Time: 8:00 a.m.
21		)	Judge: William H. Alsup
22		)	Courtroom:
23		)	
24		)	

25 **PLEASE TAKE NOTICE** that on July 23, 2015 at 8:00 a.m. or as soon thereafter as the  
26 matter can be heard, in the Courtroom of the Honorable William H. Alsup, at the United States  
27 District Court, Northern District of California 450 Gold Gate Avenue, San Francisco, California  
28 94102, Plaintiff United States Securities and Exchange Commission (the “SEC” or  
“Commission”), will and hereby does move that the Court enter an order approving a  
Distribution Plan by which investors may be compensated for their losses. A proposed  
Distribution Plan is submitted with this motion. Plaintiff’s counsel has consulted with counsel

1 for the Defendant who does not oppose the SEC's motion to approve this Distribution Plan. The  
2 SEC states the following in support of this motion.

### 3 **I. Background**

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

11 2. On May 2, 2014, this Court entered an Order to Establish a Fair Fund and Appoint a  
12 Tax Administrator in this matter. [Dkt. #13]. Damasco & Associates LLP ("Damasco") was  
13 appointed as Tax Administrator to execute all income tax reporting requirements, including the  
14 preparation and filing of tax returns, with respect to funds under this Court's jurisdiction in this  
15 case.

16 3. On July 9, 2014, the Court entered an Order appointing Gilardi & Company LLC  
17 ("Gilardi") to serve as Distribution Agent for the Fair Fund. Gilardi also serves as the  
18 Distribution Agent for the class action settlement in *Tuttle v. Agile Sky Alliance Fund, LP, et al.*,  
19 Case No. 1:13-cv-00802-RGA in the United States District Court for the District of Delaware.

20 4. The staff of the SEC, in consultation with the Distribution Agent, has formulated the  
21 attached proposed Plan. The SEC submits the Plan provides for efficient administration of the  
22 SEC v. Marks Fair Fund and sets forth an appropriate economic formula for determining the  
23 amount of their claims. The Plan should be approved.

### 24 **II. Argument**

#### 25 **A. Courts Give Significant Deference to the SEC's Proposed Distribution Plans**

26 Recognizing the difficulty of distributing limited pools of funds to large numbers of  
27 injured investors who purchased and sold at different times, courts give the SEC significant  
28

1 discretion to design and set parameters of a distribution plan. See *SEC v. Wang*, 944 F.2d 80  
2 (2d Cir. 1991); *SEC v. Levine*, 881 F.2d 1165 (2d Cir. 1989). Consistent with this discretion, a  
3 court's review of the SEC's proposed plan to distribute disgorgement, prejudgment interest, and  
4 penalties obtained in its civil actions focuses on whether the plan is fair and reasonable. See  
5 *Official Committee of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir.  
6 2006) ("unless the consent decree specifically provides otherwise, once the district court  
7 satisfies itself that the distribution of the distribution of proceeds in a proposed SEC  
8 disgorgement plan is fair and reasonable, its review is at an end"), citing *Wang*, 944 F.2d at 85.  
9 The SEC's proposed Plan for the Distribution of the SEC v. Marks Fair Fund is fair and  
10 reasonable and should be approved.

11 **B. The Commission's Proposed Distribution Plan Provides A Fair And Reasonable**  
12 **Allocation of the SEC v. Marks Fair Fund**

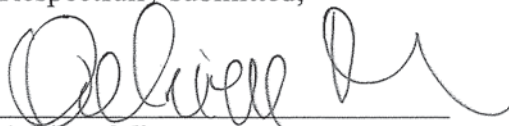
13 The Commission's principal goal in fashioning a distribution plan for the SEC v. Marks  
14 Fair Fund was to identify a methodology that would allocate the available funds fairly and  
15 reasonably, in a manner proportional to the injury investors suffered in the various funds-of-  
16 funds hedge funds that Defendant managed and recommended through Sky Bell Asset  
17 Management, LLC ("Sky Bell"), including the Agile Sky Alliance Fund ("Alliance Fund"),  
18 PipeLine Investors ("PipeLine"), Night Watch Partners ("Night Watch"), and Sky Bell  
19 Offshore Partners ("Offshore Fund") (collectively, the "Sky Bell Hedge Funds"). In  
20 determining a methodology, the staff of the SEC and the Distribution Agent have proposed a  
21 plan that will distribute the fund, on a *pro rata* basis, to 141 investor accounts that were  
22 invested in the Alliance Fund, PipeLine, Night Watch, and Offshore Fund as of December 31,  
23 2007, when the losses were recognized. Each Harmed Investor's pro rata share of the Fair  
24 Fund will be calculated as the investor's sum of holdings in the four funds as of December 31,  
25 2007 divided by the sum of all Harmed Investors' holdings in the four funds as of December  
26 31, 2007.  
27  
28

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,

7 

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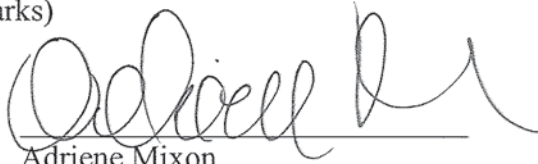
**CERTIFICATE OF SERVICE**

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