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

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

29
30 **UNOPPOSED MOTION TO TRANSFER FUNDS TO DISTRIBUTION AGENT FOR**
31 **DISTRIBUTION TO ELIGIBLE CLAIMANTS**

32 The United States Securities and Exchange Commission (the "SEC" or "Commission")
33 submits this motion to: (1) authorize the SEC to transfer funds held by the SEC at the United
34 States Treasury (the "Fair Fund") to the court-appointed Distribution Agent; (2) authorize the
35 Distribution Agent to distribute \$468,632.40 of the Fair Fund to 140 Eligible Claimants in
36 accordance with the Distribution Plan approved by this Court on June 15, 2015; (3) authorize the
37 Distribution Agent to pay the Distribution Agent \$12,266.25 from the Fair Fund for fees and
38 expenses already incurred during the distribution; and (4) authorize the Distribution Agent to pay

1 all remaining taxes, and fees and expenses of the Tax Administrator and/or the Distribution
2 Agent from a reserve for such fees and expenses (the “reserve”), upon written request to and
3 written approval by the Commission staff, without further order from the Court. Plaintiff’s
4 counsel has conferred with Defendant’s counsel who does not oppose this motion, nor any
5 motions related to distributing the funds.

6 **I. Background**

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

20 2. On October 25, 2012, this Court entered a Final Judgment against the Defendant,
21 holding him liable for disgorgement of \$321,702, representing profits gained as a result of the
22 conduct alleged in the Complaint together with prejudgment interest in the amount of \$82,866.
23 [Dkt. #10]. A civil penalty of \$100,000 was also imposed pursuant to Section 209(e) of
24 Investment Advisers Act of 1940 [15 U.S.C. § 80b-9(e)] and Section 20(d) of the Securities Act
25 of 1933 [15 U.S.C. § 77t(d)], for a total of \$504,902. Paragraph 8 of the Final Judgement
26 provided that the Commission shall hold the funds and may propose a plan to distribute the
27 funds subject to the Court’s approval. These funds are currently held by the Commission at the
28

1 U.S. Treasury.

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

7 4. On July 9, 2014, the Court entered an Order appointing Gilardi & Company LLC
8 (“Gilardi”) to serve as Distribution Agent for the Fair Fund. Consistent with the Distribution
9 Agent’s duties, an Escrow Account and checking account in the name of the SEC v. Marks Fair
10 Fund, and bearing the Employer Identification Number (“EIN”) of the Qualified Settlement
11 Fund (“QSF”), will be established at a U.S. commercial bank not unacceptable to the
12 Commission staff, from which the funds will be distributed to eligible investors.

13 5. On June 15, 2015, the Court entered an Order approving the Distribution Plan.
14 Consistent with that Order, Gilardi will distribute on a *pro rata* basis the Fair Fund, less a
15 reserve for taxes and fees, to approved Eligible Claimants who, as of December 31, 2007,
16 invested in the four hedge funds managed and recommended by Defendant. *See* Affidavit of
17 Nashira McCoy of Gilardi & Co. LLC Regarding the Distribution to Harmed Investors
18 (hereafter “McCoy” or “Gilardi” Affidavit), attached hereto as Exhibit 1. The SEC provided a
19 list of 141 potentially harmed investors to Gilardi. As contemplated by the Distribution Plan,
20 Gilardi was able to leverage beneficiary address information from the related class action,
21 *Tuttle v. Agile Sky Alliance Fund, LP, et al.*, case no. 1:13-cv-00802-RGA in the United States
22 District Court for the Delaware, to locate 122 of the harmed investors. It has been determined
23 that 1 potentially harmed investor is an entity related to the Defendant in this action and
24 therefore will be excluded from the distribution pursuant paragraph 9 of the Distribution Plan.
25 Gilardi believes that the remaining 18 harmed investors will come forward and request
26 distribution payments once the distribution begins and news of the distribution spreads among
27 the harmed investor population.

II. The Funds Should be Transferred to Gilardi for Distribution to Eligible

Investors

6. Pursuant to Paragraph 24 of the Distribution Plan, Gilardi has prepared a final payee list for submission to Commission staff listing the names of Eligible Investors, their respective *pro rata* percentage the Net Available Fund, as defined by Paragraph 7 of the Distribution Plan, and each Eligible Investor's distribution payment amount. The total amount of the payments to Eligible Investors on the final payee list is \$468,632.40. Gilardi also submitted the McCoy Affidavit in support of this Motion, which provides a detailed explanation of the procedures that Gilardi used to develop the list of Eligible Investors.

Pursuant to Paragraph 24 of the Distribution Plan, Gilardi has provided Commission staff with a reasonable assurance certification as to the completeness and accuracy of the payment file.

7. Gilardi is now in a position to distribute checks to the Eligible Investors as defined in the Distribution Plan. In order to do so, Gilardi will establish an Escrow Account in the name of and bearing the Employer Identification Number of the Qualified Settlement Fund. Gilardi will also establish a separate checking account titled as set forth above for the purpose of funding checks to be distributed to investors by Gilardi pursuant to the Distribution Plan. Accordingly, the Commission respectfully requests that the Court authorize the Commission to transfer the entire amount of \$504,902 that the Commission is holding at the U.S. Treasury to Gilardi. Gilardi will then distribute the Fair Fund, less a reserve for taxes and fees, to Eligible Investors pursuant to the Distribution Plan.

IV. Reserve for Payment of Taxes, Fees and Expenses

8. As provided in the Court's Order appointing the Distribution Agent and the Tax Administrator, the Distribution Agent and Tax Administrator are entitled to compensation and reimbursement from the Fair Fund for reasonable costs, fees, and other expenses related to administering the Fair Fund, provided however that all such reimbursements are approved by the Court before payment from the Fair Fund. To date, the Distribution Agent's expenses and fees for its work related to the Fair Fund total \$12,266.25. Gilardi Affidavit at Paragraph 12.

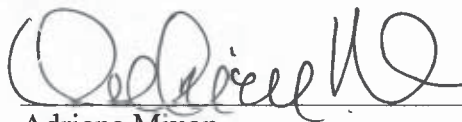
1 Through the end of the distribution process, the Distribution Agent estimates incurring an
2 additional \$3,500 in fees and expenses. To expedite the termination of the Fair Fund, the
3 Commission requests that the Distribution Agent be authorized to pay any remaining taxes,
4 fees, and expenses from the reserve upon submission of a written request to and written
5 approval by Commission staff, without further order from the Court. All such payments will be
6 reflected in the final accounting, which will be submitted to the Court for approval prior to the
7 termination of the Fair Fund.

8 **IV. Conclusion**

9 WHEREFORE, for all the foregoing reasons, the Commission respectfully requests that
10 this Court enter the attached Order for approval to transfer the Fair Fund to the Distribution
11 Agent and grant such other relief as the Court deems just and proper.

12 Dated: 1/12/2017

13 Respectfully submitted,

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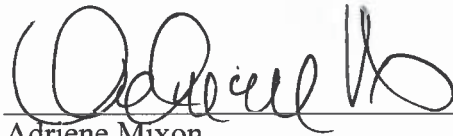
CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2017, 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: January 12, 2017