

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-13714**

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<b>In the Matter of</b>	:	
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<b>Ark Asset Management Co., Inc.,</b>	:	<b>PROPOSED PLAN OF DISTRIBUTION</b>
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<b>Respondent.</b>	:	
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**Background**

This Plan of Distribution (the “Distribution Plan”) proposes a methodology for distributing the disgorgement paid by Ark Asset Management Co., Inc. (“Ark”) in settlement of this administrative proceeding.

On September 29, 2010, the Securities and Exchange Commission (“Commission or SEC”) issued an Order Making Findings and Imposing Sanctions Pursuant to Section 203(k) of the Investment Advisers Act of 1940 (“Order”). *In the Matter of Ark Asset Management Co., Inc.*, Investment Advisers Act Rel. No. 3091; Admin. Proc. File No. 3-13714 (September 29, 2010). The Commission found that between August 2000 and December 2003 (the “Relevant Period”), Ark, which was a registered investment adviser, engaged in fraudulent trade allocation practices – “cherry-picking”- by favoring Ark’s proprietary accounts over the accounts of advisory clients in the allocation of securities. The Commission also found that Ark violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 204, 206(1), 206(2) and 207 of the Investment Advisers Act of 1940 and Rules 204-1(a)(2) and 204-2(a)(3) thereunder. The Commission ordered Ark to pay \$19.8 million in disgorgement that “in view of the limited assets available in the Ark estate ... [was] deemed satisfied in full by the payment of \$750,000.”

On October 13, 2010, Ark paid \$750,000 in disgorgement pursuant to the Order (the “Disgorgement Fund”). The assets of the Disgorgement Fund are subject to the continuing jurisdiction and control of the Commission. The Distribution Plan is subject to approval by the Commission, and the Commission retains jurisdiction over implementation of the Distribution Plan.

## **Administration of the Distribution Plan**

1. Purpose. The Distribution Plan has been developed pursuant to the Order and the Commission's Rules on Fair Fund and Disgorgement Plans, 17 C.F.R. § 201.1100, *et seq.* (the "Rules"). The purpose of the Distribution Plan is to distribute the Disgorgement Fund to clients harmed by Ark's conduct (the "Harmed Clients").

2. Plan Administrator. Rule 1105 provides that the Commission "shall have the discretion to appoint any person, including a Commission employee, as administrator of a plan of disgorgement or a Fair Fund plan and to delegate to that person responsibility for administering the plan." The Commission's staff has proposed appointing Commission trial counsel Neal Jacobson as plan administrator (the "Plan Administrator"). The Plan Administrator will be responsible for, among other things: overseeing the administration of the Disgorgement Fund, obtaining accurate mailing information for the Harmed Clients, preparing accountings, cooperating with the Tax Administrator in providing the information necessary to accomplish income tax compliance, distributing money from the Disgorgement Fund to Harmed Clients in accordance with this Distribution Plan, and preparing a final accounting.

3. Bond. Because the Plan Administrator is a Commission employee, no bond is required pursuant to Rule 1105(c).

## **Distribution Plan Procedures**

4. Receipt of Additional Funds. Rule 1101(b)(1) provides, among other things, that a distribution plan shall include "[p]rocedures for the receipt of additional funds." This Disgorgement Fund has been deposited at the United States Treasury in a SEC-designated non-interest bearing account. It is not anticipated that the Disgorgement Fund will receive additional funds.

5. Identifying the Harmed Clients. Rule 1101(b)(2) provides that a distribution plan shall include a "[s]pecification of categories of persons potentially eligible to receive proceeds from the fund." The Harmed Clients are the individuals and entities who were advisory clients of Ark during the Relevant Period. The Commission staff has already identified all Harmed Clients from Ark's books and records and has calculated the distribution percentage of the fund to be paid to each Harmed Client.

6. Methodology for Determining Distribution Amounts/Minimum Distribution. Ark's cherry-picking scheme involved allocating disproportionately fewer trades that were profitable on the first day to the Harmed Clients. As a result, the average first-day return of the Harmed Clients on their purchase allocations was less than the average first-day return across all clients. The Commission's staff computed the lost profits on each purchase allocation for the Harmed Clients as the difference between the expected first-day profits and the observed first-day profits.

The observed first-day profits are the allocation's profits<sup>1</sup> through the close of the day of the allocation. Expected first-day profits are the allocation's profits that would have been achieved had the allocation obtained the average first-day return of all allocations during the month of the allocation. The percentage of the Disgorgement Fund to be distributed to each Harmed Client is calculated as a fraction whose numerator equals the sum of the lost profits on all purchase allocations attributable to the Harmed Client and whose denominator equals the sum of the lost profits attributable to all of the Harmed Clients combined. In the event one or more Harmed Clients cannot be identified pursuant to the procedure set forth in paragraph 7, below, the lost profit(s) attributable to such Harmed Client(s) will not be included in the distribution calculation. In the view of the proposed Plan Administrator, this method constitutes a fair and reasonable allocation of the Disgorgement Fund.

7. Locating and Notifying the Harmed Clients. Rule 1101(b)(3) provides that a plan shall include "[p]rocedures for providing notice to [potential claimants – here, the Harmed Clients] of the existence of the fund and their potential eligibility to receive proceeds of the fund." In this case, the Commission staff has already identified the Harmed Clients by reviewing account statements and has calculated the distribution percentage of the fund to be distributed to each Harmed Client. The Plan Administrator will provide each Harmed Client with (a) notification of the Distribution Plan, (b) the proposed amount of disgorgement to be paid to the Harmed Client, and (c) a description of the methodology used to calculate the distribution amount. The Plan Administrator will provide such notice by United States Postal Service and will request at that time from the Harmed Client information necessary to accomplish the distribution, including confirmation of (i) social security and tax identification number(s), (ii) the payment address, and (iii) contact information. If the Harmed Client fails to respond to such notice within twenty-one (21) days from the mailing of the notice, the Plan Administrator will send a second written notice by mail. If the Harmed Client fails to respond to the second notice within twenty-one (21) days, the Plan Administrator will make two attempts to contact the Harmed Client telephonically. If an individual or entity believes it is a Harmed Client but has not received notice in the mail of their status, the individual or entity may contact the Plan Administrator in writing at the United States Securities and Exchange Commission, New York Regional Office, 3 World Financial Center, New York, New York 10281 within 60 days after Plan approval to confirm the individual or entity's eligibility as a Harmed Client. Following an investigation of the inquiry, including a review of any supporting documentation, the Plan Administrator shall notify in writing the individual or entity submitting the inquiry of the Plan Administrator's resolution as to their status as a Harmed Client and his decision will be final.

8. No Claims Process. Rule 1101(b)(4) provides, among other things, that a plan shall include "[p]rocedures for making and approving claims, procedures for handling disputed claims, and a cut-off date for making claims." The Commission staff has identified all Harmed Clients and has calculated the payment due to each of them. The Disgorgement Fund is not being distributed according to a claims-made process, so the procedures for providing notice and for making and approving claims are not applicable.

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<sup>1</sup> Profits include realized profits if the shares were sold the same day they were purchased; they include unrealized profits through the close of the day they were purchased if they were not sold.

9. Checks/Electronic Transfers. The Plan Administrator will make one payment to each of the Harmed Clients identified pursuant to paragraph 7, above. Such payment will be made as soon as practicable after the Harmed Clients are identified and notified pursuant to paragraph 7, above. The Plan Administrator may elect to make payment of any Distribution Amount to a Harmed Client by check or electronic transfer. The payment will be preceded by or accompanied with a communication that includes, as appropriate: (a) a statement characterizing the distribution; (b) a description of the tax information reporting and other related tax matters; (c) a statement that checks will be void (non-negotiable) after one year; and (d) the name of a person to contact with questions concerning the distribution. Distribution checks, on their face, or in the accompanying communication will clearly indicate that the money is being distributed from a Disgorgement Fund established by the Commission pursuant to the Order in this case. Checks that are not negotiated prior to the stale date shall be voided. Electronic credits will be made only to cash equivalent accounts (*e.g.*, checking or savings accounts).

10. Implementation of the Disgorgement Fund; Financial Management Service; Validation and Approval of Disbursement of the Disgorgement Fund. The Disgorgement Fund disbursement to the Harmed Clients will be implemented through the United States Department of the Treasury's Financial Management Service ("FMS"), which will electronically transfer funds through the Automated Clearing House ("ACH") or mail a check to the payee. Commission staff will provide the Plan Administrator with appropriate proprietary software for compiling the information necessary to be submitted to FMS. The Plan Administrator will compile the information into the specified file format and submit this electronic file to the assigned Commission staff. The Plan Administrator will validate the payee and amount in the file to the Commission staff. The validation will state that the electronic file was compiled in accordance with the Distribution Plan and provides all information necessary for FMS to make disbursement through the ACH or by check. The Plan Administrator will coordinate with the appropriate Commission staff to ensure the electronic file passes all system edits for a timely distribution. Upon receipt of a properly validated file, the Commission staff will obtain authorization from the Commission to disburse pursuant to Commission Rule 1101(b)(6). When the electronic file and validation are approved and the order to disburse is entered, the Commission will transmit the electronic file to FMS for the transfer of funds pursuant to the following FMS procedures.

11. Returned Checks/Electronic Transfer Procedures. Within 48 hours of receipt by FMS, funds will be transferred by the ACH or checks will be mailed. FMS will notify the Commission staff, which, in turn, will notify the Plan Administrator, of any returned items due to non-delivery, insufficient addresses, and/or other deficiencies. The Plan Administrator is responsible for researching and reconciling all errors that result in non-delivery and shall submit a supplemental electronic file for payment of the returned items. The Plan Administrator also is responsible for accounting for all payments. In the event that any distribution is in the form of a paper check in lieu of an electronic transfer, each check will state on its face that it is valid for one year. After one year from the date on the distribution check, FMS shall notify the Commission staff

of all uncashed checks. FMS will credit the designated account for the Disgorgement Fund for the amount of all uncashed checks.

12. Accounting. Once all funds are disbursed through FMS of the U.S. Treasury, the Plan Administrator will submit a final accounting on the standardized accounting form provided by the Commission staff for approval by the Commission prior to termination of the Disgorgement Fund and discharge of the Plan Administrator.

13. Undisbursed Amounts. Rule 1101(b)(5) requires that the distribution plan make “provision for the disposition of any funds not otherwise distributed.” Upon exhaustion of all procedures to identify and locate the Harmed Clients and to reconcile all errors that result in non-delivery, any portion of the Disgorgement Fund that remains undisbursed for any reason shall be remitted to the U.S. Treasury after the final accounting is approved by the Commission.

14. Termination of the Disgorgement Fund. Rule 1101(b)(5) requires that a distribution plan include a “proposed date for the termination of the fund.” Upon distribution of the Disgorgement Fund, the Plan Administrator shall make arrangement for the final payment of taxes and Tax Administrator fees, and shall submit a final accounting to the Commission. The Disgorgement Fund shall be eligible for termination, and the Plan Administrator shall be discharged, after all of the following have occurred: (a) a final accounting, in an SEC standard accounting format provided by the staff, has been submitted by the Plan Administrator for approval, and has been approved, by the Commission, and (b) all taxes, fees and expenses have been paid. After the Commission has approved the final accounting, the staff shall seek an order from the Commission to approve the transfer of any amount remaining in the Disgorgement Fund to the U.S. Treasury, and to terminate the Disgorgement Fund and discharge the Plan Administrator.

15. Fees and Costs of Administering the Distribution Plan. Fees and other expenses of administering the Disgorgement Fund shall be paid from the corpus of the Disgorgement Fund.

16. Tax Administrator. The Commission has appointed Damasco & Associates LLP as the Tax Administrator for the Disgorgement Fund (the “Tax Administrator”). *In the Matter of Ark Asset Management Co., Inc.*, Exchange Act Rel. No. 63118; Admin. Proc. File No. 3-13714 (October 15, 2010). The Plan Administrator will cooperate with the Tax Administrator in providing information necessary to accomplish the income tax compliance, ruling and advice work assigned to the Tax Administrator by the Commission. The Tax Administrator shall be compensated from the corpus of the Disgorgement Fund.

17. Qualified Settlement Fund. The Disgorgement Fund constitutes a Qualified Settlement Fund (“QSF”) under Section 468B(g) of the Internal Revenue Code, 26 U.S.C. § 468B(g), and related regulations, 26 C.F.R. §§ 1.468B-1 through 1.468B-5.

18. Amendments. The Plan Administrator shall take reasonable and appropriate steps to distribute the Disgorgement Fund according to the Distribution Plan. Where the Plan Administrator deems necessary, after agreement with Commission staff, the Plan Administrator

may implement immaterial changes to the Distribution Plan to effectuate its general purposes. If a change is deemed material by Commission staff, Commission approval is required prior to implementation by amending the Distribution Plan, which may be done upon the motion of any party, the Plan Administrator, or upon the Commission's own motion.

19. Distribution Timing. The Plan Administrator will use its best efforts to make the distribution as soon as practicable after all Harmed Clients are identified in accordance with paragraph 7, above.

20. Deadline Extensions. The Plan Administrator may extend any procedural deadline contained in the Distribution Plan for good cause shown.

21. Procedures for Handling Disputes. Disputes shall be limited to matters relating to the calculation of the disbursement amount to Harmed Clients. All disputes must be submitted in writing along with any supporting documentation to the Plan Administrator. All disputes must be submitted within forty-five (45) days of receipt by the Harmed Client of the notice provided for in paragraph 7. Following an investigation of the dispute, including a review of the written dispute and any supporting documentation, the Plan Administrator shall notify in writing the person submitting the dispute of the Plan Administrator's resolution of the dispute, which shall be final.

### **Notice of Proposed Distribution Plan**

22. In accordance with Rule 1103, notice of the Distribution Plan shall be published in the SEC Docket and on the Commission's website at [www.sec.gov/litigation/fairfundlist.htm](http://www.sec.gov/litigation/fairfundlist.htm). Any person or entity wishing to comment on the Distribution Plan must do so in writing by submitting their comments to the Commission within thirty (30) days of the publication date of the Notice of Proposed Plan of Distribution: (a) by sending a letter to the Office of the Secretary, United States Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549-1090; (b) by using the Commission's internet comment form (available at [www.sec.gov/litigation/admin.shtml](http://www.sec.gov/litigation/admin.shtml)) ; or (c) by sending an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Comments submitted by e-mail or via the Commission's website should include the Administrative Proceeding File Number (Admin. Proc. File No. 3-13714) in the subject line. Comments received will be available to the public. Commenters should therefore only submit information that they wish to make publicly available.