



and Rule 206(4)-8 thereunder. The Commission found that Apex improperly classified the withdrawals as receivables without evidence that the Managers were able or willing to repay them. The Commission further found that the improper classification of the withdrawals as assets resulted in the overstatement of the value of investor holdings in the Funds in monthly statements sent by Apex to investors. According to the Order, by March 2014, when Apex first notified investors that a significant portion of investor holding values was comprised of a receivable from an affiliate, the Managers had withdrawn more the \$1 million from the Funds, representing nearly 54% and 26% of Global's and Momentum's net asset value, respectively. By the end of August 2014, the Managers had liquidated all remaining assets in the Funds, with the proceeds paid to the Funds' investors and accountants (the "Funds' Termination").

4. The Commission determined that, by this conduct, Apex was a cause of the Managers' violations of Sections 206(2) and 206(4) of the Advisers Act and Rule 206(4)-8 thereunder. The Commission ordered the Respondent to disgorge \$89,050, and to pay prejudgment interest of \$7,786 and a civil money penalty of \$75,000, for a total payment of \$171,836.

### **III. THE FAIR FUND**

5. In the Order, the Commission established a Fair Fund for the disgorgement, prejudgment interest, and civil money penalty described above (the "Fair Fund"). The Fair Fund currently holds approximately \$172,000, comprised of \$171,836 in principal and accrued interest. The Fair Fund is subject to the continuing jurisdiction and control of the Commission and is currently on deposit in a Commission designated interest bearing account at the United States Department of Treasury ("U.S. Treasury").

### **IV. DEFINITIONS**

As used herein, the following definitions shall apply:

6. "Adjusted Holding Value" is an Eligible Investor's March Holding Value less the Eligible Investor's *Pro Rata* Withdrawal Amount in the respective Fund.

7. "Administrative Costs" are fees, obligations, and expenses related to the administration of the Plan and the Fair Fund, including without limitation tax obligations, Tax Administrator fees and costs, and investment fees and costs. All Administrative Costs will be paid by the Fair Fund.

8. Each Eligible Investor's "Distribution Amount" is the product of the Net Fair Fund and the Eligible Investor's *Pro Rata* Multiplier. For an investor with holdings in both Funds, the Distribution Amounts will be combined into one amount.

9. "Eligible Investor" is limited to any Investor: (a) who is not (i) an Unresponsive Investor, (ii) the Respondent, or (iii) an entity controlled by the Respondent; (b) who held one or both of the Funds on March 31, 2014; (c) who suffered a Net Loss Amount greater than zero (0); and (d) whose Distribution Amount is equal to, or greater than, \$10.

10. “Investor” is any person or entity identified by the Fund Administrator from the records obtained by the Commission staff in connection with the Administrative Proceeding or this Plan (“Staff Records”) who/which held interests in the Funds on March 31, 2014.

11. “March Holding Value” is an Eligible Investor’s investment amount in the respective Fund, as recorded in the Fund’s March 31, 2014 valuation detail statement.

12. The “Net Fair Fund” is the Fair Fund less Administrative Costs.

13. “Net Loss Amount” is the Eligible Investor’s Adjusted Holding Value in the respective Fund less Payments Out.

14. “Payments Out” is the aggregate of all redemptions of the Investor in the respective Fund during the Relevant Period.

15. “Pro Rata Multiplier” is each Eligible Investor’s Net Loss Amount, divided by the sum of Net Loss Amounts of all Eligible Investors.

16. “Pro Rata Withdrawal Amount” is the product of Withdrawals and each Eligible Investor’s March Holding Value in the respective Fund, divided by the sum March Holding Values of all Eligible Investors. It represents the proportional reduction in the Eligible Investor’s March Holding Value resulting from the decrease in the Funds’ combined value when the Withdrawals were properly recognized.

17. “Relevant Period” is the period April 1, 2014 through August 31, 2014.

18. “Unresponsive Investor” is an Investor whose address the Fund Administrator has not been able to verify despite best efforts (§ 26) and/or who does not timely respond to the Fund Administrator’s attempts to obtain information, including any information sought in the Plan Notice (*see* § 28). Unresponsive Investors will not be eligible for a distribution under the Plan.

19. “Withdrawals” is the aggregate amount due from affiliates (i.e., the improperly classified withdrawal amounts) disclosed on the Funds’ balance sheets as of March 31, 2014.

## **V. TAX ISSUES AND ADMINISTRATION OF THE PLAN**

20. Tax Administrator. On November 30, 2017, the Commission appointed Miller Kaplan Arase LLP as the tax administrator of the Fair Fund (the “Tax Administrator”).<sup>2</sup> The Tax Administrator will be compensated for reasonable costs and expenses from the Fair Fund in accordance with its Revised 2017-2018 Engagement Letter Agreement with the Commission, and tax obligations will be paid by the Fair Fund.

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<sup>2</sup> Order Appointing Tax Administrator, Exchange Act Rel. No. 82186 (Nov. 30, 2017).

21. Qualified Settlement Fund. The Fair Fund constitutes a Qualified Settlement Fund 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.

22. Fund Administrator. Catherine E. Pappas, Senior Adviser in the Commission's Division of Enforcement, is proposed to act as the administrator of the Fair Fund (the "Fund Administrator"). As a Commission employee, the Fund Administrator shall receive no compensation from the Fair Fund for her services in administering the Fair Fund. In accordance with Rule 1105(c) of the Rules, 17 C.F.R. § 201.1105(c), no bond is required because the Fund Administrator is a Commission employee. In carrying out her duties, the Fund Administrator may be assisted by other Commission staff acting under her supervision.

23. The Fund Administrator will, among other things: oversee the administration of the Fair Fund, distribute money from the assets of the Fair Fund in accordance with the Plan, resolve disputes, prepare a final accounting with assistance from the Tax Administrator, and take the steps necessary to provide to the Tax Administrator funds to ensure the payment of tax liabilities and tax compliance fees and costs, pursuant to the Omnibus Order Directing the Appointment of Tax Administrator in Administrative Proceedings that Establish Distribution Funds.<sup>3</sup>

24. Fund Administrator Contact Information. Unless directed otherwise by the Plan Notice or other correspondence or notices sent by the Fund Administrator, the Fund Administrator can be contacted by receipted mail directed to the following address:

Fund Administrator  
Apex Partners Distribution Plan  
c/o Adrienne Burleigh  
United States Securities and Exchange Commission  
Office of Distributions  
100 F. Street, NE, Stop 5628  
Washington, DC 20549

## **VI. THE DISTRIBUTION**

25. No claims-made process. The Fair 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.

26. Locating Investors. Subject to ¶ 34 below regarding each Investor's obligation to communicate changes in contact information to the Fund Administrator, the Fund Administrator will use her best efforts to ensure that communications are properly directed to Investors. Review of the Staff Records, documents resulting from the Plan Notice ("Plan Notice Documents"), and use of commercial computer databases regularly available to the Division of Enforcement, shall constitute best efforts to locate and communicate with Investors.

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<sup>3</sup> Exchange Act Rel. No. 81057 (June 30, 2017).

27. Methodology for Determining Eligible Investors and Distribution Amounts. The Fund Administrator will distribute the Net Fair Fund to Eligible Investors in proportion to their Net Loss Amount at the Funds' Termination. In the view of the Fund Administrator, this methodology constitutes a fair and reasonable allocation of the Net Fair Fund.

- (a) Using Staff Records and Plan Notice Documents, the Fund Administrator will first determine ineligibility for a distribution under the Plan any Investor who is (i) an Unresponsive Investor, (ii) the Respondent, or (iii) an entity controlled by the Respondent. All remaining Investors will be included as preliminarily determined Eligible Investors on List A.
- (b) Using Staff Records and Plan Notice Documents, the Fund Administrator will then calculate for each Investor on List A, the Investor's *Pro Rata* Withdrawal Amount, Adjusted Holding Value, and Net Loss Amount. Investors on List A with Net Loss Amounts less than or equal to zero (0) will be determined ineligible for a distribution under the Plan. All remaining Investors will be included as preliminarily determined Eligible Investors on List B.
- (c) The Fund Administrator will then calculate for each Investor on List B their *Pro Rata* Multiplier and Distribution Amount. If an Investor's Distribution Amount is less than \$10 that Investor will be deemed ineligible under the Plan, and the Investor's Distribution Amount will be returned to the Net Fair Fund for distribution to Eligible Investors.
- (d) The Fund Administrator will repeat some or all of steps (a)-(c) until, in her discretion, she has made a final determination of eligibility. Finally, determined Eligible Investors will receive their Distribution Amounts under the Plan.

28. Plan Notice Procedures. Within thirty (30) days of the Commission's approval of the Plan, the Fund Administrator will send to each Investor at the Investor's last known address a notice (the "Plan Notice") by United States Postal Service or mail delivery service, regarding the Commission's approval of the Plan. The Plan Notice will include as appropriate:

- (a) a statement characterizing the distribution;
- (b) a copy of the Plan and a link to the Plan on the Commission's public website;
- (c) a unique Investor number by which the Investor will be referenced in any public filings or notices and on schedules sent to multiple Investors;
- (d) the Fund Administrator's preliminary determination of the Investor's eligibility;
- (e) as preliminarily calculated, the Investor's Adjusted Holding Value, Payments Out, and Net Loss Amount;
- (f) objection procedures;

- (g) a description of tax information reporting and related tax matters, as applicable;
- (h) contact information for the Fund Administrator; and
- (i) information, if any, required from the Investor.

The Fund Administrator will coordinate with the Tax Administrator to request in the Plan Notice information from each Investor that the Tax Administrator needs to accomplish the distribution in accordance with applicable tax requirements relating to the Fair Fund. Investors must timely provide to the Fund Administrator any information requested in the Plan Notice in order to be considered for classification, or to retain their existing status, as an Eligible Investor.

29. Procedures to Request Plan Notice. A person who does not receive correspondence from the Fund Administrator and believes that he or she should have received correspondence after becoming aware of the Plan must submit documentation to the Fund Administrator in order to establish that the person is in fact an Eligible Investor. Such documentation must be submitted by receipted mail to the address set forth in ¶ 24 within forty-five (45) days after the Commission's approval of the Plan. The Fund Administrator will contact the person within twenty-one (21) days of receiving the documentation with a determination of eligibility.

30. Undelivered Correspondence. If correspondence from the Fund Administrator is returned as undeliverable within sixty (60) days of approval of the Plan, the Fund Administrator will make best efforts to ascertain an Investor's correct address. The Fund Administrator will then resend the correspondence to the Investor's new address within thirty (30) days of receipt of the returned correspondence. If the correspondence is returned again and the Fund Administrator, despite best efforts, is unable to find the Investor's correct address, the Investor will be deemed an Unresponsive Investor, will be excluded from the Preliminary List, and will not be eligible for a distribution under the Plan. Any Distribution Amount preliminarily allocated to that Investor will be returned to the Fair Fund for distribution to Eligible Investors.

31. Failure of Investors to Provide Information. If an Investor fails to provide to the Fund Administrator all information requested in the Plan Notice within sixty (60) days of approval of the Plan, the Fund Administrator shall make two (2) attempts to contact the Investor telephonically or by electronic mail. If a last known telephone number or electronic mail address is not located, the Fund Administrator will attempt to make contact by (at her discretion) first class or overnight mail. If an Investor fails to respond to the Fund Administrator's contact attempts as described in this paragraph within seven (7) days of the Fund Administrator's last contact attempt, the Investor will be deemed an Unresponsive Investor and will not be eligible for a distribution under the Plan. Any Distribution Amount preliminarily allocated to that Investor will be returned to the Fair Fund for distribution to Eligible Investors.

32. Objections to Eligibility Classification and the Preliminary Calculation. Any and all objection(s) to information specific to the Investor provided in the Plan Notice, and, in particular, to the information that follows, must be set forth with specificity, in writing, pursuant to the instructions provided in the Plan Notice:

- (a) The Fund Administrator’s preliminary determination of the Investor as ineligible for a distribution under the Plan;
- (b) The Fund Administrator’s classification of an Investor as (i) the Respondent, or (ii) an entity controlled by the Respondent; and/or
- (c) The Fund Administrator’s calculation of the Investor’s Adjusted Holding Value, Payments Out, and Net Loss Amount.

The objection must demonstrate, under penalty of perjury, the grounds for the objection, and be accompanied by documentation sufficient to prove the claimed inaccuracy or omission. This can be done by setting forth in detail the basis for the objection, including at the end of the statement (if true) the phrase: “I declare under penalty of perjury that the foregoing is true and correct,” and signing and dating the document. All objections submitted pursuant to this paragraph must be postmarked within sixty (60) days of approval of the Plan and be in accordance with the instructions set forth in the Plan Notice, and must include current contact information, including a telephone number and (if applicable) an electronic mail address for the objecting person. Any objections not timely submitted in accordance with the instructions in the Plan Notice will be deemed waived.

33. The Fund Administrator will review all objections and supporting documentation and will notify the Investor in writing of the resolution of the objection within ninety (90) days of approval of the Plan. Any such resolution shall be final.

34. Investor Change of Address or Contact Information after Receipt of Plan Notice. Any Investor who relocates or otherwise changes contact information after receipt of the Plan Notice must promptly communicate any change in address or contact information to the Fund Administrator (*see* ¶ 25). Any Investor who fails to comply with this paragraph will be deemed an Unresponsive Investor, will be excluded from the Preliminary List, and will not be eligible for a distribution under the Plan.

35. Validation and Approval of Disbursement of the Fair Fund. The Fair Fund disbursement to Eligible Investors will be implemented by the Commission and disbursed through the U.S. Treasury’s Bureau of the Fiscal Service (“BFS”). Checks will be mailed or distribution payments will be electronically transferred to each Eligible Investor as instructed by the Fund Administrator. The Fund Administrator will compile the payee information and prepare a payment file in a Commission-approved format for submission to BFS. Pursuant to Rule 1101(b)(6) of the Rules,<sup>4</sup> the Fund Administrator will obtain an order from the Commission to disburse the Fair Fund. The Fund Administrator will use best efforts to start the Commission disbursement approval process for the initial distribution payments within one hundred fifty (150) days of the Plan’s approval.

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<sup>4</sup> 17 C.F.R. § 201.1101(b)(6).

36. Uncashed Checks. The Fund Administrator will work with BFS to obtain information about uncashed checks, any returned items due to non-delivery, insufficient addresses and/or other deficiencies. The Fund Administrator will use best efforts to obtain additional information sufficient to reissue and/or re-send the uncashed checks. The Fund Administrator also is responsible for accounting for all payments. Checks issued by BFS will state on their face that they are valid for one (1) year. The amount of all uncashed checks will be credited to the Fair Fund and, at the discretion of the Fund Administrator, may be distributed to other Eligible Investors in a subsequent distribution or sent to the U.S. Treasury as residual in accordance with ¶ 40.

37. Accountings. When all funds have been disbursed except for the residual described in ¶ 40, the Fund Administrator will submit a final accounting for approval of the Commission prior to termination of the Fair Fund and discharge of the Fund Administrator. Because the funds are being held in a Commission designated interest bearing account at the U.S. Treasury, and a Commission employee will be appointed as Fund Administrator, no interim accountings will be submitted.

38. Amendments and Procedural Deadline Extensions. The Fund Administrator will take reasonable and appropriate steps to distribute the Net Fair Fund according to the Plan. Immaterial changes may be made by the Fund Administrator in consultation with the Commission staff. If there are any changes to the Plan that are determined to be material, Commission approval is required prior to implementation by amending the Plan. For good cause shown, the Fund Administrator may extend any procedural deadlines set forth in the Plan if agreed upon by the Commission staff.

39. Procedures for the Receipt of Additional Funds. Although no additional funds are anticipated, if the Fair Fund receives additional funds, the Fund Administrator, in consultation with the Tax Administrator, will determine if the additional amount in the Net Fair Fund is sufficient for one or more subsequent distributions. If appropriate, in the discretion of the Fund Administrator, the Fund Administrator will take the steps necessary to make such subsequent distribution(s) in accordance with the Plan.

40. Residual Account. A residual account within the Fair Fund is established for any amounts remaining after the completion of all distributions of the Net Fair Fund to Eligible Investors under the Plan. The residual account may include funds reserved for Administrative Costs, funds from checks that have not been cashed or funds returned to the Commission, tax refunds for overpayment or for waiver of IRS or other penalties, and any interest accrued after the final distribution. All funds remaining in the residual account will be transferred to the U.S. Treasury after the final accounting is approved by the Commission.

41. Termination of the Fair Fund. Upon final distribution of the Net Fair Fund to Eligible Investors, the Fund Administrator shall make arrangement for the final payment of taxes and Tax Administrator fees and shall submit a final accounting to the Commission. The Fair Fund shall be eligible for termination after all of the following have occurred: (a) a final accounting, in the Commission's standard accounting format, has been submitted by the Fund Administrator, and has been approved by the Commission; and, (b) all Administrative Costs have been paid. When the Commission has approved the final accounting, the Commission staff

shall seek an order from the Commission to approve the: (a) transfer of the residual and any funds returned to the Fair Fund in the future to the U.S. Treasury; (b) termination of the Fair Fund; and (c) discharge of the Fund Administrator.

## **VII. NOTICE AND COMMENT PERIOD**

42. Notice of the Proposed Plan of Distribution and Opportunity for Comment (“Notice”) will be published in the SEC Docket and on the Commission website at <http://www.sec.gov/litigation/fairfundlist.htm>. Any person wishing to comment on the Plan must do so in writing by submitting their comments to the Commission within thirty (30) days of the date of the Notice: (a) to the Office of the Secretary, United States Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090; (b) by using the Commission’s Internet comment form (<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 email or via the Commission’s website should include “Administrative Proceeding File No. 3-17300” in the subject line. Comments received will be publicly available. Persons should only submit comments that they wish to make publicly available.