



Management, LLC and Steven Zoernack (collectively, the “Managers”). According to the Order, the Managers made undisclosed withdrawals of more than \$1 million directly from the Funds in violation of Sections 206(2) and 206(4) of the Investment Advisers Act of 1940 (“Advisers Act”) 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that a significant portion of investor holding values was comprised of a receivable from an affiliate, the Managers had withdrawn more the \$1 million from the Funds, representing nearly 54% and 26% of the Global Fund’s and the Momentum Fund’s net asset values, respectively.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.

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. “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.

7. “Distribution Payment” is the payment made from the Net Fair Fund to an Eligible Investor under the Plan.

8. “Eligible Investor” is a Potentially Eligible Investor in a Fund whose Investor Redemption Ratio is less than or equal to the Fund Recovery Ratio for that Fund and whose Distribution Payment is equal to, or greater than, \$10.

9. “Fund Allocation” for each Fund is the portion of the Net Fair Fund allocated for payment to Eligible Investors in that Fund pursuant to the Plan, ¶28b.

10. “Fund Recovery Ratio” is, for each Fund, the sum of Potentially Eligible Investors’ Redemptions and the Fund Allocation, divided by the aggregate March Holding Values of all Potentially Eligible Investors in the Fund. In other words, the Fund Recovery Ratio is a quantification of the amount each Eligible Investor in a Fund would have received if Redemptions and the Fund Allocation had been paid to each Potentially Eligible Investor in the Fund in proportion to his, her or its March Holding Value in the Fund. In accordance with ¶28 of the Plan, each Fund will have its own Fund Recovery Ratio. Interim calculations of the Fund Recovery Ratio will be performed for each Fund until the Fund Administrator has identified all Eligible Investors in that Fund.

11. “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 who/which held an interest in one or both Funds on March 31, 2014.

12. “Investor Redemption Ratio” is the quotient of an Investor’s Redemptions in a Fund and his, her, or its March Holding Value in that Fund.

13. “March Holding Value” is an Investor’s investment amount in a Fund, as recorded in that Fund’s March 31, 2014 valuation detail statement.

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

15. “Net Loss Amount” is the Investor’s March Holding Value in the respective Fund less his, her, or its Redemptions.

16. “Potentially Eligible Investor” is limited to any Investor: (a) who is not (i) an Unresponsive Investor, (ii) the Respondent or the Managers, or (iii) and any assigns, heirs, spouses, parents, dependents or controlled entities of any of the Respondent or the Managers; (b) who held one or both of the Funds on March 31, 2014; and (c) who suffered a Net Loss Amount greater than zero (\$0) in a Fund.

17. “Redemptions” is the aggregate of all redemptions paid to an Investor in a Fund during the Relevant Period.

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

19. “Unresponsive Investor” is an Investor whose address the Fund Administrator has not been able to verify despite her best efforts (¶ 27) 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* ¶ 29). Unresponsive Investors will not be eligible for a distribution under the Plan.

20. “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

21. 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>3</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.

22. 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.

23. 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.

24. 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>4</sup>

25. Fund Administrator Contact Information. Unless directed otherwise by the Plan Notice, as defined at ¶29, 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 Russell Davis  
United States Securities and Exchange Commission  
Office of Distributions  
100 F. Street, NE, Stop 5561  
Washington, DC 20549

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<sup>3</sup> Order Appointing Tax Administrator, Exchange Act Rel. No. 82186 (Nov. 30, 2017).

<sup>4</sup> Exchange Act Rel. No. 81057 (June 30, 2017).

## VI. THE DISTRIBUTION

26. 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.

27. Locating Investors. Subject to ¶35 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 records obtained by the Commission staff in connection with the Administrative Proceeding or this Plan ("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.

28. Methodology for Determining Eligible Investors and Distribution Payments. The methodology first allocates the Net Fair Fund to the two Funds in proportion to the Withdrawals from each Fund, and then distributes the Fund Allocation to Eligible Investors in the respective Fund in such a way as to ensure that each Eligible Investor in that Fund recovers, through the combination of his, her, or its Redemptions and Distribution Payment, a percentage of his, her or its March Holding Value that is at least as large as the Fund Recovery Ratio. In the view of the Fund Administrator, this methodology constitutes a fair and reasonable allocation of the Net Fair Fund, both across Funds and within each Fund. An Eligible Investor's Distribution Payment will be calculated as follows:

- (a) Using Staff Records and Plan Notice documents, the Fund Administrator will first determine ineligible 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 determined to be Potentially Eligible Investors on List A.
- (b) The Fund Administrator will then allocate the Net Fair Fund between the two Funds in proportion to the amount of Withdrawals taken from each Fund, constituting the Fund Allocation for each Fund. Based on the percentage of Withdrawals disclosed on the balance sheets of the respective Funds as of March 31, 2014, 41% of the Net Fair Fund will be allocated to the Global Fund, and 59% of the Net Fair Fund will be allocated to the Momentum Fund.
- (c) For each Fund, the Fund Administrator will distribute the Fund Allocation in such a way as to equalize to the extent possible the recovery from the combination of Redemptions and Distribution Payments of each Potentially Eligible Investor in that Fund per dollar of his, her or its March Holding Value. The Fund Administrator will do this for each Fund, and for each Potentially Eligible Investor in that Fund included on List A, by performing these steps:
  - (i) Determine the Fund Recovery Ratio by dividing the sum of Potentially Eligible Investors' Redemptions in the Fund and the Fund Allocation by

the aggregate March Holding Values of those investors. The starting Fund Recovery Ratio, based on Staff Records, is 44.75% for Global Fund; that is, if all Potentially Eligible Investors in that Fund had received Redemptions and a payment from the Global Fund's Fund Allocation in proportion to their March Holding Value, each investor would have had a recovery of \$0.4475 on each dollar of March Holding Value. For Momentum Fund, the starting Fund Recovery Ratio is 68.93%. These starting Fund Recovery Ratios likely will change based on, among other things, information submitted through the objection process described in ¶33.

- (ii) Determine the Investor Redemption Ratio of each Potentially Eligible Investor by dividing his, her, or its Redemptions by his, her, or its March Holding Value.
- (iii) Remove from List A any Potentially Eligible Investor in the Fund whose Investor Redemption Ratio equals or exceeds the Fund Recovery Ratio: their recovery rate through their Redemptions alone exceed the potential recovery rate of other Potentially Eligible Investors through their Redemptions and a Distribution Payment.
- (iv) For each Potentially Eligible Investor in the Fund remaining on List A, distribute the Fund Allocation so that each Potentially Eligible Investor's recovery rate through Redemptions and Distribution Payment equals the Fund Recovery Ratio; that is, a Potentially Eligible Investor who received a relatively higher proportion of Redemptions will receive a relatively smaller proportion of the Fund Allocation. The allocated funds will be the Potentially Eligible Investor's tentative Distribution Payment.
- (v) If a Potentially Eligible Investor's tentative Distribution Payment is less than \$10, he, she, or it will be deemed ineligible for a distribution under the Plan and removed from List A, and their Distribution Payment will be returned to the Fund Allocation for distribution to Eligible Investors in that Fund.
- (vi) The Fund Administrator will repeat steps (i)-(v) until each remaining Potentially Eligible Investor's tentative Distribution Payment is equal to or greater than \$10. At such point, each remaining Potentially Eligible Investor on List A will be deemed an Eligible Investor in the Fund and the tentative Distribution Payment will be the Investor's Distribution Payment.

29. 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 link to the Plan on the Commission's public website and instructions for requesting a copy of the Plan;
- (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, for each Fund, the Investor's March Holding Value and Redemptions;
- (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.

30. 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 ¶25 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.

31. 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 her best efforts, is unable to find the Investor's correct address, the Investor will be deemed an Unresponsive Investor and will not be eligible for a distribution under the Plan. Any Distribution Payment preliminarily allocated to that Investor will be returned to the Fair Fund for distribution to Eligible Investors.

32. 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 Payment preliminarily allocated to that Investor will be returned to the Fair Fund for distribution to Eligible Investors.

33. Objections to Eligibility Classification, March Holding Value, and Redemptions. 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 March Holding Value in a particular Fund and/or the Investor's Redemptions in that Fund.

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.

34. 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.

35. 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 List A, and will not be eligible for a distribution under the Plan.

36. 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>5</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.

37. 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 ¶41.

38. Accountings. When all funds have been disbursed except for the residual described in ¶41, 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.

39. 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. 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.

40. 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.

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<sup>5</sup> 17 C.F.R. § 201.1101(b)(6).

41. 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.

42. 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**

43. Notice of the Proposed Plan of Distribution and Opportunity for Comment ("Notice") will be published 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.