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RICHARD W. WIERING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

8 Attorneys for Plaintiff United States
9 Securities and Exchange Commission

JSC

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

CV 12 4486

13 SECURITIES AND EXCHANGE)
14 COMMISSION,) Case No.:
15)
16 Plaintiff) COMPLAINT
17 vs.)
18)
19 GARY R. MARKS,)
20)
21 Defendant.)

20 Plaintiff Securities and Exchange Commission ("Commission"), for its
21 complaint, alleges:

22 **SUMMARY**

23
24 1. This enforcement action arises out of negligent misrepresentations
25 and lack of disclosure by Gary R. Marks ("Marks" or "Defendant") to investors in
26 various fund-of-funds hedge funds he managed and recommended through Sky
27 Bell Asset Management, LLC ("Sky Bell"), including the Agile Sky Alliance
28

1 Fund (“Alliance Fund”) that was co-managed with the Agile Group, PipeLine
2 Investors (“PipeLine”), Night Watch Partners (“Night Watch”), and Sky Bell
3 Offshore Partners (“Offshore Fund”) (collectively “Sky Bell Hedge Funds”).
4
5 These Sky Bell Hedge Funds were funds of funds, and Sky Bell was a formerly
6 registered investment adviser owned and controlled by Defendant. Between at
7
8 least 2005 and September 2007, Defendant negligently misrepresented the level
9 of correlation and diversification among the Sky Bell Hedge Funds. Furthermore,
10 between at least 2005 and 2008, Defendant also: a) made unsuitable investment
11 recommendations to certain advisory clients to invest most of their investment
12 portfolio in Sky Bell Hedge Funds, b) negligently failed to disclose that PipeLine
13 invested significantly in a purported subadviser’s fund, and c) negligently
14 provided misleading information to certain investors about the liquidity problems
15 at the Alliance Fund.
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20 **Defendant**

21 2. Defendant was at all relevant times the Chief Executive Officer
22 (“CEO”) and owner of Sky Bell and a key member of the portfolio team for the
23 Sky Bell Hedge Funds. At all relevant times, Defendant held a Series 65
24 securities licenses. During a portion of the relevant period, Marks was an
25 associated person of a broker-dealer. Defendant no longer manages any Sky Bell
26 Hedge Funds. Defendant, 61 years old, is a resident of Kihei, Hawaii.
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Other Relevant Entities

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2 3. Sky Bell, located in Kihei, Hawaii, registered with the Commission
3 as an investment adviser in 2004. Marks was the CEO and owner of Sky Bell,
4 which provided investment advice to high net worth clients as well as managed
5 the Sky Bell Hedge Funds. Sky Bell withdrew its registration as an investment
6 adviser with the Commission on October 23, 2008.
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Jurisdiction and Venue

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10 4. The Commission brings this action pursuant to the authority
11 conferred upon it by Section 209(d) and (e) of the Investment Advisers Act of
12 1940 [15 U.S.C. § 80b-9(b) and (d)] and Section 20(b) and (d) of the Securities
13 Act of 1933 (“Securities Act”) [15 U.S.C. §77t(b) and (d)].
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16 5. This Court has jurisdiction over this action pursuant to Investment
17 Advisers’ Act Section 214 [15 U.S.C. § 80(b)-14] and Securities Act Section
18 22(a) [15 U.S.C. § 77v].
19

20 6. In connection with the transactions, acts, practices, and courses of
21 business described in this Complaint, the Defendant, directly and indirectly, has
22 made use of the means or instrumentalities of interstate commerce, of the mails,
23 and/or of the means and instruments of transportation or communication in
24 interstate commerce.
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1 11. In October 2008, Sky Bell withdrew its registration from the
2 Commission as an investment adviser. In 2012, Marks resigned from his duties
3 managing the Sky Bell Hedge Funds. An independent firm was hired to handle
4 the liquidation of the funds, and an Investor Advisory Committee was formed to
5 oversee that process.
6

7
8 12. To date, no additional redemptions have been allowed since 2008 by
9 the Alliance Fund and the Offshore Fund. PipeLine has distributed 50% of its
10 capital back to investors, and Night Watch has distributed 30%. Investors likely
11 have lost a significant portion of their investments in each of these funds.
12

13 **B. Negligent Misrepresentations Relating to the Correlation among**
14 **the Sky Bell Hedge Funds**
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16 13. Marks made oral representations to certain investors that the returns
17 of certain Sky Bell Hedge Funds were non-correlated to each other. These
18 statements were made to certain investors who invested in multiple hedge funds
19 managed by Sky Bell.
20

21 14. At least some investors considered these statements in deciding to
22 invest in multiple Sky Bell Hedge Funds in order to achieve a diversified
23 investment portfolio. Until at least September 2007, these investors were led to
24 believe that they substantially increased their diversification by investing in a
25 portfolio of several Sky Bell Hedge Funds.
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1 15. Despite making these statements, Marks never did any formal
2 correlation analysis to support those claims. Marks did not even know how to
3 properly perform such an analysis.
4

5 16. Marks' representations were misleading because some of the Sky
6 Bell Hedge Funds were correlated to each other and they invested in many of the
7 same hedge funds as well as in funds that pursued the same strategies. As a
8 result, when these underlying funds or strategies suffered losses, many Sky Bell
9 Hedge Funds were similarly affected with large losses.
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12 17. These significant correlations resulted in a lack of diversification
13 among certain Sky Bell Hedge Funds and thus meant that investors holding
14 multiple positions in these certain Sky Bell Hedge Funds were significantly less
15 diversified than certain of them were led to believe by Marks at least through
16 September 2007.
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19 **C. Unsuitable Investment Recommendations**
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21 18. Marks served as an investment advisor to a limited number of Sky
22 Bell investors. Sky Bell's Form ADV disclosed that Sky Bell provided
23 investment advisory services to high net worth individuals. In monthly
24 newsletters to Sky Bell investors, Marks told investors that he offered "free"
25 financial planning assistance and investment advisory services. For those clients
26 who accepted his offer, Marks would meet with them to discuss their goals,
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1 objectives, and risk tolerance, and would provide advice regarding their
2 investment portfolio.

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4 19. Marks understood that although he was not being paid separately for
5 investment advice, he was being compensated for this work through the
6 management and performance fees he was earning from the Sky Bell Hedge
7 Funds. Marks also understood that some of these clients considered him to be
8 functioning as their adviser.
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11 20. Marks aggressively recommended the Sky Bell Hedge Funds to his
12 advisory clients. Marks told clients that certain Sky Bell Hedge Funds
13 represented an ideal investment for conservative investors, and in some cases
14 recommended that a number of these clients invest significant amounts of their
15 investment portfolio in his Sky Bell funds.
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18 21. With regard to certain clients, Marks' advice was unsuitable given
19 the client's investing goals and risk tolerance. While it may have been
20 appropriate in certain instances to recommend that a client invest a portion of his
21 assets into Sky Bell Hedge Funds, Marks' advice to these clients to invest a
22 significant amount of their investment portfolio into Sky Bell Hedge Funds was
23 unsuitable in light of those clients' conservative investing goals, low risk
24 tolerance and/or significant current income needs.
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1 **D. Inadequate Disclosure Concerning PipeLine**

2 22. PipeLine was marketed as a fund that would primarily invest in
3 PIPES funds. The PPM did not disclose that the fund had any subadvisers.
4 However, in various written materials and in oral discussions with investors, Sky
5 Bell and Marks disclosed that the fund had a subadviser. Marks claimed that this
6 purported subadviser gave them an edge in the PIPES world because of his
7 knowledge of the industry.
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11 23. The subadviser did not receive any separate compensation from Sky
12 Bell, Marks or PipeLine and his recommendations were not always followed by
13 them. However, PipeLine made substantial investments in this subadviser's fund
14 between 2006 and 2008, investing between 31%-50% of the fund's total assets in
15 this subadviser's PIPES fund. This material fact was never disclosed to investors.
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18 24. The subadviser had an incentive to recommend that PipeLine invest
19 in his fund while discouraging investments in other funds in order to his increase
20 his fees, a fact that would have been material to investors in evaluating the quality
21 and independence of the investment advice guiding the fund's strategy.
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24 **E. Misleading Information Relating to Liquidity Problems at the Alliance Fund**

25 25. In late 2007, the Alliance Fund was experiencing significant liquidity
26 issues. 29% of the fund was seeking redemptions, and the fund was having
27 difficulty meeting those redemption requests because of liquidity issues in its
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1 portfolio. Specifically, two major funds that the Alliance Fund had invested in
2 were either gated or in a slow-pay mode, and a third fund had been partially side
3 pocketed. Together, these investments comprised 17% of total capital, and 40%
4 of investor capital. Moreover, 37% of the remaining assets in the fund (i.e. after
5 the 12/31/07 redemptions were paid out) were expected to be in redemption for
6
7 March 31, 2008 based upon redemption requests the Alliance Fund had received.

9 26. To deal with the liquidity crisis, in late December 2007 or early
10 January 2008 Sky Bell started asking investors who had made 12/31/07
11 redemption requests to either partially or fully rescind those redemption requests.
12 Some of those investors were told that the fund would have to be gated unless
13 they rescinded those redemption requests because of the serious liquidity issues in
14 the fund. These investors understood that they would be able to obtain their full
15 redemption the following quarter if they rescinded their redemption requests.
16 Investors who had not made redemption requests were not provided this
17 information about the serious liquidity issues in the fund.
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22 27. Some investors did ultimately rescind their redemption requests
23 allowing the fund to meet its redemption requests. Sky Bell entered into side
24 letter agreements with some of those investors waiving future fees on their
25 investment holdings. However, to meet the redemption request, the Alliance
26 Fund had to make a small "in-kind" distribution representing 2% of each
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1 investor's redemption request attributable to a particular fund. It sent a letter in
2 February 2008 explaining that in-kind distribution only to investors who had not
3 withdrawn their December 31, 2007 redemption requests.
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5 28. During this period, Marks and Sky Bell failed to make adequate
6 disclosure of the liquidity challenges of the Alliance Fund to those investors who
7 had already made redemption requests. First, when asking investors to rescind
8 their redemption request, they did not provide investors with any underlying
9 information relating to the other underlying funds having serious liquidity issues
10 or the amount of the Alliance Fund that would be in redemption as of 3/31/08.
11 Those facts together would have raised real concerns about whether the fund
12 would have to be gated as of 3/31/08.
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16 29. In addition, before the in-kind distribution letter was sent out to
17 investors, Marks sent an email to another Sky Bell employee telling him to "call[]
18 each investor ahead of time and let them know this is ONLY a 2% position and
19 NOT a big deal." Marks' direction to downplay the significance of the letter and
20 in-kind distribution, while knowing that the fund was continuing to face severe
21 liquidity issues, negligently misled investors about the financial condition of the
22 Alliance Fund.
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1 **PRAYER FOR RELIEF**

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3 The SEC respectfully requests that this Court:

4 1. Find that Defendant committed the violations alleged;

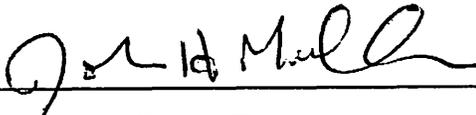
5 2. Enter injunctions, in a form consistent with Rule 65(d) of the Federal
6 Rules of Civil Procedure, permanently restraining and enjoining Defendant from
7 violating, directly or indirectly, or aiding and abetting violations of the law and
8 rules alleged in this Complaint;
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10 3. Order Defendant to disgorge all ill-gotten gains in the form of any
11 benefits of any kind derived from the illegal conduct alleged in this Complaint,
12 plus pre-judgment interest;
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14 4. Order Defendant to pay civil penalties, including post-judgment
15 interest, pursuant to Investment Advisers Act Section 209(e) [15 U.S.C. § 80b-
16 9(e)] and Securities Act Section 20 (d) [15 U.S.C. §77t(d)] in an amount to be
17 determined by the Court; and
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19 5. Order such other relief as is necessary and appropriate.
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Respectfully submitted, August 27, 2012.



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