

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-14993

In the Matter of

MIDDLECOVE CAPITAL, LLC and
NOAH L. MYERS,

Respondents.

PLAN OF DISTRIBUTION

1. *Purpose and Background.* This approved plan of distribution (the “Plan”) was developed pursuant to Rule 1101 of the Commission’s Rules on Fair Fund and Disgorgement Plans (“Rules”), 17 C.F.R. § 201.1101. As described more specifically below, the Plan provides for a distribution of funds collected from MiddleCove Capital, LLC (“MiddleCove”) and Noah L. Myers (“Myers”) (collectively, the “Respondents”), as a result of the Respondents’ engaging in fraudulent trade allocations at MiddleCove, pursuant to a Commission order issued on January 16, 2013.¹

The Order found, among other things, that from approximately October 2008 through February 2011 (the “relevant period”), Myers engaged in fraudulent trade allocation – “cherry-picking” – at MiddleCove. During the relevant period, MiddleCove was a registered investment adviser. Myers executed his cherry-picking scheme by unfairly allocating trades that had appreciated in value during the course of the day to his personal and business accounts and allocating trades that had depreciated in value during the day to the accounts of his advisory clients. He did this by purchasing securities in an omnibus account and delaying allocation of the purchases until later in the day (and sometimes the next day), after he saw whether the securities appreciated in value. When a security appreciated in value on the day of purchase, Myers would often sell the security and disproportionately allocate the purchase and the realized day-trading profit to his own accounts or accounts benefiting himself or his family members. In contrast, for securities that did not appreciate on the day of purchase, Myers would

¹ Order Making Findings and Imposing Remedial Sanctions and a Cease-and Desist Order Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Sections 203(e), 203(f), and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, Exchange Act Rel. No. 68669 (Jan. 16, 2013) (the “Order”).

disproportionately allocate these purchases to his clients' accounts and his clients would hold the position for more than one day. Myers carried out his cherry-picking scheme with regard to several securities, but was most active with an inverse and leveraged exchange traded fund called ProShares UltraShort Financials or SKF. Neither MiddleCove nor Myers disclosed to clients that they were engaged in cherry-picking and that they would favor Myers's accounts in the allocation of appreciated securities. As a result of his fraud, Myers realized ill-gotten gains of \$462,022. The Order required the Respondents to pay disgorgement of \$462,022, prejudgment interest of \$26,096, and a civil money penalty of \$300,000. Neither MiddleCove nor Meyers made any payment toward their monetary obligations, accordingly, on March 20, 2013, the Commission filed an Application for an Order Compelling Respondents to Show Cause Why a Judgment Should Not Be Entered Against Them Pursuant to Section 21(e) of the Securities Exchange Act of 1934 with the United States District Court for the District of Connecticut (Case No. 13-mc-00045). MiddleCove and Myers failed to appear, plead, or otherwise defend the District Court action, thus, on June 28, 2013 the Commission filed a Motion for Default Judgment. On July 11, 2013, the court issued an order that entered a Default Judgment against MiddleCove and Meyers. To date, the Commission has collected \$33,086.05 towards the Respondents' Default Judgment (the "Distribution Fund"). It is anticipated that there will be one disbursement to the Eligible Clients, as defined in paragraph 4 of this Plan.

The Distribution Fund is subject to the continuing jurisdiction and control of the Commission and the Distribution Fund has been deposited at the United States Department of Treasury's ("U.S. Treasury") Bureau of Fiscal Service ("BFS") for investment. Other than potential interest income from the BFS investment, the Commission does not anticipate that the Distribution Fund will receive additional funds. If any additional funds are received, those funds will either be added to Distribution Fund for disbursement to investors, or be sent to the United States Treasury and not distributed at the discretion of the Fund Administrator. All BFS fees will be paid by the Distribution Fund.

Under this Plan, the present value of incorrectly collected fees will be distributed to Eligible Clients, as defined in paragraph 4 below, from the Net Distribution Fund, which is the Distribution Fund less any reserve for taxes, fees or other expenses of administering the Plan.

2. *Tax Administrator.* The Commission has appointed Miller Kaplan Arase, LLP as the tax administrator ("Tax Administrator") for the Distribution Fund,² pursuant to Omnibus Order Directing the Appointment of Tax Administrator in Administrative Proceedings that Establish Distribution Funds.³ The Fund Administrator will cooperate with the Tax Administrator in providing information necessary to accomplish the income tax compliance and any other work ordered to the Tax Administrator by the Commission. The Tax Administrator shall be compensated for all reasonable costs and expenses from the Distribution Fund in accordance with its Revised 2017-2018 Engagement Letter Agreement with the Commission, and all tax obligations will be paid out of the Distribution Fund.

² Order Appointing Tax Administrator, Exchange Act Rel. No. 81287 (Aug. 2, 2017).

³ Exchange Act Rel. No. 81057 (Jun. 30, 2017).

3. *Fund Administrator.* Michael S. Lim, Attorney-Adviser in the Commission's Division of Enforcement's Office of Distributions, is to be the administrator of the Distribution Fund (the "Fund Administrator"). The Fund Administrator will, among other things: oversee the administration of the Distribution Fund, obtain mailing information for the Eligible Clients, distribute money from the assets of the Distribution Fund to Eligible Clients in accordance with the Plan, resolve disputes, prepare a final accounting with assistance from the Tax Administrator, and provide the Tax Administrator with funds to pay tax liabilities and tax compliance fees and costs. As a Commission employee, the Fund Administrator receives no compensation from the Distribution Fund for his services in administering the Distribution Fund. In accordance with Rule 1105(c) of the Rules, 17 C.F.R. § 201.1105(c), no bond is required since the Fund Administrator is a Commission employee. In carrying out his duties, the Fund Administrator may be assisted by other Commission staff acting under his supervision. The Fund Administrator may be removed at any time by order of the Commission or hearing officer.

4. *Specification of Eligible Clients.* The Fund Administrator shall distribute funds from the Net Distribution Fund to those clients (individually, each an "Eligible Client," and collectively, the "Eligible Clients") who were allocated trade losses in SKF identified by Professor Lawrence Harris in Exhibit 20 of his expert report to the Commission. Professor Harris was retained by the Commission in its lawsuit against the Respondents to examine records of trades by Myers and how those trades affected investor accounts. An Eligible Client is deemed harmed only if that Eligible Client was allocated trade losses in SKF when Myers unfairly allocated trades that had depreciated in value during the day to the accounts of his advisory clients. The Fund Administrator identified 141 potentially Eligible Clients to receive distribution payments.

5. *No claims-made process.* This Distribution 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.

6. *Qualified Settlement Fund.* The Distribution 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.

7. *Methodology for Determining Distribution Amounts.* The Fund Administrator determined the amount to be distributed to each Eligible Client in the following manner.

- a. The Fund Administrator identified each Eligible Client who was allocated traded losses in SKF identified by Professor Lawrence Harris in Exhibit 20 of his expert report to the Commission.
- b. The Fund Administrator staff then totaled all allocated traded losses for all Eligible Clients to obtain the total Eligible Client losses ("Total Eligible Client Losses").
- c. The Fund Administrator calculated the pro rata loss for each Eligible Client ("Pro Rata Loss for Each Eligible Client") by dividing that Eligible Client's allocated trade losses in SKF by Total Eligible Client Losses.

- d. The Fund Administrator multiplied the Pro Rata Loss for Each Eligible Client by the Net Distribution Fund to determine the estimated distribution amount to be paid to each Eligible Client (“Estimated Distribution Amount”).

In the view of the Fund Administrator and Commission staff, this methodology constitutes a reasonable allocation of the Net Distribution Fund. Based on this methodology, it is anticipated that there will be one (1) distribution to the Eligible Clients, which will take place as outlined in paragraph 10 below. If the Fund Administrator is unable to locate a potentially Eligible Client or the potentially Eligible Client has not provided adequate tax information to the Fund Administrator, that potentially Eligible Client will be removed from the distribution and that potentially Eligible Client’s Estimated Distribution Amount will be added to the Net Distribution Fund and a recalculation of the amounts to be distributed to the remaining Eligible Clients will be performed.

8. *Procedures for Locating and Notifying Eligible Clients.* On the basis of information obtained by the Commission staff and based on a review and analysis of applicable records, the Fund Administrator identified the Eligible Clients. Within thirty (30) days of the Commission’s approval of this Plan, the Fund Administrator will send each Eligible Client a notice by electronic mail, United States Postal Service, or other mail delivery service regarding the Commission’s approval of this Plan, including as appropriate, a statement characterizing the distribution, a link to this Plan on the Commission’s website and instructions for requesting a copy of the Plan, a description of the tax information reporting and other related tax matters, the procedure for the distribution as set forth in the Plan, and the name of the Fund Administrator to contact with questions regarding the distribution (the “Plan Notice”).

Eligible Clients will be asked to provide documentation if they disagree with the estimated Pro Rata Loss for Each Eligible Client. The Fund Administrator will coordinate with the Tax Administrator to request contact and other information from each Eligible Client that is needed to accomplish the distribution in accordance with applicable tax requirements relating to the Distribution Fund.

If a Plan Notice is returned as undeliverable within sixty (60) days of approval of the Plan, the Fund Administrator will make all reasonable efforts to ascertain the Eligible Client’s correct address. The Fund Administrator will then resend the Plan Notice to the Eligible Client’s new address within thirty (30) days of receipt of the returned Plan Notice. If the Plan Notice is returned again, the Eligible Client will be removed from the distribution and the allocated distribution amount will be added to the Net Distribution Fund and become part of the recalculation described above in paragraph 7.

9. *Distribution Timing.* The Fund Administrator will use his best efforts to start the distribution within one hundred fifty (150) days of the Plan’s approval.

10. *Payment to Eligible Clients.* The Fund Administrator will compile the payee information and prepare a payment file in a format approved by Commission staff for submission to the Commission. Pursuant to Rule 1101(b)(6) of the Rules, the staff will obtain an order from the Commission to disburse the Distribution Fund.

All payments will be distributed with the United States Dollar (USD) as the form of currency. For any payment that is not cashed/negotiated and where subsequently full or partial payment must be returned to the Distribution Fund this will also be required in the form of USD currency.

The Fund Administrator will maintain information about uncashed checks, any returned items due to non-delivery, insufficient addresses, and/or other deficiencies. The Fund Administrator is responsible for researching and reconciling errors and reissuing payments when possible. The Fund Administrator also is responsible for accounting for all payments. Checks will state on their face that they are valid for one (1) year. The amount of all uncashed checks will continue to be held in the Distribution Fund.

11. *Accountings.* Upon final distributions to Eligible Clients pursuant to the procedures described above, and the payment of all taxes, fees, and expenses, the Fund Administrator will submit a final accounting, pursuant to Rule 1105(f) of the Rules, for approval by the Commission on a standardized form provided by the Commission staff prior to the discharge of the Fund Administrator. No quarterly accountings will be submitted.

12. *Amendments and Procedural Deadline Extensions.* The Fund Administrator shall take reasonable and appropriate steps to distribute funds from the Net Distribution Fund according to this 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. The Fund Administrator, for good cause shown, may extend any of the procedural deadlines set forth in this Plan.

13. *Procedures to Request Plan Notice.* A person that does not receive a Plan Notice and believes that he or she should have received a Plan Notice after becoming aware of the Plan (e.g., through other Eligible Clients or on <http://www.sec.gov/litigation/fairfundlist.htm>) must submit documentation to the Fund Administrator to establish that the individual is in fact eligible to receive a Plan Notice within seventy-five (75) days after the last Plan Notices are sent to potentially Eligible Clients by the Fund Administrator. The Fund Administrator will send the individual a Plan Notice within twenty-one (21) days of receiving the individual's documentation, if the Fund Administrator determines that the individual should have received a Plan Notice.

14. *Procedures for Disputes made by Eligible Clients.* Disputes will be limited to calculations of disbursement amounts to Eligible Clients. Within thirty (30) days of the date that an Eligible Client's disbursement is made, the Fund Administrator must receive a written communication detailing the dispute along with any supporting documentation. The Fund Administrator will investigate the dispute, and such investigation will include a review of the written dispute as well as any supporting documentation. Within thirty (30) days of receipt of the written dispute, the Fund Administrator will notify the Eligible Client of its resolution of the dispute, which shall be final.

15. *Residual and Disposition of Undistributed Funds.* A residual within the Distribution Fund refers to any amounts remaining after distribution of the Net Distribution Fund to Eligible Clients has occurred. The residual may include funds reserved for future taxes and related expenses, administrative expenses, distributions from checks that have not been cashed, from checks that were not delivered or from funds returned to the Commission, and tax refunds for overpayment or for waiver of IRS penalties. All residual funds remaining after all expenses of administration and taxes have been satisfied will be transferred to the U.S. Treasury after the final accounting is approved by the Commission.

16. *Termination of the Distribution Fund.* The Distribution Fund will be eligible for termination and the Fund Administrator will be eligible for discharge after all of the following have occurred: a) a final accounting, in a standard accounting format provided by Commission staff, has been submitted by the Fund Administrator, and has been approved by the Commission; b) all taxes, final fees and expenses of the Tax Administrator, and BFS fees have been paid by the Distribution Fund; and c) any amount remaining in the Distribution Fund has been received by the Commission. When the Commission has approved the final accounting, the Commission staff will seek an order from the Commission to approve the termination of the Distribution Fund, the discharge of the Fund Administrator and the transfer of any amount remaining in the Distribution Fund to the U.S. Treasury.