

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16014

In the Matter of

**KEITH MACDONALD
SUMMERS**

Respondent.

PROPOSED PLAN OF DISTRIBUTION

1. *Purpose and Background.* The Division of Enforcement submits this proposed Plan of Distribution (the “Plan”) to the United States Securities and Exchange Commission (the “Commission”) pursuant to Rule 1101 of the Commission’s Rules on Fair Fund and Disgorgement Plans (“Rules”), 17 C.F.R. § 201.1101. The Plan provides for the distribution of the disgorgement provided for in the Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933, Section 21C of the Securities Exchange Act of 1934, Sections 203(f) and 203(k) of the Investment Advisers Act of 1940, and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”) against Keith MacDonald Summers (“Summers”) (Securities Act Rel. No. 9630 (August 13, 2014)), to certain investors in Tricoastal Capital Partners, LLC (“TCP Fund”) who suffered losses as a result of the fraudulent conduct by Summers.

The Order found, among other things, that Summers was the managing member of TCP Fund, an unregistered investment fund organized as a Delaware limited liability company. Summers was also the sole principal and director of Tricoastal Capital Management Ltd., an unregistered advisory firm organized under the laws of the province of Ontario, Canada. Summers raised \$4.69 million by lying to investors about TCP Fund’s assets under management, the intended use of its assets and its historical performance. After suffering losses in May 2012, Summers abandoned his initial trading strategy for a far riskier investment strategy involving derivatives. As a result of the change in strategy, TCP Fund suffered additional trading losses of \$1,202,000. To conceal the losses, Summers falsified monthly account statements to report positive returns in almost every month to investors based on what the performance of TCP Fund would have been if he had maintained his original trading strategy. Summers also

fraudulently withdrew and misappropriated \$918,885 of investor funds for personal living expenses and unreimbursed business expenses from July 2009 to July 2013.

On July 12, 2013, Summers reported his misconduct to the Ontario Securities Commission when he realized the largest fund investor was on the verge of discovering that he had forged TCP Fund's purported audited financial statements.

The Order required that Summers cease and desist from committing or causing any violations and any future violations of Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and Sections 206(1), 206(2) and 206(4) of the Investment Advisers Act of 1940 and Rule 206(4)-8 thereunder; barred Summers from associating with any broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization; and prohibited Summers from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter. Summers was ordered to pay disgorgement of \$4,117,658.15 to the Commission, which he partially satisfied through the transfer of the outstanding balance in TCP Fund's brokerage account (\$1,396,322.27) and the outstanding balance of TCP Fund's corporate bank account (\$1,261.65). The remaining amount of disgorgement was deemed satisfied by the Ontario criminal restitution orders in R v. Summers, Information No. 12000143, provided that Summers did not withdraw his guilty plea in R v. Summers.¹ In August 2014, a total of \$1,397,583.92 was paid to the Commission. This amount constitutes the "Disgorgement Fund." The Commission does not anticipate receiving any additional funds in this matter.

The Disgorgement Fund is subject to the continuing jurisdiction and control of the Commission and the Disgorgement Fund is currently on deposit in a Commission designated non-interest bearing account. The Plan is subject to approval by the Commission, and the Commission retains jurisdiction over the implementation of the Plan.

Under the Plan, a pro rata share of investors' losses will be distributed to Eligible Clients, defined in paragraph 4 below, from the "Net Disgorgement Fund," which is the Disgorgement Fund less any reserve for taxes, fees or other expenses of administering the Plan.

2. *Fund Administrator.* Adriene Mixon, Assistant Chief Litigation Counsel in the Commission's Division of Enforcement's Office of Distributions, is proposed to act as the administrator of the Disgorgement Fund (the "Fund Administrator"). As a Commission employee, the Fund Administrator receives no compensation from the Disgorgement Fund for her services in administering the Disgorgement Fund. In accordance with Rule 1105(c), 17 C.F.R. § 201.1105(c), no bond is required since the Fund Administrator is a Commission employee. In

¹ On October 8, 2014, Justice Sheila Ray of the Ontario Court of Justice (Toronto Region) sentenced Summers to three years incarceration, and ordered Summers to pay restitution of \$4,329,986.76, including \$4,117,658.15, to the defrauded investors in TCP Fund. Justice Ray also ordered forfeiture of \$61,953.03, an amount representing Summers' share of the proceeds from the sale of his marital home.

carrying out her duties, the Fund Administrator may be assisted by other Commission staff acting under her supervision.

The Fund Administrator will, among other things: oversee the administration of the Disgorgement Fund, obtain mailing information for Eligible Clients, distribute money from the assets of the Disgorgement Fund in accordance with the Plan, resolve disputes, distribute the Disgorgement Fund to Eligible Clients as defined in paragraph 4 below, prepare a final accounting with assistance from the Tax Administrator, defined in paragraph 3 below, and provide the Tax Administrator with funds to pay 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 (Exchange Act Rel. No. 68683 (January 17, 2013)).

3. *Tax Administrator.* The Commission has appointed Damasco and Associates, LLP as the tax administrator (“Tax Administrator”) of the Disgorgement Fund (Exchange Act Rel. No. 73073 (September 11, 2014)). 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 is compensated for reasonable costs and expenses from the Disgorgement Fund in accordance with its 2013-2015 Engagement Letter Agreement with the Commission, and tax obligations will be paid out of the Disgorgement Fund.

4. *Specification of Eligible Disgorgement Fund Recipients.* The Fund Administrator will distribute the Disgorgement Fund to those TCP Fund clients that have been harmed by the misrepresentations, omissions, and misappropriations described in the Order (individually, each an “Eligible Client,” and collectively, the “Eligible Clients”).

5. *No claims-made process.* The Disgorgement Fund is not being distributed according to a claims-made process, so the procedures for making and approving claims are not applicable.

6. *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.

7. *Control of Disgorgement Fund.* The Commission has control of the Disgorgement Fund and retains control of the assets of the Disgorgement Fund until distribution to the Eligible Clients. The Disgorgement Fund will be distributed by the U.S. Treasury’s Bureau of the Fiscal Service (“BFS”). Upon approval by the Commission, the Fund Administrator will use the assets and earnings of the Disgorgement Fund to provide payments to Eligible Clients and to provide the Tax Administrator with assets to pay tax liabilities and tax compliance fees and costs.

8. *Methodology for Determining Distribution Amounts.* The Fund Administrator has determined the amount to be distributed to each Eligible Client in the following manner. First, the Fund Administrator calculated the Net Disgorgement Fund, which is defined in paragraph 1 above; this sums to \$1,394,190.92. Second, the Fund Administrator determined, by referring to information collected by the Commission staff, the dollar amount of each Eligible Client’s investments in the TCP Fund and used this amount, less any monies received by the Eligible Client

as a settlement or other payments in connection with this matter from Summers, or any other third party, as the Eligible Client’s losses (“Net Loss Amount”). Third, the Fund Administrator calculated the percentage of each Eligible Client’s losses as a percentage of the total losses from all Eligible Clients. Finally, the Fund Administrator calculated each Eligible Client’s pro rata distribution amount as this percentage multiplied by the Net Disgorgement Fund (“Distribution Amount.”).

Eligible Client	Net Loss Amount	Approximate Percentage of Total Losses²	Net Disgorgement Fund	Eligible Client’s Distribution Amount
Client 1	\$ 129,869.85	3.15%	\$ 1,394,190.92	\$ 43,972.41
Client 2	\$ 150,000.00	3.6%	\$ 1,394,190.92	\$ 50,788.25
Client 3	\$ 192,000.00	4.66%	\$ 1,394,190.92	\$ 65,008.96
Client 4	\$ 100,000.00	2.43%	\$ 1,394,190.92	\$ 33,858.83
Client 5	\$ 450,000.00	10.93%	\$ 1,394,190.92	\$ 152,364.74
Client 6	\$ 250,000.00	6.07%	\$ 1,394,190.92	\$ 84,647.08
Client 7	\$ 108,000.00	2.62%	\$ 1,394,190.92	\$ 36,567.54
Client 8	\$ 37,788.30	0.92%	\$ 1,394,190.92	\$ 12,794.68
Client 9	<u>\$ 2,700,000.00</u>	65.57%	\$ 1,394,190.92	<u>\$ 914,188.44</u>
	\$ 4,117,658.15			\$ 1,394,190.92

9. *Procedures for Locating and Notifying Eligible Clients.* On the basis of information obtained by the Commission staff based on review and analysis of applicable records, the Fund Administrator will identify the Eligible Clients, as defined in paragraph 4 above. Within thirty (30) days of the Commission’s approval of the Plan, the Fund Administrator will send each Eligible Client a notice by United Parcel Service regarding the Commission’s approval of the Plan, including as appropriate, a statement characterizing the distribution, a link to the Plan posted on the Commission’s website and instructions for requesting a copy of the Plan, a Net Loss Amount calculation and a Distribution Amount, 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”). The Fund Administrator will coordinate with the Tax Administrator to request information from each Eligible Client that is needed to accomplish the distribution in accordance with applicable tax requirements relating to the Disgorgement Fund.

If an Eligible Client fails to respond within thirty (30) days from the mailing of the Plan Notice, the Fund Administrator will then make no fewer than two (2) attempts to contact the Eligible Client by telephone or by email. The second attempt will in no event take place more than forty-five (45) days from the mailing of the Plan Notice. If an Eligible Client fails to respond to the Fund Administrator’s contact attempts as described in this paragraph, the Fund Administrator, in her discretion, may remove such Eligible Client from the distribution and the allocated distribution amount will be distributed to the remaining Eligible Clients.

² The approximate percentages have been rounded to the nearest 100th of a percent in this column but were not rounded for purposes of calculating an Eligible Client’s Distribution Amount.

If a Plan Notice is returned as undeliverable, the Fund Administrator will make all reasonable efforts to ascertain an 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 as undeliverable again, and the Fund Administrator, despite all reasonable efforts, is unable to find an Eligible Client's correct address, the Fund Administrator, in her discretion, may remove such Eligible Client from the distribution and the allocated distribution amount will be distributed to the remaining Eligible Clients.

10. *Distribution Timing.* The Fund Administrator will use her best efforts to start the first distribution within one hundred and twenty (120) days of the Plan's approval by the Commission.

11. *Bureau of the Fiscal Service; Validation and Approval of Disbursement of the Disgorgement Fund.* The Disgorgement Fund disbursement to Eligible Clients will be implemented by the Commission and disbursed through the U.S. Treasury's BFS, which will mail checks or electronically transfer funds to each payee as instructed by the Fund Administrator. The Fund Administrator will compile the payee information and prepare a payment file in a Commission-approved format to make the disbursements through BFS. Pursuant to Rule 1101(b)(6), 17 C.F.R. § 201.1101(b)(6), the Fund Administrator will obtain an order from the Commission to disburse the Disgorgement Fund.

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 is responsible for researching and reconciling errors and reissuing payments when possible. 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. If any checks issued are not cashed within the one (1) year time period, the Fund Administrator will work with BFS to identify all uncashed checks. The amount of all uncashed checks will be credited to the Disgorgement Fund account and will, if ordered by the Commission, be distributed to other Eligible Clients.

12. *Expenses of Administration.* Fees and other expenses of administering the Plan will be paid from the Disgorgement Fund.

13. *Amendments and Procedural Deadline Extensions.* The Fund Administrator will take reasonable and appropriate steps to distribute the Net Disgorgement Fund according to the Plan. The Fund Administrator will inform the Assistant Director of Distributions, Logistics, and Services for the Division of Enforcement ("AD") of any changes in the Plan. If a change is determined to be material, a plan may be amended upon motion of any party, or the Fund Administrator, or upon the Commission's own motion. Immaterial changes may be made by the Fund Administrator with approval of the AD. For good cause shown, the Fund Administrator may extend any of the procedural dates set forth in the Plan.

14. *Procedures to Request Plan Notice.* A person who 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 www.sec.gov) must submit documentation to the Fund Administrator to establish that the individual is in fact eligible to receive a Plan Notice within forty-five (45) days after the Plan Notices are sent to 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. In the event the Distribution Amount changes, corrected plan notices will be sent to Eligible Clients.

15. *Procedures for Disputing Amounts Received.* Disputes will be limited to calculations of Distribution 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 her resolution of the dispute, which will be final. This procedure will be set forth in the Plan Notice.

16. *Disposition of Undistributed Funds.* A residual account within the Disgorgement Fund is established for any amount remaining after final distribution of the Net Disgorgement Fund to Eligible Clients has occurred. The residual account may include funds reserved for future taxes and related expenses, distribution checks that have not been cashed, from checks that were not delivered or from funds returned to the Commission, Disgorgement Fund tax refunds for overpayment or for waiver of IRS penalties. All funds remaining in the residual account will be transferred to the U.S. Treasury after the final accounting is approved by the Commission.

17. *Accountings.* When all funds have been disbursed except for the residual described in paragraph 16 above, the Fund Administrator will submit a final accounting for the approval of the Commission prior to termination of the Disgorgement Fund and discharge of the Fund Administrator. Since the funds are being held in a Commission designated non-interest bearing account at the U.S. Treasury, and a Commission employee will be appointed as Fund Administrator, no interim accountings will be made.

18. *Termination of the Disgorgement Fund.* Upon final distribution of the Net Disgorgement Fund to Eligible Clients, the Fund Administrator will make arrangement for the final payment of taxes and Tax Administrator fees and will submit a final accounting to the Commission. The Disgorgement Fund will be eligible for termination after all of the following have occurred: (1) a final accounting, appearing on the standard accounting form supplied by the Commission staff, has been submitted by the Fund Administrator, and has been approved by the Commission; and (2) all taxes, fees, and expenses have been paid. When the Commission has approved the final accounting, Commission staff will seek an order from the Commission to approve: (1) sending the remaining residual amount to the U.S. Treasury; (2) termination of the Disgorgement Fund; and (3) discharge of the Fund Administrator.

19. *Notice of Proposed Plan of Distribution and Opportunity for Comment.* The Notice of the Proposed Plan of Distribution and Opportunity for Comment (the "Notice") will be

published in the SEC Docket and on the Commission's 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 (www.sec.gov/litigation/admin.shtml); or (c) by sending an email to rule-comments@sec.gov. Comments submitted by email or via the Commission's website should include "Administrative Proceeding File Number 3-16014" in the subject line. Comments received will be publicly available. Persons should only submit comments that they wish to make publicly available.