

**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

**INVESTMENT ADVISERS ACT OF 1940**  
**Release No. 3091 / September 29, 2010**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-13714**

<b>In the Matter of</b>	:	
	:	
	:	
<b>Ark Asset Management Co., Inc.,</b>	:	
	:	
<b>Respondent.</b>	:	
	:	
	:	
	:	
	:	
	:	

**ORDER MAKING FINDINGS AND  
IMPOSING SANCTIONS PURSUANT  
TO SECTION 203(k) OF THE  
INVESTMENT ADVISERS ACT  
OF 1940**

**I.**

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest to enter this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 203(k) of the Investment Advisers Act of 1940 (“Advisers Act”) against Ark Asset Management Co., Inc., (“Ark” or “Respondent”).

**II.**

Following the institution of these proceedings on December 14, 2009, Respondent has submitted an Offer of Settlement (“Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 203(k) of the Investment Advisers Act of 1940 (“Order”), as set forth below.

### III.

On the basis of this Order and Respondent's Offer, the Commission finds<sup>1</sup> that:

#### Summary

1. These proceedings arise out of fraudulent trade allocation, disclosure and books and records violations by Ark Asset Management Co., Inc. between August 2000 and December 2003 ("Relevant Period"). During the Relevant Period, a now-deceased portfolio manager ("Portfolio Manager") of Ark engaged in fraudulent trade allocation practices – "cherry-picking" – by favoring the Proprietary accounts over the Client accounts in the allocation of securities. Ark did not disclose this scheme to its clients. As a result of this fraudulent conduct, Ark realized at least \$19 million of ill-gotten gains in the form of performance fees from the Proprietary accounts. Additionally, Ark's Form ADV filings during the Relevant Period were materially misleading. Contrary to its stated goal of being "fundamentally fair" in the allocation of securities between the Proprietary and Client accounts, Ark failed to disclose to its adversely affected clients that it favored the Proprietary accounts in the allocation of securities. Ark also committed books and records violations by failing to make and keep true and accurate order memoranda.

#### Respondent

2. **Ark Asset Management Co., Inc.**, a New York corporation headquartered in New York, New York, was registered with the Commission as an investment adviser from August 21, 1989 through March 2, 2009, when it withdrew its registration. It was the wholly-owned, operating subsidiary of Ark Asset Holdings, Inc. ("Ark Holdings"). Ark was originally the investment management arm of Shearson Lehman Brothers Inc. Ark ceased operations on February 27, 2009 and sold substantially all of its assets. On or about March 30, 2009, Ark Holdings consented to an involuntary bankruptcy proceeding under Chapter 7 of the Bankruptcy Code. Ark is being liquidated under the supervision of a Chapter 7 Trustee and has limited assets available for distribution to creditors.

#### Relevant Entities

3. **NorthStar Funds** ("Proprietary" accounts or funds) was a set of hedge funds created by Ark in 2000, in which certain Ark employees had ownership interests. In December 2003, the Portfolio Manager responsible for trading for both NorthStar and the Specialty Growth

---

<sup>1</sup> The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

accounts (defined below) left Ark and created a separate entity, NorthStar Capital Funds, LLC, which took over the management of the NorthStar Funds.

4. **Specialty Growth** (“Client” accounts) was a certain set of advisory accounts created by Ark in 1986 and managed using a growth strategy. Specialty Growth clients included large institutional investors, such as retirement plans, pension funds and charitable organizations.

### **Background**

5. In August 2000, Ark launched the Proprietary Funds in which numerous Ark employees, their friends and family, traders and board members invested, as well as certain outside investors. The Portfolio Manager made all investment decisions with respect to, and had sole trading authority over, both the Proprietary accounts and the Client accounts, and, along with other Ark employees, was also invested in Proprietary accounts. Both the Proprietary accounts and the Client accounts engaged in day-trading and investing in initial public offerings. In fact, the Proprietary funds realized most of their profits from day-trading stocks. The Portfolio Manager often traded the same securities for the Proprietary and Client accounts.

### **The Cherry-Picking Scheme**

6. At or soon after the launch of the Proprietary funds, the Portfolio Manager began to execute a cherry-picking scheme that favored the Proprietary accounts in the allocation of securities. The Portfolio Manager accomplished this cherry-picking by placing orders for securities, but delaying allocation of the purchases and sales until after the order had been filled and the price of the security had been obtained. Sometimes the Portfolio Manager did not allocate until, or made changes to allocations at, the end of the day. The Portfolio Manager allocated mostly favorable trades to the Proprietary accounts and allocated a significantly lower percentage of favorable trades to the Client accounts even though the Client accounts were legally and financially able to engage in the trades that were disproportionately allocated to the Proprietary accounts.

7. When placing trades, neither the Portfolio Manager nor the traders who worked for him documented how the trade would ultimately be allocated between the two sets of accounts. While each set of accounts had different order tickets, orders were routinely written on an order ticket for one of the two sets of accounts. The order tickets, however, did not reflect how the Portfolio Manager would ultimately decide to allocate the securities. Instead, after an order was filled, the Portfolio Manager would sometimes decide to keep the entire allocation with one set of accounts (i.e., the Proprietary or Client accounts), would sometimes move part of the allocation to the other set of accounts, or would sometimes decide to allocate the entire trade to the other set of accounts. In some instances, traders were directed to move an order from one set of accounts to the other by creating a new order ticket, transferring the security to that ticket, and discarding the old order ticket.

8. Allocations by Ark to the Proprietary accounts were much more likely to be profitable on the day of the allocation than were allocations to the Client accounts, with a difference in profitability of approximately 68% to approximately 37% respectively. Additionally, approximately 75% of Proprietary funds' long day-trades were profitable while only approximately 37% of Client accounts' long day-trades were profitable. Consequently, there was a significant overall performance differential between the Proprietary funds and the Client funds for most of the Relevant Period.

9. The cherry-picking resulted in enhanced first-day profitability (realized and unrealized gains) for the Proprietary accounts of approximately \$230 million. Favorable day-trades generated approximately \$81 million in profits for the Proprietary accounts during the Relevant Period.

10. The officers and directors of Ark knew about the disparity in performance between the Proprietary accounts and the Client accounts. Directors and officers were informed at board meetings throughout the Relevant Period about the performance of the Client accounts. In addition, many of Ark's officers and directors were investors in the Proprietary funds and thus knew about the performance of the Proprietary funds.

### **Disclosures and Books and Records Violations**

11. Ark's Form ADV became materially inaccurate in 2000 when the Portfolio Manager began allocating better trades to the NorthStar accounts than the Specialty Growth accounts, either for profit or to minimize losses to the NorthStar accounts. Ark's Form ADV stated that its "goal is to be fundamentally fair on an overall basis with respect to all clients invested in [both NorthStar and Specialty Growth accounts]... ." Even though Ark filed amendments to its Form ADV between 2000 and 2003, it failed to correct the materially inaccurate statement by not disclosing that it favored NorthStar clients over Specialty Growth clients when allocating trades.

12. Moreover, Item 11 of Part I of Ark's Form ADV requires an adviser to disclose information about the disciplinary record of the adviser and its advisory affiliates – which include persons who are controlled by the adviser. The head trader for both the Proprietary and Client accounts was controlled by Ark and was listed as a "control person" on Ark's Form ADV. In June 2003, that head trader, who was under investigation by the New York Stock Exchange at the time Ark hired him in 2000, settled with the NYSE and consented to a censure and a fine. Ark did not amend its disclosure to reflect this disciplinary action in response to Item 11 of Part I of its Form ADV.

13. Finally, Ark failed to make and keep accurate order tickets that reflected allocation determinations contemporaneous with the order, failed to make and keep accurate memoranda showing modifications or cancellations of certain orders, discarded certain order tickets, and altered order memoranda after execution of orders.

## Violations

14. By knowingly or recklessly allocating profitable trades to the Proprietary accounts at the expense of the Client accounts and not disclosing this scheme to clients, Ark violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, which prohibit fraudulent conduct in connection with the purchase or sale of securities. In addition, through this cherry-picking scheme and by failing to disclose the scheme, Ark violated Sections 206(1) and 206(2) of the Advisers Act, which, in pertinent part, prohibit investment advisers from employing any device, scheme, or artifice to defraud any client and from engaging in any transaction, practice, or course of business which operates as a fraud or deceit upon any client.

15. Ark engaged in a scheme to defraud by allocating profitable trades to the Proprietary accounts at the expense of the Client accounts without disclosing this practice. As an investment adviser, and therefore a fiduciary, Ark had an affirmative duty of loyalty not to put its interests ahead of its clients and to disclose material information to its clients. However, during the relevant period, Ark failed to disclose to the adversely affected clients that Ark was favoring the hedge funds when allocating trades. Accordingly, Ark violated Sections 206(1) and (2) of the Advisers Act.

16. Ark's Form ADV became materially misleading in 2000 when the Portfolio Manager began allocating better trades to the Proprietary accounts than the Client accounts, either for profit or to minimize losses to the Proprietary accounts. Ark failed to amend the form, as required by Section 204 of the Advisers Act and Rule 204-1(a)(2) thereunder. Ark's Form ADV stated that its "goal is to be fundamentally fair on an overall basis with respect to all clients invested in [both the Proprietary and Client accounts]... ." Ark failed to correct the materially inaccurate statement by not disclosing that it favored the Proprietary funds over the Client accounts in the allocation of securities. Accordingly, Ark violated Section 204 of the Advisers Act and Rule 204-1(a)(2) thereunder.

17. Ark also failed to file an amendment to Item 11 of Part I of Form ADV, which requires an adviser to disclose information about the disciplinary record of the adviser and its advisory affiliates – which include persons who are controlled by the adviser. The head trader for both sets of accounts was controlled by Ark and was listed as a "control person" on Ark's Form ADV. Therefore Ark was obligated to amend Item 11 to disclose that an investigation of the head trader by the New York Stock Exchange resulted in a settlement in which the head trader consented to a censure and fine in June 2003. Accordingly, Ark violated Sections 204 and 207 of the Advisers Act and Rule 204-1(a)(2) thereunder.

18. Ark violated Section 204 of the Advisers Act and Rule 204-2(a)(3) thereunder, which require registered investment advisers to make and keep true, accurate and current order memoranda for the purchase and sale of any security on behalf of a client by failing to make accurate order tickets that contained all the information required by those rules. Ark's order tickets failed to reflect and/or inaccurately reflected the "terms and conditions" of certain orders in violation of these Rules. Specifically, Ark failed to make and keep accurate memoranda

showing modifications or cancellations of certain orders, discarded certain order tickets, and altered order memoranda after execution of orders. Accordingly, Ark violated Section 204 of the Advisers Act and Rule 204-2(a)(3) thereunder.

### **Undertakings**

Respondent undertakes to:

19. Ensure that all Ark assets are used to satisfy creditor claims asserted against Ark and none of Ark's assets will be distributed to Ark Holdings except to the extent necessary to satisfy administrative priority expenses of the Ark Holdings bankruptcy estate.

### **IV.**

In view of the foregoing, the Commission deems it appropriate to impose the sanction agreed to in Respondent's Offer.

Accordingly, it is hereby ORDERED that:

A. Respondent shall comply with the undertakings enumerated in Section III.19. above.

B. Respondent shall, within 5 days of the entry of this Order, pay disgorgement of \$19,800,000 to the Securities and Exchange Commission. In view of the limited assets available in the Ark estate, Ark's disgorgement obligation to the Securities and Exchange Commission pursuant to this Order shall be deemed satisfied in full by the payment of \$750,000 without further recourse against the Ark estate. If timely payment is not made, additional interest shall accrue pursuant to SEC Rule of Practice 600. Payment shall be: (A) made by wire transfer, United States postal money order, certified check, bank cashier's check or bank money order; (B) made payable to the Securities and Exchange Commission; (C) hand-delivered or mailed to the Office of Financial Management, Securities and Exchange Commission, Operations Center, 6432 General Green Way, Stop 0-3, Alexandria, VA 22312; and (D) submitted under cover letter that identifies Ark Asset Management Co., Inc. as a Respondent in these proceedings, the file number of these proceedings, a copy of which cover letter and money order or check shall be sent to Alison Conn, Assistant Regional Director, Division of Enforcement, Securities and Exchange Commission, New York Regional Office, 3 World Financial Center, New York, New York 10281.

By the Commission.

Elizabeth M. Murphy  
Secretary

Service List

Rule 141 of the Commission's Rules of Practice provides that the Secretary, or another duly authorized officer of the Commission, shall serve a copy of the Order Making Findings and Imposing Remedial Sanctions Pursuant to Section 203(k) of the Investment Advisers Act of 1940 (the "Order"), on the Respondent and his legal agent.

The attached Order has been sent to the following parties and other persons entitled to notice:

Honorable Brenda P. Murray  
Chief Administrative Law Judge  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-2557

Alison Conn, Esq.  
New York Regional Office  
Securities and Exchange Commission  
3 World Financial Center  
New York, New York 10281

Ark Asset Management Co., Inc.  
c/o Gregory M. Messer, Esq.  
Chapter 7 Trustee  
c/o Gary F. Herbst, Esq.  
Lamonica Herbst & Maniscalco LLP  
3305 Jerusalem Avenue  
Wantagh, NY 11793

Gary F. Herbst, Esq.  
Lamonica Herbst & Maniscalco LLP  
3305 Jerusalem Avenue  
Wantagh, NY 11793