

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

**SECURITIES AND EXCHANGE COMMISSION,
Plaintiff,**

v.

**ICP ASSET MANAGEMENT, LLC,
ICP SECURITIES, LLC,
INSTITUTIONAL CREDIT PARTNERS, LLC, and
THOMAS C. PRIORE,**

Defendants,

-and-

**THOMAS C. PRIORE,
LORI A. PRIORE, and
BERTRAND H. SMYERS,**

**Defendants and
Relief Defendants**

**Case No.:
10-cv-4791-LAK-JCF**

**Notice of Motion and Motion
for an Order to Disburse**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, upon the accompanying Motion, Memorandum, Declaration, and Proposed Order, and all other related papers and proceedings, Plaintiff, the Securities and Exchange Commission (the “SEC”) will move this Court, at a date and time to be determined by the Court, for an Order to Disburse in accordance with the Distribution Plan.

MOTION

In accordance with the plan of distribution approved by this Court on May 31, 2023 (the “Plan”), Plaintiff, the SEC, respectfully submits this Motion for an Order to disburse \$22,937,549.57 to Payees in accordance with the Plan.

The grounds for this Motion are set forth in the accompanying memorandum and declaration of the Distribution Agent.

WHEREFORE, the SEC respectfully requests that the Court enter an Order substantially in the form submitted with this Motion.

Dated: September 28, 2023

Respectfully submitted,

s/Catherine E. Pappas
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Exchange Commission*

**CERTIFICATE OF
SERVICE**

I hereby certify that on September 28, 2023, I electronically filed the foregoing Notice of Motion and supporting documents with the Clerk of the Court using CM/ECF, which will automatically send a copy of the document to all interested parties as set forth on the Service List below.

/s/ Catherine E. Pappas
Catherine E. Pappas

SERVICE LIST

INTERESTED PARTIES:

Via CM/ECF

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(Proposed) Order to Disburse

The Court having reviewed the Securities and Exchange Commission's (the "SEC") Motion for an Order to Disburse, the accompanying Memorandum in Support, the Declaration of the Distribution Agent, and any related filings;

AND the Distribution Agent having provided to the SEC a Payee List in accordance with the Court-approved plan of distribution (the "Plan");

AND having considered all arguments presented and for good cause shown;

IT IS HEREBY ORDERED that the SEC shall disburse \$22,937,549.57 in accordance with the Plan.

Dated: _____, 2023

Lewis A. Kaplan
U.S. District Court Judge

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**Case No.:
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**Memorandum in Support of
Entry of an Order to
Disburse**

I. Introduction

In accordance with ¶46 of the Court-approved distribution plan (ECF No. 276, the “Plan”), the Plaintiff, the Securities and Exchange Commission (the “SEC”), respectfully submits this memorandum in support of its Motion for an Order to Disburse (the “Motion”) \$22,937,549.57 in accordance with the Plan.

II. Background

A. This Action

By Complaint filed on June 21, 2010, amended on June 30, 2011,¹ the SEC charged ICP Asset Management LLC (“ICP”); ICP Securities, LLC (“ICPS”); Institutional Credit Partners, LLC (“ICP Holdco”); and Thomas C. Priore (“Priore”) (collectively, the “Defendants”) with

¹ ECF No. 1.

repeated violations of the federal securities laws. Beginning in 2006, ICP was the asset manager of the Triaxx CDOs. The SEC alleged that, starting in 2007, as the mortgage markets deteriorated, the Defendants engaged in a range of improper transactions that defrauded the Triaxx CDOs of tens of millions of dollars and placed them at risk of substantial additional losses in the future.

The SEC charged the Defendants, variously, with violations of Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b) and Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5; Section 15(c)(1)(A) of the Exchange Act, 15 U.S.C. § 78o(c)(1)(A) and Exchange Act Rule 10b-3, 17 C.F.R. § 240.10b-3; Sections 206(1), 206(2), 206(3) and 206(4) of the Investment Advisers Act of 1940 ("Advisers Act"), 15 U.S.C. §§ 80b-6(1), 80b-6(2), 80b-6(3), and 80b-6(4) and Advisers Act Rule 206(4)-8, 17 C.F.R. § 275.206(4)-8; and Section 204 of the Advisers Act, 15 U.S.C. § 80b-4, and Advisers Act Rule 204-2 and 206(4)-7, 17 C.F.R. §§ 275.204-2 and 275.206(4)-7. The SEC further alleged that, in March 2010, after the SEC staff indicated that it intended to recommend an enforcement action, Priore transferred assets into trusts that he had created during the SEC's investigations; and named Thomas C. Priore, Lori A. Priore, and Bertrand H. Smyers, the trustees of those trusts, as relief defendants (collectively, the "Relief Defendants").

The litigation initiated by the Complaint is complete. By stipulation entered on September 6, 2012,² the SEC dismissed counts X-XV of the Amended Complaint, thereby resolving the charges with respect to the Relief Defendants. By a final judgment entered on the

² ECF No. 225.

consent of the Defendants on September 12, 2012 (the “Final Judgment”),³ the Court ordered, in relevant part:

- ICP Holdco and ICP, jointly and severally, to pay to the SEC disgorgement of \$13,916,005 and prejudgment interest of \$3,709,028, for a total of \$17,625,033;
- ICP to pay to the SEC a civil penalty of \$650,000;
- ICPS to pay to the SEC disgorgement of \$1,637,581, prejudgment interest of \$301,893, and a civil penalty of \$1,939,474; and
- Priore to pay to the SEC disgorgement of \$797,337, prejudgment interest of \$215,045, and a civil penalty of \$487,618 pursuant to a payment schedule.

Since the Final Judgment, the SEC has collected approximately \$22 million of the approximately \$23.6 million ordered.

B. Procedural History

By Order entered February 10, 2017, the Court established a Fair Fund so that collected civil penalties along with collected disgorgement and prejudgment interest, can be distributed to harmed investors (the “Fair Fund”); appointed Miller Kaplan Arase LLP (“Miller Kaplan”) as the tax administrator for the Fair Fund; and appointed Nichola L. Timmons, an SEC employee, as fund administrator for the Fair Fund (the “Fund Administrator”).⁴ The Court further authorized the Fund Administrator to retain an expert at the expense of the Fair Fund to assist with the development of a distribution plan. The Fund Administrator retained Securities Litigation and Consulting Group (“SLCG”) as the expert to assist with the development of a distribution plan.

Based on both SLCG’s initial analysis and communications from potential victims, on August 7, 2020, the SEC moved the Court to appoint a distribution agent to, among other things,

³ ECF No. 226.

⁴ ECF No. 260. The Order references Damasco and Associates, LLC (“Damasco”). As of October 1, 2016, Damasco and Associates, LLC became part of Miller Kaplan.

solicit claims from entities that may have suffered harm as a result of the misconduct described in the Complaint, and to work with the SEC staff and SLCG to review the claims and to draft and implement a plan of distribution.⁵ The Court granted the SEC’s motion, appointing RCB Fund Services LLC as the distribution agent (the “Distribution Agent”) and discharging the previously appointed Fund Administrator.⁶

C. The Fair Fund

The Fair Fund holds over \$23 million, comprised of money paid to the SEC in the captioned matter; money paid to the SEC in the related case, *SEC v. Abdullah*, 10-cv-4957 (LAK) (S.D.N.Y.);⁷ and accrued interest. The Fair Fund currently resides in an interest-bearing account at the U.S. Treasury.

D. The Distribution Plan and the Completion of the Claims Process

By Order entered May 31, 2023, this Court approved the Plan.⁸ As described in the SEC’s Memorandum in Support of Motion for and Order Approving a Distribution Plan and the accompanying declaration (the “Plan Approval Papers”),⁹ the Distribution Agent largely completed the claims process prior to submitting the Plan for approval. *See also*, Exhibit 1, ¶ 4 (Declaration of the Distribution Agent in Support of Motion for an Order to Disburse).

The Distribution Agent has since completed the remaining steps of the Plan necessary to the issuance of Distribution Payments.¹⁰ Specifically, pursuant to ¶ 38 of the Plan, the Distribution Agent engaged EisnerAmper, an independent third-party accounting firm, to

⁵ ECF No. 271.

⁶ ECF No. 273 (August 17, 2020).

⁷ See *SEC v. Abdullah*, 10-cv-4957 (LAK) (S.D.N.Y.), Docket Entry 15 (Order Establishing Fair Fund and Authorizing Distribution of the Fair Fund through a Related Action).

⁸ ECF No. 276.

⁹ ECF Nos. 274-1 and 2.

¹⁰ Capitalized terms not defined in this declaration are used as defined in the Plan.

perform a set of agreed-upon procedures and review a statistically significant sample of claims to ensure that the Distribution Agent had accurately processed the claims and applied the Plan Methodology. The review process commenced on July 24, 2023, and on September 21, 2023, the Distribution Agent provided to the SEC staff the final report. Exhibit 1, ¶ 5. The Third-Party Review resulted in a slight modification of the Eligible Loss Amount as originally determined for one of the eligible claims. *Id.*

In accordance with paragraph 40 of the Plan, the Distribution Agent issued Determination Notices to all Claimants. Exhibit 1, ¶ 6. In the Determination Notice, the Distribution Agent informed the two Claimants with eligible loss amounts (the “Payees”) of their Eligible Loss Amounts, and the Payees have each since informed the Distribution Agent that they have no objection to the amount set forth in the Declaration Notice. *Id.*

III. The Distribution and the Requested Relief

As of July 31, 2023, the Fair Fund held \$23,380,549.57. Exhibit 1, ¶ 7.

In accordance with paragraph 43 of the Plan, the Distribution Agent, in conjunction with the Tax Administrator, has established a Reserve of \$443,000, resulting in a Net Available Fair Fund of \$22,937,549.57. Exhibit 1, ¶¶ 8-9.

After applying the \$10 *de minimis* amount, the Distribution Agent has determined two Claims, with Eligible Loss Amounts of (approximately) \$4.7 million and \$2.1 billion, to be eligible for a distribution from the Fair Fund (the “Payees”). Exhibit 1, ¶ 10. In accordance with paragraph 45 of the Plan, the Distribution Agent has provided the Payee List to the SEC staff, including the name, address, calculated Eligible Loss Amount, withholding (if any), and the amount of the Distribution Payment for each Payee. Exhibit 1, ¶ 11. The Distribution Agent further represents that the Payee List: (a) was compiled in accordance with the approved Plan;

(b) is accurate as to Payees' names, addresses, Eligible Loss Amount, tax withholding amount (if applicable), and amounts of their Distribution Payment; (c) includes the number of Payees compensated; (d) includes the percentage of the Payee's Eligible Loss Amount being compensated by the disbursement from the Fair Fund, and if applicable, the total percentage including all prior disbursements; (e) includes the total amount of funds to be disbursed; and (f) provides all information necessary to make a payment to each Payee. *Id.*

Pursuant to the Payee List, the two Payees will receive an aggregate payment of \$22,937,549.57; there is no tax withholding. Exhibit 1, ¶ 12. Because the aggregate Eligible Loss Amounts exceed the Net Available Fair Fund, each Payee will receive a Distribution Payment equal to the Net Available Fair Fund multiplied by the ratio of their Eligible Loss Amount to the aggregate Eligible Loss Amounts of all Eligible Claimants. *Id.* The Distribution Payments will result in each Payee receiving 1.09 % of their Eligible Loss Amounts. *Id.*

In accordance with the Plan, upon the issuance of an Order to Disburse, the SEC shall cause Distribution Payments to be issued by the U.S. Treasury, and the Distribution Agent will promptly send out a communication to Payees regarding the Distribution Payment. See Plan, ¶¶ 46, 48; Exhibit 1, ¶ 13. After the issuance of Distribution Payments, the Distribution Agent will work with the SEC to determine if each Payee has received and/or negotiated the Distribution Payment and will make reasonable efforts to contact any Payee who fails to negotiate and/or receive their Distribution Payment. Exhibit 1, ¶ 14.

Upon completion of the distribution and any subsequent distribution(s) in accordance with the Plan, the SEC will move the Court for an Order, *inter alia*, approving a final accounting, discharging the Distribution Agent, and Terminating the Fair Fund.

IV. Conclusion

For all of the foregoing reasons, the SEC respectfully requests that the Court issue an Order substantially in the form accompanying the Motion and grant such other relief as the Court deems appropriate.

Dated: September 28, 2023

Respectfully submitted,

s/Catherine E. Pappas
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Exchange Commission*

Exhibit 1 (Declaration)

Exhibit 1 to Memorandum

(Declaration of the Distribution Agent in Support of Motion for an Order to Disburse)

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Declaration of the
Distribution Agent in Support
of Motion for an Order to
Disburse

I, Brendan J. Manfreda, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

1. I am Managing Director for RCB Fund Services LLC (“RFS” or “Distribution Agent”), the Distribution Agent in the captioned action, appointed by the Court by Order entered August 17, 2020. I submit this Declaration in support of the Securities and Exchange Commission's (the "SEC") Motion for an Order to Disburse collected funds in accordance with the Court-approved distribution plan (the “Plan”).

2. The following statements are based on my personal knowledge and information provided to me by other experienced RFS employees working under my supervision. If called to testify regarding the facts in this declaration, I could do so competently.

3. Upon the SEC’s motion, by Order entered May 31, 2023, this Court entered an Order approving a Distribution Plan in this action (“Order Approving Plan”). ECF No. 276.

4. Prior to the entry of the Order Approving Plan, RFS largely completed the claims process, as further set forth in my prior declaration, made in support of the SEC’s Motion Approving a Plan of Distribution. ECF Nos. 274, 274-1 (Motion and supporting memorandum), 274-2 (prior declaration). As set forth below, since the entry of the Order

Approving Plan, RFS has completed the remaining steps in the Plan necessary to the issuance of Distribution Payments.¹

5. Pursuant to paragraph 38 of the Plan, RFS engaged EisnerAmper, an independent third-party accounting firm, to perform a set of agreed-upon procedures, review a statistically significant sample of claims, and ensure that RFS had accurately processed the claims and applied the Plan of Allocation. The review process commenced on July 24, 2023, and on September 21, 2023, RFS provided to the SEC staff the final report. The Third-Party Review resulted in a slight modification of the eligible loss amount as originally determined for one of the eligible claims.

6. In accordance with paragraph 39 of the Plan, RFS issued Determination Notices to all Claimants. The two Claimants that have eligible losses have informed me that they have no objection to the calculated Eligible Loss Amount depicted in their Determination Notices.

7. As of July 31, 2023, the Fair Fund held \$23,380,549.57, comprised of approximately \$22 million collected in the captioned case; an additional, approximately, \$307,320 from the related action, *SEC v. Abdullah*, Civ. Act. No. 10-cv-4967 (LAK) (S.D.N.Y.); and accrued interest.

8. In accordance with paragraph 43 of the Plan, RFS, in conjunction with the Tax Administrator, has established a Reserve of \$443,000.

9. As of July 31, 2023, the Net Available Fair Fund totals \$22,937,549.57 after offsetting the Reserve.

10. After applying the \$10 *de minimis* amount, RFS has determined two Claims, with Eligible Loss Amounts of (approximately) \$4.7 million and \$2.1 billion, to be eligible for a distribution from the Fair Fund (the "Payees").

11. In accordance with paragraph 45 of the Plan, RFS has provided to the SEC staff the Payee List, including the name, address, calculated Eligible Loss Amount, tax withholding amount (if any), and the amount of the Distribution Payment for each Payee. RFS further represents that the Payee List (a) was compiled in accordance with the approved Plan; (b) is accurate as to all information therein, including Payees' names, addresses, Eligible Loss Amount, tax withholding amount (if applicable), and amounts of their Distribution Payment; (c) includes the number of Payees compensated; (d) includes the percentage of the Payee's Eligible Loss Amount being compensated by the disbursement from the Fair Fund, and if applicable, the total percentage including all prior disbursements; (e) includes the total amount of funds to be disbursed; and (f) provides all information necessary to make a payment to each Payee.

12. Pursuant to the Payee List, the Payees will receive an aggregate payment of \$22,937,549.57. According to the Tax Administrator, no tax withholding is required. Because the aggregate Eligible Loss Amounts exceed the Net Available Fair Fund, each

¹Capitalized terms not defined in this declaration are used as defined in the Plan.

Payee will receive a Distribution Payment equal to the Net Available Fair Fund multiplied by the ratio of their Eligible Loss Amount to the aggregate Eligible Loss Amounts of all Eligible Claimants. The Distribution Payments will result in each Payee receiving 1.09% of their Eligible Loss Amounts.

13. Upon issuance of an Order to Disburse, RFS will promptly send out a communication to Payees regarding the Distribution Payment, as further described in paragraph 48 of the Plan.

14. After the issuance of Distribution Payments, RFS will work with the SEC to determine if each Payee has received and/or negotiated the Distribution Payment and will make reasonable efforts to contact Payees who have failed to negotiate and/or receive their Distribution Payment.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 28, 2023



Brendan J. Manfreda
Managing Director
RCB Fund Services LLC