

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,**

**Relief Defendants.**

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

**Memorandum in Support of  
Motion for an Order  
Appointing a Distribution  
Agent, Discharging the Fund  
Administrator, and Related  
Relief**

**I. Introduction**

Plaintiff, the Securities and Exchange Commission (the “SEC”), respectfully submits this memorandum in support of its motion for an Order appointing RCB Fund Services LLC (“RCB”), a full-service distribution administration firm, as Distribution Agent; discharging the previously appointed Fund Administrator as no longer necessary; and authorizing the SEC staff to approve and direct the payment of the fees and expenses of RCB from the Fair Fund without further Court Order (the “Motion”).

Securities Litigation and Consulting Group, Inc. (“SLCG”), the economic expert retained by the SEC to assist with the development of a methodology by which to distribute the Fair Fund, has completed an initial analysis and determined, among other things, that a claims process will be necessary to identify all potentially harmed investors. Because the administration

of a claims process exceeds the expertise and resources of the Fund Administrator, who is an SEC employee, the SEC requests the appointment of RCB as Distribution Agent. The SEC, in consultation with RCB, has further determined that the immediate development of a distribution plan, including a claims process, would be premature insofar as the distribution methodology will be enlightened by the identification of those who claim an interest in the Fair Fund.

Accordingly, the proposed Order appointing RCB includes a provision by which RCB will work with the SEC to provide notice to investors who may be eligible for a recovery from the Fair Fund with details regarding the factors that will be considered in developing a plan of eligibility and soliciting claims. The Distribution Agent will then, among other things, assist the SEC in drafting a distribution plan for submission to the Court for approval, work with SLCG to determine distribution payments, and administer a Court-approved distribution plan. The SEC further requests the discharge of the Fund Administrator, insofar as the Distribution Agent will take over the administration of the Fair Fund; and authority to approve and direct the payment of the fees and expenses of RCB from the Fair Fund without further Court Order.

## **II. Background**

### **A. The Civil Action**

By Complaint filed on June 21, 2010, amended on June 30, 2011,<sup>1</sup> 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 repeated violations of the federal securities laws. At relevant times, ICP was the asset manager

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<sup>1</sup> ECF Nos. 1, 54.

of four multi-billion-dollar collateralized debt obligations (the “Triaxx CDOs”).<sup>2</sup> According to the Complaint, beginning in 2007, as the mortgage markets deteriorated, the Defendants engaged in 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 alleged that many of the improper transactions were done to favor the Triaxx Funding High Grade I, Ltd. CDO over the other Triaxx CDOs. The SEC further alleged that, in March 2010, Priore transferred assets into trusts that he had created during the SEC’s investigations and the SEC named, as relief defendants, the trustees of those trusts. The SEC charged the Defendants with, among other things, violations of the anti-fraud provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940

The litigation has since been resolved. By stipulation entered on September 6, 2012, the SEC dismissed its fraudulent conveyance claims (Counts X-XV of the Amended Complaint), thereby resolving the charges with respect to the relief defendants. By final judgment entered by consent on September 12, 2012, against the Defendants (the “Final Judgment”),<sup>3</sup> the Court ordered, in relevant part, ICP Holdco and ICP, jointly and severally, to pay disgorgement of \$13,916,005 and prejudgment interest of \$3,709,028, and ICP to pay a civil penalty of \$650,000; ICPS to pay disgorgement of \$1,637,581, prejudgment interest of \$301,893, and a civil penalty of \$1,939,474; and Priore to pay disgorgement of \$797,337, prejudgment interest of \$215,045, and a civil penalty of \$487,618 pursuant to a payment schedule. The Final Judgment directs the SEC to hold collections, together with any interest or income earned thereon, pending further

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<sup>2</sup> Triaxx Prime CDO 2006-1, Ltd.; Triaxx Prime CDO 2006-2, Ltd.; Triaxx Prime CDO 2007-1, Ltd.; and Triaxx Funding High Grade I, Ltd.

<sup>3</sup> ECF No. 226.

Court order, and permits the SEC to propose a plan to distribute the funds subject to the Court's approval.

**B. The Tax Administrator, Fund Administrator, SLCG, and the Fair Fund**

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"), and appointed Miller Kaplan Arase LLP ("Miller Kaplan"), as the tax administrator for the Fair Fund.<sup>4</sup> The Court also appointed Nichola L. Timmons, an SEC employee, as fund administrator for the Fair Fund (the "Fund Administrator"), directing her to develop a proposed Distribution Plan with the assistance of an expert, as necessary.<sup>5</sup> The Fund Administrator, on behalf of the SEC, retained SLCG as an expert to assist with the development of methodology by which to identify harmed investors and distribute the Fair Fund.<sup>6</sup>

The Fair Fund currently holds over \$22 million and resides in an interest-bearing account at the U.S. Treasury's Bureau of Fiscal Service (the "BFS Account"). Accrued interest and any additional collections will be added to the Fair Fund.

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<sup>4</sup> ECF No. 260; ECF No. 254 (proposed order subsequently approved by endorsement). The Order, comprised of an endorsement at the top of the first page of the filed Notice of Motion, references both Damasco & Associates LLP ("Damasco") and Miller Kaplan. As of October 1, 2016, Damasco became part of Miller Kaplan.

<sup>5</sup> *Id.*

<sup>6</sup> By Order entered July 5, 2017, the Court authorized the SEC to pay future tax obligations, fees, and expenses of the Tax Administrator and the SLCG from the Fair Fund without further Court Order ECF No. 265 (Docket entry only, no attached Order), *see* ECF No. 261-1 for the approved order.

**C. SLCG has Determined that a Claims Process is Necessary to Identify Harmed Investors.**

SLCG has completed an initial analysis and has determined that Triaxx CDO investors were harmed when the cash flows they received were less than the cash flows they would have received, or they spent more to purchase the notes than they would have, if the transactions with related parties had been executed at market prices. SLCG has further concluded that the negative effect on investors' cash flows began in September 2007 and continued thereafter, through the present. A notice and claims process will be necessary to identify all potentially harmed investors from September 2007 through the present.

**III. Discussion of the Relief Requested**

The SEC's initial assessment of this case was that a claims process would not be necessary to identify harmed investors; that, rather, records obtained through the investigation would be sufficient to identify the universe of harmed investors. It was on this basis that the SEC sought to reduce expenses by requesting the appointment of an SEC employee as Fund Administrator. However, SLCG's finding that harm may span a thirteen-year period will require a full claims process to determine the affected investors. Such a claims process, which will require solicitations of brokers and/or other third parties, exceeds the expertise or resources of the Fund Administrator, an SEC employee. Accordingly, the SEC now seeks the appointment of RCB as Distribution Agent to assist in developing and overseeing a claims process and to take over the administration of the Fair Fund. The SEC further seeks an Order discharging the previously appointed Fund Administrator and authorizing the SEC staff to approve and direct the payment of the fees and expenses of RCB from the Fair Fund without further Court Order.

**A. The Court Should Appoint RCB as Distribution Agent in this Matter.**

The appointed distribution agent will, among other things, work with the SEC and SLCG to: provide notice to investors who may be eligible for a recovery from the Fair Fund; administer a claims process subject to independent, third-party review; establish and maintain a website dedicated to the Fair Fund through which investors can access important updates, documents, and upload claims information; work with the SEC staff to finalize a plan of distribution for approval by the Court; work with SLCG to quantify losses and calculate distribution amounts pursuant to a Court-approved plan of distribution and distribute the same; respond to investor and distribution related inquiries; and work with the appointed tax administrator to ensure tax reporting compliance.

RCB is a member of a pool of administrators approved by the SEC to be recommended to courts in civil proceedings. It has an agreement with the SEC in which it has agreed, if selected as the Distribution Agent, to be bound by the terms of the distribution cost proposal that it submitted to the SEC staff in connection with this matter. The SEC's recommendation of RCB is based on a process in which the SEC staff solicited, reviewed, and analyzed distribution cost proposals from prospective distribution agents, including a pricing schedule that will allow the SEC staff to monitor invoices and the costs of administering the distribution. RCB has represented that it does not have any conflicts of interest that would keep it from fully and fairly exercising its duties as the Distribution Agent for the Fair Fund. If appointed by the Court, RCB will take affirmative steps to ensure that any entities or individuals engaged by RCB also have no conflicts of interest.

The SEC knows from its experience with RCB that RCB is qualified to perform all functions necessary to the administration of the distribution in this action. RCB has recent and

significant experience in distributing funds to compensate holders of collateralized debt obligations and administering a claims process such as that contemplated here. It further has years of experience in implementing distribution plans, defining eligibility and the measure of damages, collecting and validating information from claimants, remitting payments, and handling all related audit, review and reporting processes. It is a full-service distribution administration firm, capable of advanced investor location and providing investor support services with both automated and live toll-free telephone support and case-specific websites.

With respect to reporting, RCB will file, or provide to the SEC for filing with the Court, a quarterly status report within forty-five (45) days of Court approval of a distribution plan, and will provide additional reports and quarterly account statements within twenty (20) days after the end of every quarter thereafter. Once the Fair Fund has been transferred to an escrow account, RCB will include with its quarterly reports a quarterly accounting report in a format to be provided by the SEC. Upon completing its duties as distribution agent, RCB, working with the appointed Tax Administrator, will prepare a final report and final accounting for filing with the Court.

Finally, if appointed, RCB may be removed *sua sponte* by the Court or upon motion of the SEC and replaced with a successor. Under the proposed Order, in the event RCB decides to resign as distribution agent, it must first give written notice to the Court and to the SEC's counsel of such intention, and the resignation, if permitted, will not be effective until the Court appoints a successor.

**B. The Court Should Discharge the Fund Administrator as Unnecessary Upon the Appointment of RCB.**

The Fund Administrator has served her function, retaining and working with SLCG to complete its initial analysis. In the absence of a Distribution Agent, the Fund Administrator

typically would continue to administer the distribution. However, upon the appointment of a Distribution Agent, the SEC staff will work with RCB to complete a claims process and distribution plan to propose to the Court; and the execution of an approved plan, as well as the administration of the Fair Fund, will then be left to RCB. Accordingly, the Fund Administrator no longer has an identifiable function and the SEC respectfully requests that she be discharged.

**C. The Court Should Authorize the SEC Staff to Direct Payment of Administrative Fees and Expenses without Further Court Order.**

In order to ensure timely payments of RCB's fees and expenses of RCB, the SEC further requests that SEC staff be authorized to approve and arrange payment of all of RCB's administrative fees and expenses from the Fair Fund without further Court approval. By way of mechanics, RCB will provide invoices for review and approval by the SEC, which shall include supporting documentation to justify the expenses, or services rendered. Upon review and comparison with price commitments made by RCB to the SEC, the SEC will, as appropriate, authorize payment from the Fair Fund. All such expenditures will be reported to this Court in the final accounting of the Fair Fund once any Court-authorized distribution is complete.



**IV. Conclusion**

For all of the foregoing reasons, the SEC respectfully requests that the Court approve the Motion and grant such other relief as the Court deems appropriate.

Dated: August 7, 2020

Respectfully submitted,

s/ Catherine E. Pappas  
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**CERTIFICATE OF SERVICE**

I hereby certify that, on August 7, 2020, I caused a copy of the foregoing document to be filed with the Court's CM/ECF system, which will automatically send a copy of the document to all counsel of record.

s/ Catherine E. Pappas  
Catherine E. Pappas