



(“Order”)<sup>2</sup> against the Respondents. The Order found that the Respondents willfully violated Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 when they recommended and sold ABCP to Customers without obtaining sufficient information and understanding about the nature and risks of the ABCP. According to the Order, Respondents did not review the private placement memoranda for the ABCP and the extensive risk disclosures in those documents. As a result, Respondents failed to: (a) have a reasonable basis for their recommendations, and (b) in connection with their recommendations, disclose to Customers the risks associated with the ABCP, including the nature and volatility of the ABCP’s portfolio assets.

3. The Order created a Fair Fund pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, as amended, for all of the monies paid pursuant to the Order (the “Fair Fund”). The Order also provided that any additional funds collected through or as the result of related actions may be ordered to be aggregated into the Fair Fund, and distributed pursuant to the Plan. Any such order would necessarily effect the Plan’s calculation of disbursement amounts.

4. Pursuant to the Order, Wells Fargo paid disgorgement of \$65,000 (representing its total commission in 2007 for the sale of ABCP issued by the SIVs), prejudgment interest of \$16,571.96, and a civil money penalty of \$6,500,000, and McMurtry paid a civil money penalty in the amount of \$25,000. Currently, the Fair Fund is comprised of the combined total of \$6,606,571.96 paid by the Respondents.

#### **B. Jurisdiction and Control of the Fair Fund**

5. Pursuant to the Order, the Fair Fund is currently invested with the United States Treasury’s Bureau of the Fiscal Service (“BFS”) in an interest-bearing account and is subject to the control of the Commission.

6. The Fair 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. The Plan is approved by the Commission, and the Commission retains jurisdiction over the implementation of the Plan.

### **III. DEFINED TERMS**

8. “Aggregate Out-of-Pocket Loss Amount” means the sum of all Customers’ Out-of-Pocket Loss Amounts, as defined below.

9. “Claim Package” means a package sent by the Fund Administrator to Customer Recipients consisting of a copy of the Plan that is approved by the Commission, a claim form, requests for documentation described in paragraphs 32 and 33 below, and instructions for filing a claim.

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<sup>2</sup> Securities Act Rel. No. 9349 (Aug. 14, 2012).

10. “Customer Recipient” means the ten (10) Customers who purchased ABCP from the Respondents during the Relevant Period. A Customer Recipient may be a Customer’s successor, heir, designee, or assignee. A Customer Recipient in no event will include the Fund Administrator, Respondents, or any of their affiliates, assignees, designees, creditors, heirs, distributees, controlled entities, and/or immediate family members.

11. “Days” means calendar days.

12. “Disbursement” means a payment made to a Customer Recipient as approved by the Commission.

13. “Net Fair Fund” means the Fair Fund, plus any interest earned thereon, minus all taxes and BFS fees paid by the Fair Fund.

14. “Out-of-Pocket Loss Amount” means the sum of a Customer Recipient’s total Principal Investment Amount minus the Customer Recipient’s Prior Recovery Amount.

15. “Principal Investment Amount” is defined as the principal dollar amount of ABCP purchased by a Customer Recipient through the Respondents during the Relevant Period.

16. “Prior Recovery Amount” means the cash value of all payments:

- (a) received by, or offered to, a Customer Recipient as part of the liquidation of the portfolio assets of one or more SIV, whether in the form of:
  - (i) cash payments relating to the SIVs liquidations (“Option 1”);
  - (ii) for a Customer Recipient that elected to receive an interest in a new investment vehicle created to hold the underlying assets that had previously served as collateral for the SIV(s), entitling the holder to receive any periodic payments from the underlying assets, the dollar amount of the cash payments that such Customer Recipient *would have received* if they had chosen Option 1 at the time of the liquidation (“Option 2”);<sup>3</sup> or
  - (iii) for a Customer Recipient that had investments in more than one SIV, and selected both Options 1 and 2 as to different SIVs, the

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<sup>3</sup> The Fund Administrator has determined that the dollar value of cash payments that a Customer Recipient could have elected to receive at the time of liquidation is a reasonable proxy for the values that the market was assigning to the securities at the time. The Fund Administrator concluded that the performance (positive or negative) of a Customer Recipient’s interest in a new investment vehicle subsequent to a Customer Recipient’s independent investment decision to receive such consideration in a liquidation should not affect the methodology for calculating a Customer Recipient’s net losses for the purposes of determining eligibility to receive a Disbursement.

payments described in Option 1 and Option 2 should be added together; or

- (b) received by a Customer Recipient from Wells Fargo in settlement of any claims or related private litigation with respect to such Customer Recipient's defaulted ABCP investment.

#### **IV. ADMINISTRATORS**

##### **A. Fund Administrator**

17. The Order required Wells Fargo to retain the services of a fund administrator “not unacceptable” to the Commission staff. The Order required the fund administrator to identify the Wells Fargo Customers that held positions in the three (3) SIV-issued ABCP programs at the time of their respective defaults, evaluate such Customers' claim(s), propose a plan subject to the approval of the Commission staff, and effectuate the plan to distribute the Fair Fund.

18. The Commission has appointed Michael J. Liccar and Company LLC as the fund administrator (“Fund Administrator”).<sup>4</sup>

19. The Fund Administrator will provide customer support and communications services prior to and during the distribution. These services will include providing the Fund Administrator's contact information for questions relating to the Fair Fund and responding to inquiries about the Fair Fund.

20. The Fund Administrator and/or each of its designees, agents and assistants, will be entitled to rely on any orders issued in these proceedings by the Commission, the Office of the Secretary by delegated authority, or an Administrative Law Judge, and may not be held liable to any person other than the Commission or the Fair Fund for any act or omission in the course of administering the Fair Fund, except upon a finding that such act or omission was caused by such gross negligence, bad faith, willful misconduct, reckless disregard of duty, or reckless failure to comply with the terms of the Plan. This paragraph is an expression of the Fund Administrator's standard of care and is not intended as, nor should it be deemed to be, a representation to, or an indemnification of, the Fund Administrator or its designees, agents, and assistants by the Commission or the Fair Fund, nor should this paragraph preclude the Commission or the Fair Fund from seeking redress from the Fund Administrator.

##### **B. Bond Requirement**

21. The Fund Administrator is not a Commission employee, so Rule 1105(c) of the Commission's Rules on Fair Fund and Disgorgement Plans (“Rules”)<sup>5</sup> requires that the Fund Administrator, “obtain a bond in the manner prescribed in 11 U.S.C § 332, in an amount to be

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<sup>4</sup> See Order Appointing Fund Administrator and Approving Fund Administrator Bond Amount, Exchange Act Rel. No. 69917 (July 2, 2013).

<sup>5</sup> 17 C.F.R. § 201.1105(c).

approved by the Commission.” The Commission ordered that the Fund Administrator obtain a bond in the amount of \$6,606,571.96.

### **C. Tax Administrator**

22. The Commission has appointed Damasco & Associates LLP<sup>6</sup> as the tax administrator for the Fair Fund (the “Tax Administrator”).<sup>7</sup> The Fund Administrator will cooperate with the Tax Administrator in obtaining and providing information necessary for income tax compliance and any other work ordered to the Tax Administrator by the Commission.

23. The Tax Administrator will be entitled to reasonable fees and expenses.

24. The Tax Administrator will provide tax-related services for the Fair Fund.

### **D. Payment of Taxes, Fees and Expenses**

25. Wells Fargo has agreed to pay all reasonable costs and expenses of administering the Fair Fund, including fees associated with the bond premium and all reasonable fees, costs, and expenses incurred by the Fund Administrator and the Tax Administrator, as well as all reasonable fees, costs and expenses of any persons engaged to assist the Fund Administrator and Tax Administrator.

26. BFS fees and all federal, state and local taxes will be paid by the Fair Fund.

## **V. METHODOLOGY**

### **A. Customer Recipients Potentially Eligible for a Disbursement**

27. *Customer Recipients that previously elected Option 1 (cash payments).* Following the liquidation of the SIVs, certain Customer Recipients elected to receive one-time cash payments at a discount to the principal amounts of their original investments in the ABCP. Customer Recipients whose cash payments were less than their principal amounts invested may have realized losses.

28. *Customer Recipients that previously elected Option 2.* Certain other Customer Recipients elected to receive – in lieu of cash payments – an interest in a new investment vehicle created to hold the underlying assets that had previously served as collateral for the SIV(s), entitling the holder to receive any periodic payments from the underlying assets. If these Customer Recipients had investments in more than one SIV they also may have received one or more cash distributions from the liquidation trustees.

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<sup>6</sup> Effective October 1, 2016, Damasco & Associates LLP changed its name to Miller Kaplan Arase LLP.

<sup>7</sup> See Order Appointing Tax Administrator, Exchange Act Rel. No. 67829 (Sept. 11, 2012).

## **B. Calculating Customer Recipients' Disbursement Amounts**

29. The Fund Administrator will determine a Disbursement amount for each Customer Recipient by taking the following steps:

- (a) First, determine an Out-of-Pocket Loss Amount for each Customer Recipient by subtracting the Customer Recipient's Prior Recovery Amount from the Customer Recipient's Principal Investment Amount. Those Customer Recipients with a Prior Recovery Amount that equals or exceeds the Customer Recipient's Principal Investment Amount will not receive a Disbursement.
- (b) Second, calculate the Aggregate Out-of-Pocket Loss Amount by adding together all of the Customer Recipients' respective Out-of-Pocket Loss Amounts.
- (c) Third, calculate the percentage that each Customer Recipient will receive of the Net Fair Fund by dividing each Customer Recipient's Out-of-Pocket Loss Amount (the numerator) by the Aggregate Out-of-Pocket Loss Amount (the denominator).
- (d) Fourth, multiply the Net Fair Fund amount by the percentage for each Customer Recipient to determine each Customer Recipient's Disbursement amount. If the Aggregate Out-of-Pocket Loss Amount is less than the amount available for distribution in the Net Fair Fund, all excess funds will be transferred to the United States Treasury.

## **VI. FAIR FUND ADMINISTRATION**

### **A. Claims Process**

30. The Commission staff will provide the Fund Administrator with the most recent contact information for each Customer Recipient that the Fund Administrator identified pursuant to the Order, where available.

31. The Fund Administrator will prepare the Claim Package and submit the Claim Package to the Commission staff for review and approval.

32. Each Claim Package will have a claim form that contains any available transactional data for a Customer Recipient's defaulted ABCP investment, including the Customer Recipient's Principal Investment Amount. A claim form will require each Customer Recipient to provide complete and accurate information regarding the Customer's Principal Investment Amount and/or Prior Recovery Amount, and to return the signed claim form, along with supporting documentation, by the deadline set forth in the Claim Package in order for the Customer Recipient to be eligible to receive a Disbursement. For example, if the transactional data provided by the Commission staff to the Fund Administrator provides a Customer Recipient's Principal Investment Amount but not a Prior Recovery Amount, the claim form will

inform the Customer Recipient that it must provide information about the Customer's Prior Recovery Amount, as defined in paragraph 16, in order for the Customer Recipient to be eligible to receive a Disbursement.

33. The Fund Administrator will require each Customer Recipient to support its claim form with such documentary evidence as the Fund Administrator deems necessary and appropriate. An authorized representative of each Customer Recipient will be required to verify its claim form under penalty of perjury. The Fund Administrator will review all claim forms and associated documentation, evaluate each submission for completeness, and determine each Customer Recipient's eligibility to receive a Disbursement.

34. The Fund Administrator will obtain information regarding Customer Recipient's previous cash payments received (Option 1) or what they would have received if they had chosen Option 1 at the time of the liquidation (Option 2) from each Customer Recipient including, but not limited to, all documentation showing cash payments that were received or that would have been received as part of the SIVs' liquidations. A Customer Recipient that cannot provide the Fund Administrator with specific information and supporting documentation relating to the cash payments it received and/or would have received as part of the SIVs' liquidations will become ineligible for a Disbursement. The Fund Administrator will also obtain information from each Customer Recipient regarding any amounts received from Wells Fargo in settlement of related private litigation.

35. Within sixty (60) days after the Plan is approved, the Fund Administrator will send the Claim Package to each Customer Recipient by Certified United States Mail with return receipt.

36. If a Customer Recipient does not respond within thirty (30) days from the mailing of the Claim Package, the Fund Administrator will send a second notice by Certified United States Mail with return receipt, notifying the Customer Recipient of its eligibility and directing the Customer Recipient to contact the Fund Administrator at the phone number provided by the Fund Administrator. If a Customer Recipient does not respond to the second notice within twenty-one (21) days of the mailing of the second notice, the Fund Administrator will attempt to contact the Customer Recipient telephonically twice (2) to notify it of its eligibility and that the Fund Administrator is making its final attempts at notification. Failure to respond to the Fund Administrator's final notification will result in a written notice to a Customer Recipient that it is no longer eligible to receive a Disbursement. The Fund Administrator will keep records of each contact attempt for a Customer Recipient and each response received. These records will be provided to the Commission sixty (60) days before any distribution from the Net Fair Fund.

37. Prior to the distribution, the Fund Administrator will notify, in writing, each Customer Recipient of its Disbursement amount.

38. All Disbursements will be accompanied by a communication ("Distribution Letter") that includes, as appropriate: (a) a statement characterizing the Disbursement; (b) a description of tax information reporting and other related tax matters, as necessary; (c) contact information for the Fund Administrator to be used in the event of any questions regarding the

Disbursement; and, (d) a statement that all checks will be void after one (1) year. The Fund Administrator's correspondences relating to Disbursements will be submitted to Commission staff for review and approval.

39. All disputes must be submitted in writing with any supporting documentation to the Fund Administrator at the address and/or email address provided by the Fund Administrator. Customer Recipients' disputes will be limited solely to Disbursement amounts. Customer Recipients disputing Disbursement amounts must submit disputes within thirty (30) days of the date the Fund Administrator notifies in writing a Customer Recipient of its Disbursement amount. Following an investigation of the dispute, including a review of the written dispute and any supporting documentation, within twenty-one (21) days of receipt of the written dispute, the Fund Administrator will notify the Customer Recipient, or individual or entity submitting the dispute, of the Fund Administrator's resolution of the dispute. The Fund Administrator's resolution of the dispute will be final. This procedure shall be set forth in the Fund Administrator's letter described in paragraph 37 above.

40. Individuals or entities who believe that they are eligible for a Disbursement under the Plan, and were improperly excluded, may also submit a dispute. All such disputes must be submitted in writing with any supporting documentation to the Fund Administrator at the address and/or email address provided by the Fund Administrator. Individuals or entities disputing their exclusions from the Plan must submit disputes within thirty (30) days of the date that the Fund Administrator sends the Claim Packages pursuant to paragraph 35 above. Following an investigation of the dispute, including a review of the written dispute and any supporting documentation, within twenty-one (21) days of receipt of the written dispute, the Fund Administrator will notify the individual or entity submitting the dispute of the Fund Administrator's resolution of the dispute.

## **B. Disbursements**

41. Disbursements to Customer Recipients will be implemented through the BFS, which will mail a check or send an ACH transfer to each Customer Recipient. The Fund Administrator will prepare a payment file in a Commission approved format and validate the payees and amounts in the file to the Commission staff. The validation will state that the payment file was compiled in accordance with the Plan and provides all information necessary for BFS to make a Disbursement via check or ACH transfer.

42. Upon receipt of a validated file, and in accordance with the requirements of Rule 1101(b)(6) of the Rules,<sup>8</sup> the Commission staff will obtain an order from the Commission to disburse the Fair Fund. Once the order to disburse is issued, the Commission staff will transmit the payment file to BFS for the distribution of funds.

43. Checks issued by BFS will state on their face that they are valid for one (1) year. Commission staff will work with BFS to identify all checks that are not cashed within the

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<sup>8</sup> 17 C.F.R. § 201.1101(b)(6).

one (1) year time period. The amount of all uncashed checks will remain in the Fair Fund, and may be distributed to other Customer Recipients.

### **C. Procedures for Rejected Disbursements**

44. Commission staff will notify the Fund Administrator of any returned items due to non-delivery, insufficient addresses, and/or other deficiencies. The Fund Administrator is responsible for researching and reconciling all errors in payee information that result in non-delivery and will submit a supplemental payment file for the returned items. The Fund Administrator is also responsible for accounting for all payments.

### **D. Residual**

45. A residual within the Fair Fund is established for any amounts remaining after all Disbursements have been made. The residual account may include, but is not limited to, funds reserved for future taxes and BFS expenses, funds from checks that have not been negotiated, or from checks that were not delivered. The residual amount may also include funds returned to the Commission or tax refunds for overpayment or for waiver of IRS penalties. All funds remaining in the residual account will be transferred to the United States Treasury after the final accounting is approved by the Commission.

### **E. Changes to Plan**

46. The Fund Administrator will take reasonable and appropriate steps to distribute the Fair Fund according to the Plan. If a change to the Plan is determined to be material, Commission approval is required prior to implementation by amending the Plan, which may be done upon the motion of any party, the Fund Administrator, or upon the Commission's own motion. Immaterial changes may be made by the Fund Administrator without Commission approval, subject to agreement by Commission staff. For good cause shown, any of the procedural dates set forth in the Plan may be extended by the Fund Administrator, with the consultation of Commission staff.

### **F. Accounting**

47. When all funds have been disbursed except for the residual described in paragraph 45 above, the Fund Administrator will submit a final accounting for the approval of the Commission prior to termination of the Fair Fund and discharge of the Fund Administrator.

48. No interim accountings will be submitted by the Fund Administrator because: (a) the funds are being held in an interest-bearing account at BFS; and (b) the Fair Fund at no point will be under the custody or control of the Fund Administrator.

### **G. Termination of the Fair Fund**

49. After all Disbursements are made, the Fund Administrator will arrange for the final payment of taxes and fees and expenses and will submit a final accounting to the Commission for approval. The Fair Fund will be eligible for termination and the Fund

Administrator eligible for discharge after all of the following have occurred: (a) a final accounting, in a standard accounting form provided by Commission staff, has been submitted by the Fund Administrator and has been approved by the Commission; (b) all taxes, fees, and expenses have been paid; and (c) any amount remaining in the Fair Fund has been received by the Commission. When the Commission has approved the final accounting, Commission staff will seek an order from the Commission to approve the termination of the Fair Fund, the transfer of any remaining residual amount to the United States Treasury, the discharge of the Fund Administrator, and the cancellation of the Fund Administrator's bond.