

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

**SECURITIES EXCHANGE ACT OF 1934**  
**Release No. 85762 / May 2, 2019**

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-16776**

**In the Matter of**

**TABERNA CAPITAL MANAGEMENT,  
LLC, MICHAEL FRALIN, AND  
RAPHAEL LICHT**

**Respondents.**

**ORDER APPROVING MODIFIED  
PLAN OF DISTRIBUTION**

**I.**

On September 2, 2015, the Commission issued an Order Instituting Administrative and Cease-And-Desist Proceedings Pursuant to Sections 4C, 15(b), and 21C of the Securities Exchange Act of 1934, Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940, Section 9(b) of the Investment Company Act of 1940, and Rule 102(e) of the Commission's Rules of Practice, Making Findings, and Imposing Remedial Sanctions and Cease-And-Desist Orders (the "Order")<sup>1</sup> against Taberna Capital Management, LLC ("Taberna"), Michael Fralin ("Fralin"), and Raphael Licht ("Licht"). The Commission determined that, between 2009 and 2012, in connection with restructuring transactions undertaken between the Taberna collateralized debt obligation clients (the "Taberna CDOs") and the issuers of the underlying obligation in Taberna CDOs' portfolios, Taberna retained certain fees ("Exchange Fees") that should have been paid to the Taberna CDOs. The Commission further determined that the retention of Exchange Fees created actual and potential conflicts of interest that Taberna failed to disclose to its clients. The Commission found that Fralin and Licht, former officers of Taberna and its parent company, respectively, participated in the misconduct.

The Commission ordered Taberna to disgorge \$13 million and pay prejudgment interest of \$2 million and a civil penalty of \$6.5 million, and Fralin and Licht to pay civil penalties of \$100,000.00 and \$75,000.00, respectively. By Order dated August 24, 2017, the Commission created a Fair Fund pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 for

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<sup>1</sup> Exchange Act Rel. No. 75814 (Sept. 2, 2015).

distribution of the monies ordered (the “Fair Fund”).<sup>2</sup> The Commission currently holds more than \$21.9 million in the Fair Fund in an interest-bearing account at the United States Treasury Department’s Bureau of the Fiscal Service.

By Order dated November 20, 2017, the Commission appointed Rust Consulting, Inc. as the fund administrator for the Fair Fund (the “Fund Administrator”) and set the administrator’s bond amount at \$21.675 million.<sup>3</sup>

On December 6, 2018, the Commission published a Notice of Proposed Plan of Distribution and Opportunity for Comment (“Notice”),<sup>4</sup> pursuant to Rule 1103 of the Commission’s Rules on Fair Fund and Disgorgement Plans (“Rules”).<sup>5</sup> The Notice advised all interested persons that they may obtain a copy of the proposed plan of distribution (“Proposed Plan”) from the Commission’s public website at <http://www.sec.gov/litigation/fairfundlist.htm> or by submitting a written request to Catherine E. Pappas, Senior Advisor, United States Securities and Exchange Commission, One Penn Center, 1617 JFK Blvd., Ste. 520, Philadelphia, PA 19103. All persons who desired to comment on the Proposed Plan could submit their comments, in writing, no later than January 7, 2019. The Commission received two (2) comments during the comment period.

After considering the comments to the Proposed Plan, the Commission staff, working with the Fund Administrator and the Expert,<sup>6</sup> has modified the Proposed Plan in response to a comment received to make clear the intent of the methodology to compensate, and not overcompensate, harmed investors (the “Modified Plan”).

After careful consideration, the Commission concludes that the Modified Plan should be approved.

## **II.**

### **A. Public Comments on the Proposed Plan**

#### **1. Comment Letter from Fortress**

Fortress Investment Group and certain of its affiliates (collectively “Fortress”), through counsel, submitted a letter dated January 4, 2019.

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<sup>2</sup> Order Establishing a Fair Fund, Exchange Act Rel. No. 81477 (Aug. 24, 2017).

<sup>3</sup> Order Appointing Fund Administrator and Setting Administrator Bond Amount, Exchange Act Rel. No. 82124 (Nov. 20, 2017).

<sup>4</sup> Exchange Act Rel. No. 84725 (Dec. 6, 2018).

<sup>5</sup> 17 C.F.R. § 201.1103.

<sup>6</sup> All capitalized terms used herein but not defined shall have the same meanings ascribed to them in the Modified Plan.

**a) Objection to Securities Omitted from the Eligible Securities List**

Fortress objects to the omission of certain securities<sup>7</sup> from the Eligible Securities List attached as Attachment A to the Proposed Plan as unfair, unreasonable, and in error.

The Commission has considered this objection and concludes that the exclusion of these securities from the distribution is not in error but rather is consistent with the methodology set forth in the Proposed Plan, which it finds fair and reasonable. Upon analysis of the quarters in which the Exchange Fees should have been paid out to each of Taberna Preferred Funding VI, Ltd., Taberna Europe CDO I, and Taberna Europe CDO II, the Expert determined that, under the respective Taberna CDO's Waterfall, the investors in the referenced securities would not have received a payment.

**b) Objection to the "Excluded Parties" Definition**

Fortress objects to the definition of Excluded Parties as potentially excluding Potential Claimants who may have acquired their rights to the Harmed Securities in arm's-length transactions with Taberna, including by means of assignment and assumption agreements or similar legal documents.

The Commission has considered this objection as it relates to Fortress<sup>8</sup> and concludes that, under the circumstances of this distribution, the definition of "Excluded Parties" should remain as set forth in the Proposed Plan. Fortress served as a collateral manager or collateral manager-designee for each of the Taberna CDOs. The Commission finds that Fortress, prior to and in connection with its management role with the Taberna CDOs, was aware of Taberna's retention of Exchange Fees and was not a victim of the misconduct alleged in the Order. Accordingly, Fortress is properly excluded from the distribution.

**2. Comment Letter from John W. Scannell, the Chief Operating Office of Hildene Capital Management, LLC ("HCM")**

HCM is a registered investment adviser. In a letter dated January 6, 2019, HCM objects to the Proposed Plan as an unfair and unreasonable distribution of funds, claiming that the current distribution will unjustly enrich certain individual senior classes to the detriment of the Taberna CDOs and other classes of junior investors, and seeking, instead, distribution to each Taberna CDO's trustees (the "Trustees") for payment to investors through the "established payment waterfalls" of each Taberna CDO.

Under the Proposed Plan, investors are being compensated in accordance with each Taberna CDO's Waterfall, through a methodology that re-runs the Waterfall forward quarter-by-quarter after injecting the withheld fees back into each CDO. Accordingly, the distribution under

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<sup>7</sup> The securities at issue are: Taberna Preferred Funding VI, Ltd. A2 87331AAD6, Taberna Preferred Funding VI, Ltd. B 87331AAE4, Taberna Europe CDO I plc A2 XS0278170765, and Taberna Europe CDO II plc A2 XS0311585672.

<sup>8</sup> The Commission received no other objections to this definition and thus only considers it as it relates to Fortress.

the Proposed Plan is consistent with the request of HCM that investors be paid through the “established payment waterfalls” of each Taberna CDO.

With respect to HCM’s concern that certain individual senior classes will be unjustly enriched through the Proposed Plan’s methodology, at the expense of junior investor classes, the Proposed Plan will be modified to make clear the intent of the Proposed Plan to compensate, but not overcompensate, Eligible Claimants. The modification, set forth in paragraph 40 of the Modified Plan, describes the steps that will be taken to ensure that, in determining the amount of each Eligible Claimant’s Distribution Payment, the Fund Administrator will consider the actual waterfall principal payments received by senior class Eligible Claimants in excess of the payments they would have received if the Exchange Fees had been properly paid into the Taberna CDOs. The modification is intended to make clear the intent of the Proposed Plan to avoid distribution windfalls and does not change the Proposed Plan’s published methodology.

## **B. Modification and Approval of the Modified Plan**

For the reasons stated above, the Commission finds that the Modified Plan, as submitted herewith, should be approved. The described modification does not change the Proposed Plan’s allocation methodology and, as a result, does not substantially modify the Proposed Plan; therefore, the Commission concludes that an additional notice and comment period is neither necessary nor required by the Rules. Under Rule 1104 of the Rules, 17 C.F.R. § 201.1104, “[i]n the discretion of the Commission, a proposed plan that is *substantially* modified prior to adoption may be republished for an additional comment period ...” (emphasis added). In determining whether a distribution plan is substantially modified, the Commission considers, among other things, whether modifications revise the plan’s methodology, in particular whether such modifications could have a negative effect on the proposed eligible recipients, and whether the modifications affect the group of persons eligible to participate in a plan. In this case, there is no “substantial” modification because the Proposed Plan retains the proposed distribution methodology and both the distribution payment amounts and the ultimate recipients remain unaffected. As a result, the Commission exercises its discretion to not republish the Modified Plan for additional comment.

## **III.**

Accordingly, it is hereby ORDERED, pursuant to Rule 1104 of the Rules,<sup>9</sup> that the Modified Plan is approved, and it shall be posted simultaneously with this Order on the Commission’s website at [www.sec.gov](http://www.sec.gov).

By the Commission.

Vanessa A. Countryman  
Acting Secretary

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<sup>9</sup> 17 C.F.R. § 201.1104.