

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19715

In the Matter of :

Fortress Investment Management, LLC :
and William M. Malloy, III :

Respondents. :

PROPOSED PLAN OF DISTRIBUTION

I. Overview

1. *Purpose.* The Division of Enforcement (“Division”) submits this proposed plan of distribution (the “Plan”) pursuant to Rule 1101 of the Commission’s Rules on Fair Fund and Disgorgement Plans (“Commission’s Rules”), 17 C.F.R. § 201.1101. As described more specifically below, the Plan provides for the distribution of the disgorgement, prejudgment interest, and civil money penalties paid by Fortress Investment Management, LLC (“Fortress”) and William M. Malloy, III (“Malloy”) (collectively, the “Respondents”) in the captioned administrative proceeding.

2. *Background.* On February 27, 2020, the Commission issued an Order Instituting Administrative and Cease-and-Desist Proceedings, Pursuant to Sections 203(e), 203(f) and 203(k) of the Investment Advisers Act of 1940 and Section 9(b) of the Investment Company Act of 1940, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (the “Order”)¹ against the Respondents. In the Order, the Commission found that from approximately January 2014 through 2016, Malloy violated the federal securities laws by failing to fully disclose all material facts to advisory clients, including the receipt of fees from Aequitas Enterprise (“Aequitas”) for consulting and business development services that included introducing prospective investors to Aequitas. Those payments created a conflict of interest that Malloy did not disclose to clients who invested in Income Opportunity Capital, LLC (“IOC”), a private fund managed and controlled by Malloy, which in turn, invested heavily in securities issued by Aequitas (the “Aequitas Securities”). Clients did receive information broadly identifying a potential conflict of interest, but it was not sufficient to allow them to provide informed consent to the actual conflict that existed. Malloy also violated the federal securities laws by allowing an investment advisory firm controlled by Malloy, to remain improperly registered with the Commission.

¹ Advisers Act Rel. No. 5452 (Feb. 27, 2020).

As a result of the conduct described in the Order, the Commission ordered the Respondents to pay a total of \$154,097 (disgorgement of \$45,040, prejudgment interest of \$9,057 and a civil penalty of \$50,000 by Fortress, and a civil penalty of \$50,000 by Malloy). The disgorgement represents management fees IOC paid to Fortress that were assessed on capital clients had invested in IOC, which in turn, invested in Aequitas Securities. In the Order, the Commission created a fair fund, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, so the civil penalties, along with the disgorgement and prejudgment interest, paid can be distributed to harmed investors (the “Fair Fund”).

The Respondents have paid in full the amounts ordered. The Fair Fund, consisting of the \$154,097 paid by the Respondents pursuant to the Order, has been deposited in an interest-bearing account at the United States Department of the Treasury’s Bureau of Fiscal Service (“BFS”). Other than potential interest income from the BFS investment, the Commission does not anticipate that the Fair Fund will receive additional funds.

This Plan provides for the distribution of the Fair Fund, plus accrued interest and earnings thereon, less the Reserve (defined below) (“Net Available Fair Fund”) to those Eligible Investors, as defined in paragraph 10 below.

3. *Jurisdiction and Control.* The assets of the Fair Fund are subject to the continuing jurisdiction and control of the Commission. The Plan is subject to approval by the Commission, and the Commission retains jurisdiction over its implementation.

II. Administration of the Plan

4. *Costs.* All costs of administering the Fair Fund, including taxes, fees and expenses of administration (“Costs”), shall be paid by the Fair Fund, first from the interest earned on the funds, and if the interest is not sufficient, from the corpus of the Fair Fund.

5. *Fund Administrator.* Noel Gittens is proposed to be the fund administrator for the Fair Fund (“Fund Administrator”). As a Commission employee, the Fund Administrator shall receive no compensation, other than his regular salary as a Commission employee, for his services in administering the Fair Fund. In accordance with Rule 1105(c) of the Commission’s Rules,² no bond is required since the Fund Administrator is a Commission employee.

The Fund Administrator will be responsible for, among other things: overseeing the administration of the Fair Fund, obtaining accurate mailing information for the Eligible Investors (as defined below), preparing accountings, cooperating with the Tax Administrator in providing the information necessary to accomplish income tax compliance, and distributing money from the Fair Fund in accordance with the Plan. The Fund Administrator may be removed at any time by order of the Commission or hearing officer.

² 17 C.F.R. § 201.1105(c).

6. *Tax Administrator.* Pursuant to the Omnibus Order Directing the Appointment of Tax Administrator in Administrative Proceedings that Establish Distribution Funds governing calendar years 2019-2021,³ the Commission appointed Miller Kaplan Arase LLP as the tax administrator (the “Tax Administrator”) for the Fair Fund.⁴ The Tax Administrator shall be compensated for all reasonable costs and expenses from the Fair Fund according to the terms of Tax Administrator’s 2019-2021 Letter Agreement with the Commission.

7. *Qualified Settlement Fund.* 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.

8. *Reserve.* A reserve of \$9,000.00 will be held back for future Costs and to accommodate any unexpected expenditures or distribution payments (the “Reserve”). After all disbursements and Costs are paid, any remaining amounts in the Reserve will become part of the Residual described in paragraph 20.

III. Plan Procedures

9. *No Claims Process.* Based on information obtained by the Commission staff during its investigation and the review and analysis of applicable records, the Commission staff has reasonably concluded that it has all records necessary to calculate harm as described in paragraph 11 below. As a result, the Fair Fund is not being distributed according to a claims-made process, so procedures for making and approving claims in accordance with Rule 1101(b)(4) of the Commission’s Rules, 17 C.F.R. § 201.1101(b)(4), are not applicable.

10. *Specification of Eligible Investors.* Investors able to receive a payment pursuant to this Plan are limited to those clients who, based on the management fees IOC paid to Fortress, were assessed and paid those fees based on their capital invested in IOC (“Eligible Investors”). The Plan’s methodology seeks to compensate Eligible Investors for their full harm suffered due to the management fees paid, including reasonable interest, along with their *pro-rata* share of their investment losses. Based on information obtained during the Commission’s investigation and in accordance with the methodology for determining harm in paragraph 11, the Commission staff has identified thirteen (13) Eligible Investors.

11. *Methodology for Determining Distribution Payments.* Using information collected by the Commission staff, the Fund Administrator will determine the amounts to be distributed to each Eligible Investor (“Distribution Payment”), as described below.

- a. With regard to the distribution for the return of management fees paid:
 - i. Determine the amount of management fees paid by each Eligible Investor (“Fees Paid”);

³ Exchange Act Rel. No. 85174 (Feb. 22, 2019).

⁴ Exchange Act Rel. No. 88597 (Apr. 8, 2020).

- ii. Calculate the reasonable interest to be paid to each Eligible Investor using the short-term Applicable Federal Rate, compounded quarterly from May 1, 2015 through August 31, 2020 (“Interest Amount”); and
 - iii. Combine each Eligible Investor’s Fees Paid and Interest Amount to determine the “Fees Paid plus Interest” amount.
 - b. With regard to the distribution based on investments losses in Aequitas Securities:
 - i. Determine each Eligible Investors “Investment Loss” as the Eligible Investor’s Investment during the investment period;
 - ii. Calculate the “Total Investment Loss” as the sum of the Investment Losses of all Eligible Investors;
 - iii. Calculate each Eligible Investor’s “Pro-Rata Share” by dividing the Eligible Investor’s Investment Loss by the Total Investment Loss;
 - iv. Calculate each Eligible Investor’s “Loss Recovery” amount by multiplying each Eligible Investor’s Pro-Rata Share by the Net Available Fair Fund minus (a)(iii) above;
 - c. Calculate the Distribution Payment for each Eligible Investor as the sum of the Fees Paid plus Interest and Loss Recovery amounts.

Accordingly, with this distribution, each Eligible Investor will receive a Distribution Payment from the Net Available Fair Fund that compensates each Eligible Investor for Fees Paid plus Interest plus a *pro-rata* distribution based on each Eligible Investor’s Investment Loss as shown in Exhibit A. For the Eligible Investors, who have lost the totality of their investment, their Loss Recovery under the Plan is approximately 3.67%. These Eligible Investors will also be getting a recovery based on their investment losses in the receivership distribution in *SEC v. Aequitas Management, LLC et. al*, Civ. Action No. 3:16-cv-00438-JR (DC.D. Oregon) (the “Aequitas Recovery”). However, Eligible Investors’ Loss Recovery under the Plan when combined with their Aequitas Recovery does not fully compensate them for their investment losses, and will not result in a windfall to the Eligible Investors.

In the view of the Commission staff and the Fund Administrator, this methodology constitutes a fair and reasonable allocation of the Fair Fund. It is anticipated that there will be one distribution to Eligible Investors, which will take place as described herein.

12. *Procedures for Locating and Notifying Certain Eligible Investors.* From information obtained by the Commission staff based on the review and analysis of applicable records from its investigation, the Fund Administrator has identified the Eligible Investors as defined in paragraph 10. The Fund Administrator will coordinate with the Tax Administrator to obtain information that is needed to accomplish the distribution in accordance with applicable tax requirements relating to the Fair Fund. To the extent possible, within sixty (60) days of the publication of the Plan for notice and comment, requests will be sent to certain Eligible Investors whose tax information is uncertain to supply IRS Forms W-8 or W-9 tax information, and such other information needed to ensure an efficient and accurate delivery of the distribution payment (the "Request"). The Eligible Investors shall respond within thirty (30) days in order to receive a Distribution Payment.

13. *Failure to Respond.* If an Eligible Investor fails to respond within thirty (30) days from the mailing of the Request, the Fund Administrator will make no fewer than two (2) attempts to contact the Eligible Investor by telephone or email. The second attempt will in no event take place more than thirty (30) days from the mailing of the Request. If an Eligible Investor fails to respond to the Fund Administrator's contact attempts as described in this paragraph, the Fund Administrator, in his discretion, may remove such Eligible Investor from the distribution and the allocated distribution amount will be added to the Residual described in paragraph 20.

14. *Undeliverable Mail.* If a Request and/or Distribution Payment is/are returned as undeliverable, the Fund Administrator will make his best practicable efforts to ascertain an Eligible Investor's correct address. If another address is obtained, the Fund Administrator will then resend the Request and/or Distribution Payment to the Eligible Investor's new address within ten (10) days of receipt of the returned mail. If the Request and/or Distribution Payment is returned again, and the Fund Administrator, despite best practicable efforts, is unable to find an Eligible Investor's correct address, the Fund Administrator, in his discretion, may remove such Eligible Investor from the distribution and the allocated distribution payment will be added to the Residual described in paragraph 20.

Any Eligible Investor who relocates or otherwise changes contact information after receipt of the Request must promptly communicate any change in address or contact information to the Fund Administrator.

15. *Distribution Timing.* The Fund Administrator will use his best efforts to start the distribution within sixty (60) days of the Plan's approval.

16. *Disbursement of the Fair Fund.* The BFS will mail checks or electronically transfer funds to each payee as instructed by the Fund Administrator. The Fund Administrator will compile the payee information and prepare a payment file to make disbursements through the BFS. Pursuant to Rule 1101(b)(6) of the Commission's Rules, 17 C.F.R. § 201.1101(b)(6), the Fund Administrator will obtain an order from the Commission to disburse the Fair Fund.

Distribution checks and/or accompanying communications will clearly indicate that the money is being distributed from a Fair Fund established to compensate investors for harm

suffered as a result of securities law violations. Simultaneously with the mailing of the distribution checks, the Fund Administrator will mail a letter to each Eligible Investor, explaining how the two components of the Distribution Payment – the Fees Paid plus Interest amount and the Loss Recovery amount, were calculated.

The Fund Administrator will work with BFS to obtain information about uncashed checks, any returned items due to non-delivery, insufficient addresses, and/or other deficiencies. The Fund Administrator is responsible for researching and reconciling errors and reissuing payments when possible. The Fund Administrator is also responsible for accounting for all payments. Checks issued by BFS will state on their face that they are valid for one (1) year. If any checks issued are not cashed within the one (1) year time period, the Fund Administrator will work with BFS to identify all uncashed checks. In the event that there are uncashed checks, the Fund Administrator will determine the extent to which, under the circumstances in this distribution, it would be appropriate and feasible to make additional efforts to contact the Eligible Investor(s). Following the conclusion of any efforts by the Fund Administrator to locate any such Eligible Investor(s), the amount of all uncashed checks will be credited to the Fair Fund, and will become part of the Residual.

17. *Amendments and Procedural Deadline Extensions.* The Fund Administrator shall take reasonable and appropriate steps to distribute the Net Available Fair Fund in accordance with the general purposes of this Plan. If there are any changes to the Plan that are determined to be material, Commission approval is required prior to implementation by amending the Plan. Immaterial changes may be made by the Fund Administrator. For good cause shown, the Fund Administrator may extend any of the procedural deadlines set forth in the Plan.

18. *Procedures for the Receipt of Additional Funds.* Should any additional funds, be received for this matter by the Commission, prior to the Commission's termination of the Fair Fund, such funds will be added to the Residual.

19. *Procedures for Disputing Distribution Payments.* After the Plan is approved, disputes will be limited to questions regarding the calculations of the Distribution Payments. Within thirty (30) days of the date of the distribution payment, the Fund Administrator must receive a written communication detailing the dispute along with any supporting documentation. The Fund Administrator will investigate the dispute, and such investigation will include a review of the written dispute as well as any supporting documentation. Within thirty (30) days of receipt of the written dispute, the Fund Administrator will notify the Eligible Investor of his resolution of the dispute, which will be final.

20. *Residual and Disposition of Undistributed Funds.* A residual account within the Fair Fund will be established for any amounts remaining after the disbursement to Eligible Investors from the Fair Fund (the "Residual"). The Residual may include, but is not limited to, the Reserve, distribution checks that have not been cashed, funds from checks that were not delivered or from funds returned to the Commission, and Fair Fund tax refunds for overpayment or for waiver of IRS penalties. All funds remaining in the Residual that are infeasible to distribute to investors will be transferred to the U.S. Treasury after the final accounting is approved by the Commission. Returning such money to the Respondents would be inconsistent

with the equitable principle that no person should profit from their wrongdoing. Therefore, in these circumstances, distributing disgorged funds to the U.S. Treasury is the most equitable alternative.

21. *Accountings.* When all funds have been disbursed, except for the Residual described in paragraph 20 of the Plan, the Fund Administrator will submit a final accounting pursuant to Rule 1105(f) of the Commission's Rules, 17 C.F.R. § 201.1105(f), for the approval of the Commission prior to termination of the Fair Fund and discharge of the Fund Administrator. Since the funds are being held in a Commission designated account at the Treasury and the Fund Administrator is a Commission employee, no interim accountings will be made.

22. *Termination of the Fair Fund.* Following the final disbursement from the Net Available Fair Fund to Eligible Investors, the Fund Administrator will make arrangement for the final payment of all Costs, and will submit a final accounting to the Commission. The Fair Fund will be eligible for termination after all of the following have occurred: (a) a final accounting, in a standard accounting format provided by Commission staff, has been submitted by the Fund Administrator, and has been approved by the Commission; and (b) all Costs have been paid. When the Commission has approved the final accounting, the Commission staff shall seek an order from the Commission authorizing: (a) transfer of the remaining Residual, and any amounts returned to the Fair Fund in the future, to the U.S. Treasury; (b) termination of the Fair Fund; and (c) discharge of the Fund Administrator.

23. *Notice of Proposed Plan and Opportunity for Comment.* The Notice of the Proposed Plan of Distribution and Opportunity for Comment (the "Notice") shall be published on the Commission's website <http://www.sec.gov/litigation/fairfundlist.htm>. Any person wishing to comment on the Plan must do so in writing by submitting their comments within thirty (30) days of the date of the Notice (a) to the Office of the Secretary, United States Securities and Exchange Commission, 100 F Street, N.E., Washington, D.C. 20549-1090; (b) by using the Commission's Internet comment form (www.sec.gov/litigation/admin.shtml); or (c) by sending an e-mail to rule-comments@sec.gov. Comments submitted by e-mail or via the Commission's website should include "Administrative Proceeding File No. 3-19715 in the subject line. Comments received will be publicly available. Persons should only submit comments that they wish to make publicly available.

EXHIBIT A

Distribution Chart			
Investor #	Fees Paid Plus Interest	Loss Recovery	Distribution Payment
Investor # 1	\$ 558.42	\$ 935.92	\$ 1,494.34
Investor # 2	\$ 758.05	\$ 2,752.70	\$ 3,510.75
Investor # 3	\$ 16,508.57	\$ 25,691.90	\$ 42,200.47
Investor # 4	\$ 7,580.47	\$ 16,516.22	\$ 24,096.69
Investor # 5	\$ 3,284.87	\$ 7,340.54	\$ 10,624.41
Investor # 6	\$ 8,759.65	\$ 14,681.09	\$ 23,440.74
Investor # 7	\$ 1,263.42	\$ 2,752.70	\$ 4,016.12
Investor # 8	\$ 2,695.28	\$ 7,340.54	\$ 10,035.82
Investor # 9	\$ 3,032.19	\$ 7,340.54	\$ 10,372.73
Investor # 10	\$ 84.49	\$ 1,835.14	\$ 1,919.63
Investor # 11	\$ 2,442.60	\$ 5,505.41	\$ 7,948.01
Investor # 12	\$ 808.59	\$ 2,202.16	\$ 3,010.75
Investor # 13	\$ 589.60	\$ 1,835.14	\$ 2,424.74
Totals	\$ 48,366.20	\$ 96,730.00	\$ 145,096.20