Hearing Date and Time: September 28, 2017 at 10:00 a.m. (prevailing Eastern Time)
Objection Deadline: September 21, 2017 at 4:00 p.m. (prevailing Eastern Time)

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	:	Involuntary Chapter 11
Taberna Preferred Funding IV, Ltd.,	:	Case No.: 17-11628 (MKV)
Alleged Debtor.	:	

MOTION OF PROPOSED *AMICUS CURIAE*
STRUCTURED FINANCE INDUSTRY GROUP, INC.
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Non-party Structured Finance Industry Group, Inc. ("SFIG"), by and through the undersigned counsel, respectfully files this motion for an order permitting it to submit a brief as *amicus curiae* in opposition to the Petitioning Creditors' Motion for Summary Judgment. The proposed *amicus* brief is attached hereto as Exhibit 1. In support thereof, the proposed *amicus* state as follows:

JURISDICTION & VENUE

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157(b) and 1334. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

PROCEDURAL HISTORY

2. On June 12, 2017, Opportunities II Ltd., HH HoldCo Co-Investment Fund, L.P., Real Estate Opps Ltd. (collectively, the "Petitioning Creditors") filed their involuntary petition (the "Involuntary Petition") against Taberna Preferred Funding IV, Ltd. ("Taberna" or the "Alleged Debtor") in the United States Bankruptcy Court for the Southern District of New York (the "Court").

3. On July 27, the Petitioning Creditors filed a letter with the Court indicating that they wished to file a motion seeking summary judgment with respect their qualifications under section 303 of title 11 of the United States Code (the "Bankruptcy Code") (*i.e.*, that they hold unsecured debt) [Dkt. No. 44].

4. On July 28, the Court entered an order [Dkt. No. 46] approving the stipulated briefing schedule [Dkt. No. 47] on the summary judgment motion, which required the motion be filed by August 14, the responsive briefs by August 31 and the reply from the Petitioning Creditors by September 11, and set a hearing for September 28.

5. On August 14, the Petitioning Creditors filed the Petitioning Creditors' Motion for Partial Summary Judgment [Dkt. No. 51] (the "Petitioning Creditors' Motion for Summary Judgment").

6. On August 27, 2017, SFIG submitted a letter to the Court requesting the Court's instruction as to the appropriate procedure for requesting permission to file an *amicus* brief [Dkt. No. 56].

7. On August 28, 2017, the Court entered the Endorsed Order (the "Endorsed Order") [Dkt. No. 57] setting forth the procedure to be followed by proposed *amicus* in requesting leave to file an *amicus* brief and the limitations of any *amicus* brief filed in connection therewith, including that the motion to file an *amicus* brief must be filed by no later than September 7, 2017.

8. On August 31, 2017, certain Taberna noteholders and other parties (the "Objecting Parties") filed their opposition [Dkt. No. 65] to the Petitioning Creditors' Motion for Summary Judgment.

BASIS FOR RELIEF REQUESTED

9. SFIG is a leading member-based trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. SFIG and its approximately 350 members—who are involved in every sector of the securitization market and participate in securitization transactions in capacities as diverse as investors, issuers, financial intermediaries, law firms, accounting firms, technology firms, rating agencies, servicers and trustees—have an abiding interest in preserving a vibrant market for the sale and securitization of bank, consumer, commercial, automobile, and mortgage loans involving numerous forms of securitization transactions and whole loan portfolio sales. As discussed in further detail in SFIG's proposed *amicus* brief, securitization vehicles are vital to banks, borrowers, and the national economy, and SFIG is uniquely positioned to provide insight on the potential consequences arising from the application of the Bankruptcy Code to bankruptcy remote securitizations and the impact any adverse developments in this case may have on the securitization industry.

10. SFIG respectfully submits that the perspectives and considerations contained in its proposed *amicus* brief will augment the existing arguments against the Petitioning Creditors' qualifications under section 303 of the Bankruptcy Code to commence an involuntary bankruptcy case against Taberna in the first instance, and will aid the Court's evaluation of the Petitioning Creditors' Motion for Summary Judgment, as well as the policy considerations and potential impact on the structured finance industry as a whole in the event the involuntary case against Taberna were permitted to proceed.[1] *See Auto. Club of N.Y., Inc. v. Port Auth. of N.Y. & N.J.*, No. 11 Civ. 6746, 2011 WL 5865296, at *1 (S.D.N.Y. Nov. 22, 2011) ("The usual rationale for amicus curiae submissions is that they are of aid to the court and offer insights not available from the parties.").

11. The decision of whether to permit non-parties to appear as *amicus curiae* is committed to the Court's discretion. *Picard v. Greiff*, 797 F. Supp. 2d 451, 452 (S.D.N.Y. 2011). Bankruptcy courts in this Circuit have granted leave for parties to appear as *amicus curiae*. *See, e.g., In re City of Bridgeport*, 128 B.R. 30, 32 (Bankr. D. Conn. 1991) (granting Connecticut Conference of Municipalities *amicus curiae* status because court believed that it would "contribute a different and useful perspective"); *Lehman Bros. Holdings Inc. v. JPMorgan Chase Bank, N.A. (In re Lehman Bros. Holdings Inc.)*, No. 10-ap-03266, ECF Doc. No. 61 (Bankr. S.D.N.Y. Feb. 15, 2011) (stipulation and agreed order entered by Judge Peck granting

[1] SFIG originally anticipated seeking the Court's permission to file an *amicus* brief in conjunction with the briefing due in October with regard to whether the Involuntary Petition should be granted. However, the considerations and perspectives set forth in the proposed *amicus* brief are also relevant to the Court's consideration of the Petitioning Creditors' Motion for Summary Judgment, particularly considering the non-recourse and bankruptcy remote nature of securitizations, and the lack of reorganization to be had with respect to such securitizations. As such, SFIG determined to submit its proposed *amicus* brief now to afford the Court the opportunity to consider the important policy considerations inherent in the issues before the Court at this pertinent juncture.

The International Swaps and Derivatives Association, Inc. and The Securities Industry and Financial Markets Association *amicus curiae* status).

12. SFIG respectfully submits that it should be granted *amicus curiae* status. In the instant case, SFIG will contribute a different and useful perspective on the relevant issues that reflects its diverse membership and breadth of knowledge in the securitization industry. As mentioned above, SFIG is focused on improving and strengthening the broader structured finance and securitization market, and a securitization vehicle such as Taberna falls well within SFIG's area of expertise. The *amicus* brief endeavors to provide this Court with information relevant to the critical legal and policy issues raised here that impact not only the creditors of Taberna whose claims are at stake, but market participants in securitizations industry-wide.

13. That Taberna is a non-recourse securitization that lacks the capacity to be reorganized and should be liquidated by its terms is a fundamental, and universally accepted and agreed, aspect of securitization transactions. The potential erosion of this fundamental tenet of the securitization industry is not just of significant import to the Taberna noteholders that will shoulder the burden of the Petitioning Creditors' strategic maneuver to gain access to an unanticipated bankruptcy forum; it is very much important to SFIG and the securitization markets and industry at large. As discussed further in its proposed *amicus* brief, to jettison the already agreed liquidation procedures under the Taberna indenture in favor of bankruptcy for the personal and pecuniary aims of some creditors to the detriment of others would result in a significant jolt to investor confidence in the non-recourse and bankruptcy-remote nature of securitization vehicles. This will threaten to upend and substantially impair the securitization market and, by extension, the primary and secondary loan market that form a vital part of the nation's financial system. The ability to securitize bank and mortgage loans is fundamentally

important to banks, borrowers, and the national economy and the extraordinary size of the securitization market shows both the importance of securitization to banks and borrowers, as well as the potential for harm if Petitioning Creditors were to prevail here. Securitizations are structured as bankruptcy-remote, non-recourse vehicles and any uncertainty around the stability of those integral features puts at risk the demand for, and marketability of, these instruments. For these reasons, as well as those set out more fully in the proposed *amicus* brief, SFIG submits that Taberna, its creditors, as well as the interests of the capital markets and securitization industry (and, thus, the economy) would be much better served by permitting matters to proceed in accordance with the contractual and commercial provisions—and expectations—of the parties.

NOTICE

14. This motion is being filed and served in accordance with the procedures set forth in the Endorsed Order.

15. Concurrently with the filing of this Motion, SFIG will provide notice of this Motion, with its *amicus* brief attached as an exhibit thereto, to (i) the U.S. Trustee, (ii) the Petitioning Creditors, (iii) the Alleged Debtor, and (iv) the Objecting Parties. SFIG respectfully submits that no other or further notice need be given under the circumstances.

WHEREFORE, the proposed *amicus curiae* respectfully request that the Court enter an order, substantially in the form attached hereto as Exhibit 2, granting it leave to submit a brief as *amicus curiae* in opposition to the Petitioning Creditors' Motion for Summary Judgment.

September 7, 2017

Respectfully submitted,

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AMICUS CURIAE BRIEF OF STRUCTURED FINANCE INDUSTRY GROUP, INC.

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INTERESTS OF AMICUS CURIAE

The Structured Finance Industry Group's ("SFIG") core mission is to support a robust and liquid securitization market, recognizing that securitization is an essential source of core funding for the real economy. SFIG has over 350 members[1] from all sectors of the securitization market, including investors, issuers, financial intermediaries, accounting, law, and technology firms, rating agencies, servicers, and trustees.

SFIG's members—who are involved in every aspect of the structured finance industry and participate in securitization transactions in capacities as diverse as custodians, issuers, trustees, paying agents, structures, and noteholders—have an abiding interest in preserving a vibrant market for the sale and securitization of commercial, corporate, consumer and residential loans and other financial assets, involving numerous forms of securitization transactions and whole loan portfolio sales. As discussed further, *infra*, to enter an order for relief on the involuntary petition here threatens one of the core underpinnings of securitizations, which would upend the securitizations market and, by extension, the primary and secondary loan markets that form a vital part of the nation's financial system. SFIG and its members have a strong interest in the primary market of extending credit to borrowers; and, in the absence of a vibrant and reliable securitization market, the primary lending market will inevitably suffer tremendously.

PRELIMINARY STATEMENT

The involuntary petition filed against Taberna Preferred Funding IV, Ltd. ("Taberna" or "Alleged Debtor") raises critical legal and policy issues. These issues impact not only the

[1] Founded in March 2013, SFIG is a member-based, trade industry advocacy group focused on improving and strengthening the broader structured finance and securitization market. SFIG provides an inclusive network for securitization professionals to collaborate and, as industry leaders, drive necessary changes, be advocates for the securitization community, share best practices and innovative ideas, and educate industry members through conferences and other programs. With approximately 350 institutional members, SFIG's membership represents all sectors of the securitization market including investors, issuers, financial intermediaries, law firms, accounting firms, technology firms, rating agencies, servicers and trustees.

creditors of Taberna whose claims are at stake here, but market participants in securitizations industry-wide. In short, SFIG submits that the Petitioning Creditors'[2] course of action here is contrary to the structure of securitization vehicles and risks establishing precedent that will encourage potential creditor abuse across the securitization industry. Taberna should be administered in accordance with its clear contractual liquidation procedures, just as all securitization vehicles are administered. To jettison the already agreed upon procedures under an indenture in favor of a different scheme advanced by a disruptive party upsets market expectations and prejudices other creditors. Further, here, the disruptive party is a non-recourse, oversecured, opportunistic group of affiliated senior noteholders seeking to prejudice junior noteholders.

Taberna is a type of securitization known as a collateralized debt obligation or "CDO." A CDO issues debt to noteholders in exchange for cash. This cash is then used to purchase securities issued by third parties, which securities secure the CDO's obligations and should generate proceeds used to repay the debt issued by the CDO. By virtue of Taberna's express non-recourse structure whose ultimate purpose is liquidation, the Petitioning Creditors lack the capacity to carry unsecured claims or qualify under Bankruptcy Code section 303 to have commenced the involuntary proceeding in the first instance, and Taberna lacks the capacity to be reorganized. Rather, Taberna is a static pool investment vehicle, intended to exist for only a limited time. Its sole purpose was to raise funds through the sale of debt and to invest those funds in financial assets meeting prescribed criteria. The goal of every such securitization transaction is that the notes can be repaid in full, on time, when the related securitized assets

[2] Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the *Motion of Proposed Amicus Curiae Structured Finance Industry Group, Inc. for Leave to File Brief as Amicus Curiae* filed in the above-captioned case on September 7, 2017.

mature. However, based on standard risk disclosure, investors understand that they are assuming risk and that, if they assess that risk incorrectly, securitization vehicles might not possess sufficient funds to pay timely interest or ultimate principal on the maturity date on any or all of its securities. In specific contemplation of that possibility, the parties expressly agree how the remaining portfolio will be managed and how losses will be distributed among the noteholders in such circumstances. In this instance, the expectation that the disposition of Taberna's assets would be governed entirely by the procedures in the transaction documents—namely, the Taberna indenture—was central to each investor's understanding.

Thus, Taberna is nothing like a typical chapter 11 debtor. It has no employees and no other business or assets not governed by the Taberna indenture. Unlike a real business, Taberna has no involuntary creditors. The rules for liquidating this single purpose, single-use entity were set forth by contract and everyone agreed to them. By design, Taberna is not susceptible to reorganization due to the structure of the transaction. Taberna is designed to either monetize its assets per the parties' agreed upon procedures or sell its remaining assets to pay off its debts—*even if they are insufficient to pay the notes in full on the maturity date (i.e., no deficiency claim arises)*. Once the assets of Taberna are monetized or liquidated per the parties' agreement—regardless of their value—Taberna is designed to, simply stated, disappear. That is how all such securitization vehicles operate. Indeed, it is for this reason that the Alleged Debtor has not yet answered the bankruptcy petition. Here, the Alleged Debtor, unlike typical debtors for whom chapter 11 bankruptcy is designed, has no economic interest either in its assets or business prospects—the debtor exists exclusively to liquidate itself in accordance with its contractual terms. There simply is no debtor interest to protect here.

Given the foregoing, the commencement of this bankruptcy case for Taberna can serve

no legitimate reorganizational purpose. In fact, this filing comes on the heels of Petitioning Creditors' other failed attempts to initiate a fast liquidation via a failed tender offer, and a failed consent solicitation. This bankruptcy case is now a last ditch effort by a senior noteholder to further its personal, tactical and pecuniary aims and coerce a redemption of its notes to the detriment of junior creditors. This type of a tactic is in stark contrast to the spirit of the Bankruptcy Code: to afford a debtor an opportunity to continue business and a more promising future, preserve equity, and increase overall creditor recoveries. It is also fundamentally at odds with how such securitizations operate. As such, if a tactic like this were now to be permitted to proceed it would create significant uncertainty across the capital markets, which place great weight on the bankruptcy remote and non-recourse nature of securitizations and the pre-agreed and certain disposition of assets thereunder.

Thus, where parties to a securitization transaction have negotiated and agreed to express procedures after the occurrence of an event of default, a bankruptcy court should allow such procedures to continue unimpeded. Indeed, the basic architecture of the deal turns on the enforceability of the securitization vehicle's own liquidation mechanism, and priority of payments protocol that is intended to apply in the event of a default. A bankruptcy case, however, gives the Petitioning Creditors access to an unanticipated forum to try to achieve, through an improper use of the bankruptcy process, results that such investors would not be able to achieve outside of bankruptcy. To allow an opportunistic creditor a tactical means by which to avoid its contractual obligations and try to accelerate its return on investment to the detriment of other noteholders and creditors to the transaction would make no commercial sense, undercut the intended bankruptcy-remote nature of the structure, and turn all such securitization agreements on their head.

Whether the involuntary petition against Taberna is granted is not just of significant import to the Taberna noteholders that will shoulder the burden of the Petitioning Creditors' gambit here, but an issue of significance to SFIG and the securitization markets and industry at large. Lenders to date have sold over $10 trillion of loans and other financial assets into outstanding securitizations. The ability to securitize bank, consumer, commercial, automobile, and mortgage loans is fundamentally important to banks, borrowers, and the national economy. The extraordinary size of the securitization market shows both the importance of securitization to banks and borrowers, as well as the potential for harm if Petitioning Creditors were to prevail here.

Moreover, rating agencies assign credit ratings to securitization transactions based on the premise that they are bankruptcy-remote. Each of the major rating agencies that assigns credit ratings in securitization transactions has developed its own proprietary methodology to assess the likelihood of payment of amounts due based on a cash-flow and default probabilities of the underlying assets. In order to translate those assessments into credit ratings, every rating agency requires that securitization vehicles take certain measures to insulate the application of proceeds received on its assets from non-economic risks. Introducing uncertainty into securitization through the bankruptcy process, will make securitization less efficient, more costly, and, in certain instances, undoable. Fundamentally, securitizations—including CDOs such as Taberna—are intended to be isolated from the differing rules governing liquidation of assets in a bankruptcy proceeding.

Further, the outcome of this case will impact the willingness of rating agencies to rate securitizations, as well as the willingness of investors to participate in securitizations. Indeed, junior creditors make the decision to invest because they know that, while the likelihood of recouping their investment may be less than that of senior noteholders, the procedures that determine payouts from the securitized assets are certain. The motivation for their investment in

the riskier tranches of securitizations and the cost assigned to that risk are based on the expectation that the procedures as set forth and agreed to in the underlying indenture will be followed.

That a senior noteholder, in this case, is seeking to undermine the contractual certainty of junior noteholders and other creditors and misappropriate value through the use of unreasoned legal theories and unprecedented interpretations of industry terms and the Bankruptcy Code is intolerable. Such actions create universal disincentives and discourage investors from buying notes, thereby eroding the core of the securitization structure and threatening the issuance of a wide range of structured finance securities.

REQUESTED RULING

SFIG respectfully submits that the Court should deny Petitioning Creditors' Motion for Partial Summary Judgment on the basis that they do not satisfy the eligibility requirements under the Bankruptcy Code, and the unprecedented arguments of Petitioning Creditors to try to overcome their fatal deficiencies conflict with fundamental aspects of securitization vehicles' structures.[3] Taberna, like all securitizations, should be administered in accordance with the clear

[3] This involuntary bankruptcy case also warrants dismissal under section 1112(b) and section 305 of the Bankruptcy Code, whether for "cause," bad faith, or any other unenumerated cause. Bankruptcy cases that are not filed in good faith and without any likelihood of rehabilitation are subject to dismissal under section 1112 of the Bankruptcy Code. *See C-TC 9th Ave. P'ship v. Norton Co. (In re C-TC 9th Ave. P'ship)*, 113 F.3d 1304, 1309 (2d Cir. 1997) ("there is no reason a debtor should be permitted to enter these proceedings without a possibility of reorganization.").

Similarly, when, as here, a party seeking bankruptcy jurisdiction is not advancing the underlying policies of the Bankruptcy Code, but is instead using the bankruptcy court "as an additional weapon," a court can and should dismiss under section 305. *See In re Westerleigh Dev. Co.*, 141 B.R. 38, 41 (Bankr. S.D.N.Y. 1992); *see also In re Int'l Zinc Coatings & Chem. Corp.*, 355 B.R. 76, 87 (Bankr. N.D. Ill. 2006) ("A bankruptcy case . . . maintained purely for some party's procedural ends, one having no purpose cognizable under the bankruptcy laws, should be dismissed under section 305(a)(1)."). Furthermore, in bankruptcy cases where there are no unsecured creditors, and secured creditors have previously "ensure[d] their own equitable treatment" by virtue of the priorities contained in their transaction documents, a bankruptcy filing does nothing to ensure a fair distribution of assets among creditors. *See In re 801 S. Wells St. Ltd. P'ship.*, 192 B.R. 718, 726 (N.D. Ill. 1996) (dismissal warranted because, among other reasons, equitable treatment afforded to secured creditors by virtue of subordination and intercreditor agreements); *see also In re Mtn. Dairies, Inc.*, 372 B.R. 623, 636 (Bankr. S.D.N.Y. 2007).

liquidation procedures to which the parties agreed.

ARGUMENT

I. INVOLUNTARY PETITIONS AGAINST SECURITIZATION VEHICLES VIOLATE PUBLIC POLICY BY THREATENING THE EXPECTATIONS OF THE PARTIES THAT SUCH VEHICLES ARE BANKRUPTCY-REMOTE AND SERVE NO VALID REORGANIZATIONAL PURPOSE

Petitioning Creditors are non-recourse investors (sophisticated investors, to boot) who bought notes in the secondary market in a defaulted CDO and now are trying to improve their return on investment by forcing the abrogation of the other creditors' rights through bankruptcy. Undoubtedly, however, the interests of the Alleged Debtor, its creditors, as well as the interests of the capital markets and securitization industry (and, thus, the national economy) would be much better served by permitting matters to proceed in accordance with the contractual and commercial provisions—and expectations—of the parties.

"Securitization"—the combining and reselling of financial assets, like loans—is essential to the function of the global financial system. Banks routinely serve as financial intermediaries in this system, making loans to many types of borrowers, combining similar loans into packages, and then selling those packages of loans to sophisticated investors in the secondary market. By buying up these loans, investors in the secondary market instantly provide banks with liquidity, which allows banks to provide additional loans to businesses and consumers. Before the advent of securitization, banks were largely "portfolio lenders."[4] Banks held most of the loans they originated, and funded those loans through deposits or other bank debt, thereby reducing the amount of funding banks could provide to the economy while at the same time creating an

[4] For a discussion of the background of asset securitization, *see* Off. Comptroller of Currency, *Asset Securitization: Comptroller's Handbook* (Nov. 1997), http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/assetsec.pdf ("*Comptroller's Handbook*"); *see also* Bd. of Gov'rs of Fed. Res. Sys., *Report to Congress on Risk Retention* (Oct. 2010), http://www.federalreserve.gov/boarddocs/rptcongress/securitization/riskretention.pdf ("*Board Report*").

onerous cost structure driven by the bank's own funding costs. Securitization allows banks to address these limitations and risks by packaging loans or other financial assets and selling them in the form of asset-backed securities. A bank that securitizes loans typically transfers them to a special purpose vehicle, which then issues securities to investors.

Consumer and business borrowers, and therefore the national economy, benefit substantially from securitization. By drawing on the deep liquidity provided by institutional investors and the associated lower costs relative to corporate debt, bank and non-bank finance company lenders can offer more loans at more competitive rates. Banks would originate fewer loans if they were required to conduct their lending business as portfolio lenders and it could be argued that non-bank finance companies might even be priced out of the market completely. As the funding available to support lending is reduced, the cost of borrowing increases.

The secondary market also lowers risks to the Federal Deposit Insurance Corporation ("FDIC") from bank failures because it transfers ownership risks of the loans away from federally-insured banks to private investors that are not FDIC-insured. The benefits of lower interest rates, greater availability of credit, and lower-risk banks, in turn, improve the nation's economy. Federal regulatory agencies have repeatedly recognized these benefits from securitizations to banks and borrowers. They were specifically identified in a 2010 report to Congress on the securitization market from the Board of Governors of the Federal Reserve System, *see Board Report* at 8–9, and subsequently described by the Office of the Comptroller of the Currency, the Federal Reserve, the FDIC, the Federal Housing Finance Agency, the Securities and Exchange Commission and the Department of Housing and Urban Development in recent rulemaking on the requirement that banks retain risk in securitization transactions. *See* 79 Fed. Reg. 77,602, 77,604 (Dec. 24, 2014) (adopting final rule under Section 15G of the

Exchange Act, 15 U.S.C. § 78*o*-11).

In addition, rating agencies and investors in securitizations view the bankruptcy-remoteness aspect to be of critical import. As noted, each of the major rating agencies that assigns credit ratings in securitization transactions has developed its own proprietary methodology to assess the likelihood of payment of amounts due based on cash-flow and default probabilities of the underlying assets. Furthermore, investors in CDOs like Taberna are required under the United States Securities Act of 1933 to be experienced and sophisticated investors or financial institutions. They purchase such securities with full knowledge that the investments entered into carry certain risk, including the risk of default. Because investors in securitizations, like the Petitioning Creditors, are able to anticipate certain events which might arise during the lifetime of the transaction, the respective indentures are fully developed, comprehensive agreements with specific provisions and procedures to be followed upon the occurrence of an event of default. Such procedures allow the parties to agree collectively that they would rather the transaction take the predetermined actions set forth in the governing documents than have assets liquidated in a potentially different manner that does not reflect the expectations of the parties. Moreover, the transaction documents, including the procedures in the Taberna indenture, are designed to protect the interests of both senior and junior noteholders from the self-interested actions of one or a small group of minority of noteholders. Investors in securitizations, including SFIG's members who invest in such vehicles, base their decisions to invest upon the shared expectations that the explicit terms of the underlying securitization documents, including the unanimously agreed to procedures governing the disposition of assets, would be followed and enforced against the trustee and other transaction parties pursuant to their terms. These are the expectations of not only the original investors, but also investors in the secondary market who

rely on the enforcement of the terms of the underlying securitization documents as written.

Here, there is no question as to the express procedures to be followed in the wake of a default. Sections 5.4, 5.5, 5.8, 5.13, and 11.1 of the Taberna indenture govern the rights and obligations of the parties. Pursuant thereto, the Taberna indenture expressly prohibits the Class A-1 Noteholders alone from forcing a liquidation of the collateral—rather it requires collective action by all classes of Notes. *See* Taberna Indenture §§ 5.4 [Dkt. No. 2-1] (providing remedies upon Event of Default and limiting certain remedies until minimum noteholder support is obtained), 5.5(a) (requires the Indenture Trustee, following an Event of Default, to hold the collateral intact and "make and apply all payments . . . in accordance with the Priority of Payments" unless either the collateral is deemed sufficient to pay amounts due to all noteholders if liquidated, or a two-thirds majority of each class of noteholders consents to another course of action). The Petitioning Creditors concede this. *See* Dkt. No. 2 ¶ 30.

Further, under section 5.8, all creditors, including the Petitioning Creditors, agreed that they would abide by a no-action clause, which under New York law, serves to "'protect against the exercise of poor judgment by a single bondholder or a small group of bondholders, who might otherwise bring a suit against the issuer that most bondholders would consider not to be in their collective economic interest.'" *SC Note Acqs., LLC v. Wells Fargo Bank, N.A.*, 934 F. Supp. 2d 516, 531 (E.D.N.Y. 2013) (citation omitted), *aff'd*, 548 F. App'x 741 (2d Cir. 2014) (Summary Order). The importance of the enforcement of no-action clauses, including in bankruptcy cases, has repeatedly been recognized. *See In re Am. Rds. LLC*, 496 B.R. 727, 729-30 (Bankr. S.D.N.Y. 2013) (collecting cases).

Finally, pursuant to Section 11.1 of the Taberna indenture, all creditors contractually agreed at the time they invested to a comprehensive "Priority of Payments" in the Taberna

indenture, to be applied even after an Event of Default. *See* Taberna indenture §§ 11.1, 13.1. Accordingly, there is no need for bankruptcy to be invoked because the Taberna indenture already sets out the parties' agreements as to liquidation. If Petitioning Creditors' attempts to eviscerate the bargained for protections that other creditors negotiated and contracted for are deemed permissible, the impact on the securitization industry will be adverse and monumental.

Indeed, as noted, the very essence of a bankruptcy-remote securitization vehicle, like Taberna, is that there is no intention of reorganization or probability of emergence from bankruptcy because from the date of the securitization transaction's inception, it is designed to liquidate as proceeds from the assets are collected and distributed to investors in accordance with the terms of the indenture.[5] Taberna, as is typical with securitizations, was not created and is not designed to operate for any purpose other than to manage its holdings and make distributions on its own securities. Like most such securitization vehicles, it has no employees, in the classical sense, no operations, and no purpose other than, at this point, to liquidate as agreed by the parties.

The provisions of the Taberna indenture support this conclusion. Just as the operation of New York law foreclosed any reorganization in *C-TC*, the Taberna indenture precludes any possibility of reorganization of Taberna.[6] For the same reasons, there is virtually zero

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[5] There can be no good faith or valid reorganization objective here because the filing does not promote the more laudable aims of the Bankruptcy Code. *See In re C-TC*, 113 F.3d at 1309-10 (""""it is clear that on the filing date there was no reasonable likelihood that the debtor intended to reorganize and no reasonable probability that it would eventually emerge . . . from bankruptcy proceedings."""") (citations omitted).

[6] The only court to rule on the merits of an involuntary petition against a CDO was the Bankruptcy Court for the District of New Jersey in *In re Zais Inv. Grade Ltd. VII*, 455 B.R. 839 (Bankr. D.N.J. 2011), which also recognized that CDOs are designed to avoid bankruptcy. There are material differences in the facts and circumstances related to the Taberna indenture as compared to the *Zais* Indenture, as well as significant differences in procedural posture, which warrant a different outcome here. The abuse here is in stark contrast to the bankruptcy objectives argued in *Zais* (*e.g.*, that the petitioning creditors had demonstrated good faith because they attempted to (1) realize the greatest present value for similarly situated noteholders, and (2) were doing so without negatively impacting junior creditors (who had no prospect of any recovery under the status quo)). *Id.* at 849.

probability, reasonable or not, of Taberna or any securitization vehicle emerging from bankruptcy. The Petitioning Creditors' intent in filing the Involuntary Petitions is to expedite the liquidation of Taberna pursuant to a chapter 11 plan instead of the liquidation provisions previously agreed in the transaction documents in order to grab a larger piece of the pie than they are entitled (but *not* by any means to reorganize Taberna).[7] *See In re C-TC*, 113 F.3d at 1309 ("while a debtor may conclude Chapter 11 proceedings by liquidating and may even enter them with an intent to liquidate if necessary, there is no reason a debtor should be permitted to enter these proceedings without a possibility of reorganization."). Petitioning Creditors have gone to great lengths to try and implement this scheme, looking now to bankruptcy as their method of last resort. And if a bankruptcy case for a securitization vehicle like Taberna is permitted to proceed without a reorganization purpose but rather to advance senior noteholders' ill-founded objectives, it will drastically upset market expectations, deter investors who rely on the bankruptcy remote nature of these vehicles, and hobble the capital markets.

II. INVESTORS IN NON-RECOURSE AND BANKRUPTCY REMOTE SECURITIZATIONS SHOULD NOT BE ELIGIBLE PETITIONING CREDITORS TO COMMENCE AN INVOLUNTARY CASE UNDER 11 U.S.C. § 303

As a threshold matter, Petitioning Creditors cannot demonstrate that they meet the criteria of section 303 of the Bankruptcy Code to have commenced this case in the first instance. In pertinent part, section 303 requires that the Petitioning Creditors hold noncontingent, undisputed claims that aggregate at least $15,775 more than the value of any lien on property of the Alleged Debtor securing such claims held by the holders of such claims. 11 U.S.C. § 303(b)(1). The Petitioning Creditors fail to meet any of these requirements for the simple reasons that they are

[7] If the purpose of the failed tender offer was to acquire additional notes to effectuate amendments to the Taberna indenture or liquidation of the collateral, it is curious why the Petitioning Creditors purchased additional notes a month later at a premium well above the tender offer price, if not with the intent to find a way to commence this case.

adequately secured, and their notes are unequivocally non-recourse.[8]

Noteholders in Taberna, like all investors in non-recourse securitization transactions, are protected by their collateral, and knowingly waived any right to a deficiency claim if the collateral is insufficient. Notably, Petitioning Creditors' decisions to purchase notes issued by Taberna on multiple occasions demonstrate that they themselves believe that they are adequately secured without any unsecured deficiency claim.[9] Further, the unambiguous terms of the

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[8] Faced with the inability to satisfy the eligibility requirements under Bankruptcy Code section 303, Petitioning Creditors attempt to manufacture bankruptcy jurisdiction where none exists. Petitioning Creditors assert a flawed partial waiver theory, which fails due to the fundamental fact that they cannot waive the benefit of the lien, as the lien is held by the Indenture Trustee for the benefit of all noteholders, including the Class A-2 Noteholders. *See* Opposition to Petitioning Creditors' Motion for Partial Summary Judgment ¶ 41 [Dkt No. 65] ("Opposition Brief"). It is a fundamental aspect of granting clauses in securitization documents such as the Taberna indenture that the issuer grant the lien in favor of the trustee for the benefit of all classes of notes.

Petitioning Creditors next assert that all Taberna noteholders are undersecured under a "unitary lien" theory—notwithstanding their concession that they are actually oversecured. First, the plain language of Section 303 precludes the application of a unitary lien theory. Section 303(b)(1) requires the comparison of only the "noncontingent, undisputed claims" of the holders of claims filing a petition against "the value of any lien on property of the debtor securing such claims held by the holders of such claims." In this case, the only entities holding claims that are relevant for purposes of Section 303 are the Petitioning Creditors, and the only value of the liens on property of the debtor securing such claims is the value of the collateral securing the claims of the Petitioning Creditors. As admitted by the Petitioning Creditors, the value of the collateral securing the claims of the Petitioning Creditors exceeds the claims of the Petitioning Creditors.

Second, the Petitioning Creditors offer no support for the application of their purported unitary lien theory save for one decision in *First Fidelity Nat'l Ass'n, N.J. v. Midatl. Nat'l Bank (In re Ionosphere Clubs, Inc.)*, 134 B.R. 528 (Bankr. S.D.N.Y. 1991), which, as discussed in detail by the Objecting Parties, stood on completely distinguishable substantive and procedural grounds and is inapplicable here. *See* Opposition Brief ¶¶ 43-47. At the time of *Ionosphere*, the debtor was already in chapter 11. Here, Petitioning Creditors are attempting to manipulate Bankruptcy Code provisions to *initiate* chapter 11 proceedings. The *Ionosphere* court's reasoning was, under the circumstances, necessary to ensure the parties contractual rights and expectations pursuant to the expressly agreed terms of the indenture were upheld. Further, the court aimed to preserve collateral in favor of an equitable distribution to all creditors. To extend the reasoning of *Ionosphere* to the case at bar would work harm not only to the contractual expectations of the junior noteholders under the Taberna indenture, but investors in any similarly structured multi-tranche securitization vehicle and result in an inequitable distribution, favoring only senior creditors—the precise result the *Ionosphere* court endeavored to avoid.

[9] A set forth in detail by the Objecting Parties, *see* Opposition Brief ¶¶ 25-30, after the Petitioning Creditors first acquired certain of their notes in March of 2016, they conducted a solicitation for the consents required under the Taberna indenture to liquidate the collateral, commenced a public cash tender offer to purchase other notes March of 2017, and finally, after failing to find any success in any of their efforts, purchased additional notes in April of 2017, including all outstanding Class A-1 Notes, at price (91.78125%) that was substantially more than the price paid for a block of Class A-1 Notes 13 months earlier, in March 2016 (76.875%). This indicates that the value of the Class A-1 Notes had gone up in that time, indication that they are oversecured with little to no risk of nonpayment.

Taberna indenture preclude the Petitioning Creditors from being undersecured.[10] This is more than an important feature of securitizations, and Petitioning Creditors' tortured reading of the provision is fundamentally at odds with industry expectations.

As over-secured, non-recourse creditors, the Petitioning Creditors cannot, and do not, have claims against the Alleged Debtor that exceed the value of their liens on the property of the debtor as required by section 303(b) of the Bankruptcy Code. Here, the Alleged Debtor is not liable to Petitioning Creditors on its claims for more than the value of the collateral securing those claims—Petitioning Creditors are to look only to the collateral.[11] This also highlights why the Alleged Debtor has not been inclined to take a position on the petition.

Notwithstanding the plain language in the Bankruptcy Code or in the Indenture prohibiting Petitioning Creditors from qualifying as unsecured creditors, Petitioning Creditors attempt to invoke Section 1111(b) of the Bankruptcy Code as a way to circumvent the Indenture and establish their eligibility to commence this bankruptcy.[12] But, fatally, Section 1111(b) is not applicable for purposes of determining eligibility to initiate an involuntary bankruptcy under section 303.[13] The Petitioning Creditors should not be permitted to invoke a Bankruptcy Code provision that modifies the nature of claims *in* bankruptcy to modify the nature of claims *outside* of bankruptcy in order to falsely satisfy procedural thresholds to commence this involuntary in

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[10] *See, e.g.,* Taberna indenture § 2.6(h) ("[t]he obligations. . . under this Indenture are non-recourse obligations. . .payable solely from the Collateral and in accordance with the Priority of Payments, and following realization of the Collateral and its reduction to zero any claims of the Noteholders shall be extinguished and shall not thereafter revive.").

[11] *See* Opposition Brief ¶¶ 53-69 for an in-depth discussion on this issue.

[12] Section 1111(b) allows a nonrecourse creditor to assert a recourse claim for purposes of allowance under section 502 of the Bankruptcy Code.

[13] Because no order for relief has been entered in this case, there are no chapter 11 proceedings underway such that section 1111(b) can be triggered. *See CC Britain Equities, LLC v. Allen-Main Assocs. Ltd. P'ship (In re Allen-Main Assocs. Ltd. P'ship)*, 223 B.R. 59, 63 (B.A.P. 2d Cir. 1998) ("Section 1111(b) applies only to proceedings under Chapter 11 of the Bankruptcy Code.").

the first place.[14] Establishing precedent of this nature would severely undermine the confidence and ability of sophisticated investors in the securitization industry to protect their investments in, and administration of, bankruptcy-remote investment vehicles from the guerilla tactics of a minority of investors acting out of self-interest.

CONCLUSION

Taberna is a non-recourse securitization that lacks the capacity to be reorganized and should be liquidated by its terms. This is a fundamental and universally accepted and agreed aspect of securitization transactions. This bankruptcy case cannot further any legitimate bankruptcy policy or purpose, and instead would only be filed to further one party's personal tactical and pecuniary aims. Condoning the Petitioning Creditors' conduct here would upend the bargained for rights of noteholders in this and other securitization transactions. SFIG submits that permitting this case to proceed would work a significant disruption of the capital markets—and thus the national economy.

[14] Section 1111(b) on its face is not applicable where the underlying collateral is to be sold. *See* Opposition Brief ¶ 68.

September 7, 2017

Respectfully submitted,

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	:	Involuntary Chapter 11
Taberna Preferred Funding IV, Ltd.,	:	Case No.: 17-11628 (MKV)
Alleged Debtor.	:	

ORDER GRANTING MOTION OF PROPOSED *AMICUS CURIAE* STRUCTURED FINANCE INDUSTRY GROUP, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Upon the motion (the "Motion") of non-party Structured Finance Industry Group, Inc. ("SFIG") for an order permitting it to submit a brief (the "*Amicus* Brief"), a copy of which is attached as Exhibit 1 to the Motion, as *amicus curiae* in opposition to the Petitioning Creditors' Motion for Summary Judgment; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1334; and this proceeding being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue of this proceeding and the Motion in this Court being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and the Court having found that notice of the Motion was adequate and appropriate under the circumstances and that no other or further notice is necessary; and the Court having reviewed the Motion and determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and the Court having found that the relief requested in the Motion is in the best interests of the Debtor, its creditors and other parties in interest; and after due deliberation and sufficient cause appearing therefore, it is hereby **ORDERED** that:

1. The Motion is granted as set forth herein.

2. Pursuant to, and in accordance with, this Court's Endorsed Order dated August 28, 2017, SFIG is granted leave to submit the *Amicus* Brief in opposition to the Petitioning Creditors' Motion for Summary Judgment immediately upon entry of this Order.

3. SFIG is authorized and empowered to take all actions necessary or appropriate to effectuate the relief granted pursuant to this Order.

4. This Court shall retain jurisdiction and power with respect to all matters arising from or related to the interpretation or enforcement of this Order.

HONORABLE MARY KAY VYSKOCIL
UNITED STATES BANKRUPTCY JUDGE

Dated: September _____, 2017
New York, New York