

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-19831

In the Matter of

VEREIT, INC.

Respondent.

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PLAN OF DISTRIBUTION

I. OVERVIEW

1. The Division of Enforcement (“Division”) submitted the following plan of distribution (“Plan”) to the Securities and Exchange Commission (“Commission”) pursuant to Rule 1101 of the Commission’s Rules on Fair Fund and Disgorgement Plans (the “Commission’s Rules”), 17 C.F.R. § 201.1101. In accordance with Rule 1102(a) of the Commission’s Rules, 17 C.F.R. § 201.1102(a),¹ the civil penalties paid by VEREIT, Inc. formerly known as American Realty Capital Properties Inc. (“ARCP” or “Respondent”) will be transferred to the related civil action, *Securities and Exchange Commission v. AR Capital, LLC*, No. 19-cv-06603-AT (S.D.N.Y.) (the “Civil Action”) for distribution to harmed investors in accordance with Civil Action’s distribution plan approved by the Court on May 18, 2021 (the “AR Capital Plan”).² As explained below, the Division has concluded that distributing the funds collected in the

¹ Rule 1102(a) provides that “Subject to such conditions as the Commission or the hearing officer shall deem appropriate, a plan for the administration of a Fair Fund . . . may provide for payment of funds into . . . any case pending in federal or state court against a respondent or any other person based upon a complaint alleging violations arising from the same or substantially similar facts as those alleged in the Commission’s order instituting proceedings.

² Civil Action, Dkt. No. 52.

Commission’s administrative proceeding through the Civil Action is fair and reasonable because it would employ a more efficient use of resources. Further as stated below, the violations of the administrative proceeding and those alleged in the Civil Action both involve an underlying, overarching fraudulent scheme by ARCP, acting through Brian S. Block (“Block”), that were both initially disclosed on the same date. Thus, the violations in the two actions “arise from substantially similar facts.” The Plan is approved by the Commission.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Administrative Proceeding

2. On June 23, 2020, the Commission issued an Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order (the “Order”)³ against the Respondent, a real estate investment trust (“REIT”), primarily engaged in the business of acquiring, owning, and managing single-tenant commercial real estate properties that by February 2014 had grown to be the nation’s largest publicly-traded net lease REIT.

3. In the Order, the Commission found that ARCP—acting through its then Chief Financial Officer, Block, and its then Chief Accounting Officer, Lisa McAlister (the “CAO”) —took actions to falsify reporting and manipulate the company’s “Adjusted Funds from Operations” or “AFFO,” a key non-GAAP performance metric relied on by ARCP management, investors, and analysts to assess ARCP’s financial performance, from at least May 2014 until the company’s initial disclosure on October 29, 2014, of their misconduct. That initial disclosure also announced the resignations of Block and the CAO at the request of the audit committee, and that the investigation was ongoing and had been expanded to encompass fiscal year 2013 in light

³ Securities Act Rel. No. 10793 (June 23, 2020).

of the fact that Block and the CAO had key roles in the preparation of filings during that year. The closing price of ARCP's stock on the day of the initial disclosure declined by approximately 19 percent from the prior day's close.

4. ARCP, a Maryland corporation during the relevant period, was headquartered in New York, New York. ARCP's common stock had been registered with the Commission under Section 12(b) of the Securities Exchange Act of 1934 since conducting its initial public offering and becoming a publicly-traded REIT in 2011. ARCP's stock was traded on NASDAQ's Global Select Market (ticker: ARCP) until July 2015 at which time it changed its name to VEREIT, Inc. and moved its listing to the New York Stock Exchange (ticker: VER). On November 1, 2021, Realty Income Corporation announced completion of a merger with VEREIT, Inc. The combined company traded on the New York Stock Exchange under Realty Income (ticker: O).

5. In the Order, the Commission ordered the Respondent to pay an \$8,000,000 civil money penalty to the Commission. The Commission also created a Fair Fund, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, so the penalty paid can be distributed to investors harmed by the Respondent's conduct described in the Order (the "Vereit Fair Fund").

6. The Vereit Fair Fund includes the \$8,000,000 paid by the Respondent. The assets of the Vereit Fair Fund are subject to the continuing jurisdiction and control of the Commission. The Vereit Fair Fund has been deposited in a Commission-designated account at the U.S. Department of the Treasury. Any accrued interest will be added to the Vereit Fair Fund for the benefit of investors.

7. The Commission appointed Miller Kaplan Arase LLP ("MKA"), a certified accounting firm, as Tax Administrator of the Fair Fund on August 28, 2020, to fulfill the tax-related obligations that the Vereit Fair Fund may incur as a Qualified Settlement Fund ("QSF")

under the Department of Treasury Regulation § 1.468B-1(c).⁴

The Civil Action

8. On July 16, 2019, the Commission filed a complaint (the “Complaint”) against AR Capital, LLC (“AR Capital”), Nicholas S. Schorsch (“Schorsch”), and Block (collectively, the “Defendants”). As alleged in the Complaint, AR Capital sponsored and externally managed REITs, including ARCP and two publicly held, non-traded REITs: American Realty Capital Trust III, Inc. (“T3”) and American Realty Capital Trust IV, Inc. (“T4”). ARCP completed a merger with T3 in February 2013 and with T4 in January 2014. The Complaint further alleged that contrary to shareholder disclosures, AR Capital, acting through Block and Schorsch, inflated several aspects of an incentive fees “that enriched the Defendants at the expense of the REITs and their shareholders,” which resulted in Defendants’ collecting a total of 2,922,445 ARCP operating partnership units (“OP units”) to which they were not entitled and that Defendants made additional related misstatements in subsequent ARCP public filings with the Commission, including in quarterly and annual reports on Forms 10-K and 10-Q.

9. The Complaint also alleged that Defendants’ misleading presentation of agreements—purportedly for purchasing furniture, fixtures, and equipment necessary for the respective T3 or T4-related post-merger operations and reimbursing AR Capital for certain “unreimbursed expenses”—in public filings with the Commission, resulted in the Defendants wrongfully obtaining at least \$7.27 million in unsupported compensation. The Complaint alleged the Defendants’ actions relating to these agreements also resulted in recording false entries on ARCP’s books and records.

10. Without admitting or denying the allegations in the Complaint, the Defendants

⁴ See Order Appointing Tax Administrator, Exchange Act Rel. No. 89708 (Aug. 28, 2020).

consented to the entry of final judgments against them (collectively, the “Final Judgments”). AR Capital was ordered liable for disgorgement, “representing profits gained as a result of conduct alleged in the Complaint,” of 2,922,445 OP units and \$11,275,065 plus prejudgment interest thereon of \$1,038,791. The Schorsch and Block final judgments ordered each liable on a joint-and-several basis with AR Capital for certain amounts of the disgorgement. The Final Judgments also ordered payment of civil penalties of \$14,000,000 against AR Capital, \$7,000,000 against Schorsch, and \$750,000 against Block. The Final Judgments required the Defendants to satisfy the disgorgement obligation with respect to the OP units by the surrender and return of such OP units to ARCP for cancellation and by the payment of cash disgorgement, prejudgment interest, and civil penalties to the Commission. In July 2019, Defendants paid the cash disgorgement, prejudgment interest, and penalties to the Commission and surrendered the OP units as required by the Final Judgments.

11. On October 22, 2019, the Court established the AR Capital Fair Fund, pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002, for the amounts paid pursuant to the Final Judgments, \$34,063,856, plus any accrued interest and earnings thereon.

12. On May 18, 2021, the Court entered an order approving the Commission’s motion to approve a distribution plan, the AR Capital Plan.

13. On September 30, 2019, a Stipulation of Settlement was filed in the class action *In re American Realty Capital Properties, Inc. Litigation*.⁵ Lead Plaintiff specifically alleged that ARCP failed to properly report AFFO, that common measure of REIT performance, by improperly and artificially inflating AFFO, causing it to be overstated. Lead Plaintiff further alleged that when the true facts regarding the alleged accounting improprieties were revealed,

⁵ Civil Action No. 1:15-mc-00040-AKH (S.D.N.Y.).

that artificial inflation was removed from the prices of ARCP Securities, causing the prices to drop and damaging member of the Class. The Class includes all persons and entities that purchased or otherwise acquired the common stock, preferred stock, or debt securities of ARCP or ARC Properties Operating Partnership, L.P. (“ARCP Securities”) during the period between February 28, 2013 and October 29, 2014 (the “Class Period”). The approved Settlement resulted in the creation of a case settlement fund of \$1,025,000,000.00.

III. TRANSFER OF THE VEREIT FAIR FUND TO THE AR CAPITAL FAIR FUND FOR DISTRIBUTION THROUGH THE CIVIL ACTION

14. ARCP’s manipulation of AFFO that affected investors in ARCP began May 8, 2014 (the date of ARCP’s Q1 2014 earnings announcement and Form 10-Q filing) and continued through the close of trading on October 28, 2014 (just prior to the initial disclosure of the merger related fraud, the internal investigation of the books and records misconduct, and the announcement of key officer resignations, all prior to market-open the following day). The mergers described in the Civil Action occurred between February 2013 and January 2014. However, the allegations in the Civil Action and in the Administrative Proceeding both involve an underlying, overarching fraudulent scheme by ARCP acting through Block. Importantly, the initial disclosure of the AFFO fraud is the same date used in the AR Capital Plan. This disclosure related to a variety of matters impacted by ARCP’s fraud. Given this confluence, it was not possible to disaggregate the amount of inflation in ARCP’s market price based on each of the impacted matters. Thus, it could not be determined with certainty or specificity what harm each investor incurred. As a result of this uncertainty, the AR Capital Plan seeks to compensate all holders of ARCP securities at the time of the disclosure who purchased or acquired shares at the time of the T3 merger or later, which would include those investors who purchased during the time of the AFFO fraud. Because of this same uncertainty, it is fair and reasonable for the

funds collected in the Administrative Proceeding to be distributed through the Civil Action for distribution with the AR Capital Fair Fund in accordance with the Court's approved AR Capital Plan.

15. The funds available for distribution in the Civil Action are much smaller than the total losses of investors. Consequently, the AR Capital Plan provides for distribution of the AR Capital Fair Fund on a *pro rata* basis to those investors who purchased or acquired shares of ARCP common stock on or after February 28, 2013 (closing date of the T3 merger) and held through the close of trading on October 28, 2014 (the day before disclosure of misconduct). This allocation of funds was deemed fair and reasonable by the Court. The same is true of the administrative proceeding—the losses exceed the available funds for distribution. Thus, distribution of the Vereit Fair Fund through the Civil Action in accordance with the Court's approved AR Capital Plan will be more efficient and cost-effective.

16. The Commission staff will take necessary steps to transfer the Vereit Fair Fund, plus any accrued interest, less any taxes and fees, to the Civil Action for distribution to harmed investors in accordance with the Court's approved AR Capital Plan.