

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-- against --

**AR CAPITAL, LLC, NICHOLAS S. SCHORSCH
and BRIAN S. BLOCK,**

Defendants.

19 Civ. 6603 (AT)

ECF Case

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S NOTICE OF MOTION
FOR AN ORDER APPROVING A DISTRIBUTION PLAN FOR THE FAIR FUND**

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law in Support of its Motion for an Order Approving a Distribution Plan for the ARCP Fair Fund (the "Fair Fund"), and all prior proceedings and pleadings in this action, Plaintiff Securities and Exchange Commission (the "SEC" or "Commission") will respectfully move this court, at the United States District Court located at 500 Pearl Street, New York, New York 10007, before the Honorable Analisa Torres, at a date and time to be determined by the Court, for an order approving the Commission's proposed plan of distribution, which will distribute the Fair Fund of \$34,175,862.42 paid by defendants AR Capital, LLC, Nicholas S. Schorsch, and Brian S. Block, plus any accrued interest and earnings thereon established by the Court's Order of October 22, 2019 [DE 30], pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 [15 U.S.C. § 7246(a)], as amended by the Dodd-Frank Act of 2010 [15 U.S.C. § 7246].

PLEASE TAKE FURTHER NOTICE that any objections to or comments on the proposed plan of distribution should be filed with the Court within 30 days of the Commission's

motion and that, if no papers are submitted in opposition to its motion, the Court may grant the motion without any further notice or hearing.

Dated: September 14, 2020

Respectfully submitted,

/s/ Nancy Chase Burton

Nancy Chase Burton

Attorney for Plaintiff

SECURITIES AND EXCHANGE COMMISSION

100 F. Street NE

Washington, DC 20549-5678

Telephone: (202) 551-4425

Email: burtonn@sec.gov

CERTIFICATE OF SERVICE

I, Victor Suthammanont, hereby certify that, on September 14, 2020, I caused the foregoing document to be electronically filed with the clerk of the court for the U.S. District Court of Southern District of New York, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to all attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Victor Suthammanont

Victor Suthammanont

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

--against--

**AR CAPITAL, LLC, NICHOLAS S. SCHORSCH
and BRIAN S. BLOCK,**

Defendants.

19 Civ. 6603 (AT)

ECF Case

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF
SECURITIES AND EXCHANGE COMMISSION'S MOTION FOR AN ORDER
APPROVING A DISTRIBUTION PLAN FOR THE FAIR FUND**

Nancy Chase Burton
Nichola L. Timmons
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-5631
(202) 551-4425 (Burton)
burtonn@sec.gov

Victor Suthammanont
U.S. Securities and Exchange Commission
200 Vesey Street, Suite 400
New York, NY 10281
(212) 336-5674 (Suthammanont)
suthammanontv@sec.gov

TABLE OF CONTENTS

I.	Background	1
A.	The Underlying Allegations	1
B.	Procedural History.....	3
C.	The October 29, 2014 Announcement and Subsequent Events Affecting Investors.....	5
D.	The Proposed Distribution Plan	7
II.	Argument	8
A.	The Applicable Standard.....	8
B.	The Commission’s Proposed Distribution Plan Provides A Fair and Reasonable Allocation of the Fair Fund	9
III.	Leveraging Class Action Data and Identification of Eligible Claimants.....	12
IV.	Calculation Of Distribution Amounts.....	13
V.	Disposition of Remaining Funds	13
VI.	Conclusion	13

TABLE OF AUTHORITIES

Cases

<i>Official Committee of Unsecured Creditors of Worldcom, Inc. v. SEC</i> , 467 F.3d 73 (2d Cir. 2006).....	8
<i>SEC v. CR Intrinsic Investors, LLC</i> , 164 F. Supp. 3d 433 (S.D.N.Y. 2016)	8
<i>SEC v. Levine</i> , 881 F.2d 1165 (2d Cir. 1989)	8
<i>SEC v. Wang</i> , 944 F.2d 80 (2d Cir. 1991)	8

Statutes

Sarbanes-Oxley Act of 2002 § 308(a), 15 U.S.C. § 7246(a)	9
Securities Exchange Act of 1934 §21(d), 15 U.S.C. § 78u(d).....	9

Plaintiff United States Securities and Exchange Commission (“SEC” or the “Commission”) respectfully submits this Memorandum of Law in support of the Commission’s motion for an order approving the Commission’s proposed plan to distribute more than \$34 million to harmed investors who purchased shares of American Realty Capital Properties, Inc. (“ARCP”) common stock during a specific period identified in the proposed plan of distribution (“Distribution Plan”).

I. Background

A. The Underlying Allegations

On July 16, 2019, the SEC filed a Complaint (“Complaint”) against AR Capital, LLC (“AR Capital”), Nicholas S. Schorsch (“Schorsch”), and Brian S. Block (“Block”) (*collectively*, the “Defendants”). *See* ECF No. 1. The Complaint alleged that the Defendants violated the federal securities laws by making material misstatements and omissions and engaging in other improper conduct in connection with two mergers in 2013 and 2014 involving American Realty Capital Properties, Inc. (“ARCP”)¹ through which conduct, Defendants improperly obtained millions of dollars. As alleged in the SEC Complaint, AR Capital sponsored and externally managed REITs, including ARCP and the two publicly held, non-traded REITs that merged with ARCP: American Realty Capital Trust III, Inc. (“T3”) and American Realty Capital Trust IV, Inc. (“T4”). *Id.* ¶ 2. Schorsch was the chief executive officer and principal owner of AR Capital, of which Block was the chief financial officer and a minority owner. *Id.* Schorsch also served as the CEO and chairman of ARCP, T3, and T4, while Block served as CFO of those entities. *Id.*

¹ In 2015, ARCP changed its name to VEREIT, Inc. For purposes of this motion, it continues to be referred to as ARCP.

ARCP completed a merger with T3 in February 2013, *id.* ¶ 14, and with T4 in January 2014, *id.* ¶ 15. The T3 merger was contingent on approval by a majority of each of ARCP's and T3's shareholders, and ARCP and T3 issued a joint proxy statements/prospectus to shareholders, as well as a registration statement filed by ARCP to register shares to be issued in the merger. *Id.* ¶ 30. The T4 merger was contingent on approval by a majority of T4's shareholders and an effective ARCP registration statement to issue ARCP shares to T4 shareholders. *Id.* at ¶ 68. Because of their roles with T3, T4, and ARCP, the Defendants were required to disclose their interests in the merger to shareholders in these documents.

The Complaint alleged that, contrary to shareholder disclosures and the governing documents, Defendant AR Capital, acting through Block and Schorsch, inflated several aspects of the calculation used to determine an incentive fee (the "promote fee") "that enriched the Defendants at the expense of the REITs and their shareholders." *Id.* ¶ 24. The Complaint alleged that Defendants' actions collectively inflated the promote fees AR Capital received in the form of ARCP operating partnership units ("OP Units") by 1,135,360 OP Units with respect to the T3 merger and 1,787,085 OP Units with respect to the T4 merger. *Id.* ¶¶ 55, 75. The Complaint further alleged that Defendants made related misstatements in public filings with the Commission, including in quarterly and annual reports on Forms 10-K and 10-Q. *Id.* ¶¶ 57-60, 77-79.

The Complaint further alleged that, in connection with the T3 and T4 mergers, Defendants directed the creation of and/or approved misleading asset purchase and sale agreements with ARCP for furniture, fixtures and equipment purportedly necessary for post-merger operations and to reimburse AR Capital for certain "unreimbursed expenses" ("FF&E Agreements"). *Id.* ¶ 82. The Complaint alleged that presenting these FF&E Agreements in

ARCP public filings with the Commission was misleading because the FF&E Agreements did not accurately reflect the items being purchased, their cost, or the expenses being reimbursed, which allowed the Defendants to wrongfully obtain at least \$7.27 million. *Id.* ¶¶ 84-92. The Complaint also alleged that Defendants’ actions relating to these FF&E Agreements also resulted in recording of false entries on ARCP’s books and records. *Id.* ¶¶ 94-95. The Complaint alleged that by engaging in the conduct described therein, AR Capital and Block violated Section 17(a)(1), (a)(2), and (a)(3) of the Securities Act of 1933 (“Securities Act”), Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5 thereunder, and Section 13(b)(5) of the Exchange Act and Rule 13b2-1 thereunder; and that Schorsch violated Section 17(a)(2) and (a)(3) of the Securities Act and Exchange Act Rule 13b2-1. *Id.* ¶ 6.

B. Procedural History

The Commission filed the Complaint in this action along with the consents of Defendants to proposed final judgments. ECF Nos. 1, 5-6, 10. On July 17, 2019, the Court entered final judgments by consent against Defendant AR Capital (“AR Capital Judgment”), Defendant Schorsch (“Schorsch Judgment”) and Defendant Block (“Block Judgment”) (collectively, the “Final Judgments”). *See* ECF Nos. 8-9, 11. The final judgments permanently enjoined the Defendants from violating certain antifraud and books-and-records provisions of the federal securities laws, ordered Defendants liable for disgorgement on a specified joint-and-several basis, and ordered each Defendant to pay a specified civil penalty. *Id.*

The AR Capital Judgment ordered AR Capital liable for cash disgorgement and prejudgment interest of \$12,313,856 and 2,922,445 ARCP OP Units,² “representing profits

² The AR Capital Judgment required that AR Capital satisfy its disgorgement of obligation pertaining to the 2,922,445 OP Units by surrendering and returning 2,922,445 OP units to ARCP

gained as a result of conduct alleged in the Complaint,” and to pay a civil penalty of \$14,000,000. *See* ECF No. 9. The Schorsch Judgment provided that he is liable on a joint-and-several basis with AR Capital for certain amounts of disgorgement and ordered him to separately pay a civil penalty of \$7,000,000. ECF No. 8. The Block Judgment provided that he is liable on a joint-and-several basis with AR Capital for certain amounts of disgorgement and ordered him to separately pay a civil penalty of \$750,000. ECF No. 11.

Defendants have since paid the cash disgorgement, prejudgment interest, and penalties to the Commission, which is holding the cash amount (totaling \$34,063,856) in an interest-bearing account at the U.S. Treasury’s Bureau of Fiscal Service (“BFS”), for distribution pursuant to a plan of distribution to be approved by the Court.

The Final Judgments stated that the Commission shall hold the funds paid to it, together with any interest and income earned (the “Fund”), pending further order of the Court. The Final Judgments further provided that the Commission “may propose a plan to distribute the Fund subject to the Court’s approval” and that such a plan may provide for a distribution pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002.

On October 22, 2019, the Court granted the motion of the Commission and established a Fair Fund (“Fair Fund”) pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley Act”),³ and appointed Miller Kaplan Arase LLP (“Miller Kaplan”) as tax administrator to execute all income tax reporting requirements, including the preparation and filing of tax returns, for all funds under the Court’s jurisdiction in this case. *See* ECF No. 30.

(now renamed VEREIT, Inc.) for cancellation. ECF No. 9. On or about July 24, 2019, Defendants surrendered the OP units, which ARCP cancelled.

³ Section 308(a) of the Sarbanes-Oxley Act, as amended, provides that civil penalties shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of victims of securities laws violations.

On April 16, 2020, the Court granted the motion of the Commission and appointed Kurtzman Carson Consultants LLC (“KCC”) to serve as the Distribution Agent to facilitate the development of a distribution plan, and, subject to approval by the Court of a distribution plan, to implement and oversee the administration and distribution of the Fair Fund in coordination with the Commission staff. *See* ECF No. 35.

C. The October 29, 2014 Announcement and Subsequent Events Affecting Investors

Shortly following the conduct at issue in the SEC complaint in this action, prior to market open on October 29, 2014, ARCP announced in a Form 8-K filed with the Commission that its Audit Committee of the Board of Directors concluded that previously issued audited consolidated financial statements and other financial information contained in the Company’s annual report for the fiscal year ended December 31, 2013, and the quarterly reports for the first and second quarters of fiscal year 2014, as well as the Company’s earnings releases and other financial communications for these periods should no longer be relied upon. *See* October 29, 2014 Form 8-K. The announcement stated that the Audit Committee based its conclusion on the preliminary findings of its investigation into concerns regarding accounting practices and other matters that were reported to the Audit Committee. *Id.* The announcement explained that, based on the preliminary findings, the Audit Committee believed that ARCP had overstated a non-GAAP accounting measure commonly reported by REITs, Adjusted Funds from Operations (“AFFO”), for the first quarter of 2014 as a result of an error, which “was identified but intentionally not corrected, and other AFFO and financial statement errors were intentionally made, resulting in an overstatement of AFFO” and other misstatements for the three and six month periods in the second quarter of 2014. *Id.* The announcement further noted that Block, the CFO, and the Chief Accounting Officer (Lisa McAlister) had resigned and that ARCP was

expanding its investigation to encompass the fiscal year 2013 financial statements in light of the key role the CFO and CAO had in their preparation. *Id.*

ARCP's share price fell in the days following the announcement, dropping from a closing price of \$12.38 per share on October 28, 2014, to close at \$10.00 on October 29, 2014, resulting in a market capitalization loss of over \$2 billion. Subsequently, on December 15, 2014, ARCP announced management and corporate governance changes in a Form 8-K filed with the Commission that included, among other management resignations, that Schorsch was resigning from all positions at ARCP and that ARCP would be unwinding all of its relationships with entities in which Schorsch maintained an executive or director-level role or was a significant stockholder. *See* December 15, 2014 Form 8-K. ARCP's share price closed at \$8.23 that day.

ARCP filed restatements of its Form 10-K for fiscal year 2013 and Forms 10-Q for the first and second quarters of 2014 on March 2, 2015. In those restatements, among other "error corrections" ARCP noted that it could not support the value of the assets received pursuant to the FF&E Agreements. VEREIT's share price closed at \$9.90 on the day of the restatements.

On September 9, 2016, the Commission filed a separate action charging Block and McAlister in connection with the AFFO conduct, *SEC v. Block*, No. 16 Civ. 7003 (LGS) (S.D.N.Y.).⁴ In February 2018, Block settled the Commission's claims against him in that action. *See Block*, No. 16 Civ. 7003, ECF No. 94.

The Commission also brought a settled cease-and-desist proceeding against ARCP related to its AFFO misstatements in 2020. *See In re VEREIT, Inc.*, Securities Act Release No. 10793, Exchange Act Release No. 89133 (June 23, 2020).

⁴ The U.S. Attorney's Office for the Southern District of New York also charged Block, and he was convicted following a jury trial. *See U.S. v. Block*, No. 16 Crim. 595 (JPO) (S.D.N.Y.).

ARCP shareholders filed a number of class action suits that were eventually consolidated as *In re American Realty Capital Properties, Inc. Litigation*, No. 15-mc-00040 (AKH) (S.D.N.Y.). In addition, shareholders filed a derivative suit, *Witchko v. Schorsch*, No. 15-cv-6043 (AKH) (S.D.N.Y.), and several plaintiffs opted out of the class action to pursue separate suits. On September 9, 2019, ARCP filed a Form 8-K announcing that it had entered into agreements to settle certain outstanding litigations, including the pending consolidated class action and the derivative action. Gilardi & Co. LLC (which was acquired by KCC in 2015) was appointed Claims Administrator in the class action by Order dated October 4, 2019, and the settlement was approved on January 22, 2020. Proof of claims and releases were due in the Class Action on January 23, 2020. The Class Action settlement fund to be distributed is \$1.025 billion plus interest, minus approximately \$100 million in attorneys' fees, \$5 million in expenses, for a total of \$920 million less the costs of administering the settlement and distribution. As set forth in the briefing by the lead plaintiff's counsel in the Class Action, the Class Settlement amount "represents approximately 50% of estimated recoverable damages." See Memorandum of Law in Support of Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation, *In re Am. Realty Capital Props., Inc. Litig.*, No. 15-mc-00040 (AKH), DE 1283 at 19.

D. The Proposed Distribution Plan

The Commission's proposed plan would distribute the approximately \$34 million, less administration expenses and taxes, on a *pro rata* basis to harmed investors who purchased or otherwise acquired shares of ARCP common stock between February 28, 2013 (the closing date of the T3 merger) and October 28, 2014, and held such shares through the close of trading on October 28, 2014 (the "Relevant Period").

II. Argument

A. The Applicable Standard

Nearly every plan to distribute funds obtained in a Commission enforcement action requires choices to be made regarding the allocation of funds between and among potential claimants within the parameters of the amounts recovered. In recognition of the difficulty of this task, courts historically have given the Commission significant discretion to design and set the parameters of a distribution plan. As the Second Circuit has explained, “[t]his kind of line-drawing – which inevitably leaves out some potential claimants – is . . . appropriately left to the experience and expertise of the SEC in the first instance.” *SEC v. Wang*, 944 F.2d 80, 83-84, 88 (2d Cir. 1991); *see also SEC v. Levine*, 881 F.2d 1165, 1182 (2d Cir. 1989).

A court’s review of a Fair Fund distribution plan focuses on whether the plan is fair and reasonable. *See Official Committee of Unsecured Creditors of Worldcom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006) (“unless the consent decree specifically provides otherwise[,] once the district court satisfies itself that the distribution of proceeds in a proposed SEC disgorgement plan is fair and reasonable, its review is at an end”), *citing Wang*, 944 F.2d at 85; *see also SEC v. CR Intrinsic Investors, LLC*, 164 F. Supp. 3d 433, 435 (S.D.N.Y. 2016) (the standard of review for a proposed Fair Fund distribution plan is whether the fund distribution plan “fairly and reasonably distribute[s] the limited Fair Fund proceeds among the potential claimants” (*citing Worldcom*, 467 F.3d at 85)).

For the reasons articulated below, the Commission submits that its proposed distribution plan for the Fair Fund constitutes a fair and reasonable allocation of the funds available for distribution and should be approved.

B. The Commission’s Proposed Distribution Plan Provides A Fair and Reasonable Allocation of the Fair Fund

Section 21(d)(5) of the Exchange Act permits the Commission to seek, and a Federal court to grant, “any equitable relief that may be appropriate or necessary for the benefit of investors.” Section 21(d)(3) of the Exchange Act permits the Commission to seek, and gives a district court jurisdiction to impose, civil penalties to be paid by the person who committed such violation. As noted above, the consent judgments ordered Defendants to pay cash disgorgement plus prejudgment interest that totaled \$12,313,856 and civil penalties that totaled \$21,500,000. The consent judgments further provided that the Commission “may propose a plan to distribute” the funds collected by it subject to the Court’s approval and that such a plan may provide for a distribution pursuant to the Fair Fund provisions of Section 308(a) of the Sarbanes-Oxley Act of 2002. Section 308(a) of the Sarbanes-Oxley Act of 2002 provides in part that, if the Commission obtains a civil penalty against any person for a violation of the securities laws, “such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.” 15 U.S.C. § 7246(a).

The primary violations alleged in the Complaint are of the antifraud provisions of the federal securities laws—Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct and materially misleading statements in connection with the sale of securities. The facts alleged in the Complaint contemplate that the victims of the Defendants’ fraudulent conduct are the investors who purchased or otherwise acquired ARCP shares and were misled by the fraudulent misrepresentations and omissions made in connection with the T3 and T4 mergers, which required the specified shareholder approval in order to occur. In addition, the Complaint alleged

that related misrepresentations were continuously made in subsequent public filings with the Commission, including in ARCP's current reports on Form 8-K following each merger and in its annual report on Form 10-K for 2013 and quarterly reports on Forms 10-Q during 2013 and the first two quarters of 2014. *See* Compl. at ¶¶ 57-60 and 77-79. These misrepresentations directly impacted any investors who purchased ARCP common shares after the filing of these reports and who were unaware of Defendants' frauds. As such, the Commission staff in consultation with the Distribution Agent determined that all market participants who purchased or otherwise acquired ARCP stock during these periods, including investors who acquired ARCP shares through the T3 and T4 mergers, were harmed by the Defendants' conduct.

The first disclosure of any fraud at the company was in the October 29, 2014 announcement of non-reliance on ARCP's 2013 and Q1 and Q2 2014 financial reports and AFFO misconduct. While the value of ARCP shares was also artificially inflated by the AFFO-related accounting fraud, as described above, ARCP's disclosure noted not only the specifically identified AFFO misconduct and misstatements, but also that "other matters" were reported to the Audit Committee and that the company was expanding its investigation to review the fiscal year 2013 financial statements as well. The violations alleged in the Complaint in this action took place in 2013 and continued through at least the second quarter of 2014. ARCP's share price dropped by \$2.38 after the October 29, 2014 announcement, from a closing price of \$12.38 per share on October 28, 2014, to a closing price of \$10.00 on October 29, 2014.

Because the first realized monetary harm to shareholders from fraud was not realized until after the October 28, 2014 announcement, the methodology of the proposed Plan compensates ARCP common stock shareholders that purchased or otherwise acquired shares during the period beginning February 28, 2013 (the closing date of the T3 merger) and

continuing through to October 28, 2014 (the day before the announcement of non-reliance on ARCP's 2013 and Q1 and Q2 2014 financial reports), inclusive, and held those shares as of the close of trading on October 28, 2014 (i.e., the Relevant Period).⁵ The proposed Plan compensates such ARCP common stock shareholders on a *pro rata* per share basis. The Commission believes this is fair and reasonable since it is consistent with the securities violations specified and relief requested in the Complaint and treats shareholders equitably.

Moreover, a distribution under the proposed Plan will not result in a "windfall" to any shareholders. As discussed above, ARCP's common stock dropped from a closing price of \$12.38 per share on October 28, 2014, to a closing price of \$10.00 on October 29, 2014, a decrease of \$2.38 per share, resulting in a market capitalization loss of more than \$2 billion. The Class Action settlement fund to be distributed is \$920 million less distribution expenses and will likely cover 50% or less of shareholder losses. In addition, during the entirety of the Relevant Period, the highest price at which ARCP traded was the high of \$18.05 on May 15, 2013, and the lowest price was the low of \$11.42 on October 15, 2014—well above the \$10.00 per share closing price the day after the October 28, 2014 Announcement. Accordingly, notwithstanding that certain ARCP shareholders may receive compensation from both the Class Action settlement and the SEC Fair Fund, no windfall to any shareholders will result from the proposed Fair Fund distribution plan.

Finally, given the size of the Fair Fund and the expected distribution per share, the simplified *pro rata* method proposed for this distribution provides an efficient and equitable method to effectuate the distribution.

⁵ Transactions in ARCP preferred shares or debt holders, or transactions which occurred outside of the Relevant Period will not be eligible to participate in the SEC distribution.

III. Leveraging Class Action Data and Identification of Eligible Claimants

The Commission's proposed Distribution Plan is designed to compensate common stock shareholders that purchased or otherwise acquired shares during the period beginning February 28, 2013, and continuing until October 28, 2014, and that held those shares as of the close of trading on October 28, 2014. The Distribution Plan encompasses persons who submitted claims in the Class Action ("Class Action Claimants"), as well as others ("Potential Claimants") such as shareholders who opted out of the Class Action and shareholders who acquired such shares through the T3 merger (which shares were excluded from the Class Action).

By appointing KCC as the Distribution Agent of the Plan, who is also the Class Action Agent, the Plan is designed to use Class Action data wherever appropriate and reduce the cost and filing burdens for the SEC distribution and potentially eligible shareholders, while also streamlining administration, maximizing the amount of the Fair Fund available for distribution. Under the proposed plan, a Postcard Notice will be sent to Class Action Claimants as they will not need to file new claims because their Class Action claims data will be carried over and re-evaluated based on the Fair Fund Plan of Allocation.⁶ Other potential claimants known to the Distribution Agent (including known T3 shareholders who acquired ARCP shares in the merger and known persons who opted out of the Class Action) will be sent complete Notice Packets explaining the claims filing process. There will also be other means of notice to potentially eligible claimants. *See* Plan at section III.

⁶ Capitalized terms used herein that are not otherwise defined in this Memorandum refer to the defined terms in the proposed Distribution Plan.

IV. Calculation Of Distribution Amounts

The Distribution Agent will review all submissions of Claim Forms and all data compiled for Class Action Claimants to determine eligibility of claims. The Distribution Plan's methodology, as outlined more fully in Appendix 1: Fair Fund Plan of Allocation, will be used to calculate each Eligible Claimant's distribution payment. The Plan of Allocation is designed to compensate Eligible Claimants based on their number of Eligible Shares.

For each Claimant who is determined to be eligible for a distribution, the Distribution Agent will calculate the number of Eligible Shares based on the first-in, first-out ("FIFO") method, which will match eligible acquisitions and sales of Eligible Securities during the Relevant Period. The Net Available Fair Fund will be divided *pro rata* among the Eligible Claimants based on their holdings just prior to the public announcement of irregularities in public filings. The total number of each Eligible Claimants' Eligible Shares will be determined as a proportion of all Eligible Claimants total number of Eligible Shares and then multiplied by the total amount of the Net Available Fair Fund to determine each distribution payment.

V. Disposition of Remaining Funds

In the event that there are remaining funds after the distribution is complete and all tax obligations of the Fair Fund have been satisfied, the Plan provides for the Distribution Agent and Commission staff to make a recommendation to the Court as to the appropriate disposition of any residual funds.

VI. Conclusion

For all of the foregoing reasons, the proposed Distribution Plan for the ARCP Fair Fund is a fair and reasonable allocation of the Net Available Fair Fund, and the Commission

respectfully requests that the Court grant its Motion For An Order Approving A Distribution Plan For The Fair Fund and such other relief as it deems necessary and proper.

Dated: September 14, 2020

Respectfully submitted,

/s/ Nancy Chase Burton

Nancy Chase Burton

Nichola L. Timmons

U.S. Securities and Exchange Commission

100 F Street, N.E.

Washington, DC 20549-5631

(202) 551-4425 (Burton)

(202) 551-4456 (Timmons)

burtonn@sec.gov

timmonsn@sec.gov

Fax: (202) 572-1372

Victor Suthammanont

U.S. Securities and Exchange Commission

200 Vesey Street, Suite 400

New York, NY 10281

(212) 336-5674 (Suthammanont)

suthammanontv@sec.gov