

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

RANDELL QUAAL, individually and on behalf of all  
others similarly situated,

Plaintiff,

- against -

AMERICAN REALTY CAPITAL TRUST III, INC.,  
AMERICAN REALTY CAPITAL OPERATING  
PARTNERSHIP III, L.P., NICHOLAS S.  
SCHORSCH, EDWARD MICHAEL WEIL, JR.,  
SCOTT J. BOWMAN, EDWARD G. RENDELL,  
DAVID GONG, AMERICAN REALTY CAPITAL  
PROPERTIES, INC., ARC PROPERTIES  
OPERATING PARTNERSHIP, L.P., and TIGER  
ACQUISITION, LLC,

Defendants.

x

**Case No.**

**SUMMONS**

Plaintiff designates County of New  
York as the place of trial.

The basis of venue is Defendant's  
principal place of business.

**TO THE ABOVE-NAMED DEFENDANT(S):**

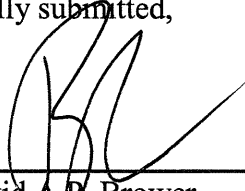
You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorney within twenty (20) days after the service of the summons, exclusive of the day of service of this summons (or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Plaintiff hereby demands a trial by jury.

DATED: January 30, 2013

Respectfully submitted,

By:

  
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David A.P. Brower  
Brian C. Kerr

**BROWER PIVEN**

**A Professional Corporation**

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Thirty-Third Floor

New York, NY 10016

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*Counsel for Plaintiff*

<b>Defendants:</b>	<b>Address:</b>
Nicholas S. Schorsch Edward Michael Weil, Jr. Scott J. Bowman Edward G. Rendell David Gong American Realty Capital Trust III, Inc. American Realty Capital Operating Partnership III, L.P. American Realty Capital Properties, Inc. ARC Properties Operating Partnership, L.P. Tiger Acquisition, LLC	c/o American Realty Capital Trust III, Inc. American Realty Capital Properties, Inc. 405 Park Avenue, 15 <sup>th</sup> Floor New York, NY 10022



until ARCT III shareholders are provided with sufficient information to cast a fully informed vote regarding the Proposed Transaction, to order that the Board (defined below) otherwise comply with its fiduciary obligations, and to award Plaintiff and the Class (defined below), to the extent available, damages suffered as a result of Defendants' wrongdoing as herein alleged.

2. On December 17, 2012, ARCT III and ARCP jointly announced that they had entered into a definitive merger agreement under which ARCP will acquire the stock of ARCT in a merger that would create a combined company with \$3.0 billion in enterprise value ("Merger Agreement"). Under the terms of the transaction, at the effective time of the merger ("Effective Time"), each outstanding share of ARCT III common stock will be converted into the right to receive (i) 0.95 of a share of common stock of ARCP, or (ii) \$12.00 in cash, but in no event will the aggregate consideration paid in cash be paid on more than 30% of the shares of ARCT III common stock issued and outstanding as of immediately prior to the closing of the Merger. Any elections for cash in excess of the cap will be reduced on a pro rata basis, with the remaining consideration paid in shares of ARCP.

3. In facilitating the acquisition of ARCT III by ARCP for inadequate consideration and through a flawed process, each of the Defendants breached and/or aided the other Defendants' breaches of their fiduciary duties.

4. The ARCT III Board of Directors breached its fiduciary duties by failing to maximize the consideration available to ARCT III shareholders. The Proposed Transaction offers ARCT III shareholders inadequate consideration for their shares, particularly in light of rising commercial real-estate prices in the period following the issuance of ARCT III shares, the high fees associated with the purchase of non-traded REIT shares, and the Definitive Proxy's (defined below) failure to provide shareholders with any comparative premiums for similar

acquisitions.

5. The ARCT III Board of Directors further breached its fiduciary duties by agreeing to a number of deal protection provisions that dissuade competing bidders who, but for those provisions designed to chill their interest, could offer more value to the Company's shareholders. Specifically, the Merger Agreement includes:

a. a "*no shop*" provision that precludes the Board from attempting to maximize shareholder value by soliciting or negotiating with any other potential acquirer and requires that the Board cease all such existing communications and negotiations;

b. an "*information rights*" provision that requires the Board to give full information about competing acquisition proposals to ARCP (including the identity of the suitor and the terms and conditions of any competing offer) within 24 hours of their receipt;

c. a "*matching rights*" provision that allows ARCP the right to match any competing proposal once they receive the relevant information; and

d. a "*termination fee*" provision whereby the Board agreed that ARCT III would pay ARCP its reasonable out-of-pocket transaction expenses, in an amount up to \$10 million, if ARCT III terminates the Proposed Transaction because of a superior or alternative proposal in the event the Company receives a higher offer for the Company and its shareholders, despite the no shop provision.

6. Finally, on January 8, 2013, Defendants filed a Form S-4 Registration Statement ("Registration Statement") with the U.S. Securities and Exchange Commission ("SEC") in connection with the Proposed Transaction, which contained numerous material misstatements and omissions. On January 22, 2013, Defendants filed a Definitive Proxy Statement ("Definitive

Proxy”) on Schedule 14A with the SEC in connection with the Proposed Transaction, which failed to correct the material misstatements and omissions contained in the Registration Statement.

7. In sum, Defendants utilized a defective sales process that was not designed to maximize shareholder value or to protect the interests of ARCT III’s shareholders, but rather was designed to create material personal benefits and divert the Company’s valuable assets to ARCP. Each of the Defendants has breached his fiduciary duties, and/or has aided and abetted such breaches by favoring his own financial interests over those of ARCT III and the public shareholders, and disseminating false and misleading information in connection with the shareholder vote. As a result, Plaintiff and the other ARCT III public shareholders are receiving an unfair price in the Proposed Transaction.

8. For these reasons and as set forth in detail herein, Plaintiff seeks to enjoin Defendants from taking any steps to consummate the Proposed Transaction or, in the event the Proposed Transaction is consummated, recover damages resulting from the Individual Defendants’ (as defined herein) violations of their fiduciary duties and from ARCP.

### **PARTIES**

9. Plaintiff Randell Quaal was, and at all relevant times is, a continuous shareholder of Defendant ARCT III.

10. Defendant American Realty Capital Trust III, Inc. is a Maryland corporation, incorporated in 2010, with its principal executive offices located at 405 Park Avenue, New York, NY 10022. As of December 31, 2012, ARCT III owned 507 properties in 44 states, with total rentable square feet of 13.0 million. Seventy-five percent of these properties were leased to investment grade tenants. As of December 31, 2012, ARCT III’s properties had an average

capitalization rate of 7.88%. ARCT III has an estimated enterprise value of \$2.7 billion, pro forma March 31, 2013. ARCT III has elected to operate as a real estate investment trust (“REIT”). Operating as a REIT, the Company is required to distribute at least 90% of REIT taxable income based on the Internal Revenue Code to its shareholders annually. As of January 4, 2013, there were over 177 million shares of ARCT III common stock issued and outstanding, held by more than 38,000 holders of record.

11. Defendant American Realty Capital Operating Partnership III, L.P. (“ARCT III OP”) is a Delaware limited partnership, with its principal executive offices located at 405 Park Avenue, New York, NY 10022. ARCT III is the sole general partner of ARCT III OP with a 99.9% stake in ARCT III OP. ARCT III conducts substantially all of its business through ARCT III OP. The remaining .1% stake in ARCT III OP is held by American Realty Capital Trust III Special Limited Partner, LLC, which is 100% owned by AR Capital, LLC

12. Defendant Nicholas S. Schorsch currently serves as the Executive Chairman of the Board of Directors and Chief Executive Officer (“CEO”) of the Company. Mr. Schorsch also serves as Chairman and CEO of ARCP, and has served in these roles since ARCP’s formation in December 2010. Mr. Schorsch has served as Chairman of the Board and CEO of American Realty Capital Trust, Inc. since its formation in 2007. Mr. Schorsch is also the Chairman and CEO of American Realty Capital New York Recover REIT, Inc. (“NYRR”), Chairman and CEO of American Realty Capital Healthcare Trust, Inc. (“ARC HT”), as well as Chairman and CEO of American Realty Capital Daily Net Asset Value Trust, Inc. (“ARC DNAV”). Mr. Schorsch serves as Chairman and CEO of ARC Properties Advisors, ARCP’s manager. Mr. Schorsch also serves as the CEO of American Realty Capital Advisors III, LLC,

and has served in that role since its formation in October 2010. Mr. Schorsch is a majority-owner and the Chairman and CEO of AR Capital, LLC.

13. Defendant Edward M. Weil, Jr. is a director of the Company, and has served as President, Chief Operating Officer, and Treasurer of ARCT III since March 2012. Mr. Weil also serves as a Director, Secretary, and Executive Vice President of ARCP. Mr. Weil has served as Executive Vice President and Secretary since ARCP's formation in December 2010. Mr. Weil also serves as President of ARC Properties Advisors, ARCP's manager. He has also served as an executive officer of NYRR, and an executive officer and director of ARC DNAV.

14. Defendant Scott J. Bowman has served as a director of ARCT III since February 2012. Mr. Bowman has also served as a director of NYRR since August 2011. He has also served as a Director of ARC DNAV. As of January 4, 2013, Mr. Bowman held 9,064 shares of ARCT III common stock, of which 6,000 were restricted shares that vest annually over a five-year period in equal installments.

15. Defendant Governor Edward G. Rendell has served as a director of ARCT III since March 2012. Governor Rendell has also previously served as a director of ARCP, ARC DNAV, ARC HT, and American Realty Capital – Retail Centers of America, Inc. ("ARC RCA"). As of January 4, 2013, Governor Rendell held 6,000 restricted shares of ARCT III common stock that vest annually over a five-year period in equal installments.

16. Defendant David Gong has served as a director of ARCT III since January 2011. Mr. Gong has also previously served as a director of ARCP and ARC RCA. As of January 4, 2013, Mr. Gong held 6,000 restricted shares of ARCT III common stock that vest annually over a five-year period in equal installments.

17. Defendants Schorsch, Weil, Bowman, Rendell, and Gong are collectively referred



to herein as the “Board” or the “Individual Defendants.”

18. Defendant American Realty Capital Properties, Inc. is a Maryland corporation incorporated in 2010 with its principal office located at 405 Park Avenue, New York, New York 10022. ARCP is listed on the NASDAQ Exchange with a trading symbol “ARCP.” ARCP has elected to operate as a REIT. ARCP has an estimated enterprise value of \$308.9 million, pro forma March 31, 2013. As of September 30, 2012, excluding one vacant property classified as held for sale, ARCP owned 124 properties consisting of 2.2 million square feet, 100% leased with a weighted average remaining lease term of 6.8 years. As of January 4, 2013, there were 11,157,643 shares of ARCP common stock outstanding and entitled to vote, held by approximately 132 holders of record. As of January 4, 2013, ARCP’s directors and executive officers, and their affiliates, held and were entitled to vote 1,898,522 shares of ARCP common stock, or 17% of ARCP’s outstanding common stock.

19. Defendant ARC Properties Operating Partnership, L.P (“ARCP OP”) is a Delaware limited partnership, with its principal executive offices located at 405 Park Avenue, New York, NY 10022. ARCP is the sole general partner of ARCP OP. ARCP is required to conduct all of its activities through ARCP OP by the limited partnership agreement of ARCP OP.

20. Defendant Tiger Acquisition, LLC is a Delaware corporation, with its principal executive offices located at 405 Park Avenue, New York, NY 10022. Tiger Acquisition, LLC is a wholly-owned subsidiary of ARCP formed solely for the purpose of consummating the Proposed Transaction.

21. Collectively, ARCT III, ARCT III OP, the Individual Defendants, ARCP, ARCP OP, and Merger Sub are referred to herein as the “Defendants.”

## **JURISDICTION AND VENUE**

22. Under New York Civil Practice Law and Rules (“CPLR”) §§ 301 & 302, this Court has personal jurisdiction over all of the Defendants. Each of the Defendants either resides in New York or conducts continuous and systematic business in New York. Defendants ARCT III and ARCP have their principal executive offices in New York, New York. Additionally, the transactions, events, and occurrences giving rise to the claims alleged herein occurred in New York.

23. Under CPLR § 503(a), venue is proper in this county.

## **FIDUCIARY DUTIES OF THE INDIVIDUAL DEFENDANTS**

24. By reason of the Individual Defendants’ positions with the Company as officers and/or directors and/or by reason of common law duties assumed by the Individual Defendants when undertaking to negotiate the consideration ARCT III shareholders will receive for their personal property, namely their ARCT III shares, said individuals are in a fiduciary relationship with Plaintiff and the other shareholders of ARCT III, and owe Plaintiff and the other members of the Class (defined herein) fiduciary duties, including a duty of candor and a duty to maximize shareholder value.

25. By virtue of their positions as directors and/or officers of ARCT III and in their capacities as common law fiduciaries, the Individual Defendants, at all relevant times, had the power to control and influence, and did control and influence and cause ARCT III to engage in the practices complained of herein.

26. Each of the Individual Defendants is required to act in good faith, in the best interests of the Company’s shareholders and with such care, including reasonable inquiry, as would be expected of an ordinarily prudent person, when fulfilling their fiduciary duties owed to

the Company's shareholders. In a situation where the directors of a publicly traded company undertake a transaction where shareholders will receive consideration in exchange for their shares, including one that results in a change in corporate control like here, the directors must take all steps reasonably required to maximize the value to be received by shareholders and to disclose all material information concerning the proposed transaction, including all steps taken and factors considered to arrive at the value of the consideration to be received by shareholders, to enable the shareholders to make an informed voting decision. To diligently comply with this duty, the directors of a corporation may not take any action that:

- a. adversely affects the value provided to the corporation's shareholders;
  - b. contractually prohibits them from complying with or carrying out their fiduciary duties;
  - c. discourages or inhibits alternative offers that will maximize shareholder value;
  - d. will otherwise adversely affect their duty to search for and secure the best value reasonably available under the circumstances for the corporation's shareholders;
- or
- e. will provide the directors and/or officers with preferential treatment at the expense of, or separate from, the public shareholders.

27. Plaintiff alleges herein that the Individual Defendants jointly and severally violated duties owed to Plaintiff and the other shareholders of ARCT III in connection with the Proposed Transaction, including, but not limited to, their duty of candor and their duty to maximize shareholder value, insofar as they, among other things, failed to maximize the consideration to be received by ARCT III's public shareholders in exchange for their personalty (their shares), engaged in self-dealing and obtained for themselves personal benefits, including

personal financial benefits, not shared equally by Plaintiff or the other shareholders of ARCT III common stock, and/or failed to fulfill their affirmative duty of disclosure to the Class (defined below) of all information necessary for ARCT III's public shareholders to cast a fully informed vote in connection with the Proposed Transaction.

### **CLASS ACTION ALLEGATIONS**

28. Plaintiff brings this action as a class action pursuant to Article 9 of the CPLR, individually and on behalf of all holders of ARCT III common stock who are being and will be harmed by the Individual Defendants' actions, described herein ("Class"). Excluded from the Class are Defendants and any person, firm, trust, corporation or other entity related to or affiliated with any Defendant.

29. This action is properly maintainable as a class action because:

- a. The Class is so numerous that joinder of all members is impracticable. As of January 4, 2013, there were over 177 million shares of ARCT III common stock issued and outstanding, held by more than 38,000 holders of record. The holders of these shares are geographically dispersed throughout the United States;
- b. There are questions of law and fact which are common to the Class and which predominate over questions affecting any individual Class member. These common questions include: (i) whether the Individual Defendants have engaged in self-dealing, to the detriment of ARCT III's public shareholders; (ii) whether the Proposed Transaction is unfair to the Class, in that the price is inadequate and is not the fair value that could be obtained under the circumstances; (iii) whether ARCP aided and abetted the Individual Defendants' breaches of fiduciary duty; and (iv) whether the Class is entitled to injunctive relief and/or damages as a

result of the wrongful conduct committed by Defendants;

- c. Plaintiff is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature. The claims of Plaintiff are typical of the claims of the other members of the Class and Plaintiff has the same interests as the other members of the Class. Accordingly, Plaintiff is an adequate representative of the Class and will fairly and adequately protect the interests of the Class;
- d. The prosecution of separate actions by individual members of the Class would create the risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for Defendants, or adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; and
- e. Defendants have acted, or refused to act, on grounds generally applicable to, and causing injury to, the Class and, therefore, preliminary and final injunctive relief on behalf of the Class as a whole is appropriate.

### **FURTHER SUBSTANTIVE ALLEGATIONS**

#### **I. Background**

30. ARCT III is Maryland corporation focused on acquiring primarily free-standing single-tenant retail properties net leased to investment grade and other creditworthy tenants with long-term lease durations that contain non-cancelable lease terms of ten or more years.

## **II. The Proposed Transaction**

31. On December 17, 2012, ARCT III and ARCP issued a joint press release announcing the Proposed Transaction:

New York, New York, December 17, 2012 /PRNewswire/ -- American Realty Capital Properties, Inc. ("ARCP") (NASDAQ: "ARCP") and American Realty Capital Trust III, Inc. ("ARCT III") announced today that they have signed a definitive merger agreement under which ARCP will acquire all of the outstanding shares of ARCT III in a transaction that would result in a combined company with \$3.0 billion of enterprise value. This will increase ARCP's enterprise value tenfold. Both companies' independent directors unanimously approved the merger agreement. The merger agreement is subject to customary closing conditions, including a stockholder vote by both companies, and the transaction is expected to close during the second quarter of 2013. Stockholders of record for each company as of December 17, 2012 will be entitled to consider and vote on the proposal to approve the merger and the other transactions contemplated by the merger agreement.

Pursuant to the terms of the merger agreement, each outstanding share of ARCT III will be converted into a right to receive, at the election of each stockholder, either 0.95 of a share of ARCP common stock (based on ARCP's closing stock price of \$12.90 on December 14, 2012, this consideration would be equivalent to \$12.26 per share) or \$12.00 in cash. Based on ARCP's closing price of \$12.90 per share on December 14, 2012, the exchange ratio is currently equivalent to \$12.26 per share. ARCT III stockholders may elect to receive 100% stock consideration in a tax-free exchange; however, in no event will the aggregate consideration paid in cash be paid on more than 30% of the shares of ARCT III's common stock issued and outstanding as of immediately prior to the closing of the merger. Any elections for cash in excess of the cap will be reduced on a pro rata basis, with the remaining consideration paid in shares of ARCP. ARCT III stockholders will not be subject to any lockup – only ARCT III's management will be locked up for one year.

Post-closing, the combined company is anticipated to be comprised of a portfolio of over 800 properties that are net leased to investment grade and other credit tenants totaling approximately 18.9 million square feet and located in 44 states. Pursuant to its previously announced 5<sup>th</sup> consecutive quarterly dividend increase effective on February 9, 2013, ARCP will continue to pay its annual dividend on the 15<sup>th</sup> day of each month at an increased rate of \$0.90 per share to its stockholders of record at the close of business on the 8<sup>th</sup> day of each month.

Nicholas S. Schorsch, Chairman and Chief Executive Officer of ARCP, said, "Today I am delighted to announce the transformative combination of ARCP and ARCT III. This combination provides unique synergies in the net lease sector,

furnishing our investor base with durable income, principal protection and perhaps most importantly, outsized growth potential.” Mr. Schorsch added, “This combined company will be guided by a proven management team and seasoned public company directors. Combining these two companies into a \$3 billion enterprise will allow us to achieve lower cost capital, substantially greater earnings multiples, and reduced fees.”

“We are extremely pleased to announce this transformative transaction,” offered Michael Weil, President and Chief Operating Officer of ARCT III. “ARCT III is 100% occupied, broadly diversified, made up of roughly 650 properties, with an average remaining lease term of 13 years. It will be combined with ARCP’s property portfolio of highly accretive vintage leases. The combined enterprise results in the 5<sup>th</sup> largest publicly-listed net lease REIT, well positioned for growth and further diversified by tenant, industry and geography.” Mr. Weil added, “ARCP stockholders will benefit from the durable rental income from tenants which are 77% investment grade credit rated. In addition, significant growth opportunity will result from properties with shorter remaining lease terms acquired considerably below replacement cost with below market rents. This transformative transaction will combine the best aspects of both investment strategies and will give the combined company greater access to more attractive financing, inclusion in the important indices, and allow us access to lowest cost capital.”

Brian S. Block, Executive Vice President and Chief Financial Officer of ARCP, explained, “This transformative combination will result in outsized earnings growth and significant potential value uplift, as well as material costs savings. We are guiding to AFFO per share in 2013 of \$0.93, and \$1.08 in 2014, which translates to 16% growth in earnings, about 4 times our peer group. Assuming ARCP trades at a 15 times multiple, the implied share price is close to \$14 for 2013. Moreover, the larger combined company should allow us to reduce our G&A costs by \$48 million over the next 5 years.”

### **American Realty Capital Properties Strategic, Financial and Portfolio Benefits**

***Adjusted Funds From Operations (AFFO) Growth:*** Pro forma combined company AFFO is estimated to grow dramatically by approximately 16% from 2013E to 2014E, compared to 4% among the peer set;

***Enhanced Portfolio Diversification:*** The pro forma combined company greatly enhances the portfolio diversification by increasing the number of distinct corporate credit tenants to 44 (formerly 17 for ARCT III and 37 for ARCP), number of industries to 20 (formerly 11 for ARCT III and 17 for ARCP) and 806 properties located in 44 states;

***Increased Lease Duration:*** The pro forma combined company will have 12.4 years of remaining lease duration as of the anticipated second quarter 2013 merger close date and an estimated 13.0 years as of year-end 2013;

***Increased Size and Scale:*** On a combined basis, the merged entities will have an enterprise value of \$3.0 billion, making the combined company the 5<sup>th</sup> largest publicly-traded net lease REIT, which will greatly improve the company's balance sheet flexibility, cost of capital, float and provide other benefits afforded to larger -sized companies;

***Operating Synergies and Cost Reduction:*** The revised management agreement significantly reduces G&A costs by eliminating acquisition and financing fees, reduces management fees and internalizes certain functions to stockholders with no internalization fee; and

***Potential Capital Markets Benefits:*** The pro forma combined company results in an equity market capitalization of \$1.9 billion, which will greatly increase the public float and provide opportunities for multiple index inclusions.

### **American Realty Capital Trust III Transaction Rationale**

***Attractive Return to ARCT III Stockholders:*** Total return of 33% to ARCT III stockholders, including a full return of gross invested capital, a 23% share premium and dividends paid since inception (assuming 100% stock election). For those who elect the cash consideration, the total return would be 30%;

***Increased Dividend Yield:*** ARCT III's annualized dividend per share is expected to increase by 30% from \$0.66 to ARCP's annualized dividend per share of \$0.90 (\$0.86 per share after adjusting for the 0.95x exchange ratio);

***Greater Borrowing Capacity:*** The pro forma combined company will have access to \$1.2 billion of debt through the new term loan and revolver;

***Lower Cost of Capital:*** The \$1.2 billion of debt is priced at a fixed interest rate of 2.45%, significantly accretive to overall corporate earnings. Additionally, the potential ability for the shares to trade at a higher AFFO multiple, in line with the peer set, could result in an overall lower cost of equity; and

***Tax-Free Exchange:*** ARCT III stockholders who opt for 100% stock consideration have the opportunity to generate a 33% total return on a tax-free basis.

### **2013 and 2014 Earnings Estimates**

Excluding the one-time costs associated with the closing of this transaction, ARCP estimates that 2013 funds from operations (FFO) should range from \$0.93



to \$0.97 per share. 2013 adjusted funds from operations (AFFO) per share should range from \$0.91 to \$0.95 per share.

The estimates for 2013 consider the following assumptions:

- The merger is consummated as of March 31, 2013;
- The merger consideration is 70% common stock and 30% cash;
- Acquisition of investment properties totaling \$400 million;
- Unsecured financing proceeds of \$1.2 billion at a fixed cost of 2.45%; and
- Fully diluted common shares and share equivalents outstanding of 134.5 million shares and share equivalents.

ARCP estimates that 2014 FFO should range from \$1.05 to \$1.09 per share. AFFO per share should range from \$1.06 to \$1.10 per share.

The estimates for 2014 consider the following assumptions:

- Acquisition of investment properties totaling \$1 billion (70% long duration and 30% mid duration), capitalized 50% equity and 50% debt;
- Estimated fully diluted common shares and share equivalents outstanding of 172.4 million shares and share equivalents.

### **Transaction Advisors**

BofA Merrill Lynch is acting as exclusive financial advisor and Duane Morris LLP is acting as special legal counsel to ARCP in connection with the transaction. UBS Investment Bank is acting as exclusive financial advisor and Weil, Gotshal & Manges LLP is acting as special legal counsel to ARCT III in connection with the transaction. Proskauer Rose LLP is acting as corporate counsel to ARCP and ARCT III.

### **Timing and Closing Process**

ARCP's acquisition of ARCT III is contingent upon the approval by ARCP's stockholders of the issuance of ARCP common stock in connection with the merger and the approval by ARCT III's stockholders of the merger. A proxy statement is expected to be filed in the near future and, following its effectiveness, a proxy statement and vote card will be mailed to each company's stockholders. The transaction will close shortly following receiving approval from both ARCP's and ARCT III's stockholders. **An investor presentation discussing the transaction will be available on ARCP's website at [www.americanrealtycapitalproperties.com](http://www.americanrealtycapitalproperties.com) and on ARCT III's website at [www.arct-3.com](http://www.arct-3.com).**

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### **About American Realty Capital Properties**

American Realty Capital Properties, Inc. is a publicly traded Maryland corporation listed on The NASDAQ Capital Market that qualified as a real estate investment trust for the year ended December 31, 2011, focused on acquiring and owning single tenant freestanding commercial properties subject to net leases with high credit quality tenants. Additional information about ARCP can be found on ARCP's website at [www.americanrealtycapitalproperties.com](http://www.americanrealtycapitalproperties.com).

### **About American Realty Capital Trust III**

ARCT III is a publicly registered, non-traded real estate investment program that elected to qualify as a real estate investment trust for tax purposes with the taxable year ended December 31, 2011, focused on acquiring primarily free-standing single-tenant retail properties net leased to investment grade and other creditworthy tenants with long-term lease durations that contain non-cancelable lease terms of ten or more years. Additional information about ARCT III can be found on ARCT III's website at [www.arct-3.com](http://www.arct-3.com).

### **Funds from Operations and Adjusted Funds from Operations**

ARCP and ARCT III consider FFO and AFFO, which is FFO as adjusted to exclude acquisition-related fees and expenses, amortization of above-market lease assets and liabilities, amortization of deferred financing costs, straight-line rent, non-cash mark-to-market adjustments, amortization of restricted stock, non-cash compensation and non-recurring gains and losses useful indicators of the performance of a REIT. Because FFO calculations exclude such factors as depreciation and amortization of real estate assets and gains or losses from sales of operating real estate assets (which can vary among owners of identical assets in similar conditions based on historical cost accounting and useful-life estimates), they facilitate comparisons of operating performance between periods and between other REITs in ARCP's and ARCT III's peer groups. Accounting for real estate assets in accordance with GAAP implicitly assumes that the value of real estate assets diminishes predictably over time. Since real estate values have historically risen or fallen with market conditions, many industry investors and analysts have considered the presentation of operating results for real estate companies that use historical cost accounting to be insufficient by themselves.

Additionally, ARCP and ARCT III believe that AFFO, by excluding acquisition-related fees and expenses, amortization of above-market lease assets and liabilities, amortization of deferred financing costs, straight-line rent, non-cash mark-to-market adjustments, amortization of restricted stock, non-cash compensation and non-recurring gains and losses, provides information consistent with management's analysis of the operating performance of the properties. By providing AFFO, ARCP and ARCT III believe they are presenting useful information that assists investors and analysts to better assess the sustainability of

their operating performance. Further, ARCP and ARCT III believe AFFO is useful in comparing the sustainability of their operating performance with the sustainability of the operating performance of other real estate companies, including exchange-traded and non-traded REITs.

As a result, ARCP and ARCT III believe that the use of FFO and AFFO, together with the required GAAP presentations, provide a more complete understanding of our performance relative to our peers and a more informed and appropriate basis on which to make decisions involving operating, financing, and investing activities.

FFO and AFFO are not in accordance with, or a substitute for, measures prepared in accordance with GAAP, and may be different from non-GAAP measures used by other companies. In addition, FFO and AFFO are not based on any comprehensive set of accounting rules or principles. Non-GAAP measures, such as FFO and AFFO, have limitations in that they do not reflect all of the amounts associated with ARCP's and ARCT III's results of operations that would be reflected in measures determined in accordance with GAAP. These measures should only be used to evaluate ARCP's and ARCT III's performance in conjunction with corresponding GAAP measures.

32. As part of the Proposed Transaction, pursuant to the Merger Agreement, ARCT III OP will merge with and into ARCP OP, with ARCP OP being the surviving entity. Upon consummation of the merger, each outstanding ARCT III OP Unit will be converted automatically into 0.95 of an ARCP OP Unit. ARCP OP Units are subject to a minimum one-year holding period, before being exchangeable into ARCP common stock.

### **III. The Unfair Price**

33. As discussed herein, the consideration offered in the Proposed Transaction is inadequate.

34. Under the Merger Agreement, ARCT III shareholders will receive, at their election, either 0.95 of a share of ARCP common stock or \$12.00 in cash. Based on ARCP's closing price of \$12.90 per share on December 14, 2012, the exchange ratio is equivalent to \$12.26 per share.

35. ARCT III shares were offered at a price of \$10.00 per share, subject to certain volume and other discounts.

36. As a non-exchange traded REIT, ARCT III's stock price does not fluctuate and has remained at \$10.00 a share since the Company began selling shares on March 31, 2011, despite a period of growth in the commercial real estate industry during this same period.

37. According to an article in the *New York Times*, non-traded REITs are characterized by high upfront fees that can lower the value of the investment by as much as 17 cents on the dollar.

38. The \$12.00 cash offer therefore represents a premium of only 20% on the issuance price of ARCT III shares and a 22.6% premium on a stock-basis, when compared to ARCP's December 14, 2012 closing price.

39. This 20% premium represents a noted departure from other recent transactions in the industry. According to *Bloomberg* data, there were eight purchases involving United States REITs in 2012. The average premium for those transactions was 46%.

40. This 20% premium also fails to account for the upfront fees paid by ARCT III investors or the period of growth in the commercial real estate industry during the relevant period.

41. In addition, the Proposed Transaction and the insufficient premium come on the heels of ARCT III's announcement on September 28, 2012, that the Company had issued all 150 millions shares of common stock available in connection with its primary offering, and that the Company had recently closed the acquisition of 91 single-tenant, freestanding, net leased properties with approximately 0.7 million leasable square feet, located in 19 states, at an aggregate purchase price of \$111.7 million (exclusive of closing costs). The acquisitions

increased the Company portfolio's size, at cost, to \$846.6 million, comprising 326 properties. Michael Weil, the President and Chief Operating Officer of ARCT III, noted that "These acquisitions reflect the Company's efforts to deploy equity in line with its investment objectives." He added that "These acquisitions reflect ARCT III's dedication to providing current income to its investors as it enters its operational phase."

42. On September 28, 2012, ARCT III also announced that its portfolio pipeline included approximately \$404.0 million of acquisitions under contract. Mr. Weil said, "We continue to create a strong pipeline that is squarely in line with our investment objectives and poises us for our operational stage."

43. On January 3, 2013, ARCT III announced that it continued to deploy its capital at a notable rate in the fourth quarter of 2012, by making \$584.1 million of acquisitions, acquiring 125 properties located in 33 states with total rentable square feet of 5.1 million. As of December 31, 2012, the ARCT III portfolio included 507 properties located in 44 states with total rentable square feet of 13.0 million purchased for an aggregate purchase price in excess of \$1.5 billion.

44. In addition to its strong acquisition history, ARCT III carries very little debt. During an investor conference call, Nicholas Schorsch noted that the ARCT III portfolio was "significantly" under leveraged, and that the Company only had about 15% leverage on it.

45. In contrast, ARCP is more highly leveraged than ARCT III, and the combined company will be more highly leveraged than ARCP and ARCT III on an absolute basis and more highly leveraged than ARCT III as a percentage of total assets.

46. As of January 4, 2013, ARCP had indebtedness of \$160.3 million. As of September 30, 2012, ARCT III had existing mortgage debt of \$156.7 million. Taking into account ARCP's existing indebtedness and the incurrence of additional indebtedness in

connection with the merger, ARCP's pro forma consolidated indebtedness as of January 4, 2013, after giving effect to the merger, would be approximately \$1.3 billion.

47. If the Proposed Transaction is consummated, ARCT III shareholders will be diluted in the merged company, holding roughly 91% of the combined entity.

48. ARCT III shareholders will go from owning 100% of a company with very little debt and an enterprise value of \$2.7 billion, pro forma March 31, 2013, to owning 91% of a company with \$1.3 billion in debt and an enterprise value of \$3.0 billion, pro forma March 31, 2013.

49. On January 23, 2013, ARCP announced that it had commended an underwritten public offering of 1.5 million shares of its common stock. This offering will further dilute the interests of ARCT III shareholders.

50. While the Merger Agreement contains some aspect of a "collar," which will guarantee ARCT III's shareholders a minimum price of \$12.00 for their shares, this "collar" will apply to no more than 30% of ARCT III's common stock, issued and outstanding as of immediately prior to the closing of the Merger. As a result, this leaves 70% of ARCT III's outstanding shares at the mercy and whim of the value of ARCP's shares at the "Effective Time," as defined in the Merger Agreement. ARCP's share price could be affected by any number of factors, and therefore has very little connection to the value of ARCT III shares at the "Effective Time."

51. Thus, it is clear that if ARCT III was properly exposed to the market for corporate control, it would bring a price materially in excess of the amount offered in the Proposed Transaction.

52. Worse yet, ARCT III's shareholders are unable to dissent from this unfair

transaction. ARCT III's Maryland charter includes a provision opting out of the appraisal rights statute, thereby precluding shareholders from exercising the rights of an "objecting shareholder." As a result of this provision, ARCT III shareholders will not have the right to dissent from extraordinary transactions, such as a merger.

53. The ARCT III subscriber agreement does not waive any of Plaintiff's claims.

#### **IV. The Unreasonable Deal Protection Devices**

54. The Merger Agreement has a number of provisions that makes it more difficult for another buyer to purchase the Company.

55. Specifically, Section 6.5 of the Merger Agreement prohibits the Company and its agents from soliciting additional bids for the Company. Section 6.5 states:

##### **Section 6.5 Company Acquisition Proposals.**

(a) Subject to the other provisions of this Section 6.5, during the Interim Period, each Company Party agrees that it shall not, and shall cause each of the other Company Entities not to, and shall not authorize and shall use reasonable best efforts to cause its and their officers and directors, managers or equivalent, and other Representatives not to, directly or indirectly through another Person, (i) solicit, initiate, knowingly encourage or knowingly facilitate any inquiry, discussion, offer or request that constitutes, or could reasonably be expected to lead to, a Company Acquisition Proposal (an "Inquiry"), (ii) engage in any discussions or negotiations regarding, or furnish to any Third Party any non-public information in connection with, or knowingly facilitate in any way any effort by, any Third Party in furtherance of any Company Acquisition Proposal or Inquiry, (iii) approve or recommend a Company Acquisition Proposal, or enter into any letter of intent, memorandum of understanding, agreement in principle, acquisition agreement, merger agreement, share purchase agreement, asset purchase agreement, share exchange agreement, option agreement or other similar definitive agreement (other than a Company Acceptable Confidentiality Agreement entered into in accordance with this Section 6.5) providing for or relating to a Company Acquisition Proposal (a "Company Alternative Acquisition Agreement"), or (iv) propose or agree to do any of the foregoing.

(b) Notwithstanding anything to the contrary in this Section 6.5, at any time prior to obtaining the Company Stockholder Approval, the Company

Parties may, directly or indirectly through any Representative, in response to an unsolicited bona fide written Company Acquisition Proposal by a Third Party made after the date of this Agreement (that did not result from a breach of this Section 6.5) (i) furnish non-public information to such Third Party (and such Third Party's Representatives) making a Company Acquisition Proposal (provided, however, that (A) prior to so furnishing such information, the Company receives from the Third Party an executed Company Acceptable Confidentiality Agreement, and (B) any non-public information concerning the Company Entities that is provided to such Third Party shall, to the extent not previously provided to Parent or Merger Sub, be provided to Parent or Merger Sub prior to or substantially at the same time that such information is provided to such Third Party), and (ii) engage in discussions or negotiations with such Third Party (and such Third Party's Representatives) with respect to the Company Acquisition Proposal if, in the case of each of clauses (i) and (ii): (x) the Company Board determines in good faith, after consultation with outside legal counsel and financial advisors, that such Company Acquisition Proposal constitutes, or is reasonably likely to result in, a Company Superior Proposal, and (y) the Company Board determines in good faith, after consultation with outside legal counsel, that failure to take such action would be inconsistent with the directors' duties under applicable Law.

Section 6.5 of the Merger Agreement also provides that the Board of ARCT III may only respond to an unsolicited takeover bid if failing to enter into discussions with a potential acquirer would be inconsistent with the directors' fiduciary duties. The Company also must notify ARCP within twenty-four hours of the terms of any offer to purchase the Company (including the identity of the bidder), and is required to negotiate with ARCP and revise the Merger Agreement such that any new proposal is no longer considered superior to the Proposed Transaction. The presence of such a "right of first refusal" all by itself chills the potential for a competing bidder to come forward because just the knowledge that the time and effort expended in doing the due diligence necessary to attempt a competing bid would be seen by a competing bidder as reason enough not to waste time thereon when ARCP has the right to just come in and match it and add a dollar to make it "superior" to the competing bidder's offer.



56. Furthermore, if the Company terminates the Proposed Transaction because of a superior or alternative proposal, Section 8.3 of the Merger Agreement states that the Company shall pay ARCP its reasonable out-of-pocket transaction expenses, in an amount up to \$10 million.

**V. The Individual Defendants' Interests in the Proposed Transaction**

57. As a result of several other factors attendant to the Proposed Transaction, the Individual Defendants have been operating under significant and troubling conflicts of interest.

58. Indeed, the Definitive Proxy admits as much, stating that “[i]n considering the recommendation of the ARCT III board (with Messrs. Schorsch and Weil abstaining) to approve the merger and the other transactions contemplated by the merger agreement, ARCT III stockholders should be aware that ARCT III’s directors and executive officers have certain interests in the merger that may be different from, or in addition to, the interests of ARCT III stockholders generally.” As such, it appears that the Proposed Transaction is designed to maximize the Individual Defendants’ financial benefit from the Proposed Transaction, rather than that of ARCT III shareholders generally.

59. Nicholas Schorsch has served as Chairman and CEO of ARCT III since the Company’s formation in October 2010. He also serves as Chairman and CEO of ARCP, and has served in these roles since ARCP’s formation in December 2010. Mr. Schorsch also serves as the CEO of American Realty Capital Advisors III, LLC (“ARCT III Advisor”). Finally, Mr. Schorsch is a majority-owner and the Chairman and CEO of AR Capital, LLC (“AR Capital”).

60. ARCT III and ARCP are each sponsored, directly or indirectly, by AR Capital.

61. ARCT III Advisor is wholly owned by American Realty Capital Trust III Special Limited Partner, LLC, which, in turn, is 100% owned by AR Capital.

62. ARC Properties Advisors, LLC (“ARCP Manager”) is ARCP’s external manager, and is also wholly owned by AR Capital.

63. Realty Capital Securities, LLC (“RC Securities”) and ARC Advisory Services, LLC (“ARC Advisory Services”) are each wholly owned by AR Capital and its affiliates.

64. In connection with the Proposed Transaction, under the terms of the Second Amended and Restated Advisory Agreement, dated November 13, 2012 (“ARCT III OP Agreement”), between ARCT III, ARCT III Advisor, and ARCT III OP, ARCT III Advisor will be entitled to subordinated distributions of net sales proceeds from ARCT III OP in an amount estimated to be around \$59.0 million (based on an implied price of ARCT III common stock of \$12.26 per share). The distributions to ARCT III Advisor will be payable in the form of units of equity ownership of ARCT III OP, which will automatically convert into 0.95 units of equity ownership of ARCP OP. ARCP OP units will be exchangeable into ARCP common stock after one year.

65. Under the ARCT III OP Agreement, ARCT III Advisor is entitled to receive Class B Units in ARCT III OP in connection with its asset management services. After the effective time of the merger and subject to certain limitations, each ARCT III OP Class B Unit will be convertible into an ARCT III OP unit and each ARCT III OP unit will be redeemable and exchangeable for one share of ARCP common stock, subject to certain limitations.

66. In connection with the Proposed Transaction, ARCT III entered into a letter agreement with RC Securities and ARC Advisory Services on December 14, 2012. Under this letter agreement, RC Securities and ARC Advisory Services will act as a non-exclusive

financial advisor and information agent, respectively, to ARCT III in connection with the merger. ARCT III will pay a total of \$640,000 for these services.

67. In connection with the Proposed Transaction, ARCT III and ARCT III OP entered into a legal services reimbursement agreement with ARC Advisory Services on December 14, 2012. Under this legal services agreement, ARC Advisory Services will provide legal support services in connection with the merger, for which ARCT III and ARCT III OP will pay ARC Advisory Services a total of \$500,000.

68. In connection with the Proposed Transaction, ARCT III and ARCT III OP entered into a transition services agreement with ARC Advisory Services on December 14, 2012. Under this transition services agreement, ARC Advisory Services will provide legal support, accounting support, marketing support, acquisition support, investor relations support, public relations support, event coordination, human resources and administration, general human resources duties, payroll services, benefits services, insurance and risk management, information technology services, telecom and internet services, and services relating to office supplies. ARCT III and ARCT III OP will pay ARC Advisory Services a total of \$2.0 million for these services.

69. In connection with the Proposed Transaction, ARCP, in its capacity as the general partner of ARCP OP, entered into an asset purchase agreement with ARCT III Advisor. Under the terms of the asset purchase agreement, ARCT III Advisor will sell to ARCP OP certain furniture, fixtures, equipment, and other assets that ARCT III Advisor had used in managing ARCT III and ARCT III OP. ARCT III Advisor will sell these assets to ARCP OP for \$5.8 million.

70. In connection with the Proposed Transaction, entities wholly owned by AR Capital, which is majority owned and controlled by Nicholas Schorsch, will receive fees and payments totaling more than \$67.9 million.

71. In addition to the above agreements, the compensation committee of the ARCP Board approved the general terms of a form of Multi-Year Outperformance Plan Agreement (“OPP”), to be entered into with ARCP Manager. The ARCP compensation committee must approve the final terms of the OPP, including the commencement date of the performance period. However, under the OPP, ARCP Manager will be eligible to earn performance-based bonus awards of up to 5% of ARCP’s anticipated market capitalization on the commencement date. If the commencement date is the closing date of the merger, ARCP Manager could earn up to \$87.5 million in performance-based bonus awards. ARCP Manager is wholly owned by AR Capital.

72. Upon the closing of the merger, the ARCP Board will increase from five directors to seven directors. Two of these directors will be individuals who are currently independent directors of ARCT III.

73. Of the three independent directors, Defendants Gong and Rendell have each previously served as directors of ARCP, along with Mr. Schorsch. Mr. Bowman has served on the Board of NYRR with Mr. Schorsch, and served on the Board of ARC DNAV with Mr. Schorsch and Mr. Weil. Governor Rendell has served on the Board of ARC DNAV and ARC T with Mr. Schorsch. The independent directors therefore have extensive relationships with one another, ARCP, Defendants Schorsch and Weil, and other American Realty-related organizations.

74. As of January 4, 2013, the executive officers and directors of ARCT III beneficially owned, in the aggregate, 23,664 shares of ARCT III common stock, excluding restricted stock. If all of these shares were converted to shares of ARCP common stock in connection with the merger, then the executive officers and directors would receive an aggregate of 22,481 shares of ARCP common stock pursuant to the merger, which based on the closing price of ARCP common stock on January 4, 2013, would have an aggregate value of approximately \$316,757.

75. Under the merger agreement, immediately prior to the effective time of the merger, each then-outstanding share of ARCT III restricted stock will fully vest. As a result of the transactions contemplated under the merger agreement, 17,400 shares of ARCT III restricted stock held by ARCT III's directors would vest and would be convertible into 16,530 shares of ARCP common stock pursuant to the merger, which based on the closing price of ARCP common stock on January 4, 2013, would have an aggregate value of approximately \$232,908.

76. American Realty Capital Trust III Special Limited Partner, which is wholly owned by AR Capital, owns 20,000 shares of ARCT III common stock.

## **VI. Change in Control Payments**

77. The Definitive Proxy provides significant personal benefits to ARCP's non-executive directors.

78. The consummation of the Proposed Transaction will result in a change in control as defined under ARCP's Equity Plan and under ARCP's Non-Executive Director Stock Plan ("ARCP Stock Plans"). As a result, restricted ARCP Manager's stock, granted to the ARCP Manager and key personnel of an affiliate of the Manager, and shares of restricted ARCP common stock, granted to ARCP's non-executive directors under the ARCP Stock Plans will

become fully vested at the effective time of the merger. ARCP's Manager's Stock is convertible into shares of ARCP common stock.

79. As a result of the transactions contemplated under the merger agreement, 256,153 shares of Restricted Manager's Stock held by the ARCP Manager and 11,400 shares of ARCP Restricted Stock held by ARCP's non-executive directors would vest, which based on the closing price of ARCP common stock on January 4, 2013, would have an aggregate value of \$3,769,822.

80. The Proposed Transaction constitutes a change in control transaction.

## **VII. Defendants Breached Their Fiduciary Duties by Filing a Materially False and Misleading Definitive Proxy**

81. It is critical that the shareholders receive complete and accurate information about the Proposed Transaction. To date, Defendants have failed to provide the Company's shareholders with that information. As set forth in more detail below, the Definitive Proxy omits and/or misrepresents material information concerning, among other things: (a) the sales process for the Company; (b) details concerning UBS's involvement with ARCT III; and (c) the data and inputs underlying the financial valuation exercises that purport to support the so-called "fairness opinion" provided by its financial advisor, UBS.

### **A. The Definitive Proxy Fails to Adequately Describe the Process That Resulted in the Proposed Transaction**

82. The process that was employed by the Board in ultimately agreeing to the Proposed Transaction was seriously flawed, as the Board breached its fiduciary duties to ensure a fair process. The Definitive Proxy fails to fully and fairly disclose certain material information concerning the Proposed Transaction, including (among other things):

- a. On page 62, the Definitive Proxy states that the ARCP Board appointed its current slate of independent directors on October 16, 2012. The Definitive Proxy fails to

include any description of David Gong's or Edward Rendell's previous service on the ARCP Board, even though they were two of the three independent directors of ARCT III who voted to approve the transaction with ARCP;

- b. On page 62, the Definitive Proxy fails to state whether Mr. Gong or Governor Rendell were serving on the ARCP Board during any point when ARCP and ARCT III were in contact with one another about a potential strategic transaction;
- c. The Definitive Proxy fails to provide any details concerning the independent directors' extensive relationships with one another, ARCP, Defendants Schorsch and Weil, and other American Realty-related organizations.
- d. On page 62, the Definitive Proxy states that UBS contacted two potential bidders. The Definitive Proxy fails to explain the reasons that UBS chose to contact only two potential bidders and did not make more extensive efforts to solicit other potential bidders;
- e. On page 62, the Definitive Proxy states that Bidder A had previously contacted ARCT III Advisor about a strategic transaction, but fails to provide any details concerning Bidder A's previous contact, expression of interest, or description of its previous proposed terms;
- f. On page 62, the Definitive Proxy states that UBS presented the ARCT III Board with a summary of potential strategic alternatives on October 26, 2012, including: (1) a merger with ARCP, (2) a merger or sale to another thirty-party public REIT, (3) a share listing, or (4) the maintenance of the status quo as a non-exchange traded REIT, but fails to describe the potential benefits and drawbacks of each of the four alternatives;

- g. On page 62, the Definitive Proxy states that after UBS's October 26, 2012 presentation, ARCT III's independent directors directed UBS to proceed with additional analysis regarding potential strategic alternatives. The Definitive Proxy fails to describe the Board's basis for directing UBS to pursue this strategy or the exact nature of this strategy;
- h. On page 62, the Definitive Proxy states that ARCP's management had received an indication that ARCT III would be interested in having ARCP bid for its outstanding common stock. The Definitive Proxy fails to describe who communicated this interest to ARCP, particularly since the Definitive Proxy states that UBS had presented the option of a merger with ARCP, but that the Board had not settled on this option;
- i. On page 62-63, the Definitive Proxy states that both ARCT III and ARCP continued to engage Proskauer Rose LLP as general corporate counsel. The Definitive Proxy fails to explain how Proskauer Rose LLP could be an appropriate choice for two companies on opposite sides of a transaction;
- j. On page 63, the Definitive Proxy states that UBS provided "further analysis" of a possible combination of ARCT III with ARCP, but fails to provide any description of the substance of this analysis;
- k. On page 63, the Definitive Proxy states that ARCT III's November 2, 2012 proposal to ARCP provided for an acquisition by ARCP of 100% of ARCT III's outstanding common stock in exchange for ARCP common stock and cash, but fails to provide the ratio of stock and cash proposed;
- l. On page 63, the Definitive Proxy states that ARCT III's proposal to ARCP



- provided for Board representation for ARCT III shareholders in the combined company, but fails to specify how many directors were sought;
- m. On page 63, the Definitive Proxy fails to explain the reasons that the Board decided not to include a price term in its letter to ARCP;
  - n. On page 64, the Definitive Proxy fails to explain the reasons that ARCP's management agreements would require amendment in the event of a merger between ARCP and the Company, and fails to describe the nature of these amendments;
  - o. On page 64, the Definitive Proxy states that ARCP requested clarification on certain matters in ARCT III's November 2 letter, but fails to describe the nature of these clarifications;
  - p. On page 64, the Definitive Proxy states that ARCT III sent a November 6, 2012 letter to ARCP, in which the Company proposed a transaction that valued ARCT III stock at a minimum of \$12.00 per share. The Definitive Proxy fails to explain the method that ARCT III used to arrive at this valuation of \$12.00 per share;
  - q. On page 65, the Definitive Proxy states that the ARCP Board met on November 16, 2012, to discuss "the merits of, and other considerations with respect to, a potential transaction with ARCT III." The Definitive Proxy fails to describe what these "other considerations" entailed;
  - r. On page 65, the Definitive Proxy states that ARCT III's financial advisor held discussions with representatives of ARCP, Bidder A, and Bidder B to better understand their respective proposals and explore improvements in their proposed terms. The Definitive Proxy fails to describe the improvements contemplated by

ARCT III with respect to ARCP's offer.

- s. The Definitive Proxy fails to explain whether the Board sought any improvements to ARCP's offer. If the Board decided not to seek improvements to ARCP's offer, the Definitive Proxy fails to provide any reasons for that decision; and
- t. On page 65, the Definitive Proxy states that on November 27, 2012, ARCT III was still considering a share listing and maintenance of the status quo. The Definitive Proxy fails to describe the reasons that the Board viewed the merger with ARCP as superior to these other two strategic alternatives.

**B. The Definitive Proxy Fails to Disclose Sufficient Details Concerning the Opinion by Merrill Lynch**

The Definitive Proxy also contains material omissions in the summary analyses of Bank of America Merrill Lynch ("Merrill Lynch"), ARCP's financial advisor, including the following:

- a. In the *Selected Precedent Transactions Analysis*, Merrill Lynch analyzed seven transactions involving REITs in the net lease sector, and provided the overall low, median, mean, and high multiples for these seven transactions. However, the Definitive Proxy fails to disclose the relevant multiples for each of these precedent transactions;
- b. The Definitive Proxy fails to disclose, in Merrill Lynch's *Discounted Cash Flow Analysis* ("DCF"), whether Merrill Lynch considered the treatment of any net operating losses in its analysis. In addition, the Definitive Proxy fails to disclose the basis for selecting a discount rate range of 7.0% to 8.0%;
- c. In the *Miscellaneous* section, the Definitive Proxy states that Merrill Lynch and its affiliates will be providing financing for the Proposed Transaction and that

they expect to receive “significant compensation” in this role. The Definitive Proxy fails to describe how much Merrill Lynch and its affiliates expect to be paid for providing this financing; and

- d. In the *Miscellaneous* section, the Definitive Proxy states that Merrill Lynch and its affiliates have provided investment banking, commercial banking, and other investment services to ARCP in the past. The Definitive Proxy fails to disclose the amount of compensation ARCP has paid to Merrill Lynch and its affiliates in the last two years.

**C. The Definitive Proxy Fails to Provide Adequate Information Concerning the Company’s Financial Advisor**

83. The Company’s financial advisor, UBS, was retained to render an opinion that the merger price is fair to the shareholders, and to perform the valuation analysis necessary to support that opinion. In light of the materiality of this opinion and analysis to the market and ARCT III’s shareholders, it is critical to know any facts that might suggest that the financial advisor is conflicted, including the extent of any contingent fee arrangements and previous or current work for any party. The Definitive Proxy is materially misleading and/or incomplete for failing to disclose:

- a. the amount of money that UBS is providing to finance the Proposed Transaction, and what fees it has or will be paid for this financing; and
- b. the work that UBS has done for ARCT III, AR Capital, and any other American Realty related organizations over the last three years, and what fees it has been paid for this work.

**D. The Definitive Proxy Fails to Disclose Material Facts Concerning UBS's Fairness Opinion**

84. In the Definitive Proxy, UBS describes its fairness opinion and the various valuation analyses it performed to render its opinion. However, UBS's description fails to include necessary underlying data, support for conclusions, or the existence of, or basis for, underlying assumptions. Without this information, one cannot replicate the analyses, or confirm the valuations, or evaluate the fairness opinion.

***Selected Publicly Traded Companies Analysis (pages 86-87)***

85. The Definitive Proxy fails to disclose material details concerning the analyses that UBS performed in connection with the *Selected Publicly Traded Companies Analysis*. Among other things, the Definitive Proxy fails to describe the exact criteria used to choose the eight selected companies, stating only that the companies are "publicly traded net lease REITs."

86. The Definitive Proxy states that ARCT III will have an implied capitalization rate of 5.2% for March 31, 2013. The Definitive Proxy fails to explain the disparity between this 5.2% figure and the 5.8% figure quoted in the Investor Conference Call. During the Investor Conference Call, the following exchange took place:

TOM LESMAN:	Okay. And then what does the purchase price represent on a going in cap rate basis?
NICHOLAS SCHORSCH:	It's been a 5.8 and a 5.9 on a pro forma basis [as of March 31st, 2013].

87. The Definitive Proxy fails to disclose the capitalization rate, enterprise value, and equity value for each of the eight selected companies.

88. The Definitive Proxy fails to explain whether the implied capitalization rates suggest that the Proposed Transaction is fair or unfair.

***Selected Precedent Transactions Analysis (pages 87-88)***

89. The Definitive Proxy fails to disclose material details concerning the analyses that UBS performed in connection with the *Selected Precedent Transactions Analysis*. Among other things, the Definitive Proxy fails to describe: (a) the amount of each transaction; (b) whether the transactions involved cash, stock, or both; (c) whether the transactions involved friendly or hostile transactions; (d) whether any of the targets was a non-traded REIT; and (e) the total assets and market capitalization of each company.

90. The Definitive Proxy fails to disclose material details concerning the analyses that UBS performed in connection with the *Selected Precedent Transactions Analysis*, including the: (a) the multiples and ratios observed for each company; (b) the EV multiple of LTM EBITDA observed for each transaction in the analysis; (c) the EV multiple of NTM EBITDA observed for each transaction in the analysis; (d) the Book Value Per Share of each target company; and (e) the Price/IBES Median AFFO per share for each target company.

91. The Definitive Proxy fails to provide the premiums observed for each of the selected precedent transactions.

***Discounted Cash Flow Analyses (pages 88-89)***

92. The Definitive Proxy fails to disclose material details concerning the analyses that UBS performed in connection with the *Discounted Cash Flow Analyses*. The Definitive Proxy states that for the combined company the “resulting ranges of per share values were discounted from April 30, 2013 to September 30, 2012 at an estimated cost of equity of 8.5%,” but fails to disclose how that estimate was calculated.

***Pro Forma Accretion/Dilution Analysis (page 89)***

93. The Definitive Proxy states that the Proposed Transaction “could be between approximately 18% to 27% accretive” but fails to provide any of the underlying estimates or forecasts to support that conclusion.

***Other Failings in the Definitive Proxy***

94. The Definitive Proxy fails to disclose why UBS failed to provide any analysis of the expected future share price of ARCP, despite the fact that 70% of ARCT III shareholders’ consideration will be in the form of ARCP stock if they approve the Proposed Transaction.

95. The Definitive Proxy fails to explain how UBS could declare the Proposed Transaction “Fair,” despite failing to address whether the Proposed Transaction made any strategic or business sense for ARCT III.

96. The Definitive Proxy contains some limited disclosure of projected financial information. However, the Definitive Proxy fails to disclose free cash flow as estimated by ARCT III management, or any of the other important metrics used to extrapolate free cash flow, including depreciation and amortization and capital expenditures.

**FIRST CAUSE OF ACTION**  
**Breach of Fiduciary Duty**  
**(Against the Individual Defendants)**

97. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

98. As alleged herein, Defendants have initiated a process to sell ARCT III that undervalues the Company and vests them with benefits that are not shared equally by ARCT III’s public shareholders. Moreover, Defendants failed to sufficiently inform themselves of ARCT III’s value, or disregarded the true value of the Company, in an effort to benefit

themselves. Furthermore, any alternate acquirer will be faced with engaging in discussions with a management team and board that is committed to the Proposed Transaction.

99. The Individual Defendants have violated fiduciary duties owed to Plaintiff and the other public shareholders of ARCT III, including but not limited to their duty of candor and their duty to maximize shareholder value.

100. By the acts, transactions and courses of conduct alleged herein, the Individual Defendants have failed to maximize value for ARCT III's public shareholders and failed to fulfill their duty of candor.

101. As demonstrated by the allegations above, the Individual Defendants breached their fiduciary duties owed to the shareholders of ARCT III because, among other reasons, they failed to take steps to maximize the value of ARCT III to its public shareholders and failed to provide ARCT III shareholders with all information necessary for ARCT III's public shareholders to cast a fully informed vote in connection with the Proposed Transaction.

102. As a result of the actions of Defendants, Plaintiff and the Class will suffer irreparable injury in that they have not and will not receive the highest available value for their equity interest in ARCT III and will not have all the material information necessary to cast a fully informed vote on the Proposed Transaction. Unless the Individual Defendants are enjoined by the Court, they will continue to breach their fiduciary duties owed to Plaintiff and the members of the Class, all to the irreparable harm of the members of the Class.

103. The Individual Defendants should take whatever action is necessary to cause ARCT III to halt the shareholder vote on the Proposed Transaction.

104. Plaintiff and the members of the Class have no adequate remedy at law. Only through the exercise of this Court's equitable powers can Plaintiff and the Class be fully

protected from the immediate and irreparable injury, which the Individual Defendants' actions threaten to inflict.

**SECOND CAUSE OF ACTION**

**Aiding and Abetting the Board's Breaches of Fiduciary Duty  
(Against ARCT III, ARCT III OP, ARCP, ARCP OP, and Merger Sub)**

105. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

106. ARCT III, ARCT III OP, ARCP, ARCP OP, and Merger Sub have acted and are acting with knowledge of, or with reckless disregard to, the fact that the Individual Defendants are in breach of their fiduciary duties to the Company's public shareholders, and have participated in such breaches of fiduciary duties.

107. ARCT III, ARCT III OP, ARCP, ARCP OP, and Merger Sub knowingly aided and abetted the Individual Defendants' wrongdoing alleged herein. In so doing, ARCT III, ARCT III OP, ARCP, ARCP OP, and Merger Sub rendered substantial assistance in order to effectuate the Individual Defendants' plan to consummate the Proposed Transaction in breach of their fiduciary duties.

108. ARCT III, ARCT III OP, ARCP, ARCP OP, and Merger Sub should take whatever action is necessary to halt the shareholder vote on the Proposed Transaction.

109. Plaintiff has no adequate remedy at law.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff demands relief in his favor and in favor of the Class, and against the Defendants, on the above-three causes of action, as follows:

A. Declaring that this action is properly maintainable as a class action, certifying Plaintiff as Class representative and certifying his counsel as class counsel;



B. Declaring that shareholders should not be asked to vote on the Proposed Transaction, and that such vote should be enjoined;

C. Declaring that Defendants and each of them have committed a gross abuse of trust and have breached their fiduciary duties owed to Plaintiff and the Class and/or have aided and abetted such breaches;

D. Declaring that the Proposed Transaction was entered into in breach of Defendants' fiduciary duties and was therefore unlawful and unenforceable, and that the Proposed Transaction or other agreements that Defendants entered into in connection with, or in furtherance of, the Proposed Transaction should be rescinded and invalidated;

E. Declaring that the Proposed Transaction, the Merger Agreement and/or the transactions contemplated thereby, should be rescinded and the parties restored to their original position;

F. Imposing a constructive trust, in favor of Plaintiff and the Class, upon any benefits, property or value improperly received by Defendants and/or traceable thereto and/or in the possession of any of the Defendants as a result of their wrongful conduct;

G. Enjoining Defendants, their agents, counsel, employees and all persons acting in concert with them from consummating the Proposed Transaction, unless and until the Company adopts and implements a procedure or process to obtain a merger agreement providing the best possible terms for shareholders;

H. Rescinding, to the extent already implemented, the Proposed Transaction or any of the terms thereof, or granting Plaintiff and the Class rescissory damages;

I. Directing the Individual Defendants to account to Plaintiff and the Class for all damages suffered as a result of the Individual Defendants' wrongdoing;

J. Awarding compensatory damages in favor of Plaintiff against all Defendants for all losses and damages suffered as a result of Defendants' wrongdoing alleged herein, in an amount to be determined at trial, together with interest thereon;

K. Awarding Plaintiff the costs and disbursements of this action, including reasonable attorneys' and experts' fees; and

L. Granting such other and further equitable relief as this Court may deem just and proper.

**JURY TRIAL DEMANDED**

Plaintiff and the Class demands a trial by jury as to all issues so triable.

Dated: January 30, 2013

Respectfully submitted,

By: 

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Brian C. Kerr

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