

STATE OF RHODE ISLAND

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: February 3, 2021)

NICHOLAS E. CAMBIO, TRUSTEE, :  
THE NICHOLAS E. CAMBIO, RONEY :  
A. MALAFRONTE, and VINCENT A. :  
CAMBIO TRUST, :  
*Petitioners,* :

v. :

C.A. No. PM-2013-0350

COMMERCE PARK REALTY, LLC; :  
COMMERCE PARK PROPERTIES, :  
LLC; COMMERCE PARK COMMONS, :  
LLC; COMMERCE PARK :  
ASSOCIATES 4, LLC; CATAPULT :  
REALTY, LLC, :  
*Respondents.* :

*Consolidated with*

MATTHEW J. MCGOWAN, as and only :  
as Receiver for COMMERCE PARK :  
REALTY, LLC, COMMERCE PARK :  
PROPERTIES, LLC, COMMERCE :  
PARK COMMONS, LLC, COMMERCE :  
PARK ASSOCIATES 4, LLC, and :  
CATAPULT REALTY, LLC, :  
*Petitioners,* :

C.A. No. PM-2013-5001

v. :

COMMERCE PARK MANAGEMENT, :  
LLC, :  
*Respondent.* :

**DECISION**

**TAFT-CARTER, J.** Before this Court is Matthew J. McGowan’s (Receiver) renewed motion for (i) confirmation that receivership estates are not responsible for income taxes and (ii) approval of how he intends to prepare tax returns (the Instant Motion). The Receiver brings the Instant Motion solely in his capacity as the court-appointed Receiver for Commerce Park Realty, LLC, Commerce

Park Properties, LLC, Commerce Park Commons, LLC, Commerce Park Associates 4, LLC, and Catapult Realty, LLC (collectively, the Receivership Entities). Nicholas E. Cambio, Trustee of the Nicholas E. Cambio, Roney A. Malafronte, and Vincent A. Cambio Trust (Petitioner) has objected to the Instant Motion. The Court held a hearing remotely via WebEx on January 11, 2021. Jurisdiction is pursuant to G.L. 1956 § 8-2-13.

## I

### Facts and Travel

With the exception of Commerce Park Management, LLC, the Receivership Entities own and hold title to unimproved and improved properties within the Centre of New England (CNE) development, which covers more than 400 acres within Coventry, West Greenwich, and East Greenwich, Rhode Island. (Receiver’s Mem. in Support of Renewed Mot. to Confirm and for Approval (R.’s Mem. ISO Mot. to Confirm) ¶ 1.) Retail stores including Home Depot, BJ’s Wholesale Club, a Walmart Supercenter; three hotels; an assisted living center; other retail stores and businesses; restaurants; an apartment complex; both fully and partially completed condominium developments; and large tracts of undeveloped properties exist within the CNE development. *Id.* ¶ 2. Upon motions to the Superior Court, the Receiver has sold certain tracts of developed and undeveloped land within the CNE development.<sup>1</sup>

All the Receivership Entities are Rhode Island Limited Liability Companies. *Id.* ¶ 3. The Receivership Entities are so-called “pass through”<sup>2</sup> entities. *See id.* at 5-6; *and see* Receiver’s Mot.

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<sup>1</sup> Both Superior Court Judge Silverstein and Judge Taft-Carter have entered orders regarding the Receiver’s motions and petitions to sell certain pieces of the CNE development. *See* Docketed Orders dated May 2, 2013; July 10, 2013; August 16, 2013; November 15, 2013; December 12, 2014; January 22, 2015; January 6, 2016; July 6, 2018; November 22, 2019; August 31, 2020; January 15, 2021.

<sup>2</sup> Under the Internal Revenue Code, a “pass through” entity is a partnership or S corporation, such as the Receivership Entities, where the members are “liable for income tax only in their separate

for Approval of Compromise and Related Relief dated November 26, 2014 (R.’s Mem. ISO Mot. for Approval) at 2, 19-20.<sup>3</sup> As pass through entities, when the Receivership Entities file income tax returns, they only file “information[al] returns.” (R.’s Mem. ISO Mot. to Confirm at 5.) “For certain years prior to the receivership proceedings, the Receivership Entities had filed F[orm] 1065 tax returns. However, they had not filed tax returns for a number of years leading up to the receivership proceedings.” *Id.* at 6.

The Receiver brought the Instant Motion on December 11, 2020, and this Court held a hearing via WebEx, on January 11, 2021. After considering oral and written arguments, this Court now renders its decision.

## II

### Analysis

The Receiver asserts that (1) the Receiver is not responsible for the Receivership Entities’ income taxes and (2) the method of how the Receiver proposes to proceed with filing the Receivership Entities’ Form 1065 returns is proper and the best way to proceed in the matter. *See generally* R.’s Mem. ISO Mot. to Confirm. First, the Receiver specifically argues that under 11 U.S.C. (Bankruptcy Code) §§ 346(b) and 346(c) the members of the Receivership Entities are responsible for all tax liabilities because the Receivership Entities are pass through entities.

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or individual capacities.” *See* 26 U.S.C. § 701 (2006) (“A partnership as such shall not be subject to the income tax imposed by this chapter. Persons carrying on business as partners shall be liable for income tax only in their separate or individual capacities.”). “Partnerships are not taxed at the entity level.” *Pridgen v. Internal Revenue Service*, 2 Fed. App’x 264, 272 (4th Cir. 2001); *see also Fidelity International Currency Advisor A Fund, LLC, by Tax Matters Partner v. United States*, 747 F. Supp. 2d 49, 69 (D. Mass. 2010), *aff’d sub nom. Fidelity International Currency Advisor A Fund, LLC ex rel. Tax Matters Partner v. United States*, 661 F.3d 667 (1st Cir. 2011) (“Partnerships are ‘[pass]-through’ entities and are not subject to an entity-level tax, although they must file annual informational returns (Forms 1065) reporting various items.” (citation omitted)).

<sup>3</sup> The Receiver’s motion for approval of compromise and related relief dated November 26, 2014 is the Receiver’s original motion that is now renewed before this Court.

Second, the Receiver states that this Court should allow him to file the Form 1065 returns making certain assumptions, including, *inter alia*, that the properties the Receiver has sold had a zero basis for tax gain purposes.

In response, Petitioner argues that the Receiver is not responsible for filing the Receivership Entities' Form 1065 returns, the Receiver has not filed any tax returns since the commencement of these receivership proceedings, and the "preparation and filing of tax returns by the Receiver in accordance with the [Instant Motion] is unnecessary, imprudent, and fundamentally unfair to Petitioner. . . ." *See* Pet'r.'s Obj. Mem. at 2. Accordingly, Petitioner asks that this Court allow him to prepare and file the Receivership Entities' Form 1065 returns. *See id.* at 3.

## A

### **Responsibility for Receivership Entities' Tax Filings and Payment**

A threshold issue in this case is whether the Receiver is responsible for preparing and filing the Receivership Entities' Form 1065 returns. The Receiver asserts that he is responsible for filing the Receivership Entities' Form 1065 returns, but the receivership estate is not responsible for paying the Receivership Entities' income taxes. Notwithstanding, the Petitioner argues that the Receiver is not responsible for filing the Form 1065 returns nor is the Receiver responsible for paying the Receivership Entities' income taxes and asks that the Court allow the Petitioner and his accountant to file the required taxes.

It is well settled in Rhode Island that when there is a lack of state law specifically to the contrary, this Court is to be guided by what is provided for under the Bankruptcy Code. *See Reynolds v. E & C Associates*, 693 A.2d 278, 281 (R.I. 1997) ("Since the insolvency laws of the State of Rhode Island have been superseded by the enactment of the Bankruptcy Code, this court

looks to the Bankruptcy Act and to decisions by the federal courts for guidance in determining priority of claims including those of secured claimants.”); *Leonard Levin Co. v. Star Jewelry Co.*, 54 R.I. 465, 468, 175 A. 651, 653 (1934) (establishing the same); *United States v. Federal Deposit Insurance Corporation*, 899 F. Supp. 50, 55 (D.R.I. 1995) (noting the accepted practice of courts presiding over receivership proceedings referring to federal bankruptcy law for guidance). Therefore, as the question of which party is responsible for filing and paying the Receivership Entities’ Form 1065 returns is an issue of first impression for this jurisdiction’s courts, the Court looks to the Bankruptcy Code for guidance.

On this issue, the Bankruptcy Code is clear: the receiver is responsible for filing the taxes as the law requires, but the tax liability for a partnership is on its members. Section 346(b) states that:

*“The trustee shall make such tax returns of income of corporations and of partnerships as are required under any State or local law, but with respect to partnerships, shall make such returns only to the extent such returns are also required to be made under such Code. The estate shall be liable for any tax imposed on such corporation or partnership, but not for any tax imposed on partners or members.”* 11 U.S.C. § 346(b) (emphasis added).

Similarly, § 346(c) states that:

*“With respect to a partnership or any entity treated as a partnership under a State or local law imposing a tax on or measured by income that is a debtor in a case under this title, any gain or loss resulting from a distribution of property from such partnership, or any distributive share of any income, gain, loss, deduction, or credit of a partner or member that is distributed, or considered distributed, from such partnership, after the commencement of the case, is gain, loss, income, deduction, or credit, as the case may be, of the partner or member, and if such partner or member is a debtor in a case under this title, shall be subject to tax in accordance with subsection (a) or (b).”* 11 U.S.C. § 346(c).

*See also In re North Carolina Tobacco International, LLC*, No. 17-51077, 2020 WL 4582282, at \*4, Bankr. M.D.N.C. 2020) (“Income taxes of a pass-through entity like an LLC or S corporation are liabilities of that entity’s members.”); *and see In re Carolina Internet Ltd.*, No. 11-32461, 2012 WL 2860024, at \*3 (Bankr. W.D.N.C. 2012) (“A significant body of case law illustrates that income taxes of a ‘pass through’ entity, such as an S corporation or a [LLC], are liabilities of that entity’s shareholders.”).

As the Receivership Entities are pass through entities that have been taxed as such, it is clear to this Court that 11 U.S.C. §§ 346(b) and 346(c) require that the Receiver file the Receivership Entities’ Form 1065 returns, but the Receivership Entities’ members are responsible for paying any income tax liabilities that may result. Therefore, the Receiver’s motion is granted on this issue.

## **B**

### **The Receiver’s Proposed Method for Filing the Tax Returns**

The Receiver next asks that this Court confirm the method he has proposed for preparing and filing the Receivership Entities’ Form 1065 returns. The Receiver has stated that he has engaged the accounting firm of DiSanto Priest & Co., and the accountants have “suggested that, unless the Cambio Parties can reliably establish otherwise, it would be reasonable and prudent to prepare such returns on the assumption that the properties that have been sold have a zero basis for tax gain purposes, and with their making assumptions . . . on other matters, as well.” (R.’s Mem. ISO Mot. to Confirm at 10.) The Receiver also asserts that if the Receivership Entities’ members have any issues or disputes regarding how the Receiver proposes to prepare, file, and report items on the Form 1065 returns, the Receiver will note them in a separate statement to

accompany the filings, and the members can work with the Internal Revenue Service and the Rhode Island Division of Taxation after this case is resolved. *Id.* at 10-11.

Meanwhile, Petitioner argues that “[t]he preparation and filing of tax returns by the Receiver in accordance with the Receiver’s [Instant Motion] is unnecessary, imprudent, and fundamentally unfair to Petitioner . . . .” (Pet’r.’s Obj. Mem. at 2.) Petitioner asserts that the Receiver’s proposal (1) “recklessly exposes Petitioner to erroneous capital gains conclusions and significant adverse tax consequences”; (2) would lead to “grossly inaccurate [returns,] inconsistent with historical transactions and tax-related positions, and result in material adverse tax consequences for Petitioner”; and (3) Petitioner’s current Rhode Island Supreme Court case “is likely to have a material impact on Petitioner’s tax-related financial history, tax strategy, tax filings, and tax obligations[,]” which Petitioner claims makes “tax preparation and filing at this time [] ill-advised.” *Id.* at 3.

While the Receiver may be correct that the engaged accountants cannot file the Form 1065 returns in the typical manner, this Court sits in equity and has determined that the matter warrants an exercise of its equitable powers. When the Court sits in equity, it has great “discretion to determine the appropriateness of, and to formulate, equitable relief.” *Ruggieri v. City of East Providence*, 593 A.2d 55, 57 (R.I. 1991) (citing *East Providence v. Rhode Island Hospital Trust National Bank*, 505 A.2d 1143, 1145 (R.I. 1986)). The Court’s discretion “should be guided by ‘basic principles of equity and justice.’” *Id.* (quoting *East Providence*, 505 A.2d at 1146). Thus, this Court has attempted to reach the most equitable resolution for all parties involved.

The Court acknowledges the Receiver’s reluctance to expend fees, costs, and expenses on the Form 1065 return preparations; however, as the Court determined above, the Receiver has a duty to file the Receivership Entities’ tax returns under 11 U.S.C. §§ 346(b) and 346(c). As such

is the case, this Court has also determined that the Receiver's proposed method for proceeding with the Form 1065 returns may leave the Receivership Entities' members responsible for large capital gains conclusions and significant adverse tax consequences. Thus, this Court will allow the Petitioner's accountants the opportunity to provide the documentation that the Receiver requires to prepare and file accurate Form 1065 returns.

Rule 72 of the Rules of Practice and Procedure of the United States Tax Court (Tax Court Rule 72) provides that:

“Any party may . . . serve on any other party a request to:  
“(1) Produce and permit the party making the request, . . . to inspect . . . any designated documents or electronically stored information (including writings, . . . images, and other data compilations stored in any medium from which information can be obtained, either directly or translated, if necessary, by the responding party into a reasonably usable form). . . .” Tax Court Rule 72(a)(1).

Tax Court Rule 72(b)(1) further provides that “[t]he request shall set forth the items to be inspected, either by individual item or category, [and] describe each item and category with reasonable particularity . . . .” Finally, Tax Court Rule 72(b)(2) requires that:

“[t]he party upon whom the request is served shall serve a written response within 30 days after service of the request. *The Court may allow a shorter or longer time.* The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to in whole or in part. . . .” (emphasis added).

Therefore, the Petitioner shall provide the Receiver and his accountants the name, address, telephone number, and any other relevant contact information of Petitioner's accountants forthwith. Then, the Receiver and his accountants shall provide a list of the documents they require to properly prepare and file the Receivership Entities' Form 1065 returns to the Petitioner's accountants. Thereafter, the Petitioner's accountants shall have thirty (30) days to produce the requested documents to the Receiver's accountants, copying the Receiver, or the Petitioner or



Receiver may petition the Court and show cause why the Receiver's suggested method for proceeding with the preparation and filing of the Receivership Entities' taxes should not be implemented.

### **III**

#### **Conclusion**

Therefore, the Receiver's Instant Motion is granted, in part, and denied, in part. Counsel shall submit the appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Nicholas E. Cambio v. Commerce Park Realty, LLC, et al.  
*Consolidated with*  
Matthew J. McGowan v. Commerce Park Management, LLC

**CASE NOS:** PM-2013-0350 *consolidated with* PM-2013-5001

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** February 3, 2021

**JUSTICE/MAGISTRATE:** Taft-Carter, J.

**ATTORNEYS:**

For Plaintiff: SEE ATTACHED LISTS

For Defendant: SEE ATTACHED LISTS

*Nicholas E. Cambio, Trustee, et al. v. Commerce Park Realty, LLC, et al.*  
C.A. No. PM-2013-0350

**Petitioners**

- Brian LaPlante, Esq.  
(401) 273-0200  
[blaplante@lsglaw.com](mailto:blaplante@lsglaw.com)
- Richard G. Riendeau, Esq.  
(401) 273-0200  
[rriendeau@lsglaw.com](mailto:rriendeau@lsglaw.com)
- Michael J. Jacobs, Esq.  
(401) 273-0200  
[mjacobs@lsglaw.com](mailto:mjacobs@lsglaw.com)

**RFP Defendants:**

**HR2-A Corp. as General Partner of HR2-A Limited Partnership;  
HR4-A Corp., as General Partner of HR4-A Limited Partnership;  
MR4A-JV Corp., as General Partner of MR4A-JV Limited Partnership;**

**Realty Financial Partners**

- Robert D. Wieck, Esq.  
(401) 454-8702  
[rwieck@wdglaw.com](mailto:rwieck@wdglaw.com)

**D'Ambra Construction Company Inc.**

- William M. Russo, Esq.  
(401) 455-1000  
[mrusso@frlawri.com](mailto:mrusso@frlawri.com)

**Town of Coventry**

- David M. D'Agostino, Esq.  
(401) 647-1400  
[daviddagostino@gorhamlaw.com](mailto:daviddagostino@gorhamlaw.com)
- Nicholas Gorham, Esq.  
(401) 647-1400  
[ngorham@gorhamlaw.com](mailto:ngorham@gorhamlaw.com)

**Vellano Bros. Inc.**

- Joseph J. Reale, Jr., Esq.  
(401) 453-9900  
[jreale@realelawltd.com](mailto:jreale@realelawltd.com)

## **INTERESTED PARTIES:**

### **670 & 720 Coventry LLC**

- Burns & Levinson LLP  
(401) 831-3010  
[rcoen@burnslev.com](mailto:rcoen@burnslev.com)
- Richard Lumley, Esq.  
(401) 831-8330  
[rlumley@burnslev.com](mailto:rlumley@burnslev.com)

### **Benderson 85-1 Trust**

- Michael J. Lepizzera, Jr., Esq.  
(401) 739-7397  
[mlepizzera@leplap.com](mailto:mlepizzera@leplap.com)
- John A. Pagliarini, Jr., Esq.  
(401) 849-3040  
[jpag@edp-energy.com](mailto:jpag@edp-energy.com)

### **Ferguson Enterprises Inc.**

- Martin K. DeMagistris, Esq.  
(401) 737-3700  
[mkd@olenn-penza.com](mailto:mkd@olenn-penza.com)

### **Holland and Knight LLP**

- Brian J. Lamoureaux, Esq.  
(401) 824-5100  
[bjl@pldolaw.com](mailto:bjl@pldolaw.com)
- Matthew C. Reeber, Esq.  
(401) 824-5100  
[mreeber@pldolaw.com](mailto:mreeber@pldolaw.com)

### **Home Depot U.S.A., Inc.**

- Jeffrey S. Brenner, Esq.  
(401) 454-1000  
[jbrenner@nixonpeabody.com](mailto:jbrenner@nixonpeabody.com)

### **LR2-A Limited Partnership;**

### **LR4-A Limited Partnership;**

### **Realty Financial Partners**

- Preston W. Halperin, Esq.  
(401) 272-1400  
[phalperin@shslawfirm.com](mailto:phalperin@shslawfirm.com)

**Linda Malafronte;  
Robin Pelleccione**

- Scott F. Bielecki, Esq.  
(401) 331-5700  
[sbielecki@cm-law.com](mailto:sbielecki@cm-law.com)

**Potomac Realty Capital LLC**

- William J. Delaney, Esq.  
(401) 454-8000  
[wjd@dlfri.com](mailto:wjd@dlfri.com)

**Daniel Palmier**

- Joseph V. Cavanagh III, Esq.  
(401) 831-8900  
[jvc3@blishcavlaw.com](mailto:jvc3@blishcavlaw.com)

**RI Heritage Inn of West Greenwich LLC**

- Ronald K. Markoff, Esq.  
(401) 272-9330  
[ron@ronmarkoff.com](mailto:ron@ronmarkoff.com)

**Roadepot, LLC**

- Zachary Berk, Esq.  
(617) 912-0927  
[zberk@saull.com](mailto:zberk@saull.com)

**W. Mark Russo**

- John A. Dorsey, Jr., Esq.  
(401) 455-1000  
[jdorsey@frlawri.com](mailto:jdorsey@frlawri.com)

**The Highlands at Hopkins Hill Condominium Association, Inc.;**

- Frank A. Lombardi, Esq.  
(401) 455-0420  
[lombardi@goshlaw.com](mailto:lombardi@goshlaw.com)
- Frederick C. Casavant, Esq.  
(401) 455-0420  
[casavant@goshlaw.com](mailto:casavant@goshlaw.com)
- Mary Joy A. Spencer, Esq.  
(401) 726-1010  
[mj@llgri.com](mailto:mj@llgri.com)

**Village Green Condominium Association, Inc.**

- Frank A. Lombardi, Esq.  
(401) 455-0420  
[lombardi@goshlaw.com](mailto:lombardi@goshlaw.com)
- Dennis J. Roberts II, Esq.  
(401) 274-9600  
[droberts@djrlaw.com](mailto:droberts@djrlaw.com)

**WIP Grandeville Apartments, LLC**

- Frank A. Lombardi, Esq.  
(401) 455-0420  
[lombardi@goshlaw.com](mailto:lombardi@goshlaw.com)
- Mary Joy A. Spencer, Esq.  
(401) 726-1010  
[mj@llgri.com](mailto:mj@llgri.com)
- Christine A. Murphy, Esq.  
(617) 512-7683  
[cmurphy1601@comcast.net](mailto:cmurphy1601@comcast.net)

**The Washington Trust Company**

- Gardner H. Palmer, Esq.  
(401) 632-0911  
[ghpalmer@dioriolaw.com](mailto:ghpalmer@dioriolaw.com)

**Wal-Mart Real Estate Business Trust;  
Wal-Mart Stores East, LP**

- Richard J. Land, Esq.  
(401) 453-6411  
[rland@crflp.com](mailto:rland@crflp.com)

**RECEIVER**

- Matthew J. McGowan, Esq.  
(401) 274-0300  
[mmcgowan@smsllaw.com](mailto:mmcgowan@smsllaw.com)
- Elizabeth Lonardo, Esq.  
(401) 749-1029  
[elonardo@davidrosenlegal.com](mailto:elonardo@davidrosenlegal.com)

**INTERVENOR:**

**MTM-CNE, Inc.**

- Americo M. Scungio, Esq.  
(401) 596-0151  
[amscungioesq@verizon.net](mailto:amscungioesq@verizon.net)

**Randolph Savings Bank**

- Daniel E. Burgoyne, Esq.  
(401) 861-8200  
[dburgoyne@psh.com](mailto:dburgoyne@psh.com)

**Special Master Mark A. Pfeiffer**

- Robert D. Goldberg, Esq.  
(401) 728-1510  
[rgoldberg@goldberglawoffices.com](mailto:rgoldberg@goldberglawoffices.com)

**Michael Kent;**

**Cedar Ridge West Greenwich, LLC**

- Glenn M. Robinson, Esq.  
(401) 490-0994  
[grobinson@richardpalumbolaw.com](mailto:grobinson@richardpalumbolaw.com)

*Matthew J. McGowan, as and only as Receiver for  
Commerce Park Realty, LLC, Commerce Park Properties, LLC,  
Commerce Park Commons, LLC, Commerce Park Associates 4, LLC  
and Catapult Realty, LLC v. Commerce Park Management, LLC  
C.A. No. PM-2013-5001*

**Matthew J. McGowan**

- Matthew J. McGowan, Esq.  
(401) 274-0300  
[mmcgowan@smsllaw.com](mailto:mmcgowan@smsllaw.com)
- R. Thomas Dunn, Esq.  
(401) 490-3418  
[rtdunn@pierceatwood.com](mailto:rtdunn@pierceatwood.com)

**Commerce Park Management, LLC**

- William J. Delaney, Esq.  
(401) 454-8000  
[wjd@dlfri.com](mailto:wjd@dlfri.com)

**INTERESTED PARTY:**

**670 & 720 Coventry LLC**

- Burns & Levinson LLP  
(401) 831-3010  
[rcoen@burnslev.com](mailto:rcoen@burnslev.com)
- Richard Lumley, Esq.  
(401) 831-8330  
[rlumley@burnslev.com](mailto:rlumley@burnslev.com)

**Nicholas E. Cambio;**

**CKLP, Inc.;**

**Commercial Park Associates 2, LLC;**

**Universal Truck & Equipment Leasing, Inc.**

- Richard G. Riendeau, Esq.  
(401) 273-0200  
[rriendeau@lsglaw.com](mailto:rriendeau@lsglaw.com)

**Home Depot U.S.A., Inc.**

- Jeffrey S. Brenner, Esq.  
(401) 454-1000  
[jbrenner@nixonpeabody.com](mailto:jbrenner@nixonpeabody.com)



**Realty Financial Partners**

- Robert D. Wieck, Esq.  
(401) 454-8702  
[rwieck@wdglaw.com](mailto:rwieck@wdglaw.com)

**W. Mark Russo**

- John A. Dorsey, Jr., Esq.  
(401) 455-1000  
[jdorsey@frlawri.com](mailto:jdorsey@frlawri.com)