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Re: *Ross Holding and Management Company, et al. v.*
Advance Realty Group, LLC, et al.
C.A. No. 4113-VCN
Date Submitted: June 27, 2011

Dear Counsel:

The Plaintiffs claim that the Defendants liquidated (or will liquidate) certain interests that may cause negative tax consequences. Thus, the Plaintiffs are asserting a not-well-defined claim for the increased tax liability that may be attributable to the Defendants' conduct.

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The Defendants want the Plaintiffs' (and the Plaintiffs' partners' and shareholders')¹ tax returns—unredacted—and various related documents for the period 2001 through 2010.² The Plaintiffs assert that this request is overly broad and will capture information that should be accorded confidential status and that will not inform an analysis of the impact of Defendants' actions on Plaintiffs' tax liability.

Some of the Plaintiffs' tax information is relevant and, indeed, necessary if the Plaintiffs are to pursue these claims. Some of the information which Defendants will obtain if the request is granted will be irrelevant. That leaves the question of how to define or describe the information which needs to be produced. Unfortunately, no one has been able to provide a workable standard that would limit the information appropriately required and would allow for redaction of the various tax returns only to the extent necessary to excise the unhelpful entries. With the tax returns containing necessary information and no means provided for

¹ The Court assumes that the term "shareholders," as used here, includes only those shareholders who report their respective Plaintiff's tax information on a pass-through basis.

² Evidently, the Plaintiffs have agreed to provide the Plaintiffs' unredacted 2008 returns in a form acceptable to the Defendants.

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limiting that information, it is difficult to find an answer other than full production of the Plaintiffs' and their partners' and shareholders' unredacted tax returns and supporting schedules and attachments filed with the returns. To the extent that the Defendants are seeking information beyond that which was filed with the tax returns, they have not shown need and that portion of their request is denied. It may turn out that further production becomes necessary as a result of information contained in the tax returns and supporting schedules, but it will not be ordered now because at some point this type of production becomes unnecessarily and unreasonably intrusive.

The parties, early on in the litigation, anticipated that confidential information might be produced. The Stipulation and Order of Confidentiality specifically allows for the designation of discovery materials as Restricted Confidential. The tax returns would appear to qualify for a Restricted Confidential designation as "personal income and tax information."³ It may not be a perfect solution, but it does offer a practicable methodology for resolving the current

³ Docket Item 97 at ¶ 5.

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impasse without creating material risk that confidential information will be released.

Plaintiffs have intimated that calculating damages could be delayed until liability is determined. No motion for bifurcating the liability and damages phases has been presented. Moreover, no apparent major efficiency would be achieved by postponing a portion of this proceeding.

There is also Plaintiffs' suggestion that the claims giving rise to this discovery dispute are not yet ripe.⁴ Plaintiffs are bringing the claims; if they are bringing claims that are not ripe, that should not benefit them. If there are claims to pursue, discovery should be taken.⁵ If there are no claims to pursue, it is not clear why either discovery is necessary or why claims remain pending. For present purposes, the pendency of such claims is the result of the Plaintiffs' litigation strategy.

⁴ Plaintiffs' allocated losses apparently exceed their allocated gains.

⁵ The Plaintiffs have made their tax records relevant. If the claims are withdrawn, the Defendants' pending discovery requests, presumably, would become moot.

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Part of the problem may be that the Plaintiffs and the Defendants do not share the same understanding of the Plaintiffs' tax claims. The Defendants understand them to include the consequences of liquidation of ARG's portfolio and reduction of debt that Plaintiffs' argue was improperly created through the conversion agreement. The Plaintiffs describe a somewhat simpler basis for their tax claim: one resulting from unreimbursed tax liability when allocated gains exceed allocated losses while there is no corresponding cash distribution. The Plaintiffs' formulation is arguably more straightforward, but the same tax information is necessary to calculate the damages suffered (or which may be suffered) by the Plaintiffs (or their partners and shareholders).

Accordingly, for the foregoing reasons, the Defendants' motions⁶ seeking unredacted tax returns are granted.⁷ To the extent that the motions seek documents beyond the tax returns, they are denied.

⁶ Defs.' Mot. to Compel Production of Pls.' Tax Returns; Defs.' Mot. for Comm. for Issuance of Subpoenas (to Laura Nicole Senkevitch Trust, Emilee Rose Senkevitch Trust, Diana L. Senkevitch, Northfield Advisors, Inc., P Ross Family Partnership, and Paul Ross).

⁷ This is subject to the assumption set forth in note 1, *supra*.

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IT IS SO ORDERED.

Very Truly yours,

/s/ John W. Noble

JWN/cap

cc: Register in Chancery-K