

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

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In re: : Chapter 11
:
ADVANTA CORP., *et al.*,¹ : Case No. 09-13931 (KJC)
:
Debtors. : (Jointly Administered)
:
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Advanta Bank Corp., :
Plaintiff, :
v. : Adv. Proc. No. 10-50795 (KJC)
Advanta Corp., : **RE: D.I. 8**
Defendant. :
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**EMERGENCY MOTION OF PLAINTIFF ADVANTA BANK CORP.
FOR DECLARATORY AND INJUNCTIVE RELIEF IN
CONNECTION WITH ITS AMENDED COMPLAINT**

Advanta Bank Corp. (“ABC”), by and through its undersigned attorneys, hereby files this Emergency Motion of Advanta Bank Corp. for Declaratory and Injunctive Relief in Connection with its Amended Complaint filed in this adversary action (“Motion”). In support of this Motion, ABC respectfully states as follows:

¹ The Debtors in these jointly administered chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Advanta Corp. (2070), Advanta Investment Corp. (5627), Advanta Business Services Holding Corp. (4047), Advanta Business Services Corp. (3786), Advanta Shared Services Corp. (7074), Advanta Service Corp. (5625), Advanta Advertising Inc. (0186), Advantennis Corp. (2355), Advanta Mortgage Holding Company (5221), Advanta Auto Finance Corporation (6077), Advanta Mortgage Corp. USA (2654), Advanta Finance Corp. (8991), Advanta Ventures Inc. (5127), BizEquity Corp. (8960), Ideablob Corp. (0726), Advanta Credit Card Receivables Corp. (7955), Great Expectations International Inc. (0440), Great Expectations Franchise Corp. (3326), and Great Expectations Management Corp. (3328).

Preliminary Statement

1. Remarkably, this Chapter 11 Debtor has purported to irrevocably and permanently waive millions of dollars in tax refunds with the stroke of a pen (or the push of a computer button) - without seeking the requisite Bankruptcy Court approval to effectuate such extraordinary relief - and which is unquestionably outside of the ordinary course of its business under section 363(b) of the Bankruptcy Code. Let there be no misunderstanding here. The Debtor's effort to relinquish the right to make a five-year carry back of 2009 net operating losses and potentially generate \$54 million in tax refunds, which conduct is void given the lack of prior judicial approval, flies in the face of common sense and logic.

2. Having said that, if the Debtor has its way here, this Court, creditors and parties in interest would have absolutely no oversight in terms of the propriety of the Debtor's business judgment, since the Debtor has attempted to take away the fundamental statutory protection embedded in the Bankruptcy Code of prior notice and an opportunity to be heard on critical business decisions like the purported irrevocable tax waiver and concomitant abandonment of millions of dollars in tax refunds.

3. In the face of ABC's request for an emergency hearing to consider various pleadings filed with this Court prior to the tax deadline, and as to which ABC's counsel previously afforded counsel to the Debtor written notice thereof, the Debtor appears to have filed a 2009 consolidated tax return on Sunday, March 14, 2010.² It did so without any notice to its

² Despite ABC's request for copies of the 2009 consolidated tax return and amended 2008 consolidated tax return that the parent Debtor filed on behalf of, among others, ABC, the Debtors waited until yesterday to transmit copies to counsel to ABC. Moreover, the Debtors imposed a condition of confidentiality upon ABC's receipt and review of the very same tax returns that the Debtor allegedly filed on ABC's behalf. As of this writing, ABC has not yet had an opportunity to review the tax returns in sufficient detail to comment on their substance.

wholly-owned subsidiary, ABC, or this Court; notably, the Debtor does not allege otherwise.³

This action is so striking because the Debtor purportedly elected to irrevocably waive and abandon an estimated \$54 million tax refund based on a strategic opportunity to carry back 2009 net operating losses for five years. Put another way, the Debtor could have (and most certainly should have) decided to affirmatively make the five-year tax election on the 2009 consolidated tax return or, at the very least, opt not to make the election but nevertheless preserve it (rather than attempt to waive it), in the event the estate later desires to amend the consolidated tax return and make the carry back election (as the Debtor appears to have done with the amended 2008 consolidated tax return).

4. The Debtor's effort to posit that ABC waited until the eleventh hour to file emergency pleadings in regard to the extraordinary decision to file tax returns this past Sunday and purportedly waive and abandon a \$54 million refund is most certainly designed to obfuscate rather than enlighten. Upon information, in years past the Debtor always sought and secured six month extensions of the deadline to file consolidated tax returns with the IRS, *and ABC previously understood from the Debtor that it intended to file the 2009 consolidated tax return in September of this year*. Without question, ABC's legitimate effort to compel the Debtor to make the five year carry back election for the 2009 tax year triggered the Debtor's actions in attempting to waive the same, and the Debtor's claim of surprise in this circumstance bespeaks a *faux naivete*.

5. The reality of what the Debtor has attempted to do here is widely divergent from its intemperate and insupportable attempt to portray its conduct as almost ministerial in nature

³ Indeed, the Debtor's representatives refused to furnish any information in response to numerous ABC requests as to the Debtor's intentions in regard to the 2009 consolidated tax return. And counsel to the Debtors did not respond to e-mail and telephonic inquiries as to same.

from a tax perspective. The Debtor can hardly argue convincingly that the strategic decision to permanently waive and abandon a \$54 million tax refund claim represents a decision within the ordinary course of its business. At bottom, and for the reasons set forth below, the Debtor's purported conduct in relinquishing the 2009 tax election, without prior notice and a hearing, is void under applicable bankruptcy law.

6. This Court should declare that the Debtor's purported 2009 tax waiver and 2008 amended tax carry back were actions outside of the ordinary course of the Debtor's business under section 363(b) of the Bankruptcy Code and, to the extent the Debtor moves for approval of such relief after proper notice and a hearing, ABC respectfully requests that the Court compel the Debtor to make the five year net operating loss carry back election in the 2009 consolidated tax return.⁴

Jurisdiction, Venue and Statutory Predicates

7. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334.

8. Venue of these chapter 11 cases and this Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b).

9. The statutory predicates for the relief requested herein are §§ 105(a) and 363(b) of the Bankruptcy Code.

⁴ ABC reserves its right to contest any request by the Debtor to approve the purported tax waiver and election that it improperly attempted to accomplish without the requisite Court approval, and ABC intends to conduct discovery as to the analysis and investigation allegedly undertaken by the Debtors and the Creditors' Committee in connection therewith.

Factual Background

A. The Debtor And Affiliated Chapter 11 Filings

10. Advanta and various of its affiliates filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code on November 8, 2009.

11. Advanta announced on or about January 11, 2010 that it intended to pursue a liquidation of its remaining assets and an orderly wind-down of its business operations.

B. The Consolidated Tax Group And 2009 NOLs

12. ABC is a non-debtor, wholly-owned subsidiary of Advanta.

13. Advanta is the common parent of an affiliated group of corporations, including ABC, which files consolidated tax returns for federal income tax purposes (the “Consolidated Group”) pursuant to the terms of a tax sharing agreement (the “Tax Sharing Agreement”) that exists between and among the Consolidated Group. The Tax Sharing Agreement is dated as of May 1, 1995, and a true and correct copy of same has been affixed hereto as Exhibit A.

14. Under a recent amendment to the Internal Revenue Code (“IRC”), net operating losses may be carried back five years to offset taxable income during the preceding five years (the “Five-Year NOL Carryback”). Prior to the amendment, IRC Section 172(b)(1)(A) provided that a net operating loss for any taxable year may be carried back to the two preceding tax years and carried forward to the 20 subsequent tax years. Newly enacted IRC Section 172(b)(1)(H) modifies the general two-year carry back rule and provides that taxpayers may elect to carry back 2008 or 2009 NOLs up to five years.

15. Notably, Revenue Procedure 2009-52, 4.01(2) provides that the Five-Year NOL Carryback election must be made by the common parent of an affiliated group filing a consolidated return, and must be filed with the taxpayer’s original or amended federal income tax return for the taxable year of the applicable net operating loss on or before the due date,

including extensions, for the return. The Consolidated Group, including ABC, is therefore dependent on Advanta, as the common parent, to not only file a tax return for the Consolidated Group, but to make an election with respect to the Five-Year NOL Carryback.⁵

16. ABC's preliminary estimates indicate that the potential tax refund that would be due from the Internal Revenue Service ("IRS") associated with such a tax election is approximately \$54 million (the "Anticipated Refund") if Advanta were to make the Five-Year NOL Carryback election. Indeed, Advanta itself has conceded that this estimate is an accurate one. See Debtor's Objection to Motion to Compel Advanta Corp. to (I) Timely File a Request for an Extension of Time to File 2009 Consolidated Federal Income Tax Return; or, in the Alternative, (II) Elect to Carry Back 2009 Consolidated Net Operating Losses Five Years (the "Advanta Tax Objection") [D.I. 332], at ¶ 23.

17. Moreover, ABC believes that it would be entitled to all or a significant portion of the Anticipated Refund pursuant to and in accordance with the Consolidated Group's Tax Sharing Agreement. ABC projects that its separate company tax loss for 2009 may exceed \$544 million. (Upon information, the Consolidated Group has reported a combined 2009 tax loss of approximately \$603 million).

18. Unless an extension was timely sought as in years past, the deadline for the Debtor to file the 2009 consolidated federal income tax return (the "Tax Return") was this past Monday, March 15, 2010 (the "Tax Deadline").

⁵ Not only is ABC dependent upon Advanta to file the Consolidated Group's tax return and make the NOL election, but the Tax Sharing Agreement itself (which the Debtor has not rejected) does not permit ABC to file its own tax returns or make its own elections. Furthermore, even if it did, given Advanta's past practice of completing and filing the Consolidated Group's tax returns, ABC does not have the requisite personnel, tax professionals or financial information at its disposal to do so.

C. The Parent's Refusal To Furnish Information To Its Subsidiary

19. In the days leading up to the Tax Deadline, ABC sought information from the Debtor as to whether Advanta would be filing the Tax Return on or before the Tax Deadline, or, alternatively (and consistent with Advanta's established practice), whether Advanta would seek a six month extension to file the Tax Return by September 15, 2010. Such legitimate inquiries were either rebuffed or ignored by Advanta. See Declaration of Kenneth Michael Goldman in Support of Motion to Emergency Motion of Advanta Bank Corp. for Entry of an Order Compelling Debtor Advanta Corp. to (1) Timely File a Request for an Extension of Time to File 2009 Consolidated Federal Income Tax Return, or in the Alternative (2) Elect to Carry Back 2009 Consolidated Net Operating Losses Five Years [D.I. 331]. The only response ABC was able to garner from Advanta was that Advanta personnel were not authorized to discuss federal income tax matters with ABC, despite the fact that ABC is a wholly-owned subsidiary of the Debtor and a member of the Consolidated Group.

20. Given the refusal of Advanta and its counsel to advise ABC even as to whether it intended to file the Tax Return by the Tax Deadline, ABC requested, by letter dated March 10, 2010, that the Debtor affirmatively elect the Five-Year NOL Carryback. See Exhibit B, attached hereto and made a part hereof.

21. Furthermore, ABC's counsel attempted on several occasions, through March 14, 2010, to reach out to Advanta's counsel to ascertain its client's intentions in this regard. Regrettably, these inquiries went unanswered as well. This "radio silence" stands in stark contrast to the repeated efforts ABC and its counsel had been making, since late December 2009, to discuss with Advanta issues related to the consolidated NOLs. These efforts were met only

with delay from Advanta, under the guise that it was still trying to determine where it stood on the NOL issues that ABC wished to discuss.

22. For the Debtor to suggest, as it does, that ABC's attempts to discuss the Five-Year NOL Carryback in the days leading up to the Tax Deadline somehow came at the "eleventh hour" is simply disingenuous. Gamesmanship of this sort should not be condoned by the Court.

D. ABC's Emergency Filings Seeking Bankruptcy Court Intervention

23. On March 12, 2010, faced with the stonewalling of its corporate parent and the Tax Deadline three days away, ABC was compelled to file its Emergency Motion of Advanta Bank Corp. for Entry of an Order Compelling Debtor Advanta Corp. to (I) Timely File a Request for an Extension of Time to File 2009 Consolidated Federal Income Tax Return; or, in the Alternative. (II) Elect to Carry Back 2009 Consolidated Net Operating Losses Five Years (the "ABC Tax Motion") [D.I. 323].⁶ Because ABC was given no information as to whether its parent, Advanta, would be filing the Tax Return by the Tax Deadline, the Motion sought the entry of an Order requiring Advanta to either timely secure an extension to file the Tax Return or, if it planned to timely file the Tax Return, to affirmatively elect the Five-Year NOL Carryback.

24. In conjunction with the ABC Tax Motion, ABC filed contemporaneously therewith its Motion for Shortened Notice and an Expedited Hearing on the Motion of Advanta Bank Corp. for Entry of an Order Compelling Advanta Corp. to Either (I) Request an Extension to File Its 2009 Consolidated Federal Income Tax Return; or (II) Elect to Carry Its 2009

⁶ As further evidence of the efforts ABC made to consensually obtain information about Advanta's plans regarding the Tax Return prior to filing the ABC Tax Motion, ABC's counsel gave Debtor's counsel advance written notice on the morning of March 12th that it intended to file the ABC Tax Motion later that day and seek an emergency hearing in connection therewith, unless Advanta confirmed that it intended to timely file for an extension. See Exhibit C, attached hereto. Like ABC's previous and subsequent tax inquiries, this too went unanswered.

Consolidated Net Operating Loss Back Five Years [D.I. 326] (the “Emergency Hearing Motion”). The Emergency Hearing Motion sought an expedited hearing to consider the relief sought in the ABC Tax Motion on Monday, March 15, 2010, so that the Debtor might be compelled to timely take action by the Tax Deadline in order to preserve its ability to elect the Five-Year NOL Carryback.

25. On March 14, 2010, ABC also filed the Complaint in this adversary proceeding. [Adv. Pr. D.I. 1]. The Complaint sought relief identical to the ABC Tax Motion. In conjunction with the Complaint, ABC also filed its Emergency Motion of Plaintiff Advanta Bank Corp. for Temporary Restraining Order and Preliminary Injunctive Relief Against Defendant Advanta Corp. (the “Emergency TRO Motion”) [Adv. Pr. D.I. 3], seeking the issuance of a temporary restraining order and preliminary injunctive relief against Advanta for those same reasons identified in the Complaint and the ABC Tax Motion. Like the ABC Tax Motion, ABC sought an emergency hearing to consider the Emergency TRO Motion to take place on Monday, March 15, 2010 [Adv. Pr. D.I. 4].

26. Consequently, as of Sunday, March 14, 2010, ABC had requested, both in the Debtor’s bankruptcy case and in the context of this adversary proceeding, emergency hearings before this Court on the gating issue of whether the Debtor should be compelled to either timely seek an extension to file the Tax Return or, if the Debtor intended to file the Tax Return on or before the Tax Deadline, to elect the Five-Year NOL Carryback treatment.

E. Advanta’s Conduct Outside Of The Ordinary Course Of Business

27. On the morning of Monday, March 15, 2010, the Debtor filed the Advanta Tax Objection. In its Objection, for the first time and despite the previous attempts by ABC to learn of its intentions, the Debtor revealed that on the previous day, Sunday, it had filed the 2009 Tax

Return, “waiving the carryback of any portion of the consolidated group’s 2009 NOL, and filed an amended 2008 federal income tax return for its consolidated group electing the five-year carryback of its 2008 NOL.” Advanta Tax Objection, at ¶ 6.

28. According to the Debtor, the Sunday filing was prompted because March 14th “was the last day to prudently file the Tax Return to avoid the risk of technical errors in transmitting the Tax Return electronically to the Internal Revenue Service ... Because of these concerns, Advanta’s consistent practice is, and has been, to avoid waiting to file its tax returns on the actual IRS deadline.” Id. Missing from its *post hoc* explanation, however, is any discussion why the Debtor did not seek an extension of time to file the Tax Return, given its historical practice to do so, and in view of ABC’s repeated efforts to discuss tax issues with its corporate parent.

29. Not only did the Debtor fail to make the Five-Year NOL Carryback on the 2009 Tax Return, but it purported to permanently waive and relinquish its ability to do so in the future, presumably in an effort to prevent ABC from collecting millions of dollars in tax refunds that are properly owing to it by virtue of tax payments made by ABC in prior tax years.

30. The purported 2009 tax waiver and amended 2008 NOL carryback are both actions that were taken by the Debtor without approval of this Court.

The Relief Requested

31. By this Motion, ABC seeks the entry of an Order finding and declaring that the Debtor’s purported waiver of the Five-Year NOL Carryback as to 2009 consolidated losses on the Tax Return, and the purported election to carry back 2008 consolidated losses, are void because they represent attempts to use and dispose of property of the estate outside of the ordinary course of the Debtor’s business, without prior notice and a hearing, in direct violation of Section 363(b) of the Bankruptcy Code.

32. Properly construed, Section 363(b) required the Debtor to seek and obtain Court approval for the kind of actions that it purported to take this past Sunday. Even under the most aggressive reading of the applicable case law interpreting Code Section 363(b), the Debtor's argument that its conduct is "beyond reproach or rebuttal" is insubstantial.

33. For the reasons set forth herein, the Court should grant declaratory and injunctive relief in favor of ABC.

Legal Argument

34. Section 363(b) of the Bankruptcy Code provides, in relevant part, as follows: "The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate ..." 11 U.S.C. § 363(b). Consequently, it is beyond peradventure that, in order for a debtor-in-possession to use property of the estate without the need for prior notice and a hearing, the proposed use must be in the ordinary course of business.

35. Section 363 is designed to allow a debtor-in-possession the flexibility to engage in ordinary transactions without unnecessary creditor and bankruptcy court oversight, while protecting creditors by giving them the opportunity to be heard when transactions are not ordinary. See In re Roth Am., Inc., 975 F.2d 949, 952 (3d Cir. 1992). It operates as a limitation on the debtor-in-possession's ability to operate the business. Johnston v. First Street Cos., Inc. (In re Waterfront Cos., Inc.), 56 B.R. 31, 34 (Bankr. D. Minn. 1985). Transactions that either by their size, nature, or both are not within the day-to-day operations of a business are extraordinary and require notice and a hearing. Id. at 35; Roth Am., 975 F.2d at 954. The notice and hearing requirements "afford due process protections to parties interested in the disposition of the estate but who did not themselves enter into the [transaction] ... this scheme of notice, a hearing, and approval is intended to protect both debtors and creditors (as well as trustees) by subjecting a trustee's actions to complete disclosure and review by the creditors of the estate and by the

bankruptcy court.” Northview Motors, Inc. v. Chrysler Motors Corp., 186 F.3d 346, 351 (3d Cir. 1999).

36. Courts engage in a two-step inquiry for determining whether a transaction is in the ordinary course of business: the “horizontal dimension test” and the “vertical dimension” test. Id., at 952. “The inquiry deemed horizontal is whether, from an industry-wide perspective, the transaction is of the sort commonly undertaken by companies in that industry ... The inquiry deemed vertical ... analyzes the transactions from the vantage point of a hypothetical creditor and the inquiry is whether the transaction subjects a creditor to economic risk of a nature different from those he accepted when he decided to extend credit.” Id. at 953 (internal citations omitted). The vertical test’s touchstone is the interested parties’ reasonable expectations of what transactions the debtor in possession is likely to enter in the course of its business, and the primary focus is on the debtor’s pre-petition business practices and conduct. Id. at 953.

37. Where a transaction or use of property is outside the ordinary course of the debtor’s business because it falls outside the reasonable expectations of creditors, it is void and unenforceable. See Roth Am., 975 F.2d at 954 (finding debtor’s extension of collective bargaining agreement with union unenforceable because it was done without notice and a hearing and was “beyond the domain of transactions that a hypothetical creditor would reasonably expect to be taken under the circumstances”); In re Koneta, 357 B.R. 540, 543 (Bankr. D. Ariz. 2006) (debtor’s unilateral post-petition modification of lease/purchase agreement that reduced the purchase price of subject property was outside the ordinary course of business and required notice, hearing and court approval, the lack of which rendered the transaction null and void); In re Weisser Eyecare, Inc., 245 B.R. 844, 850 (Bankr. N.D. Ill. 2000) (finding that trustee’s post-petition agreement to split post-petition litigation proceeds with

third-party constituted an attempted sale or transfer of estate property outside the ordinary course of business, and failure to adhere to the notice and hearing requirements of Section 363(b) rendered the agreement invalid and unenforceable); Waterfront Cos., 56 B.R. at 34 (finding void an indemnity agreement the debtor entered into post-petition without notice and a hearing because the “open-ended exposure to unlimited liability is simply not the type of transaction which creditors expect a debtor will enter into without notice to creditors and other interested parties”).

38. The Debtor’s purported waiver of the 2009 Five-Year NOL Carryback, and its purported election to carry back 2008 NOLs five years, cannot be regarded as transactions in the ordinary course of its day-to-day business. The failure to elect the Five-Year NOL Carryback in the context of the 2009 consolidated tax return and instead to purportedly waive and abandon the estate’s ability to collect a \$54 million tax refund claim is an extraordinary measure that is subject to the prior review of this Court and other parties in interest.

39. No creditor reasonably expects a debtor to waive a \$54 million refund claim without understanding the rationale for doing so, and the failure to provide for notice and an opportunity to be heard on such an important decision runs afoul of the strict mandate of Code Section 363(b), the rights of creditors, and the requirement for the Court to authorize transactions outside of the ordinary course of business.

40. ABC does not dispute that a debtor’s filing of a tax return can have some incidental economic impact that may nevertheless fall within the ordinary course of its business. But, while this may be true, the Debtor’s purported waiver and tax election in the matter *sub judice* is far different from the fairly routine act of filing an annual tax return. The Debtor overlooks this obvious distinction, for purposes of Section 363(b), between the filing of a tax

return and the purported relinquishment of a \$54 million refund. See Gibson v. U.S. (In re Russell), 927 F.2d 413, 418 (8th Cir. 1991). Where a debtor makes an election on a tax return that relinquishes a multi-million refund that would arguably inure to the benefit of the estate,⁷ it violates the vertical dimension test and is outside the ordinary course of business, requiring prior notice and a hearing under Section 363(b). Streetman v. U.S. (In re Russell), 187 B.R. 287, 293 (W.D. Ark. 1995) (finding that the debtor’s post-petition tax election to carry forward NOLs to offset future income, rather than carry back the NOLs to offset past income and receive a corresponding refund, violated the vertical dimension test and therefore was not made in the ordinary course of the debtor’s business under Section 363(b)).

41. Some of the most compelling evidence that the decision to waive the Five-Year NOL Carryback was outside of the ordinary course emanates from the Debtor itself. The Debtor acknowledges that this important tax decision was arrived at only after “many hours over the past three months discussing the carryback waiver,” “lengthy consultation with its advisors and the Creditors’ Committee and its advisors,” and “significant time over the past several months weighing the costs and benefits of a two-year carryback, five-year carryback, and waiver of carryback.” Advanta Tax Objection, at ¶¶ 1, 24. 25.⁸ For the Debtor to allege, as it likely will in an expedient manner, that this election was just an ordinary component of its day-to-day business, strains credulity. Equity does not lend itself to such a result, despite the effort of the

⁷ It is a considerable paradox for the Debtor to contend that it may have no claim to the tax refund, on the one hand, yet ABC may only hold a general unsecured claim under the Tax Sharing Agreement for such refund monies, on the other. See Advanta Tax Objection at n. 6, p. 13. If Advanta truly believes that ABC would merely have a general unsecured claim, then why would it attempt to permanently waive entitlement to an NOL carryback election that conceivably may generate \$54 million for the estate’s creditors?

⁸ These lengthy and protracted discussions with the Creditors’ Committee undoubtedly occurred while ABC was repeatedly asking the Debtor to meet with it in order to discuss tax-related issues.

Debtor to moot out the substantive relief pending before the Court when the Debtor acted in contravention of the dictates of Section 363(b) this past Sunday.

42. In fact, beyond the Debtor's own admissions, the resounding authority provided by the case law is that where a chapter 11 debtor takes affirmative action to release a claim, deplete estate funds, or divert claim proceeds away from the estate, such action is outside the ordinary course of business and requires notice and a hearing pursuant to Section 363(b). See Braunstein v. McCabe, 571 F.3d 108, 125-26 (1st Cir. 2009) (finding that debtor's post-petition use of settlement funds without notice and a hearing represented a major transaction not within the day-to-day operations of the debtor, depleting the assets and value of the estate, and therefore violated the vertical dimension test); Koneta, 357 B.R. at 543 (debtor's unilateral post-petition modification of lease/purchase agreement that reduced the purchase price of subject property was outside the ordinary course of business and required notice, hearing and Court approval, the lack of which rendered the transaction null and void); Peltz v. Gulfcoast Workstation Grp (In re Bridge Info. Sys., Inc.), 293 B.R. 479, 486-87 (Bankr. E.D.Mo. 2003) (finding that the debtor's alleged settlement agreement disposing of a \$2.1 million preference action was unenforceable because it was reached without notice and hearing under Section 363(b), and stating that "although it may have been customary for Debtor to settle its causes of action pre-petition, settlement of its claims do not occur frequently enough to deem them as 'ordinary' for purposes of § 363(b)(1)."); Weisser Eyecare, Inc., 245 B.R. at 850 (finding that trustee's post-petition agreement to split post-petition litigation proceeds with third-party constituted an attempted sale or transfer of estate property outside the ordinary course of business, and failure to adhere to the notice and hearing requirements of Section 363(b) rendered the agreement invalid and unenforceable); Moore & Munger Mktg. & Ref., Inc. v. Hawkins, 1991 U.S. Dist. LEXIS 21712,

at *8 (W.D. Ark. Oct. 7, 1991) (finding that the trustee’s post-petition agreement without notice and a hearing, whereby a third party paid reduced rent for use of an oil pipeline, was outside the ordinary course of the debtor’s business and therefore not binding on the estate); In re Bacigalupi, Inc., 60 B.R. 442 (B.A.P. 9th Cir. 1986) (finding that the debtor’s assignment of a portion of the litigation proceeds it might receive to non-debtor parties required notice and a hearing under Section 363(b)(1) because the estate’s creditors could have objections and the lack of notice could not be considered harmless given the Code’s requirement of notice and an opportunity to be heard).

43. By filing the Tax Return and purportedly waiving the Five-Year NOL Carryback treatment for 2009 NOLs, the Debtor hopes to cast aside Section 363(b)’s procedural protections that otherwise allow this Court and interested parties the opportunity to consider the appropriateness of a \$54 million transaction and whether it is consistent with the estate’s best interests.

44. The Debtor boldly alleges that its “election to forgo the Carryback and to waive the carryback of any portion of the consolidated group’s 2009 NOL on behalf of Advanta’s consolidated tax group ... is a valid exercise of Advanta’s business judgment **that is beyond reproach or rebuttal.**” Advanta Tax Objection, at ¶ 1 (emphasis added). While a debtor’s business judgment is certainly afforded a level of respect in bankruptcy, this assertion plainly ignores the protections of prior notice and an opportunity to be heard as mandated under the Bankruptcy Code, which are there precisely because decisions of this sort are not beyond reproach or rebuttal. There is something to be said for allegations that have a sound basis in fact, but there is nothing to be said for the Debtor’s contention that an attempt to waive and abandon a \$54 million tax refund claim is free from scrutiny by this Court and parties in interest.

45. It is of no import, as the Debtor argues, that the waiver of the Five-Year NOL Carryback treatment as to 2009 NOLs is supported by the Creditors' Committee. Advanta Tax Motion, at ¶ 1, 25. According to the Debtor, it has expended considerable time analyzing the Five-Year NOL Carryback election, including sharing its analysis with the Creditors' Committee. But that fact does not aid the Debtor here. The imprimatur of the Creditors' Committee does not - and cannot - override the need for judicial approval of an issue of this magnitude.

46. Put simply, rather than provide the requisite notice and a hearing on its decision to relinquish a \$54 million tax refund or face this Court at a hearing in the context of ABC's emergency pleadings interposed before the Tax Deadline, the Debtor effectuated a preemptive strike by filing the Tax Return, purportedly irrevocably waiving the Five-Year NOL Carryback. In so doing, the Debtor trampled on the procedural and substantive safeguards codified in Section 363(b).

47. One must not lose sight of the fact that, buried in a footnote in the Advanta Tax Objection, there is an assertion by the Debtor that ABC is entitled to, at most, a general unsecured claim in connection with the \$54 million refund (which contention ABC disputes). See Advanta Tax Objection at n.6, p.13. The fiction that this Debtor can abandon a claim to collect \$54 million, notwithstanding the blessing of its Creditors' Committee, without affording creditors and the Bankruptcy Court with a chance to be heard on the matter is wholly untethered to the Bankruptcy Code.⁹

⁹ Whether the Debtor's conduct in regard to the purported tax waiver and election were appropriate exercises of its business judgment are questions that this Court will have occasion to address at a subsequent hearing to consider the relief sought by ABC to compel the Five-Year NOL Carryback election. Tellingly, the justification proffered by the Debtor in preserving 2009 NOLs for some future use consumes only a single paragraph in its 20-page objection. But, at the present time, it is sufficient for the Court to determine that the Debtor's extraordinary actions were outside of the ordinary course of business and, therefore, void given the lack of prior notice and judicial approval.

48. A chapter 11 debtor's decisions are not boundless. The statutory protections codified in Section 363(b) of the Bankruptcy Code mandated that the Debtor seek and obtain Court approval before it purported to effectuate the release and abandonment of millions of dollars in tax refunds and the alleged carryback of 2008 NOLs for five years.

49. Therefore, ABC respectfully requests that the relief sought herein be granted in all respects.

WHEREFORE, ABC respectfully requests that the Court enter an Order (i) declaring and nullifying as void (a) the Debtor's purported waiver of the Five-Year NOL Carryback as to 2009 NOLs; and (b) the Debtor's purported election to carry back 2008 NOLs for five years; and (ii) for such other and further relief as is just and proper.

Dated: March 19, 2010

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EXHIBIT A

TAX SHARING AGREEMENT

This Fourth Amended and Restated Tax Sharing Agreement, made this 15th day of May, 1995 by and between Advanta Corp., a Delaware corporation, and its wholly owned (except for director qualifying shares, when appropriate) direct and indirect subsidiaries, which are defined in Section 14 as parties hereto ("Subsidiaries"), shall be as follows:

WHEREAS, Advanta Corp. (formerly TSO Financial Corp.) entered into a First Amended and Restated Tax Sharing Agreement on October 1, 1986, a Second Amended and Restated Tax Share Agreement on August 20, 1988 and a Third Amended and Restated Tax Sharing Agreement on October 11, 1989 with its then existing subsidiaries, and the parties thereto now desire to amend and restate the First Amended and Restated Tax Sharing Agreement, the Second Amended and Restated Tax Sharing Agreement and the Third Amended and Restated Tax Sharing Agreement; and

WHEREAS, Advanta Corp. and its subsidiaries are, for purposes of the Internal Revenue Code of 1954, as amended, members of an affiliated group ("Affiliated Group") of which Advanta Corp. is the parent company, and of which all other Advanta Corp. subsidiaries are the member companies ("Member"); and

WHEREAS, it has been determined that for the current year the Affiliated Group should file a consolidated income tax return, and similar determinations may be made with respect to future years; and

WHEREAS, it is the intention of the parties that if such consolidated returns are filed, each Member company should contribute its fair and equitable share to the taxes payable by the Affiliated Group or compensation for the reduction in the net operating loss deduction, capital loss deduction, or other tax benefit of the Affiliated Group resulting from the inclusion of the Member companies in the Affiliated Group, but that in any event, the filing of such consolidated returns shall be beneficial rather than disadvantageous to each Member company and that each Member company should not

disadvantageous to each Member company and that each Member company should not with respect to any year, or part thereof, for which it is a Member of the Affiliated Group be required to pay more in lieu of taxes or receive a payment in lieu of a refund less than it would have paid or received if the Member company had at all times computed and paid its tax liability on a separate return basis. It is intended that this will comply with the pro rata method as described in SFAS 109 and its interpretation and all consideration of regulatory accounting principles.

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, the parties hereto, intending to be legally bound hereby, agree as follows:

1. Computation of Separate Tax.

In any year or part thereof in which it is planned that the Affiliated Group and any other affiliated subsidiaries of Advanta Corp. which may hereinafter become parties to this Agreement should file a consolidated income tax return (either for federal or state taxes), on or before the date provided by law for payment of any federal or state tax or estimated federal or state tax by a Member, or as soon thereafter as the necessary computations have been completed (hereinafter called the "Adjustment Date") a computation shall be made of the accrued taxes or refund of tax properly reflected in the income statement, on a separate company basis, that should be reflected under generally accepted accounting principals. The amount so computed is hereinafter referred to as the "Separate Member Tax" or the "Separate Member Refund," as the case may be.

2. Payments by Member Companies to Advanta Corp.

(a) If on any Adjustment Date there is a Separate Member Tax and the tax payment then due from the Affiliated Group is in excess of the amount of the Separate Member Tax, then the Member shall pay to Advanta Corp. an amount equal to the Separate

Member Tax. No member shall pay to Advanta Corp. an amount in excess of the amount which would have been payable on a separate company basis.

(b) If on any Adjustment Date there is a Separate Member Tax which exceeds the payment then due from the Affiliated Group, the Member shall pay to Advanta Corp. an Adjustment Payment equal to such Affiliated Group payment then due together with 100% of the excess of the Separate Member Tax over the Affiliated Group payment then due, or if no such payment is then due 100% of the Separate Member Tax.

(c) Any tax which is due as a result of an alternative minimum tax calculation shall be paid by the Advanta Corp. to the extent that such tax exceeds the regular tax.

(d) The quarterly estimated income tax payments and the annual tax liability shall be remitted to Advanta Corp. on the due dates prescribed by the Internal Revenue Code of 1954, as amended.

3. Payments by Advanta Corp. to Members.

(a) If on any Adjustment Date there is a Separate Member Refund, and for the period for which such computation is made the Affiliated Group also files a refund claim in an amount equal to or greater than the Separate Member Refund, then promptly after the receipt of the refund payment from the taxing authority there shall be paid to the Member an Adjustment Payment equal to the Separate Member Refund, together with the allocable share of any interest received with respect thereto.

(b) If on any Adjustment Date there is a Separate Member Refund and the Affiliated Group also is entitled to a refund, but such refund is less than the Separate Member Refund, Advanta Corp. shall pay to such Member payment in an amount equal to the Separate Member Refund, together with an allocable share of any interest promptly upon receipt of the refund payment from the taxing authority.

(c) If on any Adjustment Date there is a Separate Member Refund but no Affiliated Group refund, Advanta Corp. shall pay to the Member the amount equal to the Separate Member Refund.

4. Separate Member Loss.

If on any Adjustment Date the separate return computation for a Member would show a loss but not a Separate Member Refund, Advanta Corp. shall pay to the Member an amount equal to the amount of the loss which results in a tax benefit, determined in a manner consistent with the allocation of tax due to taxable Members, from those losses on the consolidated return.

5. Aggregation of Indirect Subsidiaries.

For purposes of determining payments to be made under Section 2, 3 and 4, the separate company calculations described in Section 1 shall be aggregated so that each direct subsidiary of Advanta Corp., which itself has one or more subsidiaries, shall be affiliated with its direct and indirect subsidiaries as if each such direct subsidiary of Advanta Corp. filed a consolidated return.

6. Deferred Taxes.

No member shall pay to Advanta Corp. any portion of its deferred federal income tax liability.

7. Audit Results.

If, as a result of audit or otherwise, it is determined that there was an error in the computation of any Adjustment Payment, an appropriate repayment or additional

payment shall promptly be made, together with interest thereon at the prime rate on the date of such repayment or additional payment, regardless of whether at that date Advanta Corp. and the Members are still joining in consolidated returns filed by the Affiliated Group.

8. Effective Date.

Promptly upon execution hereof, a computation shall be made of the amounts, if any, owing by Advanta Corp. to the Members or the Members to Advanta Corp., as if this Agreement had been in effect since January 1, 1995.

9. Termination.

This Agreement shall terminate if:

- (a) the parties agree in writing to such termination.
- (b) the Member's membership in the Affiliated Group ceases or is terminated for any reason whatsoever.
- (c) the Affiliated Group fails to file a consolidated return for any taxable year.

Notwithstanding the termination of this Agreement, its provisions will remain in effect with respect to any period of time during the tax year in which termination occurs for which the income of the terminating party must be included in the consolidated return.

10. Assignment.

The respective rights and obligations of each of the parties to this Agreement may not be assigned by any party without the prior written consent of the other parties hereto.

11. Arbitration.

Any disputes arising out of the interpretation or implementation of the terms and conditions of this Agreement shall be submitted to binding arbitration.

12. Access.

All materials, including but not limited to tax returns, supporting schedules, workpapers, correspondence and other documents relating to consolidated income tax returns filed by the Affiliated Group shall be made available to any party of this Agreement during regular business hours. This Paragraph 11 shall survive the termination of this Agreement.

13. Nonviolation of Applicable Laws.

No Member shall pay an amount in excess of any limitation contained within this Tax Sharing Agreement or which would otherwise cause such payment to be in violation of any applicable statute, regulation or administrative ruling.

14. Parties.

Any corporation which is currently or which may in the future become an affiliated subsidiary of Advanta Corp. shall become a party to this Agreement when it becomes a member of the Affiliated Group.

This Agreement shall be effective on the date set forth above, upon execution of same.

Amendment

As between Advanta Corp. and Advanta Insurance Company, Advanta Life Insurance Company, Direct National Life Insurance Company and TSO National Life Insurance Company, the Fourth Amended and Restated Tax Sharing Agreement dated May 1, 1995, shall be amended as follows:

To add a new provision at the end of Paragraph 2(d) stating:

; provided however that Advanta Insurance Company, Advanta Life Insurance Company, Direct National Life Insurance Company, and TSO National Life Insurance Company shall be required to make their respective estimated income tax payments no later than 60 days after each Advanta Corp. estimated income tax payment is due.

This Amendment has been agreed to by the parties set forth below, effective as of September 1, 1995, on the dates so indicated.

Advanta Corp.

By: Richard A. Greenawalt
Richard A. Greenawalt, President

Attest: Gene S. Schneyer
Gene S. Schneyer, Secretary

Date: 12/11/95

Advanta Insurance Company
Advanta Life Insurance Company
Direct National Life Insurance Company
TSO National Life Insurance Company

By: Charles Podowski
Charles Podowski, President

Attest: Ronald Souders
Ronald Souders, Secretary

Date: 12/11/95

Amendment and Adoption

As between ADVANTA Corp. and Colonial National Financial Corp., the Tax Sharing agreement hereby being adopted dated October 11, 1989, shall be amended as follows:

Paragraph four (4) shall state:

If on any Adjustment Date the separate return computation for a Member would show a loss but not a Separate Member Refund, ADVANTA Corp. shall pay in a reasonable time after the Adjustment Date to the Member an amount equal to the amount of the loss which results in a tax benefit, determined in a manner consistent with the allocation of tax due to taxable Members, from those losses on the consolidated return.

The Agreement has been adopted by the parties set forth below, effective as of April 14, 1993, on the dates so indicated.

ADVANTA Corp.

By: Richard A. Greenawalt
Richard A. Greenawalt, President

Attest: Gene S. Schneyer

Date: _____

Colonial National Financial Corp.

By: John L. Richards
John L. Richards, President

Attest: Julie Boyle
Julie Boyle

Date: 5/18/93

EXHIBIT B



RECEIVED MAR 12 2010

Advanta
Bank Corp.
MEMBER FDIC
11850 South Election Road
Draper, UT 84020

March 10, 2010

Dennis Alter
Bill Rosoff
Advanta Corp.
Welsh & McKean Roads
P.O. Box 844
Spring House, PA 19477-08444

Re: Election for 5-Year Carryback of Federal Net Operating Losses

Dear Dennis and Bill:

We continue to miss seeing you both and hope you are well. We were pleased to hear that Bill Wirthlin had a good discussion with Bill Rosoff on the issues. We understand and appreciate the issues you are facing. Given the differing and overlapping constituents we both face, we think regular communication is a good thing.

We wanted to let you know that the Board today decided to amend the Call Report consistent with the discussions in the meeting last Thursday that Jay attended. We also wanted to formally request that Advanta Corp. ("Advanta") (i) file its consolidated income tax return as soon as possible, (ii) immediately thereupon elect to carry its 2009 consolidated net operating loss back five years as permitted under new federal income tax rules, and (iii) immediately thereupon file an application for a tentative carryback adjustment of the tax for the prior tax years affected by the 5-year net operating loss carryback.

Since Advanta is the common parent of an affiliated group of corporations, including Advanta Bank Corp ("ABC"), it files a consolidated return for federal income tax purposes (the "Consolidated Group"). We understand that the Consolidated Group will report a consolidated net operating loss in 2009, and that Advanta, as the Consolidated Group's common parent, may elect to carry this 2009 net operating loss to the Consolidated Group's preceding five taxable years. Our preliminary estimates indicate that the potential refund from the Internal Revenue Service associated with such an election should be approximately \$54 million (the "Anticipated Refund"). ABC believes that it is entitled to a portion of the Anticipated Refund pursuant to and in accordance with the Consolidated Group's tax sharing agreement dated May 1, 1995 (the "TSA").

The timely resolution of this matter is critically important to ABC given ABC's capital status as described in the Report of Examination as of December 31, 2009, which you have been provided, and our decision today to amend the December 31st call report. If the FDIC is appointed receiver of ABC, that event may impair, or even extinguish, Advanta's equity position in ABC and convert any equity into a subordinated claim, notwithstanding the pendency of Advanta's Chapter 11 bankruptcy case. Thus, Advanta's equity position in ABC could be severely devalued and its ability to receive distributions from ABC diminished, if not entirely eliminated, as a consequence of such a course of action by the prudential regulators of ABC.

ABC has discussed with its prudential regulators the possibility that it may be entitled to a portion of the Anticipated Refund should Advanta elect the 5-year net operating loss carryback, and that it is ABC's position that its portion of the Anticipated Refund is material to ABC's viability. We reasonably believe that an extinguishment of your equity in ABC may be delayed – or quite possibly avoided altogether – if ABC is able to demonstrate to its prudential regulators that Advanta intends to expeditiously file a 5-year net operating loss carryback claim and that ABC will receive a portion of the Anticipated Refund in a manner consistent with the TSA. In view of this, the 5-year net operating loss carryback claim requested in this letter may have the effect of, among other things, preserving Advanta's equity position in ABC. We believe ABC has intrinsic franchise value due to the uniqueness of ABC's type of banking charter and the lack of de novo charters currently being approved by the prudential regulators.

Please understand that the 5-year net operating loss carryback claim is a limited opportunity provided for under recent changes to the tax law. Section 172(b)(1)(A) of the Internal Revenue Code of 1986, as amended ("IRC"), provides that a net operating loss for any taxable year may be carried back to the 2 preceding tax years and carried forward to the 20 subsequent tax years. Newly enacted IRC Section 172(b)(1)(H) modifies the general 2-year carryback rule and provides that taxpayers may elect to carry back 2008 or 2009 net operating losses up to five years. Revenue Procedure 2009-52, 4.01(2) provides that the 5-year net operating loss carryback election must be made by the common parent of an affiliated group filing a consolidated return. The 5-year carryback election must be filed with the taxpayer's original or amended federal income tax return for the taxable year of the applicable net operating loss on or before the due date, including extensions, for the return. IRC Section 6411 provides for certain "quick refund" procedures using Form 1139 whereby taxpayers may file and attach a tentative net operating loss carryback claim to their tax return or within 12 months of the end of the year in which the net operating losses arose.

Against this backdrop, ABC requests that Advanta (i) file its consolidated income tax return as soon as possible, (ii) immediately thereupon elect to carry its 2009 consolidated net operating loss back five years as permitted under new federal income tax rules, and (iii) immediately thereupon file an application for a tentative carryback adjustment of the tax for the prior tax years affected by the 5-year net operating loss. We firmly believe this course of action will be mutually beneficial to ABC and Advanta. To be sure, the recovery by ABC of a sizable portion of the Anticipated Refund will enhance its capital position and, in all likelihood, provide the prudential regulators with a greater degree of comfort in its oversight of ABC. This outcome most assuredly inures to the benefit of Advanta and its bankruptcy estate given its equity stake in ABC. I wish to acknowledge the assistance of Frank Mayer in providing the detail for this letter. Please feel free to contact me or Frank with any questions you might have. In the meantime, thank you for your prompt attention to this matter.

Very truly yours,



Calvin M. Boardman
Chairman of the Board of Directors

cc: ABC Board of Directors

EXHIBIT C

From: Barson, Leon R.
Sent: Friday, March 12, 2010 11:20 AM
To: 'Vron, Victoria'
Subject: Advanta

Victoria - We intend to file an emergency motion this afternoon with the Bankruptcy Court, on behalf of our client, Advanta Bank Corp., seeking relief to compel the debtor parent to make a 5-year NOL tax election, if it does not otherwise intend to file for an extension by this coming Monday. Since our client is advised that the debtor's business people have been instructed not to provide it with any information regarding the debtor's intentions as to the tax return issue - which mystifies us given that our client is a wholly-owned subsidiary of the parent debtor and part of a consolidated tax group - we feel that our client has no alternative but to proceed in this fashion.

We will request an emergency hearing for this Monday, March 15th, and are so advising you of same.

Of course, if the debtor intends to file for an extension, or has already done so, please let us know immediately, as this may obviate the need for such emergency relief.

Thank you.

Leon

Leon R. Barson
Attorney at Law
Pepper Hamilton LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103-2799
215.981.4424 - Direct
215.981.4750 - Fax
215.689.4692 - Direct Fax
barsonl@pepperlaw.com
www.pepperlaw.com

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

-----X
:
In re: : Chapter 11
:
ADVANTA CORP., *et al.*,¹ : Case No. 09-13931 (KJC)
:
Debtors. : (Jointly Administered)
:
-----X
Advanta Bank Corp., :
Plaintiff, :
v. : Adv. Pro. No.10-50795 (KJC)
Advanta Corp., : **RE: D.I. 8**
Defendant. :
-----X

ORDER

Upon consideration of the Emergency Motion of Advanta Bank Corp. for Declaratory and Injunctive Relief in Connection with Amended Complaint (“Motion”), and having given due consideration to the Motion and any response or objections thereto, and this Court possessing jurisdiction to consider the Motion, and venue lying appropriately with this

¹ The Debtors in these jointly administered chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Advanta Corp. (2070), Advanta Investment Corp. (5627), Advanta Business Services Holding Corp. (4047), Advanta Business Services Corp. (3786), Advanta Shared Services Corp. (7074), Advanta Service Corp. (5625), Advanta Advertising Inc. (0186), Advantennis Corp. (2355), Advanta Mortgage Holding Company (5221), Advanta Auto Finance Corporation (6077), Advanta Mortgage Corp. USA (2654), Advanta Finance Corp. (8991), Advanta Ventures Inc. (5127), BizEquity Corp. (8960), Ideablob Corp. (0726), Advanta Credit Card Receivables Corp. (7955), Great Expectations International Inc. (0440), Great Expectations Franchise Corp. (3326), and Great Expectations Management Corp. (3328).

Court, and notice of the Motion being sufficient under the circumstances, and the relief requested by the Motion being just and proper, IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED and any objections thereto are OVERRULED.
2. The Debtor's purported waiver in the Tax Return (as defined and described in the Motion) of the Five Year NOL Carryback to 2009 consolidated losses is hereby found to be void and unenforceable under section 363(b) of the Bankruptcy Code.
3. The Debtor's purported election in the amended 2008 consolidated tax return of a Five-Year NOL Carryback is hereby found to be void and unenforceable under section 363(b) of the Bankruptcy Code.
4. The Debtor shall immediately provide notice to the Internal Revenue Service of the entry of this Order and further take such additional steps as may be necessary and appropriate to effectuate the directives of this Order.
5. To the extent that the Debtor and its estate wish to pursue those actions declared void and unenforceable in paragraphs 2 and 3 above, the Debtor shall file a motion on appropriate notice and consistent with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure and this Court's Local Rules, seeking approval thereof before this Court, and all parties' respective rights and remedies as to such relief are reserved and preserved.
6. This Court shall retain jurisdiction with respect to all matter arising from or related to the implementation of this Order.

Dated: _____, 2010
Wilmington, Delaware

HONORABLE KEVIN J. CAREY,
CHIEF UNITED STATES BANKRUPTCY JUDGE