UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re: ADVANTA CORP., *et al.*, Debtors.	Chapter 11 Case No. 09-13931 (KJC) (Jointly Administered) **Hearing Date: February 10, 2011 at 1:00 p.m.** **Objection Deadline: February 1, 2011 at 5:00 p.m.** **Re: Doc. Nos. 1037 and 1042**

OBJECTION OF PROPOSED ERISA CLASS REPRESENTATIVES TO DEBTORS' JOINT PLAN UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

Proposed Class Representatives, Matthew A. Ragan, Paula Hiatt, Pamela Yates and Joann Claflin ("Plaintiffs"), in the ERISA[1] class action entitled *In re Advanta Corp. ERISA Litig.*, Civil Action No. 2:09-cv-4974-CMR (the "ERISA Litigation"), filed in the United States District Court for the Eastern District of Pennsylvania (the "District Court"), on behalf of all persons who were participants in or beneficiaries of the Advanta Corp. Employee Stock Ownership Plan and/or the Advanta Corp. Employee Savings Plan (collectively, the "Employee Plans") and the Employee Plans themselves, at any time between October 31, 2006 and November 8, 2009 (the "Class Period"), and whose Employee Plan accounts included investments in common stock of Advanta Corp. ("Advanta" or the "Debtor"), (collectively, the participants and account holders are the "ERISA Class") hereby submit this objection (the "Objection") to the Debtors' Joint Plan under Chapter 11 of the Bankruptcy Code, dated December 17, 2010 [Doc. No. 1037] (the "Plan")[2], and state the following:

BACKGROUND

1. On October 29, 2009, plaintiff Matthew A. Ragan filed a class action complaint (the "Ragan Action") in the District Court against Advanta and certain officers and directors of Advanta alleging violations of ERISA. Thereafter, two other related class action complaints were filed by Plaintiffs Hiatt and Yates and Claflin, respectively, on November 16, 2009 and

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1 Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

2 Capitalized terms shall have the meanings ascribed to them in the Plan, unless defined otherwise herein.

December 3, 2009 (together with the Ragan Action, the "ERISA Actions"). The complaints in the ERISA Actions allege that the defendants breached their fiduciary duties under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) in connection with the continued offering of Advanta common stock as an investment option in the Employee Plans despite the fact that the Defendant-fiduciaries knew Advanta common stock to be an imprudent investment alternative.

2. On November 8, 2009 and November 20, 2009 (the "Petition Dates"), the Debtor and certain affiliated entities (collectively, the "Debtors") filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Case") in the United States Bankruptcy Court for the District of Delaware.

3. On May 14, 2010, Plaintiff Ragan filed a class proof of claim in the Bankruptcy Case in an amount in excess of $50 million (the "Class Claim").

4. On June 4, 2010, the District Court entered an Order consolidating the individual ERISA Actions as the ERISA Litigation.

5. On August 11, 2010, Plaintiffs filed a Consolidated Class Action Complaint (the "Consolidated Complaint") in the ERISA Litigation, alleging violations of §§ 404 and 405 of ERISA and for breach of fiduciary duties in connection with the Employee Plans against certain current and former officers and directors of Advanta (the "Non-Debtor Defendants"). Pursuant to 11 U.S.C. § 362(a), Advanta was not named as a defendant in the Consolidated Complaint.

6. On November 2, 2010, the Debtors filed the initial Plan [Doc. No. 895] and Disclosure Statement [Doc. No. 896], together with the Motion for an Order Approving the Disclosure Statement and other relief [Doc. No. 899].

7. On December 7, 2010, Plaintiffs filed their Objection to the Disclosure Statement (the "Disclosure Statement Objection") [Doc. No. 979]. On December 13, 2010, Debtors filed their Omnibus Reply [Doc. No. 1005] to various objections to the Disclosure Statement.

8. On December 17, 2010, the Court entered an Order, *inter alia*, approving the Disclosure Statement and scheduling a hearing on confirmation of the Plan for February 10, 2011 [Doc. No. 1042]. Certain of the objections contained in Plaintiffs' Disclosure Statement

Objection were resolved through agreed upon modifications to the Plan and the Disclosure Statement and agreements between the parties. Other objections were reserved for confirmation.

OBJECTION

9. Plaintiffs object to confirmation of the Plan on the following grounds:

(a) the Plan attempts to improperly classify the Class Claim as a Class 6 Subordinated Claim, and the Debtors seek to improperly utilize the Plan to subordinate the Class Claim as opposed to commencing some other contested matter so as to allow any subordination issue to be properly resolved after discovery and an evidentiary hearing;

(b) the proposed protocol established in the AC Trust Agreement for the preservation and/or destruction of the Debtors' books, records or documents transferred to the AC Trust contains an inconsistency, fails to provide for adequate notice of the proposed destruction or disposal of the books and records and fails to address the preservation and/or disposal of those books and records, if any, retained by Reorganized Advanta or transferred to a party other than the AC Trust;

(c) the Plan should preserve the rights of Plaintiffs and the ERISA Class to proceed with their claims against the Debtors to the extent of available insurance coverage, irrespective of any injunction, discharge or distribution under the Plan;

(d) notwithstanding modifications to the Plan, the Plan Injunction and Stay provision is still ambiguous and improper, and must affirmatively exclude any claims of Plaintiffs and the ERISA Class against the current Non-Debtor Defendants and any other non-Debtors.

10. Plaintiffs believe that in order for the Plan to be confirmable under the Bankruptcy Code, the Plan must be modified to satisfactorily address these objections.

A. The Plan Attempts to Improperly Classify the Class Claim as a Class 6 Subordinated Claim, and the Debtors Seek to Improperly Utilize the Plan to Subordinate the Class Claim as Opposed to Some Other Contested Matter.

11. Holders of Subordinated Claims are placed in Plan Class 6. Under the Plan, such Holders are entitled to receive Beneficial Interests in the applicable Liquidating Trusts, but only after allowed Claims in classes having a higher priority are paid in full. The Debtors anticipate that the distribution to Class 6 Subordinated Claims will be zero and that such Holders will receive no distribution under the Plan. Plan, §4.11.

12. The Plan defines "Subordinated Claim" as a Claim that is subordinated pursuant to 11 U.S.C. § 510. Plan, §1.159.

13. Furthermore, the Plan expressly provides that the claims related to the ERISA Litigation are "classified and treated as Subordinated Claims, *without the need for further court order*." Plan, §4.11(c) (emphasis added).

14. As a result, if confirmed, the Plan would deem the Class Claim a Subordinated Claim in Class 6 without the filing of any adversary proceeding to subordinate the Class Claim pursuant to 11 U.S.C. § 510(b) and without Plaintiffs having their "day in court" on this issue. Plaintiffs would receive no distribution under the Plan despite there being no determination by this Court in the appropriate context of an adversary proceeding. Although Federal Rule of Bankruptcy Procedure 7001(8) dictates that subordination under Section 510 of the Bankruptcy Code requires that an adversary (or at least a contested matter) be brought (presumably to provide the aggrieved party with due process), the Rule appears to create an exception when a Chapter 11 plan "provides for subordination." However, the exception begs the question as to the proper procedure where, as here, the issue of subordination is contested. Subordination of the Class Claim should not be automatic so as to do away with a hearing as to the merits of such subordination. *See* ¶¶ 15 to 22, *infra*. Clearly, no case has been made by the Debtor for subordination other than the conclusory determination under the Plan.

15. Plaintiffs dispute this improper classification and maintain that the Class Claim and any other claim based upon the allegations of the ERISA Litigation are general unsecured

claims which should be placed in Plan Class 4. This issue cannot be resolved simply by the Debtors' unilateral determination under the Plan without the issue having been properly vetted before this Court. Moreover, confirmation of the Plan is not conditioned upon subordination of the Class Claim and no such classification based upon similar subordination is sought with respect to the indemnification claims of the Non-Debtor Defendants based upon their status as defendants in the ERISA Litigation. *See* ¶ 22, *infra.*

16. The Class Claim and such other Claims asserted by Plaintiffs, individually, are not and should not be subject to subordination under 11 U.S.C. § 510(b). These claims are not securities claims as contemplated by 11 U.S.C. § 510(b), but rather are claims for breach of fiduciary duty under ERISA against the Employee Plans' fiduciaries for improperly investing or administering the holdings of the Employee Plans, especially with respect to Advanta stock. Plaintiffs are not proceeding in the ERISA Litigation in any capacity other than as participants in the Employee Plans – they are not proceeding as shareholders of Advanta.

17. Moreover, the Class Claim is not premised upon any allegations of fraud by Advanta in connection with Plaintiffs' individual purchase of Advanta stock, which allegations generally trigger subordination under 11 U.S.C. § 510(b). The ERISA Litigation arises from breaches of statutorily mandated fiduciary duties by the Employee Plans fiduciaries, independent of and quite distinct from securities fraud causes of action. *See Rogers v. Baxter Int'l, Inc.*, 521 F.3d 702, 705 (7th Cir. 2008) (noting that in distinguishing an ERISA suit from a securities action, "*[t]his is not a securities suit.* It is an action against fiduciaries of a pension plan . . . The sets of potentially responsible parties overlap *only incidentally*") (emphasis added). *See also Merck & Co., Inc. Securities, Derivatives and ERISA Litigation*, 2009 U.S. Dist. LEXIS 10243, *16 (D.N.J., Feb. 10, 2009) (citing *Rogers, supra,* for the proposition that there is a distinction between securities laws and ERISA); *Lambert Brussels Associates LP v. The Drexel Lambert Group, Inc. (In re The Drexel Lambert Group, Inc.*, 140 B.R. 347, 349-50 (S.D.N.Y. 1992)(holding, albeit in the context of a settlement, that "the bankruptcy court did not abuse its discretion in considering that the disputed [ERISA] class owned distinct securities possessing

different legal rights than those in the [common stockholder class]" and thereby classifying the ERISA claims as unsecured creditor claims). Moreover, this is not an action brought by shareholders, but rather, it is brought so that members of the ERISA Class may receive benefits promised to them as part and parcel of their employment through an assertion of claims for legal damages pursuant to ¶¶ 409 and 502 of ERISA. *See Graden v. Conexant Systems Inc.*, 496 F.3d 291, 296 (3d Cir. 2007)(finding a plan participant is entitled to the net value of his or her account as it should have been in the absence of any fiduciary mismanagement).

18. Notwithstanding this Court's decision in *In re Touch America Holdings*, 381 B.R. 95, 106 (Bankr. D. Del. 2008), the subordination of ERISA claims must not, at least not without an evidentiary hearing, be subordinated pursuant to 11 U.S.C. § 510(b). Indeed, this Court noted that the "underlying nature of the claim" is critical to the application of 11 U.S.C. § 510(b). *Touch America*, 381 B.R. at 104. The nature of the Class Claim in this case should not be ignored in the context of subordination. Here, the Class Claim does not arise out of the purchase of the Debtor's securities. It arises out of breaches of fiduciary duty and violations of ERISA regarding the management of the Employee Plans.

19. Plaintiffs were employees of Advanta and participants in or beneficiaries of the Employee Plans. The Employee Plans held investments in Advanta stock during the Class Period. Plaintiffs, along with the other proposed class members (current and/or former employees of Advanta), as participants in the Employee Plans, lost millions of dollars of their retirement savings when the value of Advanta stock held in the Employee Plans plummeted in value, eventually becoming worthless. Notwithstanding the foregoing, the fiduciaries of the Employee Plans (including Advanta) continued to offer Advanta stock as an investment for participant contributions under the Employee Plans, despite actual or constructive knowledge of the financial disaster that was about to befall Advanta as it spiraled into bankruptcy.

20. The Consolidated Complaint alleges that Non-Debtor Defendants, fiduciaries of the Employee Plans, breached their fiduciary duties to the Employee Plans, Plaintiffs and members of the putative class, and were therefore liable to the Employee Plans, Plaintiffs and

members of the putative class for the damages from that breach. *See* ERISA § 409(a) (fiduciaries are obligated to "make good to such plan any losses to the plan resulting from each such breach." Moreover, a court may grant "other appropriate relief" under ERISA § 502(a)(3).

21. Because the Class Claim is not a claim subject to subordination under 11 U.S.C. § 510(b), Advanta cannot, and should not, be permitted to use the Plan as a means to unilaterally subordinate the Class Claim. Merely manipulating definitions to create subordinated claims is impermissible as is stripping a creditor of its rights to due process before subordination of its claim. Indeed, some contested matter seeking subordination, which would provide discovery rights and ultimately a full evidentiary hearing, must be commenced before a claim may be subordinated under 11 U.S.C. § 510. The unilateral designation in the Plan, together with the Debtors' statement that no court order is necessary, is no substitute for due process.

22. It is curious that the claims for indemnification against the Debtor by the Debtor's current or former officers and directors arising out of their liability for claims against them in the ERISA Litigation are not subject to the same automatic subordination. Plan, §8.6(a). Debtor's failure to treat these indemnification claims as subordinated under 11 U.S.C. § 510(b) is totally inconsistent with the Debtor's position as it relates to the Class Claim. There is no reasonable explanation for this discriminatory treatment of the Class Claim. If the Class Claim is subject to subordination under 11 U.S.C. §510(b), then the officer and director claims for indemnification must be as well. Indeed, while the Debtor reserves the right to object to or subordinate these indemnification claims, it will obviously not do so until after confirmation. *See* n.4, *infra*. The Class Claim should be treated no differently.

B. The Plan Fails to Provide an Appropriate Mechanism for the Preservation or Destruction of Documents, Including Notice.

23. The Plan provides for the establishment of various Liquidating Trusts pursuant to the respective Liquidating Trust Agreements (the "LTAs"). Plan §5.4. Copies of the LTAs are to be furnished as part of the Plan Supplement (Plan, §1.145) at least ten (10) days prior to the deadline for voting on confirmation of the Plan. *See* Plan, §12.7. On January 22, 2011, the

Debtors filed the Plan Supplement [Doc. No. 1121] which included, *inter alia*, the AC Trust Agreement. In response to the Disclosure Statement Objection addressing the preservation of documents, the Debtors stated (in their Omnibus Reply) that the Trust Agreements, to be filed as part of the Plan Supplement, will provide a mechanism for the Trustee's disposition of documents. While the AC Trust Agreement addresses the preservation, destruction or abandonment of assets of the Debtors, it fails to require notice of any proposed document destruction or abandonment, it fails to address at all documents transferred to other entities and it contains internal inconsistencies.

24. The Liquidating Trust Assets (Plan §1.13) are comprised of, *inter alia*, the AC Trust Assets, which encompasses all of Advanta's rights and assets, including Causes of Action and Books and Privileges relating to the Assets, Plan, §1.11. The Plan provides for the Debtors to transfer those Assets to the Liquidating Trusts to be administered by the Liquidation Trustee. Plan, §5.4(c) and (g)). Title to all Assets vests in the Liquidating Trusts. Plan, §5.4(c). Books and Privileges include the Debtor's books, records, all documents and communications of any kind, whether physical or electronic and all privileges attendant thereto. *See* Plan, §1.88.

25. Although the Debtors are compelled to maintain and preserve their Assets during the chapter 11 proceeding, any proposed document preservation protocol must provide for the preservation of the Debtors' Books and Privileges; *i.e.*, books, records and other documents, in any format (*e.g.*, electronic or hard-copy) (collectively, the "Documents") by Reorganized Advanta, the applicable Trust and Trustee or such other transferee[3] post-confirmation. The document preservation protocol must prevent the destruction or abandonment of the Documents post-confirmation, especially because the Documents likely include critical information relevant to the ERISA Litigation, as well as to the Class Claim.

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[3] To the extent Documents are transferred to the Liquidating Trusts or other Entities, the Liquidating Trust, the Liquidating Trustees and the transferee must also be bound by any document preservation protocol approved by the Bankruptcy Court.

26. Indeed, whether the Documents are retained by Reorganized Advanta or transferred to the Liquidating Trusts or to some other estate representative or third party, the Documents must be preserved or maintained so as to be available to parties in interest, especially if the Documents are not available elsewhere. To do otherwise prejudices the rights of the Plaintiffs, members of the ERISA Class and other parties in interest. At the very least, some mechanism for obtaining Court approval and providing notice and an opportunity to be heard by a court of competent jurisdiction must be established before any such Documents are abandoned, destroyed or rendered otherwise unavailable.

27. It is imperative that Reorganized Advanta, the Liquidating Trusts, the Liquidating Trustees or any third party transferee retain and preserve the Documents that may be potentially relevant to the claims asserted in the ERISA Litigation, at least until such time as Plaintiffs are able to conduct and complete discovery, and that Plaintiffs be given reasonable notice of any proposed destruction or abandonment of the Documents and an opportunity to be heard before any such proposed destruction or abandonment is approved by court order.

28. Pursuant to the AC Trust Agreement, the AC Trustee shall not dispose of those books and records transferred to the Trust that are "reasonably likely to pertain to pending litigation in which the Debtors or their officers or directors are a party without further order of the Bankruptcy Court." AC Trust Agreement, §3.2(a)(x) and §3.5.

29. The AC Trust Agreement further provides that the books, records and other documents that were transferred to or created by the AC Trust shall be retained for two years following the dissolution of the AC Trust; thereafter, at the discretion of the AC Trustee, they may be destroyed. AC Trust Agreement, §7.2. Notwithstanding the foregoing, the AC Trustee must obtain approval of the Bankruptcy Court "before disposing of any books and records that are reasonably likely to pertain to pending litigation in which the Debtors or its (*sic*) *current or former* officers or directors are a party." AC Trust Agreement, §7.2 (emphasis added).

30. Thus, while §7.2 properly and expressly includes current or former officers or directors, §§3.2(a)(x) and 3.5 do not and, as a result, may be interpreted to refer only to current

officers or directors. To avoid any doubt, the language of §§3.2(a)(x) and 3.5 should be amended to accurately reflect that it refers to current and former officers and directors. This will eliminate any inconsistency and ambiguity within the AC Trust Agreement.

31. Additionally, although Bankruptcy Court approval is properly required before books and records may be destroyed or otherwise disposed of, there is no requirement that (reasonable) notice of the destruction or disposal of books and records be given to parties in interest, including Plaintiffs. Notice and an opportunity to be heard must be provided and should be included in any protocol established and approved by the Court. Failure to provide such notice is prejudicial to Plaintiffs and other parties in interest.

32. Plaintiffs further object to the apparent discretion of the AC Trustee to determine which books and records are "reasonably likely to pertain to pending litigation." Court approval should be required prior to any proposed destruction or abandonment of any and all books and records that are in any way related to the ERISA Litigation, not just those that the AC Trustee may think "are reasonably likely to pertain to pending litigation."

33. The Debtors, the Liquidating Trusts, Liquidating Trustees, or such other potential transferee of the Documents, as the case may be, must be required to preserve the Documents, so that they are readily available for production if and when required, and must notify parties in interest of their intention to destroy or abandon the Documents. Therefore, the Plan and/or any order confirming the Plan should include the following language:

> From and after the Effective Date, the Debtors, Reorganized Advanta, the Liquidating Trusts, the Liquidating Trustees, and any transferee of the Debtors' Documents (defined *infra*), as the case may be, shall preserve and maintain all of the Debtors' documents, files, books, records, electronic data (including, but not limited to, emails and email server back-up tapes) (collectively, the "Documents"), whether retained by Reorganized Advanta or any successor thereto, or transferred to the Liquidating Trusts or the Liquidating Trustees, pursuant to the Liquidating Trust Agreements, or to such other transferee pursuant to the Plan, and Reorganized Advanta, any successors thereto, the Liquidating Trusts, the Liquidating Trustees and/or such other transferee shall not destroy or otherwise abandon any such Documents absent

further order of this Court or such other court of competent jurisdiction after a hearing upon reasonable notice to parties in interest, including Plaintiffs, with an opportunity to be heard.

C. Plaintiffs and the ERISA Class are Entitled to Proceed with their Claims Against the Debtors to the Extent of Available Insurance Coverage, Irrespective of any Injunction, Discharge or Distribution under the Plan, and the Plan should Preserve These Rights.

34. In response to the Disclosure Statement Objection addressing insurance for fiduciary liability ("Liability Insurance"), the Debtors identified multiple Liability Insurance policies (the "Liability Policies"), the amount of insurance and whether there was a priority of payments provision in the Liability Policies. The Plan provides that Allowed indemnification and reimbursement claims of the Debtors' current and former officers and directors shall be paid to the extent of applicable insurance coverage (Plan. §8.6(a)).[4] However, the Debtor cannot dictate payment by any insurance carrier. To the extent the liability of these officers and directors is satisfied through insurance, it simply reduces any similar claim against the Debtor to the extent *bona fide*.[5] Plaintiffs maintain that the ERISA Class is entitled to look to the proceeds of such Liability Policies for payment in connection with the claims asserted in the ERISA Litigation and may, at least, pursue these Claims against the Debtors to the extent of such available insurance post-Confirmation. Because Plaintiffs may not have a direct action against the insurance carriers under the Liability Policies, the proceeds of the Liability Policies may only be accessed through the pursuit of the claims asserted in the ERISA Litigation. Accordingly, the Plan should not impact the rights of Plaintiffs or the ERISA Class to pursue their claims against the Debtors to the extent of the proceeds of the D&O Policy.

35. Therefore, the Plan and any order confirming the Plan should provide that:

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4 To the extent the proceeds of available and applicable insurance are inadequate to satisfy these officer and director claims for indemnification and reimbursement related to claims asserted in the ERISA Litigation, the Plan purports to treat these claims as General Unsecured Claims. If the Class Claim is subject to subordination, such indemnification claims are likewise subject to subordination under 11 U.S.C. §510(b) and should not be treated otherwise. The Debtors' reservation of their right to object to or subordinate such claims (Plan, §8.6(a)) is inadequate. These claims are not entitled to priority over other subordinated claims to the extent they seek indemnification for damages arising from the purchase or sale of securities of the Debtors. *See* ¶22, *supra*.

5 To the extent the Liability Policies are determined to be an executory contract, it is deemed assumed and transferred to the applicable Liquidating Trust. Plan, §8.6(b).

> Nothing in the Plan, or in any Order confirming the Plan, shall preclude Plaintiffs and the ERISA Class from pursuing their claims against the Debtors to the extent of available insurance coverage and proceeds. The Claims of Plaintiffs and the ERISA Class against the Debtors, to the extent of available insurance, are preserved and not discharged or subordinated by the Plan.

36. Additionally, the Debtors asserted in their Omnibus Reply to the Disclosure Statement Objection that to the extent the claims of the Plaintiffs and the ERISA Class (the "ERISA Claims") against the Debtors are subordinated, Plaintiffs and the ERISA Class cannot pursue the ERISA Claims against the Debtors to the extent of available insurance until all senior claims have been paid in full or it is determined that there are no other claims against the available Liability Policies. There is no basis for such treatment and Plaintiffs dispute this proposition. Moreover, confirmation of the Plan should not be deemed an acknowledgement or approval of this proposition.

37. Debtors admit that this is a "modified plan of liquidation," yet refer to the Debtor as Reorganized Advanta. The reality is that the Debtors are liquidating and the fiction of a reorganization involving one entity to hold stock for purposes of taking advantage of tax losses should not offer the Debtors a discharge to which they would not otherwise be entitled as liquidating debtors. *See* 11 U.S.C. §1141(d)(3)(A) (confirmation of a liquidating plan does not discharge a debtor). The Plan is silent as to any discharge of the Debtors.

D. Despite Some Clarification, the Plan Injunction and Stay Provision[6] is Ambiguous and Improper and Must Affirmatively Exclude any Claims of Plaintiffs and the ERISA Class Against the Non-Debtor Defendants and any Other Non-Debtors.

i. The Bankruptcy Court Lacks Jurisdiction to Release and Enjoin the Prosecution of the ERISA Claims Asserted in the ERISA Litigation against Non-Debtors.

38. To the extent the Plan intends to release the claims or interests of Plaintiffs and/or the ERISA Class or enjoin them from prosecuting those claims against the Non-Debtor

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6 While the Plan does not identify this provision as a "Release," it effectively constitutes a release of the Claims and Interests held by creditors and other parties in interest. Therefore, to the extent this provision does in fact release or attempt to release any claims of Plaintiffs against a non-Debtor, including the Non-Debtor Defendants, Plaintiffs asserts that this Objection is applicable.

Defendants, the Court must, as a threshold question, first determine whether or not it has jurisdiction to release non-debtors from liability to third parties and enjoin the prosecution of the ERISA Litigation against the non-Debtors. The Third Circuit Court of Appeals in *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 214, n. 12 (3d Cir. 2000), has expressed its concern "that the Bankruptcy Court apparently never examined its jurisdiction to release and permanently enjoin [the third party's] claims against non-debtors." While certain matters between non-debtor third parties affecting the debtor and the bankruptcy case may be within the subject matter jurisdiction of the Court, it is not without limits and the Court "cannot simply presume it has jurisdiction in a bankruptcy case to permanently enjoin third-party *class actions* against non-debtors." *Id.* (emphasis added).

39. Recently, the Second Circuit addressed the jurisdictional issue and upheld its earlier holding in the same case that a "'bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate.'" *Johns-Manville Corp. v. Chubb Indemnity Ins. Co. (In re Johns-Manville Corp.)*, 600 F.3d 135,152 (2d Cir. 2010) ("*Manville 2010*")(quoting *In re Johns-Manville Corp.*, 517 F.3d 52, 66 (2d Cir. 2008) ("*Manville 2008*")). Such jurisdiction is statutory. *In re Combustion Engineering, Inc.*, 391 F3d. 190, 225 (3d Cir. 2004). As noted in the *Manville 2010* decision, *Manville 2008* held that "a bankruptcy court's *in rem* jurisdiction was insufficient to enjoin the [direct claim] based upon . . . legal theories that seek to impose liability on [the insurer] as a separate entity rather than on the policies." *Manville 2010*, 600 F.3d at 152. Thus, the nature of the third party claim against the non-debtor, whether it be direct or derivative, must be considered before the Court can exercise subject matter jurisdiction in connection with the non-debtor releases and injunctions in the Plan. The ERISA Litigation clearly asserts direct claims against non-debtor third parties over which the Court does not have subject matter jurisdiction.

ii. The Plan Injunction and Stay Provision Is Unclear and, Therefore, Improper.

40. The Plan injunction and stay provision (Plan, §10.3) requires clarification to the extent it may impact the claims of Plaintiffs and the ERISA Class against a non-Debtor. The Plan has been amended to state that "all Persons who have held, hold or may hold Claims or Equity Interests and all other parties in interest . . . are permanently enjoined from [*inter alia*] (i) commencing or continuing in *any* manner *any* action or other proceeding of *any* kind (whether directly, derivatively or *otherwise*) against the Debtors related to a Claim or Equity Interest." *Id.* (emphasis added). While Debtors have deleted "indirectly" from the parenthetical in §10.3(i), the inclusion of "otherwise" remains problematic, as it may be read as negating any carve-out of non-Debtor releases. Because the allegations asserted against the Non-Debtor Defendants in the ERISA Litigation arise from the same operative facts as the Class Claim against the Debtor, the causes of action against the Non-Debtor Defendants may be construed as being subject to this improper permanent injunction. This provision is, at best, ambiguous, requires clarification and, therefore, should be modified. Indeed, if, as Debtors stated in their omnibus response to objections to the Disclosure Statement that it is not the Plan's intent to release non-Debtors, then that must be clearly stated in the Plan and in any Order confirming the Plan.

41. In the absence of language to the contrary, the Plan's injunction provision is improper as it may be interpreted to impact, enjoin, prohibit and/or preclude Plaintiffs from asserting claims in the ERISA Litigation against non-Debtors or seeking discovery post-Effective Date. The Plan offers no basis for such broad and improper injunctive relief. *See* ¶¶42-43, *infra*. In order to avoid any doubt, the Plan should affirmatively provide that no non-Debtors are being released from claims by or liability to third parties, such as Plaintiffs and the ERISA Class, and that Plaintiffs' ability to request and obtain relevant discovery is not enjoined in any way.

42. To the extent any of Plaintiffs' claims in the ERISA Litigation may be subject to the Plan Injunction provision, the Plan Injunction is improper. *See Deutsche Bank AG London*

Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.), 416 F.3d 136, 141-42 (2d Cir. 2005) (holding that non-debtor releases are proper only in rare cases and may be "tolerated only if the affected creditor consents"); *see also Continental*, 203 F.3d at 211(holding that a debtor must satisfy its burden of proof and establish through specific factual findings that non-debtor third-party releases are fair and necessary); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 608 (Bankr. D. Del. 2001)(citing *Continental* for the proposition that "extraordinary circumstances [are] required to meet even the most flexible test for third party releases"); *In re Combustion Engineering*, 391 F. 3d 190, 236 (3d Cir. 2004) (holding in an asbestos injury case that 11 U.S.C. §105 may not be used to validate a non-debtor release where to do so trumps another Bankruptcy Code section). *See also In re Washington Mutual, Inc.*, Case No. 08-12229 (Bankr. D. Del., J. Walrath), opinion dated January 7, 2011, wherein Judge Walrath provides a lengthy analysis of the non-debtor releases under a chapter 11 plan and the need to consider the specific facts of a case before allowing such extraordinary relief. Opinion, at 61, *et seq*.

43. In the absence of consideration and creditor consent, non-debtor third-party release, injunction and exculpation provisions have been disallowed and rejected by this Court. *See, e.g., In re Exide Techs.*, 303 B.R. 48, 75 (Bankr. D. Del. 2003). Here, Plaintiffs and the ERISA Class do not consent to the injunction and resultant release provision under the Plan and are not receiving any consideration from the non-Debtor third parties who may benefit from these gratuitous provisions. Therefore, the following language should be included in the Plan and any Order confirming the Plan:

> Nothing in the Plan, the Plan Supplement, any document contained in the Plan Supplement, any amendment to the Plan or in any order confirming the Plan shall (i) affect, release, enjoin or impact in any way the prosecution of the claims asserted, or to be asserted, against any non-Debtor in the ERISA Litigation or (ii) preclude Plaintiffs and/or the ERISA Class from seeking discovery from the Debtors, Reorganized Advanta, the Liquidating Trusts or Trustees or such other transferee of the Debtors' Books and Privileges, or any other assets of the Debtors.

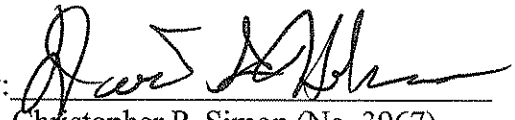
44. Whether or not it is the Debtors' intent to release and/or enjoin third-party claims against non-Debtors, including any of the claims asserted in the ERISA Litigation, the Plan must be clarified. Plaintiffs should not be obliged to take the risk with respect to determining the extent of the Plan injunction provision or whether a Non-Debtor Defendant may claim it is provided shelter by virtue of the ambiguous language under the Plan.

CONCLUSION

45. Based on the foregoing, Plaintiffs respectfully requests that an order be entered (i) denying confirmation of the Plan unless the Plan is modified as set forth herein and (ii) granting Plaintiffs such other and further relief as the Court deems just and proper.

Dated: February 1, 2011

CROSS & SIMON LLC

By: 

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CERTIFICATE OF SERVICE

I, David G. Holmes, hereby certify that on this 1st day of February, 2011, I caused copies of the *Objection of Proposed Erisa Class Representatives to Debtors' Joint Plan Under Chapter 11 of the Bankruptcy Code* to be served on the parties on the attached list in the manner indicated.

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