

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

	X	
In re:	:	Chapter 11
ADVANTA CORP., <i>et al.</i> ,	:	No. 09-13931 (KJC)
Debtors. <sup>1</sup>	:	(Jointly Administered)
	X	
ADVANTA BANK CORP.	:	
Plaintiff,	:	
- against -	:	Adversary Proceeding
ADVANTA CORP.	:	No. 10-50795 (KJC)
Defendant.	:	
	:	<b>RE: D.I. Nos. 8, 9 &amp; 17</b>
	X	

**JOINDER OF THE OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS IN ADVANTA’S OBJECTION  
TO THE MOTION OF ADVANTA BANK CORP. FOR DECLARATORY AND  
INJUNCTIVE RELIEF IN CONNECTION WITH ITS AMENDED COMPLAINT**

The Official Committee of Unsecured Creditors (the “Committee”) appointed in the chapter 11 cases of Advanta Corporation (“Advanta”), *et al.* (collectively, the “Debtors”), by and through its undersigned counsel, hereby joins in *Advanta’s Objection* (the “Objection”) to *Motion of Plaintiff Advanta Bank Corp.* (“ABC”) for Declaratory and Injunctive Relief in

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<sup>1</sup> 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).

*Connection with its Amended Complaint* (the “Motion for Injunctive Relief”), and in support thereof, respectfully states as follows:

### **PRELIMINARY STATEMENT**

1. On the Friday evening before Advanta’s Monday federal tax return filing deadline, ABC moved to compel Advanta to make a tax election that would inure solely to the benefit of ABC. ABC claimed, *inter alia*, that it would be severely prejudiced if Advanta filed its 2009 consolidated tax return without affirmatively electing the five-year NOL carryback because it “believe[d] that it may be entitled to a significant portion of the Anticipated Refund pursuant to and in accordance with the Consolidated Group’s Tax Sharing Agreement.”

2. After Advanta filed its tax return with the election to waive the 2009 carryback and ABC received Advanta’s objection to the Tax Motion (as defined below) and the Committee’s joinder therein, ABC appears to have changed legal theories in recognition of the fact that Advanta’s decisions on these issues were carefully undertaken and were, in all respects, a proper exercise of Advanta’s sound business judgment. To that end, ABC now argues that Advanta’s election to carry forward the consolidated group’s 2009 net operating losses (“NOLs”) was outside of the ordinary course of business. In so contending, ABC ignores the well-established tests for determining whether a transaction is ordinary course, as well as the fact that (i) Advanta has been making tax decisions and elections on behalf of the consolidated group pursuant to a tax sharing agreement that has been in effect for no less than 15 years, (ii) applicable Treasury regulations provide Advanta with the authority to do so, and (iii) the transaction – i.e., the filing of the consolidated returns and the concomitant elections therein – is what creditors reasonably would have expected from Advanta.

3. It is the view of the Committee, after consulting with the Debtors and conducting its own diligence concerning the analysis and circumstances related to the tax election, that Advanta's decision to carry forward the NOLs was an ordinary course transaction as well as an exercise of its sound business judgment. ABC's last minute strategy to unwind Advanta's tax elections should not be countenanced because the relief requested, in addition to being unsupported by any legal authority, would inure solely to the benefit of ABC and would severely prejudice the Debtors and the creditors of the Debtors' estates. The Motion for Injunctive Relief should accordingly be denied.

## **JOINDER**

### **I. BACKGROUND**

#### **A. The Bankruptcy Cases**

4. On November 8, 2009, (and November 20, 2009, with respect to certain of the Debtors), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), which are being jointly administered under Case No. 09-13931 (KJC) (the "Bankruptcy Cases").

5. Pursuant to Sections 1107 and 1108 of the Bankruptcy Code, the Debtors continue to manage and operate their businesses as debtors-in-possession.

6. The Committee was appointed on November 24, 2009.

#### **B. The Tax Sharing Agreement**

7. On May 1, 1995, Advanta and its wholly-owned direct and indirect subsidiaries entered into the Fourth Amended and Restated Tax Sharing Agreement (the "TSA").<sup>2</sup> The TSA

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<sup>2</sup> See Ex. A to ABC's Motion for Injunctive Relief.

establishes the relative rights and obligations of the parties concerning, among other things, the computation of tax liabilities owed by and tax refunds owed to the members.

8. It is undisputed that Advanta is the parent company of a consolidated tax group. *See* TSA, at p. 1 (“Advanta Corp. and its subsidiaries are, for purposes of the Internal Revenue Code of 1954, as amended, members of an affiliated group . . . of which Advanta Corp. is the parent company, and of which all other Advanta Corp. subsidiaries are the member companies[.]”). It is also undisputed that, under applicable Treasury regulations, Advanta has sole and unilateral authority to act on behalf of the members of the consolidated tax group with respect to tax filings, tax elections and matters relating to the tax liability of the consolidated group. *See* Treas. Reg. § 1.1502-77; *see also* Tax Motion, at ¶ 16 (“Under IRC regulations, only Advanta, as the parent entity, can make the tax election . . .”).

9. Once a corporation elects to file consolidated returns, it must obtain the consent of the Internal Revenue Service (the “IRS”) to deconsolidate. *See* Treas. Reg. §§ 1.1502-75(a)(2) and (c)(1)(i). This consent is obtained upon application by the parent. *Id.* Furthermore, the filing of a bankruptcy case does not change the parent company’s responsibility for filing tax returns. *See* I.R.C. § 6012(b)(3)-(4). As noted above, Advanta has filed consolidated tax returns on behalf of the Affiliated Group (as defined in the TSA) in years prior, and there was no basis for ABC to assume that Advanta would refrain from exercising its right or obligation to do so this year.

**C. The Timing Of The Pending Motions**

10. On March 12, 2010 – the final business day before the March 15 filing deadline – ABC filed the Emergency Motion for Entry of an Order Compelling 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 “Tax Motion”). (See D.I. No. 323; No. 09-13931). ABC illogically contends that it waited until the last minute to file the Tax Motion because Advanta had stonewalled ABC’s request for information starting in December 2009, and continuing until the tax filing took place on March 14, 2010. See Motion for Injunctive Relief, at ¶ 23 and fn 6.

11. On March 14, 2010, Advanta filed a consolidated return for the Affiliated Group and waived the carryback portion of the consolidated group’s 2009 NOLs.<sup>3</sup> In making this election, Advanta avoided incurring a potential \$170 million unsecured claim against the Debtors’ estates under the TSA,<sup>4</sup> and at the same time preserved losses<sup>5</sup> for future use.

12. Upon filing the Tax Motion, ABC notified the Debtors and the Committee that it planned to file a second motion to supplement the Tax Motion. However, instead of promptly filing its second motion, ABC waited five additional days, until March 19, to file another “emergency” motion – this one the Motion for Injunctive Relief.<sup>6</sup> (See D.I. No. 9; No. 10-50795).

13. On March 19, 2010, the Federal Deposit Insurance Corporation (the “FDIC”) announced that ABC had been closed by the Utah Department of Financial Institutions, which appointed the FDIC as receiver.<sup>7</sup>

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<sup>3</sup> Advanta also filed an amended 2008 federal income tax return in which it elected the five-year carryback of its 2008 NOLs.

<sup>4</sup> Nothing in this Joinder is an admission that ABC has or would under any circumstances have valid claims against Advanta under the tax sharing agreement. The Committee reserves all rights to object to any and all claims asserted by or on behalf of ABC (and/or the FDIC, in its capacity as receiver for ABC) against the Debtors’ estates in connection with Advanta’s tax election or otherwise.

<sup>5</sup> All references herein to preservation of “NOLs,” “losses” or similar references include preservation of tax basis in stock and related potential worthless stock deduction.

<sup>6</sup> Although the Motion for Injunctive Relief by its styling seeks some form of restraint, it is noticeably devoid of any discussion or analysis of the typical elements required for such relief (e.g., irreparable harm, likelihood of success on the merits, etc.).

<sup>7</sup> It is intended for the references herein to ABC, after March 19, 2010, to apply equally to the FDIC, as receiver for ABC.

14. On April 30, 2010, the Debtors filed the Objection to the Motion of Plaintiff Advanta Bank Corp. for Declaratory and Injunctive Relief in Connection with its Amended Complaint. (*See* D.I. No. 17; No. 10-50795).

## **II. ARGUMENT**

15. The Motion for Injunctive Relief should be denied because Advanta's filing of a consolidated federal tax return and concomitant election to carry forward certain NOLs was made in the ordinary course of business and was a proper exercise of the Debtors' sound business judgment. Additionally, the Motion for Injunctive Relief should be denied because, as a matter of contract and applicable non-bankruptcy law, ABC has no standing to compel the action requested in its initial motion and, as a matter of equity, ABC's unreasonable delay in petitioning the Court bars the extraordinary remedy it now seeks.

### **A. Advanta's Filing Of Its Consolidated Tax Return And Election To Waive The Carryback Was Made In The Ordinary Course of Business**

#### **(1) *The Legal Standard***

16. Pursuant to Section 363 of the Bankruptcy Code, a debtor-in-possession "may enter into transactions . . . in the ordinary course of business, without notice or a hearing[.]" *See* 11 U.S.C. § 363(c)(1). "In order to determine whether or not a transaction falls in the ordinary course of business most courts . . . have adopted a two-step inquiry" consisting of a horizontal and vertical dimension test. *In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 797 (Bankr. D. Del. 2007). The horizontal dimension test asks "whether, from an industry-wide perspective, the transaction is of the sort commonly undertaken by companies in that industry." *Id.* The vertical dimension test, which is also called the "creditor's expectation test," asks "whether the transaction subjects a creditor to economic risk of a nature different from those he accepted when he decided to extend credit" and therefore focuses on the reasonable expectations of certain

interested parties. *Id.* While a court will assess a debtor’s prepetition activities during this analysis, it “must also consider the changing circumstances inherent in the hypothetical creditor’s expectations.” *Id.* The touchstone of “ordinariness is the interested parties’ reasonable expectations of what transactions the debtor in possession is likely to enter in the course of business.” *Id.* Courts will not upset an ordinary course transaction if “the trustee can articulate reasons for his conduct (as distinct from a decision made arbitrarily or capriciously).” *Id.*

**(2) *Advanta’s Filing Of Its Consolidated Tax Return And Election To Carry Forward Its NOLs Satisfies The Horizontal Dimension Test***

17. The horizontal dimension test centers on “whether, from an industry-wide perspective, the transaction is of the sort commonly undertaken by companies in that industry.” *Nellson Nutraceutical*, 369 B.R. at 797. The Treasury regulations make clear that a parent of a consolidated group of corporations is required to file a consolidated tax return, which includes making any related tax elections. *See* Treas. Reg. § 1.1502-77 (“Except as provided in paragraphs (a)(3) and (6) of this section, the common parent (or a substitute agent described in paragraph (a)(1)(ii) of this section) for a consolidated return year is the sole agent (agent for the group) that is authorized to act in its own name with respect to all matters relating to the tax liability for that consolidated return year[.]”). Advanta’s right and obligation to file a consolidated tax return on behalf of the corporate group is not altered by the Bankruptcy Cases. *See* I.R.C. §§ 6012(b)(3) (where a trustee in a case under title 11 has possession of or holds title to all or substantially all the property or business of a corporation, such trustee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns); 6012(b)(4) (“[r]eturns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 . . . shall be made by the fiduciary thereof”).

18. ABC does not really argue that the filing of a tax return is outside the ordinary course, and even goes so far as to admit that the opposite is true. *See* Motion for Injunctive Relief, at ¶ 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.”). On the other hand, ABC claims (without any legal support) that the act of filing of a tax return is somehow different from making elections within a tax return.<sup>8</sup> *Id.*

19. ABC’s argument ignores the contractual and historical relationship between Advanta and ABC, and does little more than misdirect the Court. Indeed, ABC was forced to admit (nine pages earlier in the same brief) that under relevant tax laws Advanta has the right to file consolidated tax returns on behalf of the Affiliated Group and to make elections in those returns. *See* Motion for Injunctive Relief, at ¶ 15 and fn. 5 (“Not only is ABC dependent upon Advanta to file the Consolidated Group’s tax return and make the NOL election [under federal tax law], but the Tax Sharing Agreement itself . . . does not permit ABC to file its own tax returns or make its own elections.”). ABC cannot seriously argue that the first prong of the test is unsatisfied. Not only is it commonplace, but corporations that are parents of consolidated groups such as Advanta are *required* to file annual tax returns for the consolidated group and make any attendant elections; thus, the horizontal dimension test is met.

**(3) *Advanta’s Filing Of Its Consolidated Tax Return And Election To Carry Forward Its NOLs Satisfies The Vertical Dimension Test***

20. With respect to the vertical dimension test, ABC cannot genuinely argue that Advanta’s creditors would not have reasonably expected Advanta to file a consolidated tax

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<sup>8</sup> As noted by Advanta in its Objection, the act of making an election is part and parcel of the filing of the return. If no affirmative election is made there is a default provision applied by the IRS which effectuates a tax election. *See* Objection, at ¶ 16.

return on behalf of the Affiliated Group and make the elections that are part and parcel of the same.

(a) ABC Expected Advanta To File A Consolidated Return And Make Concomitant Tax Elections

21. As discussed above, Advanta has been making tax elections in its consolidated tax return filings on behalf of the consolidated group under a tax sharing agreement that, on information and belief, has been in effect for no less than fifteen years. Moreover, the applicable Treasury regulations give the parent company the authority to act on behalf of a consolidated group, such as the Affiliated Group, with respect to nearly all matters relating to tax liability for the consolidated return year. *See* Treas. Reg. § 1.1502-77.

22. ABC makes much of the fact that Advanta undertook the decision to enter into the “transaction” only after consulting with its professional advisors and the Committee. That argument is a non-sequitur. While the Committee agrees that the issue of whether to waive the carryback was an important decision, the Motion for Injunctive Relief ignores the fact that ordinary course transactions can be decisions that a corporation undertakes each year after carefully weighing its options – in other words, one is not exclusive of the other as ABC would have the Court believe.

23. As a member of the consolidated tax group, ABC cannot legitimately claim that Advanta’s elections are outside of the ordinary course of business simply because ABC does not agree with Advanta’s decisions. To be sure, Advanta’s filing of its return and making of an election (which is part of the filing of such returns), is precisely what ABC expected. *See Nellson Nutraceutical*, 369 B.R. at 797. Indeed, it would have been **outside** the ordinary course of business for Advanta **not** to take these actions.

(b) Reasonable Creditors Would Have Expected Advanta To Mitigate Claims And Maximize Recovery For The Estates

24. While the Treasury regulations provide ample evidence that ABC and other creditors would have expected Advanta to file a consolidated tax return, bankruptcy law and common sense provide further evidence that a hypothetical creditor would have expected Advanta to elect to carry forward the 2009 NOLs.

25. “Upon the commencement of a case in bankruptcy, all corporate property passes to an estate represented by the trustee.” *See Commodity Futures Trading Com v. Weintraub*, 471 U.S. 343, 352 (1985) (citations omitted). The trustee – here the debtor-in-possession – has the duty “to maximize the value of the estate” for all creditors. *Id.*; *see also Martin v. Myers (In re Martin)*, 91 F.3d 389, 394 (3d Cir. 1996) (“a trustee has a fiduciary relationship with *all* creditors of the estate”) (emphasis in original). The creditors of Advanta, including ABC, are well aware of Advanta’s fiduciary duties. Moreover, considering that these fiduciary duties are to all creditors of the Debtors’ estates, any reasonable creditor would have expected Advanta to waive the carryback and avoid triggering a potential \$170 million claim for the benefit of ABC under the TSA.

26. ABC’s behavior leading up to the March 15, 2010 filing deadline is further evidence that a hypothetical creditor would have expected Advanta to make the tax elections it did. In its motion, ABC reports that it began seeking information relating to Advanta’s intentions with respect to its consolidated tax return in December 2009, and continued requesting information until just days before the IRS filing deadline. *See Motion for Injunctive Relief*, at ¶¶ 19-21. On March 12, 2010, when ABC realized that its strategies were proving fruitless in light of Advanta’s fiduciary duties to its creditors, ABC petitioned this Court to compel Advanta to file a tax return that met ABC’s specific, self-interested motives. *See id.* at ¶ 19-23. While ABC

claims that it acts for the benefit of all creditors, ABC did not take these actions to protect the estate, but instead to extract a recovery for its sole benefit. *See, e.g.*, Tax Motion, at ¶ 20 (“ABC believes that it may be entitled to a significant portion of the nearly \$54 million Anticipated Refund that the IRS will owe to the Consolidated Group if the five-year NOL carry back election is made here.”).

27. Moreover, as Advanta notes in its Objection, ABC did not posture the tax election in its first motion (the Tax Motion) as outside the ordinary course, nor did it style or set the Tax Motion with the notice and hearing required pursuant to Section 363 of the Bankruptcy Code. *See* Objection, at ¶¶ 8-9. The Court should see the Motion for Injunctive Relief for what it is: an eleventh hour effort by a self-interested creditor to unwind Advanta’s tax decision in order to improve its own position. As noted above, the “touchstone of ordinariness” is the interested parties’ reasonable expectations of what transactions the debtor in possession is likely to enter into in the course of its business – Section 363 is not a mechanism to allow one creditor to force the debtor into a decision that inures solely to that creditor’s benefit. Advanta’s creditors reasonably would have expected it to mitigate claims and maximize recovery for all creditors; accordingly, the vertical dimension test is satisfied in this case.

(c) The Case Law Cited By ABC Is Inapposite

28. Rather than squarely address it, ABC confuses the meaning and purpose of the vertical dimension test by oversimplifying the holding in *Streetman v. United States (In re Russell)*, 187 B.R. 287 (W.D. Ark. 1995) (“*Russell*”). Contrary to ABC’s position, *Russell* does not stand for the proposition that every time a debtor elects to carry forward its NOLs and relinquish a refund, the debtor “violates the vertical dimension test and is outside of the ordinary course business, requiring prior notice and a hearing under Section 363(b).” *See* Motion for Injunctive Relief, at ¶ 40 (*citing Russell*, 187 B.R. at 293). Indeed, the *Russell* court did not

enunciate any blanket rules, but instead noted that it could “conceive of situations” where it would reach a different conclusion. *Russell*, 187 B.R. at 293.

29. Although glossed over by ABC, the facts of the *Russell* case are readily distinguishable from the current case. As argued by Advanta in its Objection, in *Russell*, the debtor made elections in his tax returns with respect to NOLs for two separate years. In assessing the earlier of the two elections, the court found the transaction to be a fraudulent transfer under Section 548 of the Bankruptcy Code because the estate did not receive any value for carrying the NOLs forward. *Id.* The court then determined if the first year’s election was a constructive fraudulent transfer under Section 548, then the post-petition election in the second year could not be ordinary course. *Id.* In the matter *sub judice*, however, Advanta did not elect to forgo a tax refund for nothing; the election in the tax return was made to mitigate the creation of a potential \$170 million claim under the TSA, a result that maximizes value to the estates and is in line with creditors’ reasonable expectations generally. *See supra*, § A(3)(b).

30. Advanta’s filing of the consolidated tax return and election therein to carry forward its 2009 NOLs passes both the horizontal and the vertical dimension tests, and was thus an ordinary course transaction.

**B. Advanta’s Election To Carry Forward Its NOLs Was A Proper Exercise Of Its Business Judgment**

31. As ABC acknowledged in the Tax Motion, the decisions management took in furtherance of their fiduciary duties to the creditors of the Debtors’ estates are protected by the business judgment rule, absent gross and palpable overreaching. *See, e.g.*, Tax Motion, at ¶ 23; see also *Marvel Entm’t Group, Inc. v. Mafco Holdings, Inc. (In re Marvel Entm’t Group, Inc.)*, 273 B.R. 58, 78 (D. Del. 2002) (board’s judgment concerning tax issues will not be disturbed if it can be attributed to any rational purpose, and a court will not substitute its own thinking of what

is or is not “sound business judgment”). Similarly, courts will not disturb an ordinary course transaction “provided that the conduct involves a business judgment made in good faith upon a reasonable basis and within the scope of authority under the Bankruptcy Code.” *Nellson Nutraceutical, Inc.*, 369 B.R. at 797.

32. Advanta’s decision to carry forward its NOLs was made after careful consultation with management, the Debtors’ professional advisors, the Committee, and the Committee’s professional advisors. After considering all of its options, Advanta filed a consolidated tax return that elected to carry forward the 2009 NOLs to mitigate claims against the estate. The tax election – which ABC argues will result in a loss of a \$54 million refund – prevents the creation of a potential \$170 million unsecured claim, which in turn maximizes the recovery for the creditors of the Debtors’ estates. The waiver of the carryback also permits Advanta to carry forward the NOLs, which preserves meaningful value to the Debtors’ estates and may be of significant value in connection with the structuring of the Debtors’ plan or otherwise.

33. Instead of confronting the Debtors’ business judgment in any meaningful way, ABC seeks to create confusion by mischaracterizing the nature and purpose of the carryforward. For example, in the Motion for Injunctive Relief, ABC implies that Advanta has taken an action akin to releasing a claim, depleting estate funds, or diverting claim proceeds away from the estate. *See* Motion for Injunctive Relief, at ¶ 42. In reality, Advanta has done just the opposite. The carryforward mitigates a potential \$170 million claim against the estate and preserves tax attributes for the benefit of the estates on a going forward basis. It is Advanta’s business judgment, and the Committee agrees, that the creditor constituency is better served by mitigating this potential claim and preserving the NOLs than by electing to carry them back for the 2009 tax year.

34. In addition, ABC's argument that Advanta has released claims or depleted funds only concerns itself with potential contingent claims and funds of *ABC*, not the entire creditor group. While ABC touts its status as an insider creditor to whom the Debtors owe a fiduciary duty, its papers notably fail to draw the clear connection that – if ABC's analysis is correct (a proposition which the Committee disputes) – the relief it is seeking will inure solely to the benefit of ABC, and to the detriment of all other creditors of the Debtors' estates. As such, Advanta's prudent exercise of its business judgment to file a tax return electing to waive the carryback should be respected and affirmed.

**C. The Relief Sought In The Motion For Injunctive Relief Is Barred As A Matter Of Contract And Applicable Non-Bankruptcy Law**

35. In addition to failing to establish that Advanta's filing of a consolidated return electing to carry forward the NOLs was outside the ordinary course or not a proper exercise of the Debtors' business judgment, ABC's extraordinary request for relief should be denied on the basis that it cannot articulate any recoverable injury. Simply put, ABC is not now – nor was it ever – entitled to a \$54 million tax refund. As is discussed above, under the relevant Treasury regulations, Advanta has the sole right to make tax elections in its consolidated returns on behalf of the consolidated group. In addition, there is no requirement that Advanta, as a parent company, consult with any of its subsidiaries before filing a consolidated tax return and making concomitant tax elections. ABC is not entitled to relief that it cannot compel under the TSA<sup>9</sup> or under applicable Treasury regulations. Thus, ABC's application for extraordinary relief should be denied.

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<sup>9</sup> Cf. *In Ion Media Networks, Inc. et al.*, 419 B.R. 585, 595 (Bankr. S.D.N.Y. 2009) (opining, in the context of an intercreditor agreement, that plainly worded pre-petition contracts are to be interpreted using general contract principles, and rejecting a creditor's attempt to make an end-run around express prohibitions in the agreement).

**D. The Relief Sought In The Motion For Injunctive Relief Is Barred As A Matter Of Equity**

36. Finally, in addition to the contractual bar, the Court should find that the Motion for Injunctive Relief is barred as a matter of equity because ABC's delay in petitioning the Court was unreasonable under the totality of the circumstances, and the relief it requests would significantly prejudice the Debtors and the creditors of the Debtors' estates.

37. Laches, an equitable doctrine, applies in bankruptcy, *see Hendry, infra*, and has been held to apply in the tax context as well. *See Rodek v. United States*, 962 F. Supp. 34 (D. Del. 1997). Laches "generally requires the establishment of three things: first, knowledge by the claimant; second, unreasonable delay in bringing the claim; and third, prejudice to the defendant." *Hendry v. Hendry (In re Hendry)*, Civ. No. 08-232-SLR, 2009 U.S. Dist. LEXIS 120234, fn. 9 (D. Del. Dec. 21, 2009) (citation omitted). "What constitutes unreasonable delay and prejudice are questions of fact that depend upon the totality of the circumstances." *Id.*; *see also McKesson Info. Solutions LLC v. TriZetto Group, Inc.*, 426 F. Supp. 2d 203, 208 (D. Del. 2006) (opining that "the length of time which may be deemed unreasonable has no fixed boundaries but rather depends on the circumstances").

38. It was common knowledge that Advanta's deadline for filing a consolidated return was March 15. ABC has demonstrated its understanding of this deadline in its motion papers, and through its behavior prior to filing the Tax Motion and the Motion for Injunctive Relief. ABC attempts to couch its last minute motions as a product of Advanta's bad acts – but ABC cannot have it both ways. On the one hand, ABC claims it waited to file its motion until March 12 because Advanta ignored its inquiries, *see, e.g.*, Motion for Injunctive Relief, at ¶¶ 19-21, but in the same breath represents that it has been seeking to discuss this issue with Advanta for months, only to be met with a stonewall in return. *See id.* at ¶ 21. ABC is a sophisticated

party that could have availed itself of a remedy earlier than the eve of the tax filing deadline, but for one reason or another chose not to do so. *See In re Lukens Inc. Shareholders Litigation*, 757 A.2d 720, 728 (Del. Ch. 1999) (demand for rescission of merger was plainly futile where plaintiffs failed “to pursue injunctive relief prior to the shareholder vote, *although that option was readily available*”) (emphasis in original); *Funkhouser v. Fusion Sys. Corp.*, No. Civ. A. 12895, 1993 WL 1502228, at \*17 (Del. Ch. Mar. 17, 1993) (denying motion for temporary restraining order based on laches, among other grounds, and noting that for a sophisticated party to delay in exercising its rights and then seek extraordinary relief “does smack a bit of being a tactical decision”).

39. Although ABC feigns outrage after the fact, in reality, ABC’s actions in December 2009 and of late *support* the premise that it believed that the filing of a tax return and the concomitant tax election was an ordinary course decision and action that Advanta could take at any point in time. In other words, if ABC truly believed the filing of a tax return was outside of the ordinary course such that notice and a hearing before the Bankruptcy Court would have been required, why did it feel compelled in December 2009 to seek confirmation of Advanta’s intentions? And, if the converse is true, and ABC really believed that Advanta was going to file a tax return making an election that was in violation of the Bankruptcy Code, why did it sit on its right to file a motion seeking an “emergency” restraint for more than three months?<sup>10</sup>

40. The most likely explanation for ABC’s timing is not any bad act by Advanta, but rather that it hoped the threat of litigation would induce Advanta to make an election in its tax return that would be favorable to ABC alone. ABC’s litigation strategy and attendant delay

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<sup>10</sup> Notably, ABC offers no rationale for why its second “emergency” motion came a full week after it notified Advanta that it intended to request additional emergency relief. Its papers are also devoid of any argument as to why the Court should overlook its failure to move for a temporary restraining order on a schedule that would have permitted the Court to order such relief prior to the March 15 deadline.

should not be condoned, particularly where there is the potential for significant prejudice to Advanta and the creditors of the Debtors' estates. As is discussed in the Debtors' Objection, the decision to waive the carryback for the consolidated group's 2009 NOLs is irrevocable, as is the decision to amend its consolidated group return to elect the five-year carryback of its 2008 NOLs. See Objection, at ¶ 43. As such, a reversal of these decisions by this Court would be highly prejudicial to Advanta's creditors and permit ABC's eleventh hour, self-interested complaints to upset Advanta's well-considered business decision that inures to the benefit of all creditors. This is precisely the type of situation where courts have applied equitable doctrines such as laches to bar the requested relief. See, e.g., *Cottrell v. Pawcatuck Co.*, 34 Del. Ch. 528, 533 (Del. Ch. 1954) (doctrine of laches was additional ground for denying injunctive relief where plaintiff stood by for several months and thereafter sought restoration of status quo existing prior to sale of corporate assets); *In re Blockbuster Entm't Corp. S'holders' Litig.*, Civ. A. No. 13319, 1994 WL 89011, at \*1 (Del. Ch. Mar. 1, 1994) (denying, on laches grounds, motion to temporarily restrain the close of a tender offer where plaintiff delayed bringing suit for thirteen days and asked court to decide motion hours before the closing of the offer); *Union Pac. Corp. v. Santa Fe Pac. Corp.*, Civ. A. No. 13778, 1995 WL 54428, at \*1-3 (Del. Ch. Jan. 30, 1995) (denying motion to expedite on laches grounds where plaintiff could have presented injunction application much earlier but chose not to do so); *Plyman v. Glynn County*, 578 S.E.2d 124, 126 (Ga. 2003) (finding that laches barred action initiated 42-days after voters approved special sales and use tax).

**CONCLUSION**

**WHEREFORE**, the Committee respectfully requests that the Court deny the Motion for Injunctive Relief, and grant any such other and further relief it deems just and proper.

Dated: April 30, 2010  
Wilmington, Delaware

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

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In re:	: Chapter 11
	:
ADVANTA CORP., <i>et al.</i> ,	: Case No. 09-13931 (KJC)
	:
Debtors.	: (Jointly Administered)
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**CERTIFICATE OF SERVICE**

I, Howard A. Cohen, hereby certify that on the 30th day of April 2010, I caused a true and correct copy of the *Joinder of the Official Committee of Unsecured Creditors in Advanta's Objection to the Motion of Advanta Bank Corp. for Declaratory and Injunctive Relief in Connection with its Amended Complaint* to be served on all parties by operation of the Case Management/Electronic Case Filing System for the United States Bankruptcy Court for the District of Delaware.

Dated: April 30, 2010

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