IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re ADVANTA CORP., *et al.*, Debtors.	Chapter 11 Case Nos. 09-13931 (KJC), *et seq.* (jointly administered)
ADVANTA BANK CORP., Plaintiff, v. ADVANTA CORP., Defendant.	Adversary Proc. No. 10-50795-KJC

NOTICE OF FILING OF EXHIBIT 1 TO OPENING BRIEF IN SUPPORT OF MOTION OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF ADVANTA BANK CORP. SEEKING A DECLARATION THAT THE AUTOMATIC STAY DOES NOT APPLY OR, IN THE ALTERNATIVE, AN ORDER GRANTING RELIEF FROM THE AUTOMATIC STAY

(relates to Docket No. 26)

PLEASE TAKE NOTICE that Federal Deposit Insurance Corporation, As Receiver Of Advanta Bank Corp. hereby files Exhibit 1 to the Opening Brief In Support of Motion of The Federal Deposit Insurance Corporation, as Receiver of Advanta Bank Corp. Seeking A Declaration That The Automatic Stay Does Not Apply Or, In The Alternative, An Order

Granting Relief From The Automatic Stay (Docket No. 26), inadvertently omitted from the original filing.

Dated: May 16, 2010
Wilmington, Delaware

Respectfully submitted,

PINCKNEY, HARRIS & WEIDINGER, LLC

/s/ Adam Hiller

Adam Hiller (DE No. 4105)
Donna Harris (DE No. 3740)
1220 North Market Street, Suite 950
Wilmington, Delaware 19801
(302) 504-1497 telephone
(302) 442-7046 facsimile
ahiller@phw-law.com

-and-

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Attorneys for FDIC-R

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
ADVANTA CORP., *et al.*,	:	Case No. 09-13932-KJC
Debtors.	:	(Jointly Administered)
ADVANTA BANK CORP.,	:	
Plaintiff,	:	Adv. Proc. No. 10-50795-KJC
v.	:	
ADVANTA CORP.,	:	
Defendant.	:	

DECLARATION OF RICHARD L. THOMPSON

I, Richard L. Thompson, do hereby aver that:

1. I am a Tax Accountant for the Division of Resolutions and Receiverships of the Federal Deposit Insurance Corporation ("FDIC"). My duties include analysis and preparation of income tax returns for failed banks that are in FDIC receivership. I have personal knowledge of the facts set forth in this Declaration.

2. On March 19, 2010, ABC was closed by the Utah Department of Financial Institutions, and the FDIC was appointed as receiver of ABC (the "Receiver"). Under the laws of the United States, the Receiver is charged with the duty of supervising and facilitating the orderly administration of the affairs of ABC.

3. The affairs of ABC and Advanta are significantly intertwined. Advanta is the sole shareholder and owner of ABC. ABC is a first tier subsidiary of Advanta and an affiliate of other Advanta subsidiaries.

4. The primary business of ABC, a Utah-chartered industrial bank with $2.3 billion in total assets, as of September 30, 2009, was to issue and service credit cards to small businesses. Until 2009, ABC was one of the largest issuers of credit cards to small businesses in the United States. Advanta's primary business has been directly related to its ownership of ABC, which was the primary source of Advanta's income.

5. As Receiver of ABC, the FDIC has reviewed ABC's existing contracts, including the Tax Sharing Agreement ("TSA", a true and complete copy of which is attached hereto as Exhibit A) and the actions that have been undertaken by ABC and Advanta pursuant to that agreement.

6. As receiver of ABC, the FDIC also filed an IRS Form 56-F (Notice Concerning Fiduciary Relationship of Financial Institution) with the relevant IRS Service Center on March 22, 2010, within three days of its appointment. A true and complete copy of the IRS Form 56-F filed by the FDIC is annexed hereto as Exhibit B.

7. The Consolidated Group is a calendar year taxpayer and its federal tax return for the 2009 tax year was due on or before March 15, 2010. The Consolidated Group had consolidated net operating losses totaling $8,123,872 and $628,081,799 in the 2008 and 2009 taxable years, respectively. It is estimated that approximately $544,000,000 of the 2009 consolidated net operating loss is attributable to the operations of ABC.

8. Advanta e-filed the Consolidated Group's 2009 consolidated tax return on March 14, 2010, but did not elect the five-year carryback rule with respect to the Consolidated

Group's 2009 NOLs. Instead, in its 2009 tax return Advanta elected to waive the five-year carryback period with respect to the Group's 2009 NOL. The same day, Advanta also filed an amended 2008 Consolidated Return electing the Five-Year NOL Carryback with respect to the Consolidated Group's 2008 NOLs.

9. If the five-year carryback election had been made with respect to the 2009 NOL, it is the FDIC's belief that the Consolidated Group as whole would have been entitled to a federal tax refund of approximately $54 million, most, if not all, of which would have been payable to ABC pursuant to the TSA.

10. In addition, in October 2009, Advanta filed a Form 1139 with the IRS claiming a refund of $1,469,206 resulting from a carryback of 2008 NOLs incurred of $8,123,872. Advanta utilized the two-year carryback rule. On information and belief, Advanta has received the refund but ABC has not received any of the funds.

11. Attached as Exhibit C to this Declaration is a true and complete copy of the case *BSD Bancorp, Inc. v. FDIC*, No 93-12207-A11.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 13, 2010.

Richard L. Thompson
Tax Accountant
Federal Deposit Insurance Corporation

EXHIBIT A

TAX SHARING AGREEMENT

This Fourth Amended and Restated Tax Sharing Agreement, made this 1st 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, President

Attest: _____
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, President

Attest: _____
Ronald Souders, Secretary

Date: 12/11/95

a:agreement\amndfour.doc

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 Greenawalt
Richard A. Greenawalt, President

Attest: _____
Gene S. Schneyer

Date: _____

Colonial National Financial Corp.

By: _____
John L. Richards, President

Attest: Julie Boyle
Julie Boyle

Date: 5/18/93

(amendment)

EXHIBIT B

Federal Deposit Insurance Corporation
1601 Bryan Street, Dallas, TX 75201
Division of Resolutions and Receiverships

March 22, 2010

Department of the Treasury
Internal Revenue Service
Ogden, UT 84201-0012

Reference: Advanta Bank Corp.
Draper, UT
c/o FDIC as Receiver
23-2597173
Form 56-F
Notice of Fiduciary Relationship

Dear Sir or Madam:

On March 19, 2010, Advanta Bank Corp., Draper, UT, (the "Institution") was closed the Utah Department of Financial Institutions and the Federal Deposit Insurance Corporation was appointed as receiver of the Institution (the "Receiver"). Under the laws of the United States, the Receiver is charged with the duty of winding up the affairs of the former Institution.

For purposes of Sections 6402(k) and 6903 IRC, we submit Form 56-F to make notification of the newly established fiduciary relationship for the FDIC. Power of attorney and change of address forms will be submitted in the near future.

The failed bank was a member of an affiliated group filing under its parent:

Advanta Corp., FEIN: 23-1462070

The FDIC as receiver submits a Form 56-F to notify the Service of its fiduciary relationship to the failed bank.

Thank you.

Sincerely,

Nancy L. Appleby
Resolutions and Receiverships Specialist, DRR
Phone: 972-761-8443

Enclosure: Form 56-F

Cc: IRS-AIQ Office
10200: Advanta Bank Corp.: Permanent File

Form **56-F**
(Rev. December 2009)
Department of the Treasury
Internal Revenue Service

Notice Concerning Fiduciary Relationship of Financial Institution

(Internal Revenue Code sections 6036, 6402, and 6903)

OMB No. 1545-2159

For IRS Use Only

Part I Identification

1 Name of person for whom you are acting (as shown on the tax return) **Advanta Bank Corp.**	2 Employer identification number **23 : 2597173**
3 Address of financial institution (number, street, and room or suite no.) **1850 South Election Drive**	
4 City, state, and ZIP code **Draper, UT 84020**	5 Telephone no. **(949) 614-3626**

6 Check the applicable box for the type of financial institution: ☑ Bank ☐ Thrift

7 Check here ▶ ☑ if the financial institution is insolvent.

8 Enter the ending date of the financial institution's tax year (mo., day, yr.) . . . . . ▶ **12/31/2010**

9 Fiduciary's name **Federal Deposit Insurance Corporation**	10 Contact person **Richard L. Thompson**
11 Address of fiduciary (number, street, and room or suite no.) **1601 Bryan Street**	
12 City or town, state, and ZIP code **Dallas, TX 75201**	13 Telephone no. **(949) 614-3626**

14 Check the applicable box if the fiduciary is a:
☑ Receiver ☐ Conservator

15 Check this box ▶☑ if the financial institution is or was a member of a group filing a consolidated return and complete lines 16 to 21 below: Lines 16 through 21 are to be completed only if the financial institution is or was a member of a group filing a consolidated return.

16 Name of person for whom you are acting (as shown on the tax return) **Advanta Corp.**	17 Employer identification number **23 : 1462070**
18 Address of the common parent (number, street, and room or suite no.) **Welsh McKean Roads**	
19 City, state, and ZIP code **Spring House, PA 19477-0844**	

20 Check here ▶ ☑ if a copy of this form has been sent to the common parent of the group.

21 Enter the tax year(s) that the financial institution is or was a member of the consolidated group ▶ **2003 through 2010**

Part II Authority

22 Evidence of fiduciary authority. Check applicable box(es), and attach copy of applicable orders:

a ☐ Appointment of conservator
b ☐ Replacement of conservator
c ☑ Appointment of receiver
d ☐ Order of insolvency
e ☐ Other evidence of creation of fiduciary relationship (describe) ▶

Part III Tax Notices

23 All notices and other written communications with regard to income, employment, and excise taxes of the financial institution (listed on line 1) will be addressed to the fiduciary. Indicate below if other notices and written communications should be addressed to the fiduciary. Include the type of tax, tax periods or years involved.

Part IV Revocation or Termination of Notice

Section A—Total Revocation or Termination

24 Evidence of termination or revocation of fiduciary authority (Check applicable box(es)):

a ☐ Certified copy of court order revoking fiduciary authority attached.
b ☐ Copy of certificate of dissolution or termination of a business entity attached.
c ☐ Other evidence of termination of fiduciary relationship (describe) ▶

Please Sign Here

I certify that I have the authority to execute this notice concerning fiduciary relationship on behalf of the taxpayer.

▶ Fiduciary's signature: Tamara Appleby

Title, if applicable: **Resolutions & Recvrshps Spec**

Date: **03/22/10**

PERRI ANN BABALIS #5658
BRYCE H. PETTEY #2593
Assistant Attorney General
MARK L. SHURTLEFF #4666
Attorney General
Attorneys for Commissioner
of Financial Institutions
160 East 300 South, 5th Floor
P.O. Box 140874
Salt Lake City, Utah 84114-0874
Telephone: (801)366-0375
Email: pbabalis@utah.gov

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

In the Matter of: The Possession of ADVANTA BANK CORP. by the COMMISSIONER OF FINANCIAL INSTITUTIONS	**ORDER APPROVING POSSESSION** Case No. 1009046690 Judge Anthony B. Quinn

This matter came before the Court ex parte on this 19th day of March, 2010, pursuant to the Verified Petition for Order Approving Possession of Advanta Bank Corp. ("Bank") filed by G. Edward Leary, Commissioner of Financial Institutions of the State of Utah ("Commissioner"). The Commissioner was represented by Perri Ann Babalis and Bryce H. Pettey, Assistant Attorneys General.

It appearing to the Court that the Commissioner has found that:

1. The Bank is not in a safe or sound condition to transact its business, which, under Utah Code Ann. § 7-2-1(1)(a) (West 2004), constitutes, in part, grounds for taking possession under Utah Code Ann. § 7-2-1(2)(a)(i) (West 2004);

2. The Bank has failed to maintain a minimum amount of capital as required by the Utah Department of Financial Institutions, or the relevant federal regulatory agency, which, under Utah Code Ann. § 7-2-1(1)(f) (West 2004), constitutes, in part, grounds for taking possession under Utah Code Ann. § 7-2-1(2)(a)(i) (West 2004);

3. The Bank is or is about to become insolvent, which, under Utah Code Ann. § 7-2-1(1)(g) (West 2004), constitutes, in part, grounds for taking possession under Utah Code Ann. § 7-2-1(2)(a)(i) (West 2004);

4. The Bank or its officers or directors have failed or refused to comply with the terms of a legally authorized order issued by the Commissioner, which, under Utah Code Ann. § 7-2-1(1)(h) (West 2004), constitutes, in part, grounds for taking possession under Utah Code Ann. § 7-2-1(2)(a)(i) (West 2004);

5. The remedies provided in Utah Code Ann. §§ 7-1-307, -308, and -313 (West 2004) are ineffective or impracticable to protect the interest of the Bank's depositors or creditors, or to protect the interests the public, which, under Utah Code Ann. §§ 7-2-1(1)(l) (West 2004), constitutes, in part, grounds for taking possession under Utah Code Ann. § 7-2-1(2)(a)(i) (West 2004), and, when found in conjunction with any of the findings in paragraphs (1) through (4)

above, is grounds for taking possession under Utah Code Ann. § 7-2-1(2)(a) (West 2004); and

6. The Bank has violated provisions of federal law that are applicable to the Bank, pursuant to Utah Code Ann. § 7-1-325(2)(a)(i) (West Supp. 2009); specifically, the Bank is in violation of the Federal Deposit Insurance Corporation Improvement Act ("Prompt Corrective Action"), 12 U.S.C. Sec. 1831o, which is made enforceable by the Commissioner pursuant to Utah Code Ann. § 7-1-325(2)(b) (West Supp. 2009) and Utah Admin. Code, R333-13-3(5), and is grounds for taking possession under Utah Code Ann. § 7-1-325(3)(a)(ii) (West Supp. 2009); and

7. Under Utah Code Ann. § 7-2-1(2)(a)(ii) (West 2004), an order issued pursuant to Utah Code Ann. §§ 7-1-307, -308, or -313 would not adequately protect the interests of the Bank's depositors or creditors, or other interested persons from the dangers presented by the conditions found to exist, which, when found in conjunction with any of the findings in subparagraphs 6(a) through 6(e) above, is grounds for taking possession under Utah Code Ann. § 7-2-1(2)(a) (West 2004); and

It appearing to the Court that the purpose of this proceeding is to provide this Court with supervisory jurisdiction to review the actions of the Commissioner in accordance with, and pursuant to, Utah Code Ann. § 7-2-2 (West 2004); and

It appearing to the Court that all conditions required by Utah Code Ann. § 7-2-1(2)(a) (West 2004) have been met for the Commissioner to take possession of the Bank;

IT IS HEREBY ORDERED that:

1. The taking of possession of Advanta Bank Corp. by G. Edward Leary, Commissioner of Financial Institutions of the State of Utah, is approved, and the Commissioner is vested, by this Order and by operation of law, with title to, and the right to possession of, the business, property, and all assets of the Bank.

2. G. Edward Leary, Commissioner of Financial Institutions of the State of Utah, is authorized and directed to rehabilitate, reorganize, liquidate or give effect to the acquisition of, control of, the merger with, the acquisition of all or a portion of the assets of, or the assumption of all or a portion of the liabilities of, the Bank in such manner as the Commissioner determines to be in the best interest of the Bank's depositors, creditors, and other parties in interest, and to do all other things in connection therewith as may be authorized by law.

3. G. Edward Leary, Commissioner of Financial Institutions of the State of Utah, is authorized to appoint a liquidator or receiver for the Bank if the Commissioner deems it appropriate to do so.

4. All persons are ordered and directed to turn over immediately to the Commissioner any of the business, property or assets of the Bank in their possession.

5. This Order shall operate as a stay of the commencement or continuation of:

(a) Any judicial, administrative or other proceeding, including service of process;

(b) The enforcement of any judgment;

(c) Any act to obtain possession of property;

(d) Any act to create, perfect, or enforce any lien against property of the Bank;

(e) Any act to collect, assess, or recover a claim against the Bank; and

(f) The setoff of any debt owing to the Bank against any claim against the Bank.

DATED this 19th day of March, 2010.

BY THE COURT:

Anthony B. Quinn
DISTRICT COURT JUDGE

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT ON FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.
DATE: 3/19/10
DEPUTY COURT CLERK

FDIC
Division of Resolutions and Receiverships
West Coast Temporary Satellite Office
40 Pacifica
Irvine, California 92618 **(949) 208-6200**

March 19, 2010

Utah Department of Financial Institutions
G. Edward Leary, Commissioner
324 South State Street, Suite 201
Salt lake City, Utah 84110

Subject: **Advanta Bank Corp.**
Draper, UT – In Receivership
Acceptance of Appointment as Receiver

Dear Sir or Madam:

Please be advised that the Federal Deposit Insurance Corporation accepts its appointment as Receiver of the captioned depository institution, in accordance with the Federal Deposit Insurance Act, as amended.

Sincerely,

FEDERAL DEPOSIT INSURANCE CORPORATION

By: _____
Thomas D. Giffin, Receiver-in-Charge

PERRI ANN BABALIS #5658
BRYCE H. PETTEY #2593
Assistant Attorney General
MARK L. SHURTLEFF #4666
Attorney General
Attorneys for the Commissioner
of Financial Institutions
160 East 300 South, 5th Floor
P.O. Box 140874
Salt Lake City, Utah 84114-0874
Telephone: (801)366-0375
Email: pbabalis@utah.gov

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

In the Matter of: The Possession of ADVANTA BANK CORP. by the COMMISSIONER OF FINANCIAL INSTITUTIONS	**CERTIFICATE OF APPOINTMENT OF THE FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER OR LIQUIDATOR** Case No. 100904690 Judge Anthony B. Quinn

G. Edward Leary, Commissioner of Financial Institutions of the State of Utah ("Commissioner"), as Commissioner in possession of Advanta Bank Corp. ("Bank"), having determined and found that the deposits of the Bank are insured by the Federal Deposit Insurance Corporation ("FDIC"), and having heretofore taken possession of the Bank pursuant to an "Order Approving Possession" entered on March 19, 2010, under the provisions of Utah Code Ann. §

7-2-6(1)(a) (West Supp. 2009),

HEREBY APPOINTS the FDIC as receiver/liquidator of the Bank pursuant to Utah Code Ann. § 7-2-9(2)(a) (West Supp. 2009).

Upon receiving notice, in writing, of the acceptance of this appointment, the Commissioner shall thereupon file this Certificate of Appointment in his office and with the Clerk of the Court, whereupon, by operation of law and pursuant to Utah Code Ann. § 7-2-9 (West Supp. 2009):

(a) the possession of all assets, business and property of the Bank shall be vested in the FDIC, without the execution of any instruments of conveyance;

(b) the Commissioner shall be relieved from any and all further responsibility and liability for the receivership or liquidation; and

(c) the FDIC, as receiver or liquidator, shall have all the powers and privileges provided by law with respect to the receivership or liquidation of the Bank, and with respect to the depositors and other creditors of the Bank.

DATED this 19th day of March, 2010.

G. EDWARD LEARY
Commissioner of Financial Institutions
of the State of Utah

EXHIBIT C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re

BSD BANCORP, INC.,

Debtor.

BSD BANCORP, INC.,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for the Bank of San Diego,

Defendant.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for the Bank of San Diego,

Counterclaimant,

v.

BSD BANCORP, INC.,

Counterdefendant.

Case Number 93-12207-A11

DIST. CT. CASE NO. 94-1341-IEG

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND ORDERING FURTHER BRIEFING ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT [DOC. # 2]

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BACKGROUND

BSD Bancorp Inc. ("Bancorp") was the corporate parent of the Bank of San Diego ("Bank"). On October 29, 1993, the Federal Deposit Insurance Corporation ("FDIC") was appointed receiver for the Bank. On November 3, 1993, Bancorp filed a petition under Chapter 11 of the Bankruptcy Code.

Bancorp and the corporations which it controlled, including the Bank, filed their tax returns as a consolidated group. When a group of affiliated corporations elects to file their tax returns as a consolidated group, the entire group is subject to one annual tax liability. Losses in one company can be offset against profits in another for purposes of computing this tax liability, and many intercompany transfers have no direct effect on tax liability. The group's parent corporation files the return, pays the tax, receives any refunds, and deals with the IRS generally. The corporations in the group are each severally liable for the entire amount of the tax. See generally Boris I. Bittker & James S. Eustice, Federal Taxation of Corporations and Shareholders ¶ 13.43 (6th ed. 1994).

Shortly after its bankruptcy filing, Bancorp received federal and state tax refunds totalling about $2 million. Those refunds are said to be Bancorp's primary asset. The refunds were concededly based on prior tax payments attributable to the Bank's earnings, and have been kept in a segregated account. The FDIC

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filed a contingent claim against Bancorp in the bankruptcy court,[1] contending that Bancorp held the tax refunds in trust for the Bank and that they were thus not property of the bankruptcy estate.

On March 24, 1994, Bancorp initiated an adversary proceeding in the bankruptcy court against the FDIC as receiver of the Bank, seeking a declaration that the tax refunds are property of the estate and the avoidance of a number of prepetition payments which Bancorp made to the Bank. This Court withdrew the reference on August 8, 1994. Bancorp has now filed a motion for summary judgment on its first declaratory judgment claim. The FDIC has filed a cross-motion for partial summary judgment.

DISCUSSION

A. Debt or Trust?

There is no dispute that Bancorp owes all or most of the refund money to the Bank. The primary issue here is whether this is an ordinary debt or a sum of money which Bancorp holds in trust for the Bank. If the debt is an ordinary debt, the FDIC has to share the refund money with Bancorp's other creditors in bankruptcy. If the money is held in trust, on the other hand,

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[1]The FDIC also tried to get the IRS to pay the federal refunds directly to it by following the procedure set out in Treas. Reg. § 301.6402-7. That rule establishes a special procedure by which the FDIC and other receivers for insolvent financial institutions can arrange to receive the institutions' share of refunds owed to consolidated groups directly. Bancorp contends that by invoking this procedure, the FDIC violated the automatic stay. At any rate, the FDIC was unsuccessful; the IRS paid the refunds to Bancorp.

under 11 U.S.C. § 541(d) it is not part of the bankruptcy estate,[2] and Bancorp has to hand it over to the FDIC.

In re Bob Richards Chrysler-Plymouth Corp., 473 F.2d 262, 265 (9th Cir. 1973), held that the parent of a consolidated group acts as an agent for the rest of the group in collecting taxes and refunds. The court based this holding on Treas. Reg. § 1.1502-77, which provides that the parent corporation is an agent of the remaining corporations for a number of purposes set out in detail in the regulation. This holding is thus apparently federal common law.

Furthermore, because of the agency relationship, the parent corporation holds the money owing to the subsidiaries in trust for them. 473 F.2d at 265. This accords with the general principle that when an agent "is vested with the title to property that he holds for his principal, he is also a trustee." 1 Austin W. Scott & William F. Fratcher, The Law of Trusts § 8, at 95 (4th ed. 1987).[3]

The rules of Bob Richards would seem to resolve the issue and lead to the conclusion that Bancorp holds the refunds in trust. Bancorp argues, however, that because it entered into a

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[2]Ninth Circuit cases applying 11 U.S.C. § 541(d) have said that assets held in trust might nonetheless be property of the bankruptcy estate if the state law creating the trust was contrary to federal bankruptcy policy. See, e.g., In re Unicom, 13 F.3d 321, 325 & n.6 (9th Cir. 1994). No case has yet considered whether this "policy override" would apply to a trust arising under federal law.

[3]The Third Circuit recently declared a similar federal common law trust over certain refunds that a bankrupt gas pipeline held for its customers pursuant to an order of the Federal Energy Regulatory Commission. In re Columbia Gas Sys. Inc., 997 F.2d 1039, 1055-61 (3d Cir. 1993).

tax sharing agreement with the Bank, their relationship was transformed in such a way that it holds the money as a debtor and not in trust. The FDIC attacks this tax allocation agreement on a number of grounds.

B. The Tax Allocation Agreement

Bancorp, the Bank, and other affiliated corporations entered into a tax sharing agreement in 1991. (Pl.'s Ex. 17.) Their boards of directors ratified it. There are also some similar agreements pertaining to earlier time periods. The agreement provides, in relevant part:

> Any subsidiary incurring an annual loss on a tax basis that results in a tax benefit on the consolidated return shall be reimbursed in cash in an amount determined in a manner consistent with the allocation of taxes to profitable subsidiaries. Refunds due subsidiaries from the Company which cannot be fully funded when due then will be carried on the subsidiary's books as a "loan to parent" and will accrue interest at not less than the Federal Funds Rate. The occurrence of this event is unusual and its likelihood of happening is considered remote. All loans between parent and subsidiary will be in accordance with applicable federal regulations regarding affiliate transactions.

The parties have proffered no extrinsic evidence bearing on the interpretation of this contract. The Court consequently interprets it as a matter of law. Cf. Southland Corp. v. Emerald Oil Co., 789 F.2d 1441, 1443 (9th Cir. 1986).

Before interpreting the tax sharing agreement, however, it is necessary to consider the FDIC's contentions that portions or all of it are invalid. It is convenient for these purposes to consider two relevant aspects of the agreement separately. First, the agreement appears to establish some guidelines for how tax liabilities and refunds are allocated. These will be referred to as the "allocation guidelines." Second, the

agreement appears to allow Bancorp to defer payment of refunds by, in effect, "borrowing" the refund from the subsidiary. This will be referred to as the "line of credit." Separate consideration of these two portions of the agreement is useful because "[t]he California cases take a very loose view of severability, enforcing valid parts of an apparently indivisible contract where the interests of justice or the policy of the law . . . would be furthered." 1 B.E. Witkin, Summary of California Law: Contracts § 432 (9th ed. 1987).

C. Validity of the Tax Allocation Agreement

The FDIC argues that the agreement is invalid or not binding on the FDIC for a number of reasons:[4]

1) 12 U.S.C. § 1823(e). That subsection provides that

> No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it . . . as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement--
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> . . .
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> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution . . . .

The FDIC argues that the agreement violates 12 U.S.C. § 1823(e) because it is not "contemporaneous[] with the acquisition of the asset by the depository institution."

If one views the "asset" as the refunds, this view seems literally correct, since the refunds were paid long after the agreement took effect. However, this reasoning would ban all tax

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[4]Even if the agreement is binding, the FDIC as receiver appears to have the power to repudiate it under 12 U.S.C. § 1821(e). The FDIC does not argue this issue, however, so it need not be considered further.

allocation agreements because such agreements necessarily have to be prospective. "[S]atisfaction of the contemporaneousness requirement should be considered in light of commercial reality." RTC v. Midwest Fed. Sav. Bank, 4 F.3d 1490, 1501 (9th Cir. 1993). In this case, it is consistent with commercial reality, and with the FDIC's own recommendations, for consolidated groups of corporations to enter into prospective tax allocation agreements. It is likewise consistent with commercial reality for banks to approve lines of credit in advance of the actual borrowing. Consequently, the Court finds that § 1823(e) does not prevent the tax allocation agreement from binding the FDIC.[5]

2) The Common Law D'Oench Duhme Doctrine. The common-law D'Oench Duhme doctrine largely overlaps with 12 U.S.C. § 1823(e). However, "[f]or D'Oench Duhme to apply, there at least must be a showing that the [borrower] lent himself to a scheme or arrangement whereby the banking authority . . . was or was likely to be misled." Murphy v. FDIC, 38 F.3d 1490, 1498 (9th Cir. 1994) (en banc) (internal quotation marks omitted). Here, the agreement was sufficiently explicit that the FDIC could not have been misled as to Bancorp's potential right to "borrow" the refunds. The FDIC in fact knew in early 1993 that the

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[5]The FDIC also argues that the ratification by the board of directors is ineffective because the tax portion of the agreement was an addendum to the agreement as adopted by the board. The addendum was incorporated by reference, however, and it appears that an explicit incorporation by reference suffices for § 1823(e). See FDIC v. Kasal, 913 F.2d 486, 491 (8th Cir. 1991); see also RTC v. Midwest Fed. Sav. Bank, 4 F.3d 1490, 1501 (9th Cir. 1993) (§ 1823(e) "does not require that such agreements be confined to the face of any one particular lending/borrowing document") (quoting RTC v. Oak Apts. Joint Venture, 966 F.2d 995, 999 (5th Cir. 1992)).

arrangements for passing tax refunds through Bancorp were a source of potential problems. (Pl.'s Ex. 19.)

3) Indefiniteness. The FDIC also contends that the tax allocation agreement is too indefinite to be binding. It cites In re Florida Park Banks Inc., 110 B.R. 986 (Bankr. M.D. Fla. 1989), where the consolidated group had a "policy" regarding tax allocation. The court there found that the policy did not rise to the level of an agreement that could override the rule of Bob Richards, so the FDIC got the tax refund.

The tax allocation guidelines at issue here are extremely vague. They state that loss-making subsidiaries will receive tax benefits "in an amount determined in a manner consistent with the allocation of taxes to profitable subsidiaries" (emphasis added). The agreement also provides that tax payments by profitable subsidiaries "will be calculated based on the individual subsidiary's stand-alone estimated payment liability" (emphasis added).

The line of credit provision in the agreement is not as vague. However, nothing is said about how long Bancorp may continue to hold on to the borrowed funds. The interest rate must be "not less than the Federal Funds Rate," but the actual rate is not specified.

California courts are tolerant of indefinite terms in contracts. Thus, for example, courts may fill in an omitted duration term. 1 Witkin, supra, § 152. The interest rate could be implied from that which comparable borrowers pay. The allocation guidelines may be seen as setting very broad outer limits to how the tax burdens and benefits are spread, excluding,

for example, payments utterly unrelated to an individual subsidiary's stand-alone payment liability. Consequently, the tax allocation guidelines and line of credit provisions of the tax allocation agreement are not so indefinite as to be unenforceable.

4) Lack of Consideration. The FDIC also contends that the agreement lacked consideration to the Bank. Consideration may be any benefit however small or contingent. Consolidated group tax reporting offered the Bank at least the possibility of lower tax burdens as a consequence of the benefits of consolidation discussed extensively in the FDIC's own papers. This is sufficient consideration for the tax allocation agreement.

5) Illegality. The FDIC appears to argue that the tax refund line of credit from the Bank to Bancorp is contrary to applicable law and regulations. However, the tax allocation agreement itself provides that credit will be extended only in a way consistent with applicable regulations, which would seem to cure any possible illegality.

D. Effect of the Agreement on the Agency and Trust Relationship

Having concluded that the tax allocation agreement is binding on the FDIC, it is now necessary to consider whether the agreement destroys the principal-agent relationship recognized in Bob Richards, supra.

Bancorp first contends that the very existence of a tax allocation agreement destroys the principal-agent relationship. It bases this contention on the fact that there was no such agreement in Bob Richards. However, this is an excessively

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narrow interpretation of that case. This Court interprets Bob Richards as holding that unless the corporations in a consolidated group agree otherwise, the parent acts as their agent for payment of tax and refunds. This rule is like many other gap-filling rules in contract law which provide a default in the absence of applicable agreement by the parties, e.g. U.C.C. § 2-205 (offer by merchant in signed writing irrevocable "during the time stated or if no time is stated for a reasonable time"). Parties to a contract do not override a gap-filling rule simply by reaching explicit agreement on some other matter. Rather, the terms of their agreement must expressly or impliedly override the gap-filling rule itself. It is thus necessary to consider whether the terms of the tax allocation agreement expressly or impliedly override the Bob Richards principal-agent relationship.

Bancorp points to the language "[a]ny subsidiary incurring an annual loss on a tax basis that results in a tax benefit on the consolidated return shall be reimbursed in cash" in the tax allocation agreement. It contends that the use of the word "reimbursed" indicates that a debtor-creditor relationship was intended. It also argues that the refunds owing the Bank were recorded as a "receivable" on its books. It cites In re Franklin Sav. Corp., 159 B.R. 9, 29 (Bankr. D. Kan. 1993), where the court relied on the words "reimbursement" and "credits" to conclude that a tax allocation agreement established a debtor-creditor relationship.

In deciding whether a transaction intended to create a debtor-creditor relationship, however, a court must examine the

economic reality of the transaction rather than the words used. See In re Woodson Co., 813 F.2d 266, 272 (9th Cir. 1987). The economic reality here is that, except in the "unusual" circumstances in which the agreement allowed Bancorp to borrow the refund, the agreement required Bancorp to give the Bank its share of the refund in cash and immediately. This strongly suggests an intent to maintain a principal-agent relationship unless Bancorp borrowed the refund pursuant to the terms of the agreement.

Furthermore, the agreement itself recognizes that any loan from the Bank to Bancorp would be subject to regulations governing loans to affiliates. Although the parties do not discuss these regulations in their papers,[6] it appears that 12 U.S.C. § 371c(c)(1) applies here. That subsection forbids unsecured loans from a Federal Reserve member bank to its holding company, while § 371c(e) allows the Federal Reserve Board to authorize such loans by regulation or order. 12 U.S.C. § 1828(j)(1) extends the restrictions of § 371c to all federally insured banks. For a debtor-creditor relationship to arise

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[6]Bancorp does attach as an exhibit to its complaint some excerpts from an FDIC examination manual containing an extensive discussion of § 371c. (Pl.'s Ex. 4, at 8-11.) The FDIC cites Lincoln Savings & Loan Association v. Wall, 743 F. Supp. 901 (D.D.C. 1990), where the court upheld the Federal Home Loan Bank Board's decision to put Charles Keating's thrift into receivership. In doing so, the court found that an agreement requiring the thrift to make large payments to its parent, ostensibly for the purpose of paying the consolidated group's tax liability, fell afoul of the then-existing regulatory restrictions on a thrift's lending to its parent. Lincoln Savings, 743 F. Supp. at 908-11. Those restrictions (then codified at 12 C.F.R. § 583.4 (1986), and since repealed) were similar to those in 12 U.S.C. § 371c.

between Bancorp and Bank, then, there would presumably have to be some further agreement through which Bancorp supplied collateral meeting the requirements of § 371c(c)(1).

The Court consequently holds that the tax allocation agreement intended to abrogate the principal-agent relationship between Bank and Bancorp only when Bancorp borrowed the refunds from Bank under the terms of the agreement. Bancorp holds Bank's share of the refunds in trust, as the Bank's agent, unless and until Bancorp borrows them under the terms of the agreement.

There remains the question whether Bancorp could properly borrow the refunds at issue here under the terms of the agreement. The language of the agreement itself provides the answer. Bancorp is allowed to borrow "[r]efunds . . . which cannot be fully funded when due." Bancorp received the refunds at issue here in cash and placed them in a segregated account. Therefore, it had the wherewithal to pay the refunds immediately to the Bank. The requirement that the refunds "cannot be fully funded" was thus not met here. Bancorp had no right to borrow the refunds under the tax allocation agreement, and it therefore continued to hold them in trust.[7] Bancorp's motion for summary judgment is thus **DENIED.**

E. Funds in the Segregated Tax Refund Account

The FDIC's cross-motion for summary judgment seeks an order directing that the whole of Bancorp's segregated tax refund account be turned over to it. To decide this motion, it is

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[7]It is also possible that Bancorp had no right to borrow the refunds from the Bank because its doing so would be inconsistent with applicable regulations.

necessary to determine what portion of that money represents refunds owed to the Bank.

The Court does not believe that the parties have adequately briefed the issue of what share of the refunds belongs to the Bank. The resolution of that issue depends on how refunds received by Bancorp are supposed to be allocated to other members of the consolidated group. The tax allocation agreement may shed some light on this question. Background rules of law, such as those stated in Bob Richards, may also shed light on this question. The Court consequently directs the parties to provide further briefing on what share of the refunds belongs to the Bank. The FDIC is to file an additional brief, no longer than 25 pages, by March 13, 1995. Bancorp may file an opposition by March 27, 1995. The FDIC may file a 10-page reply by April 3, 1995. At that point, the Court may decide the FDIC's motion for partial summary judgment on the papers, or it may schedule an additional hearing.

F. Objections to Evidence

Bancorp objects extensively to the declaration of Carol Turner filed by FDIC. The primary objection is that Ms. Turner is rendering inadmissible lay opinion. Ms. Turner states that she has worked for over fourteen years as a tax accountant for the FDIC. This would normally justify her testifying as an expert on tax accounting. The objections on the ground of inadmissible lay opinion are thus overruled.

Ms. Turner's declaration appears to rely on tax records of the Bank of San Diego. Such documents are admissible hearsay under Fed. R. Evid. 803(6). Expert witnesses are also permitted

to rely on inadmissible evidence if "of a type reasonably relied on by experts in the particular field." Fed. R. Evid. 703. Hearsay objections to Ms. Turner's declaration are thus overruled.

Ms. Turner's declaration contains expert opinion on pure questions of law. The declaration of Diane L. Gilabert filed by Bancorp also contains expert opinion on questions of law. Expert opinion on questions of law is inappropriate. United States v. Brodie, 858 F.2d 492, 496 (9th Cir. 1988). The Court has reached an independent conclusion on all questions of law and has not taken expert opinion as authoritative on such issues.

Bancorp has also filed evidentiary objections to the FDIC's memorandum of points and authorities. A memorandum of points and authorities is not evidence and evidentiary objections to it are inappropriate.

G. Conclusion

Bancorp's motion for summary judgment on its first claim is DENIED. The FDIC's motion for partial summary judgment is continued pending further briefing as directed by this order.

IT IS SO ORDERED.

Dated: Feb. 28, 1995

Irma E. Gonzalez
IRMA E. GONZALEZ
United States District Judge

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re ADVANTA CORP., *et al.*, Debtors.	Chapter 11 Case Nos. 09-13931 (KJC), *et seq.* (jointly administered)
ADVANTA BANK CORP., Plaintiff, v. ADVANTA CORP., Defendant.	Adversary Proc. No. 10-50795-KJC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 16, 2010, I caused copies of the foregoing Notice of Filing of Exhibit 1 to Opening Brief In Support of Motion of The Federal Deposit Insurance Corporation, as Receiver of Advanta Bank Corp. Seeking A Declaration That The Automatic Stay Does Not Apply Or, In The Alternative, An Order Granting Relief From The Automatic Stay to be served via first-class mail, postage prepaid, upon the parties listed on the attached matrix.

Dated: May 16, 2010
Wilmington, Delaware

/s/ Adam Hiller

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