IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
ADVANTA CORP., *et al.,*	:	Case No. 09-13931 (KJC)
Debtors.[1]	:	(Jointly Administered)
ADVANTA BANK CORP.	:	
Plaintiff,	:	
- against -	:	Adv. Proc. No. 10-50795 (KJC)
ADVANTA CORP.	:	
Defendant.	:	**RE: D.I. Nos. 8, 9**

PRELIMINARY JOINDER OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN ADVANTA'S PRELIMINARY OBJECTION TO THE MOTION OF 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

Dated: May 28, 2010

DRINKER BIDDLE & REATH LLP
Howard A. Cohen (DE 4082)
1100 N. Market Street, Suite 1000
Wilmington, DE 19801
Telephone: (302) 467-4200
Facsimile: (302) 467-4201

- and -

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

LATHAM & WATKINS LLP
Mitchell A. Seider (admitted *pro hac vice*)
Roger G. Schwartz (admitted *pro hac vice*)
Melinda Franek (admitted *pro hac vice*)
Adam J. Goldberg (admitted *pro hac vice*)
Catherine Martin (admitted *pro hac vice*)
885 Third Avenue, Suite 1000
New York, NY 10003
Telephone: (212) 906-1200
Facsimile: (212) 751-4864

Counsel to the Official Committee
of Unsecured Creditors

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 Federal Deposit Insurance Company, as Receiver for 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* (the "Motion for Stay Relief"), and in support thereof, respectfully states as follows:[1]

PRELIMINARY STATEMENT

1. The FDIC-R is pursuing a highly aggressive litigation strategy with the goal of reaping a tax refund and creating a $170 million claim solely for its own benefit and to the severe detriment of other creditors of the Debtors' estates, all in the name of allegedly benefiting the taxpayers.[2] In reality, one arm of the federal government is playing a zero sum game of pursuing funds from the government's own general treasury in order to create a new and massive claim against the estates. The real result of granting the FDIC-R's requested relief would be to deprive the estates of valuable tax assets and create a basis for the FDIC-R to allege a new $170 million claim against the estates arising out of the Tax Sharing Agreement (as defined below). Such a claim, if proven, would virtually double the claims pool in these chapter 11 cases and nearly halve recoveries for all other creditors, including the individual holders of retail notes issued by the Debtors, many of whom are depending upon a recovery from the Debtors' estates for their retirement savings.

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[1] The Committee is filing this Preliminary Joinder to the Objection, but reserves all rights to further supplement this Joinder, including to supplement its existing arguments, respond to arguments made by the FDIC-R, and introduce arguments based on the testimony of any fact and/or expert witness.

[2] Upon information and belief, the depositors of Advanta Bank Corp. ("ABC") have already been satisfied out of the FDIC's deposit fund, and the federal government is the only stakeholder of ABC.

2. The automatic stay applies to the FDIC-R's proposal to file an amended consolidated tax return because the FDIC-R seeks to exact control over property of the estates, in the form of net operating losses ("NOLs") that have benefits for the Debtors' estates as well as Advanta's tax basis in the stock of ABC, and would file the amended return for the purpose of recovering upon the FDIC-R's alleged claims. It is well settled that NOLs are property of the estate under Section 541 of the Bankruptcy Code, and the FDIC-R plainly seeks to exercise control over the affiliated group's NOLs via the filing of an amended consolidated return that would contain tax elections that impact the Debtors' estates as well as ABC. The FDIC-R's proposed actions would further deprive the estates of the worthless stock deduction available with respect to the stock of ABC and the ability to carry forward NOLs for the benefit of creditors.[3] There can be no doubt that the FDIC-R is, by its own admission, seeking to recover a $54 million refund that it will claim is its property to be allocated to reduce claims it has asserted against the Debtors or can assert as a result of claiming the refund, as discussed below. The automatic stay applies to the FDIC-R's attempt to seize control over property of the estate, apply the estates' NOLs for the FDIC-R's sole benefit and recover on its alleged claims.

3. Relief from the stay should be denied because granting the FDIC-R's requested relief would allow the FDIC-R to create a new basis to allege a $170 million claim against the estates—a claim that does not currently exist. The FDIC-R presently has no valid claims under the Tax Sharing Agreement or otherwise arising out of the Debtors' tax elections, and the FDIC-R's attempts to manufacture claims through self-serving and conclusory allegations of breaches under the TSA are wrong as a matter of fact and law. Granting stay relief would therefore impose severe hardship on the estates by threatening to virtually double the claims pool in these

[3] All references herein to preservation of "NOLs," "losses" or similar references include preservation of tax basis in stock and any related potential worthless stock deduction.

cases—a result that would imperil the livelihoods of the thousands of "Mom and Pop" creditors of the estates that purchased retail notes issued by the Debtors with their personal savings. In addition, granting relief would diminish the value of the estates by reducing the worthless stock deduction available with respect to ABC and eliminating the Debtors' ability to carry losses forward for the benefit of creditors. Moreover, in contrast to the severe prejudice that would befall the Debtors and their creditors if the FDIC-R's motion for stay relief was granted, the FDIC-R is not prejudiced in its ability to claim a $54 million refund by maintenance of the stay because, in fact, the FDIC-R has no right to file an amended return claiming a carryback with respect to 2009 NOLs now that the deadline for filing Advanta's 2009 consolidated tax return has passed. As such, the FDIC-R has failed to meet its burden to demonstrate that cause exists to grant relief from the stay because the balance of hardships weighs decisively in favor of denying relief. The FDIC-R should be stayed from exercising control over the Debtors' tax elections, radically increasing the liabilities of the estates and reducing the value of the estates for the sole benefit of the FDIC-R.

PRELIMINARY 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.

7. On March 12, 2010, ABC filed an emergency motion for an Order compelling Advanta to (i) timely file a request for an extension of time to file its 2009 consolidated federal income tax return; or, in the alternative, (ii) elect to carry back the 2009 consolidated NOLs five years (the "Tax Motion") [D.I. No. 323; No. 09-13931].

8. On March 14, 2010, ABC commenced this adversary proceeding by filing a complaint (the "Complaint") seeking substantially the same relief requested in the Tax Motion. *See* [D.I. No. 1; No. 10-50795].[4]

9. On March 14, 2010, Advanta filed (i) a consolidated tax return on behalf of itself and its wholly-owned direct and indirect subsidiaries that waived the carry back of the affiliated group's 2009 NOLs (the "2009 Consolidated Return") and (ii) an amended consolidated tax return that elected a five-year carryback of the affiliated group's 2008 NOLs (the "2008 Amended Consolidated Return"). In making this election, Advanta avoided incurring a potential $170 million unsecured claim against the Debtors' estates under the Fourth Amended and Restated Tax Sharing Agreement (the "TSA" or "Tax Sharing Agreement"),[5] and at the same time preserved losses, assets of the estates, for future use.

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[4] On March 19, 2010, ABC filed an amended version of the Complaint (such version, the "Amended Complaint") [D.I. No. 8, No. 10-50795].

[5] Nothing in this Joinder is an admission that ABC has or would under any circumstances have valid claims against Advanta under the TSA. The Committee reserves all rights to object and/or otherwise respond 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.

10. On March 19, 2010, ABC filed another emergency motion seeking declaratory and injunctive relief in connection with the Amended Complaint (the "Motion for Injunctive Relief"). *See* [D.I. No. 9; No. 10-50795].

11. On March 19, 2010, ABC was closed by the Utah Department of Financial Institutions and the Federal Deposit Insurance Corporation (the "FDIC") was appointed receiver of ABC (in such capacity, "FDIC-R"). [6]

12. On May 14, 2010, the FDIC-R filed two proofs of claim alleging:

a. claims against Advanta in an unliquidated amount based on a variety of theories including (i) "tax related entitlements," (ii) capital maintenance obligations, (iii) avoidance actions and fraudulent transfers under 12 U.S.C. § 1821(d)(17)(D), (iv) tort claims, (v) breach of the Tax Sharing Agreement, (vi) setoff and recoupment claims, (vii) claims for insurance proceeds and premium refunds and (viii) litigation claims for breach of fiduciary duties, breach of contract and/or negligence; and

b. a claim against Advanta Credit Card Receivables Corp. in an unliquidated amount based on the Receivables Purchase and Servicing Agreement dated June 29, 2005.

13. On May 14, 2010, the FDIC-R filed the Motion for Relief from Stay and its opening brief in support of the Motion for Relief from Stay (the "FDIC-R Opening Brief") [D.I. No. 26; No. 10-50795] asserting that (i) the automatic stay does not apply, or alternatively, (ii) it should be granted relief from the automatic stay so that it can file (a) a tax return for the 2009 taxable year that elects to carry back over five years the affiliated group's 2009 NOLs

[6] It is intended for the references herein to ABC, after March 19, 2010, to apply equally to the FDIC, as receiver for ABC.

attributable to ABC with a claim for a tax refund resulting from such election, and (ii) a tax return for the 2008 taxable year that does not elect to carry back over the five years prior to that tax year the affiliated group's NOLs with a claim for a tax refund with respect to the 2008 NOLs attributable to ABC pursuant to the general two-year carry back rule.

B. The Tax Sharing Agreement

14. On May 1, 1995, Advanta and its wholly-owned direct and indirect subsidiaries entered into the TSA.[7] The TSA 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. On information and belief, at all times since the TSA has been in place, Advanta has filed a consolidated income tax return on behalf of the Affiliated Group (as defined in the TSA).

15. It is undisputed that Advanta is the parent company of an affiliated 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 unilateral authority to act on behalf of the members of the Affiliated Group with respect to consolidated tax return filings, tax elections and matters relating to the tax liability of the Affiliated Group filing a consolidated tax return. *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 . . . .").[8]

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[7] *See* Ex. A to ABC's Motion for Injunctive Relief.

[8] Treasury Regulations promulgated under Internal Revenue Code Sections 6012 and 6402 provide limited exceptions for corporations in receivership. ABC was not in receivership on the date the 2009 federal income tax return was due.

16. Once an affiliated group of companies elects to file consolidated tax returns, it generally 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).[9] This consent is obtained upon application by the parent. *Id*. Furthermore, the filing of a bankruptcy case does not relieve the parent company of responsibility for filing tax returns. *See* I.R.C. § 6012(b)(3); Treas. Reg. § 301.6402-7(f).

17. The TSA does not obligate Advanta to consult with any particular member of the Affiliated Group before making determinations with respect to tax elections in a consolidated return nor does it dictate the tax elections that Advanta should make in a consolidated return. Moreover, the Internal Revenue Code does not mandate that a common parent filing a consolidated tax return on behalf of an affiliated group carry back NOLs whenever possible. An election to waive or carry back NOLs for an affiliated group filing a consolidated tax return is a discretionary choice—it is an exercise of business judgment depending on the particular tax situation of the affiliated group. For a business in bankruptcy, this choice is further complicated by the debtor's duty to maximize creditor recoveries. In a vacuum, receiving a tax refund could appear to be the preferred course for a company with limited liquidity; however, the bankruptcy process imposes obligations to maximize the value of the estates and provides strategic opportunities to achieve that goal that must be considered. The TSA does not by its terms or otherwise contain contractual obligations governing how Advanta should make its tax elections, and the TSA does not give any member or the FDIC-R as receiver the right to dictate a particular election for purposes of benefiting its own interests.

[9] There is a limited exception to this rule where an affiliated group may elect irrevocably to deconsolidate a subsidiary that is placed in receivership. *See* Treas. Reg. § 1.597-4(g). However, Advanta did not have the right to make such election for the 2009 taxable year because ABC had not been placed into receivership at the time Advanta filed its consolidated tax return.

II. ARGUMENT

18. Under the applicable tax laws and regulations, the FDIC-R is neither obligated to file consolidated tax returns for the 2008 and 2009 taxable years claiming a refund on behalf of ABC nor entitled to retroactively file returns after the March 15, 2010 due date that would undo elections made by the Debtors in their timely-filed return. What is more, the FDIC-R is not excepted from compliance with Section 362 of the Bankruptcy Code, and the automatic stay applies to the FDIC-R's proposed action to modify the Debtors' tax elections because the FDIC-R is seeking to exert control over assets of the estate in order to recover on its alleged claims. Furthermore, relief from the stay should be denied because the FDIC-R's proposed reversal of the Debtors' carryback elections would impose extreme hardship on the estates by *creating a potential $170 million claim* against the estates.

19. As explained below, the FDIC-R's claims in connection with the TSA are entirely without merit, but if the FDIC-R were allowed to reverse the Debtors' election to waive the carryback of 2009 NOLs, the TSA could be read to grant the FDIC-R a potential claim against Advanta in the amount of approximately $170 million. In addition, the FDIC-R's proposed tax elections would reduce the value of the worthless stock election available with respect to ABC and deprive the estates of the ability to carry forward 2009 NOLs. In contrast, the FDIC-R cannot show that it is prejudiced by denial of its requested relief because it has failed to demonstrate a likelihood of success on the merits—in this case, that the IRS would accept an amended return filed by the FDIC-R. As such, the balance of hardships tilts decisively in favor of denying relief from the stay, and the hardship that would be imposed upon the estates as a result of the FDIC-R's requested relief alone justifies denying relief from the stay.

A. The FDIC-R Is Not Obligated or Entitled to File Tax Returns or Make Tax Elections Under the Internal Revenue Code and Applicable Treasury Regulations For the 2008 and 2009 Taxable Years

20. Contrary to the FDIC-R's assertions that it is "obligated" to file tax returns on behalf of ABC under Sections 6012(b)(3) and 6402(k) of the Internal Revenue Code and Treasury Regulation Section 301.6402-7(e), *see* FDIC-R Opening Brief at ¶¶ 15-16, there is simply no tax law or regulation that *requires* the FDIC-R to file a return on behalf of ABC. Section 6012(b)(3) of the Internal Revenue Code provides that "where a receiver . . . has possession of or holds title to all or substantially all the property or business of a corporation . . . such receiver . . . shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns." *See* I.R.C. § 6012(b)(3). In the first instance, Section 6012(b)(3) does not override the general provisions of Treasury Regulation Section 1.1502-77 and therefore does not provide the FDIC-R, which is the receiver of a subsidiary member of an affiliated group, with the obligation or the right to file consolidated federal income tax returns with respect to that group. Moreover, this section clearly applies only where a receiver "has possession of or holds title to all or substantially all the property or business of a corporation" and in such a case, the receiver would be required to file a tax return for the corporation subject to receivership to assure that such return is in fact filed. This section does not apply to institutions at a time when they are not subject to receivership. ABC was not subject to receivership in 2009, nor was it subject to receivership at the time the 2009 tax return was due.

21. Pursuant to Section 6072(b) of the Internal Revenue Code, the Affiliated Group's consolidated tax return for the 2009 taxable year was due on March 15, 2010. *See* I.R.C. § 6072(b). At such time, ABC was not subject to receivership; therefore, it is beyond peradventure

that it was Advanta that was obligated to file a tax return on behalf of ABC, which return Advanta timely filed on March 14, 2010. *See* Treas. Reg. §§ 1.1502-75(a)(2) and (c)(1)(i). Any claim filed now by the FDIC-R for the 2009 taxable year would be late, and the FDIC-R has not cited any authority that would obligate the IRS to accept an untimely tax return filed by a receiver that was not a fiduciary during the applicable loss years nor at the time the affiliated group's tax return for the applicable tax year was due.

22. The sole agency power granted to a receiver of a financial institution with respect to consolidated tax returns of an affiliated group is the opportunity to file certain competing income tax returns pursuant to Treasury Regulation Section 301.6402-7. *See* Treas. Reg. § 1.1502-77(a). Treasury Regulation Section 301.6402-7(e) provides:

> If no claim for refund is filed by the common parent for the consolidated carryback year or the fiduciary does not accept a claim for refund filed by the common parent, the fiduciary may claim a refund under this section by filing its own claim for refund under section 6402, based on all information pertaining to the institution and all information pertaining to other members of the carryback year group and the loss year group to which the fiduciary has reasonable access. Any claim for refund filed by the fiduciary under this paragraph (e)(1) must contain the title "Claim for refund under section 6402(i) of the Code" at the top of the first page of the claim . . . .

Treas. Reg. § 301.6402-7(e).

23. This Treasury Regulation would permit the FDIC-R to file a tax return claiming a refund on behalf of ABC if it was a fiduciary of ABC in the relevant carryback year or loss year for which it seeks to file a return. ABC was not subject to receivership for the 2008 or 2009 tax years, and the FDIC-R cannot use the rights granted to fiduciaries of financial institutions in receivership under this regulation to reach back and assert control over those years. If such were the case, a receiver would be permitted to essentially recreate an affiliated group's consolidated return tax history for years prior, when it was a stranger to the group, by undoing elections made

in the past to benefit the insolvent institution in the present at the expense of the other affiliated group members. Moreover, ABC was not under receivership when the affiliated group's 2009 consolidated tax return was due, a fact the FDIC-R does not acknowledge. Thus it is unclear how this section would even provide the FDIC-R with the authority, let alone the obligation, to file a competing consolidated tax return after the March 15, 2010 filing deadline.

24. Furthermore, even if the FDIC-R had the authority to file a competing consolidated tax return under Treasury Regulation Section 301.6402-7, the IRS would not be obligated to accept it. Section 6402(k) of the Internal Revenue Code contemplates "the case of an insolvent corporation which is a member of an affiliated group of corporations filing a consolidated return for any taxable year" and provides that where such insolvent corporation is subject to a statutory fiduciary, "the Secretary may by regulation provide that any refund for such taxable year *may* be paid on behalf of such insolvent corporation to such fiduciary . . . ." *See* I.R.C. § 6402 (k) (emphasis added); *see also* Treas. Reg. § 301.6402-7(g) ("Nothing in this section obligates the Internal Revenue Service to pay to the fiduciary all or any portion of a claim for refund or application for tentative carryback adjustment."). It is not clear why the FDIC-R cites this provision of the Internal Revenue Code in support of its argument that it is "obligated" to file a tax return. This section does not create any obligations for the FDIC-R as fiduciary; rather, it simply provides that where a fiduciary of an insolvent institution under certain circumstances files a competing consolidated tax return with respect to the group of which such institution is a member, the IRS may, in its discretion, pay a refund to such fiduciary.[10]

[10] The FDIC-R also asserts that stay relief is necessary to prevent the possibility that it could be deemed to have waived any right it has to the refund and, to support this assertion, cites an unpublished Ninth Circuit decision, the facts of which, as discussed more fully below, are inapposite to this case. *See* FDIC-R Opening Brief at ¶45 citing *United States v. Rodrigues*, 1998 U.S. App. LEXIS 36919, *22 (9th Cir. 1998). *Rodrigues* addresses the

B. The Automatic Stay Applies to the FDIC-R's Proposed Action

(1) *The FDIC-R Voluntarily Submitted to the Jurisdiction of this Court*

25. The FDIC-R asserts inherently contradictory arguments that it has not submitted to the jurisdiction of this Court and yet is entitled to relief from this Court. (*Compare* FDIC-R Opening Brief at n.1 (stating FDIC-R reserves rights "without the intention or purpose of conceding jurisdiction in any way by this filing or by any other participation in this matter or in this case"), *with* FDIC-R Opening Brief at ¶ 29 ("This Bankruptcy Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334.") *and* Amended Complaint at ¶ 2 ("This Court has subject matter jurisdiction of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b) . . . .").) By filing its Motion for Stay Relief, in addition to the Tax Motion and Amended Complaint, and arguing that this Court has jurisdiction over the Motion for Stay Relief as a core proceeding and that this Court is the proper venue to resolve such motion, the FDIC has clearly and voluntarily submitted to the jurisdiction of this Court.

(2) *The FDIC-R's Powers Are Not Infinite*

26. The FDIC-R misstates applicable law by arguing that Congress intended the FDIC-R to have "full rein" to act regardless of the automatic stay and "without interference from bankruptcy courts." (*See* FDIC-R Opening Brief at ¶ 13.) In fact, the statute upon which the FDIC-R relies—the anti-injunction provision of FIRREA, 18 U.S.C. § 1821(j) (hereinafter, "Section 1821(j)")—is not applicable to the automatic stay. Section 1821(j) provides a limited defense to the FDIC-R against injunctive relief by prohibiting courts from granting injunctions to

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imposition of criminal liability on a defendant, owner of a savings and loan company, who used a tax refund to pay business expenses where the Resolution Trust Corporation (the "RTC"), as receiver for the savings and loan company, had an arguable claim to such refund. *Rodrigues*, 1998 U.S. App. LEXIS 36919 at *22. The Ninth Circuit noted that the RTC did not exercise its rights under Treasury Regulation Section 301.6402-7, but if the refund was owed to the savings and loan company, then the RTC could recover it in equity. *Id*.

restrain the actions of the FDIC-R.[11] *See*, *e.g.*, *Gross v. Bell Sav. Bank*, 974 F.2d 403, 408 (3d Cir. 1992) (noting that Section 1821(j) does not apply to claims for damages arising out of the same conduct). Section 1821(j) applies to judicial conduct, particularly the issuance of injunctions; it does not patently override all other statutes that could constrain FDIC-R action.

27. Application of the automatic stay under Section 362 of the Bankruptcy Code does not require issuance of an injunction or any other judicial action, and therefore enforcement of the stay is not limited by Section 1821(j). *In re Colonial Realty Co.*, 980 F.2d 125, 137 (2d Cir. 1992) ("[T]he § 1821(j) ban upon '*court* . . . action . . . to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver does not inhibit the operation of the automatic statutory stay imposed by § 362(a)."") (internal citations omitted) (emphasis and alterations in original); *Sunshine Dev. v. FDIC*, 33 F.3d 106, 113-14 (1st Cir. 1994) ("Because the automatic stay is exactly what the name implies – automatic – it operates without the necessity for judicial intervention [and] the stay . . . does not run afoul of FIRREA's anti-injunction provision, which only prohibits *court* . . . action . . . ."") (internal citations omitted) (emphasis and alterations in original). While limited case law has concluded that Section 1821(j) supersedes the automatic stay, *see*, *e.g.*, *Carlton v. Firstcorp, Inc.*, 967 F.2d 942 (4th Cir. 1992), the Third Circuit has fallen in line with the First and Second Circuits and clearly interpreted Section 1821(j) to allow the FDIC-R to be constrained, and even enjoined, where a "remedy is imposed by statute and by operation of law, without any action by a court" such as in the case of the automatic stay. *Gross*, 974. F.2d at 407 (citing *In re Lane*, 136 B.R. 319, 320-21 (D. Mass. 1992) (granting temporary restraining order against RTC barring foreclosure while automatic

[11] Section 1821(j), provides: "[e]xcept as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the Corporation as a conservator or a receiver." 18 U.S.C. § 1821(j).

stay is in effect) and *In re Colonial Realty Co.*, No. 3:91-200X (JAC), 1991 WL 433816, at *4 (D. Conn. Dec. 30, 1991), *aff'd*, 980 F.2d 125 (2d Cir. 1992) (holding that the automatic stay overrides Section 1821(j)); *see also Sunshine Dev.*, 33 F.3d at 113-14; *In re Colonial Realty Co.*, 980 F.2d at 137.

(3) *The Stay Applies to the FDIC-R's Proposed Actions*

28. The automatic stay applies to, among other things, "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" and "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 361(a)(3), (6). The stay applies to the FDIC-R's proposed action because the FDIC-R seeks to both exercise control over property of the estate and recover on its alleged claims under the TSA.

a. The FDIC-R Cannot Seriously Contend that Its Actions Do Not Exercise Control Over Property of the Estate

29. The FDIC-R admitted that the Debtors' carryback elections encompassed and exercised control over property of the estate by filing the Amended Complaint alleging that the Debtors violated Section 363(b) of the Bankruptcy Code. Section 363 applies only to the use, sale or lease of "*property of the estate*." 11 U.S.C. § 363(b) (emphasis added). The FDIC-R cannot fairly have it both ways and should not be allowed to prevail on such self-serving and contradictory positions. If the FDIC-R stands by its allegations that the Debtors' tax elections under the 2008 Amended Consolidated Return and 2009 Consolidated Return constituted the use, sale or lease of property of the estate, it must accept that the stay applies to exactly the same actions when sought to be taken by the FDIC-R.

30. Property of the estate is defined by Section 541 of the Bankruptcy Code and is comprised of "all legal and equitable interests of the debtor in property as of the commencement

of the case." 11 U.S.C. § 541. Pursuant to the Debtors' 2009 Consolidated Return, the Debtors elected to carry forward the Affiliated Group's NOLs. The ability to carry forward NOLs represents a tax asset that may be utilized to reduce the tax liabilities of the estates and thereby enhance the value of the estates for creditors under any plan confirmed in the Bankruptcy Cases. The NOLs are accordingly a property interest of the estates. *See*, *e.g.*, *In re Prudential Lines Inc.*, 928 F.2d 565, 571 (2d Cir. 1991), *cert. denied*, 502 U.S. 821 (1991) ("Congress intended that NOL carryforwards be included in property of the estate . . . .").

31. If the FDIC-R is granted relief from the stay to file amended consolidated tax returns for 2008 and 2009, the FDIC-R will attempt to reverse the Debtors' carryback elections. If successful, the results would be, among other things, the creation of a potential $170 million claim and that the estates would lose the benefit of losses that otherwise could have carried forward for the benefit of creditors. The FDIC-R's proposed action would thus wrest control over the estates' tax assets and attributes away from the estates and advantage the FDIC-R's own recoveries at the expense of all other creditors. The stay applies to such actions to exercise control over property of the estates, even when they are taken by a government agency. *See* 11 U.S.C. § 362(a)(3); s*ee*, *e.g.*, *Westmoreland Human Opportunities, Inc. v. Walsh*, 246 F.3d 233, 254 n.9 (3d Cir. 2001) (finding action by federal government to cancel a federal procurement contract was an act to obtain property of debtor's estate); *In re Krystal Cadillac Oldsmobile GMC Truck, Inc.*, 142 F.3d 631, 637-38 (3d Cir. 1998) (holding post-petition action by state regulator to terminate Debtor's auto dealership franchise violated Section 362(a)(3)).

b. The FDIC-R Is Trying to Pursue Its Claims

32. While the FDIC-R proposes to place any refund it receives following filing of an amended tax return into an escrow account, the FDIC-R readily admits that it is seeking to

recover a $54 million tax refund for the purpose of satisfying part of its alleged $170 million claim for breach of the TSA. *See*, *e.g.*, FDIC-R Opening Brief at ¶ 1 ("Had Advanta made that election, ABC would have been entitled to most, if not all, of the $54 million refund."). Once the refund has been issued, the FDIC-R will undoubtedly seek a ruling that the refund is its property and not property of the estate, with the result being that its claim has been partially satisfied. *See*, *e.g.*, FDIC-R Opening Brief at ¶ 45 (arguing FDIC-R should be permitted to file an amended consolidated tax return to "officially state its claim to all or a portion of the $54 million refund to which it is entitled . . ."). The FDIC-R's efforts to reverse the Debtors' tax elections are part of a concerted effort to maximize and pursue recovery on a portion of the FDIC-R's alleged claims in connection with the TSA, and as such, they are stayed under Section 362 of the Bankruptcy Code. *See* 11 U.S.C. § 362(a)(6); *In re Fasgo, Inc.*, No. 86-civ-1995, 1986 WL 10817, at *4 (E.D. Pa. Sept. 30, 1986) ("The language of § 362(a)(6) is extremely broad in scope and encompasses any act to collect a claim against the debtor."). There should be no doubt that Section 362(a)(6) applies in this instance because the FDIC-R's claims arising from alleged breaches of the TSA should be construed as prepetition claims. The TSA has not been assumed by the Debtors, and upon its rejection, claims arising out of the TSA will be deemed prepetition claims. *See* 11 U.S.C. § 365(g); FDIC-R Reply Br. in Support of Compl. [D.I. 24; No. 10-50795], at ¶ 18 ("Advanta *rejected* the TSA as to ABC and gave rise to (at minimum) a claim for breach by ABC.") (emphasis in original).

33. Furthermore, as explained below, the only way the FDIC-R could potentially have a claim against the Debtors under the TSA is if the FDIC-R is actually successful in persuading the IRS to reverse the Debtors' tax elections, thus causing the affiliated group to have elected a carryback on its 2009 tax return. The FDIC-R's proposed action is not only an effort to pursue

its alleged claim, it is an effort *to create* a $170 million claim against the Debtors, and the stay should apply to any such action. *See* 11 U.S.C. § 361(a)(6); *In re Fasgo*, 1986 WL 10817, at *4 ("The purpose of the automatic stay provision is to (1) provide for the orderly determination of the debtor's obligations by the Bankruptcy Court and (2) prohibit a creditor from taking any action against the debtor which would frustrate the debtor's efforts to deal with its financial problems or interfere with the debtor's attempt to rehabilitate itself.") (citing *In re Haffner,* 25 B.R. 882 (Bankr. D. Ind. 1982); *In re Kozak Farms, Inc.,* 47 B.R. 399 (D. Mo. 1985)).

C. Relief from the Stay Should Be Denied

34. The decision of "[w]hether to annul the automatic stay is a decision committed to the bankruptcy court's discretion." *In re Myers*, 491 F.3d 120, 128 (3d Cir. 2007). In assessing whether to grant relief, the movant bears the initial burden to produce "evidence that cause exists to grant relief from the automatic stay; if the movant meets its burden, then the burden shifts to opposing party." *In re DBSI, Inc.*, 407 B.R. 159, 166 (Bankr. D. Del. 2009); *Tribune Media Servs. v. Beatty*, 418 B.R. 116, 126-27 (Bankr. D. Del. 2009). This Court has developed a three-part balancing test to decide whether cause exists to grant relief from the stay: (1) whether great prejudice to the bankrupt estate or the debtor will result from granting relief, (2) whether the hardship to the movant by maintenance of the stay considerably outweighs the hardship to the debtor and (3) the probability of the movant prevailing on the merits. *In re SCO Group, Inc.,* 395 B.R. 852, 857 (Bankr. D. Del. 2007) (citation omitted).[12] The "most important factor" in

[12] While the FDIC-R cites to case law involving the continuation of prepetition litigation (a different context than the one at issue here), it notably fails to address the policy considerations addressed by the courts in considering whether to lift the stay in those situations. *See*, *e.g.*, *In re Continental Airlines, Inc*., 152 B.R. 420, 426 (D. Del. 1993). These considerations include, among others: (1) whether relief would result in a partial or complete resolution of the issues—here the relief would not resolve whether the IRS will ultimately pay a refund to the FDIC-R, nor which party should take actual ownership of any refund; (2) whether the judgment claim arising from the other action is subject to equitable subordination—here the potential $170 million claim against the estates may be subject to equitable subordination because the FDIC-R, standing in the shoes of ABC (an insider of the Debtors) has acted to confer an unfair advantage with respect to recovery of its own claims to the

determining whether to grant relief from the stay is the effect on administration of the estate—"[e]ven slight interference with the administration may be enough to preclude relief in the absence of a commensurate benefit." *In re W.R. Grace & Co.*, No. 01-01139, 2007 Bankr. LEXIS 1214, at *9 n.7 (Bankr. D. Del. Apr. 13, 2007) (quoting *In re Curtis*, 40 B.R. 795, 806 (Bankr. D. Utah 1984)).

(1) ***Relief Would Cause Great Prejudice to the Bankruptcy Estate***

(a) FDIC-R's Prejudice Argument Assumes that It Has Correctly Interpreted the TSA

35. Relief from the stay should not be granted in this case because granting relief could result in great harm to the estates through the creation of a $170 million claim that does not presently exist. Granting the FDIC-R stay relief could almost double the amount of claims against the estate and vastly diminish recoveries of all other unsecured creditors. The FDIC-R asserts that Advanta will not be prejudiced by the lifting of the automatic stay because "by not electing the Five-Year NOL Carryback, Advanta breached the TSA, and as a result, has exposed itself to a breach of contract and tort claims of at least $170 million." *See* FDIC-R Opening Brief at ¶39. This argument must fail because the FDIC-R has not demonstrated—nor can it—that Advanta breached any of its contractual obligations under the TSA. Instead, the FDIC-R has selectively cited portions of the TSA out of context and seeks to manipulate the terms of the TSA to imply contractual obligations where they do not lie in an attempt to create a claim in the Bankruptcy Cases when the FDIC-R has none.

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detriment and harm of the other creditors of the Debtors' estates; and (3) the impact of the stay on the parties and the balance of the harms—here, as discussed in more detail below, the balance of harms tips sharply in the Debtors' favor.

(b) FDIC-R's Conclusory Allegations Regarding Advanta's Breach of the TSA Are Unavailing

36. First, the FDIC-R argues that Advanta has breached the fourth recital of the TSA, which provides in pertinent part:

> 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 net operating loss deduction, capital loss deduction, or other tax benefit of the Affiliated Group . . . the filing of such consolidated return shall be beneficial rather than 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 that 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 interpretations and all consideration of regulatory accounting principles.

37. The TSA is a contract that allocates among the parties certain obligations for paying the affiliated group's tax liability and distributing any overpayments that may be attributed to loss carrybacks or other tax attributes. These obligations are set forth in the operative terms of the TSA and should not be supplanted by a recital where such terms are clear and unambiguous. Indeed, there are only three sections of the TSA that impose payment obligations on the Affiliated Group: (i) Section 2, which obligates members to make payments to Advanta at the time the group's tax liability is due; (ii) Section 3, which obligates Advanta to make payments to members where a consolidated return creates a Separate Member Refund (as defined in the TSA); and (iii) Section 4, which obligates Advanta to pay members the amount of any tax savings realized by the taxable members of the Affiliated Group as a result of the use of any consolidated losses attributable to a loss member at the time such savings are realized (if not otherwise compensated). Advanta has not triggered any of these obligations by filing the 2009 Consolidated Return and the 2008 Amended Consolidated Return. It is unnecessary to turn to

the recitals of the TSA to appreciate this fact. Moreover, the recitals in the TSA should not, and cannot logically, be interpreted to contractually obligate Advanta to ensure that all members of the Affiliated Group will be optimally benefited at all times or to prefer any particular member over another when making tax elections. Indeed, as this case readily demonstrates, it would be impossible to provide that the application of the TSA would be beneficial to each member of the Affiliated Group at all times.

38. Second, the FDIC-R argues that Advanta breached Section 2(a) of the TSA, which provides (emphasis added):

> 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.

39. Section 2(a) of the TSA, entitled "Payments by Member Companies to Advanta Corp.," sets forth the obligations of each member to pay to Advanta an amount equal to the Separate Member Tax (as defined in the TSA). It does not address or create any payment obligations of Advanta to any such member nor does it address tax elections. The sole purpose of Section 2(a) is to create an obligation on the part of each subsidiary member (including ABC) to pay to Advanta its share of taxes owed by the Affiliated Group in a tax year in which such subsidiary is profitable. The FDIC-R asserts that Advanta has somehow breached Section 2(a) because it waived the carryback and caused ABC to "effectively pay more than it would have paid had it filed separately." *See* FDIC-R Opening Brief at ¶ 42. This allegation simply is not supported under Section 2(a), which is merely a mechanism for apportioning the tax liability of the Affiliated Group among the members at the time such tax liability is due and required to be paid.

40. Finally, the FDIC-R argues that Advanta breached Section 4 of the TSA, which provides (emphasis added):

> 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***.

41. Section 4 of the TSA, entitled "Separate Member Loss," is a somewhat typical tax sharing agreement provision, which obligates Advanta to pay a member an amount equal to the tax benefits created by the use of such member's losses in the current year's tax return. For example, if and when Advanta used a loss of ABC against taxable income earned by another subsidiary of the group, Section 4 would obligate Advanta to pay to ABC the amount of any tax savings resulting from the use of its loss. Here, the ABC loss for the 2009 tax year has not yet resulted in any current tax benefit to the group.

42. The FDIC-R, however, erroneously tries to interpret this section as providing a "remedy" for situations "where a member is injured as a result of the filing of a consolidated return, [which causes] a member to pay more than other members, or where a member is deprived of a tax benefit it would otherwise receive . . . ." *See* FDIC-R Opening Brief at ¶ 43. Section 4 says no such thing. It is not a remedial section that gives members a right to payment in situations where they are dissatisfied with the elections made in the consolidated tax return filed by Advanta. Section 4, by its plain terms, applies where there has been a tax benefit resulting from the utilization of a member's losses in the consolidated tax return; therefore, unless and until there is a current tax savings—and there has been none to this point—Advanta is not obligated to make a payment to ABC under Section 4.

(c) Advanta Did Not Owe ABC Fiduciary Duties

43. In addition to its unsupported assertions regarding alleged breaches of various contractual obligations in the TSA which the FDIC-R has conjured to lay the basis for a claim in the Bankruptcy Cases (as described above), the FDIC-R asserts (similarly without support) that Advanta has also "breached its fiduciary duties under the TSA" because it "abandoned the $54 million refund that would have belonged to ABC, and by not making ABC whole." *See* FDIC-R Opening Brief at ¶ 44. The FDIC-R, however, fails to establish any basis or cite any legal authority for Advanta's "fiduciary duties" under the TSA.

44. Advanta is a Delaware corporation and ABC is a wholly-owned subsidiary of Advanta. It is well-established Delaware law that parent corporations do not owe fiduciary duties to their wholly-owned subsidiaries; rather such subsidiaries are created to operate for the benefit of the parent. *See Trenwick Am. Litig. Trust v. Ernst & Young*, L.L.P., 906 A.2d 168, 173 (Del. Ch. 2006); *see also Anadarko Petro. Corp. v. Panhandle Eastern Corp.*, 545 A.2d 1171, 1174 (Del. 1988) ("Although it is said in general terms that a parent corporation owes a fiduciary obligation to its subsidiaries, this obligation does not arise as such unless the subsidiary has minority stockholders.").

45. Furthermore, while Delaware law does not impose a fiduciary duty in the context of a parent corporation and its wholly-owned subsidiary, even where it does acknowledge fiduciary duties to exist in a parent-subsidiary context (*i.e.*, in cases where the subsidiary has minority shareholders), Delaware courts hold that a parent's fiduciary duty in such circumstances "does not require self-sacrifice from the parent, . . . [t]he parent corporation, too, has shareholders which it is bound to consider, and the parent's directors owe that corporation a fiduciary duty."). *See Getty Oil Co. v. Skelly Oil Co.*, 267 A.2d 883, 888 (Del. 1970).

46. Under applicable law, Advanta cannot be found to have breached a fiduciary duty to ABC. Advanta made the decision in the exercise of its business judgment to file the 2009 Consolidated Return and the 2008 Amended Consolidated Return as a chapter 11 debtor in possession pursuant to its statutory duty under the Bankruptcy Code to act in the best interests of its estates and creditors. By electing to waive the carryback as the TSA permitted it to do, Advanta avoided the creation of a potential $170 million claim against its estates. Thus, Advanta's decision to waive the carryback prevented the creation of a potential claim by ABC under the TSA that would have substantially diluted the recoveries of Advanta's creditors.

47. The TSA should not be interpreted, as the FDIC-R requests, as contractually obligating Advanta to have made a tax election for the benefit of a particular wholly-owned subsidiary member. The FDIC-R may be disappointed that Advanta did not make a tax election that would have inured to the sole benefit of ABC by creating a $170 million claim for ABC against the estates, but Advanta was not obligated in any manner to act solely in ABC's best interest when making its tax elections for the affiliated group.

48. In sum, the FDIC-R has failed to carry its burden to show that no great prejudice would result to the Debtors' estates from its requested relief. The FDIC-R presently has no valid claims arising out of the TSA, and granting the FDIC-R's requested relief could result in creating a $170 million claim. Thus, there can be no question that great harm to the Debtors' estates would result if the FDIC-R is allowed to create a new basis to claim $170 million from the estates.

(2) *The Balance of Hardships Tilts Strongly Against Granting Relief*

49. A party moving for relief from the stay "bears the heavy and possibly insurmountable burden of proving that the balance of hardships tips significantly in favor of granting relief as against the hardships to the Debtor in denying relief." *In re Micro Design, Inc.*,

120 B.R. 363, 369 (E.D. Pa. 1990) (collecting cases). The FDIC-R has failed to meet its burden, and cannot meet its burden in this instance, because granting relief would cause great hardship to the estates by creating a new basis for the FDIC-R to claim $170 million against the estates and depriving the estates of their property interests in carrying NOLs forward to benefit their creditors in a plan of liquidation. In contrast, as explained below, the FDIC-R has failed to demonstrate any likelihood of success on the merits. In fact, as demonstrated *infra*, the applicable Treasury Regulations cannot be reasonably interpreted to give the FDIC-R the option to file a competing tax return for the 2009 tax year, for which the deadline to file has passed, and therefore, the FDIC-R cannot be prejudiced in its ability to file an amended consolidated tax return—it has no such ability. Simply put, the FDIC-R cannot point to any hardship that would tilt the balance of hardships in its favor.

50. Even if this Court finds that the FDIC-R has proven a likelihood of success on the merits, the FDIC-R has failed to show that it would be prejudiced in its ability to file an amended consolidated tax return by maintenance of the automatic stay.[13] The case cited by the FDIC-R in support of its argument that it could be deemed to have waived its opportunity to file an amended consolidated return under Section 6402(k) of the Internal Revenue Code, *United States v.*

[13] During a status conference with the Court on May 26, 2010, the FDIC-R suggested there was a potential deadline of September 15, 2010, which could cut off its right to file a claim with the IRS as fiduciary for ABC. The FDIC-R did not reference a particular section of the Internal Revenue Code or Treasury Regulations that would impose such a deadline or explain how such deadline would be applicable in these cases. It appears, however, that the FDIC-R may be alluding to Treasury Regulation Sections 301.9100-1 and -2, which provide an automatic six-month extension from the original due date of a tax return to a tax payer that has timely filed a return and failed to make certain regulatory or statutory elections for the taxable year the elections should have been made. *See* Treas. Reg. § 301.9100-1, -2. However, this deadline would not be applicable in this case where Advanta timely filed a return and made the irrevocable election to waive the carryback for the 2009 taxable year. *See* I.R.C. § 172(b)(3) (an election to waive a carryback "shall be made by the due date (including extensions of time) for filing the taxpayer's return for the taxable year of the net operating loss for which the election is to be in effect. Such election, once made for any taxable year, shall be irrevocable for such taxable year.").

Rodrigues, is completely inapposite. As discussed above, in *Rodrigues*, the Ninth Circuit reversed a criminal conviction for impeding the functions of the RTC based on the defendant's payment of a bonus to a bank employee out of an account in which tax refunds had been deposited. 1998 U.S. App. LEXIS 36919 at *22. The conviction was reversed because the court found that the relevant statute did not impose criminal liability on the act of expending funds upon which the RTC has an arguable claim. *Id.* The Ninth Circuit pointed out that the RTC could have filed for the tax refund itself under Section 6402(k) of the Internal Revenue Code but did not do so, so it was unfair to impose criminal liability stemming from a situation that the RTC "could have prevented" by filing the return and taking possession of the refund directly. *See id.* Unlike the facts in *Rodrigues*, it is not credible to assume that the IRS or a court of competent jurisdiction would find that the FDIC-R waived its right to file an amended return under Section 6402(k) of the Internal Revenue Code by seeking relief from the automatic stay to protect and pursue its rights and then observing an order from this Court denying relief. As such, the FDIC-R's argument that *Rodrigues* implies that the FDIC-R could be deemed to waive its opportunity to file a claim for a refund under Section 6402(k) of the Internal Revenue Code reaches far beyond any fair reading of the case and misstates the law.

51. While the deadline for filing a consolidated tax return for the 2009 tax year has passed already there are no apparent further deadlines or time restrictions on the FDIC-R's ability to file an amended return and a claim for refund pursuant to its rights, if any, under Treasury Regulation Section 301.6402-7. The FDIC-R has not pointed to any statute, regulation or rule that would make any difference in the IRS's willingness to accept a claim for refund filed pursuant to Section 301.6402-7 if it were filed several months after resolution of the FDIC-R's

tax-related claims[14] or conclusion of the Bankruptcy Cases. Furthermore, denying relief from the stay would not prejudice the FDIC-R's recovery on its claims under the TSA because it has none. The FDIC-R plainly has failed to meet its heavy burden to prove that the balance of hardships tilts significantly in its favor.

(3) *FDIC-R Has Failed to Prove a Likelihood of Success on Merits*

52. The FDIC-R is required to prove a likelihood of success on the merits. *See Rexene Prods.*, 141 B.R. at 578. In this case, the FDIC-R must show that the IRS would likely accept an amended consolidated tax return filed by the FDIC-R on behalf of ABC. The FDIC-R glazes over the fact that any amended consolidated return filed at this point would be late, the elections made by Advanta are statutorily irrevocable, and accordingly the IRS may reject the FDIC-R's attempt at reversal. Pursuant to Section 6072(b) of the Internal Revenue Code, corporate tax returns made on the basis of the calendar year are due by the 15th day of March following the close of the calendar year. I.R.C. § 6072(b). Section 6402(k) of the Internal Revenue Code and the Treasury Regulations make no provision for an extension of this deadline so that the FDIC-R could claim a greater refund under new carryback elections for the 2009 tax year. The IRS would be required to exercise its discretion in direct contravention of the deadline set by Congress under Section 6072(b) of the Internal Revenue Code to accept an amended consolidated return filed by the FDIC-R, and the FDIC-R has not pointed to any reasons to suggest that the IRS would be so generous as to disregard its statutory mandate so that cash could be shuffled from one government account to another.

[14] If this Court rules that the FDIC-R's tax-related claims are valid, the Committee would likely support granting relief from the stay to recover a greater tax refund for the benefit of the estates. The Committee reserves all rights with respect to FDIC-R's claims and any tax refunds related to the Debtors or ABC, including without limitation the ownership of any tax refunds, equitable subordination of any claims of the FDIC-R and potential claims of the estates against the FDIC-R.

CONCLUSION

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

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Wilmington, Delaware

DRINKER BIDDLE & REATH LLP

/s/ Howard A. Cohen
Howard A. Cohen (DE 4082)
1100 N. Market Street, Suite 1000
Wilmington, DE 19801
Telephone: (302) 467-4200
Facsimile: (302) 467-4201

- and -

LATHAM & WATKINS LLP
Mitchell A. Seider (admitted *pro hac vice*)
Roger G. Schwartz (admitted *pro hac vice*)
Melinda Franek (admitted *pro hac vice*)
Adam J. Goldberg (admitted *pro hac vice*)
Catherine Martin (admitted *pro hac vice*)
885 Third Avenue, Suite 1000
New York, NY 10003
Telephone: (212) 906-1200
Facsimile: (212) 751-4864

Counsel to the Official Committee
of Unsecured Creditors