

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

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

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ADVANTA BANK CORP.,	:	Adversary Proceeding
	:	No.: 10-50795 (KJC)
Plaintiff,	:	
	:	RE: D.I. 25, 26
-against-	:	
ADVANTA CORP.,	:	Hearing Date: June 8, 2010 at 10:00 a.m.
	:	Reply Deadline: June 4, 2010 at 5:00 p.m.
Defendant.	:	

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**PRELIMINARY OBJECTION TO  
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**

\* 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). Information regarding the Debtors' businesses and the background relating to the events leading up to these chapter 11 cases can be found in (i) the Declaration of William A. Rosoff in Support of the Debtors' Chapter 11 Petitions and First-Day Motions, filed on November 8, 2009 (the "*Rosoff Declaration*"), the date the majority of Debtors filed their petitions under chapter 11 of title 11 of the United States Code (the "*Bankruptcy Code*"), and (ii) that certain supplement thereto, filed on November 20, 2009, the date Advanta Ventures Inc., BizEquity Corp., Ideablob Corp. and Advanta Credit Card Receivables Corp. filed their chapter 11 cases. The Debtors are authorized to continue to operate their businesses and manage their properties as debtors and debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Further, in accordance with an order of this Court, the Debtors' cases are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the "*Bankruptcy Rules*").

TABLE OF CONTENTS

Page

Preliminary Statement..... 1

Background..... 4

Objection..... 8

I. The Receiver’s Filing of the Receiver Competing Returns Is Subject to the Automatic Stay..... 8

    a. The 2008 and 2009 NOLs Are Property of Advanta’s Estate ..... 8

    b. The Receiver Is Seeking to Exercise Control Over Property of the Estate ..... 11

    c. The Receiver Is Subject to the Automatic Stay With Respect to the Receiver Competing Returns ..... 13

II. Cause Does Not Exist to Lift the Automatic Stay ..... 15

    (1) Advanta’s Estate Will Be Significantly Prejudiced by the Filing of the Receiver Competing Returns ..... 16

        i. Paragraph 2(a) (Payments by Member Companies to Advanta Corp.)..... 17

        ii. Paragraph 4 (Separate Member Loss)..... 18

        iii. Fourth Recital..... 19

        iv. Other Claims ..... 21

    (2) Any Harm to the Receiver Is Outweighed by the Harm to Advanta ..... 22

    (3) The Probability of the IRS Accepting the Receiver Competing Returns Is Speculative..... 23

III. Relief from the Automatic Stay Is Premature..... 26

Conclusion ..... 27

## TABLE OF AUTHORITIES

### CASES

	Page
<i>BSD Bancorp, Inc. v. FDIC (In re BSD Bancorp, Inc )</i> , No. 93-12207-A11 (S.D. Cal. 1995).....	1, 10, 25
<i>In re Benalcazar</i> , 283 B.R. 514 (Bankr. N.D.Ill. 2002).....	14
<i>In re Birchall</i> , 2007 WL 1992089 (Bankr. D. Mass. July 3, 2007).....	14
<i>In re Bob Richards Chrysler-Plymouth Corp.</i> , 473 F.2d 262 (9th Cir. 1973).....	25
<i>Case v. N.Y. Cent. R.R. Co.</i> , 204 N.E.2d 643 (N.Y. 1965).....	22
<i>City &amp; County of San Francisco v. PG &amp;E Corp.</i> , 433 F.3d 1115 (9th Cir. 2006).....	14
<i>In re Colonial Realty Co.</i> , 980 F.2d 125 (2d Cir. 1992).....	15
<i>In re Continental Airlines, Inc.</i> , 152 B.R. 420 (D. Del. 1993).....	16
<i>Corporacion de Servicios Medicos Hospitalarios de Fajardo v. Mora (In re Corporacion de Servicios Medicos Hospitalarios de Fajardo)</i> , 805 F.2d 440 (1st Cir. 1986).....	14
<i>Cournoyer v. Town of Lincoln</i> , 790 F.2d 971 (1st Cir. 1986).....	14
<i>Franklin Sav. Corp. v. Franklin Sav. Ass'n (In re Franklin Sav. Corp.)</i> , 159 B.R. 9 (Bankr. D. Kan. 1993), <i>aff'd</i> , 182 B.R. 859 (D. Kan. 1995).....	10, 25
<i>In re Fruehauf Trailer Corp.</i> , 444 F.3d 203 (3d Cir. 2006).....	9
<i>Gibson v. United States (In re Russell)</i> , 927 F.2d 413 (8th Cir. 1991).....	9
<i>In re Grossman's, Inc.</i> , 1997 WL 33446314 (Bankr. D. Del. 1997).....	8
<i>In re Hohol</i> , 141 B.R. 293 (M.D. Pa. 1992).....	16
<i>Interim Healthcare, Inc. v. Spherion Corp.</i> , 884 A.2d 513 (Del. Super. Ct. 2005).....	20
<i>Izzarelli v. Rexene Prods. Co. (In re Rexene Prods., Co.)</i> , 141 B.R. 574 (Bankr. D. Del. 1992).....	16

**TABLE OF AUTHORITIES**  
(continued)

	Page
<i>Javens v. City of Hazel Park (In re Javens)</i> , 107 F.3d 359 (6th Cir. 1997).....	14
<i>Kuroda v. SPJS Holdings, L.L.C.</i> , 2010 WL 925853 (Del. Ch. Mar. 16, 2010).....	21
<i>In re Laguna Assocs. Ltd.</i> , 30 F.3d 734 (7th Cir. 1994) .....	15
<i>In re Lincoln</i> , 264 B.R. 370 (E.D. Pa. 2001) .....	16
<i>Marvel Enter. Group, Inc. v. Mafco Holdings, Inc. (In re Marvel Enter. Group, Inc.)</i> , 273 B.R. 58 (D. Del. 2002) .....	9, 22
<i>Meyerson v. El Paso Natural Gas Co.</i> , 246 A.2d 789 (Del. Ch. 1967).....	22
<i>Nelson Dairies Inc. v. Royal</i> , 6 Pa. D. & C. 2d 371, 71 Mont. County L. Rep. 403, 1956 WL 8287 (Pa. Com. Pl. 1956) .....	19
<i>In re NextWave Personal Commc'n Inc.</i> , 244 B.R. 253 (Bankr. S.D.N.Y. 2000) .....	14
<i>Official Comm. of Unsecured Creditors v. PSS Steamship Co. (In re Prudential Lines Inc.)</i> , 928 F.2d 565 (2d Cir. 1991), <i>cert. denied</i> , 502 U.S. 821 (1991).....	8, 9, 12
<i>In re Phar-Mor, Inc.</i> , 152 B.R. 924 (Bankr. N.D. Ohio 1993).....	12, 13
<i>Prestancia Mgmt. Group, Inc. v. Virginia Heritage Foundation, II LLC</i> , 2005 WL 1364616 (Del. Ch. May 27, 2005).....	22
<i>Rhone-Poulenc Basic Chem. Co. v. American Motorists Ins. Co.</i> , 616 A.2d 1192 (Del. 1992) .....	19, 20
<i>Sunshine Dev., Inc. v. Fed. Deposit Ins. Corp.</i> , 33 F.3d 106 (1st Cir. 1994) .....	14, 15
<i>Superintendent of Ins. V. Ochs (In re First Cent. Fin. Corp.)</i> , 377 F.3d 209 (2d Cir. 2004).....	10, 25
<i>Team Financial</i> , 2010 WL 1730681 (same).....	25
<i>Team Financial, Inc. v. FDIC (In re Team Financial, Inc.)</i> , 2010 WL 1730681 (Bankr. D. Kan. Apr. 27, 2010) .....	9, 10
<i>United Dominion Industries, Inc. v. United States</i> , 532 U.S. 822 (2001).....	9

**TABLE OF AUTHORITIES**  
(continued)

	Page
<i>W. Pac. R.R. Corp. v. W. Pac. R.R. Co.</i> , 197 F.2d 994 (9th Cir. 1951), vacated on procedural grounds, 345 U.S. 247 (1953).....	22
<i>In re Wilson</i> , 116 F.3d 87 (3d Cir. 1997).....	15

**STATUTES**

11 U.S.C. § 105(a) .....	12
11 U.S.C. § 362(a)(3).....	8, 13, 15, 16
26 C.F.R. §§ 1.1502-11(a), -21(a) .....	9
26 C.F.R. § 1.1502-32(b)(2), (3)(i).....	11
26 C.F.R. § 1.1502-75(h)(1) .....	13
26 C.F.R. § 1.1502- 75(h)(1) .....	23
26 C.F.R. § 1.1502-77(a)(1)(i).....	5
26 C.F.R. § 1.508-1(a)(1), (2).....	24
26 C.F.R. § 1.597-4(g).....	10, 11
26 U.S.C. § 165(g).....	11
26 U.S.C. § 172(b)(3) .....	5
26 U.S.C. § 301.6402-7(f) .....	26
And 26 C.F.R. § 301.6402-7 .....	5, 13, 23, 24
Tax Code and 26 C.F.R. § 1.6012-3(b)(4).....	13
United States Bankruptcy Code, 11 U.S.C. §§ 101 et seq.....	8

Advanta Corp. (“*Advanta*”), as debtor and debtor in possession in the above-referenced jointly administered chapter 11 cases, submits this preliminary objection (the “*Objection*”) to the motion, dated May 14, 2010 (the “*Motion*”), of the Federal Deposit Insurance Corporation (the “*FDIC*”), as receiver of Advanta Bank Corp. (the “*Receiver*” or “*ABC*”), seeking a declaration that the automatic stay does not apply or, in the alternative, an order granting relief from the automatic stay, and respectfully represents as follows:<sup>1</sup>

### Preliminary Statement

1. This Motion is yet another attempt by ABC and the Receiver to supplant Advanta’s business judgment and substantially dilute the recoveries of Advanta’s existing creditors. The Receiver seeks stay relief to (i) file competing tax returns (the “*Receiver Competing Returns*”) for the Advanta consolidated federal income tax group (comprised of Advanta and various subsidiaries including ABC) with respect to the 2008 and 2009 taxable years, (ii) make certain elections thereunder to carry back net operating losses (“*NOLs*”) for 2008 and 2009 that are property of Advanta’s estate reversing the elections Advanta made with respect to the NOLs in the tax returns that Advanta filed on March 14, 2010 for the consolidated tax group for the taxable years 2008 (the “*Amended 2008 Return*”) and 2009 (the “*2009*

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<sup>1</sup> As Advanta argued to the Court at a telephonic hearing on May 26, 2010 (the “*Status Conference*”), Advanta does not believe that this Motion or the Emergency Motion for Declaratory and Injunctive Relief filed by ABC on March 19, 2010 (Adv. Proc. D.I. 9) (the “*Third Emergency Motion*”) should be ruled on absent a determination by the Court – with the Court having the benefit of an evidentiary hearing at which Advanta would offer, among other things, expert testimony regarding the application of accounting principles expressly incorporated in the TSA (as defined below) – of all claims or issues that ABC or the Receiver has raised or will raise regarding the TSA and Advanta’s tax elections. Per the Court’s instructions at the Status Conference, Advanta will be submitting to the Court on June 3, 2010 a letter further setting forth its views on the best procedure for, and scheduling of, the adjudication of the TSA-related disputes. In the meantime, Advanta is filing this preliminary Objection, but reserves all rights to supplement this Objection, including to supplement its existing arguments, respond to arguments made by the Receiver, and introduce new arguments, including based on the testimony of any fact and/or expert witness.

*Return*” and, together with the Amended 2008 Return, the “*Tax Returns*”), and (iii) claim for itself – not the consolidated tax group – a refund attributable to the consolidated group’s 2009 NOL to which ABC is not entitled.

2. If the Motion is granted, the Receiver will exercise control over the NOLs, which are Advanta’s property, to attempt to create an approximately \$170 million claim against Advanta. This claim would dwarf any other creditor’s claim and would dramatically reduce existing creditors’ recoveries. The Motion is based on the faulty premise that the filing of the Receiver Competing Returns will not harm Advanta’s estate because, according to what the Receiver (incorrectly) alleges, Advanta’s election in the Tax Returns to carry back the consolidated group’s 2008 NOL five years and waive the carry back of the consolidated group’s 2009 NOL (the “*Tax Elections*”) breached that certain Fourth Amended and Restated Tax Sharing Agreement, dated as of May 1, 1995, by and between Advanta and its wholly-owned direct and indirect subsidiaries (the “*TSA*”); indeed, the Receiver alleges that such a “breach” already has created a claim against Advanta in the amount of at least \$170 million. This breach allegation is not supported by facts or law. To the contrary, as discussed below, and as Advanta will establish at trial, the Tax Elections did not breach the TSA and ABC has no claims resulting from the Tax Elections.

3. The Receiver has shown no basis to justify lifting the automatic stay imposed by section 362 of the Bankruptcy Code (the “*Automatic Stay*”) to permit the filing of the Receiver Competing Returns. First, lifting the Automatic Stay has the potential to harm Advanta and its creditors severely by allowing the Receiver to attempt to manufacture an enormous claim against Advanta’s estate. Second, keeping the Automatic Stay in place will not harm ABC because it already is receiving the full benefit that it bargained for under the TSA.

The fact that Advanta took actions that prevented the crystallization of contingent claims under the TSA is not a “harm.” Third, any benefit to the Receiver is speculative at best: the Tax Elections are irrevocable elections that have been made on timely-filed returns and the time for making the elections has expired. Contrary to its assertions, the Receiver has no right to make new elections because the due date for the return passed before its appointment as receiver. Moreover, even if the Internal Revenue Service (the “*IRS*”) accepts the Receiver Competing Returns, the approximately \$54 million tax refund that the Receiver claims would actually be property of Advanta’s estate.

4. In any event, there is no reason to lift the Automatic Stay *now*. The Motion is predicated on the Receiver’s interpretation of the TSA, which the Debtors vigorously dispute, and the Receiver has not moved for summary judgment about its rights under the TSA – because it cannot given that discovery has not yet commenced. So, despite using the alleged breach of the TSA as the foundation of the Motion, the Receiver has failed to place before the Court its claims under the TSA. In fact, the Receiver filed a proof of claim in which it asserted additional theories of damages in respect of the TSA and the Tax Elections,<sup>2</sup> and has informed the Debtors that it may seek to further amend the complaint in this Adversary Proceeding to assert new theories if the Court denies the Motion and/or the Third Emergency Motion. In essence, the Receiver is looking for ultimate relief without ever having to prove its case and without giving Advanta the opportunity to take discovery.

5. A pivotal issue in the Debtors’ chapter 11 cases – whether ABC has claims under the TSA or otherwise in connection with the Tax Elections – should not be litigated in a disorganized, piecemeal fashion at the whim of the Receiver. And because there is no

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<sup>2</sup> See Proof of Claim No. 2336, annexed hereto as *Exhibit “A”*.

deadline for the Receiver to file the Receiver Competing Returns (should the Court ever permit such a filing), the Receiver is not prejudiced by maintaining the Automatic Stay now.

6. Accordingly, Advanta requests that the Court deny the Motion in its entirety in order to allow the issues surrounding the TSA to be decided in a fair and judicially economical way, which will conserve estate resources and allow a final resolution of all claims arising from the TSA and the Tax Elections. Following such proceedings, should the Court disagree with Advanta and agree with the Receiver that it has an approximately \$170 million claim against Advanta under the TSA, Advanta would likely support the Receiver's filing of competing returns to make alternative elections, and would work with the Receiver to seek payment of the refund from the IRS. Under those circumstances, the IRS's payment of the refund would be in Advanta's best interest – but Advanta will not know that until the Court issues its final ruling on ABC's claims in respect of the Tax Elections.

### **Background**

7. Advanta is the common parent of an affiliated group of corporations, including ABC, that files consolidated returns for federal income tax purposes. Consistent with applicable tax law, Advanta and its subsidiaries, including ABC, entered into the TSA prepetition.

8. The Receiver does not dispute that Advanta, as the common parent corporation of the consolidated group, had *sole authority* (and therefore complete discretion) to act on behalf of the group in matters relating to tax liability for the consolidated return years (*See 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*, dated May 14, 2010 (Adv. Proc. D.I. 26) (the "**Brief**"), ¶ 1). *See generally* 26 C.F.R. § 1.1502-77(a)(1)(i) (subject to

exceptions, “the common parent . . . for a consolidated return year is the sole agent (agent for the group) that is authorized to act in its own name with respect to all matters relating to the tax liability for that consolidated return year, for – (A) Each member in the group . . .”).<sup>3</sup>

9. In the exercise of such uncontested authority, on March 14, 2010, one day before the IRS deadline, Advanta filed the Tax Returns. In the Amended 2008 Return, Advanta amended its previously-filed tax return for 2008 by electing to carry back the consolidated group’s 2008 NOL five years, and, in the 2009 Return, Advanta elected to waive the carryback of any portion of the consolidated group’s 2009 NOL.<sup>4</sup>

10. Notwithstanding that ABC was aware for months of the NOL carryback issues and the filing deadline of March 15, 2010 for the Tax Returns, ABC waited until March 10, 2010 to send Advanta a letter requesting that Advanta file as soon as possible the 2009 Return and elect to carry back the 2009 NOL five years (a “*2009 Five Year Carryback*”). There was no suggestion in the letter that such a filing and election would require Court approval.

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<sup>3</sup> Following the commencement of ABC’s receivership and the satisfaction of certain notice requirements, the Receiver became a co-agent of the consolidated group for certain limited purposes pursuant to 26 C.F.R. § 301.6402-7(c)(1). However, the Tax Elections were made and the filing deadline for the Tax Returns passed before the Receiver acquired this co-agent status and the attendant rights, and there is nothing in the applicable tax regulations making such rights applicable to such returns.

<sup>4</sup> March 14, 2010 was the last day to prudently file the Tax Returns because of the need to avoid the risk of technical errors in transmitting the Tax Returns electronically to the IRS (Advanta is required to file the Tax Returns electronically). Indeed, Advanta’s consistent practice has been to avoid waiting to file its tax returns until the actual IRS deadline. If Advanta did not timely file the Tax Returns, the default result would have been that the generally applicable two-year carryback would not have been waived with respect to the 2009 NOL (absent obtaining an extension of time to file the Tax Returns, which Advanta determined was not in the estate’s best interests), as 26 U.S.C. § 172(b)(3) requires an election waiving the carryback of a NOL to be made on a timely-filed tax return for the year in which the NOL arises, and Advanta would have been exposed to a potential claim by ABC of up to approximately \$71 million under the TSA (with a refund of approximately \$27 million due from the IRS). Accordingly, the Debtors determined that it was not in the best interests of Advanta’s estate to wait until after March 14, 2010 to file the Tax Returns.

11. Late in the afternoon on Friday, March 12, 2010, ABC filed the *Emergency Motion of Advanta Bank Corp. for Entry of an Order Compelling Debtor Advanta Corp. to (I) Timely File a Request for an Extension of Time to File 2009 Consolidated Federal Income Tax Return; or, in the Alternative (II) Elect to Carry Back 2009 Consolidated Net Operating Losses Five Years* (the “**First Emergency Motion**”) (D.I. 323). The First Emergency Motion sought to compel Advanta to request an extension of time to file the 2009 Return or, in the alternative, elect the 2009 Five Year Carryback. Notwithstanding the looming deadline to file the Tax Returns, ABC did not file an adversary proceeding and seek a temporary restraining order.<sup>5</sup> On March 15, 2010, Advanta filed an objection to the First Emergency Motion (the “**First Emergency Motion Objection**”) (D.I. 332), asserting that the First Emergency Motion was procedurally flawed (because, among other reasons, it was not within an adversary proceeding), partially moot, and lacking in authorities to substantiate the extraordinary relief requested. The same day, the statutory committee of unsecured claim holders in the Debtors’ chapter 11 cases (the “**Committee**”) filed a joinder to the First Emergency Motion Objection (D.I. 333), in which it set forth its support for Advanta’s decision to make the Tax Elections.<sup>6</sup>

12. On March 14, 2010, ABC initiated this adversary proceeding (Adv. Proc. D.I. 1). On March 19, 2010, ABC filed an Amended Complaint (Adv. Proc. D.I. 8) and the Third Emergency Motion whereby ABC changed its legal theory to assert that, pursuant to section 363(b) of the Bankruptcy Code, the Tax Elections were unauthorized transactions outside

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<sup>5</sup> On March 14, 2010, ABC filed its *Emergency Motion of Plaintiff Advanta Bank Corp. for Temporary Restraining Order and Preliminary Injunctive Relief Against Defendant Advanta Corp.* (the “**Second Emergency Motion**”) after commencing this adversary proceeding (Adv. Proc. D.I. 3). The Second Emergency Motion was subsequently withdrawn pursuant to the *Order Approving Stipulation*, which this Court signed on April 6, 2010 (Adv. Proc. D.I. 15).

<sup>6</sup> The First Emergency Motion was withdrawn with prejudice by the Receiver as moot pursuant to the Supplemental Scheduling Order entered on May 17, 2010 (Adv. Proc. D.I. 29).

of the ordinary course of Advanta's business and therefore void *ab initio*. Notwithstanding that Advanta clearly stated in the First Emergency Motion Objection that by making the Tax Elections it avoided triggering a potential claim of approximately \$170 million under the TSA (see First Emergency Motion Objection at ¶ 24), the Third Emergency Motion made no allegation of any breach of the TSA caused by the Tax Elections. On April 30, 2010, Advanta filed its objection to the Third Emergency Motion (the "***Third Emergency Motion Objection***") (Adv. Proc. D.I. 17), explaining why the Tax Elections were within the ordinary course of Advanta's business. Also on April 30, 2010, the Committee joined in the Third Emergency Motion Objection (Adv. Proc. D.I. 18).

13. On May 14, 2010, the Receiver filed its reply to the Third Emergency Motion Objection (the "***Third Emergency Reply***") (Adv. Proc. D.I. 24), in which it argued *for the first time* that the Tax Elections breached the TSA.

14. Also on May 14, 2010, the Receiver filed the Motion and the Brief, which argue that the Automatic Stay does not apply to a filing of competing tax returns for the Advanta consolidated group by the Receiver and, in the alternative, that the Automatic Stay should be modified to permit the filing of the Receiver Competing Returns.

### **Objection**

#### **I. The Receiver's Filing of the Receiver Competing Returns Is Subject to the Automatic Stay**

15. Section 362(a) of the Bankruptcy Code operates as a stay of, 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." 11 U.S.C. § 362(a)(3). Accordingly, "where a non-debtor's action with respect to an interest that is intertwined with that of a bankrupt debtor would have the legal effect of diminishing or eliminating property of the bankrupt estate, such action is

barred by the automatic stay.” *Official Comm. of Unsecured Creditors v. PSS Steamship Co. (In re Prudential Lines Inc.)*, 928 F.2d 565, 574 (2d Cir. 1991), *cert. denied*, 502 U.S. 821 (1991).

a. The 2008 and 2009 NOLs Are Property of Advanta’s Estate

16. NOLs and other tax attributes are property of a debtor’s estate protected by section 362. *See In re Grossman’s, Inc.*, 1997 WL 33446314, at \*1 (Bankr. D. Del. 1997) (“The Debtors’ net operating loss carryforward is property of the Debtors’ estates and is protected by the automatic stay of § 362 of the United States Bankruptcy Code, 11 U.S.C. §§ 101 et seq.”). The Second Circuit, in its seminal *Prudential Lines* decision (928 F. 2d 565 (2d Cir. 1991)), affirmed the application of the automatic stay and upheld a permanent injunction prohibiting a parent corporation from taking a “worthless stock” deduction for the stock of its debtor subsidiary because doing so would have adversely affected the subsidiary’s ability to use its NOLs under the special relief provisions of section 382 of title 26 of the United States Code (the “*Tax Code*”). The Second Circuit stated:

Including NOL carryforwards as property of a corporate debtor’s estate is consistent with Congress’ intention to “bring anything of value that the debtors have into the estate.”

*Id.* at 573 (internal citations omitted); *see also In re Fruehauf Trailer Corp.*, 444 F.3d 203 (3d Cir. 2006) (“Property of the estate ‘includes all interests, such as . . . contingent interests and future interests, whether or not transferable by the debtor.’”) (quoting *Prudential Lines*, 928 F.2d at 572); *Gibson v. United States (In re Russell)*, 927 F.2d 413, 417 (8th Cir. 1991) (concluding the “right to carry forward the [debtor’s] NOLs” was a “property interest” of the estate); *In re Delta Air Lines, Inc.*, Ch. 11 Case No. 05-17923 (PCB) (Bankr. S.D.N.Y. Sept. 16, 2005) (finding that tax credit carryforwards were property of the debtors’ estates and approving notification procedures and restrictions on certain transfers of claims against and interests in the debtors to protect, among other things, \$346 million in non-NOL tax credits); *In re Enron Corp.*,

Case No. 01-16034 (Bankr. S.D.N.Y. 2003) (finding that the debtors' NOL carryforwards "are property of the debtors' estates and are protected by the automatic stay prescribed in section 362 of the Bankruptcy Code").

17. Advanta's consolidated tax group's 2008 NOL is property of Advanta's estate. That NOL was generated entirely by losses of Advanta and its non-ABC subsidiaries in 2008. ABC clearly has no interest in the 2008 NOL because ABC generated approximately \$34 million of *positive* net taxable income on a separate company basis in 2008. Therefore, ABC did not produce losses in 2008 that contributed to the consolidated group's 2008 NOL.

18. The consolidated group's 2009 NOL also is property of Advanta's estate even though it stemmed in significant part from losses of ABC. This is because there is only one consolidated NOL per taxable year for a consolidated group, and it is an attribute of the consolidated group, though its computation is a function of the income and losses of the group members. *See* 26 C.F.R. §§ 1.1502-11(a), -21(a), (e); *see also United Dominion Industries, Inc. v. United States*, 532 U.S. 822, 830 (2001) ("Given this apparently exclusive definition of NOL as CNOL [consolidated NOL] in the instance of affiliated entities with a consolidated return ... we think it is fair to say ... that the concept of separate NOL 'simply does not exist.'"). As held by the District of Delaware, NOLs attributable to a subsidiary in a consolidated tax group are not assets of the subsidiary. *See In re. Marvel Enter. Group, Inc.*, 273 B.R. 58, 72-73 (D. Del. 2002) ("In the context of the consolidated tax filing group, the hypothetical stand-alone NOLs that were calculated for purposes of the Tax Sharing Agreement were not property of [the subsidiary] because they were a legal fiction ... Accordingly, ... [the parent's] application of NOLs attributable to [the subsidiary] in the Federal income tax filings of [the parent's] consolidated

group does not constitute a transfer from [the subsidiary] to [the parent] that is cognizable under the Bankruptcy Code.”).

19. Moreover, by entering into the TSA, ABC relinquished any property interest that it even could have had in the consolidated group’s NOLs (whether or not attributable to ABC’s losses) in exchange for the contractual rights set forth in the TSA. As recognized by the courts in *Superintendent of Ins. v Ochs (In re First Cent. Fin. Corp.)*, 377 F.3d 209, 211 (2d Cir. 2004), *Franklin Sav. Corp. v. Franklin Sav. Ass’n (In re Franklin Sav. Corp.)*, 159 B.R. 9, 29 (Bankr. D. Kan. 1993), *aff’d*, 182 B.R. 859 (D. Kan. 1995), and *Team Financial, Inc. v. FDIC (In re Team Financial, Inc.)*, 2010 WL 1730681, \*8-\*12 (Bankr. D. Kan. Apr. 27, 2010), when a parent and its consolidated subsidiary tax group members enter into a written tax sharing agreement with terms similar to those found in the TSA, the subsidiary members relinquish any property rights they possess in the consolidated group’s tax attributes in exchange for their rights under the tax sharing agreement.<sup>7</sup> Additionally, if Advanta elects to deconsolidate ABC effective as of immediately prior to ABC’s being placed in receivership (as permitted by 26 C.F.R. § 1.597-4(g) within 120 days of the inception of the receivership, *i.e.*, on or before July 17, 2010), the deconsolidated ABC will not succeed to the portion of the consolidated group’s 2009 NOL attributable to ABC’s losses. *See* 26 C.F.R. § 1.597-4(g)(4)(i).

20. Finally, were the 2009 NOL to be carried back, Advanta’s tax basis in the stock of ABC – which is similarly property of the estate – would be reduced by roughly the same amount. As discussed below, the IRS’s discretionary acceptance of the Receiver Competing Returns would diminish the value of this property.

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<sup>7</sup> As discussed below, the TSA is wholly unlike the tax sharing agreement at issue in *BSD Bancorp, Inc. v. FDIC (In re BSD Bancorp, Inc.)*, No. 93-12207-A11 (S.D. Cal. 1995), the unpublished decision cited by the Receiver.

b. The Receiver Is Seeking to Exercise Control Over Property of the Estate

21. The filing by the Receiver of the Receiver Competing Returns would be an exercise of control by the Receiver over Advanta's NOLs. In so doing, the Receiver would ask the IRS to apply an asset of Advanta's – the NOLs – in a manner contrary to Advanta's wishes and that would harm Advanta. If the IRS then accepted the Receiver Competing Returns, which would be solely a discretionary action (*see* Brief at ¶ 20), the refund from the IRS could trigger a liability from Advanta to ABC under the TSA of up to approximately \$170 million, with the effect of materially reducing recoveries to existing unsecured creditors in Advanta's chapter 11 case.

22. In addition to the harm to Advanta resulting from the triggering of a claim under the TSA, should the Receiver Competing Returns be filed and accepted by the IRS, Advanta will suffer a meaningful reduction in the amount of its tax basis in its ABC stock. *See* 26 C.F.R. § 1.1502-32(b)(2), (3)(i) (providing that absorption of the portion of a consolidated NOL attributable to a subsidiary's operations results in a corresponding decrease in the parent's tax basis in its stock in the subsidiary). Assuming that ABC is insolvent, the stock basis will make available to Advanta a "worthless stock" loss (in lieu of the portion of the consolidated group's NOLs attributable to ABC).<sup>8</sup> *See* 26 U.S.C. § 165(g). The use of the "worthless stock" loss, unlike the use of any NOLs attributable to ABC, would not result in a claim under the TSA. This stock loss could offset in whole or in part any gains triggered during the remainder of Advanta's chapter 11 case, pursuant to the terms of its chapter 11 plan or, potentially, after consummation of the chapter 11 plan. Therefore, any reduction in this stock basis, such as

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<sup>8</sup> In the event that Advanta electively deconsolidates ABC as of immediately prior to ABC's receivership, Advanta would be immediately entitled to the worthless stock loss. *See* 26 C.F.R. § 1.597-4(g)(2)(v).

would occur if the Receiver Competing Returns are filed and accepted by the IRS, diminishes an asset of Advanta's estate.

23. In *Prudential Lines*, the Second Circuit held that the parent corporation's attempt to claim a worthless stock deduction in stock of its debtor subsidiary effectively would eliminate the value of the debtor's NOLs and, thus, would be an act to exercise control over estate property in violation of the Automatic Stay. *Prudential Lines*, 928 F.2d at 573-574. The Second Circuit determined that, if the parent were permitted to take a "worthless stock" deduction, it would have an adverse impact on the debtor subsidiary's ability to carry forward its NOLs. The Second Circuit thus held that, "despite the fact that the [parent corporation's] action is not directed specifically at [the debtor subsidiary], it is barred by the automatic stay as an attempt to exercise control over property of the estate." *Id.*<sup>9</sup> The Second Circuit also held that the permanent injunction was supported by the court's equitable powers pursuant to section 105(a) of the Bankruptcy Code, which authorizes the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [title 11]." *Id.*; *see also* 11 U.S.C. § 105(a).

24. Similarly, in *In re Phar-Mor, Inc.*, 152 B.R. 924 (Bankr. N.D. Ohio 1993), chapter 11 debtors moved to prohibit transfers of their stock that could have an adverse effect on their ability to use NOLs. The court held that the NOLs qualified as property of the estate and issued an injunction and enforced the Automatic Stay, thereby protecting the assets of the debtors' estates. The court granted the relief requested even though the stockholders did not

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<sup>9</sup> In the present case, unlike in *Prudential Lines*, the parent is the corporation in bankruptcy and it is the parent's interest in the consolidated NOL that the Automatic Stay protects, even if the subsidiary may also have an interest therein. Moreover, the subsidiary in *Prudential Lines* had not relinquished any property rights that it possessed in the consolidated NOL by entering into a tax sharing agreement with its parent, as ABC did here.

state any intent to sell their stock and even though the debtors did not show that a sale was pending that would trigger the prescribed ownership change under section 382 of the Tax Code. *See id.* at 927. Despite the “ethereal” nature of the situation, the court observed that “[w]hat is certain is that the *NOL has a potential value, as yet undetermined*, which will be of benefit to creditors and will assist debtors in their reorganization process.” *Id.* (emphasis added). The *Phar-Mor* court also concluded that, because the debtors were seeking to enforce the stay, they did not have to meet the more stringent requirements for preliminary injunctive relief:

The requirements for enforcing an automatic stay under 11 U.S.C. § 362(a)(3) do not involve such factors as lack of an adequate remedy at law, or irreparable injury, or loss and a likelihood of success on the merits. The key elements for a stay . . . are the existence of property of the estate and the enjoining of all efforts by others to obtain possession or control of property of the estate.

*Id.* at 926 (quoting *In re Golden Distributions, Inc.*, 122 B.R. 15, 19 (Bankr. S.D.N.Y. 1990)).

25. These cases establish that it is well settled that the Automatic precludes actions that would adversely affect a debtor’s tax position and its NOLs.

c. The Receiver Is Subject to the Automatic Stay With Respect to the Receiver Competing Returns

26. In seeking to lift the Automatic Stay to allow the filing of the Receiver Competing Returns, the Receiver’s objective is to maximize the value of ABC’s assets at the expense of Advanta’s existing unsecured creditors. The Receiver is subject to the Automatic Stay with respect to the Receiver Competing Returns, as demonstrated below, as it is not acting in its capacity as a governmental unit to enforce its police or regulatory powers, but rather seeks to use these proceedings solely to advance its own pecuniary interest.<sup>10</sup>

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<sup>10</sup> Moreover, the Receiver’s contention that it is obligated under the tax law to file the Receiver Competing Returns is incorrect. Section 6012(b)(3) of the Tax Code and 26 C.F.R. § 1.6012-3(b)(4), both of which are cited by the Receiver in support of this contention, merely require a fiduciary to file returns in the same manner and form as the corporation otherwise would. Since a subsidiary in a

27. While, under section 362(b)(4) of the Bankruptcy Code, “the automatic stay does not reach proceedings undertaken to enforce a ‘governmental unit’s police or regulatory power’” (see *Sunshine Dev., Inc. v. Fed. Deposit Ins. Corp.*, 33 F.3d 106, 114 n.8 (1st Cir. 1994)), the legislative history of section 362(b)(4) makes clear that the exception contained in section 362(b)(4) was intended to be given a “narrow construction” and was not intended to apply “to actions by a governmental unit to advance its own ‘pecuniary interest.’” *In re Benalcazar*, 283 B.R. 514, 530 (Bankr. N.D.Ill. 2002); accord *In re NextWave Personal Commc’n Inc.*, 244 B.R. 253, 273-74 (Bankr. S.D.N.Y. 2000). Furthermore, for the exception to apply, “the governmental unit must bring the action in its capacity as a regulator, or a private party acting as a private attorney general.” *In re Birchall*, 2007 WL 1992089, at \*7 (Bankr. D. Mass. July 3, 2007) (citing *Cournoyer v. Town of Lincoln*, 790 F.2d 971, 974 (1st Cir. 1986); *Corporacion de Servicios Medicos Hospitalarios de Fajardo v. Mora (In re Corporacion de Servicios Medicos Hospitalarios de Fajardo)*, 805 F.2d 440 (1st Cir. 1986); *Javens v. City of Hazel Park (In re Javens)*, 107 F.3d 359 (6th Cir. 1997)).

28. The phrase “police or regulatory power” is not defined in the Bankruptcy Code, but has been interpreted to refer to the “enforcement of laws affecting health, welfare, morals and safety, but not regulatory laws that directly conflict with the control of the property of the bankruptcy estate.” *City & County of San Francisco v. PG &E Corp.*, 433 F.3d 1115, 1123 (9th Cir. 2006).

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consolidated group cannot file a consolidated return for the group – it is the parent’s duty to file this return – these provisions are irrelevant. See 26 C.F.R. § 1.1502-75(h)(1) (“The consolidated return shall be made on Form 1120 for the group by the common parent corporation.”). And 26 C.F.R. § 301.6402-7, which the Receiver also cites in support of its contention, merely permits a fiduciary to file a competing tax return, but does not obligate it to do so.

29. Specifically, courts have held that where the FDIC is acting in its capacity as receiver, it is not exercising “regulatory powers” that would exempt the FDIC from the strictures of the automatic stay. *Sunshine*, 33 F.3d at 114 n.8 (citing *Howell v. FDIC*, 986 F.2d 569, 574 (1st Cir. 1993)). Indeed, courts have denied the FDIC’s request to find that it has powers that override both substantive and procedural law governing bankruptcy cases simply because enforcement of those bodies of law constrain the FDIC’s powers related to assets in which it has interests as successor to a failed bank, as is the case with ABC. *See, e.g., In re Colonial Realty Co.*, 980 F.2d 125 (2d Cir. 1992).

30. The Receiver cites several cases that purportedly support its argument that the Automatic Stay does not apply to acts it commits in its capacity as a receiver (Brief at ¶ 14), but none involves bankruptcy cases or provisions of the Bankruptcy Code, much less the application of the Automatic Stay. In fact, the only relevant cases cited in the Brief are cases in which appellate courts held that the Receiver is *not* exempt from the Automatic Stay when acting in its capacity as a receiver. *See Sunshine*, 33 F.3d at 114 n.8; *Colonial Realty*, 980 F.2d 125 (Brief at ¶ 14, n. 4).

## **II. Cause Does Not Exist to Lift the Automatic Stay**

31. Section 362(d) of the Bankruptcy Code provides, in relevant part, as follows:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay – (1) for cause...

11 U.S.C. § 362(d). “Cause” is a flexible concept and courts often conduct a fact intensive, case-by-case balancing test, examining the totality of the circumstances to determine whether sufficient cause exists to lift the stay. *See, e.g., In re Wilson*, 116 F.3d 87, 90 (3d Cir. 1997); *In*

*re Laguna Assocs. Ltd.*, 30 F.3d 734, 737 (7th Cir. 1994); *In re Continental Airlines, Inc.*, 152 B.R. 420, 424 (D. Del. 1993). As one court phrased it,

There is no rigid test for determining when an unsecured creditor...has established cause to warrant relief from the automatic stay. Instead the cases recognize that the bankruptcy court's exercise of discretion in resolving motions for relief for "cause" must appropriately consider the policies underlying the Bankruptcy Code as well as the competing interests of the creditor, debtor, and other parties in interest. Each request for relief for "cause" under § 362(d)(1) must be considered on its own facts. *In re Hohol*, 141 B.R. 293 (M.D. Pa. 1992); *In re Lincoln*, 264 B.R. 370 (E.D. Pa. 2001) (KJC).

32. In *Izzarelli v. Rexene Prods. Co. (In re Rexene Prods., Co.)*, 141 B.R. 574, 576 (Bankr. D. Del. 1992), this Court established the following three-prong analysis for determining whether cause exists to modify the stay to allow an action to continue: (i) whether the debtor or the estate will suffer great prejudice if the action is continued; (ii) balancing of the hardships faced by the debtor and the moving party; and (iii) the probability that the moving party will succeed on the merits in the action. *See* 141 B.R. at 576.

(1) *Advanta's Estate Will Be Significantly Prejudiced by the Filing of the Receiver Competing Returns*

33. If the relief sought by the Receiver is granted and the Receiver proceeds to file the Receiver Competing Returns, Advanta expects that the Receiver will make the 2009 Five-Year Carryback election, thereby creating a potential general unsecured claim against Advanta by ABC of up to approximately \$170 million if the Receiver Competing Returns are accepted by the IRS. The Receiver does not dispute this fact.

34. The Receiver contends, however, that Advanta's estate will not be prejudiced by the lifting of the Automatic Stay because it alleges that ABC will have a claim in the amount of approximately \$170 million against Advanta in all circumstances, and that Advanta therefore is better off if the Receiver files the Receiver Competing Returns and is able to obtain an approximately \$54 million refund that would either belong to Advanta or partially

offset the approximately \$170 million claim if it is paid to ABC (Brief at ¶ 39). The basis for this allegation is the Receiver's assertion that the Tax Elections breached the TSA and gave rise to a \$170 million claim of ABC against Advanta. But as demonstrated below, Advanta has not breached the TSA, has not generated a \$170 million claim to ABC by filing the Tax Returns, and will be put at risk of enormous prejudice by the lifting of the Automatic Stay and the filing of the Receiver Competing Returns. Accordingly, the Receiver has not made any showing that it would have a claim against Advanta based on the waiver of the 2009 Five-Year Carryback election.

35. The Receiver cites three paragraphs of the TSA to support its contention. But an examination of each shows that the Tax Elections did not breach such paragraphs. The TSA simply neither requires that Advanta make any particular tax elections nor provides for a claim by one member of Advanta's consolidated group if it does not like tax elections made by Advanta.

*i*      Paragraph 2(a) (Payments by Member Companies to Advanta Corp.)

36. Paragraph 2(a) (*Payments by Member Companies to Advanta Corp.*) of the TSA, which the Receiver relies upon to support its claim of breach (Brief at ¶¶ 41-42), provides:

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.

The Receiver's reliance on this provision addressing payments by subsidiaries in the group to Advanta to argue a breach of contract claim against Advanta is misplaced. ABC made no

payment to Advanta relating to the 2009 taxable year. This section of the TSA is simply inapplicable to the Tax Returns.<sup>11</sup>

ii Paragraph 4 (Separate Member Loss)

37. The Receiver also is mistaken in its reliance on Paragraph 4 (*Separate Member Loss*) of the TSA (Brief at ¶ 43). Paragraph 4 provides:

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.

This provision of the TSA plainly does not have the meaning ascribed to it by the Receiver, namely that: “where a member is injured as a result of the filing of a consolidated return, a member pays more than the other members, or a member is deprived of a tax benefit it would otherwise receive, the TSA provides that Advanta is to pay the member the difference” (Brief at ¶ 43). Such construction takes a narrow provision and adopts a meaning not found in the text. A plain reading of Paragraph 4 shows that this provision merely applies where a member has a loss but not a Separate Member Refund (as defined in the TSA), and such loss results in a tax benefit on the group’s consolidated return by means of reducing the taxable income of other members of the group.<sup>12</sup> But the consolidated group has not realized any tax benefit from ABC’s 2009 loss: because the non-ABC members of the consolidated group generated a net loss in 2009, ABC’s loss was not needed to offset other income in the group in 2009. Rather than providing a

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<sup>11</sup> The Receiver argues that ABC’s inability to collect a refund for the 2009 tax year is the equivalent of a payment by ABC (Brief at ¶ 42). But there was no right to a refund. A refund would only have become due if the 2009 Five-Year Carryback election was made. Accordingly, any claim arising from a refund was contingent. The failure of a contingency to occur is not a payment to Advanta as contemplated by Paragraph 2(a).

<sup>12</sup> Paragraph 4 provides that a payment to a member is required to be made only when the member’s loss “results in a tax benefit... from those losses on the consolidated return” as “determined in a manner consistent with the allocation of tax due to taxable Members”.

realized tax benefit, ABC's loss merely increased the amount of the consolidated 2009 NOL, *which has not been utilized*. Therefore, Paragraph 4 does not support the Receiver's contention that Advanta breached the TSA.

iii. Fourth Recital

38. The Receiver's reliance on the fourth recital to the TSA (Brief at ¶ 40) (the "**Fourth Recital**") likewise is misplaced.<sup>13</sup> The Fourth Recital is not an operative provision of the TSA, and is only relevant when interpreting contractual provisions that are ambiguous. *See, e.g., Nelson Dairies Inc. v. Royal*, 6 Pa. D. & C.2d 371, 71 Mont. County L. Rep. 403, 1956 WL 8287 (Pa. Com. Pl. 1956) (when the recital provisions and the operative provisions of a contract conflict, the operative provisions, unless ambiguous, should control).

39. Although the parties disagree on the interpretation of the TSA, neither contends that the language of the TSA is ambiguous. Under Delaware law, a contract is not ambiguous simply because the parties disagree as to the meaning of its terms. *See Rhone-Poulenc Basic Chem. Co. v. American Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992) ("A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction."). A contract is ambiguous only if the provisions in question are "reasonably or fairly susceptible of different interpretations or may have two or more different meanings."

*Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 546 (Del. Super. Ct. 2005) (*citing*

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<sup>13</sup> The fourth recital reads: "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 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."

*Rhone-Poulenc*, 616 A.2d at 1196). Advanta submits that the two operative sections of the TSA cited by the Receiver clearly do not give rise to a claim by ABC against Advanta.

40. But even if it were appropriate to look to the recitals to interpret the TSA, while the Debtors agree with the Receiver that the TSA generally is intended to benefit its members through the filing of a consolidated tax return, it cannot be argued by extension that each consolidated return must be prepared, and all decisions must be made, so as to maximize the benefit *to ABC* rather than other members of the tax group or the group as a whole. If this was the intent of the parties, such a provision could have been explicitly agreed as part of the TSA – although it is unclear why other members of the group would ever agree to such a provision.

41. Moreover, although the Fourth Recital contemplates that there be a computation of the amount a Member “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 also specifies that the intention of the parties is that this computation must “comply with the pro rata method as described in SFAS 109 and its interpretation and all consideration of regulatory accounting principles.” This intention is expressly incorporated into the TSA’s operative provisions: TSA § 1 provides that the computation of “Separate Member Tax” and “Separate Member Refund” are a function 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 [sic].” Under GAAP, separate company computations are governed by the elections and methods employed by the consolidated group. There are numerous elections, accounting method choices, and other variables inherent in the determination of a consolidated group’s tax liability generally. Often the party making the elections will be forced to make elections and

choices that will inure to the benefit of one group member and the detriment of another, or vice versa. Interpreting the Fourth Recital to require separate company computations to be governed by each member's own hypothetical optimal elections and methods (rather than the same elections and methods as the consolidated group actually chose) would lead to absurd results and would be impossible to administer. If this was the specific intent of the parties to the TSA, the TSA would need to include extensive provisions governing the procedures to determine a group member's hypothetical elections and how those would affect the rights of all group members. The TSA includes no such provisions. *To the contrary, it requires that GAAP principles be used, which principles mandate that the parent's elections control.* Advanta is prepared to introduce expert testimony to support this assertion.

iv. Other Claims

42. The only other theories for damages arising from the Tax Elections that the Receiver articulates in the Brief are vague and not supported by any authority or detail. The Receiver alleges that Advanta, by making the Tax Elections, “violated its fiduciary duties under the TSA” (Brief at ¶¶ 2, 44) and “exposed itself to a breach of contract claim and tort claims with damages of at least \$170 million” (Brief at ¶ 39). But the Brief does not explain what fiduciary duty Advanta has under the TSA, and does not even identify the torts supposedly committed by Advanta that give rise to a \$170 million claim. The Receiver moreover cites no authority to support its theories.

43. Indeed, applicable case law provides that a contractual relationship generally does not create fiduciary duties. *See, e.g., Kuroda v. SPJS Holdings, L.L.C.*, 2010 WL 925853, \*8 (Del. Ch. Mar. 16, 2010) (“Had defendants wanted everyone to enjoy a red rose of fiduciary duty, they should not have planted white roses of contractual obligations and now ask me to paint over them.”); *Prestancia Mgmt. Group, Inc. v. Virginia Heritage Foundation, II*

LLC, 2005 WL 1364616, \*6 (Del. Ch. May 27, 2005) (“The relationship between [the parties] was a bargained-for commercial relationship between sophisticated parties, a relationship that does not give rise to fiduciary duties.”).<sup>14</sup> There is nothing in the TSA to indicate the creation of any fiduciary duty or any departure from established law on the subject.

(2) *Any Harm to the Receiver Is Outweighed by the Harm to Advanta*

44. The harm to Advanta should the Automatic Stay be lifted and the Receiver be allowed to proceed with the filing of the Receiver Competing Returns is clear: should the Receiver Competing Returns be accepted by the IRS, a claim under the TSA against Advanta will be generated in an amount of up to approximately \$170 million, materially diminishing any recovery to creditors.

45. The harm to the Receiver from denying the Motion would not compare to the harm that granting the Motion would cause to Advanta. First, the Receiver would not be harmed by denying the Motion without prejudice to the ability of the Receiver to refile it after the Court has the opportunity to adjudicate all issues relating to the TSA and the Tax Elections because there are no IRS or other deadlines requiring the Receiver to file the Receiver Competing Returns prior to the adjudication of the TSA-related issues. Indeed, it is Advanta’s understanding that there is no remaining action to be taken by the IRS with respect to the Tax

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<sup>14</sup> Additionally, applicable case law clearly supports the notion that a parent has no fiduciary duty to its subsidiaries with respect to tax attributes. Indeed, Advanta owes no fiduciary duty to ABC to make or waive tax elections. It is well-established that a parent’s decision regarding allocation of tax savings among affiliated group members should be reviewed under the deferential business judgment rule. See *Meyerson v El Paso Natural Gas Co.*, 246 A.2d 789 (Del. Ch. 1967); *Case v. N.Y. Cent. R.R. Co.*, 204 N.E.2d 643 (N.Y. 1965); *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 197 F.2d 994 (9th Cir. 1951), *vacated on procedural grounds*, 345 U.S. 247 (1953). As a result of cases such as *Meyerson*, *Western Pacific*, and *Case*, a *per se* rule has evolved that a parent’s decisions concerning the allocation of tax savings among consolidated group members (including a parent’s entitlement to retain or take all tax savings for itself) is a business judgment with which courts generally will not interfere unless the evidentiary presumptions are overcome. See also *Marvel* 273 B.R. at 78-79 (applying business judgment rule to analysis of breach of fiduciary duty claims in connection with subsidiary’s entry into consolidated group tax sharing agreement).

Returns, given that the 2009 Return sought no refund and the 2008 Amended Return has already been processed by the IRS, with the reapplication of a refund previously received by Advanta. The Receiver has the same ability to file the Receiver Competing Returns in October as it does now.

46. Second, as previously discussed, the Tax Elections did not breach or create any claims under the TSA. The Receiver may regret ABC's entry into the TSA, but it should not be allowed to argue that it has suffered harm by virtue of its receipt of the full benefit it bargained for in the TSA.

(3) *The Probability of the IRS Accepting the Receiver Competing Returns Is Speculative*

47. Contrary to the Receiver's assertion, sections 6012(b)(3) and 6402(k) of the Tax Code and 26 C.F.R. § 301.6402-7 (the "**6402-7 Regulation**") do not impose on the Receiver a duty to file competing tax returns (Brief at ¶ 46), and the 6402-7 Regulation cannot reasonably be interpreted to give the Receiver the right to file competing tax returns for tax years for which the deadline for filing a tax return has passed prior to it becoming a fiduciary.

48. Section 6012(b)(3) of the Tax Code provides that a fiduciary of a corporation has the same obligation to file a tax return for the corporation as the corporation had. However, where a corporation is a subsidiary member of a consolidated group, the duty to file the group's tax return falls upon the parent rather than the subsidiary. *See* 26 C.F.R. § 1.1502-75(h)(1) ("The consolidated return shall be made on Form 1120 for the group by the common parent corporation.").

49. Furthermore, the 6402-7 Regulation is not operative until a fiduciary is authorized to act as a receiver or conservator for a financial institution. *See* 26 C.F.R. § 301.6402-7(a)(1), (b)(4). Interpreting the 6402-7 Regulation in a way that permits the Receiver

to file competing returns for taxable years for which the deadline for filing a tax return has passed, and even for taxable years that have otherwise closed, before the Receiver's appointment as receiver would create havoc in the tax system. Indeed, were this the correct interpretation of the 6402-7 Regulation, one would reasonably expect to find in the 6402-7 Regulation provisions governing the number of prior years to which such a right would apply, and the applicability of the statute of limitations with respect to such right, or some explicit recognition that the fiduciary's rights apply retroactively.<sup>15</sup> But such provisions do not exist. It is therefore inappropriate to read the 6402-7 Regulation in a manner that extends the Receiver's right to file competing tax returns to taxable years for which the deadline to file a tax return has passed before the Receiver's appointment as receiver.

50. Even if the 6402-7 Regulation is interpreted to permit a receiver to file a competing return for such tax years prior to the commencement of the receivership, the IRS has discretion not to accept competing returns. The Receiver provides no basis for its bald claim that the likelihood that the IRS will accept the Receiver Competing Returns is "very high" (Brief at ¶ 46). In fact, the IRS could easily reject the Receiver Competing Returns to avoid voluntarily paying an approximately \$54 million refund that it otherwise would be forced to pay, as well as on the merits. All either the Receiver or Advanta can do is speculate as to whether the IRS would accept the Receiver Competing Returns.

51. Furthermore, even if the IRS were to accept the Receiver Competing Returns and make a refund payment, this refund would belong to Advanta and not ABC because ABC relinquished any property rights that it had in refunds received by the Advanta consolidated

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<sup>15</sup> For example, the Treasury regulations governing tax-exempt organizations provide that tax-exempt status shall be retroactive to a corporation's date of incorporation if the corporation files IRS Form 1023 within 15 months following such date, but if the form is not filed within such period, tax-exempt status is effective only upon the filing. 26 C.F.R. § 1.508-1(a)(1), (2).

group when ABC entered into the TSA. Courts considering this issue have regularly and consistently found that where a parent and subsidiary have entered into a tax sharing agreement like the TSA, a debtor/creditor relationship, not an agent/principal relationship or a constructive trust, is created with respect to a tax refund. *See, e.g., Ochs*, 377 F.3d at 211 (finding that a debtor/creditor relationship existed, and that “a constructive trust was not warranted . . . because the relationship between the parties was governed by a written agreement”); *Franklin Sav. Corp.*, 159 B.R. at 29 (holding that an agreement between a parent and its subsidiary regarding tax liability led to the creation of a debtor/creditor relationship); *Team Financial*, 2010 WL 1730681, \*8-\*12 (same).<sup>16</sup> The result is that any refund paid by the IRS in respect of Advanta’s consolidated tax returns would belong to Advanta, and ABC could only assert an unsecured prepetition claim for any amounts to which it would be entitled under the TSA.<sup>17</sup>

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<sup>16</sup> As with the Receiver’s alleged claims in respect of the TSA, the Motion has implicated the dispute over ownership of any refund, but has not properly put the issue before the Court. If the issue becomes ripe for the Court’s adjudication, the Debtors will more fully brief the issue and develop the factual record.

<sup>17</sup> The Receiver’s authority in support of its argument that it is entitled to any refund because Advanta acts as its agent is not persuasive. *In re Bob Richards Chrysler-Plymouth Corp.*, 473 F.2d 262, 265 (9th Cir. 1973) (Brief ¶ 48), is a Ninth Circuit case that does not control in this jurisdiction, and involves a fact pattern that is in no way similar to the present one: the case did not put a tax sharing agreement at issue, but the court expressly noted that parties are “free to adjust among themselves the ultimate tax liability” by agreement, which undermines the Receiver’s argument that a principal-agent relationship is automatically created in such circumstances. Indeed, it is not clear why a principal would need its agent’s agreement as to its entitlement to a tax refund – under ordinary principles of the law of agency, instructions to its agent would be sufficient for any amounts due to be paid over. The Receiver further cites *BSD Bancorp, Inc. v. FDIC*, No. 93-12207-A11 (S.D. Cal. 1995) (Brief Ex. C), an unpublished decision in the Southern District of California (and, thus, having no precedential value even within its own jurisdiction), with facts that are wholly distinguishable from the facts at issue here. In *BSD Bancorp*, the court focused on the language that it interpreted as requiring the parent to give its subsidiary “its share of the refund immediately and in cash,” *id.* at 11, indicating that the parent was acting as a mere conduit for any funds actually received from the IRS. The TSA, on the other hand, envisions the obligation by Advanta to make a payment to its subsidiaries calculated with reference to a hypothetical Separate Member Refund (as such term is defined in the TSA).

### **III. Relief from the Automatic Stay Is Premature**

52. Relief from the Automatic Stay is premature in these early stages of the proceedings surrounding the TSA. Despite claims to the contrary, the Receiver has not shown that Advanta has breached the TSA by submitting the Tax Returns without electing the 2009 Five-Year Carryback. Further, and as discussed in detail above, there are no compelling reasons to grant the Motion and lift the Automatic Stay at this stage, given that the Receiver will not be prejudiced in any way should the various issues surrounding the TSA be finally resolved by the Court on the expedited schedule to which Advanta is prepared to agree. There are no looming deadlines, or in fact any deadlines whatsoever, relating to the IRS's review of the Tax Returns, nor is the Receiver subject to any deadline with respect to its filing of the Receiver Competing Returns. The deadline has already passed for making the elections relevant here. If, notwithstanding this, the Receiver were able to convince the IRS to accept different elections, the IRS would be accepting them late or, in effect, saying there is no deadline for the Receiver.<sup>18</sup> In either event, the Receiver would be unaffected by any deadline. On this basis alone, the Court should deny the Motion as premature.

#### **Conclusion**

53. Based upon the foregoing, Advanta submits that the relief requested in the Motion is not warranted by the facts, circumstances, or applicable law and the Motion should be denied. But in light of the concerns raised herein, if the Court grants the Motion, Advanta respectfully requests that the Court require the Receiver to include in its filing with the IRS of

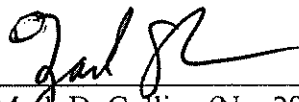
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<sup>18</sup> 26 U.S.C. § 301.6402-7(f) provides that the IRS, in its sole discretion, can adjust the common parent's properly-filed return or accept or adjust the competing return filed by the fiduciary. Accordingly, either the IRS requires that the Receiver's competing return has to have been timely filed, which is not possible since the filing deadline passed even before ABC was put into receivership, or the IRS determines that it is able to take the Receiver's competing return into account regardless of any filing deadline.

the Receiver Competing Returns a response to such filing prepared by Advanta so that the IRS may consider Advanta's arguments in determining whether to accept the Receiver Competing Returns.

WHEREFORE, Advanta respectfully requests that the Court deny the Motion in all respects, and grant such other and further relief as it deems just and proper.

Dated: May 28, 2010  
Wilmington, Delaware

  
\_\_\_\_\_  
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ATTORNEYS FOR  
DEBTORS AND DEBTORS IN  
POSSESSION

**EXHIBIT A**

**PROOF OF CLAIM NO. 2336**

<b>UNITED STATES BANKRUPTCY COURT</b> District of Delaware		<b>PROOF OF CLAIM</b>
Name of Debtor <b>Advanta Corp et al</b>		Case Number <b>09-13931 (KJC)</b>
<i>NOTE This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503</i>		
Name of Creditor (the person or other entity to whom the debtor owes money or property) <b>The Federal Deposit Insurance Corporation</b>		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim
Name and address where notices should be sent <b>McDermott Will &amp; Emery LLP 340 Madison Avenue New York, New York 10173-1922 Attn: Geoffrey T Raicht Telephone number (212) 547-5400</b>		<b>Federal Deposit Insurance Corporation 3501 Fairfax Drive Arlington, Virginia 22226 Attn: Dennis J Early (703) 562-2783</b>
Name and address where payment should be sent (if different from above) <b>McDermott Will &amp; Emery LLP 340 Madison Avenue New York, New York 10173-1922 Attn: Geoffrey T Raicht Telephone number (212) 547-5400</b>		<b>FILED - 02336 USBC FOR THE DISTRICT OF DELAWARE ADVANTA CORP., ET AL. 09-13931 (KJC)</b>
<b>1</b> Amount of Claim as of Date Case Filed <b>\$ See Attachment</b>		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars
If all or part of your claim is secured, complete item 4 below, however, if all of your claim is unsecured, do not complete item 4		<input type="checkbox"/> Check this box if you are the debtor or trustee in this case
If all or part of your claim is entitled to priority, complete item 5		<b>5</b> Amount of Claim Entitled to Priority under 11 U.S.C. §507(a) If any portion of your claim falls in one of the following categories, check the box and state the amount
<input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges		Specify the priority of the claim
<b>2</b> Basis for Claim <b>See Attachment</b> (See instruction #2 on reverse side)		<input type="checkbox"/> Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B)
<b>3</b> Last four digits of any number by which creditor identifies debtor _____		<input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. §507 (a)(4)
<b>3a</b> Debtor may have scheduled account as _____ (See instruction #3a on reverse side)		<input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. §507 (a)(5)
<b>4</b> Secured Claim (See instruction #4 on reverse side) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information		<input type="checkbox"/> Up to \$2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507 (a)(7)
Nature of property or right of setoff <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other		<input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. §507 (b)(8)
Describe _____		<input checked="" type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. §507 (a)(9)
Value of Property \$ _____ Annual Interest Rate _____%		Amount entitled to priority <b>See Attachment</b>
Amount of arrearage and other charges as of time case filed included in secured claim, if any \$ _____ Basis for perfection _____		<i>*Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment</i>
Amount of Secured Claim \$ _____ Amount Unsecured \$ _____		
<b>6</b> Credits The amount of all payments on this claim has been credited for the purpose of making this proof of claim		
<b>7</b> Documents Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary (See instruction 7 and definition of 'redacted' on reverse side)		
DO NOT SEND ORIGINAL DOCUMENTS ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING		
If the documents are not available, please explain _____		
Date <b>5/12/2010</b>	Signature The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.  <b>Tom Giffin, Receiver in Charge</b>	<b>FOR COURT USE ONLY</b>



Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571

# McDermott Will & Emery

Boston Brussels Chicago Düsseldorf London Los Angeles Miami München  
New York Orange County Rome San Diego Silicon Valley Washington D.C.  
Strategic alliance with MWE China Law Offices (Shanghai)

Nava Hazan  
nhazan@mwe.com  
212 547 5460

The Garden City Group, Inc  
Attn: Advanta Corp  
5151 Blazer Parkway, Suite A  
Dublin, OH 43017

May 13, 2010

Re: Advanta Corp. et al., Case No. 09-13931

Dear Sir or Madam

This office represents creditor the Federal Deposit Insurance Corporation in the above referenced matter. I am enclosing two original proofs of claim for the Federal Deposit Insurance Corporation, as well as a copy of each proof of claim. Please return the copies of the proofs of claim in the self-addressed postage-paid envelope as proof of receipt. Thank you.

Sincerely,



Nava Hazan

U.S. practice conducted through McDermott Will & Emery LLP

340 Madison Avenue, New York, New York 10017-4613 Telephone: 212 547 5400 Facsimile: 212 547 5444 www.mwe.com

NYK 1310472-1 084080 0019

**Attachment to Proof of Claim  
of The Federal Deposit Insurance Corporation**

Advanta Corp , *et al*  
Case No : 09-13931-KJC

**The Claimant**

1 This proof of claim (the "***Proof of Claim***") is submitted by the Federal Deposit Insurance Corporation (the "***FDIC***") in its capacity as receiver (the "***FDIC-R***") of Advanta Bank Corp , a state chartered Utah industrial bank that is headquartered in Utah ("***ABC***") The Federal Deposit Insurance Corporation (FDIC) is an independent agency created by the Congress, under 12 U S C § 1811 et seq , to maintain stability and public confidence in the nation's financial system by insuring deposits, examining and supervising financial institutions for safety and soundness and consumer protection, and managing receiverships The FDIC-R files this Attachment and Exhibits hereto in support of the Proof of Claim This Proof of Claim is submitted pursuant to 11 U S C § 501 and Rule 3001 of the Federal Rules of Bankruptcy Procedure

**Background and Summary of FDIC Claims**

2 This is a claim against Advanta Corp ("***Advanta***"), a debtor and debtor in possession in the above-captioned cases To the extent that Advanta was operating on a consolidated basis, the Claim, as defined below, may extend to additional debtors and debtors in possession in the above-captioned cases (the "***Debtors***") The FDIC-R reserves its rights to amend the Proof of Claim to assert the Claim, or any additional claims, against additional Debtors

3 The FDIC-R has multiple claims against Advanta, the bases of which are set forth in the summary chart below and detailed herein, in an unliquidated amount but which the FDIC-R believes at this time will be well in excess of \$200 million (the "***Claim***") Furthermore, the FDIC-R is entitled to superpriority or priority claim status with respect to a portion of the Claim, including but not limited to, relating to the avoidance and recovery of fraudulent transfers that are subject to 12 U S C § 1821(d)(17) (which rights are superior to even administrative claim expenses against Advanta's bankruptcy estate as provided under Title 11) and capital maintenance obligations under 11 U S C §§ 507(a)(9), 503 and/or 365(o)

4 Pursuant to 12 U S C § 1821(d)(2), the FDIC-R succeeds by operation of the law to the rights, titles, powers, and privileges, including legal claims, of ABC, and any stockholder, member, account holder, depositor, officer, or director of ABC Further, pursuant to 12 U S C § 1821(g), and notwithstanding any other provision of federal law, the FDIC-R is subrogated to all rights of any payment to any depositors upon either payment to depositors or the making of provisions for payment to the depositors of ABC This Claim is based in part on the FDIC-R's subrogated rights against Advanta for Advanta's failure to comply with regulatory requirements and applicable law The FDIC-R's claim against Advanta is based, in part, on Advanta's failure to adequately maintain the capitalization of ABC, which failure has damaged the FDIC in an unliquidated amount which the FDIC-R believes is in excess of \$7,000,000 The FDIC-R acts to protect insured depositors and creditors of ABC The claims set forth herein in large part arise

out of and relate to Advanta's actions by and through its agents, to direct ABC for the benefit of Advanta at the expense of ABC. In addition to the specific bases for the claims discussed below, Advanta is liable to ABC under various theories at law and in equity, including, without limitation, quantum meruit, quantum valebant, assumpsit for money lent, assumpsit for money had and received to the use of Advanta, unjust enrichment, and mutual mistake of fact, because in all instances, ABC provided money, goods and/or valuable services to Advanta for which ABC, under the foregoing principles, is entitled to be re-paid. Further, some or all of the claims set forth herein may be entitled to priority under, among other sections of chapter 11 of Title 11, 11 U.S.C. § 507.

**Summary of FDIC Claims**

<p><b>Tax Related Entitlements</b></p>	<p>Amounts undetermined at present relating to ABC's claims and rights against Advanta stemming from consolidated federal, state and local tax returns filed or to be filed by Advanta on behalf of, among others, ABC, including, but not limited to, any rights with respect to net operating losses. Significant amounts of federal, state and local tax related refunds that have been received by Advanta are outstanding or that may be sought in the future based on consolidated tax returns are due and owing to ABC and are therefore property of the ABC receivership and not the bankruptcy estates of Advanta or any other Debtors. The FDIC-R asserts that any refunds currently in the possession of Advanta (or which come into the possession of Advanta in the future) are not property of the bankruptcy estates but are being held in trust by Advanta for the benefit of ABC and/or the FDIC-R and are property of the FDIC-R. To the extent a court of competent jurisdiction finds that such tax refunds are not property of the FDIC-R or are not being held in trust and are determined to constitute property of the bankruptcy estates, the FDIC-R, in the alternative, asserts a priority or general unsecured claim for such tax refunds.</p>
<p><b>Capital Maintenance Obligations</b></p>	<p>Amounts undetermined at present relating to Advanta's failure to maintain adequate capitalization of ABC as required by applicable law, policies adopted by Advanta, regulatory requirements and contract (including claims for breach), which are subject to priority under 11 U.S.C. § 507(a)(9), 11 U.S.C. § 503 and/or 11 U.S.C. § 365(o). At this time, the FDIC believes it is owed at least \$7,000,000 with respect to this specific claim.</p>

<p><b>Claims Based on Avoidance and/or Recovery of Fraudulent Transfers</b></p>	<p>Amounts undetermined at present relating to claims based on the FDIC-R's rights to avoid and recover direct or indirect transfers of funds and property from ABC to Advanta or transferees of Advanta which constitute constructive or actual fraudulent transfers, obligations or payments to Advanta. These claims may be entitled to "superpriority" to the extent such claims fall under 12 U.S.C. § 1821(d)(17)(D). In the event such claims do not fall under 12 U.S.C. § 1821(d)(17)(D), these claims are general unsecured claims to the extent not deemed to have arisen after the filing of Advanta's chapter 11 petition. However, to the extent such transfers arose after the filing of Advanta's chapter 11 petition, these claims are entitled to administrative expense priority.</p>
<p><b>Tort Based Claims</b></p>	<p>Amounts undetermined at present relating to breaches of fiduciary duties, constructive fraud, negligence, and/or gross negligence of Advanta and/or the directors and officers of Advanta causing damage to ABC and the liability of Advanta in connection therewith. These claims are subject to administrative expense priority to the extent they arose after the filing of Advanta's chapter 11 petition. To the extent a court of competent jurisdiction finds that such claims are not entitled to administrative priority, in the alternative, the FDIC-R asserts that such claims should be entitled to either priority or general unsecured claim status.</p>
<p><b>Contract Based Claims</b></p>	<p>Amounts undetermined at present relating to breach of contract, breach of implied duty of good faith and fair dealing, and unjust enrichment due to Advanta's failure to adhere to the terms of the Tax Sharing Agreement, as defined below, and Advanta's failure to elect to carryback its 2009 net operating losses. The FDIC estimates that it is owed in excess of \$170 million on account of Advanta's breach of the Tax Sharing Agreement. This is an administrative, priority or general unsecured claim.</p>
<p><b>Setoff and Recoupment Claims</b></p>	<p>Amounts undetermined at present relating to rights of setoff or recoupment available under applicable law. The FDIC-R is investigating whether such claims may be available to it and/or ABC and expressly reserves all of its rights to assert such claims in the future. At present, the FDIC-R estimates that rights of setoff</p>

	and/or recoupment may be in excess of \$5.5 million
<b>Insurance Proceeds and Premium Refund Claims</b>	Insurance proceeds in an unliquidated and contingent amount and unearned premium refunds, to the extent paid by ABC, in an amount to be determined for various insurance policies. These monies are not property of the Debtors' estates but instead constitute property of the FDIC-R as ABC's receiver. Alternatively, to the extent that a court rules that less than all of the monies belong to the FDIC-R, the FDIC-R claims its share of such amounts that are held to be property of the Debtors' estates and incorporates these sums into this Proof of Claim.
<b>Litigation Recovery Claims</b>	Undetermined unliquidated claims as described herein

5 On November 8, 2009, Advanta and certain of its consolidated subsidiaries voluntarily filed petitions for relief under Chapter 11 of the United States Bankruptcy Code (11 U.S.C. §§ 101 *et seq.*). This Proof of Claim is submitted in Case No. 09-13931-KJC currently pending in the United States Bankruptcy Court for the District of Delaware (the "*Bankruptcy Court*").

6 On March 19, 2010, ABC was closed by the Utah Department of Financial Institutions. The FDIC was duly appointed as the Receiver of ABC. ABC was a directly held, wholly-owned subsidiary of Advanta. Advanta was ABC's holding company for purposes of applicable laws and regulations governing such holding companies.

**FDIC Claims**

7 TAX RELATED CLAIMS

a The FDIC-R asserts claims and rights against Advanta stemming from tax related issues arising from consolidated tax returns filed by Advanta on behalf of, among others, ABC ("*Tax Claims*"). Advanta is the common parent of an affiliated group, ABC among the members, that files consolidated returns for federal income tax purposes (the "*Group*") in conformance with a tax sharing agreement dated May 1, 1995 (the "*Tax Sharing Agreement*," attached hereto as Exhibit 1). The Group had consolidated net operating losses ("*CNOLs*") totaling \$8,123,872 and \$628,081,799 in its 2008 and 2009 taxable years, respectively. Under the Internal Revenue Code of 1986, as amended (the "*Code*"), net operating losses ("*NOLs*") may be carried back two years and carried forward 20 years to offset taxable income in such years. However, amendments to the Code that became effective on November 6, 2009 permitted NOLs arising in one taxable year of the taxpayer's choosing ending after 2007 and beginning before 2010 to be carried back three, four, or five years subject to certain conditions and limitations, at the election of the taxpayer (the "*five-year carryback*"). On March 14, 2010, Advanta e-filed the Group's 2009 consolidated tax return but did not elect the five-year carryback with respect to the Group's 2009 CNOLs (the "*2009 Tax Return*"). Instead, Advanta

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elected to waive the five-year carryback. In addition, Advanta filed an amended consolidated tax return for the 2008 taxable year electing the five-year carryback with respect to the Group's 2008 CNOL (the "2008 Tax Return")

b. Significant amounts of federal, state and local tax related refunds that have been received by Advanta, or are outstanding based on filed consolidated tax returns or returns to be filed, notably the 2008 Tax Return and 2009 Tax Return, are due and owing to ABC, and not Advanta or any other Debtors. A tax refund resulting from offsetting losses of one member of a consolidated filing group against the income of that same member in a prior or subsequent year inure to the benefit of that member, namely ABC. Allowing Advanta to retain any refunds arising from a subsidiary's losses simply because the parent and subsidiary chose a procedural device to facilitate their income tax reporting unjustly enriches the parent and is a breach of Advanta's contractual and fiduciary duties to ABC. Any amounts received by Advanta in connection therewith will be held in trust for ABC and would not constitute property of Advanta or any other Debtors or their respective bankruptcy estates

c. Pursuant to the Code or state tax laws, as applicable, ABC has an independent right to pursue, contest, compromise, or settle any tax related adjustment or deficiency relating to ABC.

d. ABC was a significant operating entity for Advanta and it was ABC that incurred significant losses which are the basis of pending tax refunds owed by the Internal Revenue Service, state and local tax authorities. All such refunds are property of ABC and not Advanta's estate by operation of the law notwithstanding the Tax Sharing Agreement. Upon information and belief, the tax refunds are significantly, if not entirely, attributable to the income and loss of ABC, and not Advanta or any other Debtors, and ABC's portion of the refund belongs entirely to the FDIC-R. Advanta's or any other Debtors' receipt of ABC's portion of tax related refunds should be immediately turned over to the FDIC-R, and the FDIC-R reserves all rights relating to its claim for turnover of such tax refunds.

e. Because the tax refund belongs to the failed ABC, to the extent that the Debtors claim an interest in this refund, it must pursue that claim through the receivership claims process prescribed by 12 U.S.C. § 1821 (d)(3) – (13). Unless the Debtors complete this process, this Court lacks jurisdiction over any issue relating to the tax refund. FDIC-R specifically reserves the right to litigate, prosecute, dispute, contest, compromise or settle any purported right of setoff or offset claimed by Advanta or any other Debtors relating to tax refunds in the proper venue under Title 12. The FDIC-R's claims and defenses are not subject to the jurisdiction of the bankruptcy court, but rather are independent property rights and claims that are subject to the exclusive jurisdiction under Title 12 and administrative hearings pursuant to 12 U.S.C. § 1821(d).

f. Without prejudice to any of the above, to the extent that a court of competent jurisdiction determines that all or a portion of the tax refunds are property of the Debtors' estates, ABC and/or the FDIC-R asserts a claim against Advanta or any other Debtors for tax related refunds owed to ABC as an administrative expense pursuant to 11 U.S.C. § 503, through setoff or otherwise, or as a priority or general unsecured claim.

8 ADVANTA'S CAPITAL MAINTENANCE OBLIGATIONS TO ABC

a FDIC-R's Claim arises in part from Advanta's obligation to maintain and guarantee the appropriate capital levels of ABC pursuant to applicable capital and liquidity requirements including, but not limited to, (i) the statutory and regulatory provisions set forth in 12 U.S.C. § 1831o and other regulations promulgated thereunder, (ii) that certain Agreement to Provide a Borrowing Facility and Assure Maintenance of Capital Levels, dated June 30, 2009, between Advanta and ABC (the "*Capital Maintenance Agreement*", attached hereto as Exhibit 2), and (iii) the Federal Deposit Insurance Corporation's Order to Cease and Desist against ABC, dated June 24, 2009 (the "*C&D Order*") (collectively, "*Capital Maintenance Claims*") The Capital Maintenance Claims are priority claims under chapter 11 of Title 11, including without limitation under 11 U.S.C. § 503, 11 U.S.C. § 507(a)(9) and/or 11 U.S.C. § 365(o) Among other things, Advanta failed to comply with the "prompt corrective action" provision as codified under the statutory and regulatory scheme set forth under 12 U.S.C. § 1831o which imposes a capital maintenance obligation and mandates cash infusions to ABC

b. Advanta's failure to, among other things, sufficiently maintain the appropriate capitalization of ABC damaged ABC in an unliquidated amount in excess of \$7,000,000

c Advanta's actions and/or omissions to take appropriate measures as well as Advanta's failure to adequately capitalize ABC based upon an accurate valuation of ABC's assets, contributed to and caused the lack of appropriate capitalization of ABC as required under applicable statutes and regulations in an amount to be determined based upon the FDIC-R's investigation and analysis under way

d The FDIC-R's claims based upon ABC's insufficient capitalization are entitled to priority pursuant to 11 U.S.C. § 503, 11 U.S.C. § 507(a)(9) and 11 U.S.C. § 365(o)

9 AVOIDANCE OF FRAUDULENT TRANSFERS FROM ABC

a Part of the FDIC's Claim arises from the FDIC's authority, as Receiver of ABC, to avoid and recover a transfer of any interest of an institution-affiliated party or any "persons" that the FDIC-R determines is a debtor of ABC, any transfer of any interest or obligation in property that may have been made with the intent to hinder, delay, or defraud ABC, the FDIC-R or any other appropriate Federal Banking agency within five years of the date of appointment of the FDIC as Receiver of ABC pursuant to 12 U.S.C. § 1821(d)(17) Subject to the FDIC-R's ongoing investigation, the FDIC-R may be entitled to avoid and recover property fraudulently transferred, including any interests of Advanta as either an "institution affiliated party" or a "debtor" In this respect, the FDIC-R's rights under Section 1821(d)(17) are superior to any rights of a trustee or any other party (other than any party which is a Federal agency) under Title 11 or the powers given Advanta 12 U.S.C. § 1821(d)(17)(D) As such, the FDIC-R may have a statutory "superpriority" to recover all fraudulently conveyed transfers subject to that statute over all other creditors of Advanta The FDIC-R reserves all rights to recover the property transferred, or, if a court so orders, the value of such property (at the time of such

transfer) from the initial transferee, the institution-affiliated party, or the person for whose benefit the transfer was made, or from any immediate or mediate transferee of any such initial transferee 12 U S C § 1821(d)(17)(B)

b Further, and subject to FDIC-R investigations related hereto, the FDIC-R's Claim may also include and be based on its authority under applicable state law enactments of the Uniform Fraudulent Transfer Act, successor statute to the Uniform Fraudulent Conveyance Act including the Delaware Uniform Fraudulent Transfer Act (6 Del C §§ 1301 *et seq*), the Utah Uniform Fraudulent Transfer Act (Utah Code Ann §§ 25-6-1 *et seq*), and the Pennsylvania Fraudulent Transfer Act (12 Pa C S §§ 5101 *et seq*) to avoid and recover (among other things) transfers or obligations within the statutory reachback period set forth in such state statutes (the "*State UFTAs*") The FDIC-R has standing to assert a claim against Advanta under the State UFTAs since it succeeds to the rights of ABC as a creditor under state law pursuant to 12 U S C § 1821(d)(2)(A) More specifically and without limitation, to the extent the FDIC-R's Claim includes transfers subject to State UFTAs, the FDIC-R has standing to avoid and recover transfers pursuant to 12 U S C § 1821(d)(2) which provides that the FDIC-R succeeds to all rights of the institution and any depositors of the institution Accordingly, the FDIC-R is a "creditor" and has rights against various "debtors" including Advanta as those terms are defined in the State UFTAs

c Actual Fraud Advanta may have engaged in actual fraud with respect to its decision to waive the five year carryback of the 2009 NOLs for its 2009 Tax Return The interests and the assets in the transfer, namely ABC's NOLs, subject to State UFTAs, were retained and controlled by Advanta with respect to such transfers as the controlling holding company and parent of ABC The transfer intentionally "hindered," "delayed," and "obstructed" ABC's recovery of monies rightfully owed to it by Advanta and involved significant and substantial assets of ABC.

d. Constructive Fraud Under the State UFTAs, ABC may also have a claim against Advanta for "constructive fraud" because Advanta incurred obligations without receiving "reasonably equivalent value" and Advanta was insolvent at the time, or was rendered insolvent by the subject obligations and transfers Reasonably equivalent value may not have been received by Advanta as to the transfers subject to the State UFTAs as further described in this Claim

e. Based on the foregoing statutes, the FDIC-R may be entitled to avoid and recover an unliquidated amount of assets transferred from ABC to Advanta and/or other Debtors

## 10 TORT CLAIMS

a ABC's claims (and therefore the FDIC-R's Claim) are also based upon the breaches of fiduciary duties, constructive fraud, negligence, and/or gross negligence of Advanta and/or the directors and officers of Advanta causing damage to ABC and the liability of Advanta in connection therewith Such directors and officers may have failed to meet their lawful obligations to act in the best interests of ABC, including, but not limited to, waiving the five-year carryback of the 2009 NOLs, refusing to adequately capitalize ABC, failing to recognize the conflicts of interest faced by dual executives of Advanta and ABC and taking action that resulted

in losses to ABC. These claims are subject to administrative expense priority to the extent they arose after the filing of Advanta's chapter 11 petition

11 CONTRACT CLAIMS.

a The FDIC-R asserts claims against Advanta stemming from its breach of the Tax Sharing Agreement, including breach of the express terms of the Tax Sharing Agreement, breach of the implied duty of good faith and fair dealing, and unjust enrichment. Advanta's decision to waive the five-year carryback for its 2009 Tax Return breached the express terms of the Tax Sharing Agreement. Additionally, Advanta failed to act in good faith when it intentionally chose an action that harmed ABC, namely the decision to waive the five-year carryback for the 2009 NOLs.

b Had Advanta elected the five-year carryback for its 2009 Tax Return, ABC would have had a \$170 million general unsecured claim against Advanta. This \$170 million is comprised of the \$54 million tax refund that ABC was deprived of in 2009, in addition to \$116 million as repayment for cash advanced by ABC to finance the Group's tax payments in the previous years.

c The FDIC-R and/or ABC also asserts breach of contract claims against Advanta in unliquidated amounts with respect to Advanta's failure to capitalize and comply with the Capital Maintenance Agreement and/or the C&D Order.

12. INSURANCE PROCEEDS AND PREMIUM REFUND CLAIMS

a Prior to the receivership, Advanta purchased insurance policies for which ABC was, at least in part, a named insured or an intended beneficiary (the "*Insurance Policies*") To the extent that ABC has suffered a covered loss within the meaning of the relevant Insurance Policies, the FDIC-R is entitled to all proceeds paid under applicable insurance coverage for such loss (the "*Insurance Proceeds Claims*") The FDIC-R also has succeeded to rights, claims and causes of action by ABC against directors, officers, and professionals and others who provided services to ABC. The FDIC-R reserves all of its rights and remedies in and to any Insurance Policies potentially covering the FDIC-R's claims against such persons and entities, including policies pursuant to which Advanta or ABC are insureds or additional insureds. Without limiting the foregoing, the FDIC-R claims any proceeds under the applicable Insurance Policies for insured wrongful acts that caused harm in any respect to ABC. To the extent that proofs of loss have been or may be filed with respect to such matters with the relevant insurer, the FDIC-R hereby claims any payments in respect of such loss, which are not property of Advanta's estate and, to the extent paid to Advanta, are held in trust for the FDIC-R as the rightful recipient thereof. The FDIC-R claims and reserves the right to tender to the insurers any insured matter that has been or may be asserted against ABC.

b Upon receipt of any and all unearned premiums (the "*Insurance Premium Refunds*"), if any, the FDIC-R is the rightful legal owner of ABC's share of Insurance Premium Refunds to the extent that such premiums were paid by ABC and therefore, such monies are not property of Advanta's estate. The FDIC-R reserves its right to petition the appropriate court for the

entry of any order directing the release and turnover of such Insurance Premium Refunds to the FDIC-R.

13 INSURANCE PROCEEDS

a Prior to the receivership, Advanta and/or ABC purchased insurance for which ABC was, at least in part, a named insured, additional insured, joint insured or an intended beneficiary. Such insurance includes, without limitation, the following:

<u>COMPANY</u>	<u>POLICY NO.</u>
AIG/National Union Fire Ins Co of Pittsburgh, PA	01-825-19-85/00-478-59-65
Berkley Regional Ins Co	BFI 7000061-09
Zurich/Fidelity and Deposit Co of MD	0006576 02
Ace/Westchester Fire Ins Co	DOX G24580490 001
Axis Ins Co	MNN 714088/01/2008
Axis Ins Co./Fireman's Fund Ins Co of Wisconsin	MNN 714089/01/2008
Chubb Group/Federal Ins Co	6804-5991
AIG/National Union Fire Ins Co of Pittsburgh, PA	00-538-95-70
Hooghuis Group LLC/Hudson Ins Co.	HN-0303-2239
Catlin Ins Co Inc	XSP-95767-0609
Catlin Ins Co Inc	XSP-91773-0608
XL Specialty Ins Co	ELU105068-08
Lloyds, London/Marsh Ltd	QA032909(1)
Catlin Specialty Ins Co	XSP-95766-0609
ACE/Westchester Surplus Lines Ins Co	G24074523 001
Everest Indemnity Ins Co	FL5EE00028-091
Indian Harbor Inc Co	ELU111652-09

Lloyds, London/Marsh Ltd	QA33208
Lloyds, London/Marsh Ltd	QA33108
AIG/National Union Fire Ins Co of Pittsburgh, PA	00-571-04-63
Lloyds, London/Marsh Ltd	QA076408

b The FDIC-R is continuing its investigation into the extent to which ABC was the entity that paid the premiums, directly or indirectly, with respect to any such Insurance Policies as to which there is unearned premium and asserts a claim to ownership of all such amounts to the extent that the source of the premium payments was ABC

c To the extent that a covered loss within the meaning of the relevant Insurance Policies has been suffered by ABC, the FDIC-R is entitled to all proceeds paid under applicable insurance coverage for such loss. Without limiting the foregoing, the FDIC-R claims any proceeds under the applicable Insurance Policies for insured wrongful acts that caused harm in any respect to ABC

d To the extent that notices of circumstances, claims and/or proofs of loss have been or may be submitted or filed with respect to such matters with the relevant insurer, the FDIC-R hereby claims any payments in respect of such loss, which are not property of the Debtors' estates and, to the extent paid to the Debtors, are held in trust for the FDIC-R as the rightful recipient thereof

e Alternatively, if a court were to hold that less than all of the foregoing monies belong to the FDIC-R, then in the alternative the FDIC-R asserts a claim for its share of such amounts from whatever monies are held to be the property of the Debtors' estates

f The FDIC-R reserves the right to tender to the insurers any insured matter that has been or may be asserted against the receivership notwithstanding any claim that proceeds under such Insurance Policies are, in whole or in part, property of the Debtors' estates

g The FDIC-R also has succeeded to rights, claims and causes of action by ABC against directors, officers, and professionals and others who provided services to ABC. The FDIC-R reserves all of its rights and remedies in and to any Insurance Policies potentially covering the FDIC-R's claims against such persons and entities including policies pursuant to which the Debtors or ABC are insureds or additional insureds

h To the extent that Advanta is the designated insured to give and receive notices to the insurer under the Insurance Policies and fails to give timely or proper notice to the insurer of potential losses to which ABC would be entitled under the Insurance Policies or to ABC and coverage is denied as a result, ABC reserves the right to tender additional claims against Advanta for those losses

1 Without limiting the foregoing, the FDIC-R is aware of a notice of claim submitted by Advanta on behalf of ABC to its insurers prior to the receivership seeking to recover \$35 million in restitution paid by ABC in accordance with a Cease & Desist Order dated June 24, 2009. The FDIC-R hereby asserts its right to any insurance proceeds that may be paid out for this claim and that such insurance proceeds are not part of the Debtors' estates.

#### 14 LITIGATION CLAIMS

a. The FDIC-R has or may have claims based upon breaches of fiduciary duties, breach of contract and/or negligence by Advanta and/or directors and officers of Advanta or ABC to ABC, including any liability of the Debtors in connection therewith. Such directors and officers may have breached their fiduciary duties and/or otherwise failed to meet their lawful obligations or to act in the best interests of ABC, including but not limited to,

- Failure to adhere to applicable laws and regulations
- Failure to heed warnings of bank supervisory authorities
- Failure on the part of the directors to exercise adequate supervision over the Bank's officers and employees
- Failure to scrutinize insider transactions
- Failure to utilize acceptable accounting methods
- Failure to establish appropriate loan loss reserve levels and methodology
- Failure to establish adequate debtor repayment programs
- Failure to establish or follow adequate collection procedures
- Permitting conflicts of interest to the detriment of ABC
- Failure to properly manage ABC's liquidity
- Extensions of credit to borrowers who were not creditworthy or were known to be in financial difficulty
- Extensions of credit based on inadequate or inaccurate information concerning the financial condition of prospective borrowers
- Failure to employ sound internal controls
- Failure to supervise, manage, conduct and direct the business and affairs of the bank to insure compliance with the law, the by-laws of ABC, and safe, sound prudent principles of banking
- Permitting unsafe and unsound concentrations of credit

- Misstatements of financial reports and statements of condition
- Payment of imprudent cash bonuses or dividends

These areas are currently under investigation by FDIC-R and are believed to arise out of a number of decisions and/or transactions, which have caused or may cause a loss to ABC, in an amount to be determined

b Further, to the extent that officers or directors (or any other persons as to whom the Debtors owe a duty of indemnification or advancement) assert claims against the FDIC-R for indemnification or advancement, the FDIC-R asserts a claim for reimbursement of such amounts against the Debtors

c. The FDIC-R also asserts an unliquidated claim for indemnity or contribution to the extent that ABC is entitled to assert such claims against the Debtors with respect to any pending or future litigation in which ABC or the FDIC-R is or may be a named defendant

d To the extent any governmental authority obtains or enters an order directing restitution for the criminal or otherwise wrongful acts of the officers or directors of ABC, such orders are for the benefit of the FDIC-R as successor to ABC. If the Debtors receive any payment in respect of such an order, they shall hold such amounts in trust for ABC, and the FDIC-R demands that such funds be turned over to the receivership estate

#### 15 SETOFF AND RECOUPMENT CLAIMS

a The FDIC-R believes that it and/or ABC may have valid rights of Setoff and/or Recoupment against Advanta under applicable law including, but not limited to, 12 U.S.C. § 1822(d). The FDIC-R is investigating the extent to which such claims may be available. The FDIC-R expressly reserves all of its rights with respect to such claims.

b At the present time, the amounts of such rights of setoff and/or recoupment are unknown. However, the FDIC-R estimates that the claims of setoff and/or recoupment may be in excess of \$5.5 million. By way of a single example, the FDIC-R believes that it may be entitled to setoff or recoup \$1.469 million in refunds with respect to the 2008 Tax Return.

#### RESERVATION OF RIGHTS

1 Neither this Proof of Claim, nor any subsequent appearance, pleading, claim, document, suit, motion nor any other writing or conduct, shall constitute a waiver or consent by the FDIC of any: (a) rights to Sovereign Immunity when the FDIC is acting in its capacity as Receiver, (b) right to have any and all final orders in any and all non-core matters entered only after de novo review by a United States District Court Judge, (c) right to trial by jury in any proceeding as to any and all matters so triable therein, whether or not the same be designated legal or private rights, or in any case, controversy or proceeding related hereto, whether or not such jury trial right is pursuant to statute or the United States Constitution, (d) right to have the reference of this matter withdrawn by the United States District Court in any matter or

proceeding subject to mandatory or discretionary withdrawal, or (e) other rights, claims, actions, defenses, setoffs, recoupments or other matters to which this party is entitled under any agreements or at law or in equity or under the United States Constitution. All of the above rights are expressly reserved and preserved without exception and with no purpose of conceding jurisdiction in any way by this filing or by any other participation in this matter. The FDIC expressly reserves all rights at law and equity to assert that the preemption of the Bankruptcy Court's jurisdiction and the exclusive jurisdiction provided under Title 12 and applicable with respect to the FDIC.

2 The FDIC reserves the right to amend, modify and supplement this Proof of Claim in any manner whatsoever, including, without limitation, the right to assert administrative claims and priority claims under Sections 503 and 507 of the Bankruptcy Code, to assert indemnity or contribution claims, to assert post-petition claims (including legal costs and expenses), to file additional Proofs of Claim for additional claims, and to assert without limitation, any claim to which the FDIC might be entitled, at law or in equity. The FDIC specifically reserves all rights to setoff against Advanta any interests that are subject to setoff under Section 553 of the Bankruptcy Code. Accordingly, the FDIC asserts and reserves all of its rights, if any, to setoff any sums due to Advanta against sums due to the FDIC by Advanta.

3 Currently pending before the Bankruptcy Court is an adversary proceeding, case number 10-50795 (the "*Tax Litigation*"), consisting of an Amended Complaint by Advanta Bank Corp. against Advanta Corp. (docket no. 8) and an Emergency Motion of Plaintiff Advanta Bank Corp. for Declaratory and Injunctive Relief in Connection with Its Amended Complaint (docket no. 9). The Tax Litigation was commenced prior to the FDIC's appointment as receiver of ABC and involves certain Tax Claims. The Tax Litigation is an ongoing procedure and the FDIC retains certain rights in connection therewith. The FDIC-R expressly reserves all of its rights, claims (at law and equity) and remedies in connection with the Tax Litigation, including the right to amend the complaint and assert any additional claims that the FDIC-R believes to be just and proper. Nothing in this Proof of Claim shall be deemed a waiver of any right, claim or remedy in connection with the Tax Litigation.

4 The FDIC-R's investigations and review of ABC's and Advanta's books and records (most of which were neither created nor maintained by the FDIC) are ongoing and the FDIC-R and its professional advisers have not yet had a sufficient opportunity to evaluate and determine all claims that the FDIC-R may have against Advanta including those relating to the FDIC-R's tax entitlements and damages caused by the undercapitalization of ABC and breaches of Advanta's obligations and duties in connection therewith. As such, this Claim is filed upon information and belief, and the FDIC-R also reserves the right to further amend, revise, or supplement this Proof of Claim in any respect, and to file such additional claims and requests for payment including, but not limited to, other priority and administrative claims for damages caused by Advanta that arises pre and post-petition.

5 The FDIC-R specifically reserves any rights at law or equity that the FDIC-R has or may have against Advanta or any other entity, person or persons, including *inter alia*, the insiders, directors or officers of Advanta.

6. This Proof of Claim is not intended to be, and shall not be construed as (a) an election of remedies, (b) a waiver of any right to the determination of any issue or matter by a jury; (c) a waiver of any defaults, or (d) a waiver or limitation of any rights at law or equity, remedies, claims or interests of the FDIC-R

7 Copies of various documents in support of this Claim are not attached hereto due to the voluminous nature of such documents and the relevant provisions are described herein Further, a significant portion of such documents should be in the possession of Advanta and/or are matters of public record

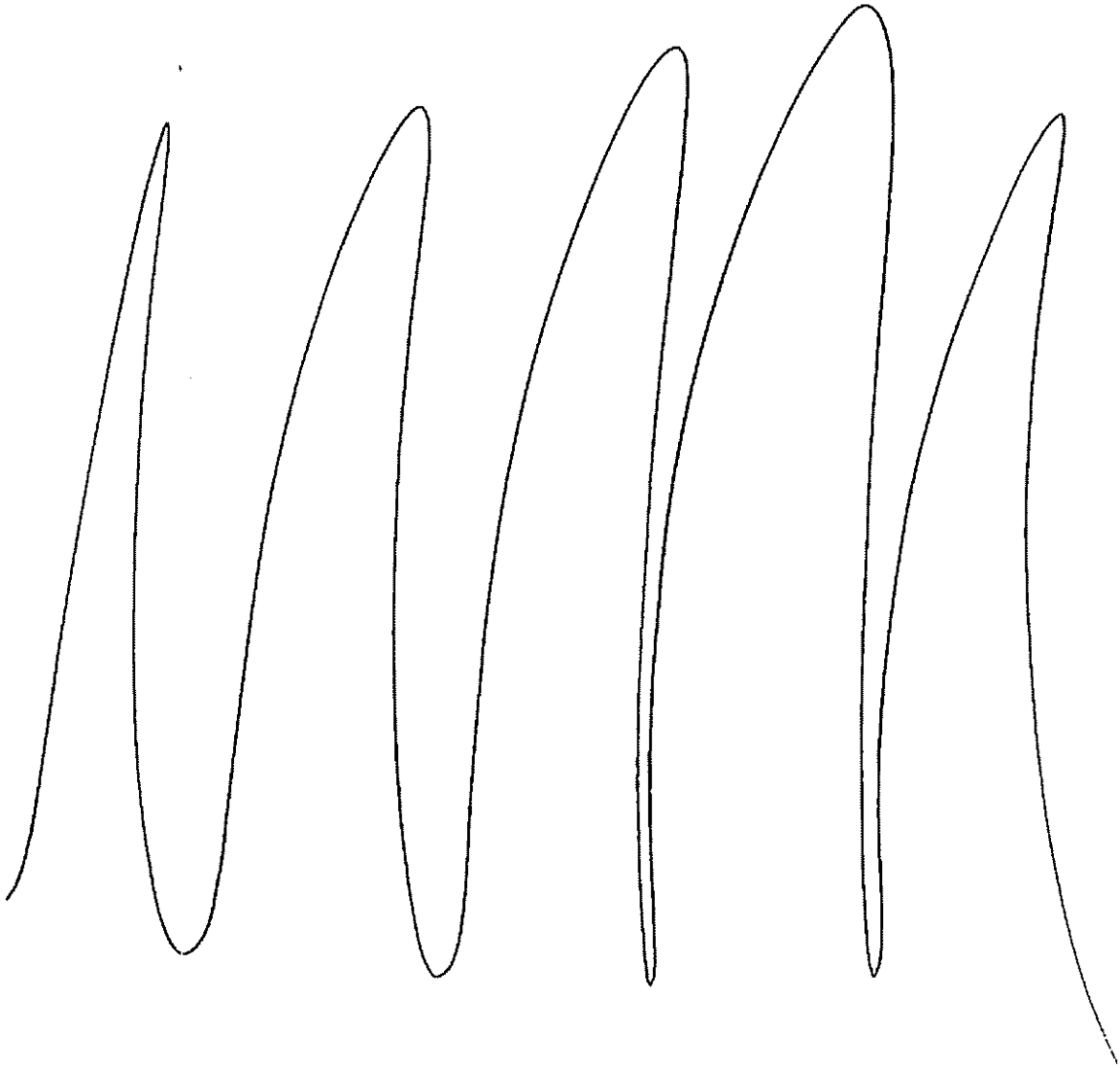
**NOTICES AND REQUESTS FOR DOCUMENTS AND FDIC REPRESENTATION**

All notices and requests for documents to the FDIC-R relating to this Claim shall be served upon.

Dennis J Early, Esq Counsel - Legal Division Federal Deposit Insurance Company 3501 Fairfax Drive Arlington, VA 22226-3500 DEarly@FDIC.gov	Geoffrey T. Raicht, Esq c/o McDermott Will & Emery LLP 340 Madison Avenue New York, NY 10173-1922 Telephone (212) 547-5400 Facsimile (212) 547-5444 graicht@mwe.com
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The claims herein include (1) claims to funds that may be held by third parties, (2) claims to funds that are held by Advanta or subject to express or equitable trust, (3) general unsecured claims, and (4) administrative and priority claims. Based on the state of the records currently available to the FDIC-R, on the fact that many records were not available to the FDIC-R at the time of preparation and filing of this Proof of Claim, and on information derived from various records reviewed, it is possible that certain assets which Advanta asserts to own in its schedules or otherwise, may in fact be owned by the FDIC-R, and may not be property of the Debtors' estates. The FDIC-R is investigating the circumstances as thoroughly and expeditiously as possible. The FDIC-R hereby asserts its claim to such assets and will submit more specific claims as soon as information is made available in order to evaluate, ascertain and determine specific ownership interests

Exhibit 1



## TAX SHARING AGREEMENT

This Fourth Amended and Restated Tax Sharing Agreement, made this 15<sup>th</sup> 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. Greenawald  
Richard A. Greenawald, President

Attest Gene S. Schneyer  
Gene S. Schneyer, Secretary

Date 12/11/95

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

By Charles Podowski  
Charles Podowski, President

Attest Ronald J. Souder  
Ronald Souder, Secretary

Date 12/11/95

Amendment and Adoption

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

Paragraph four (4) shall state:

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

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

ADVANTA Corp.

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

Attest: \_\_\_\_\_  
Gene S. Schneyer

Date: \_\_\_\_\_

Colonial National Financial Corp.

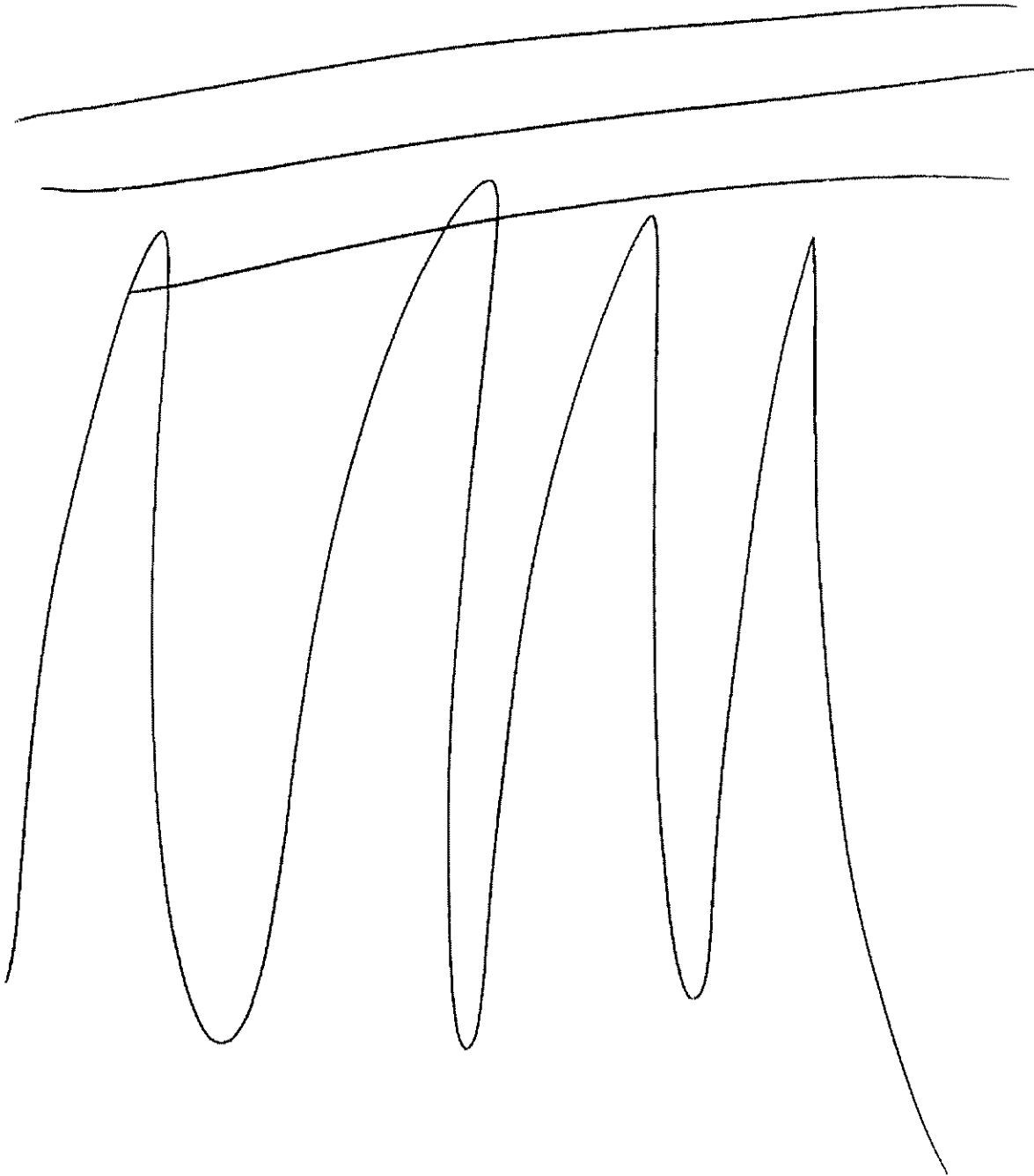
By: John L. Richards  
John L. Richards, President

Attest: Julie Boyle  
Julie Boyle

Date: 5/18/93

(enacted)

Exhibit 2





Advanta  
Corporation  
11850 S Election Road  
Draper, UT 84020  
801.571.5000  
www.advanta.com

Dated as of June 30, 2009

Advanta Bank Corp.  
11850 S Election Road  
Draper, UT 84020

**RE: AGREEMENT TO PROVIDE A BORROWING FACILITY AND ASSURE  
MAINTENANCE OF CAPITAL LEVELS, Effective as of June 30, 2009**

Gentlemen

This letter agreement, effective as of June 30, 2009, amends all prior debt obligations referenced herein and supersedes all prior borrowing facilities, including any amendments thereto, between Advanta Corp ("Advanta") and Advanta Bank Corp ("ABC").

Whereas Advanta wishes to assure maintenance of certain capital levels at ABC by providing as necessary for forgiveness of amounts payable by ABC to Advanta under and subject to the terms of this letter agreement, and

Whereas, from time to time, ABC wishes to obtain short-term advances from Advanta under and subject to the terms of this letter agreement

Now, therefore, intending to be legally bound, the parties agree as follows

I Capital Maintenance

Advanta hereby agrees to forgive all or a portion of amounts payable by ABC to Advanta with respect to certain debt obligations specified below for the purpose of maintaining ABC's minimum capital ratio requirements. The maximum combined amount of debt forgiveness permitted under Sections I and II of this letter agreement shall not exceed \$25,000,000.

To assure compliance with the capital requirements imposed by paragraph 4(b) of the Federal Deposit Insurance Corporation's Order to Cease and Desist against ABC, dated June 30, 2009 (the "Order"), ABC will be relieved of its obligations to repay all or a portion of any amounts payable by ABC to Advanta for intercompany advances, reimbursements, fees and charges ("Intercompany Advances") under General Ledger Account Number 353900 (with an account balance of \$11,573,283 as of May 31, 2009), as necessary so that at all times, ABC maintains the capital levels required under the Order. ABC's obligations to repay Advanta for Intercompany Advances will be waived

and forgiven, to the extent, and only to the extent, such amounts are required to maintain the minimum capital ratio levels set forth in the Order

In the event that ABC remains unable to maintain the minimum capital ratio requirements set forth in the Order after waiver and forgiveness of all amounts payable by ABC to Advanta for Intercompany Advances, ABC will thereafter be relieved of its obligations to repay all or such portion of any funds on deposit in the Settlement Account ("Settlement Account Advances") established in Section 2(b)(iii) of the Receivables Purchase and Servicing Agreement between ABC and Advanta, dated June 29, 2005 (as amended) in the same manner as described above in order to assure that at all times, ABC maintains the capital levels required under the Order. ABC's obligations to repay Advanta for Settlement Account Advances will be waived and forgiven, to the extent, and only to the extent, such amounts are required to maintain the minimum capital ratio requirements set forth in the Order.

## II Borrowing Facility (Uncommitted)

Advanta hereby agrees to provide ABC with an unsecured working capital line of credit for the purpose of funding ABC's short-term interim cash needs. ABC recognizes that the Borrowing Facility is uncommitted and Advanta may choose, in its sole discretion, to delay or deny funding of any request for advances except that Advanta may not delay or deny any request or advances or debt forgiveness necessary to assure maintenance of minimum capital levels referenced herein, provided such amount in total shall not exceed \$25,000,000. The maximum amount available on this line is \$10,000,000. This facility will be available to ABC until December 31, 2009 and may be renewed for an additional six months with affirmation approval from both parties as set forth below.

Approval of this borrowing facility and affirmation approval of any renewal of this borrowing facility for an additional six month period shall be evidenced by the execution of a Master Promissory Note substantially in the form of Exhibit A attached hereto. Advances will be on the terms set forth in the Master Promissory Note and on such other terms as are mutually agreed upon from time to time and confirmed in writing.

Interest on advances will accrue from the date of the advance. The interest rate in effect from the date of the advance to the first Interest Reset Date (as defined below), will be the initial interest rate. Thereafter, the interest rate for each advance will reset monthly on the 15<sup>th</sup> day of each month that the advance is outstanding (the "Interest Reset Date"). On each Interest Reset Date, the interest rate will be the Prime Rate for the day that is two (2) business days prior to the Interest Reset Date, as reported on Bloomberg. Interest will be payable monthly in arrears on or before the third business day of the month or at the time of repayment or partial prepayment of principal, provided, however that to the extent interest is not paid monthly it shall be deemed to be an additional advance of principal hereunder.

Unless otherwise set forth below and in Master Promissory Note, principal and accrued interest must be repaid on or before the Maturity Date, in accordance with the terms of

the Master Promissory Note. Prepayments may be made at any time prior to the Maturity Date without penalty.

In the event that ABC is unable to maintain the minimum capital ratio requirements set forth in the Order after waiver and forgiveness of all amounts payable by ABC to Advanta for Intercompany Advances and Settlement Account Advances pursuant to Section I of this letter agreement, ABC will thereafter be relieved of its obligations to repay funds drawn under the Master Promissory Note ("Master Promissory Note Advances") as necessary to assure that at all times, ABC maintains the capital levels required under the Order. ABC's obligations to repay Advanta for Master Promissory Note Advances will be waived and forgiven, to the extent, and only to the extent, such amounts are required to maintain the minimum capital ratio requirements set forth in the Order.

### III Additional Capital Contribution

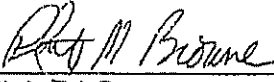
In the event that ABC is relieved of its obligations to repay any Intercompany Advances, Settlement Account Advances, or Master Promissory Note Advances (collectively, the "Additional Capital Contribution") owed to Advanta in order to comply with its capital ratio requirements, such funds shall immediately convert into a capital contribution of Advanta to ABC and be reflected as such on the books and records of each party. Before July 31, 2009, ABC shall deliver to Advanta an officer's certificate stating the Additional Capital Contribution as of June 30, 2009, if any, and documenting the amount of such Additional Capital Contribution attributable to forgiveness of Intercompany Advances, Settlement Account Advances, and Master Promissory Note Advances.

IV Miscellaneous

In the event of a conflict between this letter agreement and the Master Promissory Note, the terms of the Master Promissory Note shall govern

Each of the undersigned parties has caused this letter agreement to be duly executed by a duly authorized representative, all as of the date first written above

Advanta Corp

By   
Philip M Browne  
Senior Vice President and Chief Financial Officer

Accepted and Agreed

Advanta Bank Corp

By   
Name Ken Goldman  
Title Chief Financial Officer

Exhibit A

MASTER PROMISSORY NOTE

Amount \$10,000,000 (subject to the  
terms and conditions  
described herein)

Dated as of June 30, 2009

For value received, Advanta Bank Corp (the "Borrower") hereby promises to pay to the order of Advanta Corp. (the "Parent"), the principal amount of all advances made by the Parent to the Borrower, plus interest accruing thereon, under the terms of this Master Promissory Note. The aggregate principal amount of all advances made and outstanding hereunder aggregated with any advances outstanding under any other lines of credit between the Borrower and the Parent shall at no time exceed TEN MILLION DOLLARS (\$10,000,000).

The Borrower hereby authorizes the Parent to accept written, facsimile (fax) or e-mail instructions from the Borrower's President, Chief Financial Officer or Treasurer or their designees. Advances to the Borrower shall be credited to the Borrower's DDA account referenced below. Advances may be repaid in whole or in part at any time prior to the Maturity Date without penalty. All principal repayments and interest payments hereunder shall be evidenced by the actual crediting of funds to the Parent's account referenced below.

Advances to the Borrower will be paid from the Parent's account at

Advanta Bank  
ABA# 031100212  
Advanta Corp  
Account # 10502771-04

The Borrower requests that, unless otherwise stated, Advances be paid to the Borrower's account at

Advanta Bank Corp  
ABA# 124384848  
Draper, UT  
Credit Advanta Bank Corp

The Parent requests that all repayments and interest payments be made to its account at

Advanta Bank  
ABA# 031100212  
Credit Advanta Corp  
Account # 10502771-04

Interest on advances will accrue from the date of the advance. The interest rate in effect from the date of the advance to the first Interest Reset Date (as defined below), will be (a) the Prime Rate for the day that is two (2) business days prior to the 15<sup>th</sup> day of the month prior to the date of the advance, as reported on Bloomberg, or (b) if the advance occurs between the 15<sup>th</sup> day and the last day of a month then the Prime Rate for the day that is two (2) business days prior to the 15<sup>th</sup> day of the month in which the advance is taken, as reported on Bloomberg. Thereafter, the interest rate for each advance will reset monthly on the 15<sup>th</sup> day of each month that the advance is outstanding (the "Interest Reset Date"). On each Interest Reset Date, the interest rate will be the Prime Rate for the day that is two (2) business days prior to the Interest Reset Date, as reported on Bloomberg.

Interest will be payable monthly in arrears on or before the third business day of the month or at the time of repayment or partial prepayment of principal, provided, however that to the extent interest is not paid monthly it shall be deemed to be an additional advance of principal hereunder. Interest on advances shall accrue from the date the advance is credited to the Borrower's account until the day immediately preceding repayment. Interest shall be computed on the basis of a year consisting of 365 days and paid for actual days elapsed. Under this Master Promissory Note, advances, repayments of principal and interest on the advances shall be made in immediately available funds.

Prepayments may be made at any time prior to the Maturity Date without penalty.

If and only if after all amounts payable by Borrower to Parent for intercompany advances, reimbursements, fees and charges ("Intercompany Advances") under General Ledger Account Number 353900 and all funds on deposit in the Settlement Account ("Settlement Account Advances") established in Section 2(b)(iii) of the Receivables Purchase and Servicing Agreement between Borrower and Parent, dated June 29, 2005 (as amended), have been forgiven by Parent, and such amounts have been converted into capital contributions from Parent to Borrower and such amounts are not sufficient to maintain the minimum capital ratios required under paragraph 4(b) of the Federal Deposit Insurance Corporation's Order to Cease and Desist against the Borrower ("Order"), dated June 30, 2009, then the Borrower will be relieved of its obligation to repay funds drawn under this Master Promissory Note (the "Master Promissory Note Advances") to the extent, and only to the extent, that such funds are required to maintain the minimum capital ratios required under the Order. Such debt relief under this Master Promissory Note shall be referred to herein as the "Additional Capital Contribution."

In the event that Borrower is relieved of its obligations to repay any Intercompany Advances, Settlement Account Advances, or Master Promissory Note Advances owed to Parent in order to comply with its capital ratio requirements, such funds shall immediately convert into a capital contribution of Parent to Borrower and be reflected as such on the books and records of each party. Before July 31, 2009, Borrower shall deliver to Parent an officer's certificate stating the Additional Capital Contribution as of

June 30, 2009, if any, and documenting the amount of such Additional Capital Contribution as well as the amount of forgiveness of Intercompany Advances and Settlement Account Advances

The intent of these forgiveness provisions is to assure that the Borrower will at all times be in compliance with paragraph 4(b) of the Order. Any Borrower obligations under this Master Promissory Note that constitute all or a portion of the Additional Capital Contribution shall be extinguished and the Parent will be deemed to have simultaneously made a capital contribution to the Borrower in the amount of the Additional Capital Contribution. Any remaining balance owed by the Borrower hereunder not required to satisfy the capital requirements set forth in the Order shall remain subject to the repayment terms specified in this Master Promissory Note.

To the extent any other agreement related to the Intercompany Advances, Settlement Account Advances, or Master Promissory Note Advances is at variance with the provisions of this Note, this Note shall govern.

The term of this Master Promissory Note shall be until December 31, 2009 (the "Maturity Date"), with payment in full due on the Maturity Date unless the Borrowing Facility between the Borrower and the Parent, dated as of June 30, 2009 is renewed for an additional six month period. In the event the Borrowing Facility between the Borrower and the Parent is renewed, the Borrower and the Parent shall evidence their affirmation and approval of such a renewal by executing a new Master Promissory Note relating to the renewal period.

This Master Promissory Note is the Master Promissory Note referred to in and is entitled to the benefits of the Borrowing Facility letter agreement between the Borrower and the Parent dated as of June 30, 2009. Capitalized terms used herein without definition shall have the meanings ascribed to such terms in that letter agreement.

This Master Promissory Note shall be governed by and constituted in accordance with the laws of Delaware.

Advanta Corp.

Advanta Bank Corp.

By \_\_\_\_\_  
Name Philip M. Browne  
Title Senior Vice President  
and Chief Financial Officer

By \_\_\_\_\_  
Name Ken Goldman  
Title Chief Financial Officer

**MASTER PROMISSORY NOTE**

Amount \$10,000,000 (subject to the  
terms and conditions  
described herein)

Dated as of June 30, 2009

For value received, Advanta Bank Corp (the "Borrower") hereby promises to pay to the order of Advanta Corp (the "Parent"), the principal amount of all advances made by the Parent to the Borrower, plus interest accruing thereon, under the terms of this Master Promissory Note. The aggregate principal amount of all advances made and outstanding hereunder aggregated with any advances outstanding under any other lines of credit between the Borrower and the Parent shall at no time exceed TEN MILLION DOLLARS (\$10,000,000)

The Borrower hereby authorizes the Parent to accept written, facsimile (fax) or e-mail instructions from the Borrower's President, Chief Financial Officer or Treasurer or their designees. Advances to the Borrower shall be credited to the Borrower's DDA account referenced below. Advances may be repaid in whole or in part at any time prior to the Maturity Date without penalty. All principal repayments and interest payments hereunder shall be evidenced by the actual crediting of funds to the Parent's account referenced below.

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Advanta Bank  
ABA# 031100212  
Advanta Corp  
Account # 10502771-04

The Borrower requests that, unless otherwise stated, Advances be paid to the Borrower's account at

Advanta Bank Corp  
ABA# 124384848  
Draper, UT  
Credit Advanta Bank Corp

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Contribution as well as the amount of forgiveness of Intercompany Advances and Settlement Account Advances

The intent of these forgiveness provisions is to assure that the Borrower will at all times be in compliance with paragraph 4(b) of the Order. Any Borrower obligations under this Master Promissory Note that constitute all or a portion of the Additional Capital Contribution shall be extinguished and the Parent will be deemed to have simultaneously made a capital contribution to the Borrower in the amount of the Additional Capital Contribution. Any remaining balance owed by the Borrower hereunder not required to satisfy the capital requirements set forth in the Order shall remain subject to the repayment terms specified in this Master Promissory Note.

To the extent any other agreement related to the Intercompany Advances, Settlement Account Advances, or Master Promissory Note Advances is at variance with the provisions of this Note, this Note shall govern.


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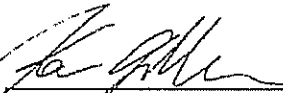
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This Master Promissory Note shall be governed by and constituted in accordance with the laws of Delaware.

Advanta Corp

By   
Name Philip M. Browne  
Title Senior Vice President  
and Chief Financial Officer

Advanta Bank Corp

By   
Name Ken Goldman  
Title Chief Financial Officer

OFFICERS CERTIFICATE

NOTICE OF WAIVER, FORGIVENESS AND CAPITAL CONTRIBUTION

I, Ken Goldman, certify that I am the duly elected Senior Vice President and Chief Financial Officer of Advanta Bank Corp, a Utah industrial bank, ("ABC"), and further certify to Advanta Corp ("Advanta") in such capacity that

- 1 Reference is made to that certain Agreement to Provide a Borrowing Facility and Assure Maintenance of Capital Levels (the "Agreement"), dated June 30, 2009 by and between ABC and Advanta. All terms that are not defined herein shall have the meaning ascribed to them in the Agreement.
- 2 Pursuant to the Agreement, notice is hereby provided that to assure compliance with the capital requirements under the Order, \$10 million of Intercompany Advances from Advanta to ABC is waived and forgiven by Advanta and such amount is and shall be recorded as a capital contribution of Advanta to ABC effective as of June 30, 2009 and shall be deemed an Additional Capital Contribution under the Agreement.
- 3 Due to the fact that management and KPMG have identified several open areas and the books of ABC have not yet closed so that the capital requirements under the Order are not yet finally determined, additional amounts may need to be forgiven pursuant to the Agreement prior to the filing of ABC's call report on July 30, 2009.

IN WITNESS WHEREOF, the undersigned has executed this Officer's Certificate this 24<sup>th</sup> day of July, 2009

Advanta Bank Corp

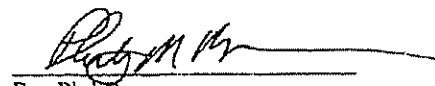


By Ken Goldman

Senior Vice President, Chief Financial Officer

Agreed to and acknowledged  
this 24 day of July, 2009

Advanta Corp



By Phil Browne

Senior Vice President, Chief Financial Officer

Advanta Bank Corp  
 Review of Forecast and Actual Capital Levels

	Forecast		Actual	
	Plan Scenario 1F	6/29 update	7/24 - before contribution	7/24 after contribution
Tier 1 Capital, before disallowed DTA	210	197	204	214
Disallowed DTA	(47)	(47)	(66)	(66)
Tier 1 Capital	163	150	138	148
Average assets	2.914	2.988	2.946	2.946
Tier 1 Leverage Ratio	5.6%	5.0%	4.7%	5.0%
Excess/(deficiency) to 5% Tier 1 leverage ratio	17	-	(10)	-

AC Report of Condition  
2008 06 30  
Layout ABCBS12R  
Run Date 07/22/2008

WITH \$10 MILLION

Risk Weighting Check	Jun 08	AFCRP Jun 08	Total Adjusted Jun 08	Risk Weight	Risk Weighted Assets
Assets Excluded			(3,301,516.00)	N/A	N/A
Assets @ 0%			1,825,547,855.09	0%	
Assets @ 20%			878,344,463.83	20%	175,668,892.76
Assets @ 50%			18,380,000.00	50%	9,190,000.00
Assets @ 100%	351,993,645.84		621,881,783.73	100%	621,881,783.73
Assets @ 200%			3,927,854.00	200%	7,855,708.00
<b>Total Assets</b>			<b>2,842,070,480.65</b>		<b>775,598,404.49</b>

OFF Balance Sheet

Item	Input	Credit Conv Factor	Risk Weight
Swaps	Input	0.60%	50%
Cont P 1 yr	Input	0.80%	50%
Letter M Credit	Input	0.00%	20%
Securitized Loans & Receivables			
1st Position (Mg)			
2nd Position (Mg)			
Securitized Bus Card		Input	100%
Securitized Leases			100%
Credit Enhancements	Pass/Fail	LLN %	
MIO	Pass	0.75%	
Business Card UD			64%
UD			100%
Other			
Leasing	Pass	401/41	

Gross Weighted Assets

775,598,404.49

Disallowed Reserves

Limit	Max Conty \$ Amt	Reserves
	34,491,847.97	12,489,204.28
		(12,489,204.28)
		(58,113,177.27)

RISK WEIGHTED ASSET BASE w/o Credit Enhancements

717,405,227.22

Institution Specific Add On Factor (Low Level Recourse)

Direct Reduction	Yield	Rate	Amount
	100%		174,600,027.68

RISK WEIGHTED ASSET BASE FOR CAPITAL COMPUTATION

542,805,200.54

Direct Reduction

Capital Calculation	Amount
Net Tier 1 Capital	213,900,371.08
Disallowed DTA	(65,438,281.16)
Net Tier 1 Capital less DTA Disallowance	148,462,089.92
TIER 2 Capital	13,459,306.33
<b>TOTAL CAPITAL BASE</b>	<b>161,921,396.25</b>

RISK BASED CAPITAL RATIOS

Tier 1 Risk Based Capital Ratio - Owned	17.58%
Total Risk Based Capital Ratio	19.18%
Average Assets for Leverage Ratio Computation	Input
Average Assets	3,811,742,374.64
Less DTA Disallowance	(61,835,281.16)
Less Other Intangible	
Total Average Assets for Leverage Ratio	3,749,907,093.48
Leverage Ratio - 3Mo Avg	15.28%

RC Report of Condition  
2008-08-30  
Layout ABCBS2R  
Run Date 07/23/2009

*WITHOUT \$10 MILLION*

Risk Weighting Check  
Assets Excluded  
Assets @ 0%  
Assets @ 20%  
Assets @ 50%  
Assets @ 100%  
Assets @ 200%  
Total Assets

APCRP Jun-09	Total Adjusted Jun 09	Risk Weight	Risk Weighted Assets
	(5,701,516.06)	NA	NA
	1,825,647,855.00	0%	
	878,344,463.00	10%	138,268,117.15
	18,350,000.00	20%	3,180,000.00
381,893,049.84	823,891,783.73	100%	623,891,783.73
	3,627,864.00	100%	7,255,728.00
	<u>2,842,070,450.56</u>		<u>775,656,404.48</u>

OFF Balance Sheet

Asset	Input	Credit Conv Factor		
Average	Input	0.66%		10%
Capex 1 Yr	Input	0.66%		10%
Letter of Credit	Input	10.00%		20%
Securitized Loans & Receivables				
1st Position (Mtg)			5,521,071,301.31	100%
3rd Position (Mtg)				100%
Securitized Bus Card				
Securitized Loans	Input			
Credit Enhancements	Pass/Fail	LR %		
MTG				
Business Card UD	Pass	0.75%		
HO			6%	
Other			100%	
Leasing	Pass	100%	14,031,847.97	
Gross Weighted Assets				<u>775,596,404.49</u>

Disclosed Reserves	Limit	Max Contr & Arb		
Limit		13,488,326.26		
Reserves		(71,673,483.87)		(58,185,157.61)

RISK WEIGHTED ASSET BASE w/o Credit Enhancements 521,110,776,483.87

Institution Specific Add-On Factor (Low Level Recourse)	Direct Reduction		
		100%	128,458,302.41

RISK WEIGHTED ASSET BASE FOR CAPITAL COMPUTATION 649,669,078.93

Capital Calculation		
TIER 1 (CDRE) Capital		
Total Equity	188,913,268.95	
Less: Loss on Equity Securities	(47,403,771)	
Capital Securities		
Unrealized Loss (Gain)	15,034,385.84	
Less: Goodwill		
Less: Other Intangibles		
And: Debt forgiveness		
Net Tier 1 Capital	<u>203,604,371.08</u>	

Net Tier 1 Capital	Disclosed DTA	
	(65,836,291.15)	
Net Tier 1 Capital less DTA Disallowance	<u>137,768,079.93</u>	

TIER 2 Capital		
Subordinated Debt		
Loan Loss Reserve	13,469,308.30	
TOTAL CAPITAL BASE	<u>151,237,388.23</u>	

RISK BASED CAPITAL RATIOS

Tier 1 Risk Based Capital Ratio	Owned	16.21%
Total Risk Based Capital Ratio		17.78%

Average Assets for Leverage Ratio Computation	Input	
Average Assets	3,811,742,671.41	
Less: DTA Disallowance	(6,859,391.15)	
Less: Other Intangibles		
Total Average Assets for Leverage Ratio	<u>3,804,883,280.26</u>	
Leverage Ratio - 3Mo Avg		17.33%

OFFICERS CERTIFICATE

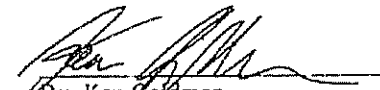
NOTICE OF WAIVER, FORGIVENESS AND CAPITAL CONTRIBUTION

I, Ken Goldman, certify that I am the duly elected Senior Vice President and Chief Financial Officer of Advanta Bank Corp, a Utah industrial bank, ("ABC"), and further certify to Advanta Corp ("Advanta") in such capacity that

- 1 Reference is made to that certain Agreement to Provide a Borrowing Facility and Assure Maintenance of Capital Levels (the "Agreement"), dated June 30, 2009 by and between ABC and Advanta. All terms that are not defined herein shall have the meaning ascribed to them in the Agreement.
- 2 Pursuant to the Agreement, notice is hereby provided that to assure compliance with the capital requirements under the Order, \$4 million of Intercompany Advances from Advanta to ABC is waived and forgiven by Advanta and such amount is and shall be recorded as a capital contribution of Advanta to ABC effective as of June 30, 2009 and shall be deemed an Additional Capital Contribution under the Agreement.

IN WITNESS WHEREOF, the undersigned has executed this Officer's Certificate this 29<sup>th</sup> day of July, 2009

Advanta Bank Corp

  
By: Ken Goldman

Senior Vice President, Chief Financial Officer

Agreed to and acknowledged  
this 29th day of July, 2009

Advanta Corp

  
By: Phil Browne

Senior Vice President, Chief Financial Officer

**Advanta Bank Corp**  
**Analysis for July 29 debt forgiveness**

	<u>As prepared, 7/29</u>	<u>Full Valuation Allowance</u>	<u>Full Valuation Allowance</u>
Net Tier 1 Capital	213,900,371	148,064,080	148,064,080
Additional Capital contribution, 7/29		4,000,000	
Disallowed DTA	(65,836,291)	-	-
<b>Net Tier 1 Capital less DTA Disallowance</b>	<u>148,064,080</u>	<u>148,064,080</u>	<u>152,064,080</u>
Average Assets for Leverage Ratio Computation			
Average Assets	3,011,742,571 (A)	3,011,742,571	3,011,742,571
Less DTA Disallowance	(65,836,291) (B)	-	-
Estimated change in average assets for DTA valuation allowance		(723,476)	(723,476)
<b>Total Average Assets for Leverage Ratio</b>	<u>2,945,906,280</u>	<u>3,011,019,096</u>	<u>3,011,019,096</u>
<b>Tier 1 Leverage Ratio</b>	<u>5.03%</u>	<u>4.92%</u>	<u>5.05%</u>

(A) Uses daily average balance sheet as prescribed

(B) Uses quarter end amount as prescribed

OFFICERS CERTIFICATE

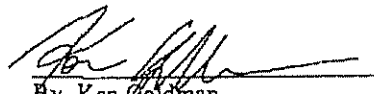
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1. Reference is made to that certain Agreement to Provide a Borrowing Facility and Assure Maintenance of Capital Levels (the "Agreement"), dated June 30, 2009 by and between ABC and Advanta. All terms that are not defined herein shall have the meaning ascribed to them in the Agreement.
2. Pursuant to the Agreement, to assure compliance with the capital requirements under the Order, \$5 million of obligations from ABC to Advanta is hereby waived and forgiven by Advanta, which obligations shall be satisfied (i) first from any remaining Intercompany Advances, then (ii) to the extent necessary, from Settlement Account Advances, and then (iii) to the extent necessary, from Master Promissory Note Advances, all of which advances to be calculated as of the close of ABC's books on July 31, 2009 for a total not to exceed \$5 million. Such \$5 million is and shall be recorded as a capital contribution of Advanta to ABC effective as of July 29, 2009 and shall be deemed an Additional Capital Contribution under the Agreement.

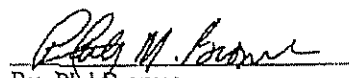
IN WITNESS WHEREOF, the undersigned has executed this Officer's Certificate this as of the 29<sup>th</sup> day of July, 2009

Advanta Bank Corp

  
By Ken Goldman  
Senior Vice President, Chief Financial Officer

Agreed to and acknowledged  
as of the 29<sup>th</sup> day of July, 2009

Advanta Corp

  
By Phil Browne  
Senior Vice President, Chief Financial Officer

Intercompany ABC to ADV Rollforward

	Receivable 155001	Payable 353900	Net Payable
May (Actual)	221,755.70	(11,573,282.83)	(11,351,527.13)
May Settled			
June (Actual)	2,662,324.97	(5,781,720.02)	(3,119,395.05)
June (Settled)	(215,776.15)	332,097.79	116,321.64
June Debt Forgiveness		10,000,000.00	10,000,000.00
July (Posted)	(1,209,086.68)	(69,893.93)	(1,278,980.61)
July (Settled)		260,884.43	260,884.43
July (Estimate)		(3,572,588.48)	(3,572,588.48)
Intercompany Advances	1,459,217.84	(10,404,503.04)	(8,945,285.20)
Parent Funded Settlement Account		(4,292,100.00)	(4,292,100.00)
Intercompany line of credit		(10,000,000.00)	(10,000,000.00)
Total	1,459,217.84	(24,696,603.04)	(23,237,385.20)

	<u>INTERCO ADV</u>	<u>PF</u>	<u>INTERCO</u>
MAY	11.4	4.3	10.0
JUN +	3.2		
	<u>14.6</u>	<u>4.3</u>	<u>10.0</u>
Contribution (14.0)			
Net June 0.6			
July	3.5		
	<u>4.1</u>	<u>4.3</u>	<u>10.0</u>

**AMENDMENT TO AGREEMENT TO PROVIDE A BORROWING FACILITY  
AND ASSURE MAINTENANCE OF CAPITAL LEVELS and MASTER  
PROMISSORY NOTE**

This Amendment to Agreement to Provide a Borrowing Facility and Assure Maintenance of Capital Levels (this "Amendment") is made and entered into this July 31, 2009 between Advanta Corp ("Advanta") and Advanta Bank Corp ("ABC").

**RECITALS**

A. Advanta and ABC have previously entered into an Agreement to Provide a Borrowing Facility and Assure Maintenance of Capital Levels dated as of June 30, 2009 (the "Agreement")

B. ABC has previously entered into a Master Promissory Note dated as of June 30, 2009 in the amount of \$10,000,000 to Advanta Corp. (the "Master Promissory Note")

C. Advanta and ABC now desire to amend the Agreement and the Master Promissory Note as set forth herein

**AGREEMENT**

In consideration of the mutual covenants contained herein and other good and valuable consideration, receipt and sufficiency of which is acknowledged, Advanta and ABC hereby agree as follows:

- 1 Section III of the Agreement is deleted in its entirety and is replaced and superseded with the following:

**III. Additional Capital Contribution**

In the event that ABC is relieved of its obligations to repay any Intercompany Advances, Settlement Account Advances, or Master Promissory Note Advances (collectively, the "Additional Capital Contribution") owed to Advanta in order to comply with its capital ratio requirements, such funds shall immediately convert into a capital contribution of Advanta to ABC effective as of the last day of the month in which ABC's obligations are forgiven (the "Contribution Date"), and shall be reflected as such on the books and records of each party as of the Contribution Date. Before the last day of the month following any Contribution Date, ABC shall deliver to Advanta an officer's certificate stating the Additional Capital Contribution as of the Contribution Date, if any, and documenting the amount of such Additional Capital Contribution attributable to forgiveness of Intercompany Advances, Settlement Account Advances, and Master Promissory Note Advances.

2 (a) The following paragraph that is part of Exhibit A to the Agreement is deleted in its entirety and is replaced with the paragraph that appears in 2(b) of this Amendment:

"In the event that Borrower is relieved of its obligations to repay any Intercompany Advances, Settlement Account Advances, or Master Promissory Note Advances owed to Parent in order to comply with its capital ratio requirements, such funds shall immediately convert into a capital contribution of Parent to Borrower and be reflected as such on the books and records of each party. Before July 31, 2009, Borrower shall deliver to Parent an officer's certificate stating the Additional Capital Contribution as of June 30, 2009, if any, and documenting the amount of such Additional Capital Contribution as well as the amount of forgiveness of Intercompany Advances and Settlement Account Advances."

(b) "In the event that Borrower is relieved of its obligations to repay any Intercompany Advances, Settlement Account Advances, or Master Promissory Note Advances owed to Parent in order to comply with its capital ratio requirements, such funds shall immediately convert into a capital contribution of Parent to Borrower effective as of the last day of the month in which Borrower's obligations are forgiven (the "Contribution Date"), and shall be reflected as such on the books and records of each party as of the Contribution Date. Before the last day of the month following any Contribution Date, Borrower shall deliver to Parent an officer's certificate stating the Additional Capital Contribution as of the Contribution Date, if any, and documenting the amount of such Additional Capital Contribution as well as the amount of forgiveness of Intercompany Advances and Settlement Account Advances."

3 (a) The following paragraph that is part of the Master Promissory Note, dated as of June 30, 2009, between Advanta Corp. and Advanta Bank Corp. is deleted in its entirety and is replaced with the paragraph that appears in 3(b) of this Amendment:

"In the event that Borrower is relieved of its obligations to repay any Intercompany Advances, Settlement Account Advances, or Master Promissory Note Advances owed to Parent in order to comply with its capital ratio requirements, such funds shall immediately convert into a capital contribution of Parent to Borrower and be reflected as such on the books and records of each party. Before July 31, 2009, Borrower shall deliver to Parent an officer's certificate stating the Additional Capital Contribution as of June 30, 2009, if any, and documenting the amount of such Additional Capital Contribution as well as the amount of forgiveness of Intercompany Advances and Settlement Account Advances."

(b) "In the event that Borrower is relieved of its obligations to repay any Intercompany Advances, Settlement Account Advances, or Master Promissory Note Advances owed to Parent in order to comply with its capital ratio requirements, such funds shall immediately convert into a capital contribution of Parent to Borrower effective as of the last day of the month in which Borrower's obligations are forgiven (the "Contribution Date"), and shall be reflected as such on the books and records of each party as of the Contribution Date. Before the last day of the month following any Contribution Date, Borrower shall deliver to Parent an officer's certificate stating the Additional Capital Contribution as of the Contribution Date, if any, and documenting the amount of such Additional Capital Contribution as well as the amount of forgiveness of Intercompany Advances and Settlement Account Advances "


4. Capitalized terms used but not otherwise defined in this Amendment will have the meanings set forth in the Agreement

5. In the event of a conflict between this Amendment and the Agreement or the Master Promissory Note, the terms of this Amendment will control. Otherwise, all terms and conditions of the Agreement and the Master Promissory Note will remain in full force and effect


6. This Amendment may be executed in several counterparts each of which will be deemed an original but all of which will constitute only one Amendment.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment as of the date first above written

Advanta Corp

By:   
Philip M. Browne  
Senior Vice President and Chief Financial Officer

Advanta Bank Corp

By:   
Name: John Moore  
Title: President