

UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

Case No. 09-13931 (KJC); Adv. Case No. 10-50795 (KJC)

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In the Matter of:

ADVANTA CORP., et al.,

Debtors.

- - - - -x

ADVANTA BANK CORP.,

Plaintiff,

-against-

ADVANTA CORP.,

Defendant.

- - - - -x

U.S. Bankruptcy Court

824 North Market Street

Wilmington, Delaware

May 26, 2010

10:01 AM

B E F O R E:

HON. KEVIN J. CAREY

CHIEF U.S. BANKRUPTCY JUDGE

ECR OPERATOR: AL LUGANO

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TELEPHONIC HEARING re Emergency Motion of Plaintiff Advanta Bank Corp. for Declaratory and Injunctive Relief in Connection with its Amended Complaint [Adv Proc. No. 10- 50795; Adv. Docket No. 9 - filed March 19, 2010]

TELEPHONIC HEARING re 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 [Adv. Proc. No. 10-50795; Adv. Docket No. 25 - filed May 14, 2010]

Transcribed By: Clara Rubin

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P R O C E E D I N G S

THE CLERK: Court is now in session.

THE COURT: Good morning. This is Judge Carey. We're on the record in Advanta Corp. adversary 10-50795. Counsel have requested a status conference, so I will turn it over to counsel.

MR. LEMONS: Good morning, Your Honor. Robert Lemons from Weil, Gotshal & Manges, on behalf of the debtors. Just want to thank Your Honor for making the time on such short notice to hear us this morning. We of course appreciate your accommodation, and I'm going to try to be as brief as I possibly can.

I believe my partner Rick Levine is also on the call with me, and I believe that our Delaware counsel Paul Heath from Richards Layton is also on the call.

Your Honor, this morning we're seeking the Court's guidance regarding scheduling and procedure, relating to an adversary proceeding that was filed by Advanta Banking Corporation, or "ABC" as I'll call it, through the FDIC as its receiver, and two motions within that adversary proceeding which were also filed by ABC.

If Your Honor will bear with me for a moment, I think it's important to try to briefly outline the somewhat tortured procedural history to date, so that the Court can understand where we are in the debtors' requests today.

1 All of the litigation that we're discussing today
2 relates to tax elections made by Advanta Corporation on March
3 14th of this year for the 2008 and 2009 tax years for Advanta's
4 consolidated tax group, and that tax group includes both the
5 debtors and ABC. And the elections in question have to do with
6 the group's net operating losses, or NOLs. We believe -- and
7 the sort of -- the dispute we're having with ABC revolves
8 around the treatment of those, and we believe that their
9 treatment will have a major impact on distributions to
10 creditors in the debtors' cases.

11 Turning now to the specific motions, even before the
12 adversary proceeding and the two pending motions were filed by
13 ABC, ABC first filed an emergency motion on March 12th, trying
14 to compel Advanta to take certain actions relating to the NOLs
15 in the tax returns. ABC didn't bring this motion properly via
16 an adversary proceeding, and the motion was mooted by Advanta's
17 filing of its tax returns on March 14th. But we were
18 nevertheless forced to scramble to file a reply to the motion.
19 And notwithstanding that the motion was clearly moot, after we
20 filed our tax returns it was kept on the docket and not
21 withdrawn until May 17th.

22 ABC next commenced the adversary proceeding by filing
23 a complaint against Advanta Corporation on March 14th. The
24 complaint was then amended by ABC on March 19th. In its
25 current form, the complaint is seeking to void Advanta's tax

1 elections and to force Advanta to either seek an extension from
2 the IRS of its time to, I guess, refile its 2009 tax return; or
3 it's seeking to force Advanta to file the 2009 tax return,
4 making elections regarding the NOLs that are contrary to what
5 Advanta believes are best for it and its estate.

6 Within this adversary proceeding, ABC has also filed
7 two substantive motions. The first motion was filed on March
8 14th as an emergency motion; it asks the Court to void the
9 debtors' 2008 and 2009 tax return and elections, this having
10 been made without authorization, outside of the ordinary course
11 of their business. The debtors filed an objection to that
12 motion on April 30th; the committee joined that objection. The
13 FDIC filed its reply to our objection on May 14th, and in that
14 reply it asserted for the first time that Advanta's tax
15 elections that it had made breached a tax-sharing agreement
16 between Advanta and ABC, among other parties, and gave rise to
17 a claim of ABC against Advanta.

18 Your Honor, for the sake of brevity, I'll refer to the
19 tax-sharing agreement as the "TSA".

20 The second motion was filed by ABC on May 14th, the
21 same day it filed the reply to Advanta's objection to its first
22 motion. The second motion seeks relief from the automatic stay
23 to allow the FDIC to try to file with the IRS a competing tax
24 return for 2008 and 2009 that would make different tax
25 elections with respect to Advanta's NOLs.

1 Both motions are scheduled to be heard on June 8th at
2 the debtors' next omnibus hearing. Currently, Your Honor, the
3 objection deadline for the second motion, which is the
4 automatic stay motion, is this Friday. And with respect to the
5 first motion, despite the FDIC's raising a new theory in its
6 reply to our objection, the current briefing schedule doesn't
7 permit the debtors to file a written reply with respect to that
8 motion.

9 So having described, Your Honor, where we are
10 procedurally today, I'd like to tell the Court why the debtors
11 believe that the current procedure and schedule should be
12 amended. The FDIC's motions are now both predicated on its
13 claim that the debtors' recent tax filings create a claim under
14 the TSA. And the debtors, as you can imagine, disagree with
15 this interpretation of the TSA. I think that both parties
16 believe that it's a TSA unambiguous in their favor. So there's
17 a real dispute over that.

18 This agreement, Your Honor, goes to the heart of what
19 may be the most critical issue regarding creditors' recoveries
20 in these cases, which is whether, to what extent and in what
21 priority does ABC have claims under the TSA or in respect of
22 the tax elections. I think, as we've mentioned to the Court
23 previously, the answer to this question will really
24 dramatically impact the recoveries of all of the debtors'
25 creditors, including the mom-and-pop retail noteholders.

1 Your Honor, in the two pending motions, the FDIC only
2 cites three passages from the TSA to support its claim that
3 Advanta's tax election breached the TSA. And in that language
4 cited by the FDIC -- or that language cited by the FDIC
5 incorporates GAAP rules and principles by, among other things,
6 expressly referencing SFAS 109 and, quote, "regulatory
7 accounting principles", end quote.

8 In light of this, Your Honor, and, you know, how
9 important the issue of whether a breach has occurred is to the
10 debtors' case, the debtors believe they should be able to
11 introduce expert testimony about how GAAP works in this
12 context, because GAAP is clearly relevant here to the
13 interpretation of the TSA.

14 Your Honor, in addition to the pending motions and
15 complaint, the FDIC also filed a proof of claim on May 14th in
16 which it asserted a variety of claims, not all of which were
17 specifically related to the TSA and the tax elections. But
18 with respect to the TSA and tax elections, it asserted claims
19 in contract and tort, including some with alleged
20 administrative priority.

21 So at this point, Your Honor, we have multiple
22 motions, we have a complaint that's been amended, and we have a
23 proof of claim, all really revolving around whether a breach of
24 a TSA has occurred and/or whether ABC has other claims arising
25 from these tax elections.

1 Your Honor, the debtors think that, as a matter of
2 judicial economy and to conserve the estate's resources, that
3 the pending motion should be determined together with any and
4 all claims that ABC or the FDIC asserts under the TSA in
5 respect of the tax elections. The debtors would propose an
6 aggressive and an expedited schedule that would require the
7 FDIC to assert all of its claims and actions relating to their
8 TSA to be litigated at this time, but would also allow for
9 discovery, expert reports and briefing, all arching towards the
10 proposed October trial date, subject of course to Your Honor's
11 calendar.

12 After taking a few days to digest the FDIC's most
13 recent pleadings and to confer with the committee, the debtors
14 proposed this to the FDIC, and at the FDIC's request the
15 debtors followed that up with a detailed draft schedule. But
16 the FDIC is unwilling to agree to depart from this, sort of,
17 piecemeal litigation approach.

18 We think, however, that the debtors' approach, which
19 would allow for determination in one proceeding of all the TSA
20 and tax election issues, makes sense for a variety of reasons;
21 first, Your Honor, because the FDIC has put at issue the
22 occurrence of a TSA breach. We don't think it makes sense to
23 litigate arguments predicated on that breach, without actually
24 litigating the occurrence of the breach and any other claims
25 arising from the tax elections.

1 As I mentioned, Your Honor, ABC -- or the FDIC and/or
2 the FDIC has already filed a complaint that it's amended.
3 They've filed three substantive motions. They filed a proof of
4 claim relating to the tax elections. There have been a number
5 of procedural motions filed. Two of the substantive motions
6 were filed initially on an emergency basis. The FDIC has also
7 informed us that it might amend the complaint if the Court
8 ruled in the debtors' favor on the pending motions.

9 This approach where the FDIC wants to sort of continue
10 to take bites at the apple and assert different theories as
11 times goes is really going to keep the Court and the debtors on
12 a litigation treadmill, and we don't believe it's in the
13 interest of the debtors or their creditors to litigate a
14 pivotal issue in this case in this sort of piecemeal
15 disorganized manner.

16 Second, Your Honor, ironically, if the Court agrees
17 with the FDIC at the end of all of this that the FDIC would
18 have a claim against the debtors even if the debtors' tax
19 elections are honored, the debtors actually would likely
20 support the FDIC's efforts to file a competing return with the
21 IRS to make different elections than those made by the debtors.
22 And the debtors would likely work with the FDIC to seek payment
23 of that refund from the IRS, because under those circumstances
24 the IRS's payment of the refunds would be in the debtors' best
25 interest. So the position the debtors might take could be

1 materially altered, you know, by 180 degrees, depending on
2 where the Court comes out with respect to their claim.

3 Finally, Your Honor, we don't believe ABC is harmed by
4 the debtors' proposed schedule. There is no deadline for the
5 FDIC to file the competing return that it wants to file, and
6 there is no remaining action by the IRS to be taken with
7 respect to the return that the debtors filed in March. The
8 2009 return that was filed by the debtors doesn't seek a refund
9 or any other action by the IRS. And the 2008 amended return
10 that was filed has already been processed by the IRS with the
11 reapplication of a refund previously paid to the debtors
12 already been made. The FDIC, Your Honor, can just as easily
13 file this competing return in October as it could now.

14 So, accordingly, here we are, Your Honor. We seek the
15 Court's guidance regarding the posture and timing of the
16 current litigation. As I mentioned, we believe that everything
17 should be litigated at once, arching towards an October trial
18 date. If Your Honor disagrees with that approach and only
19 wants to address at this time the two pending motions, we'd
20 still like to present our expert testimony regarding the TSA
21 breach, and we'd like to be able to answer both motions and
22 would need more time to prepare our expert and brief those
23 issues and would propose an August hearing date in that event.

24 THE COURT: Well, so that I'm clear, you're suggesting
25 in the first instance really a trial on the complaint, combined

1 with what I anticipate would be an objection to the FDIC claim,
2 am I correct?

3 MR. LEMONS: That's correct, Your Honor. The only
4 nuance I'd like to make clear for that is that it would be an
5 objection to any portions of the FDIC claim relating to the TSA
6 and the tax elections. They have other theories they have
7 asserted, which -- you know, the claim was just filed on May
8 14th and we're not trying to tee those up for litigation right
9 now. But we think that these TSA and tax election related
10 issues and the proof of claim are now sort of squarely in front
11 of the Court.

12 THE COURT: And how much time would you anticipate
13 would be needed for trial?

14 MR. LEMONS: I would imagine probably a day.

15 THE COURT: All right, let me hear from the FDIC.

16 MR. KRATENSTEIN: Good morning, Your Honor. Andrew
17 Kratenstein, McDermott Will & Emery, for the FDIC. With me is
18 Nava Hazan, and also, I believe, on the lines are local counsel
19 Adam Hiller.

20 Your Honor, just by way of background, Mr. Lemons went
21 through the procedural history here. One thing I wanted to
22 make clear is that this complaint and the initial motions were
23 filed by the -- by Advanta Bank Corp., "ABC". The FDIC
24 subsequently seized ABC as an insolvent financial institution.
25 So we stepped into the shoes of ABC, and our initial work was

1 to make heads or tails of everything that had been filed by ABC
2 and then come up with what to do next.

3 And we think we have come up with an efficient
4 approach to resolve this litigation that we don't think
5 requires all of the what we think is extraneous burden and
6 expense that the debtor is proposing to go off and take
7 discovery, have evidentiary hearings and trials that we think
8 are unnecessary to resolution, at least of the first -- of the
9 two motions that are currently pending.

10 And really, just to cut through it all, Advanta is
11 really trying to take what is a fairly simple issue and make it
12 very complicated. To decide the two motion that are pending,
13 the first being the motion filed by the FDIC seeking permission
14 to file tax returns, and the second the motion that had been
15 filed by ABC to void the original election, all this Court
16 needs is: the law; the plain language of the TSA, which, as
17 you heard debtors' counsel state, is unambiguous; and Advanta's
18 own admissions in its papers.

19 Addressing the motions one at a time, again, the first
20 motion is the FDIC's motion to file return as receiver of ABC,
21 seeking to claim the refund that Advanta have waived. The
22 FDIC, as we state in our papers, Your Honor, has not only the
23 statutory right to file these returns, but a statutory
24 obligation to do that as receiver of ABC. And we believe,
25 under the applicable law, including FIRREA, that we didn't even

1 need to come to the Court to file those returns. But out of an
2 abundance of caution, because we believe that the debtor will
3 argue that filing the returns has an impact on the property of
4 the estate, we decided to come to Court and ask for permission
5 to file the returns.

6 A delay in the resolution of that motion, contrary to
7 what debtor's counsel just told you, could very well, and
8 probably will, prejudice the FDIC, because we are told by our
9 tax folks, including people who have worked at the IRS, that
10 the longer it takes to get a competing return on file, the more
11 likely it is that the IRS will process the original return, and
12 the less likely it is that the IRS will honor the competing
13 return. So we are very concerned about delay here.

14 Mr. Lemons also mentioned that there is no deadline
15 for doing this or there's no action for the IRS to take. As
16 Your Honor probably knows, with even individual tax returns --
17 the IRS obviously processes tax returns, and whether there's a
18 refund claimed or not, at some point the tax return goes in the
19 Done pile. Once it is in the Done pile, it is less likely that
20 the IRS will be inclined to take it out of the Done pile and
21 look at it again. So we're very concerned about that.

22 And there is some authority in the IRS Rules and
23 Regulations that any adjusted return must be filed by September
24 15th. So we are concerned that if this does not get resolved
25 quickly, the IRS may take the position that even if we're able

1 to file an FDIC return, it was too late.

2 So that is one of the reasons why the schedule
3 proposed doesn't work. And we don't even think that we need
4 all of this discovery and evidentiary hearing to resolve the
5 issues here.

6 Let me get to the second motion, which is the motion
7 that was filed by the FDIC before it was seized -- filed by ABC
8 before it was seized by the FDIC. That motion seeks to void
9 Advanta's original election to waive the tax refund at issue.
10 The argument is that creditors were not given requisite notice
11 and an opportunity to object under Section 363(b) of the
12 Bankruptcy Code. In fact, ABC was given no advance notice
13 whatsoever, notwithstanding that all parties agree that the tax
14 election has a significant impact on ABC.

15 ABC argues, and the FDIC has assumed this argument,
16 that the waiver of the fifty-four million dollar refund was not
17 an ordinary-course transaction. Advanta has finally told us,
18 for the first time in the objection that it filed to that
19 motion, that it was an ordinary-course transaction, and their
20 rationale for that is as follows: They say, quote, "By making
21 such election, Advanta likely would have exposed itself to a
22 general unsecured claim under the TSA of up to approximately
23 170 million dollars. The amount of approximately 170 million
24 dollars is based upon the hypothetical tax refund ABC would
25 have been entitled to if it had filed separate returns and an

1 election to carry back the 2009 tax laws for five years was in
2 effect." That is from Mr. Brown's declaration, paragraph 9.

3 So in other words, the AB -- Advanta is arguing that
4 the 54 million dollar refund would not compensate creditors for
5 a 170 million dollar dilution of their recovery pool.

6 All we did in our reply, Your Honor, was not introduce
7 some new arguments or bring in things that Advanta could not
8 have reasonably expected we would bring in. We made a very
9 simple argument; we said very simply, If, as Advanta concedes,
10 it would have owed ABC up to 170 million dollars, pursuant to
11 the TSA, by claiming a refund, then Advanta breached the TSA by
12 waiving the refund. The TSA unambiguously provides that no
13 member company can do worse by being part of the group return
14 than if it filed a separate return. And all you need to look
15 at is the first Whereas clause of the contract which says --
16 does that -- just that.

17 So by not making ABC whole, by waiving the refund for
18 no apparent benefit, we believe that Advanta breached the TSA.
19 And this idea that the estate is somehow worse off if it had
20 accepted the refund doesn't make any sense to us.

21 So now Advanta wants to take discovery and hold an
22 evidentiary hearing. And their goal here is, we think, really
23 to delay a resolution of this. They are really caught in the
24 pincer of the ambiguous language of the TSA and their own
25 admissions as to why they made this election. And so they're

1 trying to break out of that by bringing in a bunch of extrinsic
2 evidence and experts and GAAP, and whatever else they want to
3 bring in. And, by the way, this is the first time we've heard
4 exactly what extrinsic evidence that they wanted. They told us
5 they might call an expert, but they never told us before, you
6 know, they want somebody to interpret GAAP, or what have you.

7 Put that aside. If Advanta believes that,
8 notwithstanding the clear admissions -- their own clear
9 admissions and the unambiguous language of the contract, which
10 they concede is unambiguous, they will let them in their
11 objection, which is due on Friday, only two days from now, put
12 forth why they think the TSA is unambiguous, or why they think
13 our argument doesn't work, we'll have an opportunity to reply
14 on June 4th. Your Honor's scheduled to hear us on June 8th.
15 Let's have a full airing of these issues. If at the June 8
16 hearing Your Honor thinks that more discovery is required or
17 extrinsic evidence is needed or you can't just interpret the
18 contract on its face, then by all means we should go off and
19 have discovery and set a schedule for an evidentiary hearing or
20 trial. But we think that the approach proposed by Advanta is
21 actually the least efficient approach.

22 We're proposing a phased approach to this litigation
23 that may make some of the issues to be litigated totally
24 irrelevant and unnecessary. The first question is, Can the
25 election be undone? That's the purpose of these two motions.

1 That's the question asked by these two motions: Can the
2 election be undone? If the answer to that question is yes, ABC
3 and the FDIC may not have any damage, may not be harmed. You
4 get the refunds in and then maybe we have to have a discussion
5 over who owns the refunds. And, by the way, I would note, the
6 FDIC has stated in its motion that it will put any refund in an
7 escrow account, so that that issue can be resolved. But that's
8 question 1: Can we undo the election?

9 If the answer to that question is no, then, yes, ABC
10 and the FDIC have been damaged, and then we can go off and
11 litigate whether there's been a breach of contract or a tort or
12 some other wrongdoing that results in damages.

13 But, really, we should answer the first question first
14 and then go from there, rather than litigating the entire case,
15 much of which may be totally necessary, spend the resources of
16 the FDIC and of the taxpayers, spend the resources of the
17 debtor, to litigate issues which may not be necessary, and then
18 come back in October or November for a trial, which, as I noted
19 at the outset, it may be too late anyway to file an adjusted
20 return at that time, and any victory that the FDIC wins could
21 be a Pyrrhic victory.

22 So we think the right approach, Your Honor, is to
23 continue on the schedule that we have, hear us on June 8th,
24 have an opportunity to look at all the papers. If after
25 looking at all the papers you agree we need trials and

1 evidentiary hearings and discovery, okay. But we don't think
2 you're going to -- once you've read all of the papers, we don't
3 think you'll think that that's necessary. And we think that
4 that's the most efficient way to go, Your Honor.

5 THE COURT: Does the committee wish to be heard?

6 MR. SCHWARTZ: Yes, Your Honor. Thank you. Roger
7 Schwartz, Latham & Watkins, on behalf of the committee. Your
8 Honor, I have with me today my colleague Melinda Franek, and I
9 believe our local counsel Howard Cohen is on the phone as well.

10 Your Honor, the committee agrees with the debtors'
11 position. From the committee's perspective, Your Honor, this
12 is the most important issue in these cases. And the relief
13 being sought by the FDIC, through its motions and its proof of
14 claim, will directly and significantly impair the recoveries of
15 all unsecured creditors other than the FDIC and ABC, including
16 the thousands of mom-and-pop holders of the retail notes who've
17 invested with Advanta for their retirement. It's those holders
18 and the other unsecured creditors in these cases, not the FDIC,
19 the committee believes, will be prejudiced by short-circuiting
20 adjudication of the TSA in a piecemeal fashion and denying the
21 debtors the right to put on a full case with respect to
22 interpretation of the TSA.

23 Your Honor, the committee believes that the FDIC's
24 pleadings and proof of claim have directly put the question of
25 the proper interpretation of the TSA at issue. The FDIC's

1 position appears to be that the Court only needs to consider
2 particular sections of the TSA taken out of context that the
3 FDIC alleges the debtors breached in order to interpret the TSA
4 as an overall matter.

5 We believe this is an unfair and inappropriate
6 process, given the importance of the issues to these cases. We
7 believe the debtors should have an opportunity to fully
8 adjudicate and put on its case with respect to proper
9 interpretation of the TSA. The committee believes that the
10 FDIC position effectively asks this Court to find that the
11 debtors have breached the TSA, without permitting the debtors
12 the opportunity to demonstrate why their tax election was
13 appropriate under the TSA. And in our view, given that the
14 FDIC has directly put the TSA and its interpretation at issue,
15 it would be highly unfair and prejudicial to the unsecured
16 creditors of these cases to limit the debtors' rights to put on
17 a full case with respect to its interpretation of the TSA.

18 Finally, Your Honor, we believe the procedural posture
19 of these motions have not led to the issues being put squarely
20 before the Court in an appropriate manner, given how vital and
21 important these issues are to the ultimate recovery of
22 unsecured creditors other than ABC and the FDIC. The committee
23 supports an efficient and speedy adjudication of all TSA-
24 related issues in accordance with an agreed-upon scheduling
25 order, as suggested by the debtors, that permits a full and

1 fair adjudication of these issues.

2 Your Honor, I'd note that all parties, I believe, and
3 in particular the unsecured creditor, have a compelling
4 interest in getting all the TSA issues determined and resolved
5 as soon as possible but in an appropriate manner. In our view,
6 the efficient and fast resolution of the TSA issues does not,
7 however, mean denying the debtors the right to put on full
8 evidence with respect to the TSA so that the FDIC can hurry the
9 lock-in, you know, of a potential 170 million dollar claim for
10 its own benefit and to the severe detriment of all other
11 creditors in these cases. Thank you, Your Honor.

12 THE COURT: Let me ask the committee, is it your
13 intention to seek intervention, or have the parties agreed to
14 the committee's intervention in this adversary?

15 MR. SCHWARTZ: Yes, Your Honor. We believe that, as
16 the ultimate stakeholders with a significant vested interest in
17 the outcome of these motions -- as we've been trying to do all
18 along, the committee would participate in any TSA-related
19 litigation.

20 THE COURT: Well, it seems to me you have to intervene
21 in the adversary if that's your goal. Now, I don't know
22 whether everyone would agree to that or whether you need to
23 file a motion, but that needs to be put on the menu of things
24 to be considered.

25 Okay --

1 MR. SCHWARTZ: Thank you, Your Honor.

2 THE COURT: Here's my thought. I will hear you on the
3 8th, but merely in the nature of a further discussion on what I
4 should hear and when. So I will ask the parties to do the
5 following: I'll ask each of the debtor, the FDIC and the
6 committee to file with the Court position papers, telling me
7 what they think the Court should do. They may be in letter
8 form. They should be no longer than five pages. They'll be
9 filed simultaneously, and we'll pick a date in a minute. They
10 should include, among the types of things we talked about
11 today, specifically, if I should decide that we should gather
12 everything together and have a full trial, what the pre-trial
13 schedule should be. I'd like the parties to address the IRS
14 deadline that the FDIC has asserted here and, if it's real,
15 whether there's a workaround past September 15th, if indeed the
16 Court were to determine that an October trial is appropriate.
17 I'd like you to address committee mediation or let me know that
18 the parties have intervention -- that the parties have
19 consented.

20 I'd also like the parties to consider mediation.
21 Frankly, my inclination is, if we decide that a full trial
22 schedule is necessary, I would order that mediation occur on a
23 parallel track, in the hopes that much of the efforts could --
24 and expense, in the end, could be saved. So I'd like the
25 parties not just to give me a position on it but actually to

1 have discussions on who and how that mediation might occur.

2 I would like -- I appreciate the preparation of the
3 agenda today; that was helpful to me. I'd like a binder
4 delivered to chambers with all of the documents reflected in
5 today's agenda, either filed or to be filed, along with the
6 FDIC proof of claim and the position papers. But I'd like them
7 delivered by the close of business, say, 4 o'clock on June 3rd,
8 which is a day earlier. I'd like a little more time to prepare
9 for the 8th, in light of the issues. And I have reviewed none
10 of the papers at this point.

11 Are there any questions?

12 MR. LEMONS: Your Honor, it's Robert Lemons from Weil.
13 The one question I have is, as I understand it, the 8th will
14 not be a hearing on the merits of the two pending motions but
15 will be a hearing to further discuss with Your Honor the --
16 sort of, how we're going forward after the 8th; is that
17 correct, Your Honor?

18 THE COURT: That's correct. And I -- it's a good
19 question and it brings another aspect to mind, and that is, the
20 debtor should, in its position paper, tell me, if I should
21 decide not to have a full-blown trial schedule and trial in
22 October, what discovery do you think you will still need in
23 connection with the Court's disposition of the two pending
24 motions.

25 MR. LEMONS: Okay. Thank you, Your Honor. One last

1 question: I assume that means, since we're focusing our
2 attention right now on, I guess, providing the Court the
3 information that you've requested and moving towards a June 8th
4 hearing to, I guess, ultimately set the procedure and schedule,
5 that the debtors are not required to file on Friday a
6 substantive objection to the automatic stay motion that was
7 filed?

8 THE COURT: Well, let me ask you this: Why shouldn't
9 it be filed?

10 MR. LEMONS: Well, the reason we don't think it should
11 be filed, Your Honor, is because we believe that that motion
12 is, again, predicated on the FDIC's assertion that this breach
13 has occurred under the TSA. We also know the FDIC seems to
14 believe that there have been -- they may have other claims
15 under the TSA which they haven't fully fleshed out yet. And
16 the debtors, you know, believe, Your Honor, that the best way
17 to address this issue of claims under the TSA, and the most
18 fulsome way to do it, is not to sort of deal with it in a
19 relatively summary fashion here without having a chance to put
20 on our expert, for example, to talk about GAAP, and without
21 knowing and dealing with the rest of their -- whatever claims
22 they may assert under the TSA motion might be.

23 THE COURT: Well, let's do this: I'd prefer that the
24 parties follow the already in-place supplemental scheduling
25 order. And if you want to style it as a preliminary response

1 or objection, you may do so. And I'll ask that the FDIC file
2 its reply, if any, by the same time that I mentioned for
3 submission of the binders, and that is June 3rd at 4 o'clock.
4 So I'm going to press you, again, up a day a little bit. But
5 the reply, as with the objection and response by Advanta and
6 the committee, if you file it, may be styled a preliminary
7 reply. So --

8 MR. KRATENSTEIN: Yes, Your Honor. Thank you.

9 THE COURT: Okay. And I appreciate that. I'm sorry
10 to cut you a day short.

11 MR. KRATENSTEIN: That's okay, Your Honor. We
12 appreciate it.

13 THE COURT: Okay.

14 Are there any other questions, or is there anything
15 else that any of the parties think need to be addressed in the
16 position papers?

17 (No response)

18 THE COURT: Okay. Anything further for today? Well,
19 before we sign off, let me ask this: What else, if anything,
20 is scheduled for hearing on the 8th?

21 MR. LEMONS: Your Honor, I don't have the entire
22 agenda in front of me. I believe there are a -- I think there
23 may be a few motions relating to asset sales, which we're not
24 expecting to be contested.

25 THE COURT: Okay. Well --

1 MR. LEMONS: But I don't -- I apologize, Your Honor, I
2 don't have the full agenda of items that have been filed in
3 front of me.

4 THE COURT: That's okay. I just wanted to let you
5 know -- I mean, there's just an hour slated for Advanta on that
6 day, and it is a full hearing day. Now, between now and then,
7 it may be that some things come off, and if a spot opens up
8 that gets you a little more than an hour, I may shift the
9 hearing time a little bit, But it's too early to determine
10 whether we can do that. It sounds as if you may need more than
11 an hour. But we'll see where that stands. For now, we'll
12 leave the hearing at 10 o'clock on the 8th.

13 Okay, anything further for today?

14 (No response)

15 THE COURT: Thank you all very much. That concludes
16 this hearing. Court will stand in recess.

17 IN UNISON: Thank you, Your Honor.

18 (Proceedings concluded at 10:37 AM)

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C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.

Clara Rubin

AAERT Certified Electronic Transcriber (CET**D-491)

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: May 27, 2010

**UNITED STATES BANKRUPTCY COURT
District of Delaware**

In Re:

Chapter: 0

Case No.: 10-50795-KJC

***NOTICE OF FILING OF TRANSCRIPT AND OF DEADLINES RELATED TO RESTRICTION AND
REDACTION***

A transcript of the proceeding held on 5/26/2010 was filed on 6/2/2010 . The following deadlines apply:

The parties have seven days to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is 6/23/2010 .

If a request for redaction is filed, the redacted transcript is due 7/6/2010 .

If no such notice is filed, the transcript may be made available for remote electronic access upon expiration of the restriction period, which is 8/31/2010 unless extended by court order.

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Clerk of Court

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