IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
ADVANTA CORP., *et al.*,	:	Case No. 09-13931 (KJC)
Debtors.[1]	:	(Jointly Administered)
	:	**Re: Docket Nos. 346, 357, 383**

DEBTORS' REPLY TO ACTING UNITED STATES TRUSTEE'S OBJECTION TO MOTION FOR AUTHORITY TO IMPLEMENT POSTPETITION SEVERANCE PLAN AND OTHER RELATED RELIEF

Advanta Corp. ("***Advanta***") and its affiliated debtors in the above-referenced chapter 11 cases, as debtors and debtors in possession (together with Advanta, the "***Debtors***"), submit this reply (the "***Reply***") to the Acting United States Trustee's Objection to the Debtors' Motion for Authority to Implement Postpetition Severance Plan and Other Related Relief (the "***Objection***") (D.E. 383), and respectfully represent as follows:

[1] The Debtors in these jointly administered chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are Advanta Corp. (2070), Advanta Investment Corp. (5627), Advanta Business Services Holding Corp. (4047), Advanta Business Services Corp. (3786), Advanta Shared Services Corp. (7074) ("***Shared Services***"), 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 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 "***First Day 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***").

Preliminary Statement

1. The Debtors' employees are critical to the successful wind-down of the Debtors' businesses. A myriad of complex regulatory, tax, and operational issues in these cases require employees' full attention and dedicated efforts. Employee attrition or demoralization will seriously jeopardize creditor recoveries. The delay in implementing the Postpetition Severance Plan[2] has already had a demoralizing and highly detrimental effect on employee morale. Thus the Debtors view the relief requested in the Motion as essential to restore morale and maximize creditors' recoveries.

2. The Debtors' employees have continued to work diligently since the commencement of these cases (collectively, the "***Commencement Date***") and have remained with the Debtors based on their belief that the Debtors would continue to pay certain benefits, such as severance, even if the Debtors determined a reorganization was not feasible. Now that the Debtors have announced they are liquidating, their employees are keenly aware that they will inevitably lose their jobs. At the same time, the Debtors' employees have expended, and will continue to put forth, substantial time and effort during the wind-down process. Alleviating employees' growing uncertainty over their future will ensure their continued loyalty and support through the resolution of these chapter 11 cases, and allow the Debtors' estates to realize the highest overall possible value from the pool of assets available for distribution to creditors.

3. The Postpetition Severance Plan and Incentive Bonus were heavily negotiated with the statutory committee of unsecured creditors (the "***Creditors' Committee***"), and the Motion has the support of this key constituency. In particular, with regard to the

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion for Authority to Implement Postpetition Severance Plan and Other Related Relief (the "***Motion***") (D.E. 346).

Incentive Bonus, the well-developed performance targets were selected by the Debtors and the Creditors' Committee, in consultation with their respective financial advisors, as being appropriate for the circumstances of the Debtors' chapter 11 cases, and were approved by the Compensation Committee of Advanta's Board of Directors. In fact, *no* economic stakeholder has objected to the relief sought in the Motion. Only the Acting United States Trustee (the "***U.S. Trustee***") objects to the relief sought in the Motion.

4. The U.S. Trustee's objection to the Motion is without merit. The Postpetition Severance Plan is not only consistent with the Debtors' prepetition business practices, but is essential to increase employees' morale and, along with the Incentive Bonus, motivate employees to continue to work hard in adverse circumstances to maximize the value of the Debtors' assets, even in the face of their eventual job eliminations. The Debtors rely on their employees, whose efforts have been, and continue to be, critical to facilitating the liquidation and wind-down process that will allow the Debtors and their estates to realize the highest value possible for the pool of assets to be distributed to creditors on the effective date of a chapter 11 plan. Contrary to the Objection, it is precisely in the liquidation context, where employees experience an expanded workload and employee turnover is a significant risk, that the Debtors must continue to provide severance benefits. The potential loss of their workforce would be devastating to the wind-down of the Debtors' businesses.

5. In addition, and contrary to the U.S. Trustee's statement that the Debtors have given no indication when they will file a chapter 11 plan, the Debtors stated on the record at the March 3, 2010 hearing that they anticipated filing their chapter 11 plan in mid-June and consummating the plan this fall. (*See* Hr'g Tr. 13:21-14:4, Mar. 3, 2010.) This date is the earliest that the Debtors could expect to file a chapter 11 plan, given the earliest possible bar date

for governmental claims. In any event, the Debtors have already initiated the wind-down of their affairs during these chapter 11 cases. Specifically, the Debtors have been working with the Creditors' Committee to design and begin implementing for the benefit of the estate certain strategies relating to critical regulatory and tax issues, and have begun the process of monetizing certain assets. After they evaluate proofs of claim received by the claims bar date, the Debtors still hope to meet the schedule for filing a chapter 11 plan mentioned on the record on March 3, 2010. However, now that the Debtors' workforce has been reduced to a fraction of its original size, the Debtors have the bare minimum of employees needed to pursue their wind-down strategies and can ill afford to lose these key employees as they head into the final stretch of their cases.

6. The Court should overrule the Objection and permit the Debtors to (i) implement and pay amounts under the Postpetition Severance Plan and the Incentive Bonus, and (ii) ratify Interim Severance Payments that have been made or will be made prior to the effective date of the Postpetition Severance Plan, including severance payments owing to Insider Employees, pursuant to the Prepetition Severance Plan, which was authorized by the Court in prior orders to continue in effect postpetition in the ordinary course of the Debtors' businesses. (*See* Interim Order Pursuant to Sections 105(a), 363(b), and 507(a) of the Bankruptcy Code (a) Authorizing the Debtors to (i) Pay Certain Employee Compensation and Benefits and (ii) Maintain and Continue Such Benefits and other Employee-related Programs and (B) Authorizing the Debtors' Financial Institutions to Honor and Process Checks and Transfers Related to Such Obligations (the "***Interim Wage Order***") (D.E. 23); Final Order Pursuant to Sections 105(a), 363(b), and 507(a) of the Bankruptcy Code (A) Authorizing the Debtors to (i) pay certain Employee Compensation and Benefits and (ii) Maintain and Continue such Benefits and Other

Employee-Related Programs and (B) Authorizing the Debtors' Financial Institutions to Honor and Process Checks and Transfers Related to Such Obligations (D.E. 409) (the "***Final Wage Order***").)

Background

7. On March 19, 2010, the Debtors filed the Motion, which was originally scheduled to be heard by the Court on April 7, 2010 (the "***Original Hearing***"). On April 5, 2010, the U.S. Trustee filed its Objection with this Court, asserting primarily that the Debtors had not sufficiently disclosed the identities, titles, and job duties of Eligible Employees, the performance metrics applicable to the Incentive Bonus, or the provisions of the Prepetition and Postpetition Severance Plans to permit the U.S. Trustee to evaluate whether the Postpetition Severance Plan payments to insiders and the Incentive Bonus payment to an insider Eligible Employee are appropriate under section 503(c) of the Bankruptcy Code. (Objection ("***Obj.***") ¶¶ 4-5, 18.) In response to the Objection, the Debtors furnished the U.S. Trustee with additional information in support of the relief requested in the Motion, including the severance amounts, the identities of the Former Employees and Insider Employees who have or will receive Interim Severance Payments and the amounts of those payments, identities of Eligible Employees and their respective compensation under the Postpetition Severance Plan and the Incentive Bonus, and the proposed performance targets applicable to the Incentive Bonus.

8. The Debtors' disclosures to the U.S. Trustee did not resolve the Objection. In fact, on April 6, 2010, the U.S. Trustee sent the Debtors an email outlining further objections to the Motion. In her informal objection, the U.S. Trustee indicates that she opposes on two grounds the entire Postpetition Severance Plan, as it applies to all Eligible Employees, even non-insiders, and the Interim Severance Payments for which the Debtors have sought ratification:

(i) the Debtors allegedly have not proven severance payments to non-insiders[3] are justified by the facts and circumstances of the case under section 503(c)(3) of the Bankruptcy Code and (ii) in the context of a liquidating case, the necessity of severance payments to employees allegedly is questionable. (*See also* Obj. ¶ 22.) Furthermore, the U.S. Trustee disputes that the Debtors have satisfied the statutory requirements of section 503(c)(2) of the Bankruptcy Code for severance payments to insiders.

9. In an attempt to provide the parties with additional time to resolve the Objection and informal comments, the Debtors adjourned the Original Hearing to May 10, 2010. Thereafter, the Debtors engaged in discussions with the U.S. Trustee to address the concerns of the U.S. Trustee. As discussed more fully below, the Debtors provided the U.S. Trustee with additional information about each of the Former Employees and Eligible Employees. This additional information is filed under seal contemporaneously herewith as ***Schedules A and B*** to the Declaration of William A. Rosoff in Further Support of the Motion for Authority to Implement Postpetition Severance Plan and Other Related Relief (the "***Supplemental Declaration***"). In addition, the Debtors have submitted under seal as ***Schedule D*** to the Supplemental Declaration the performance metrics applicable to the Incentive Bonus. Unfortunately, the Debtors were unable to resolve any aspects of the Objection or informal comments raised by the U.S. Trustee.

10. This Reply first addresses those aspects of the Objection that question severance payments in the liquidation or sale context, and explains why good business reasons support such payments pursuant to the Postpetition Severance Plan or the Interim Severance

[3] Reference to "insiders" is as that term is defined in section 101(31) of the Bankruptcy Code. Section 101(31) of the Bankruptcy Code defines "insiders" to include, among others, officers and directors of a debtor and a "person in control of the debtor." 11 U.S.C. §§ 101(31)(B)(i), (ii), (iii).

Payments. The Reply then addresses the U.S. Trustee's objection to the Debtors' calculation of the statutory cap for severance payments to insiders under section 503(c)(2) of the Bankruptcy Code. Finally, the Reply explains why the Incentive Bonus is appropriate in the context of these chapter 11 cases.

Good Business Reasons Support Implementation of the Postpetition Severance Plan and Honoring Interim Severance Payments

A. The Postpetition Severance Plan and Interim Severance Payments Should Be Approved Under Section 363 of the Bankruptcy Code, Not Section 503(c)(3)

11. Although the Debtors believe that they can implement the Postpetition Severance Plan, which is based on the Prepetition Severance Plan, or continue the Prepetition Severance Plan in the ordinary course of their businesses,[4] out of an abundance of caution, the Debtors have sought pursuant to sections 105(a) and 363(b) of the Bankruptcy Code, authorization to implement the Postpetition Severance Plan and ratification of the Interim Severance Payment obligations.[5] The Debtors submit that, to the extent that the Interim Severance Payments and payments under the Postpetition Severance Plan are not in the ordinary

[4] The Third Circuit has enunciated a two-part test for determining whether a transaction is in the ordinary course of a debtor's business. *In re Roth Am., Inc.*, 975 F.2d 949, 952-53 (3d Cir. 1992). The "horizontal test" compares the transaction to those made in the debtor's industry to determine whether the debtor's transaction is similar to those entered into by others in the debtor's industry. *Id.* at 953 (citation omitted). The "vertical test" views the transaction from a hypothetical creditor's perspective and inquires whether the transaction is within the reasonable expectations of transactions the debtor-in-possession "is likely to enter in the course of its business." *Id.* (internal quotation marks and citation omitted). If a court determines that a transaction in which a debtor-in-possession engaged is in the ordinary course of the debtor's business, a court will not entertain an objection to the transaction, provided that the conduct involves a business judgment made in good faith upon a reasonable basis and within the scope of authority under the Bankruptcy Code. *In re Nellson Nutraceutical, Inc.*, 369 B.R. 787, 797 (Bankr. D. Del. 2007). The Debtors believe that the Postpetition Severance Plan satisfies the first prong of the Third Circuit's two-part test because severance programs are common for businesses in the debtor's industry. The Postpetition Severance Plan also satisfies the second prong because it is very similar to the Prepetition Severance Plan and, therefore, the severance payments proposed under the Postpetition Severance Plan are within the reasonable expectation of the Debtors' creditors.

[5] Pursuant to the Final Wage Order, the Debtors were authorized to pay prepetition amounts under the Prepetition Severance Plan up to $10,950 per individual current or former employee and in an aggregate amount up to $350,000, and to continue to honor certain practices, programs, and policies that were in effect as of the Commencement Date, including under the Prepetition Severance Plan. (Final Wage Order at 3.)

course of the Debtors' businesses, the business judgment test of section 363(b) is the only appropriate standard for evaluating the Postpetition Severance Plan and the Interim Severance Payments with respect to non-insiders.[6] The U.S. Trustee, however, argues that severance payments to non-insiders implicate section 503(c)(3) of the Bankruptcy Code. The U.S. Trustee misstates the standard under which courts review severance payments, such as the Interim Severance Payments and those contemplated under the Postpetition Severance Plan. *See, e.g., In re Calpine Corp.*, No. 05-60200 (BRL) (Bankr. S.D.N.Y. Mar. 1, 2006) (approving implementation of postpetition severance program applicable to all employees pursuant to sections 363(b) and 503(c)(2) of the Bankruptcy Code); *In re FLYi*, No. 05-20011 (MFW) (Bankr. D. Del. Feb. 3, 2006) (approving wind-down employee plan that provided severance package for employees, including six insiders, pursuant to sections 363 and 503(c)(2) of the Bankruptcy Code).

12. Under section 363(b) of the Bankruptcy Code, the Court may authorize the use, sale, or lease of property of the estate, other than in the ordinary course of business, when there is a good business reason that justifies such action. *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (stating that a court will "defer to the trustee's judgment so long as there is a legitimate business justification" (citing *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991))); *In re Abbotts Dairies of Penn., Inc.*, 788 F.2d 143 (3d Cir. 1986) (implicitly adopting the "sound business judgment" test of *Lionel Corp.*); *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983) ("The rule we adopt requires that a judge determining a § 363(b) application expressly find from the evidence

[6] With respect to insiders, any severance payments must also satisfy the requirements of section 503(c)(2), which the Debtors address below.

presented before him at the hearing a good business reason to grant such an application."); *In re Montgomery Ward Holding Corp.*, 242 B.R. 147, 153 (D. Del. 1999); *In re Del. & Hudson Ry. Co.*, 124 B.R. 169, 176, 178 (D. Del. 1991) (concluding that the Third Circuit adopted the "sound business judgment" test in the *Abbotts Dairies* decision and affirming decision permitting debtor to sell assets where sound business reasons supported the sale). For the reasons stated below, implementation of the Postpetition Severance Plan and honoring the Interim Severance Payments are within the Debtors' sound business judgment (and, even assuming, *arguendo*, that section 503(c)(3) is implicated, implementation of the Postpetition Severance Plan and ratification of the Interim Severance Payments are more than justified by the facts and circumstances of these cases, as explained herein).

B. Valid Business Reasons Exist for Implementing the Postpetition Severance Plan and Honoring the Interim Severance Payments

13. As set forth in the Motion, the Debtors have articulated valid business reasons for implementing the Postpetition Severance Plan and honoring Interim Severance Payments. Because the Debtors are liquidating, their employees know their employment with the Debtors will inevitably end. (Supplemental Decl. ¶¶ 7, 9.) In this environment, employees are concerned about their job security and severance benefits. (*Id.* ¶ 9.) Without the reassurance that terminated employees will receive severance payments, morale and loyalty among employees will suffer, and employees may perform their duties at less-than optimal levels, or seek other employment. (*Id.*) The Debtors have already lost several key employees, and remaining employees are likely to find jobs elsewhere, even in today's distressed market. (*Id.*) In fact, on May 3, 2010, one Eligible Employee provided two weeks' notice of her voluntary resignation. (*Id.*) The Debtors can ill afford employee turnover at this stage of their chapter 11

cases. (*Id.*) Creditor recoveries will suffer significantly if the Debtors are not able to maintain in good morale their existing workforce. (*Id.*)

14. Furthermore, it is difficult to retain, much less recruit, employees because the Debtors are operating their businesses in chapter 11 and are winding down their affairs. (*Id.* ¶ 10.) Without the Eligible Employees, the Debtors' restructuring professionals would be required to devote substantial time and resources to familiarize themselves with the Debtors' businesses and attempt to replicate the knowledge and skill possessed by such employees. (*Id.*) This would entail a substantial and unnecessary expenditure of time and money. (*See id.*)

15. The Debtors have reduced their workforce significantly in the time leading up to the chapter 11 cases and postpetition. On the Commencement Date, the Debtors employed 45 employees. (*Id.* ¶ 11.) Currently, 32 employees remain.[7] (*Id.*) These employees are handling financial and operational demands stemming from the chapter 11 cases, such as providing information to the Debtors' professionals, responding to creditor inquiries, complying with reporting requirements, and formulating a wind-down business plan and a chapter 11 plan. (*Id.*) The severance amounts proposed under the Postpetition Severance Plan take into account remaining employees' increased duties attendant to the resolution of these chapter 11 cases and their going-forward utility to the wind-down process (*id.*), all of which is more fully set forth in the Supplemental Declaration and Schedules A and B thereto.

[7] As mentioned above, one employee has voluntarily resigned and will no longer be employed by the Debtors as of May 17, 2010, which will reduce the number of remaining employees to 31. (*See* Reply, *supra*, ¶ 13.) In addition, one Former Employee who is currently employed by the Debtors is now expected to be terminated after the effective date of the Postpetition Severance Plan. (Supplemental Decl. ¶ 11.) Severance obligations for this employee will be incurred pursuant to the Postpetition Severance Plan in an amount determined by the Debtors upon consultation with the Creditors' Committee. (*Id.*) This amount will likely be commensurate with the employee's entitlement to severance pay under the Prepetition Severance Plan. (*Id.*)

16. Contrary to the U.S. Trustee's contention, the Debtors' wind-down is not simply the collection of cash and proceeds of receivables and distribution of these assets to creditors. The Debtors' wind-down involves resolution of complex regulatory matters, separation of their business operations from certain non-debtors, and formulation of a complicated chapter 11 plan. (*Id.* ¶ 12.) For example, the Debtors' employees have been and will continue to be necessary to completing the following tasks in these chapter 11 cases:

- analyzing and litigating claims, once filed;
- structuring plan issues related to accounting and taxes;
- litigation of tax matters;
- transitioning servicing and collection of a portfolio of small business credit card receivables from a non-debtor banking subsidiary, Advanta Bank Corp. ("***ABC***"), to third party servicers;
- effectuating the physical and operational separation of ABC, which is currently under FDIC receivership, from the Debtors, including, without limitation, separating information technology functions and relocating the Debtors' records;
- relocation of the Debtors' facilities, including exiting existing facilities, locating a new, smaller facility, and reestablishing operations in such facility;
- retaining appraisers and other professionals in connection with the sale of personal property and a substantial art collection, and overseeing such sale processes;
- negotiating and facilitating the sale of two insurance companies;
- dissolution of non-debtor subsidiaries (other than ABC);
- maintaining records of holders of Investment Notes and RediReserve Certificates (the "***Noteholders***") and monitoring transfers of such interests during these chapter 11 cases;[8]

[8] Advanta is the paying agent for the Investment Notes and RediReserve Certificates. (Supplemental Decl. ¶ 12.) As paying agent, Advanta is responsible for keeping books and records of Noteholders, and tracking transfers of Noteholders' interests during the bankruptcy cases. (*Id.*) As of the Commencement Date, there were approximately 3,845 Noteholders, as indicated in the First Day Declaration. (*Id.*) The Investment Notes and RediReserve Certificates continue to be traded during the Debtors' chapter 11 cases. (*Id.*)

- facilitation of the wind down of employee plans and programs including Employee Stock Ownership Plan, 401(k), Employee Stock Purchase Plan, COBRA, and other group plans;
- preparation of the Debtors' 13-week cash flow forecast as required by the Debtors' Protocol with the Creditors' Committee;
- preparation of the Debtors' Monthly Operating Reports, Schedules and Statements of Financial Affairs;
- preparation of state tax returns; and
- overseeing ongoing document production in connection with matters not stayed by the bankruptcy filings.

(*Id.* ¶ 12.)

17. The remaining employees have the essential background knowledge and skills to assist with the wind-down of the Debtors' operations and recovery of assets to repay their creditors. (*Id.* ¶ 13.) For example, as mentioned above, a major task for existing employees will be to analyze and potentially litigate proofs of claim filed by the bar date. (*Id.*) This analysis will require information technology access, and significant legal and financial analysis. (*Id.*) Also, the transfer of servicing for the credit card receivables portfolio from ABC to third parties is a significant undertaking that will require historical knowledge of the servicing arrangements between ABC and Advanta. (*Id.*) The book value of the portfolio is approximately $30 million, as reported in the Debtors' Monthly Operating Report filed on April 30, 2010 (D.E. 456), and includes approximately 7,700 credit card accounts. (*Id.*) The portfolio constitutes Advanta's second largest asset; significant value could be lost if the transition of servicing for the portfolio does not proceed smoothly. (*Id.*) In addition, Advanta is in the process of separating its facilities and operations from ABC. (*Id.*) Certain Eligible Employees are familiar with the shared services arrangement between the two entities, and how critical

shared data is stored, and will be instrumental in achieving a physical and operational separation of the two entities with minimal disruption to Advanta's business or loss of assets. (*Id.*) Finally, certain wholly-owned non-debtor subsidiaries will need to be liquidated as part of the resolution of these chapter 11 cases. (*Id.*) This will require the efforts of employees who are familiar with these subsidiaries and with such liquidation processes. (*Id.*) It is important that the Debtors handle the dissolution of these subsidiaries correctly to avoid triggering potentially significant liabilities against the Debtors. (*Id.*) As these examples demonstrate, the Eligible Employees' experience, skills, and institutional knowledge are irreplaceable and essential to maximizing creditor recoveries.

18. The Postpetition Severance Plan is designed not only to honor the commitments made to employees prior to the Commencement Date, but also to motivate Eligible Employees to continue providing invaluable services to the Debtors. (*Id.* ¶ 14.) These twin goals will ensure Eligible Employees continue to render superior services for the benefit of the Debtors and their estates and work towards a speedy and efficient resolution of these chapter 11 cases. (*Id.*) Therefore, a sound business purpose exists to approve the Postpetition Severance Plan.

19. In addition, a sound business purpose exists to honor the Interim Severance Payments. Honoring payments promised to Former Employees will bolster employee morale among existing employees and will ensure that they continue to support the Debtors in the wind-down process. (*Id.* ¶ 16.)

20. In sum, it is imperative that the Debtors implement the Postpetition Severance Program and continue to make Interim Severance Payments in order to preserve and maximize asset recoveries in the most cost effective and efficient manner for the benefit of their

estates and stakeholders. To lose any of the Debtors' remaining employees at this point in these chapter 11 cases would result in the Debtors incurring unnecessary expenses and delays, and more importantly, would impair the Debtors' ability to monetize their assets and mitigate their claims. (*Id.* ¶ 14.) The severance payments described in the Motion will ensure that those employees having the knowledge and skills to effectively manage and monetize the Debtors' assets diligently perform their duties through the wind-down of these cases for the benefit of the Debtors' estates and creditors. (*Id.*) The Debtors – and the Creditors' Committee – have determined that the benefits to be realized from the implementation of the Postpetition Severance Plan and honoring the Interim Severance Payments justify the investment. (*See id.*) Accordingly, the Debtors submit that the relief requested in the Motion is based on a good business purpose, represents a reasonable exercise of the Debtors' business judgment, and is justified by the facts and circumstances of these cases.

C. Severance Payments in a Wind-Down Scenario Are Appropriate

21. Without citing any statute or case law for support, the U.S. Trustee objects to the notion that severance can be paid to *any* employee in the context of a debtor's wind-down or liquidation. However, courts have permitted severance payments or additional compensation in the form of a bonus to employees whose jobs were anticipated to be eliminated as a result of sale or liquidation of a debtor's assets. *See, e.g.*, *In re Circuit City Stores, Inc.*, No. 08-35653 (KRH) (Bankr. E.D. Va. Mar. 25, 2009) (approving wind-down incentive and retention plan); *In re Lehman Brothers Holdings, Inc.*, No. 08-13555 (JMP) (Bankr. S.D.N.Y. Nov. 21, 2008) (approving employee retention and recruitment program in connection with wind-down of debtors' businesses); *In re Linens Holding Co.*, No. 08-10832 (CSS) (Bankr. D. Del. July 1, 2008) (approving severance payments in context of ongoing store closings); *In re Sharper Image*

Corp., No. 08-10322 (KG) (Bankr. D. Del. May 14, 2008) (approving amended severance program in anticipation of sale of substantially all of assets); *In re Am. Home Mortgage Holdings, Inc., et al.*, No. 07-11-47 (CSS) (Bankr. D. Del. Nov. 28, 2007) (approving incentive plan to senior management for, among other things, performance related to wind-down process); *In re Musicland Holding Corp.*, No. 06-10064 (SMB), (Bankr. S.D.N.Y. Feb. 1, 2006) (approving incentive plan and severance program where debtors were winding down assets pursuant to a "Shrink Plan" and where Debtors stated they might move to sell substantially all of their assets); *In re Refco Inc.*, No. 05-60006 (RDD), Hr'g Tr. 29-32, Jan. 10, 2006 (Bankr. S.D.N.Y.) (approving under the business judgment standard program designed to incentivize non-insider employees to remain with the debtor and assist in its liquidation). As discussed above, liquidation is precisely the type of circumstance where severance payments are most needed. Moreover, as mentioned above, any additional costs associated with the Postpetition Severance Plan are outweighed by the benefits the Eligible Employees will provide to the Debtors' estates by performing with maximum effort their roles in the wind-down process.

D. The Creditors' Committee Supports the Motion

22. Importantly, the Creditors' Committee supports the relief sought in the Motion, including the severance payments to the insider Eligible Employees. (Supplemental Decl. ¶ 4.) The Creditors' Committee has been very active and vigilant in these chapter 11 cases. (*Id.*) The Debtors and the Creditors' Committee have worked together on all major issues in the case, including analyzing potential creditor recoveries and the appropriate expenditures to achieve the recoveries. (*Id.*) Both parties have spent a significant amount of time analyzing and negotiating the amounts proposed under the Postpetition Severance Plan, the Incentive Bonus, and other relief requested in the Motion. (*Id.*) In fact, the Debtors waited over a month to file

the Motion in order to ensure that the Creditors' Committee, which has a fiduciary duty to all creditors, and is comprised of members representing all major creditor constituencies, including both indenture trustees, was comfortable with the relief sought in the Motion. (*Id.*) As this Court has recognized, creditor recoveries are directly impacted by the amounts paid as administrative expenses at the end of these chapter 11 cases. *In re New Century TRS Holdings, Inc. et al.*, No. 07-10417(KJC), Hr'g Tr. 77:15-20, Apr. 12, 2007 (Bankr. D. Del.). Although the U.S. Trustee plays a role in monitoring the progress of these chapter 11 cases, the Creditors' Committee – not the U.S. Trustee – is the fiduciary of the parties whose money is at risk if the Debtors do not effectively wind down their operations. Accordingly, the fact that the Creditors' Committee supports amounts to be paid under the Postpetition Severance Plan and as Interim Severance Payments is important evidence that there is a valid business justification for the relief requested in the Motion, and is a further basis for granting the relief requested by the Motion.

The Postpetition Severance Plan and Interim Severance Payments, As They Relate to Insiders, Comply with the Requirements of Section 503(c)(2) of the Bankruptcy Code and Should Be Approved

23. Bankruptcy Code section 503(c) provides that certain types of claims may not be allowed or paid. Specifically, section 503(c)(2) prohibits severance payments to insiders of the Debtors unless the payment is part of a program that is generally applicable to all full-time employees and the amount of payment is not in excess of ten times the mean severance paid to non-management employees during the calendar year in which the payment is made. 11 U.S.C. § 503(c)(2)(A), (B).

24. The U.S. Trustee challenges the Debtors' calculation of the mean severance amount referenced in section 503(c)(2) of the Bankruptcy Code under the theory that any employee with a "manager," "director," or "vice president" title is automatically considered

"management" and should be excluded from the mean severance calculation. The U.S. Trustee's determination in these cases of which employees are insiders and/or "management" is incorrect.

25. Courts have recognized that whether an employee of a debtor is an insider, and would, therefore, fall under the strictures of Bankruptcy Code section 503(c), is a factual determination that is applied to each individual case with a measure of flexibility. *KDI Specialty Foods, Inc. v. Austin Fin. Servs., Inc. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 511 (Bankr. S.D.N.Y. 1999) (citing *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 490-500 (S.D.N.Y. 1994)). Flexibility notwithstanding, courts have further recognized that the presence of control is critical to the determination of whether an employee is an insider, regardless of the employee's official title. *Fabricators, Inc. v. Technical Fabricators, Inc. (In re Fabricators, Inc.)*, 926 F.2d 1458, 1465-66 (5th Cir. 1991); *see also Herbert Constr. Co. v. Greater N.Y. Sav. Bank (In re 455 CPW Assocs.)*, No. 99-5068, 2000 WL 1340569, at *5 (2d Cir. Sept. 14, 2000) (affirming a bankruptcy court's holding that a vice president of a limited partnership that was a limited partner of the debtor was not an insider because his responsibilities were "delegated to him by someone else" and because he was a person "not in control but someone who exercised and functioned pursuant to someone else who [was] in control"); *Butler v. David Shaw, Inc.*, 72 F.3d 437, 443 (4th Cir. 1996) (finding "manager" title, absent actual managerial authority over debtor, is insufficient to confer insider status); *cf. Schubert v. Lucent Techs. Inc. (In re Winstar Commc'ns, Inc.)*, 554 F.3d 382, 396-97 (3d Cir. 2009) (articulating legal standard for "non-statutory insider" as "whether there is a close relationship [between debtor and creditor] and . . . anything other than closeness to suggest that any transactions were not conducted at arms' length" (internal quotation marks and citation omitted)).

26. A nominal officer title is not determinative of whether an employee is, in fact, an insider of a debtor. Courts look beyond an employee's title to determine whether such employee participates in management of the debtor. *See In re Foothills Texas, Inc.*, 408 B.R. 573, 579 (Bankr. D. Del. 2009) (holding that a person holding the title of an officer is presumptively an insider, but that presumption is rebuttable by the "submission of evidence sufficient to establish that the officer is, in fact, not participating in the management of the debtor"); *In re New Century TRS Holdings, Inc. et al.*, No. 07-10417 (KJC), Hr'g Tr. 58:14-61:8, 77:22-78:2, Apr. 12, 2007 (Bankr. D. Del.) (giving weight to debtors' proffer regarding true character of officer titles and finding true nature of certain Vice Presidents and Assistant Vice Presidents was more in the nature of rank and file employees, where debtors explained that, despite their titles, such employees were not functional officers because they had no check writing authority and no authority whatsoever to bind the corporation); *see also Kunz v. U.S. Bank (In re Kunz)*, 335 B.R. 170, 175 n.19 (10th Cir. 2005) (collecting cases recognizing that title alone, without evidence of control, is insufficient to confer insider status); *In re Circuit City Stores, Inc.*, No. 08-35653 (Bankr. E.D. Va. Mar. 25, 2009) (finding that employees holding vice president, manager, or director titles were not statutory insiders and that section 503(c) did not apply to any wind-down payments to those employees); *NMI Sys., Inc. v. Pillard (In re NMI Sys., Inc.)*, 179 B.R. 357, 369-70 (Bankr. D.D.C. 1995) (holding that a vice president/sales manager did not qualify as a statutory insider of the debtor because he did not set overall corporate policy and he did not "perform[] . . . important executive duties").

27. Here, the Postpetition Severance Plan and Interim Severance Payments that the Debtors seek to ratify cover almost entirely non-insiders. (Supplemental Decl. ¶ 18.) There are four Eligible Employees and four Former Employees whom the Debtors have

identified as statutory insiders pursuant to their schedules, and 42[9] Eligible Employees and Former Employees who are non-insiders. (*Id.* ¶ 18, Schedules A & B.) Of the 50 employees who have or will receive severance pay since the Commencement Date, 24 are not even nominally managers, directors, vice presidents, or officers of the Debtors. (*Id.* ¶18.) All but two of the employees who are nominally managers, directors, vice presidents, or officers are not persons "in control" of the Debtors pursuant to section 101(31)(B)(iii) of the Bankruptcy Code such that they set overall corporate policy or otherwise perform executive management duties. (*See id.*)

28. The Debtors came to this conclusion after reviewing the job responsibilities of each of the Eligible Employees and Former Employees to determine whether, notwithstanding their title of vice president, manager, or director, such employee plays a management role in the Debtors' businesses. (*Id.* ¶ 19.) For each Eligible Employee and Former Employee, the Debtors considered the following factors: their job duties, their reporting structure, how important decisions are made within that employee's department, and the level of discretionary authority accorded to such employee. (*Id.*) The Debtors have determined that no Eligible Employee or Former Employee who is not a statutory insider plays a management role or is a person in control of the Debtors' businesses. (*Id.*)

29. Although some non-insider employees may hold officer titles,[10] this is not indicative of a management role in the Debtors businesses. (*Id.* ¶ 20.) The Debtors have

[9] This number excludes the non-insider Eligible Employee that provided notice of her resignation to the Debtors on May 3, 2010. (*See* Reply, *supra*, ¶ 13.)

[10] An officer title (*i.e.*, Senior Vice President, Vice President, Secretary, Treasurer, Assistant Secretary, and Assistant Treasurer) is designated by action of the respective Debtor's Board of Directors, and the Debtors believe that such process for designating an officer is standard within the Debtors' industry. (Supplemental Decl. ¶ 19.)

historically accorded officer titles to a significant number of non-management, professional employees. (*Id.*) In January 2009, Advanta employed 812 people in debtor and non-debtor entities. At that time, 67 employees held an officer title of Vice President or above. (*Id.*) As of November 6, 2009, Advanta employed 168 persons in debtor and non-debtor entities, and 30 employees held an officer title of Vice President or above. (*Id.*) In addition, the Debtors submit that officer titles are common amongst companies similar to the Debtors. (*Id.*) Indeed, the Debtors believe there is a certain amount of "title inflation" within the financial services industry, attributable to an industry-wide desire to remain marketable, competitive, and to attract talented employees. (*Id.*) In fact, unlike other industries, such as the auto industry, for example, where it is more clear that rank and file employees do not constitute "management," with insiders being a smaller subset of management, in the Debtors' case, most rank and file employees are professional workers, and many may have management titles notwithstanding that "management" encompasses just four insiders, as described below.

30. The Eligible Employees and Former Employees have provided valuable postpetition services to enable the Debtors' estates to recover value for their creditors and play an important role in the wind-down of the Debtors' businesses. (*Id.* ¶ 21.) However, only two insider Eligible Employees, in addition to Dennis Alter and William Rosoff, have the level of strategic responsibility, or the ability to influence decisions made by the Debtors' management: Philip Browne, Advanta's Chief Financial Officer, and Jay Dubow, Advanta's Senior Vice President, Chief Administrative Officer, and General Counsel. (*Id.*) No other Eligible Employees or Former Employees exercise control over the Debtors, influence general corporate policy, direct overall strategy, make tactical decisions on behalf of the Debtors, or perform executive functions. (*Id.*) In addition, no other Eligible Employees or Former Employees have

the ability to make any final decisions regarding hiring or termination of employees, compensation, or entry into any contracts or leases without approval of one or more of Dennis Alter, William Rosoff, Philip Browne, and/or Jay Dubow. (*Id.*) Finally, no other Eligible Employees or Former Employees made or will make any decisions regarding the amount, scope, or other terms of the Postpetition Severance Plan. (*Id.*) *See In re Winstar Commc'ns*, 554 F.3d at 395-97 (affirming bankruptcy court's determination that an "insider" can either be a party exercising actual control in the sense of managerial control over a debtor's operations or a party whose dealings with the debtor are not at arms' length); *In re NMI Sys.*, 179 B.R. at 370 (stating that an officer includes "those in the collective group exercising overall authority regarding the debtor's corporate decisions who, as members of that insider group, are in a position to exert undue influence over corporate decisions regarding payment of their claims in tight financial times").

31. As a result, the Debtors submit that they have properly calculated the projected mean severance pay to non-management employees for the calendar year 2010 to equal approximately $39,800, and the payment limitation to insiders under section 503(c)(2)(B) as approximately $398,000.[11] (*Id.* ¶ 22.) A schedule setting forth the Former Employees and

[11] The mean anticipated severance pay was calculated by (i) adding (a) all amounts of Interim Severance Payments paid or to be paid in 2010 to non-insider Former Employees and (b) all proposed severance amounts to be paid under the Postpetition Severance Plan to non-insider Eligible Employees, and then (ii) dividing that amount by the number of non-insider Former Employees and Eligible Employees who have or will have been paid severance in 2010. (Supplemental Decl. ¶ 22.) The number cited in the Reply is slightly higher than the number in the Motion (*see* Mot. ¶ 21 (referencing mean anticipated severance pay to non-management employees for 2010 of $37,500 and payment limitation to insiders of $375,000)) because the Debtors have (i) included one non-insider Eligible Employee who, at the time of the Motion, was employed by a non-debtor affiliate, but is now a debtor employee, (ii) excluded three Former Employees who only received severance pay in the 2009 calendar year, and (iii) excluded the Eligible Employee who provided two weeks' notice of her resignation on May 3, 2010 (*see* Reply, *supra*, ¶ 13). The additional non-insider Eligible Employee was included in the total number of employees who may be covered under the Postpetition Severance Plan (*see* Mot. ¶ 6), but was excluded from the mean severance calculation referenced in the Motion (*id.* ¶ 21).

Eligible Employees who have received or will receive (subject to Court approval) severance pay during the 2010 calendar year and the amounts of severance paid or proposed to be paid to each of these employees, and demonstrating the calculation of the mean projected severance pay to non-management employees and the statutory cap to insiders, has been filed under seal as ***Schedule C*** to the Supplemental Declaration. Because the payment limitation under section 503(c)(2)(B) is significantly greater than either (i) the amount any Eligible Employee could be paid under the Postpetition Severance Plan or (ii) any Interim Severance Payments that are owing to the Insider Employees (all of which payments are expected to be made in calendar year 2010) (*see id.*), the Postpetition Severance Plan and the Interim Severance Payments as applied to insiders meet the requirements of section 503(c)(2) of the Bankruptcy Code.

The Incentive Bonus Is Justified by the Facts and Circumstances and Establishes Appropriate Performance Targets

32. Contrary to the U.S. Trustee's contention that the Incentive Bonus is a payment to an "insider for remaining with the Debtors through confirmation of a plan in these liquidating chapter 11 cases" (Obj. ¶ 34), the Incentive Bonus is not subject to the requirements of section 503(c)(1) of the Bankruptcy Code.[12] Courts have recognized that incentive-based compensation is not primarily retentive in nature, and, therefore, is subject to scrutiny under section 503(c)(3) of the Bankruptcy Code. *See, e.g., In re QuVIS, Inc.*, No. 09-10706, 2009 WL 4262077, at *5 (Bankr. D. Kan. Nov. 23, 2009) ("If the plan or payment motivates the insider to produce and increase the value of the estate, § 503(c)(1) does not apply." (citations omitted)); *In*

[12] Section 503(c)(1) of the Bankruptcy Code prohibits the allowance and payment of sums to insiders "for the purpose of inducing such person to remain" with the debtor "absent a finding by the court based on the evidence in the record" that (1) the payment is "essential" to the individual's retention "because the individual has a bona fide job offer from another business at the same or greater rate of compensation;" and (2) the individual's services are "essential to the survival of the debtor's business." The statute also limits the amount of retention bonus for insiders to ten times the mean amount of bonuses paid to non-management employees in the same calendar year, or 25% of any retention award granted to the insider during the previous calendar year. 11 U.S.C. §§ 503(c)(1)(C)(i), (ii).

re Nellson Nutraceuticals, 369 B.R. at 803 (holding that bonus payments that "[m]otivat[ed] the employees to do a 'great job' in connection with the matters that those employees could reasonably be expected to influence" were not primarily retentive and not precluded or restricted by section 503(c)(1) of the Bankruptcy Code); *In re Global Home Prods., LLC*, 369 B.R. 778, 783 (Bankr. D. Del. 2007) (evaluating a "'pay for value' compensation plan . . . intended to incentivize management" under section 503(c)(3) of the Bankruptcy Code (internal quotations omitted)); *In re Dana Corp.*, 351 B.R. 98, 100 (Bankr. S.D.N.Y. 2006) (same); *In re Nobex Corp.*, No. 05-20050 (MFW), 2006 WL 4063024, at *3 (Bankr. D. Del. Jan. 19, 2006) (concluding sale-related incentive pay to debtor's senior management was governed by section 503(c)(3) of the Bankrutpcy Code, not sections 503(c)(1) or 503(c)(2)). Here, the Incentive Bonus is not a "pay to stay" bonus – that is, the Incentive Bonus is not intended primarily to "induce" the insider Eligible Employee to "remain with the [Debtors'] business[es]." 11 U.S.C. § 503(c)(1); *see In re New Century TRS Holdings, Inc.*, No 07-10416 (KJC) Hr'g Tr. 65:1-5, Apr. 12, 2007 (Bankr. D. Del.) (stating that primary purpose of transfer must be retention in order for such transfer to fall within the ambit of section 503(c)(1) of the Bankruptcy Code). Rather, the Incentive Bonus is designed to ensure that the insider Eligible Employee makes a continued effort to maximize distributions to creditors. Therefore, section 503(c)(1) has no applicability to the Incentive Bonus.

33. However, as the Debtors acknowledge in the Motion, pursuant to section 503(c)(3) of the Bankruptcy Code, payments of the Incentive Bonus must be justified by the facts and circumstances of the case. This Court has interpreted the requirements of section 503(c)(3) as an "enhanced business judgment" standard. *In re LandSource Cmtys. Development, LLC*, No. 08-11111 (KJC), Hr'g Tr. 63:20-21, Oct. 10, 2008 (Bankr. D. Del.). That is, the Court

scrutinizes not only how the Debtor reached its decision to make a transfer that might otherwise be considered an administrative expense under section 503(b) of the Bankruptcy Code, but also whether the results are appropriate under the circumstances of the case. *Id.* at 63:22-64:3. This is a slightly more stringent standard than the business judgment standard, whereby Courts presume a transaction is appropriate if a debtor-in-possession shows a valid business reason for the transaction. *Cf. In re Global Home Prods., LLC*, 369 B.R. 778, 783 (Bankr. D. Del. 2007) (explaining that a "'pay for value' compensation plan . . . intended to incentivize management" requires an analysis that "utilizes the more liberal business judgment review under § 363" (internal quotations omitted)); *In re Dana Corp.*, 358 B.R. 567, 576-77 (Bankr. S.D.N.Y. 2006) (noting that "the test in section 503(c)(3) appears to be no more stringent a test than the one courts must apply in approving any administrative expenses under section 503(b)(1)(A)" and articulating four considerations when determining whether a compensation plan satisfies the business judgment test: (i) whether the plan is calculated to achieve the desired performance; (ii) whether the scope of the plan is fair and reasonable; (iii) whether the plan is consistent with industry standards; and (iv) the debtor's due diligence in developing the plan, including whether the debtor received independent counseling in connection therewith); *In re Nobex Corp.*, No. 05-20050 (MFW), Jan. 12, 2006 Hrg. Tr. 86:21-87:4 (Bankr. D. Del. 2006) (stating that section 503(c)(3) of the Bankruptcy Code is "nothing more than a reiteration of the standard under [section] 363," which standard is "based on the business judgment of the debtor").

34. The Debtors submit that the Incentive Bonus is justified by the facts and circumstances of this case. The Incentive Bonus has been designed to motivate a critical employee to maximize the value of the Debtors' assets that will be liquidated, thereby increasing the pool of assets available for distribution to creditors. (Supplemental Decl. ¶ 23.) The

Incentive Bonus achieves this goal by conditioning the amount of payment on the proceeds that will become available for distribution to the Debtors' creditors on the effective date of a chapter 11 plan, using a calculation agreed upon with the Creditors' Committee. (*Id.* & Schedule D ¶ 11.) The performance targets are reasonable, realistic, and yet, at the same time, require effort to achieve. (*Id.* ¶ 23.) The Debtors submit that such monetary incentive based on asset recovery is an appropriate gauge of success in the context of the wind-down of the Debtors' businesses.

35. Notwithstanding that the Debtors believe the performance targets negotiated with the Creditors' Committee should be approved as set forth in the Motion, in order to make clearer that the Incentive Bonus is not primarily retentive in nature, the Debtors have modified the performance targets so that the insider Eligible Employee will not receive any Incentive Bonus payment unless the proceeds available for distribution to creditors exceeds the threshold amount identified in Schedule D to the Supplemental Declaration. (*Id.* ¶ 24.) This change clarifies that in no way are payments of the Incentive Bonus guaranteed. (*Id.*)

36. Furthermore, the amount of the Incentive Bonus is modest in the context of these cases. The Incentive Bonus contemplates payments ranging from $50,000 up to $200,000, depending on the proceeds available for distribution to creditors on the effective date of a plan. (*Id.* ¶ 24.) This ranges from approximately .02% to .07% of the total liabilities of the Debtors.[13] (*Id.*) Moreover, the performance targets are appropriate. They were developed in consultation with the Debtors' financial advisers and negotiations with the Creditors' Committee and its financial advisers. (*See id.* ¶¶ 4, 23.) By supporting the terms of the Incentive Bonus, the Creditors' Committee, as the fiduciary of the creditors, clearly believes that it is a rational

[13] Based on the Debtors' total consolidated liabilities as of December 31, 2009, including $2.8 million of postpetition liabilities and excluding $2.4 million related to uncashed checks paid to Noteholders for prepetition redemptions and interest. (Supplemental Decl. ¶ 24.)

expenditure of the Debtors' funds that is in the best interests of the creditors. In addition, the Compensation Committee of Advanta's Board of Directors approved the performance targets for the Incentive Bonus. (*See id.* ¶ 23.)

37. If the Court approves the Incentive Bonus, the efforts of the insider Eligible Employee will directly impact the proceeds available for distribution to creditors on the effective date of a chapter 11 plan. (*Id.* ¶ 25.) The employee plays an important role in negotiations of asset sales that will generate proceeds for the Debtors' estates. (*Id.*) The employee's knowledge will also be critical to analyzing claims filed against the Debtors. (*Id.*) In addition, this insider Eligible Employee will interface with the FDIC, as receiver for ABC, on several key issues. (*Id.*) First, this employee is critical to the analysis of any claims the FDIC asserts on behalf of ABC. (*Id.*) Second, the employee plays a vital role in negotiations with the FDIC that will preserve the value of the credit card receivables that constitute one of the Debtors' most important assets. (*Id.*) Third, this employee is essential to trying to recover claims against, and assets from, ABC. (*Id.*) Moreover, this employee plays a lead role in formulating the Debtors' liquidation strategy, and in executing such strategy. (*Id.*) The Debtors' chapter 11 plan may require that Advanta emerge as a dramatically smaller, but reorganized, entity in order to distribute proceeds in a tax efficient manner and maximize creditors' pro rata recoveries. (*Id.*) The perspective of this insider Eligible Employee is an important component of these complicated strategic restructuring decisions. (*Id.* ¶ 25.) Finally, this employee is charged with playing a lead role in ensuring that the Debtors operate and liquidate in the most cost-efficient manner. (*Id.* & Schedule D ¶ 8.) This saves the estates money and preserves cash, which is the Debtors' most valuable asset. (*Id.*)

38. In addition, although the Incentive Bonus is designed primarily to incentivize this employee, the Debtors are at risk of losing this critical employee. (*Id.* ¶ 26.) This critical insider Eligible Employee is very marketable to other employers, even in the current troubled economic environment. (*Id.*) Since the Commencement Date, this employee has been approached by firms and employment search companies about other job opportunities. (*See id.* Schedule D ¶ 10.) The employee's full engagement is necessary for the Debtors to preserve and maximize the value of assets for their estates and creditors. (*Id.*)

39. In sum, the Debtors have crafted a set of performance targets that have won the approval of their major constituency, that are meaningful and require real effort to achieve, and that are modest when compared to the liabilities of the Debtors. Moreover, this is a key employee whose direct efforts will impact asset sale proceeds, and who will also incentivize other employees to maximize the proceeds available for distribution to creditors. Therefore, the Debtors submit that the Incentive Bonus is appropriate under the circumstances of these chapter 11 cases.

Conclusion

40. As mentioned above, the Debtors' business depends on the expertise, effort, attitude, and efficiency of their employees. It is precisely because the Debtors have announced that they are liquidating, and employees face uncertainty regarding their future, that the Debtors must continue to honor their commitment to their employees to provide severance benefits, so that employees' expanded workload and the significant risk of employee turnover do not threaten the Debtors' ability to implement a wind-down plan and maximize value for their estates and creditors. The Debtors formulated the Postpetition Severance Plan and Incentive Bonus in consultation with their financial advisers and the Creditors' Committee, which supports

the Motion. No economic stakeholder objects to the relief sought in the Motion. Only the U.S. Trustee has objected to the Motion. Moreover, the Debtors have (i) articulated valid business justifications for severance payments to non-insiders, as required by section 363(b) of the Bankruptcy Code, (ii) demonstrated that severance payments to insiders comply with section 503(c)(2) of the Bankruptcy Code, and (iii) justified the Incentive Bonus as appropriate under the circumstances of this case, as required by section 503(c)(3) of the Bankruptcy Code. Accordingly, the Debtors submit that they have met their statutory burden for the relief requested in the Motion.

WHEREFORE, the Debtors respectfully request that the Court (i) overrule the Objection, (ii) enter an order granting the Motion, as modified herein, and (iii) grant such other and further relief as is just.

Dated: May 5, 2010
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