UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re: ADVANTA CORP., *et al.*, Debtors.	Chapter 11 Case No. 09-13931 (KJC) (Jointly Administered) **Hearing Date: December 16, 2010 at 3:30 p.m.** **Objection Deadline: December 7, 2010 at 5:00 p.m.**

OBJECTION OF PROPOSED ERISA CLASS REPRESENTATIVES TO DISCLOSURE STATEMENT FOR DEBTORS' JOINT PLAN UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

Proposed Class Representatives, Matthew A. Ragan, Paula Hiatt, Pamela Yates and Joann Claflin ("Plaintiffs"), in the ERISA[1] class action entitled *In re Advanta Corp. ERISA Litig.*, Civil Action No. 2:09-cv-4974-CMR (the "ERISA Litigation"), filed in the United States District Court for the Eastern District of Pennsylvania (the "District Court"), on behalf of all persons who were participants in or beneficiaries of the Advanta Corp. Employee Stock Ownership Plan and/or the Advanta Corp. Employee Savings Plan (collectively, the "Employee Plans") at any time between October 31, 2006 and November 8, 2009 (the "Class Period"), and whose Employee Plan accounts included investments in common stock of Advanta Corp. ("Advanta" or the "Debtor"), (collectively, the "ERISA Class"), hereby submit this objection (the "Objection") to the Disclosure Statement for Debtors' Joint Plan under Chapter 11 of the Bankruptcy Code (the "Disclosure Statement")[2], and state the following:

BACKGROUND

1. On October 29, 2009, plaintiff Matthew A. Ragan filed a class action complaint (the "Ragan Action") in the District Court against Advanta and certain officers and directors of Advanta alleging violations of ERISA. Thereafter, two other related class action complaints were filed by Plaintiffs Hiatt and Yates and Claflin on November 16, 2009 and December 3,

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[1] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

[2] Capitalized terms shall have the meanings ascribed to them in the Disclosure Statement, unless defined otherwise herein.

2009, respectively (together with the Ragan Action, the "ERISA Actions"). The complaints in all three actions allege that the defendants breached their fiduciary duties under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) in connection with the continued offering of Advanta common stock as an investment option in the Employee Plans despite the fact that the Defendant-fiduciaries knew Advanta common stock to be an imprudent investment alternative.

2. On November 8, 2009 and November 20, 2009 (the "Petition Dates"), the Debtor and certain affiliated entities (collectively, the "Debtors") filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

3. On May 14, 2010, Plaintiff Ragan filed a class proof of claim against Advanta in an amount in excess of $50 million (the "Class Claim").

4. On June 4, 2010, the District Court entered an Order consolidating the individual ERISA Actions as the ERISA Litigation.

5. On August 11, 2010, Plaintiff filed a Consolidated Class Action Complaint (the "Consolidated Complaint") in the ERISA Litigation, alleging violations of §§ 404 and 405 of ERISA, for breach of fiduciary duties in connection with the Employee Plans, against certain officers and directors of Advanta (the "Non-Debtor Defendants"). Pursuant to 11 U.S.C. § 362(a), Advanta was not named as a defendant in the Consolidated Complaint.

6. On November 2, 2010, the Debtors filed the Disclosure Statement for Debtors' Joint Plan [Doc. No. 896] under Chapter 11 of the Bankruptcy Code (the "Plan") [Doc. No. 895] and the Motion for an Order Approving the Disclosure Statement and other relief [Doc. No. 899]. The hearing on the approval of the Disclosure Statement is scheduled for December 16, 2010.

OBJECTION

7. A disclosure statement may be approved as adequate only if it contains "information of a kind, and in sufficient detail, as far as is reasonably practical in light of the

nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan." 11 U.S.C. § 1125(a); *see also In re Zenith Electronics Corp.*, 241 B.R. 92, 99-100 (Bankr. D. Del. 1999) (the disclosure statement must contain information that is "reasonably practicable [to permit an] informed judgment" by holders of claims or interests to vote on the plan). Courts have ample discretion to determine what constitutes adequate information. *See, e.g., Abel v. Shugrue (In re Ionosphere Clubs, Inc.)*, 179 B.R. 24, 29 (S.D.N.Y. 1995), *appeal dismissed by, in part, affirmed by, in part*, 184 B.R. 648 (S.D.N.Y. 1995)(citing *In re Texas Extrusion Corp.*, 844 F.2d 1142, 1157 (5th Cir. 1988)). Although adequacy is determined on a case-by-case basis under a fact-specific flexible standard, (*see id.*), a disclosure statement must contain "simple and clear language delineating the consequences of the proposed plan on [creditors'] claims and the possible [Bankruptcy] Code alternatives so that [creditors] can intelligently accept or reject the Plan." *In re Copy Crafters Quickprint, Inc.*, 92 B.R. 973, 981 (Bankr. N.D.N.Y. 1988). A disclosure statement "must clearly and succinctly inform the average unsecured creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." *In re Ferretti*, 128 B.R. 16, 19 (Bankr. D.N.H. 1991).

8. Plaintiffs believe that in certain material respects, the Disclosure Statement does not contain sufficient information to enable a reasonable person to make an "informed judgment about the Plan." Indeed, the Disclosure Statement and the Plan contain broad and ambiguous provisions and/or omit material facts that (i) may mislead holders of claims or interests, or (ii) should be available to holders of claims or interests.

9. ***To the extent any objection, in whole or in part, contained herein is deemed to be an objection to confirmation of the Plan rather than, or in addition to, an objection to the adequacy of the Disclosure Statement, Plaintiffs reserve their right to assert such objection, as well as any other objections, to confirmation of the Plan. Furthermore, to the extent Plaintiffs or any member of the ERISA Class are impacted in any way by the contents of any***

supplements or amendments to the Disclosure Statement or the Plan, which may be filed after any Disclosure Statement or Plan confirmation objection deadline, Plaintiffs reserve their right to object thereto.

10. Plaintiffs object to the adequacy of the Disclosure Statement and to the Plan (subject to the above reservation of rights) on the following grounds:

a. the Plan attempts to improperly classify the Class Claim as a Class 6 Subordinated Claim, and the Debtors seek to improperly utilize the Plan to subordinate the Class Claim as opposed to asserting a claim objection or commencing some other contested matter;

b. the Disclosure Statement fails to describe, and the Plan fails to provide, an adequate protocol for the preservation and/or destruction of the Debtors' books, records or documents whether transferred to the Liquidating Trusts or others or retained by Reorganized Advanta;

c. the Disclosure Statement fails to adequately describe available insurance as it relates to the claims of Plaintiffs and the ERISA Class asserted in the Bankruptcy Proceeding and in the ERISA Litigation, or disclose whether the Plan intends to deny Plaintiffs or the ERISA Class the right to proceed with their claims against the Debtors to the extent of available insurance coverage, irrespective of any injunctions, discharge or distribution under the Plan; and

d. the Plan Injunction, Stay and Exculpation provisions are ambiguous and improper, and must affirmatively exclude any claims of Plaintiffs and the ERISA Class against the Non-Debtor Defendants and any other non-Debtors.

11. In order to bring the Disclosure Statement into compliance with 11 U.S.C. § 1125(a) and to make the Plan confirmable under the Bankruptcy Code, the Disclosure Statement

and Plan must be modified. Unless and until the Plan and Disclosure Statement are revised, the Disclosure Statement should not be approved.

A. The Plan Attempts to Improperly Classify the Class Claim as a Class 6 Subordinated Claim, and the Debtors Seek to Improperly Utilize the Plan to Subordinate the Class Claim as Opposed to Asserting a Claim Objection or Some Other Contested Matter.

12. Holders of Subordinated Claims are placed in Plan Class 6. Under the Plan, such Holders are entitled to receive Beneficial Interests in the applicable Liquidating Trusts, but only after allowed Claims in classes having a higher priority are paid in full. The Debtors anticipate that the distribution to Class 6 Subordinated Claims will be zero and that such Holders will receive no distribution under the Plan. Disclosure Statement ("D.S."), Art. II. B; V.D.6; Plan, § 4.11.

13. The Plan defines "Subordinated Claim" as a Claim that is subordinated pursuant to 11 U.S.C. § 510. Plan, § 1.159.

14. Furthermore, the Plan expressly provides that the claims related to the ERISA Litigation are "classified and treated as Subordinated Claims, *without the need for further court order*." D.S., Art. V.D.6; Plan, § 4.11(c) (emphasis added).

15. As a result, if confirmed, the Plan would deem the Class Claim a Subordinated Claim in Class 6 without the filing of any claim objection or adversary proceeding to subordinate the Class Claim pursuant to 11 U.S.C. § 510(b) and without Plaintiffs having their "day in court" on this issue. Plaintiffs would receive no distribution under the Plan despite there being no determination by this Court in the appropriate context of a claim objection or adversary proceeding, which is required under the Federal Rules of Bankruptcy Procedure (*see* FED. R. BANKR. P. 7001(8)).

16. Plaintiffs dispute this improper classification and maintain that the Class Claim and any other claim based upon the allegations of the ERISA Litigation are general unsecured claims which should be placed in Plan Class 4. This issue cannot be resolved simply by the

Debtors' unilateral determination under the Plan without the issue having been properly vetted before this Court.

17. The Class Claim and such other Claims asserted, or that may be asserted, by Plaintiffs, individually, or on behalf of the Employee Plans and the ERISA Class, are not and should not be subject to subordination under 11 U.S.C. § 510(b). These claims are not securities claims as contemplated by 11 U.S.C. § 510(b), but rather are claims for breach of fiduciary duty under ERISA against the Employee Plans' fiduciaries for improperly investing or administering the holdings of the Employee Plans, especially with respect to Advanta stock. Plaintiffs are not proceeding in the ERISA Litigation in any capacity other than as participants in the Employee Plans – they are not proceeding as shareholders of Advanta.

18. Moreover, the Class Claim is not premised upon any allegations of fraud by Advanta in connection with Plaintiffs' individual purchase of Advanta stock, which allegations may generally trigger subordination under 11 U.S.C. § 510(b). The ERISA Litigation arises from breaches of statutorily mandated fiduciary duties by the Employee Plans fiduciaries, independent of and quite distinct from securities fraud causes of action. *See Rogers v. Baxter Int'l, Inc.*, 521 F.3d 702, 705 (7th Cir. 2008) (distinguishing an ERISA suit from a securities action).

19. Plaintiffs were employees of Advanta and participants in or beneficiaries of the Employee Plans. The Employee Plans held investments in Advanta stock during the Class Period. Plaintiffs, along with the other proposed class members (current and/or former employees of Advanta), as participants in the Employee Plans, lost millions of dollars of their retirement savings when the value of Advanta stock held in the Employee Plans plummeted in value, eventually becoming worthless. Notwithstanding the foregoing, the fiduciaries of the Employee Plans (including Advanta) continued to offer Advanta stock as an investment for participant contributions under the Employee Plans, despite actual or constructive knowledge of the financial disaster that was about to befall Advanta as it spiraled into bankruptcy.

20. The Consolidated Complaint alleges that Non-Debtor Defendants, fiduciaries of the Employee Plans, breached their fiduciary duties to the Employee Plans, Plaintiffs and members of the putative class, and were therefore liable to the Employee Plans, Plaintiffs and members of the putative class for the damages from that breach. *See* ERISA § 409(a) (fiduciaries are obligated to "make good to such plan any losses to the plan resulting from each such breach." Moreover, a court may grant "other appropriate relief" under ERISA § 502(a)(3).

21. Because the Class Claim is not a claim subject to subordination under 11 U.S.C. § 510(b), Advanta cannot, and should not, be permitted to use the Plan as a means to unilaterally subordinate the Class Claim. Merely manipulating definitions to create subordinated claims is impermissible as is stripping a creditor of its rights to due process before subordination of its claim. Indeed, some contested matter seeking subordination, which would provide discovery rights and ultimately a full evidentiary hearing, must be commenced before a claim may be subordinated under 11 U.S.C. § 510. The unilateral designation in the Plan, together with the Debtors' statement that no court order is necessary, is no substitute for due process.

B. The Disclosure Statement Fails to Describe, and the Plan Fails to Provide, an Appropriate Mechanism for the Preservation of Documents.

22. The Disclosure Statement states that the Plan provides for the establishment of various Liquidating Trusts pursuant to the respective Liquidating Trust Agreements (the "LTAs"). *See* D.S., Art. V. E.4(a); Plan, § 5.4. Copies of the LTAs are to be furnished as part of the Plan Supplement (Plan, § 1.145) at least five (5) days prior to the deadline for voting on confirmation of the Plan.[3] *See* Plan, § 12.7.

23. The Plan defines Liquidating Trust Assets as all of Advanta's rights and assets, including Causes of Action and Books and Privileges relating to the Assets, Plan, § 1.11, and provides for the Debtors to transfer those Assets to the Liquidating Trusts to be administered by

[3] Plaintiffs reserve their right to object to the LTAs and such other documents that may be included in the Plan Supplement.

the Liquidation Trustee (*see* D.S., Art. V. E.4(c) and (g); Plan, § 5.4(c) and (g)). Title to all Assets will vest in the Liquidating Trusts. *See* D.S., Art. V. E.4(c); Plan, § 5.4(c). Books and Privileges include the Debtor's books, records, all documents and communications of any kind, whether physical or electronic and all privileges attendant thereto. *See* Plan, § 1.88.

24. Although the Debtors are compelled to maintain and preserve their Assets during the chapter 11 proceeding, the Plan fails to provide for the preservation of the Debtors' Assets, including the Debtors' books, records and other documents, in any format (*e.g.*, electronic or hard-copy) (collectively, the "Documents") by Reorganized Advanta post-confirmation. Therefore, a document preservation protocol must be established to prevent the destruction or abandonment of the Documents post-confirmation, especially because the Documents may include critical information relevant to the ERISA Litigation and certain other information relevant to the Class Claim.

25. To the extent Documents are transferred to the Liquidating Trusts or other Entities, the Liquidating Trust, the Liquidating Trustees and any transferee must also be bound by any document preservation protocol approved by the Bankruptcy Court.

26. Indeed, whether the Documents are retained by Reorganized Advanta or transferred to the Liquidating Trusts or to some other estate representative or third-party, the Documents must be preserved or maintained so as to be available to parties in interest, especially if the Documents are not available elsewhere. To do otherwise prejudices the rights of the Plaintiffs, members of the ERISA Class and other parties in interest. At the very least, some mechanism for providing notice and an opportunity to be heard by a court of competent jurisdiction must be established before any such Documents are abandoned, destroyed or rendered otherwise unavailable.

27. It is imperative that Reorganized Advanta, the Liquidating Trusts, the Liquidating Trustees or any third-party transferee retain and preserve the Documents that may be potentially relevant to the ERISA Litigation and the Claims arising therefrom, at least until such time as Plaintiffs are able to conduct and complete discovery, and that Plaintiffs be given reasonable

notice of any proposed destruction or abandonment of the Documents and an opportunity to be heard before such proposed destruction or abandonment.

28. The Debtors, the Liquidating Trusts, Liquidating Trustees, or such other potential transferee of the Documents, as the case may be, must advise parties in interest through the Plan of their intention with respect to the Documents. Therefore, the Plan and/or any order confirming the Plan should include the following language:

> From and after the Effective Date, the Debtors, Reorganized Advanta, the Liquidating Trusts, the Liquidating Trustees, and any transferee of the Debtors' Documents (defined *infra*), as the case may be, shall preserve and maintain all of the Debtors' documents, files, books, records, electronic data (including, but not limited to, emails and email server back-up tapes) (collectively, the "Documents"), whether retained by Reorganized Advanta or any successor thereto, or transferred to the Liquidating Trusts or the Liquidating Trustees, pursuant to the Liquidating Trust Agreements, or to such other transferee pursuant to the Plan, and Reorganized Advanta, any successors thereto, the Liquidating Trusts, the Liquidating Trustees and/or such other transferee shall not destroy or otherwise abandon any such Documents absent further order of this Court or such other court of competent jurisdiction after a hearing upon notice to parties in interest, including Plaintiffs, with an opportunity to be heard.

29. To the extent the Debtors do not intend to preserve the Documents or object to the inclusion of the foregoing language in the Plan or in any Order confirming the Plan, the Disclosure Statement should explain why.

C. The Disclosure Statement Fails to Adequately Describe Available Insurance as It Relates to the Claims of Plaintiffs and the ERISA Class Asserted in the Bankruptcy Proceeding and in the ERISA Litigation, or Disclose Whether the Plan Intends to Deny Plaintiffs the Right to Proceed with their Claims Against the Debtors to the Extent of Available Insurance Coverage, Irrespective of any Injunctions, Discharge or Distribution under the Plan.

30. Upon information and belief, the Debtors maintain fiduciary liability insurance policies (the "Liability Policies")[4] in favor of their directors and officers for claims asserted in

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4 To the extent the Liability Policies are determined to be executory contracts, they are deemed assumed and transferred to the applicable Liquidating Trust. D.S., Art. V.H.6; Plan, § 8.6(b).

the ERISA Litigation, as well as for claims against the Debtors directly for violations of ERISA. While the Disclosure Statement and Plan refer to the Debtors' D&O Policies,[5] D.S., Art. V, H.6; Plan, § 8.6(b), they fail to disclose the extent of the coverage provided by any Liability Policies. Plaintiffs maintain that the ERISA Class is entitled to look to the proceeds of such insurance for payment in connection with the claims of Plaintiffs and the ERISA Class and may, at least, pursue these Claims against the Debtors to the extent of such available insurance post-Confirmation. Because Plaintiffs may not have a direct action against the insurance carriers under the Liability Policies, the proceeds of the Liability Policies may only be accessed through the pursuit of the claims asserted in the ERISA Litigation. Accordingly, the Plan should not impact the rights of Plaintiffs or the ERISA Class to pursue their claims against the Debtors to the extent of the proceeds of the Liability Policies.

31. In order to overcome this Disclosure Statement inadequacy, the Plan and Disclosure Statement should provide that:

> Nothing in the Plan, or in any Order confirming the Plan, shall preclude Plaintiffs and the ERISA Class from pursuing their claims against the Debtors to the extent of available insurance coverage and proceeds. The Claims of Plaintiffs and the ERISA Class against the Debtors, to the extent of available insurance, are preserved and not discharged by the Plan.

32. Furthermore, although couched as a "reorganization," the reality is that the Debtors are liquidating, and the fiction of a reorganization involving one entity to hold stock should not offer the Debtors a discharge they would not otherwise be entitled to as liquidating debtors. *See* 11 U.S.C. § 1141(d)(3)(A) (confirmation of a liquidating plan does not discharge a debtor). The Disclosure Statement is silent as to any discharge of the Debtors.

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5 Unless advised otherwise, the Liability Policies would appear to be treated or considered as D&O Policies under the Plan.

D. The Plan Injunction, Stay and Exculpation Provisions[6] are Ambiguous, and Must Affirmatively Exclude any Claims of Plaintiffs and the ERISA Class Against the Non-Debtor Defendants and any Other Non-Debtors.

i. The Bankruptcy Court Lacks Jurisdiction to Release and Enjoin the Prosecution of the ERISA Claims Asserted in the ERISA Litigation against Non-Debtors.

33. To the extent the Plan intends to release the claims or interests of Plaintiffs and/or the ERISA Class, or enjoin them from prosecuting their claims against the Non-Debtor Defendants, the Court must, as a threshold question, first determine whether or not it has jurisdiction to determine the validity of the Plan release and injunction provisions as they relate to the ERISA Litigation against non-Debtors. The Third Circuit Court of Appeals in *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 214, n. 12 (3d Cir. 2000), has expressed its concern "that the Bankruptcy Court apparently never examined its jurisdiction to release and permanently enjoin [the third-party's] claims against non-debtors." While certain matters between non-debtor third-parties affecting the debtor and the bankruptcy case may be within the subject matter jurisdiction of the Court, it is not without limits and the Court "cannot simply presume it has jurisdiction in a bankruptcy case to permanently enjoin third-party *class actions* against non-debtors." *Id.* (emphasis added).

34. Recently, the Second Circuit addressed the jurisdictional issue and upheld its earlier holding in the same case that a "'bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate.'" *Johns-Manville Corp. v. Chubb Indemnity Ins. Co. (In re Johns-Manville Corp.)*, 600 F.3d 135,152 (2d Cir. 2010) "*Manville 2010*")(quoting *In re Johns-Manville Corp.*, 517 F.3d 52, 66 (2d Cir. 2008) ("*Manville 2008*")). Such jurisdiction is statutory. *In re Combustion Engineering, Inc.*, 391 F.3d. 190, 225 (3d Cir. 2004). As noted in the *Manville 2010* decision, *Manville 2008* held that "a bankruptcy court's *in rem* jurisdiction was insufficient to enjoin the [direct claim] based upon

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[6] While the Plan and Disclosure Statement do not identify these provisions as "Releases," they effectively constitute a release of the Claims and Interests held by creditors and other parties in interest. Therefore, to the extent these provisions do in fact release or attempt to release any claims of Plaintiffs against a non-Debtor, including the Non-Debtor Defendants, Plaintiffs assert that this Objection is applicable.

. . . legal theories that seek to impose liability on [the insurer] as a separate entity rather than on the policies." *Manville 2010*, 600 F.3d at 152. Thus, the nature of the third-party claim against the non-debtor, whether it be direct or derivative, must be considered before the Court can exercise subject matter jurisdiction in connection with the non-debtor releases and injunctions in the Plan. The ERISA Litigation certainly asserts direct claims against third-parties over which the Court does not have subject matter jurisdiction.

ii. The Plan Injunction, Stay and Exculpation Provisions are Improper.

35. The Plan injunction and stay provision (*see* D.S., Art. V, J.3; Plan, § 10.3) at the very least requires clarification as to the extent it may impact claims against a non-Debtor. The Plan states that "all Persons who have held, hold or may hold Claims or Equity Interests and all other parties in interest . . . are permanently enjoined from [*inter alia*] (i) commencing or continuing in *any* manner *any* action or other proceeding of *any* kind . . . related to a Claim or Equity Interest against the Debtors . . . or (v) pursuing any Claim or Interest released pursuant to Article XII (*sic*)[7] of the Plan." *Id.* (emphasis added). Because the causes of action asserted against the Non-Debtor Defendants in the ERISA Litigation relate to a Claim against the Debtor, they may be subject to this improper provision. Therefore, this provision should not be allowed, and is, at best, ambiguous and requires clarification.

36. The exculpation provision is also tantamount to a release of various parties, including the Debtors' officers and directors, from liability to any Entity "for *any* Claim, Cause of Action or other assertion of liability for *any* act taken in connection with, or arising out of, the Chapter 11 Cases." D.S., Art. V, J.7; Plan, § 10.7 (emphasis added). This language may be read to include pre-petition claims and is therefore improper.

37. The reference in the injunction and stay provision to claims in *any* action or proceeding of *any* kind, (*see* D.S., Art. V. J.3(i) and (v); Plan, §10.3(i) and (v)), as well as similar

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[7] Article XII of the Plan does not appear to provide any releases and the reference thereto should be deleted. However, to the extent Article XII is intended to provide for the release of any Claims or Interests, those Claims and Interests should be disclosed. Plaintiffs their right to object to any release purportedly available under Article XII.

language in the exculpation provision, (*see* D.S., Art. V, J.7; Plan, § 10.7 (quoted at ¶ 36, *supra*)), compounds the ambiguity. Indeed, in the absence of language to the contrary, the Plan's release, injunction and exculpation provisions are so broad and ambiguous that they may be interpreted to impact, enjoin, prohibit and/or preclude Plaintiffs from asserting claims in the ERISA Litigation against non-Debtors or seeking discovery post-Effective Date. The Disclosure Statement offers no basis for such broad release, injunction and exculpation provisions, that may be justified only in the most extraordinary and unusual circumstances. *See* ¶¶ 38-39, *infra*. In order to avoid any doubt, the Disclosure Statement and Plan should affirmatively provide that no non-Debtors are being released from claims by or liability to third-parties, such as Plaintiffs and the ERISA Class, and that Plaintiffs' ability to request and obtain relevant discovery is not impacted in any way.

38. As a result of the broad language of the aforesaid Plan provisions, non-debtors who, in the absence of unusual circumstances, are not entitled to the protections of the Bankruptcy Code, may very well benefit from such protections. Therefore, to the extent any of Plaintiffs' claims in the ERISA Litigation may be subject to the Plan Injunction and/or Release provisions, the provisions are improper. *See, e.g., Deutsche Bank AG London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 141-42 (2d Cir. 2005) (holding that non-debtor releases are proper only in rare cases and may be "tolerated only if the affected creditor consents"); *see also Gillman*, 203 F.3d at 211 (holding that a debtor must satisfy its burden of proof and establish through specific factual findings that non-debtor third-party releases are fair and necessary); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 608 (Bankr. D. Del. 2001) (citing *Gillman* for the proposition that "extraordinary circumstances [are] required to meet even the most flexible test for third party releases."); *In re Combustion Engineering*, 391 F. 3d 190, 236 (3d Cir. 2004) (holding in an asbestos injury case that 11 U.S.C. § 105 may not be used to validate a non-debtor release where to do so trumps another Bankruptcy Code section).

39. In the absence of consideration and creditor consent, non-debtor third-party release, injunction and exculpation provisions have been disallowed and rejected by this Court. *See, e.g., In re Exide Techs.*, 303 B.R. 48, 75 (Bankr. D. Del. 2003). Here, Plaintiffs and the ERISA Class are not receiving any consideration from the non-Debtor third-parties who may benefit from these gratuitous provisions and do not consent to the injunction, exculpation and resultant release provisions under the Plan. Therefore, the following language should be included in the Disclosure Statement and the Plan:

> Nothing in the Plan or in any order confirming the Plan shall (i) affect, release, enjoin or impact in any way the prosecution of the claims asserted, or to be asserted, against any non-Debtor in the ERISA Litigation or (ii) preclude Plaintiffs and/or the ERISA Class from seeking discovery from the Debtors, Reorganized Advanta, the Liquidating Trusts or Trustees or such other transferee of the Debtors' Books and Privileges, or any other assets of the Debtors.

40. If it is the Debtors' intent to release and enjoin third-party claims against non-Debtors, including any of the claims asserted in the ERISA Litigation, then the Plan is unconfirmable as a matter of law. Furthermore, Plaintiffs should not be obliged to take the risk with respect to determining the extent of the Plan release, injunction and exculpation provisions, or whether a Non-debtor Defendant may be provided shelter within the ambiguous language under the Plan.

CONCLUSION

41. Based on the foregoing, Plaintiffs respectfully request that an order be entered (i) denying approval of the Disclosure Statement, and (ii) granting Plaintiffs such other and further relief as the Court deems just and proper.

Dated: December 7, 2010

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By: _____

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CERTIFICATE OF SERVICE

I, David G. Holmes, hereby certify that on this 7th day of December, 2010, I caused copies of the *Objection of Proposed ERISA Class Representatives to Disclosure Statement for Debtors' Joint Plan Under Chapter 11 of the Bankruptcy Code* to be served on the parties on the attached list in the manner indicated.

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