UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	**Chapter 11**
ADVANTA CORP., *et al.*,	:	**Case No. 09-13931 (KJC)**
Debtors.	:	**(Jointly Administered)**
	:	**Re: Docket Nos. 1134, 1135, 1142, 1147, 1151, 1153, 1154 & 1155**

MEMORANDUM OF LAW IN SUPPORT OF CONFIRMATION OF THE DEBTORS' JOINT PLAN UNDER CHAPTER 11 OF THE BANKRUPTCY CODE, AS MODIFIED

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Advanta Corp. ("***Advanta***") and its affiliated debtors and debtors in possession (collectively, the "***Debtors***")[1] submit this Memorandum of Law (the "***Memorandum***") in support of confirmation, pursuant to section 1129 of title 11 of the United States Code (the "***Bankruptcy Code***"), of the Debtors' proposed Plan (as defined below), which has been accepted almost unanimously by creditors who voted, and respectfully represent as follows:

BACKGROUND

On November 8, 2009, the majority of the Debtors filed their petitions under chapter 11 of the Bankruptcy Code.[2] Advanta Ventures Inc., BE Corp. (f/k/a BizEquity Corp.), ideablob Corp. and ACCRC commenced their chapter 11 cases on November 20, 2009 (collectively with the cases commenced on November 8, 2009, the "***Chapter 11 Cases***"). The Chapter 11 Cases were consolidated for procedural purposes only and are being jointly administered. The Debtors have been operating their businesses and managing their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee has been appointed in the Chapter 11 Cases.

The Debtors have proposed a modified plan of liquidation pursuant to chapter 11 of the Bankruptcy Code, which provides that most of the assets of the

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[1] The Debtors in these jointly administered Chapter 11 Cases are Advanta, Advanta Investment Corp., Advanta Business Services Holding Corp., Advanta Business Services Corp., Advanta Shared Services Corp. ("***ASSC***"), Advanta Service Corp. ("***ASC***"), Advanta Advertising Inc., Advantennis Corp., Advanta Mortgage Holding Company, Advanta Auto Finance Corporation ("***Advanta Auto Finance***"), Advanta Mortgage Corp. USA ("***AMCUSA***"), Advanta Finance Corp. ("***Advanta Finance***"), Advanta Ventures Inc., BE Corp. (f/k/a BizEquity Corp.), ideablob Corp., Advanta Credit Card Receivables Corp. ("***ACCRC***"), Great Expectations International Inc., Great Expectations Franchise Corp., and Great Expectations Management Corp.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan or the Disclosure Statement (both as defined below), as may be applicable.

Debtors' estates will be transferred to six liquidating trusts and distributed from such trusts to the Debtors' stakeholders according to their priorities set forth in the Bankruptcy Code. A seventh trust (the Advanta Trust) will hold stock of Reorganized Advanta, which will own stock of Debtor-subsidary ASC and non-Debtor subsidiary ABHC, some cash, a certain portion of Advanta's portfolio of credit card receivables, and an interest in a certain credit card partnership that may be impractical to liquidate in the near future. Any distributions from the Advanta Trust will be distributed to the Consolidated Debtors' stakeholders in accordance with the priorities set forth in the Bankruptcy Code. The Plan contemplates and is predicated upon substantive consolidation of the Consolidated Debtors into a single entity for the purpose of all actions under the Plan and for all purposes related to the Plan, including, without limitation, for purposes of voting, confirmation and distribution.

To effectuate and implement the liquidation of their assets, the Debtors filed the following documents with the Court:

- That certain Joint Plan under Chapter 11 of the Bankruptcy Code, dated November 2, 2010 (as modified December 17, 2010) (as further modified, the "***Plan***") [Docket. No. 1037].
- That certain Disclosure Statement for the Joint Plan Under Chapter 11 of the Bankruptcy Code, dated November 2, 2010 (as modified December 17, 2010) (the "***Disclosure Statement***") [Docket. No. 1038], which was approved by Order of this Court, dated December 17, 2010 [Docket No. 1042].

On November 2, 2010, the Debtors filed a motion requesting approval of the Disclosure Statement and authority to solicit acceptances of the Plan (the "***Disclosure Statement Motion***") [Docket No. 899]. On December 17, 2010, the Court entered an order approving the Disclosure Statement and authorizing the Debtors to solicit

acceptances of the Plan (the "***Disclosure Statement Order***").[3] The Creditors' Committee supports the Plan that was sent out for solicitation and urged creditors to vote to accept the Plan. Pursuant to the Disclosure Statement Order, the Court established February 1, 2011, at 5:00 p.m. as the voting deadline with respect to the Plan (the "***Voting Deadline***") and as the deadline for parties in interest to object to confirmation of the Plan and/or disallowance of Claims listed on Schedule 12.10 of the Plan.

On January 22, 2011, the Debtors filed the supplement to the Plan (as the documents contained therein have been and may be further amended or supplemented, the "***Plan Supplement***"), which includes the following documents: (i) the form of Trust Agreements, (ii) Schedules 8.1 and 8.7 of the Plan, (iii) a list of initial directors for Reorganized Advanta and ASC, (iv) a list of initial officers of the Reorganized Advanta and ASC, and (v) the charter and by-laws of Reorganized Advanta and ASC. The Debtors believe that all such materials comply with the terms of the Plan, and the filing and notice of such documents was good and proper and in accordance with the Bankruptcy Code, the Bankruptcy Rules and the Local Bankruptcy Rules for the United States Bankruptcy Court for the District of Delaware (the "***Local Rules***"), and that no other or further notice is required.

The Plan has been overwhelmingly accepted by each of the 11 impaired accepting Classes: Class 3 (Investment Note Claims and RediReserve Certificate Claims against Advanta); Classes 4(a)-(f) (General Unsecured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, Advanta Finance,

[3] *Order (i) Approving the Disclosure Statement, (ii) Approving Notice and Objection Procedures for the Disclosure Statement Hearing, (iii) Establishing Solicitation and Voting Procedures, (iv) Scheduling a Confirmation Hearing, and (v) Establishing Notice and Objection Procedures for Confirmation of the Proposed Plan*, dated December 17, 2010 [Docket. No. 1042].

respectively); Class 5 (Subordinated Note Claims against Advanta); and Classes 7(d)-(f) (Equity Interests in AMCUSA, Advanta Auto Finance, and Advanta Finance, respectively). In fact, more than 97% of the amount of Claims and Equity Interests that voted in each of these Classes voted to accept the Plan and, in the aggregate, only 11 of the 3,029 holders of Claims and Equity Interests who voted rejected the Plan.

The Plan has been deemed rejected by Classes 7(a)-(c) (Equity Interests in the Consolidated Debtors, Advantennis, and ASSC, respectively). In addition, Classes 6(a)-(f) (Subordinated Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance) did not submit votes on the Plan, and, thus, have not accepted the Plan.[4]

The Debtors received several informal responses and two formal objections to the Plan. The Debtors have resolved all of the informal responses to the Plan (the "***Resolved Responses***"). Simultaneously herewith, the Debtors have filed certain modifications to the Plan to, among other things, incorporate the resolution of the Resolved Responses. The objections that have not yet been resolved (the "***Objections***") are:

- Objection of Lead Plaintiff, Western Pennsylvania Electrical Employees Pension Fund, to Debtors' Joint Plan Under Chapter 11 of the Bankruptcy Code [Docket No. 1134] (the "***Securities Plaintiffs' Objection***"); and
- Objection of Proposed ERISA Class Representatives to Debtors' Joint Plan Under Chapter 11 of the Bankruptcy Code [Docket No. 1135] (the "***ERISA Claimants' Objection***").

[4] No ballots were received on account of Claims in Class 6(a). In addition, there were no holders of filed or scheduled Claims who met the classification requirements of Classes 6(b)-(f) (Subordinated Claims against Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), and, accordingly, no ballots were sent or received on account of Classes 6(b)-(f). The Debtors are not aware of any holders of Claims who will meet the classification requirements of Classes 6(b)-(f).

Exhibit A hereto summarizes each of the Objections and the Debtors' response thereto. In Section XVII herein, the Debtors respond more fully to some of the legal and factual arguments raised in the Objections. As set forth more fully below, the Objections are without merit and should be overruled.

As discussed below, and as will be further demonstrated at the Confirmation Hearing, the Plan satisfies all of the confirmation requirements contained in sections 1122, 1123, 1125, 1126 and 1129 of the Bankruptcy Code.[5] Accordingly, the Objections should be overruled and the Plan confirmed.

In further support of confirmation of the Plan and in opposition to the Objections, the Debtors are filing contemporaneously herewith:

- Declaration of William A. Rosoff in Support of Confirmation of the Joint Plan Under Chapter 11 of the Bankruptcy Code, Dated November 2, 2010, As Modified (the "***Rosoff Declaration***");
- Declaration of Joseph A. Bondi in Support of Confirmation of the Joint Plan Under Chapter 11 of the Bankruptcy Code, Dated November 2, 2010, As Modified (the "***Bondi Declaration***"); and
- Declaration of Jeffrey S. Stein of The Garden City Group, Inc. Certifying the Methodology for the Tabulation of Votes on and Results of Voting With Respect to the Debtors' Joint Plan Under Chapter 11 of the Bankruptcy Code (the "***GCG Declaration***" and, together with the Bondi Declaration and the Rosoff Declaration, the "***Declarations***").

FACTS

The pertinent and salient facts relating to the Debtors' Chapter 11 Cases and the Plan are set forth in the pleadings and other documents filed on the docket in these Chapter 11 Cases, including the Disclosure Statement, the Plan, the Declarations,

[5] Unless otherwise specified herein, all references to "sections" in this Memorandum shall be construed to refer to section of the Bankruptcy Code.

and orders entered by the Court in these Chapter 11 Cases. Such facts are incorporated herein as though set forth fully and at length. As necessary, salient facts will be referred to in connection with the discussion of applicable legal principles.

ARGUMENT

To obtain confirmation of the Plan, the Debtors must demonstrate that the Plan satisfies the applicable provisions of section 1129 of the Bankruptcy Code by a preponderance of the evidence. *See, e.g., Heartland Fed. Sav. & Loan Ass'n v. Briscoe Enter., Ltd. II (In re Briscoe Enter., Ltd. II)*, 994 F.2d 1160, 1165 (5th Cir. 1993) ("The combination of legislative silence, Supreme Court holdings, and the structure of the [Bankruptcy] Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof under both § 1129(a) and in a cramdown."); *In re Hawkeye Renewables, LLC*, No. 09-14461 (KJC), 2010 WL 2745975, at *3 (Bankr. D. Del. June 2, 2010) ("The Debtors have the burden of proving the elements of sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence.") (annexed hereto as ***Exhibit E***); *see also In re Adelphia Communications Corp.*, 361 B.R. 337, 364-65 (S.D.N.Y. 2007) ("The bankruptcy court must find by a preponderance of the evidence that the plan is in the best interests of the creditors."); *In re Armstrong World Indus., Inc.*, 348 B.R. 111, 120 (D. Del. 2006) ("In the context of a cramdown, the debtor's standard of proof that the requirements of § 1129 are satisfied is preponderance of the evidence." (citations omitted)).

Through filings with the Court and, potentially, additional testimonial evidence that may be adduced at the hearing to be held before the Court on February 10, 2011 (the "***Confirmation Hearing***"), the Debtors will demonstrate by a preponderance of

the evidence that all applicable subsections of section 1129 of the Bankruptcy Code have been satisfied with respect to the Plan.

I.
SECTION 1129(A)(1): THE PLAN COMPLIES WITH THE APPLICABLE PROVISIONS OF THE BANKRUPTCY CODE

Section 1129(a)(1) of the Bankruptcy Code requires that a plan must "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history of section 1129(a)(1) informs that this provision encompasses the requirements of sections 1122 and 1123 of the Bankruptcy Code governing classification of claims and contents of a plan, respectively. H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *see In re Johns-Manville Corp.*, 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986), *aff'd in part, rev'd in part on other grounds*, 78 B.R. 407 (S.D.N.Y. 1987), *aff'd*, *In re Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988); *In re Nutritional Sourcing Corp.*, 398 B.R. 816, 824 (Bankr. D. Del. 2008).

As demonstrated below, the Plan fully complies with the requirements of sections 1122, 1123, and all other applicable provisions of the Bankruptcy Code.

A. The Plan Complies with Section 1122 of the Bankruptcy Code

Section 1122(a) of the Bankruptcy Code provides in pertinent part as follows:

> Except as provided in subsection (b) of this section, a plan may place a claim or interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.

For a classification structure to satisfy section 1122 of the Bankruptcy Code, not all substantially similar claims or interests need to be designated in the same

class. Instead, claims or interests designated to a particular class must be substantially similar to each other. *In re Armstrong World Indus., Inc.*, 348 B.R. at 159.

The Plan provides for the separate classification of Claims against and Equity Interests in the Debtors based upon valid business, factual, and legal reasons. Specifically, in addition to Administrative Expense Claims and Priority Tax Claims, which need not be classified, the Plan designates the following 26 classes of Claims and seven classes of Equity Interests: Classes 1(a)-(f) (Other Priority Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively); Classes 2(a)-(f) (Secured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively); Class 3 (Investment Note Claims and RediReserve Certificate Claims against Advanta); Classes 4(a)-(f) (General Unsecured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, Advanta Finance, respectively); Class 5 (Subordinated Note Claims against Advanta); Classes 6(a)-(f) (Subordinated Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively); and Classes 7(a)-(g) (Equity Interests in the Consolidated Debtors (other than ASC), Advantennis, ASSC, AMCUSA, Advanta Auto Finance, Advanta Finance, and ASC, respectively).

Each of the Claims or Equity Interests in each particular Class is substantially similar to the other Claims or Equity Interests in such Class. Specifically, all claims entitled to priority treatment under sections 507(a)(4), (5), (6) or (7) of the Bankruptcy Code are classified in Classes 1(a)-(f). All secured claims are classified in

Classes 2(a)-(f). All claims of Investment Notes and RediReserve Certificates, respectively, are classified in Class 3. All other non-subordinated, non-priority general unsecured claims are classified in Classes 4(a)-(f). All claims arising under the 8.99% Indenture relating to the Subordinated Notes are classified in Class 5. All claims subject to subordination other than the Subordinated Note Claims, including, without limitation, subordination under section 510(b) of the Bankruptcy Code, are classified in Classes 6(a)-(f). All Equity Interests are classified in Classes 7(a)-(g).

Based on the foregoing, the Debtors submit that the classification of Claims and Equity Interests does not prejudice the rights of holders of such Claims or Equity Interests, is consistent with the requirements of the Bankruptcy Code and, thus, is appropriate. *See Olympia & York Fla. Equity Corp. v. Bank of New York (In re Holywell Corp.)*, 913 F.2d 873, 880 (11th Cir. 1990) (plan proponent allowed considerable discretion to classify claims and interests according to facts and circumstances of case so long as classification scheme does not violate basic priority rights or manipulate voting).

Section 1122(b) of the Bankruptcy Code is an elective, not mandatory, provision relating to the designation of a class of *de minimis* claims for administrative convenience. The Plan does not include a *de minimis* convenience class of claims. Therefore, section 1122(b) is inapplicable.

B. The Plan Complies with Section 1123(a) of the Bankruptcy Code

Section 1123(a) of the Bankruptcy Code sets forth seven requirements with which every chapter 11 plan must comply. As demonstrated herein, the Plan fully complies with each enumerated requirement.

1. Section 1123(a)(1): Designation of Classes of Claim and Interests

Section 1123(a)(1) requires that a plan must designate classes of claims and classes of equity interests subject to section 1122 of the Bankruptcy Code. As discussed above, the Plan designates 26 classes of Claims and seven classes of Equity Interests subject to section 1122. *See* Plan at Art. III and IV. Accordingly, the Plan satisfies the requirements of section 1123(a)(1).

2. Section 1123(a)(2): Classes that Are Not Impaired by the Plan

Section 1123(a)(2) requires a plan to specify which classes of claims or interests are unimpaired by the Plan. The Plan specifies that Classes 1(a)-(f) (Other Priority Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), Classes 2(a)-(f) (Secured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), and Class 7(g) (Equity Interests in ASC) are unimpaired by the Plan. *See* Plan at Art. IV. Accordingly, the Plan satisfies the requirements of section 1123(a)(2).

3. Section 1123(a)(3): Treatment of Classes that Are Impaired by the Plan

Section 1123(a)(3) requires a plan to specify how it will treat impaired classes of claims or interests. The Plan sets forth the treatment of (a) claims in Class 3 (Investment Note Claims and RediReserve Certificate Claims against Advanta), Classes 4(a)-(f) (General Unsecured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, Advanta Finance, respectively), Class 5 (Subordinated Note Claims against Advanta), Classes 6(a)-(f) (Subordinated Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance,

ASSC, and Advanta Finance, respectively), and (b) interests in Classes 7(a)-(f) (Equity Interests in the Consolidated Debtors (other than ASC), Advantennis, ASSC, AMCUSA, Advanta Auto Finance, and Advanta Finance, respectively), each of which constitutes an impaired class. *See* Plan at Art. IV. Accordingly, the Plan satisfies the requirements of section 1123(a)(3).

4. Section 1123(a)(4): Equal Treatment Within Each Class

Section 1123(a)(4) requires that a plan provide the same treatment for each claim or interest within a particular class unless any claim or interest holder agrees to receive less favorable treatment than other class members. Pursuant to the Plan, the treatment of each Claim against or Equity Interest in the Debtors in each respective class is the same as the treatment of each other Claim or Equity Interest in such class unless such holder voluntarily agrees to receive a less favorable treatment. *See* Plan at Art. IV. Accordingly, the Plan satisfies the requirements of section 1123(a)(4).

5. Section 1123(a)(5): Adequate Means for Implementation

Section 1123(a)(5) requires that a plan provide "adequate means for the plan's implementation." Article V of the Plan and the various documents and agreements set forth in the Plan Supplement provide adequate and proper means for the implementation of the Plan, including the substantive consolidation of the Consolidated Debtors. In addition to the Plan, the Debtors will execute, pursuant to the Plan, the documentation necessary to implement the terms of the Plan, including, without limitation the Liquidating Trust Agreements for each of the Liquidating Trusts and the Advanta Trust Agreement for the Advanta Trust. The Plan, together with the documents and agreements contemplated therein and in the Plan Supplement, provides the means for implementation of the Plan as required by section 1123(a)(5).

6. Section 1123(a)(6): Prohibitions on the Issuance of Non-Voting Securities

Section 1123(a)(6) prohibits the issuance of nonvoting equity securities and requires amendment of the charters of reorganized debtors to so provide. 11 U.S.C. § 1123(a)(6). The Plan does not provide for the issuance of nonvoting equity securities. In addition, as provided for in the Plan Supplement, the charter and by-laws for Reorganized Advanta and ASC prohibit the issuance of nonvoting equity securities to the extent prohibited by section 1123(a)(6) of the Bankruptcy Code. Section 1123(a)(6) does not apply to the other Debtors because such entities are liquidating and not issuing securities under the Plan. As such, the Plan satisfies section 1123(a)(6).

7. Section 1123(a)(7): Provisions Regarding Directors and Officers

Section 1123(a)(7) requires that the Plan "contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee." Pursuant to the Plan, the Debtor entities other than Advanta and ASC will be liquidated. As such, no officers or directors will be selected with respect to any of the Debtors, other than Reorganized Advanta and ASC. The identities and affiliations of the persons proposed to serve as the initial director and initial officer of Reorganized Advanta and ASC after the Effective Date of the Plan are disclosed in the Plan Supplement. In addition, the Plan provides for the creation of seven Trusts, each governed by their respective trustee, which may be the same for any or all of the Trusts. The selection of the trustees for all the Trusts was made in consultation with the Creditors' Committee. FTI Consulting, Inc. ("***FTI***") has been selected as the Advanta Trustee for the Advanta Trust and as the Liquidating Trustee for

each of the six Liquidating Trusts (collectively, the "***Trustee***"), and Wilmington Trust Company has been selected as the Delaware trustee for all seven Trusts (the "***Delaware Trustee***"). The Trusts will each be overseen by their respective Trust Advisory Board (the "***TAB***"). Each TAB was designated by the Debtors with the consent of the Creditors' Committee, and is identified in Exhibit "A" to each applicable Trust Agreement included in the Plan Supplement. As such, the Plan satisfies section 1123(a)(7).

C. The Plan Complies with Section 1123(b) of the Bankruptcy Code

Section 1123(b) sets forth certain permissive provisions that may be incorporated into a chapter 11 plan. Each provision of the Plan is consistent with section 1123(b) of the Bankruptcy Code.

1. Section 1123 (b)(1): Impairment/ Unimpairment of Claims and Interests

Section 1123(b)(1) provides that a plan may "impair or leave unimpaired any class of claims, secured or unsecured, or of interests." 11 U.S.C. § 1123(b)(1). Claims in Class 3 (Investment Note Claims and RediReserve Certificate Claims against Advanta), Classes 4(a)-(f) (General Unsecured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, Advanta Finance, respectively), Class 5 (Subordinated Note Claims against Advanta), Classes 6(a)-(f) (Subordinated Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), and (b) interests in Classes 7(a)-(f) (Equity Interests in the Consolidated Debtors (other than ASC), Advantennis, ASSC, AMCUSA, Advanta Auto Finance, and Advanta Finance, respectively) are impaired by the Plan. *See* Plan at Art. IV. Classes 1(a)-(f) (Other Priority Claims against the

Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), Classes 2(a)-(f) (Secured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), and Class 7(g) (Equity Interests in ASC) are not impaired by the Plan. *See id.* Accordingly, the Plan is consistent with section 1123(b)(1).

2. Section 1123(b)(2): Assumption/ Rejection of Executory Contracts and Leases

Section 1123(b)(2) allows a Plan to provide for the assumption, assumption and assignment, or rejection of executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code. Section 8.1 of the Plan provides that all executory contracts and unexpired leases that exist between the Debtors and any person or entity shall be deemed rejected by the Debtors as of the Effective Date, except for any executory contract or unexpired lease (i) that has been assumed or rejected pursuant to an order of the Bankruptcy Court prior to the Effective Date, (ii) as to which a motion for approval of the assumption of such executory contract or unexpired lease has been filed and served prior to the Confirmation Date, or (iii) that is specifically designated as a contract or lease to be assumed on Schedule 8.1. Plan at § 8.1. Accordingly, the Plan is consistent with section 1123(b)(2).

3. Section 1123(b)(3): Settlement of Claims and Causes of Action

Section 1123(b)(3)(A) allows a Plan to provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." As the Plan does not settle or adjust any claim or interest that belongs to the Debtors or their estates, section 1123(b)(3)(A) does not apply.

Section 1123(b)(3)(B) provides that a plan may "provide for the retention and enforcement by the debtor" of claims or interests belonging to the debtor or the estate. Section 10.6 provides for the retention of certain Causes of Action belonging to the Debtors or the Estates.

Accordingly, the Plan is consistent with section 1123(b)(3).

4. Section 1123(b)(4): Sale of All or Substantially All Assets

Section 1123(b)(4) provides that a plan may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests." While the Plan does not provide for any such sale (and, therefore, section 1123(b)(4) is inapplicable), the Plan does transfer substantially all remaining assets in the Debtors' estates other than the Reorganized Advanta Assets and ASC's Fleet Partnership Interest to the Liquidation Trusts for sale and liquidation. To the extent such transfer is considered a "sale," it is permitted by section 1123(b)(4).

5. Section 1123(b)(5): Modification of Creditor Rights

Section 1123(b)(5) provides that a Plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims." As set forth in Article IV of the Plan, the Plan leaves unaffected the rights of holders of claims in Classes 1(a)-(f) (Other Priority Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), Classes 2(a)-(f) (Secured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), and Class 7(g) (Equity Interests in

ASC), but does impair the rights of holders of Claims in Classes Class 3 (Investment Note Claims and RediReserve Certificate Claims against Advanta), Classes 4(a)-(f) (General Unsecured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, Advanta Finance, respectively), Class 5 (Subordinated Note Claims against Advanta), Classes 6(a)-(f) (Subordinated Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), and (b) interests in Classes 7(a)-(f) (Equity Interests in the Consolidated Debtors (other than ASC), Advantennis, ASSC, AMCUSA, Advanta Auto Finance, and Advanta Finance, respectively). Accordingly, the Plan is consistent with section 1123(b)(5).

6. Section 1123(b)(6): Retention of Jurisdiction/Substantive Consolidation/Exculpation

Section 1123(b)(6) is a "catchall" provision, which permits inclusion in the Plan of any appropriate provision as long as such provision is consistent with applicable sections of the Bankruptcy Code.

The Plan provides, among other things, that the Court will retain jurisdiction as to, among other things, all matters arising out of or related to these Chapter 11 Cases and the Plan, including, without limitation, the claims allowance and distribution process, and disputes concerning the Trusts. *See* Plan at Art. XI. These provisions are appropriate because the Court would have otherwise had jurisdiction over all of these matters during the pendency of the Debtors' Chapter 11 Cases. Moreover, case law establishes that a bankruptcy court may retain jurisdiction over the debtor or the property of the estate following confirmation. *See, e.g.*, *Universal Oil Ltd. v. Allfirst Bank (In re Millennium Seacarriers, Inc.*), 419 F.3d 83, 96 (2d Cir. 2005) ("[A]

bankruptcy court retains post-confirmation jurisdiction to interpret and enforce its own orders, particularly when disputes arise over a bankruptcy plan of reorganization." (quotation marks and citation omitted)); *In re EBHI Holdings, Inc.*, No. 09-12099 (MFW), 2010 WL 3493027, at *5 (Bankr. D. Del. Mar. 18, 2010) (approving retention of jurisdiction by the court over certain matters after the applicable effective date) (annexed hereto as ***Exhibit F***); *In re Kaiser Aluminum Corp.*, No. 02-10429 (JKF), 2006 WL 616243, at *8 (Bankr. D. Del. Feb. 6, 2006) (same) (annexed hereto as ***Exhibit G***). Accordingly, the continuing jurisdiction of the Court is consistent with applicable law and therefore permissible under section 1123(b)(6).

The Plan also provides for the substantive consolidation of the Consolidated Debtors. Entry of the Confirmation Order will constitute approval, pursuant to section 105(a) of the Bankruptcy Code, effective as of the Effective Date, of the substantive consolidation of the Chapter 11 Cases of the Consolidated Debtors for all purposes related to the Plan, including, without limitation, for purposes of voting, confirmation and distribution. On and after the Effective Date, (i) no distributions will be made under the Plan on account of Intercompany Claims among the Consolidated Debtors, (ii) all guarantees by any of the Consolidated Debtors of the obligations of any other Consolidated Debtor arising prior to the Effective Date will be deemed eliminated so that any Claim against any Consolidated Debtor and any guarantee thereof executed by any other Consolidated Debtor and any joint and several liability of any of the Consolidated Debtors will be deemed to be one obligation of the deemed Consolidated Debtors, and (iii) each and every Claim filed or to be filed in the Chapter 11 Cases of the Consolidated Debtors will be deemed filed against the Consolidated Debtors and will be

deemed one Claim against and obligation of the Consolidated Debtors. The substantive consolidation contemplated in Section 5.2 of the Plan will only include the Consolidated Debtors and will not include Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance. No parties have objected to the substantive consolidation of the Consolidated Debtors. Substantive consolidation of the Consolidated Debtors satisfies applicable law and is appropriate based on the facts and circumstances of these Chapter 11 Cases. *See, e.g., In re Owens Corning,* 419 F.3d 195, 211 (3d Cir. 2005). Accordingly, the substantive consolidation provisions of the Plan are permissible under section 1123(b)(6).

Additionally, the Plan provides for the exculpation of the Debtors, the Trusts, the Trustees (solely in their capacity as such), the Delaware Trustee (solely in its capacity as such), the members of the TAB (solely in their capacity as such), the Creditors' Committee (solely in its capacity as such), and their respective officers, directors, employees, managing directors, accountants, financial advisors, investment bankers, agents, restructuring advisors, and attorneys, and each of their respective agents and representatives (but solely in their capacities as such) for any Exculpated Conduct. The Bankruptcy Court should approve Section 10.7 of the Plan because the inclusion of the exculpation provision in the Plan, which is limited in scope to post-petition conduct, contains customary and appropriate limitations, has been heavily negotiated with the Creditors' Committee, and is in the best interests of the Estates. Accordingly, the Plan's exculpation provision is permissible under section 1123(b)(6).

7. Section 1123(c) of the Bankruptcy Code

Section 1123(c) only applies in a case concerning an individual and therefore does not apply to these Chapter 11 Cases.

8. Section 1123(d): Cure of Defaults

Section 1123(d) provides that "if it is proposed in a plan to cure a default the amount necessary to cure the default shall be determined in accordance with the underlying agreement and applicable non-bankruptcy law." Section 8.4 of the Plan provides the procedures to determine the cure amount for any contract assumed and assigned pursuant to the Plan. The cure amounts listed on the modified Schedule 8.1 to be filed as part of the modifications to the Plan Supplement were determined in accordance with the underlying agreements, the Bankruptcy Code and applicable non-bankruptcy law. Accordingly, the Plan complies with section 1123(d).

Based upon all of the foregoing, the Plan complies with the requirements of sections 1122 and 1123, as well as with all other provisions of the Bankruptcy Code, and thus satisfies the requirement of section 1129(a)(1) of the Bankruptcy Code.

II.
SECTION 1129(A)(2): THE DEBTORS HAVE COMPLIED WITH THE BANKRUPTCY CODE

Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "compl[y] with the applicable provisions of [the Bankruptcy Code]." The legislative history of section 1129(a)(2) reflects that this provision is intended to encompass the disclosure and solicitation requirements under sections 1125 and 1126 of the Bankruptcy Code. *See* H.R. REP. NO. 95-595, at 412 (1977); S. REP. NO. 95-989, at 126 (1978) ("Paragraph (2) [of § 1129(a)] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure."); *see also In re Johns-Manville Corp.*, 68 B.R. at 630; *In re Toy & Sports Warehouse, Inc.*, 37 B.R. at 149.

As set forth more fully below, the Debtors have complied with the applicable provisions of the Bankruptcy Code, including the provisions of sections 1125 and 1126, regarding disclosure and Plan solicitation.

A. Compliance with Section 1125: Postpetition Disclosure and Solicitation

Section 1125(b) of the Bankruptcy Code provides, in pertinent part:

> An acceptance or rejection of a plan may not be solicited after the commencement of the case under [the Bankruptcy Code] from a holder of a claim or interest with respect to such claim or interest, unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information. . . .

By entry of the Disclosure Statement Order, the Bankruptcy Court approved the Disclosure Statement as containing "adequate information" pursuant to section 1125(b) of the Bankruptcy Code.

On December 28, 2010, the Debtors concluded their solicitation of votes to accept the Plan. On February 8, 2011, the Debtors' voting and tabulation agent, The Garden City Group, Inc. (the "***Garden City Group***"), filed the GCG Declaration, which states that the Garden City Group solicited and tabulated votes in accordance with the Disclosure Statement Order. GCG Declaration ¶¶ 4-12. The Disclosure Statement Order provides that the Garden City Group will transmit (i) to each holder of a Claim or Equity Interest that was entitled to vote to accept or reject the Plan, the Disclosure Statement (which includes as an exhibit a copy of the Plan) and any additional solicitation materials approved by the Court in the Disclosure Statement Order and (ii) to holders of Claims and Equity Interests that were not entitled to vote to accept or reject the Plan, certain non-voting materials approved by the Court in the Disclosure Statement Order. The Debtors

did not solicit acceptances of the Plan by any holder of Claims or Equity Interests prior to the transmission of the Disclosure Statement or approval of the Disclosure Statement by the Court. The GCG Declaration describes the methodology for the tabulation and results of voting with respect to the Plan. GCG Declaration ¶¶ 6-14 & Exs. A & B.

The deadline for voting to accept or reject the Plan was February 1, 2010. The results of the vote in respect of the Plan are discussed in more detail below.

B. Compliance with Section 1126: Acceptance of Plan

Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a chapter 11 plan. Pursuant to section 1126, only holders of allowed claims in impaired classes of claims or equity interests that will receive or retain property under a plan on account of such claims or equity interests may vote to accept or reject such plan. Section 1126 provides, in pertinent part, as follows:

> (a) The holder of a claim or interest allowed under section 502 of [the Bankruptcy Code] may accept or reject a plan.
>
> * * *
>
> (f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.
>
> (g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan on account of such claims or interests.

As set forth in the Disclosure Statement, the GCG Declaration and above, the Debtors solicited acceptances of the Plan from holders of all Claims or Equity Interests against the Debtors in each class of impaired Claims or Equity Interests entitled to receive distributions under the Plan in accordance with section 1126. The impaired classes entitled to vote under the Plan are Classes 4(a)-(f) (General Unsecured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC and Advanta Finance, respectively), Class 5 (Subordinated Note Claims against Advanta), Classes 6(a)-(f) (Subordinated Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), and Classes 7(d)-(f) (Equity Interests in AMCUSA, Advanta Auto Finance, and Advanta Finance, respectively). The Plan reflects that Classes 1(a)-(f) (Other Priority Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), Classes 2(a)-(f) (Secured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), and Class 7(g) (Equity Interests in ASC) are unimpaired, and thus, are conclusively presumed to have accepted the Plan. Classes 7(a)-(c) (Equity Interests in the Consolidated Debtors (other than ASC), Advantennis, and ASSC, respectively) will not receive or retain any interest or property pursuant to the Plan and, therefore, are deemed to have rejected the Plan and holders of Equity Interests in those Classes are not entitled to vote thereon.

Section 1126(c) of the Bankruptcy Code specifies the requirements for acceptance of a plan by impaired Classes entitled to vote to accept or reject a chapter 11 plan:

> A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

As evidenced in the GCG Declaration, the Plan has been accepted by creditors in Class 3 (Investment Note Claims and RediReserve Certificate Claims against Advanta), Classes 4(a)-(f) (General Unsecured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), Class 5 (Subordinated Note Claims Against Advanta), and Classes 7(d)-(f) (Equity Interests in AMCUSA, Advanta Auto Finance, and Advanta Finance, respectively) holding substantially in excess of two-thirds in amount and one-half in number of the Allowed Claims that voted in each class.[6] *See* GCG Declaration ¶ 14 & Ex. A. As set forth above, the Debtors did not solicit acceptances from the holders of Equity Interests in the Consolidated Debtors (other than ASC), Advantennis, and ASSC in Classes 7(a)-(c). In addition, no members of Classes 6(a)-(f) (Subordinated Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively) voted on the Plan, and such Classes have not accepted the Plan. Nevertheless, as discussed in Section XIV below and, to the extent applicable, the Plan may be confirmed, pursuant to section 1129(b) of the Bankruptcy Code, notwithstanding that Classes 6(a)-(f) (Subordinated Claims against the Consolidated Debtors, Advantennis, and AMCUSA, Advanta Auto Finance, ASSC, and

[6] As set forth below, the Debtors submit that, pursuant to section 1127 of the Bankruptcy Code, acceptances in favor of the Plan should be deemed acceptances of the Plan, as modified on February 8, 2011.

Advanta Finance, respectively) and Classes 7(a)-(c) (Equity Interests in the Consolidated Debtors (other than ASC), Advantennis, and ASSC, respectively) have not accepted the Plan, because the Plan does not discriminate unfairly and is fair and equitable with respect to each such Class. Based upon the foregoing, the Debtors submit that the requirements of section 1129(a)(2) of the Bankruptcy Code have been satisfied.

III.
SECTION 1129(A)(3): THE PLAN HAS BEEN PROPOSED IN GOOD FAITH AND NOT BY ANY MEANS FORBIDDEN BY LAW

Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." The Third Circuit has found that good-faith requires "some relation" between the chapter 11 plan and the "reorganization-related purposes" of chapter 11. *See In re SGL Carbon Corp.*, 200 F.3d 154, 165 (3d Cir. 1999); *see also In re Johns-Manville Corp.*, 843 F.2d at 649 (citing *Koelbl v. Glessin*g (*In re Koelbl*), 751 F.2d 137, 139 (2d Cir. 1984)). In the context of a chapter 11 plan, courts have held that "a plan is proposed in good faith if there is a likelihood that the plan will achieve a result consistent with the standards prescribed under the Code." *In re WorldCom, Inc.*, No. 02-13533, 2003 Bankr. LEXIS 1401, at *151-52 (Bankr. S.D.N.Y. Oct. 31, 2003) (annexed hereto as ***Exhibit H***); *see also In re Leslie Fay Cos.*, 207 B.R. 764, 781 (Bankr. S.D.N.Y. 1997) (quoting *In re Texaco Inc.*, 84 B.R. 893, 907 (Bankr. S.D.N.Y. 1988)); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 107 (Bankr. D. Del. 1999). Moreover, "[w]here the plan is proposed with the legitimate and honest purpose to reorganize and has a reasonable hope of success, the good faith requirement of section 1129(a)(3) is satisfied." *In re Sun Country Dev., Inc.*, 764 F.2d 406, 408 (5th Cir. 1985). The requirement of good faith must be viewed in light of the totality of the circumstances surrounding the establishment of a chapter 11 plan. *Id.*

The Debtors, as the Plan's proponents, have met their good faith obligation under the Bankruptcy Code. As set forth in the Rosoff Declaration, the Debtors proposed the Plan with the purpose of liquidating and expeditiously distributing value to their creditors. The Plan (including all documents necessary to effectuate the Plan) is the result of extensive arms-length negotiations among the Debtors, the Creditors' Committee, and their respective advisors. The Plan has the support of the Creditors' Committee.

The Plan contemplates and is premised upon the creation of seven Trusts and the transfer by the Debtors of most of their assets to the Liquidating Trusts. The Liquidating Trusts will, in turn, liquidate the Debtors' non-cash assets and distribute the value of the Debtors' estates to creditors in accordance with the priorities and provisions of the Bankruptcy Code. The Plan achieves one of the primary objectives underlying a chapter 11 bankruptcy: the equitable distribution of value to creditors for amounts owing. *See Pereira v. Foong (In re Ngan Gung Rest.)*, 254 B.R. 566, 570 (Bankr. S.D.N.Y. 2000) (stressing the importance of payment of creditors in chapter 11 cases). The Plan accomplishes these goals by providing the means through which the Debtors may effectuate timely and prompt distributions to their creditors. Because the Debtors have proposed the Plan with the legitimate and honest purposes of liquidating the Debtors' estates and maximizing their value, the Plan and the related documents have been filed in good faith and the Debtors have satisfied their obligations under section 1129(a)(3).

IV.
SECTION 1129(A)(4): THE PLAN PROVIDES THAT PROFESSIONAL FEES AND EXPENSES ARE SUBJECT TO COURT APPROVAL

Section 1129(a)(4) of the Bankruptcy Code requires that certain professional fees and expenses paid by the plan proponent, the debtor, or a person receiving distributions of property under the plan, be subject to the Court's approval.

Pursuant to the Court's orders establishing the interim compensation procedures and appointing a fee auditor in these Chapter 11 Cases, the Court has authorized and approved the payment of certain fees and expenses of retained professionals, subject to final review by the Court under section 330.[7] The Plan further provides that the Court shall retain jurisdiction "to hear and determine all applications for awards of compensation for services rendered and reimbursement of expenses under sections 330, 331 and 503(b) of the Bankruptcy Code." *See* Plan at Art. XI. All fees and expenses accrued through the Effective Date thus remain subject to final review by the Court pursuant to sections 330, 331, and 503(b). The proposed Confirmation Order sets forth procedures for filing final fee applications with the Court.

The foregoing procedures for the Court's review and ultimate determination of the fees and expenses to be paid by the Debtors satisfy the objectives of section 1129(a)(4). *See In re Elsinore Shore Assos.*, 91 B.R. 238, 268 (Bankr. D.N.J. 1988) (requirements of section 1129(a)(4) satisfied where plan provided for payment of only "allowed" administrative expenses). Based upon the foregoing, the Plan complies with the requirements of section 1129(a)(4).

[7] *Order Implementing Certain Procedures for the Interim Compensation and Reimbursement of Professionals* [Docket No. 102].

V.
SECTION 1129(A)(5): THE DEBTORS HAVE DISCLOSED ALL NECESSARY INFORMATION REGARDING DIRECTORS, OFFICERS, AND INSIDERS

Section 1129(a)(5) of the Bankruptcy Code requires that the plan proponent disclose the identity and affiliations of the proposed officers and directors of, or "any individual proposed to serve, after confirmation of the plan, as . . . a successor to the debtor under the plan." 11 U.S.C. § 1229(a)(5)(A)(i). Further, section 1129(a)(5) requires that the appointment of such individual be "consistent with the interests of creditors and equity security holders and with public policy. . . ." 11 U.S.C. § 1129(a)(5)(A)(ii).

The Debtors have satisfied the foregoing requirements. Other than Reorganized Advanta and ASC, the Debtors are liquidating, and, as such, will have no ongoing officers and directors. To the extent that it is applicable to section 1129(a)(5), the appointment of FTI, as the Trustee of each Trust, and Wilmington Trust Company, as the Delaware Trustee of each Trust, was made in conjunction with and with the support of the Creditors' Committee. In addition, the identities of the members of each Trust's respective TAB were disclosed in the Plan Supplement.

As detailed in the Plan Supplement, the board of directors of each of Reorganized Advanta and ASC shall consist of one person, whose name is also disclosed in the Plan Supplement. In addition, the identity of the initial officer of Reorganized Advanta and ASC was set forth in the Plan Supplement. Each director and officer will serve in accordance with the terms and subject to the conditions of the applicable charters and by-laws of Reorganized Advanta and ASC, and other relevant organizational documents, each as applicable.

The Debtors submit that these provisions are consistent with the interests of creditors, equity security holders, and public policy and, therefore, satisfy the requirements of section 1129(a)(5) of the Bankruptcy Code.

VI.
BANKRUPTCY CODE SECTION 1129(A)(6) IS NOT APPLICABLE

Bankruptcy Code section 1129(a)(6) provides that "[a]ny governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval." The Debtors submit that this provision of the Bankruptcy Code is not applicable to their Chapter 11 Cases because the Debtors are liquidating substantially all of their assets and have no ongoing business subject to any such regulatory approval. In addition, the Debtors submit that this provision of the Bankruptcy Code is not applicable because no rate change is "provided for in the Plan."

VII.
THE PLAN SATISFIES THE REQUIREMENTS OF SECTION 1129(A)(7) OF THE BANKRUPTCY CODE

Section 1129(a)(7) of the Bankruptcy Code provides, in relevant part:

> With respect to each impaired class of claims or interests –
>
> (A) each holder of a claim or interest of such class –
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date. . . .

Section 1129(a)(7) of the Bankruptcy Code is often referred to as the "best interests test" or the "liquidation test." The "best interests test" focuses on individual dissenting creditors rather than classes of claims and equity interests. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999). Under the "best interests test," the court "must find that each [non-accepting] creditor will receive or retain value that is not less than the amount he would receive if the debtor were liquidated [under chapter 7 of the Bankruptcy Code]." *Id*. at 440; *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213, 228 (1996).

The "best interests test" is satisfied as to each holder of a Claim or Equity Interest in an unimpaired Class of Claims or Equity Interests, which includes Classes 1(a)-(f) (Other Priority Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), Classes 2(a)-(f) (Secured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), and Class 7(g) (Equity Interests in ASC), as they are unimpaired and are deemed to have accepted the Plan. As set forth below, the "best interests test" is also satisfied as to each holder of a Claim or Equity Interest in an impaired Class of Claims or Equity Interests, which includes Class 3 (Investment Note Claims and RediReserve Certificate Claims), Classes 4(a)-(f) (General Unsecured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), Class 5 (Subordinated Note Claims), Classes 6(a)-(f) (Subordinated Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), and Classes 7(a)-(f) (Equity Interests in the Consolidated

Debtors (other than ASC), Advantennis, ASSC, AMCUSA, Advanta Auto Finance, and Advanta Finance, respectively).

Exhibit D to the Disclosure Statement sets forth the Debtors' liquidation analysis (the "***Liquidation Analysis***"), which is supported by the Bondi Declaration. While the Plan proposes a liquidation of most of the Debtors' assets through the Liquidating Trusts, the Liquidation Analysis and the Bondi Declaration demonstrate that holders of Claims and Equity Interests are expected to receive under the Plan at least what they would have received in a hypothetical chapter 7 liquidation. Based upon the foregoing, the Debtors submit the "best interests test" is satisfied.

VIII.
SECTION 1129(A)(8): THE PLAN HAS BEEN ACCEPTED BY MOST OF THE IMPAIRED CLASSES, AND, AS TO SUCH CLASSES, THE REQUIREMENTS OF SECTION 1129(A)(8) HAVE BEEN SATISFIED

Section 1129(a)(8) of the Bankruptcy Code requires that each class of claims or interests either accept the plan or not be impaired by the plan. As set forth above, holders of claims in Classes 1(a)-(f) (Other Priority Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), Classes 2(a)-(f) (Secured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), and Class 7(g) (Equity Interests in ASC) are unimpaired under the Plan and are, therefore, conclusively presumed to have accepted the Plan pursuant to section 1126(f). Class 3 (Investment Note Claims and RediReserve Certificate Claims against Advanta), Classes 4(a)-(f) (General Unsecured Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively), Class 5 (Subordinated Notes Claims against Advanta),

and Classes 7(d)-(f) (Equity Interests in AMCUSA, Advanta Auto Finance, and Advanta Finance, respectively), each of which is an impaired Class of Claims or Equity Interests eligible to vote, have affirmatively voted to accept the Plan. As such, section 1129(a)(8) is satisfied with respect to these Classes of Claims and Equity Interests.

Holders of Equity Interests in the Consolidated Debtors (other than ASC), Advantennis, and ASSC (Classes 7(a)-(c)) will not receive or retain any property on account of their Equity Interests in the Debtors, and, as such, are deemed to reject the Plan. In addition, no holders of claims in Classes 6(a)-(f) (Subordinated Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively) voted on the Plan, and, as such, Classes 6(a)-(f) have not accepted the Plan. Nonetheless, as set forth in Section XIV below, the Plan may be confirmed under the "cram down" provisions of section 1129(b) of the Bankruptcy Code.

IX.
SECTION 1129(A)(9): THE PLAN PROVIDES FOR PAYMENT IN FULL OF ALL ALLOWED PRIORITY CLAIMS

Section 1129(a)(9) of the Bankruptcy Code requires that persons holding claims entitled to priority under section 507(a) receive specified cash payments under the Plan. Unless the holder of a particular claim agrees to a different treatment with respect to such claim, section 1129(a)(9) requires a plan to provide as follows:

> (A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of [the Bankruptcy Code], on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;
>
> (B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6) or 507(a)(7) of [the Bankruptcy Code], each holder of a claim of such class will receive –

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of [the Bankruptcy Code], the holder of such claim will receive on account of such claim regular installment payments in cash –

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

A. Section 1129(a)(9)(A): Administrative Expense Claims

With respect to Administrative Expense Claims, in accordance with section 1129(a)(9)(A) of the Bankruptcy Code, Section 2.1 of the Plan provides that, except to the extent that any entity entitled to payment of any Allowed Administrative Expense Claim agrees to a less favorable treatment, on the latest of (i) the Effective Date, (ii) the date on which its Administrative Expense Claim becomes an Allowed Administrative Expense Claim, each holder of an Allowed Administrative Expense

Claim shall receive from the applicable Trustee from the applicable Trust, in full satisfaction, settlement, and release of and in exchange for such Allowed Administrative Expense Claim, Cash equal to the unpaid portion of its Allowed Administrative expense Claim. Notwithstanding the foregoing, any Allowed Administrative Expense Claim based on a liability incurred by the Debtors in the ordinary course of business by the Debtors shall be paid by the Debtors or the applicable Trustee, as applicable, in the ordinary course of business consistent with past practice and in accordance with the terms and conditions of any agreements governing, instruments evidencing, or other documents relating to such transactions. Thus, the Plan satisfies section 1129(a)(9(A).

B. Section 1129(a)(9)(B): Priority Non-Tax Claims

With respect to the payment of Allowed Priority Non-Tax Claims, in accordance with section 1129(a)(9)(B) of the Bankruptcy Code, Section 4.1 of the Plan provides that, except to the extent that a holder of an Allowed Priority Non-Tax Claim (i) has been paid by the Debtors, in whole or in part, prior to the Effective Date, or (ii) agrees to a less favorable treatment, each holder of an Allowed Priority Non-Tax Claim shall receive from the Liquidating Trust, in full satisfaction of such Claim, Cash in the full amount of such Allowed Claim, on or as soon reasonably practicable after the later of (a) the Effective Date and (b) the date such Claim becomes Allowed. Thus, the Plan satisfies section 1129(a)(9)(B).

C. Section 1129(a)(9)(C): Priority Tax Claims

With respect to the payment of Priority Tax Claims, in accordance with section 1129(a)(9)(C) of the Bankruptcy Code, Section 2.4 of the Plan provides that, on the later of (i) the Effective Date or (ii) the date such Priority Tax Claim becomes an Allowed Priority Tax Claim, or as soon as practicable thereafter, except to the extent that

a holder of an Allowed Priority Tax claim agrees to less favorable treatment, each holder of an Allowed Priority Tax claim shall receive, in full satisfaction, settlement, and release of and in exchange for such Allowed Priority Tax Claim, Cash in an amount equal to such Allowed Priority Tax Claim. Thus, the Plan satisfies section 1129(a)(9)(C).

D. Section 1129(a)(9)(D): Secured Tax Claims

With respect to the payment of Secured Tax Claims, in accordance with sections 1129(a)(9)(D) of the Bankruptcy Code, Section 4.2 of the Plan provides that, except to the extent that a holder of an Allowed Secured Claim has been paid in whole or in part by the Debtors prior to the Effective Date or agrees to a less favorable treatment, each holder shall receive from the applicable Trustee from the applicable Trust, Cash in the full amount of the Claim, on or as soon as reasonably practicable after the later of (i) the Effective Date and (ii) the date on which such Claim becomes Allowed. Thus, the Plan satisfies section 1129(a)(9)(C).

Based upon the foregoing, the Plan satisfies all the requirements of section 1129(a)(9) of the Bankruptcy Code.

X.
SECTION 1129(A)(10): AT LEAST ONE CLASS OF IMPAIRED CLAIMS HAS ACCEPTED THE PLAN

Section 1129(a)(10) of the Bankruptcy Code requires the affirmative acceptance of the Plan by at least one class of impaired claims, "determined without including any acceptance of the plan by any insider" if a class of claims is impaired by the Plan. The Debtors satisfy this requirement in that 5 of the 14 Classes of impaired Claims entitled to vote on the Plan — Class 3 (Investment Note Claims and RediReserve Certificate Claims against Advanta), Class 4(a) (General Unsecured Claims against the Consolidated Debtors), Class 4(c) (General Unsecured Claims against AMCUSA), Class

4(e) (General Unsecured Claims against ASSC), and Class 5 (Subordinated Note Claims against Advanta) — have affirmatively accepted the Plan, without including the acceptance of the Plan by insiders, if any, in such Classes. *See* GCG Declaration ¶ 14 & Ex. A.

XI.
SECTION 1129(A)(11): THE PLAN IS NOT LIKELY TO BE FOLLOWED BY LIQUIDATION OR THE NEED FOR FURTHER REORGANIZATION

Section 1129(a)(11) of the Bankruptcy Code requires that, as a condition to confirmation, the Bankruptcy Court determine that the Plan is feasible. Specifically, the Bankruptcy Court must determine that:

> Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

The feasibility standard is greatly simplified when a modified plan of liquidation is tested against section 1129(a)(11). In the context of a liquidating plan, feasibility is established by demonstrating the debtor's ability to satisfy the conditions precedent to the effective date and otherwise have sufficient funds to meet its post-confirmation date obligations to pay for the costs of administering and fully consummating the plan and closing the chapter 11 cases. *See In re NexPak Corp.*, No. 09-11244 (PJW), 2010 WL 5053973, at *6 (Bankr. D. Del. May 18, 2010) (finding plan feasible where "[t]he Plan properly provides for the means for the Plan Administrator to complete the liquidation of the estates and to make the distributions to creditors according to the Plan and the relative priorities of the parties") (annexed hereto as ***Exhibit I***). As set forth in the Rosoff

Declaration, the Debtors will have sufficient funds to administer and consummate the Plan and to close the Chapter 11 Cases. *See* Rosoff Declaration ¶ 23.

In particular, pursuant to the provisions of the Plan and the Trust Agreements, it is clear that the applicable Trustees will have sufficient funds to manage the Trusts, maintain the Trust Assets, and make payments to the Trust Beneficiaries. The Trusts will consist of the Trust Assets (as defined in the Plan), which include, among other things, the Cash necessary to fund the Trusts. *See* Plan §§ 1.11, 1.28, 1.42, 1.56, 1.68, 1.137, 5.4; Rosoff Declaration ¶ 23.

In addition, based upon the projections set forth in the Disclosure Statement, confirmation of the Plan is not likely to be followed by the eventual liquidation of Reorganized Advanta or ASC. Reorganized Advanta and ASC will have sufficient funds to manage their remaining assets and satisfy their liabilities. *See* Rosoff Declaration ¶ 23. Specifically, the Plan contemplates that Reorganized Advanta will retain, among other assets, (i) $6.7 million in Cash or such other amount as agreed by the Debtor and the Creditors' Committee on or prior to the Effective Date, (ii) a certain portion of Advanta's portfolio of credit card receivables, which shall be determined by the Debtors on or prior to the Effective Date with the consent of the Creditors' Committee, which consent shall not be unreasonably withheld, (iii) the stock of ASC, (iv) the stock of ABHC, and (v) a partnership interest in Fleet Credit Card Services, L.P. Plan § 1.154. As of the Effective Date, the sole assets of ASC and ABHC shall be partnership interests in Fleet Credit Card Services, L.P. *Id.* As such, the Debtors have satisfied the feasibility requirement of section 1129(a)(11).

XII.
SECTION 1129(A)(12): ALL STATUTORY FEES HAVE BEEN OR WILL BE PAID

Section 1129(a)(12) of the Bankruptcy Code requires the payment of "[a]ll fees payable under section 1930 [of title 28 of the United States Code], as determined by the court at the hearing on confirmation of the plan." Section 507 of the Bankruptcy Code provides that "any fees and charges assessed against the estate under [section 1930 of] chapter 123 of title 28" are afforded priority as administrative expenses. In accordance with sections 507 and 1129(a)(12) of the Bankruptcy Code, the Plan provides that all such fees and charges will be paid on the Effective Date, or as soon thereafter as is practicable, by the applicable Liquidating Trust. *See* Plan at § 12.8.

XIII.
SECTIONS 1129(A)(13), 1129(A)(14), 1129(A)(15), 1129(A)(16), 1129(C), 1129(D), AND 1129(E) ARE SATISFIED OR DO NOT APPLY

Section 1129(a)(13) of the Bankruptcy Code requires a plan to provide for retiree benefits at levels established pursuant to section 1114 of the Bankruptcy Code. The Debtors believe that the only "retiree benefits" (as that term is defined in section 1114 of the Bankruptcy Code) the Debtors have provided is the COLI Program. Accordingly, section 8.7 of the Plan provides that the COLI Program shall continue in effect after the Effective Date, subject to the right of the Trustees or Reorganized Advanta, as applicable, to modify, terminate, or surrender the COLI Program and/or any underlying insurance policies in accordance with the terms thereof. As such, the requirements of section 1129(a)(13) of the Bankruptcy Code are satisfied.

Section 1129(a)(14) of the Bankruptcy Code relates to the payment of domestic support obligations. The Debtors are not subject to any domestic support obligations, and, as such, section 1129(a)(14) does not apply.

Section 1129(a)(15) applies only in cases in which the debtor is an "individual" (as that term is defined in the Bankruptcy Code). The Debtors are not "individuals," and, accordingly, section 1129(a)(15) is inapplicable.

Section 1129(a)(16) of the Bankruptcy Code applies to transfers of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust. The Debtors are each a moneyed, business, or commercial corporation and, accordingly, section 1129(a)(16) of the Bankruptcy Code is inapplicable.

The Plan is the only plan filed in these Chapter 11 Cases and, accordingly, section 1129(c) of the Bankruptcy Code is inapplicable in these Chapter 11 Cases.

The principal purpose of the Plan is not the avoidance of taxes or the application of section 5 of the Securities Act of 1933, and no governmental unit has objected to confirmation of the Plan on any such grounds. *See* Rosoff Declaration ¶ 33. The Plan, therefore, satisfies the requirements of section 1129(d) of the Bankruptcy Code.

The Chapter 11 Cases are not "small business cases" as defined in the Bankruptcy Code and, accordingly, section 1129(e) of the Bankruptcy Code is inapplicable in these Chapter 11 Cases.

XIV.
SECTION 1129(B): THE PLAN SATISFIES THE "CRAM DOWN" REQUIREMENTS WITH RESPECT TO CLASSES 6(A)-(F) AND 7(A)-(C)

Section 1129(b) of the Bankruptcy Code provides a mechanism for confirmation of a plan in circumstances where not all impaired classes of claims and equity interests accept a plan. This mechanism is known colloquially as "cram down."

Section 1129(b) provides in pertinent part:

> [I]f all of the applicable requirements of [section 1129(a) of the Bankruptcy Code] other than [the requirement contained in section 1129(a)(8) that a plan must be accepted by all impaired classes] are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

Thus, under section 1129(b), the Bankruptcy Court may "cram down" a plan over the non-acceptance of a plan by impaired classes of claims or equity interests as long as the plan does not "discriminate unfairly" and is "fair and equitable" with respect to such classes. *See, e.g., In re Johns-Manville Corp.*, 843 F.2d at 650.

No members of Classes 6(a)-(f) (Subordinated Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively) voted on the Plan, and, thus, Classes 6(a)-(f) have not accepted the Plan. In addition, Classes 7(a)-(c) (Equity Interests in the Consolidated Debtors (other than ASC), Advantennis, and ASSC, respectively) are not receiving any distribution under the Plan and are deemed to reject the Plan. Accordingly, the Debtors must satisfy section 1129(b) with respect to Classes 6(a)-(f) and 7(a)-(c).

A. The Plan Does Not Discriminate Unfairly

The unfair discrimination standard of section 1129(b) ensures that a plan does not unfairly discriminate against a dissenting class with respect to the value it will receive under a plan when compared to the value given to all other similarly situated classes. *In re Barney and Carey Co.*, 170 B.R. 17, 25 (Bankr. D. Mass 1994). Section 1129(b)(1) does not prohibit discrimination between classes; it prohibits only discrimination that is unfair. *In re 11,111, Inc.*, 117 B.R. 471, 478 (Bankr. D. Minn.

1990). The weight of judicial authority holds that a plan unfairly discriminates in violation of section 1129(b) of the Bankruptcy Code only if similar classes are treated differently without a reasonable basis for the disparate treatment. *See In re Buttonwood Partners, Ltd.*, 111 B.R. 57 (Bankr. S.D.N.Y. 1990); *In re Johns-Manville Corp.*, 68 B.R. 618. Accordingly, as between two classes of claims or two classes of equity interests, there is no unfair discrimination if (i) the classes are comprised of dissimilar claims or interests, *see, e.g.*, *Johns-Manville Corp.*, 68 B.R. at 636, or (ii) taking into account the particular facts and circumstances of the case, there is a reasonable basis for such disparate treatment, *see, e.g., Buttonwood Partners*, 111 B.R. at 63; *In re Rivera Echevarria*, 129 B.R. 11, 13 (Bankr. D.P.R. 1991).

1. The Plan Does Not Discriminate Unfairly Against Claims in Classes 6(a)-(f) (Subordinated Claims Against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, Respectively)

Classes 6(a)-(f) are comprised of all other Subordinated Claims. Claims in Classes 6(a)-(f) are subordinated to other unsecured claims, including under section 510(b) of the Bankruptcy Code, and as such, claims in Classes 6(a)-(f) differ in legal nature and priority from claims in all other classes and are therefore not entitled to the same treatment. Accordingly, the Plan does not discriminate unfairly against Classes 6(a)-(f) (Subordinated Claims against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, respectively).

2. The Plan Does Not Discriminate Unfairly Against Claims in Classes 7(a)-(c) (Equity Interests in the Consolidated Debtors (Other Than ASC), Advantennis, and ASSC, Respectively)

Classes 7(a)-(c) are comprised of Equity Interests in the Consolidated Debtors (other than ASC), Advantennis, and ASSC. The Plan provides that holders of Equity Interests in Classes 7(a)-(c) will receive no property on account of such interests, and that such interests will be cancelled on the Effective Date. These Classes differ in legal nature and priority from all other Classes of Claims and, as between other Equity Interests, also are dissimilar in certain respects. Specifically, the holders of Equity Interests in Classes 7(a)-(c), which are either Advanta or one of its wholly-owned subsidiaries, will not receive any distribution because creditors of the Consolidated Debtors (other than ASC), Advantennis, and ASSC are not expected to be paid in full. In contrast, the holders of Equity Interests in AMCUSA, Advanta Auto Finance, and Advanta Finance, which are other Debtors, will receive distributions on account of their Equity Interests in the event creditors of such Debtors are paid in full and sufficient funds remain to fund the wind-down of those Debtors. Accordingly, the Plan does not discriminate unfairly against Classes 7(a)-(c); rather, the Plan effectuates the priorities set forth in the Bankruptcy Code.

B. <u>The Plan Is Fair and Equitable</u>

Section 1129(b)(2) of the Bankruptcy Code defines the phrase "fair and equitable" as follows:

> (B) As to Unsecured Creditors: Either (i) each impaired unsecured creditor receives or retains under the plan property of a value equal to the amount of its allowed claim or (ii) the holders of claims and interests that are junior to the claims of the

dissenting class will not receive any property under the plan.

(C) As to Equity Interest Holders: Either (i) each holder of an equity interest will receive or retain under the plan property of a value equal to the greatest of the fixed liquidation preference to which such holder is entitled, the fixed redemption price to which such holder is entitled or the value of the interest or (ii) the holder of an interest that is junior to the nonaccepting class will not receive or retain any property under the plan.

In the instant case, the "fair and equitable" rule is satisfied as to the holders of (i) Subordinated Claims in Classes 6(a)-(c) and (ii) Equity Interests in Classes 7(a)-(c). Specifically, the Plan maintains the relative priority among the Classes, and Claims in no Class receive more value than their respective Claim amounts.

1. The Plan Is Fair and Equitable as to Claims in Classes 6(a)-(f) (Subordinated Claims Against the Consolidated Debtors, Advantennis, AMCUSA, Advanta Auto Finance, ASSC, and Advanta Finance, Respectively)

Because holders of Equity Interests in Classes 7(a)-(c) – the only classes junior in priority to Classes 6(a)-(c) – will not receive or retain any property on account of their Equity Interests, the Plan is fair and equitable as to claims in Class 6(a)-(c). Similarly, because holders of Equity Interests in Classes 7(d)-(f) – the only classes junior in priority to Classes 6(d)-(f) – will only receive a distribution after any Allowed Claims in Classes 6(d)-(f) are paid in full, the Plan is fair and equitable as to Claims in Classes 6(d)-(f).

2. The Plan Is Fair and Equitable as to Equity Interests in Classes 7(a)-(c) (Equity Interests in the Consolidated Debtors (Other Than ASC), Advantennis, and ASSC, Respectively)

Classes 7(a)-(c) are comprised of holders of certain Equity Interests. The Bankruptcy Code provides that equity interests are afforded the lowest priority in the distribution of a debtor's estate, and, accordingly, there are no Classes junior to Classes 7(a)-(c). Therefore, because no holder of a junior interest will receive or retain any property under the Plan, the Plan satisfies the absolute priority rule of section 1129(b)(2)(C) of the Bankruptcy Code and provides for the fair and equitable treatment of Equity Interests in Classes 7(a)-(c).

XV.
THE PLAN SATISFIES THE REQUIREMENTS OF SECTION 1127 OF THE BANKRUPTCY CODE

Pursuant to section 1127 of the Bankruptcy Code, a plan proponent may modify a plan at any time before confirmation so long as the plan, as modified, satisfies the requirements of sections 1122 and 1123 of the Bankruptcy Code. In addition, Bankruptcy Rule 3019 provides, in relevant part:

> after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

As noted above, simultaneously herewith the Debtors are filing certain modifications to the Plan in accordance with Section 12.4 of the Plan. The modifications to the Plan fall into the following categories:

- Changes to the language in Sections 5.4 and 5.5 of the Plan to conform to the terms of the Trust Agreements, initial forms of which were filed as part of the Plan Supplement prior to the Voting Deadline;[8]

- Clarifying language added to the Plan at the request of certain informal responses from creditors, the Creditors' Committee, and the Fee Auditor;

- Clarifying language to Section 8.7 of the Plan to make clear that the COLI Program shall continue in effect after the Effective Date, subject to the right of the Trustees or Reorganized Advanta, as applicable, to modify, terminate, or surrender such COLI Program; and

- Correction of a typographical error in the final proviso of Section 7.2 of the Plan to correctly provide that the applicable Trustees shall have until sixty (60) days after the payment in full of all Allowed Claims in Classes 1 through 5 to object to any Claims in Class 6.[9]

None of the modifications constitutes a material modification. Indeed, the adjustments have no unexpected impact upon the economics of the Plan vis-à-vis any Class of Claims or Equity Interests. A modification is material if it "so affects any creditor or interest holder who accepted the plan that such entity, if it knew of the modification, would be likely to reconsider its acceptance." 9 COLLIER ON BANKRUPTCY ¶ 3019.01 (15th ed. rev. 2009); *see also In re Am. Solar King Corp.*, 90 B.R. 808, 826 (Bankr. W.D. Tex. 1988). Re-solicitation is appropriate only if "the modification adversely affects the interests of a creditor who has previously accepted the plan, in more than a purely ministerial *de minimis* manner…." *In re Frontier Airlines, Inc.*, 93 B.R. 1014, 1023 (Bankr. D. Colo. 1988). Because the Debtors made no material

[8] The Debtors continue to negotiate with counsel to the Delaware Trustee regarding the terms of the Trust Agreements, and reserve their rights to make further changes to the Trust Agreements, which changes are not expected to have a material, economic effect on holders of Claims and Interests under the Plan.

[9] The Debtors believe that this modification is not material, and re-solicitation is unnecessary, because claimants in Class 6 have not voted to accept the Plan, and, in fact, certain holders of Claims in Class 6 filed the Objections, in which they acknowledge that the Plan intends to delay the prosecution of their Claims against the Debtors, which is what the correction to the final proviso in Section 7.2 clarifies. *See* Securities Plaintiffs' Objection ¶ 26; ERISA Claimants' Objection ¶ 36.

modifications, the Debtors believe that re-solicitation is unnecessary and acceptances of the Plan should be deemed acceptances of the Plan, as modified.

Furthermore, certain technical and minor modifications may be made to the Plan at or prior to the Confirmation Hearing. As will be demonstrated at the Confirmation Hearing, any such modifications should have no impact on the treatment of any Claims or Equity Interests and, thus, pursuant to Bankruptcy Rule 3019, all acceptances of the Plan should also be deemed acceptances of the Plan as may be modified by the Confirmation Order.

As set forth above, the Plan, as modified, complies fully with sections 1122 and 1123 of the Bankruptcy Code. Accordingly, the requirements of section 1127 of the Bankruptcy Code have been satisfied.

XVI.
THE PLAN COMPLIES WITH BANKRUPTCY RULE 3016(A)

Bankruptcy Rule 3016(a) provides that "every proposed plan and any modification thereof shall be dated and, in a chapter 11 case, identified with the name of the entity or entities submitting or filing it." FED. R. BANKR. P. § 3016(a). The Plan is dated and identifies the Debtors as the Plan proponents, thereby satisfying Bankruptcy Rule 3016(a).

XVII.
THE OBJECTIONS SHOULD BE OVERRULED

As described above and as detailed in the summary attached hereto as ***Exhibit A***, the Objections were filed by (i) Western Pennsylvania Electrical Employees Pension Fund, as lead plaintiff (the "***Securities Plaintiffs***") in the securities class action entitled *Steamfitters Local 449 Pension Fund, Individually and on Behalf of All Others Similarly Situated v. Dennis Alter, et al.*, Civ. No. 2:09-cv-4730-CMR (E.D. Pa.) (the

"***Securities Litigation***"), and (ii) certain proposed class plaintiffs (the "***ERISA Claimants***" and together with the Securities Plaintiffs, the "***Objecting Parties***") in the ERISA class action entitled *In re Advanta Corp. ERISA Litig.*, Civ. No. 2:09-cv-4974-CMR (E.D. Pa.) (the "***ERISA Litigation***"). For the reasons discussed in ***Exhibit A*** and below, the Objections are without merit and should be overruled in their entirety.

1. The ERISA Litigation Claims Should Be Equitably Subordinated

The Bankruptcy Code provides that all claims arising from the purchase or sale of securities must be subordinated to the claims of other general creditors. Specifically, section 510(b) of the Bankruptcy Code states:

> [A] claim … for damages arising from the purchase or sale of [a security of the debtor or an affiliate of the debtor] or for reimbursement or contribution allowed under section 502 on account of such a claim … shall be subordinated to all claims or interests that are senior to or equal the claim or interest represented by such security, except that if such security is common stock, such claim has the same priority as common stock.

11 U.S.C. § 510(b). Section 101(49) of the Bankruptcy Code defines "security" to include notes, stock, bonds, debentures and any other claim or interest commonly referred to as a security. 11 U.S.C. § 101(49).

The Third Circuit has applied section 510(b) broadly in ruling that it encompasses all potential claims arising from the purchase or sale of securities. *Baroda Hill Invs., Ltd. v. Telegroup, Inc. (In re Telegroup, Inc.)*, 281 F.3d 133, 144 (3d Cir. 2002) (analyzing whether section 510(b) extended to shareholder claims for breach of a

provision in a stock purchase agreement and finding that subordination was proper).[10] In *Telegroup*, the Third Circuit held, *inter alia*, that the policy considerations underlying section 510(b) favor subordination whenever a claimant's potential damages would be based on a loss in the value of their equity holdings, and thus, "from a policy standpoint" subordination is appropriate any time a claimant "seek[s] to recover a portion of [its] equity investment." *Id.* at 142. In so holding, the court in *Telegroup* made clear that, "[s]ince claimants … are equity investors seeking compensation for a decline in the value of Telegroup's stock, … the policies underlying § 510(b)" militated in favor of subordination, and that an equity investor – like the ERISA Claimants here – "must bear the risk, in the event of bankruptcy, of any unlawful conduct on the debtor's part that causes the stock's value to drop." *Id.* at 142-43. Accordingly, under *Telegroup*, the relevant inquiry is whether "the claim would not exist but for claimants' purchase of debtor's stock." *Id.* at 143.[11]

Consistent with *Telegroup*'s broad application of section 510(b), this Court has *already* ruled that claims, like those asserted by the ERISA Claimants, from alleged breaches of fiduciary duties under ERISA arising from losses in the value of debtor's stock must be subordinated pursuant to section 510(b). In *In re Touch America*

[10] In reaching its decision, the court in *Telegroup* concluded that nothing in the legislative history of section 510(b) indicated a congressional intent to limit that provision, as the shareholders had argued, to claims relating to illegality in the issuance of a security. *See Telegroup*, 281 F.3d at 142. Accordingly, the court held that claims "for the breach of a provision in a stock purchase agreement … arise from the purchase or sale of the stock, and therefore must be subordinated pursuant to section 510(b)." *Id.* at 144.

[11] Other courts have agreed with *Telegroup*'s holding that section 510(b) should be read expansively to further Congress' policy of preventing equity investors from recouping investment losses at the expense of general unsecured creditors. *See, e.g.*, *In re Geneva Steel Co.*, 281 F.3d 1173, 1180 (10th Cir. 2002) (permitting investor whose "investment gamble turn[s] sour" to elevate his claims to that of a creditor "clashes with the legislative policies that section 510(b) purports to advance"); *In re Betacom of Phoenix, Inc.*, 240 F.3d 823, 829 (9th Cir. 2001) (accord); *In re WorldCom, Inc.*, 329 B.R. 10, 15 (Bankr. S.D.N.Y. 2005) ("[f]rom the perspective of Section 510(b), it makes no difference whether the stockholder's loss in the value of his stock was caused by a pre-purchase fraud which induced his purchase, or a post-purchase fraud, embezzlement, looting, or other corporate misconduct which undermined the value of his stock").

Holdings, Inc., 381 B.R. 95 (Bankr. D. Del. 2008), this Court subordinated claims of a debtor's officers and directors for indemnification arising from claims against them for breach of fiduciary duties under ERISA due to failures to move plan assets out of the debtor's stock, lift restrictions on the participants' ability to transfer that stock, and cease using the debtor's stock for matching contributions. *Id.* at 103, 106. The Court held that subordination under such circumstances was mandated because the ERISA claims were based on a diminution in the value of an equity investment. As the Court explained:

> By participating in the Plan, the [plaintiffs] took on the risk and return expectations of shareholders. Although the Complaint seeks damages for breach of fiduciary duties, the underlying allegations center around the [defendants'] decision to continue the Plan's investment in [debtor's] stock….The gist of the ERISA Litigation is to recover damages based upon the lost value of the stock, which are claims derived from the employees' purchase and ownership of the stock. Section 510(b) applies to subordinate this claim.

Id. at 106. At least one other court has reached the same conclusion. *See, e.g.*, *Brown v. Owens Corning Investment Review Committee*, 541 F. Supp. 2d 958, 961-62, 971 (N.D. Ohio 2008) (subordinating ERISA breach of fiduciary duty claims by former employees and participants in the debtor's retirement plans), *rev'd on reconsideration on other grounds*, 2008 WL 5378361 (N.D. Ohio Dec. 24, 2008).

Here, like the claimants in *Touch America*, the ERISA Claimants assert that they are entitled to monetary relief for the loss in the value of their ERISA plans' equity holdings. As such, their claims satisfy section 510(b)'s requirement for mandatory subordination – *i.e.*, that the claims at issue "aris[e] from the purchase or sale of securities." 11 U.S.C. § 510(b). The allegations in the ERISA Complaints, attached to the Class Proof of Claim and annexed hereto as ***Exhibits B-D***, make it clear that the

ERISA Claimants are seeking to recover losses based on the diminution in the value of Advanta stock. For example, the Ragan Complaint alleges:

> The Plans suffered tens of millions of dollars in losses because substantial assets of the Plans were imprudently invested, or allowed to be invested by Defendants, in Company stock during the Class Period, in breach of Defendants' fiduciary duties, reflected in the diminished account balances of the Plans' participants. Had Defendants properly discharged their fiduciary and/or co-fiduciary duties, the Plans and its participants would have avoided a substantial portion of the losses that they suffered through the Plans' continued investment in Company stock.

(***Ex. B***, Ragan Compl. ¶¶ 167-68.) Similarly, the Hiatt Complaint alleges:

> The Plans suffered millions of dollars in losses of vested benefits because substantial assets of the Plans were imprudently invested or allowed to be invested by Defendants in the Fund during the Class Period in breach of Defendants' fiduciary duties. Had the Defendants properly discharged their fiduciary and co-fiduciary duties, including the monitoring and removal of fiduciaries who failed to satisfy their ERISA-mandated duties of prudence and loyalty, eliminating Company stock as an investment alternative when it became imprudent, and divesting the Plans of Company stock when maintaining such an investment became imprudent, the Plans would have avoided some or all of the losses that they suffered.

(***Ex. C***, Hiatt Compl. ¶¶ 154-55.) Finally, The Yates Complaint alleges:

> Upon information and belief, the Plans suffered millions of dollars in losses in Plans benefits because substantial assets of the Plans were imprudently invested or allowed to be invested by Defendants in Advanta Stock during the Class Period, in breach of Defendants' fiduciary duties. These losses to the Plans were reflected in the diminished account balances of the Plans' Participants.

(***Ex. D***, Yates Compl. ¶ 101.)

The ERISA Claimants' Objection reaffirms that the ERISA Claimants seek recovery based on the diminution of an equity investment. The ERISA Claimants

state that "the Class Claim does not arise out of the purchase of the Debtor's securities" (Objection ¶ 18), and yet, in the following paragraph allege:

> 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 … 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.

(Objection ¶ 19) (emphasis added). The foregoing allegations in the ERISA Complaints, as reaffirmed in the ERISA Claimants' Objection, demonstrate that the ERISA Claims fit squarely within the criteria for section 510(b) mandatory subordination established in *Telegroup* and, with respect to ERISA claims, in *Touch America*. As participants in plans that purchased Advanta stock, the ERISA Claimants had the potential to earn profits from the increase in the value of this stock, but equally bore the risk of loss of value with respect to that stock. *Telegroup*, 281 F.3d at 143; *Touch Am.*, 381 B.R. at 105. Thus, the ERISA Claimants seek to recover monetary relief "'aris[ing] from' the purchase or sale of a security," and must be subordinated pursuant to section 510(b) of the Bankruptcy Code to the claims of Advanta's unsecured creditors. *Telegroup*, 281 F. 3d at 140.

Finally, the ERISA Claimants' contention that the ERISA Litigation Claims should not be subordinated in the Plan without the ERISA Claimants having a "day in court" is also without merit – and ignores the fact that the ERISA Claimants are having their day in court now. No evidentiary hearing or adversary proceeding is required to determine that, as a matter of law, the Claims related to the ERISA Litigation should be subordinated under section 510(b). First, Bankruptcy Rule 7001(8) expressly

provides that a chapter 11 plan may subordinate claims without an adversary proceeding. Second, no evidentiary hearing is required because the facts necessary to make a legal determination as to subordination are already before the Court. To determine that the ERISA Litigation Claims arise from the purchase or sale of securities, thereby warranting subordination pursuant to section 510(b), the Court need only review the allegations in the Class Complaints, annexed hereto as ***Exhibits B-D***, which make it clear that the ERISA Claimants seek to recover losses based on the diminution in the value of Advanta stock. *See Touch Am.*, 381 B.R. at 102-06 (reviewing allegations in complaint to determine whether subordination was warranted). Indeed, this Court has made such a determination on request for summary judgment in *Touch America*. *Id.* at 100, 106. Third, the ERISA Claimants have been on notice for months that the Plan will effect the subordination of their Claims and have had a fair opportunity to object to the subordination. For these reasons, the subordination of the ERISA Litigation Claims and the classification of such Claims as Class 6(a) Claims should be approved.

2. The Objecting Parties Must Delay Pursuing Claims Against the Debtors Regardless of Available Insurance Coverage

To avoid the obvious consequences of the subordination of their Claims under section 510(b) of the Bankruptcy Code, the Objecting Parties contend that the Plan should allow them to proceed now with their Claims against the Debtors to the extent of available insurance coverage. The Objecting Parties, however, cannot state that the Plan's refusal to allow them to proceed now with their Claims against the Debtors to the extent of available insurance coverage renders the Plan unconfirmable. As discussed above, the Plan satisfies all of the Bankruptcy Code's confirmation requirements. The fact that the Objectors demand the right to receive distributions from the Debtors now

does not alter the Plan's satisfaction of the confirmation requirements. This reason alone justifies denial of the Objecting Parties' demands.

Moreover, permitting the ERISA Claimants and Securities Plaintiffs to pursue their Claims against the Debtors to the extent of insurance coverage would subvert the absolute priority rule and the policy behind equitable subordination of their Claims under section 510(b) of the Bankruptcy Code to the detriment of more senior unsecured creditors in these Chapter 11 Cases. The "absolute priority rule" long has been one of the bedrock principles of reorganization law. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 202 (1988); *see also LaSalle*, 526 U.S. at 444-47 (discussing historical development and codification of absolute priority rule). It provides that no junior class of unsecured creditors may receive or retain property under a plan if the more senior creditors are not paid in full. As discussed below, the Objecting Parties are inappropriately – and without offering any legal support – demanding a departure from this bedrock principle of bankruptcy law.

The Objecting Parties imply that they simply want to be paid by the Debtors' insurers, as if the Debtors will barely be involved in the process and suffer no harm. This grossly distorts reality. The Objecting Parties have no entitlement to the insurance proceeds. They simply have asserted Claims against the Debtors for which the Debtors may seek coverage from their insurers under certain circumstances. In fact, the insurance policies are property of the Estates under section 541 of the Bankruptcy Code. *Acands, Inc. v. Travelers Cas. and Sur. Co.*, 435 F.3d 252, 260 (3d Cir. 2006) ("It has long been the rule in this Circuit that insurance policies are considered part of the property of a bankruptcy estate." (citations omitted)); *see also In re Downey Fin. Corp.*,

428 B.R. 595, 603 (Bankr. D. Del 2010) (same); *In re SN Liquidation Inc.*, 388 B.R. 579, 583-84 (Bankr. D. Del. 2008) ("Insurance policies purchased and paid for by a debtor are property of the estate"). Third parties, including the Objecting Parties, are not beneficiaries under the insurance policies, which were put in place to protect the assets of the Debtors and their directors and officers. Both as a matter of policy and applicable insurance law, the third parties have no direct right of action against the Debtors' insurers and have no standing under the Debtors' insurance policies.[12]

In addition, allowing the Objecting Parties to proceed to judgment against the Debtors would require the Debtors to incur defense costs that would come out of the Estate, to the detriment of more senior creditors. Permitting the Objecting Parties to pursue their claims against the Debtors to the extent of insurance coverage would, therefore, reduce the recoveries of the Debtors' more senior creditors, as the Debtors would undoubtedly incur significant expense in defending the Securities Litigation and the ERISA Litigation. Under the Debtors' relevant directors and officers insurance policies and fiduciary liability policy, there are self-insured retentions of $2 million and up to $500,000, respectively. This means that the Debtors would have to incur more than $2 million in defense costs before they could even expect to receive any coverage from their insurers. As such, defense costs up to $2 million would come directly out of Estate

[12] The Debtors' insurance policies provide that no action will lie against the applicable insurer unless, as a condition precedent thereto, there has been full compliance with all the terms of the applicable policy, and no person or organization has any right under the applicable policy to join the applicable insurer as a party to any action against the insureds to determine the insureds' liability, nor shall the applicable insurer be impleaded by the insureds or their legal representatives. *See also Tremco, Inc. v. Pa. Mfrs. Ass'n Ins. Co.*, 832 A.2d 1120 (Pa. Super. Ct. 2003) (holding that third parties have no interest in a particular insurance policy or its proceeds unless and until a judgment is rendered); *Strutz v. State Farm Mut. Ins. Co.*, 609 A.2d 569 (Pa. Super. Ct. 1992) (same).

assets, which, of course, would decrease distributions to senior creditors on a dollar for dollar basis.

Moreover, as discussed below, any insurance payment of the Debtors' defense costs or any judgment against the Debtors beyond the self-insured retentions would deplete available insurance proceeds, thereby increasing potential indemnification Claims against the Debtors by their directors and officers (the "***Indemnification Claims***"). These Indemnification Claims could increase the pool of more senior claims, thereby decreasing the recoveries of those more senior creditors.

The Objecting Parties contend that any Indemnification Claims will be subordinated. But this is a premature conclusion. Unlike the Objecting Parties' Claims, the potential Indemnification Claims are unknown at this time. Pursuant to Section 8.6(a) of the Plan, liquidated and non-contingent Indemnification Claims may be asserted against the applicable Liquidating Trust at any time prior to the dissolution of such Liquidating Trust. When the nature and amounts of any Indemnification Claims become known, the applicable Trustee will have to determine whether such Claims should be subordinated and, if it believes they should be, seek their subordination. It is simply impossible to make that determination at this time. The Objecting Parties' contention also ignores the fact that, even if Indemnification Claims arising from the Securities Litigation and ERISA Litigation are ultimately subordinated, these are not the only potential litigations against the Debtors' directors and officers. As the Objecting Parties know, the Plan does not release the Debtors' directors and officers from any prepetition Claims that could be asserted by any party. These potential Claims could be entirely unrelated to the purchase or sale of any securities. For example, Advanta has sent to its

applicable insurers notices of circumstances that could give rise to claims against Advanta and its directors and officers that are unrelated to the purchase and sale of securities, including certain claims that the Federal Deposit Insurance Corporation might assert against Advanta's directors and officers. *See* Rosoff Declaration ¶ 35. The Plan thus preserves available insurance proceeds to satisfy potential claims against directors and officers, thereby reducing potential Indemnification Claims against the Debtors that would share *pari pasu* with other unsecured creditors, which is consistent with the absolute priority rule and the general policy in favor of maximizing the bankruptcy estate. Even though their Claims are subordinated, the Objecting Parties seek to get paid first at 100 cents on the dollar in contravention of the absolute priority rule.

Finally, contrary to the Objecting Parties' assertions, the Plan does not seek a discharge of the Claims related to the Securities Litigation and the ERISA Litigation. Rather, the Plan merely delays the prosecution of the Subordinated Claims against the Debtors until such time as all senior Allowed Claims have been paid in full. This ensures that the pursuit of the Subordinated Claims related to the Securities Litigation and ERISA Litigation does not violate the absolute priority rule and does not erode recoveries of more senior creditors. The Objecting Parties should not be allowed to circumvent the fact that their Claims are subordinated.

For the foregoing reasons and those discussed in ***Exhibit A*** hereto, the Objections should be overruled.

CONCLUSION

The Plan complies with and satisfies all of the requirements of section 1129 of the Bankruptcy Code. The Objections should, therefore, be overruled and the Plan confirmed.

Dated: February 8, 2011
Wilmington, Delaware

/s/ Zachary I. Shapiro

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EXHIBIT A

EXHIBIT A

REPLIES TO PLAN[13] OBJECTIONS

Objector	Objection	Debtors' Response	Status of the Objection
ERISA Claimants in the class action entitled *In re Advanta Corp. ERISA Litig.*, Civil Action No. 2:09-cv-4974-CMR ("*ERISA Litigation*") [Docket No. 1135]	Improper Classification • The Plan attempts to improperly classify the ERISA Claimants' claim as a Class 6 Subordinated Claim.	• As discussed in detail in the Memorandum of Law (see Section XVII), the ERISA Litigation Claims must be equitably subordinated under Section 510(b) of the Bankruptcy Code because they arise from the sale or purchase of the Debtors' securities.	• Unresolved
	• Subordination should be sought through some other contested matter after discovery and an evidentiary hearing.	• As discussed in detail in the Memorandum of Law (see Section XVII), the Plan may subordinate the ERISA Litigation Claims.	• Unresolved
	Preservation of Books and Records • The AC Trustee should be required to seek Court approval and give ERISA claimants prior notice of the destruction of <u>any</u> books and records; not just those that are reasonably likely to pertain to pending litigation.	• The Debtors have proposed a reasonable compromise to the ERISA Claimants' request to receive notice of the destruction of documents that may pertain to the ERISA Litigation. The Debtors have specifically included in the proposed Conformation Order a provision requiring the Liquidating Trustees to provide notice to the ERISA Claimants of the destruction of documents that pertain to the ERISA Litigation. There is no basis to believe that the Liquidating Trustees, who are fiduciaries, will not take seriously their obligation under the Liquidating Trust Agreements to seek Court approval before disposing of books and records that pertain to pending litigation. Officers and directors of corporations make these decisions routinely, and there is no reason to	• The Debtors believe that the changes made to the proposed Confirmation Order should resolve this objection.

[13] Any capitalized terms not defined herein have the meaning ascribed to such term in the Plan.

Objector	Objection	Debtors' Response	Status of the Objection
		believe that the Liquidating Trustees will act differently. The ERISA Claimants' request for the Liquidating Trustees to seek Court approval before disposing of *any* books and records is burdensome and unreasonable.	
	• The AC Trust Agreement contains internal inconsistencies because it does not refer to "current or former" officers or directors consistently in connection with preservation of books and records. Specifically, sections 3.2(a)(x) and 3.5 of the AC Trust Agreement should be amended to include "current *and former* officers and directors" to eliminate ambiguity and to be consistent with section 7.2 of the AC Trust Agreement.	• The Debtors have corrected the Trust Agreements to fix this inconsistency by adding "current or former" in the places requested.	• The Debtors believe that the changes made to the forms of the Trust Agreements should resolve this objection.
	Pursuit of Insurance Coverage • The Plan should preserve the rights of the ERISA Claimants to proceed with their claims against the Debtors to the extent of available insurance coverage, irrespective of any injunction, discharge or distribution under the Plan.	• As discussed in detail in the Memorandum of Law (see Section XVII), permitting the ERISA Claimants to pursue their claims to the extent of available insurance coverage would subvert the absolute priority rule and the policy behind equitable subordination of their claims against the Debtors, and reduce the recoveries of the Debtors' more senior creditors. In addition, the Debtors are not seeking to discharge the ERISA Litigation Claims, just to delay the prosecution of the ERISA Litigation Claims as against the Debtors until such time as all Allowed Claims have been in full.	• Unresolved

Objector	Objection	Debtors' Response	Status of the Objection
	Release and Injunction Language • The Bankruptcy Court lacks jurisdiction to release and enjoin the prosecution of the claims asserted by the ERISA Claimants against non-Debtors.	• The Debtors are not seeking to release any claims asserted by the ERISA Claimants against non-Debtors in the ERISA Litigation.	• The Debtors believe that the changes made to the proposed Confirmation Order should resolve this objection.
	• The Plan injunction and stay provisions are unclear as to whether the ERISA Litigation against non-debtors is enjoined.	• The Debtors have added the following language to the proposed Confirmation Order to address this objection: Notwithstanding anything to the contrary contained in the Plan, any Plan Supplement document, any amendment to the Plan, or this Order: (A) other than with respect to any Claim, Cause of Action or other assertion of liability that is released pursuant to Section 10.7 of the Plan, nothing contained in the Plan, any Plan Supplement document, any amendment to the Plan, or this Order shall release, enjoin, preclude or otherwise affect in any way the pursuit or prosecution of the claims asserted, or which may be asserted (including without limitation any appeals), against any non-Debtor in (i) that certain securities class action titled William E. Underland, on behalf of himself and all other similarly situated persons (collectively, the "***Underland Class Plaintiffs***") against Dennis Alter, *et. al.*, currently pending in the United States District Court, Eastern District of Pennsylvania (Philadelphia), Civil Action No. 2:10-cv 03621-CMR (the "***Underland Action***"), (ii) that certain ERISA class action titled *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, or (iii) that certain securities class action	• The Debtors believe that the changes made to the proposed Confirmation Order should resolve this objection.

Objector	Objection	Debtors' Response	Status of the Objection
		titled *Steamfitters Local 449 Pension Fund, Individually and On Behalf of All Other Similarly Situated v. Dennis Alter, et al.*, Civil Action No. 2:09-cv-4730-CMR (the ***Securities Litigation***"), filed in the United States District Court for the Eastern District of Pennsylvania, including without limitation the pursuit or prosecution (a) of any otherwise applicable discovery to which the Underland Class Plaintiffs or the plaintiffs in the ERISA Litigation or the Securities Litigation, as applicable, would be entitled under the Federal Rules of Civil Procedure and applicable case law, but subject to any otherwise applicable defense of the Debtors or the Trustees under the Federal Rules of Civil Procedure and applicable case law; (b) of or against applicable insurance with respect to claims against any non-Debtors, including without limitation, litigation against any insurer providing insurance coverage to any non-Debtor defendants; and (c) as concerns any claims asserted against such insurers, insurance and non-Debtors, the entry or enforcement of any settlement or judgment obtained; and (B) prior to abandoning or otherwise disposing of any books, records or other documents (in any format, including electronic, paper form or otherwise) that pertain to the Underland Action, the ERISA Litigation or the Securities Litigation (collectively, "***Litigation Books and Records***") the Liquidating Trustees shall seek approval of the Bankruptcy Court on not less than seventeen (17) days written notice to the attorneys for the Underland Plaintiffs and the attorneys for the plaintiffs in the ERISA Litigation and the Securities Litigation and shall not abandon or otherwise dispose of any of the Litigation Books and Records absent the entry of a further order of the Bankruptcy Court authorizing same.	

Objector	Objection	Debtors' Response	Status of the Objection
Western Pennsylvania Electrical Employees Pension Fund as lead plaintiff (the "*Securities Plaintiffs*") in the securities class action entitled *Steamfitters Local 449 Pension Fund, Individually and on Behalf of All Others Similarly Situated v. Dennis Alter, et al.,* Civil Action No. 2:09-cv-4730-CMR (the "*Securities Litigation*") [Docket No. 1134]	Preservation of Books and Records • The AC Trustee should be required to seek Court approval and give ERISA claimants prior notice of the destruction of <u>any</u> books and records; not just those that are reasonably likely to pertain to pending litigation.	• See response above to ERISA Claimants' objection.	• The Debtors believe that the changes made to the proposed Confirmation Order should resolve this objection.
	• The AC Trust Agreement contains internal inconsistencies because it does not refer to "current or former" officers or directors consistently in connection with preservation of books and records. Specifically, sections 3.2(a)(x) and 3.5 of the AC Trust Agreement should be amended to include "current <u>*and former*</u> officers and directors" to eliminate ambiguity and to be consistent with section 7.2 of the AC Trust Agreement.	• See response above to ERISA Claimants' objection.	• The Debtors believe that the changes made to the forms of the Trust Agreements should resolve this objection.
	<u>Pursuit of Insurance Coverage</u> • The Plan should preserve the rights of the Securities Plaintiffs to proceed with their claims against the Debtors to the extent	• See response above to ERISA Claimants' objection.	• Unresolved.

Objector	Objection	Debtors' Response	Status of the Objection
	of available insurance coverage, irrespective of any injunction, discharge or distribution under the Plan		
	Release and Injunction Language • The Bankruptcy Court lacks jurisdiction to release and enjoin the prosecution of the claims asserted by the Securities Plaintiffs against non-Debtors.	• See response above to ERISA Claimants' objection.	• The Debtors believe that the changes made to the proposed Confirmation Order should resolve this objection.
	• The Plan injunction and stay provisions are unclear as to whether the Securities Litigation against non-Debtors is enjoined.	• See response above to ERISA Claimants' objection.	• The Debtors believe that the changes made to the proposed Confirmation Order should resolve this objection.

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

MATTHEW A RAGAN, individually and on behalf of all others similarly situated,	**CIVIL ACTION NO..**
Plaintiff,	
v	**CLASS ACTION COMPLAINT**
ADVANTA CORP., DENNIS ALTER, MAX BOTEL, DANA BECKER DUNN, RONALD LUBNER, WILLIAM A ROSOFF, PHILLIP M. BROWNE, PAUL JEFFERS and DOES 1-10,	**JURY TRIAL DEMANDED**
Defendants	

Plaintiff Matthew A Ragan ("Plaintiff"), on behalf of the Advanta Corp Employee Stock Ownership Plan and the Advanta Corp Employee Savings Plan (each a "Plan" and collectively, the "Plans"), himself and a class of all others similarly situated, alleges as follows

INTRODUCTION

1 This is a class action brought pursuant to §§ 409 and 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U S C §§ 1109 and 1132, against Advanta Corp. ("Advanta" or the "Company") and other fiduciaries of the Plans

2 Plaintiff was a Plan participant during the Class Period, during which time the Plans held interests in the Company's common stock Plaintiff's investment portfolio in the Plans during the Class Period included Advanta stock

3 401(k) plans confer tax benefits on participating employees to incentivize saving for retirement and/or other long-term goals An employee participating in a 401(k) plans may have the option of purchasing the common stock of his or her

employer, often the sponsor of the plans, for part of his or her retirement investment portfolio Common stock of Advanta was held by each of the Plans throughout the Class Period

4. Plaintiff alleges that Defendants, as "fiduciaries" of the Plans, as that term is defined under ERISA § 3(21)(A), 29 U S C § 1002(21)(A), breached their duties owed to her and to the other participants and beneficiaries of the Plans in violation of ERISA §§ 404(a) and 405, 29 U S C §§ 1104(a) and 1105, particularly with regard to the Plans' vast holdings of Advanta stock

5 Specifically, Plaintiff alleges in Count I that certain Defendants, each having certain responsibilities regarding the management and investment of Plans assets, breached their fiduciary duties to Plaintiff, the Plans and proposed Class by failing to prudently and loyally manage the Plans' investment in Company securities by (1) continuing to offer Advanta common stock as a Plan investment option when it was imprudent to do so, (2) failing to provide complete and accurate information to Plan participants regarding the Company's financial condition and the prudence of investing in Company stock, and (3) maintaining the Plans' pre-existing heavy investment in Advanta equity when Company stock was no longer a prudent investment for the Plans These actions/inactions run directly counter to the express purpose of ERISA pension plans, which are designed to help provide funds for participants' retirement *See* ERISA § 2, 29 U S C § 1001 ("CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY")

6 Plaintiff's Count II alleges that certain Defendants failed to avoid or ameliorate inherent conflicts of interests which crippled their ability to function as

independent, "single-minded" fiduciaries with only the Plans' and their participants' best interests in mind

7 Plaintiff's Count III alleges that certain Defendants breached their fiduciary duties by failing to adequately monitor other persons to whom management/administration of Plan assets was delegated, despite the fact that such Defendants knew or should have known that such other fiduciaries were imprudently allowing the Plans to continue offering Advanta stock as an investment option and continuing to invest Plan assets in Advanta stock when it was no longer prudent to do so

8 Plaintiff alleges that Defendants allowed the heavy imprudent investment of the Plans' assets in Advanta equity throughout the Class Period despite the fact that they clearly knew or should have known that such investment was imprudent because, as explained in detail below and among other things (a) the Company's assets contained large amounts of impaired credit card receivables for which Advanta had not accrued losses, (b) Advanta's customer default rate would be substantially higher than the industry average by 2009 due to the Company's failure to verify its customers' ability to pay, (c) due to Advanta's practice of issuing credit cards to small business owners without verifying income, the Company's credit receivables were excessively risky, (d) customers were leaving and would continue to leave the Company due to, among other things, Advanta's drastic increase of interest rates and its manipulation of the cash reward program, and (e) the Company's portfolio would have large charges to reflect impairments, due to Advanta's failure to correctly account for its delinquent customers and credit trends

9 This action is brought on behalf of the Plans and seeks losses to the Plans for which Defendants are liable pursuant to ERISA §§ 409 and 502, 29 U.S C. §§ 1109 and 1132 Because Plaintiff's claims apply to the Plans, inclusive of all participants with accounts invested in Company stock during the Class Period, and because ERISA specifically authorizes participants such as Plaintiff to sue for relief to the Plans for breaches of fiduciary duty such as those alleged herein, Plaintiff brings this as a class action on behalf of the Plans and all participants and beneficiaries of the Plans during the proposed Class Period

JURISDICTION AND VENUE

10 This Court has subject matter jurisdiction over this action pursuant to 28 U S C § 1331 and ERISA § 502(e)(1), 29 U S C § 1132(e)(1)

11 Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U S C § 1132(e)(2), because the Plans are administered in this district, some or all of the fiduciary breaches for which relief is sought occurred in this district, and/or some Defendants reside or maintain their primary place of business in this district

PARTIES

Plaintiff

12 Plaintiff Michael A Ragan is a "participant," within the meaning of ERISA § 3(7), 29 U S C § 1102(7), of the Employee Savings Plan and held Advanta shares in his account during the Class Period

Defendants

Advanta

13 Advanta is a Delaware corporation headquartered in Spring House, Pennsylvania

14 Advanta is both the sponsor and administrator of the Plans

15 The Company acted through the Board of Directors (the "Board"), the Board's Compensation Committee (the "Compensation Committee"), as well as its Chief Executive Officer ("CEO"), Chief Financial Officer ("CFO"), the Company's Plan Administrative Committee for each of the Plans (the "Administrative Committee") and other Company officers and employees appointed by the Company to perform Plan-related fiduciary functions in the course and scope of their employment

Chairman/CEO

16 Defendant Dennis Alter ("Alter") served as the Company's Chairman of the Board and CEO during the Class Period Defendant Alter was a fiduciary of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U S C § 1002(21)(A), because he exercised discretionary authority or control over Plan management and/or authority or control over management or disposition of Plan assets

Other Director Defendants

17 Defendant Max Botel ("Botel") served as a member of the Board during the Class Period Further, Defendant Botel served as a member of the Compensation Committee Defendant Botel was a fiduciary of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U S C § 1002(21)(A), because he exercised discretionary authority or control over Plan management and/or authority or control over management or disposition of Plan assets

18 Defendant Dana Becker Dunn ("Dunn") served as a member of the Board during the Class Period Further, Defendant Dunn served as a member of the Compensation Committee Defendant Dunn was a fiduciary of the Plans, within the

meaning of ERISA Section 3(21)(A), 29 U S C. § 1002(21)(A), because she exercised discretionary authority or control over Plan management and/or authority or control over management or disposition of Plan assets.

19. Defendant Ronald Lubner ("Lubner") served as a member of the Board during the Class Period Further, Defendant Lubner served as a member of the Compensation Committee Defendant Lubner was a fiduciary of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U S C § 1002(21)(A), because he exercised discretionary authority or control over Plan management and/or authority or control over management or disposition of Plan assets

20 Defendant William A Rosoff ("Rosoff") served as a member of the Board during the Class Period In October 1999, Defendant Rosoff became President as well as Vice Chairman of the Board of the Company Defendant Rosoff was a fiduciary of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U S C § 1002(21)(A), because he exercised discretionary authority or control over Plan management and/or authority or control over management or disposition of Plan assets

21 Defendants Alter, Botel, Dunn, Lubner and Rosoff are hereinafter collectively referred to as the "Director Defendants "

Administrative Committee Defendants

22 Each Plan is administered by a Plan Administrative Committee The Administrative Committee is comprised of certain Company employees/officers appointed by the Board The Administrative Committee is charged with the day-to-day management and administration of the Plans and/or management and disposition of the Plans' assets

23 Defendant Philip M Browne ("Browne") served as Senior Vice President and CFO of Advanta during the Class Period. During the Class Period, Defendant Browne signed the 2006, 2007 and 2008 Form 11-K submissions for the Plans on behalf of the Company, as a "Member of the Committee Administering the Plan" Defendant Browne was a fiduciary of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U S C § 1002(21)(A), because he exercised discretionary authority or control over Plan management and/or authority or control over management or disposition of Plan assets

24 Defendant Paul Jeffers ("Jeffers") served as Vice President, Human Resources, of Advanta during the Class Period During the Class Period, Defendant Jeffers signed each of the Plans' Form 5500 submissions to the IRS and Dept. of Labor on behalf of the Company, as Plan Administrator Defendant Jeffers was likely a member of the Administrative Committee Defendant Jeffers was a fiduciary of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U S C § 1002(21)(A), because he exercised discretionary authority or control over Plan management and/or authority or control over management or disposition of Plan assets

Additional Plan Fiduciaries

25 Without limitation, unknown "Doe" Defendants 1-10 include other individuals, including members of the Plans' Administrative Committee, as well as other Company officers, directors and employees who are or were fiduciaries of the Plans within the meaning of ERISA § 3(21)(A), 29 U S C § 1002(21)(A), during the Class Period The identities of the Doe Defendants are currently unknown to Plaintiff, once their identities are ascertained, Plaintiff will seek leave to join them to the instant action under their true names

THE PLANS

26 The Plans are "employee pension benefit plans," as defined by ERISA § 3(2)(A) Specifically, each Plan is a "defined contribution plan" within the meaning of ERISA § 3(34) Each Plan is a legal entity that can sue and be sued ERISA § 502(d)(1) However, in a breach of fiduciary duty action such as this, the Plans are neither defendants nor plaintiffs Rather, pursuant to ERISA § 409, and the law interpreting it, the relief requested in this action is for the benefit of the Plans and their participants and beneficiaries

Employee Stock Ownership Plan

27 The Plan is purportedly an employee stock ownership plan (an "ESOP") and is generally available to employees of the Company and its subsidiaries who have reached 21 years of age with one year of service

28 The Plan is administered by the Plan Administrative Committee, which is comprised of persons appointed by the Board

29 The Plan invests in Advanta Class A common stock

30 At December 31, 2006, the ESOP held $37,073,699 in Advanta Class A stock. By December 31, 2007, the ESOP held only $10,113,880 in Advanta Class A stock *See* 2007 Form 5500

31 Fiduciaries of an ESOP remain bound by core ERISA fiduciaries duties, including the duties to act loyally, prudently, and for the exclusive purpose of providing benefits to plan participants.

32 Accordingly, if the fiduciaries know or if an adequate investigation would reveal that company stock no longer is a prudent investment for the ESOP, the fiduciaries

must disregard plans direction to maintain investments in such stock and protect the plans by investing the plans assets in other suitable investments

Employee Savings Plan

33. The Plan invests in Advanta stock along with other mutual funds and other investment vehicles

34 The Plan is administered by the Administrative Committee, which is comprised of persons appointed by the Board

35 Employees are eligible to participate in the Plan when they have reached 21 years of age and have had six months of service with the Company

36 In 2008, participants could elect to contribute to the Plan up to 75% of their eligible compensation Advanta's contributions were equal to 50% of each employee's contributions to the Plan up to 5% of each employee's eligible compensation (so that the initial maximum contribution by Advanta would be 2 5% of an employee's eligible contribution) *See* 2008 Form 11-K

37 The Plan was restated effective January 1, 2009 to provide for matching contributions equal to 100% of employee contributions up to 4% of an employee's eligible compensation *See* 2008 Form 11-K

38 On October 1, 2008, Schwab Retirement Plans Services, Inc replaced Wilmington Trust Company as the Trustee of the Plan *See* 2008 Form 11-K

39 The Plan has been heavily invested in Advanta stock At December 31, 2006, the Plan held approximately $7,654,030 in Advanta Class B common stock and $315,304 in Advanta Class A common stock At December 31, 2007, the Plan held approximately $2,678,692 in Advanta Class B common stock and $91,834 in Advanta

Class A common stock. At December 31, 2008, the Plan held approximately $932,309 in Advanta Class B common stock and $14,745 in Advanta Class A common stock

CLASS ACTION ALLEGATIONS

40 Plaintiff brings this action as a class action pursuant to Rules 23(a), (b)(1), and/or (b)(2) of the Federal Rules of Civil Procedure on behalf of the Plans, himself/herself and the following class of persons similarly situated (the "Class")

> All persons, except Defendants and their immediate family members, who were participants in or beneficiaries of the Advanta Corp Employee Stock Ownership Plan and/or the Advanta Corp. Employee Saving Plan at any time between October 31, 2006 and the present (the "Class Period") and whose Plan accounts included investments in Advanta common stock

41. The members of the Class are so numerous that joinder of all members is impracticable While the exact number of Class members is unknown to Plaintiff at this time, and can only be ascertained through appropriate discovery, Plaintiff believes there are hundreds of members of the Class who participated in, or were beneficiaries of, the Plans during the Class Period and whose Plan accounts included investment in Advanta stock According to the 2007 Form 5500 submissions for the Plans, as of December 31, 2006, the ESOP had approximately 700 participants and the Employee Savings Plan had approximately 1,100 participants

42 Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class Among the questions of law and fact common to the Class are

- whether Defendants each owed a fiduciary duty to the Plans, Plaintiff and members of the Class,

- whether Defendants breached their fiduciary duties to the Plans, Plaintiff and members of the Class by failing to act prudently and solely in the interests of the Plans and the Plans' participants and beneficiaries,
- whether Defendants violated ERISA, and
- whether the Plans and members of the Class have sustained damages and, if so, what is the proper measure of damages.

43 Plaintiff's claims are typical of the claims of the members of the Class because Plaintiff, the Plans and the other members of the Class each sustained damages arising out of Defendants' wrongful conduct in violation of federal law as complained of herein

44 Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class actions, complex, and ERISA litigation Plaintiff has no interests antagonistic to or in conflict with those of the Plans or the Class

45 Class action status in this ERISA action is warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests

46 Class action status is also warranted under the other subsections of Rule 23(b) because (1) prosecution of separate actions by the members of the Class would

create a risk of establishing incompatible standards of conduct for Defendants, and (ii) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole

DEFENDANTS' FIDUCIARY STATUS

47 During the Class Period, upon information and belief, each Defendant was a fiduciary of the Plans, either as a named fiduciary or as a de facto fiduciary with discretionary authority with respect to the management of the Plans and/or the management or disposition of the Plans' assets

48 ERISA requires every plans to provide for one or more named fiduciaries who will have "authority to control and manage the operation and administration of the plans" ERISA § 402(a)(1), 29 U S C § 1102(a)(1)

49 ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under § 402(a)(1), 29 U S C § 1102(a)(1), but also any other persons who in fact perform fiduciary functions Thus a person is a fiduciary to the extent "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan" ERISA § 3(21)(A)(i), 29 U S C § 1002(21)(A)(i)

50 Each of the Defendants was a fiduciary -- either as a named fiduciary or *de facto* fiduciary -- with respect to one or both of the Plans and owed fiduciary duties to

one or both of the Plans and the participants under ERISA in the manner and to the extent set forth in the Plans' documents, through their conduct, and under ERISA

51 As fiduciaries, Defendants were required by ERISA § 404(a)(1), 29 U S C § 1104(a)(1), to manage and administer the Plans, and the Plans' investments solely in the interest of the Plans' participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims

52 Plaintiffs do not allege that each Defendant was a fiduciary with respect to all aspects of the Plans' management and administration Rather, as set forth below, Defendants were fiduciaries to the extent of the specific fiduciary discretion and authority assigned to or exercised by each of them, and, as further set forth below, the claims against each Defendant are based on such specific discretion and authority

53 Instead of delegating all fiduciary responsibility for the Plans to external service providers, the Company chose to assign the appointment and removal of fiduciaries, such as the Administrative Committee members, to itself

54 ERISA permits fiduciary functions to be delegated to insiders without an automatic violation of the rules against prohibited transactions, ERISA § 408(c)(3), 29 U S C § 1108(c)(3), but insider fiduciaries, like external fiduciaries, must act solely in the interest of participants and beneficiaries, not in the interest of the Plan sponsor

55 During the Class Period, all of Defendants acted as fiduciaries of the Plans pursuant to ERISA § 3(21)(A), 29 U S C § 1002(21)(A), and the law interpreting that section

The Company's Fiduciary Status

56 Instead of delegating fiduciary responsibility for the Plans to external service providers, the Company chose to internalize certain vital aspects of this fiduciary function

57 The Company acted through the Board, the Compensation Committee, the Administrative Committee and certain other officers and employees The Company had, at all applicable times, effective control over the activities of its officers and employees, including over their Plan-related activities The Board had the authority and discretion to hire, appoint, monitor, and remove the members of the Administrative Committee, as well as other officers and employees appointed by the Company to perform Plan-related fiduciary functions in the course and scope of their employment

58 By failing to properly discharge their fiduciary duties under ERISA, the employee and officer defendants, including the Administrative Committee Defendants, breached fiduciary duties they owed to the Plans, their participants and their beneficiaries Such individuals were appointed by the Company to perform Plan-related fiduciary functions in the course and scope of their employment Accordingly, the actions of such employee fiduciaries are imputed to the Company under the doctrine of *respondeat superior*, and the Company is liable for these actions

Director Defendants' Fiduciary Status

59 The Board has primary oversight of the Plan Indicative of the Board's authority, The Board was responsible for selecting, monitoring and removing members of the Plans' Administrative Committee *See* 2007 Form 5500 for the ESOP

60 The Board's Compensation Committee was charged with reviewing and approving company-wide benefit programs *See* Compensation Committee Charter, available at https //www advanta com/ADV/Corporate/Investing page? ("Compensation Committee Charter")

61 The Compensation Committee Charter provides that, as part of this responsibility, "the Committee will review major changes to the Company's Benefit Programs including fiduciary issues, major plan revisions "

62 The Company's Senior Vice President of Human Resources, or his or her designee, served as the Secretary of the Compensation Committee

63 Ultimately, the Board collectively retained responsibility for the Compensation Committee's actions Further, each member of the Compensation Committee, by virtue of their committee position, was a member of the Board and therefore also had fiduciary responsibility to the Plans and their participants in that regard

Administrative Committee's Fiduciary Status

64 The Administrative Committee is comprised of persons appointed by the Board and delegated the day-to-day responsibility for the administration of the Plans The Administrative Committee and its members were fiduciaries of the Plans, within the meaning of ERISA § 3(21)(A), 29 U S C § 1002(21)(A), in that they were, upon information and belief, named fiduciaries of the Plans and exercised discretionary authority with respect to the management and administration of the Plans and/or management and disposition of the Plans' assets

Additional Fiduciary Aspects of Defendants' Actions/Inactions

65 ERISA mandates that pension plan fiduciaries have a duty of loyalty to the plan and its participants which includes the duty to speak truthfully to the Plans and its participants when communicating with them A fiduciary's duty of loyalty to plan participants under ERISA includes an obligation not to materially mislead, or knowingly allow others to materially mislead, plan participants and beneficiaries "[L]ying is inconsistent with the duty of loyalty owed by all fiduciaries and codified in section 404(a)(1) of ERISA" *Varity Corp v Howe*, 516 U.S. 489, 506 (1996), *see also In re Unisys Corp Retiree Medical Benefit ERISA Litig*, 57 F.3d 1255, 1261 (3d Cir 1995); *Fisher v Philadelphia Elec Co*, 994 F.2d 130, 133 (3d Cir 1993)

66 Moreover, an ERISA fiduciary's duty of loyalty requires the fiduciary to correct the inaccurate or misleading information so that plan participants will not be injured *See, e g*, *In re Unisys Corp*, *supra,* 994 F 2d at 133 ("a plan administrator has an affirmative duty to speak when it knows that silence might be harmful"), *see also Bixler v Central Penn Teamsters Health & Welfare Fund*, 12 F 3d 1292, 1300 (3rd Cir 1993), *James v Pirelli Armstrong Tire Corp*, 305 F 3d 439, 449 (6th Cir 2002), *Matthews v Chevron Corp*, 362 F 3d 1172, 1180 (9th Cir 2004)

67 During the Class Period, upon information and belief, the Company and certain other Defendants made direct and indirect communications with the Plans' participants including statements regarding investments in Company stock These communications included, but were not limited to, SEC filings, annual reports, press releases, and Plans documents (including Summary Plans Descriptions ("SPDs") and/or prospectuses regarding Plans/participant holdings of Company stock), which included and/or reiterated these statements Upon information and belief, at all times during the

Class Period, Advanta's SEC filings were incorporated into and part of the SPDs, and/or a prospectus and/or any applicable SEC Form S-8 registration statements. Defendants also acted as fiduciaries to the extent of this activity

68 Further, Defendants, as the Plans' fiduciaries, knew or should have known certain basic facts about the characteristics and behavior of the Plans' participants, well-recognized in the 401(k) literature and the trade press,[1] concerning investment in company stock, including that

Employees tend to interpret a match in company stock as an endorsement of the company and its stock,

- Out of loyalty, employees tend to invest in company stock,
- Employees tend to over-extrapolate from recent returns, expecting high returns to continue or increase going forward,
- Employees tend not to change their investment option allocations in the plans once made,
- No qualified retirement professional would advise rank and file employees to invest more than a modest amount of retirement savings in company stock, and many retirement professionals

[1] Joanne Sammer, *Managed Accounts A new direction for 401(k) plans*, Journal of Accountancy, Vol 204, No 2 (August 2007) (available at http //www aicpa org/pubs/jofa/aug2007/sammer htm), Roland Jones, *How Americans Mess Up Their 401(k)*s, MSNBC com (June 20, 2006) (available at http //www msnbc msn com/id/12976549/), Bridgitte C Mandrian and Dennis F Shea, *The Power of Suggestion Inertia in 401(k) Participation and Savings Behavior*, 116 Q J Econ 4, 1149 (2001) (available at http //mitpress mit edu/journals/pdf/qjec_116_04_1149_0 pdf), Nellie Liang & Scott Weisbenner, 2002, *Investor behavior and the purchase of company stock in 401(k) plans - the importance of plans design*, Finance and Economics Discussion Series 2002-36, Board of Governors of the Federal Reserve System (U S.) (available at http //www federalreserve gov/pubs/feds/2002/200236/200236pap pdf)

would advise employees to avoid investment in company stock entirely,

- Lower income employees tend to invest more heavily in company stock than more affluent workers, though they are at greater risk, and
- Even for risk-tolerant investors, the risks inherent to company stock are not commensurate with its rewards

69 Even though Defendants knew or should have known these facts, and even though Defendants knew of the substantial investment of the Plans' funds in Company stock, they still took no action to protect the Plans' assets from their imprudent investment in Company stock

DEFENDANTS' CONDUCT

70 Advanta is an issuer of credit cards, particularly MasterCard and Visa, to professionals and small businesses in the United States The Company issued cards through its subsidiary, Advanta Banks Corp ("Advanta Bank") In addition to the credit cards, Advanta offers credit protection and insurance products that provide coverage for disability, involuntary unemployment and loss of life, among other things Moreover, the Company provides deposit products, including retail and large denomination certificates of deposit and money accounts The Company was founded in 1951 and was formerly known as TSO Financial Corp , changing its name to Advanta Corp in 1988

71 Throughout the Class Period, Defendants knew or should have known that Advanta common stock was an imprudent Plans investment, because (a) the Company's assets contained large amounts of impaired credit card receivables for which Advanta had not accrued losses, (b) Advanta's customer default rate would be nearly six times that of

the industry average by 2009 due to the Company's failure to verify its customers' ability to pay; (c) due to Advanta's practice of issuing credit cards to small business owners without verifying income, the Company's credit receivables were excessively risky; (d) customers were and would continue to leave the Company due to, among other things, Advanta's drastic increase of interest rates and its manipulation of the cash reward program, and (e) the Company's portfolio would have large charges to reflect impairments, due to Advanta's failure to correctly account for its delinquent customers and credit trends

72 Nevertheless, Defendants failed to protect the Plans' assets—which were imprudently invested in Advanta stock.

Advanta Was Exposed to Substantial Problems, Yet Concealed the Truth Regarding its Financial Condition and Business Operations

73 On October 31, 2006, the Company announced its financial results for the third quarter of 2006 Advanta reported quarterly net income of $21 1 million, or $0 73 per diluted share for Class A and Class B shares combined, and announced that Advanta Business Cards earned net income of $20 7 million for the quarter, as compared to $16 2 million for the third quarter of 2005 The Company also stated that

> "I am happy to report strong profits again this quarter and to share with you that our portfolio is performing well and growing Not only are we continuing to attract a large number of new high credit quality, profitable customers through our focused marketing efforts, but we are able to leverage our infrastructure costs through this growth," said Dennis Alter, Chairman and CEO "During the quarter, new bankruptcy filings remained lower than we anticipated, and we are increasing our guidance for 2006 full year earnings from continuing operations to a range of $2 78 to $2 83 per combined diluted share primarily due
>
> * * *
>
> During the third quarter of 2006, Advanta Business Cards

> customers exceeded the 1 million mark while ending managed receivables of $4 6 billion grew 29% over the same quarter last year Owned Business Cards receivables were $1 2 billion at quarter end, reflecting growth of 46% over those reported at the same quarter end last year Transaction volume for the quarter was $3 1 billion, exceeding third quarter 2005 volume by 23%

74 In a conference call with investors later that day, Defendant Rosoff spoke of the Company's "solid foundation for originated high credit quality customers," and Defendant Alter maintained that the high earnings for the quarter were due to "lower credit losses "

75 On this day, Advanta Class B stock closed at $26 16 per share and Advanta Class A stock closed at $29 93 per share

76 On January 25, 2007, Advanta announced its financial result for the fourth quarter 2006 and fiscal year 2006 Advanta reported full year 2006 net income from continuing operations to be $84 2 million, or $2 86 per diluted share for Class A and Class B shares combined The Company also stated that

> "Our 2006 full year Business Cards earnings increased by over 50%, and our managed receivables grew by almost 39%, we added 56% more new customers, and our managed net credit loss rate dropped by 230 basis points to 3 41% We had a great year! Most importantly we continued to strengthen and build on the foundation for the burgeoning results we expect to see going forward," said Dennis Alter, Chairman and CEO
>
> Ending managed receivables grew to $5 2 billion at December 31, 2006, with full year new customers totaling approximately 371,000 Ending owned receivables grew 29% during the year to $1 1 billion, and the full year net credit loss rate on owned receivables decreased 218 basis points to 3 19% 2006 customer transaction volume totaled $12 3 billion, a 26% increase over 2005
>
> For the fourth quarter, Advanta reported net income of

> $18 2 million or $0 62 per combined diluted share, including a $0 01 per share asset valuation gain associated with the Company's venture capital portfolio

77 Later that day, during a conference call with investors, Defendant Alter spoke of his confidence for 2007, 2008 "and beyond," and Defendant Rosoff stated that profits from new customers "are expected to make our 2008 income shoot up by more than 40% "

78 On that day, Advanta's Class B common stock closed at $31 11 per share and Advanta Class A stock closed at $28 96 per share

79 On April 24, 2007, Advanta reported its financial results for the first quarter of 2007 The Company reported quarterly net income of $21 4 million, or $0 72 per diluted share for Class A and Class B combined Additionally, according to a Company press release·

> "We had a very good start to 2007," said Dennis Alter, Chairman and CEO. "Strong earnings, low credit losses and delinquencies, and the addition of new high credit quality customers continued to mark our performance "
>
> Ending managed receivables grew to $5 6 billion at March 31, 2007 with ending owned receivables totaling $1 1 billion During the quarter, approximately 97,000 new customers were added and transaction volume of $3 4 billion reflected growth of 24% over the comparable quarter of 2006 The managed net credit loss rate decreased 32 basis points to 3.3% and the owned net credit loss rate decreased by 43 basis points to 3 1%

80 On this day, Advanta's Class B common stock closed at $31 36 per share and Advanta Class A stock closed at $28 84 per share

81. On July 31, 2007, Advanta reported its financial results for the second quarter of 2007 The Company reported net income from continuing operations of $0 51 per diluted share for Class A and Class B shares combined, $0 03 higher than the first quarter Additionally, the Company stated

> "The powerful dynamics we have described in the business are once again demonstrated by the performance in the quarter," said Dennis Alter, Chairman and CEO
>
> Ending managed receivables grew to $6 0 billion at quarter end with ending owned receivables totaling $1 1 billion During the quarter, 103,000 new customers were added and transaction volume increased to $3 7 billion The managed net credit loss rate was 3 48% and the owned net credit loss rate was 3 06%

82. Later that day, during a conference call with investors, Defendant Rosoff assured participants that Advanta was reviewing and "completely complying" with all new credit card regulations

83 On this day, Advanta Class B common stock closed at $25 66 per share and Advanta Class A stock closed at $23 49 per share

84 On October 25, 2007, Advanta announced its financial results for the third quarter of 2007 The Company reported third quarter 2007 net income of $22 1 million, or $0 50 per diluted share for Class A and Class B shares combined Additionally, the Company announced

> Ending managed receivables grew to $6 2 billion at quarter end with ending owned receivables totaling $1 2 billion During the quarter, over 74,000 new customers were added and transaction volume totaled $3.6 billion The managed net credit loss rate was 3 87% and the owned net credit loss rate was 3.52%
>
> "Over the past years, we've been planning for a potentially

> more difficult environment by focusing on high credit quality customers," said Dennis Alter Chairman and CEO "This strategy continues to look good to us now "

85 On this day, Advanta's Class B common stock closed at $17 69 per share and Advanta Class A stock closed at $15 67 per share

86 On November 27, 2007, the Company held a conference call with analysts and investors Two days later, on November 29, 2007, the Company filed a Form 8-K with the SEC detailing the call In particular, the Company referenced the economic climate and its expected effect on Advanta However, the created the impression that all current and future hardship was due to external circumstances, and not due to specific actions and policies that Company had undertaken The Company's Form 8-K stated

> With respect to fiscal year 2007, management addressed the impact of the current economic environment on business performance Specifically, management addressed, among other things, the following items during the conference call
>
> > • Since the Company announced third quarter 2007 earnings results, delinquency buckets have been negatively impacted as a higher percentage of customers than anticipated have rolled into delinquency and a lower percentage of delinquent customers have made payments Management indicated that, consistent with what other credit card issuers are anticipating, the Company now believes that these higher delinquency rates, and therefore charge-off trends, will continue for some time before they improve
> >
> > • The Company indicated that if current entry rates and collections rates for delinquent customers continue for the rest of this year, or get modestly worse, it expects 2007 earnings per share from continuing operations to be between $1 90 and $2 00 per combined diluted share This is lower than the Company's previous guidance range of

$2.10 and $2.17 per combined diluted share Management further noted that if there were more than modest worsening in delinquency entry rates and/or collections rates, then earnings per share would be less

- The Company indicated that, based on current collection rates and recovery expectations, the managed net charge-off rate is expected to be about 3 75% for the 2007 fiscal year, as compared to its most recent estimate of 3 6% to 3 7% for the year Based on the same assumptions, the owned net charge-off rate is expected to be about 3 4% for the 2007 fiscal year, as compared to the Company's most recent estimate of 3 25% to 3 35% for the year

- The Company confirmed that it is on track with its previously announced guidance for receivable and transaction volume growth for 2007

- The Company expects to acquire approximately 330,000 new customers in fiscal year 2007 The Company indicated that its marketing campaigns continue to do well and that management is pleased with the results of its marketing investments

The Company noted that it has not factored anything into its 2007 earnings guidance range related to the Visa/American Express litigation settlement since it is still being evaluated The Company discussed this litigation settlement and its potential impact on the Company's financial results in a Current Report on Form 8-K filed with the SEC on November 16, 2007

With respect to expectations for 2008, the Company stated that it would not be providing guidance for earnings or other 2008 financial measures at this time Management commented that it believes it is prudent not to give guidance for 2008 at this time given the degree of volatility and uncertainty in the current economic environment Management stated that the Company expects to be profitable and to continue to pay its quarterly dividend at its present level

Following the Company's prepared remarks, there was a

> question and answer session with institutional investors and analysts Management responded to questions about various items, including the following·
>
> > • With respect to credit trends in the current portfolio, management indicated that the deteriorating credit trends were not limited to any specific segments of the portfolio and that the trends are being experienced throughout the portfolio
> >
> > • There were questions about various aspects of the Company's business, plans and expectations, including, among others, questions about plans for managing growth, marketing campaigns, expectations for credit quality and the possibility of authorizing a stock buyback The Company reiterated that it would not give guidance for 2008 and, consistent with that, management declined to speculate or offer predictions in any of these areas
> >
> > However, management indicated that it plans to continue to monitor all aspects of the business, including these areas, and to evaluate opportunities and make prudent decisions that are focused on the long-term health of the business

87 The Company's Class B common stock closed at $11 06 per share and Advanta Class A stock closed at $10 08 per share on November 27, 2007, $9 52 per share and $8 86 per share, respectively, on November 28, 2007 and $9 51 and $8 74 per share, respectively, on November 29, 2007

88 On January 30, 2008, Advanta reported its financial results for the fourth quarter and full year 2007. The Company reported full year 2007 net income from continuing operations of $71 million, or $1 61 per diluted share for Class A and Class B share combined, and fourth quarter earnings of $0 17 per share The Company highlighted its disappointment with the economic climate, yet gave no indication that it had acted improperly The Company stated

> During the year, the Company acquired approximately 335,000 new customers Managed receivables grew approximately 22% to $6 3 billion in 2007 Owned receivables were $1 0 billion at year end, approximately 9% lower than December 31, 2006 Transaction volume of $14 4 billion for 2007 increased 17% from the prior year For the full year, the managed net credit loss rate was 3 71% and the owned net credit loss rate was 3 39% These net credit loss rates compare to the 2006 rates of 3 41% and 3 19%, respectively
>
> "Our decision to focus exclusively on the small business market almost 7 years ago has enabled us to build a profitable, sustainable business over the long haul Although we're disappointed with the impact of the current economy on our recent results, we believe the small business market will continue to provide opportunities for us going forward," said Dennis Alter, Chairman and CEO

89 That day, the Company's Class B common stock closed at $9 18 per share and Advanta Class A stock closed at $8 00 per share

90 On April 30, 2008, the Company reported its financial results for the first quarter of 2008 Advanta reported first quarter net income $18 4 million, or $0 44 per diluted share for Class A and Class B shares combined Additionally, the Company stated

> Managed and owned net credit losses for the quarter were 6 43% and 6 53%, respectively Managed receivables ended the quarter at $6 3 billion while owned receivables totaled almost $1 0 billion New customers added were just over 67,000, and transaction volume was $3 4 billion
>
> "We are managing the business diligently through this down cycle, with the goal of minimizing risk and improving our results," said Dennis Alter, Chairman and CEO "We have strong liquidity, flexible funding options, and the same determination that has moved us through down cycles over the past six decades "

91 That day, Advanta's Class B common stock closed at $8 78 per share and Advanta Class A stock closed at $7 58 per share.

92. On or about July 29, 2008, Advanta reported its financial results for the second quarter of 2008 The Company reported second quarter net income of $4 0 million, or $0 10 per diluted share for Class A and Class B shares combined. Additionally, the Company stated

> At the end of the quarter, managed and owned receivables totaled $6 1 billion and $851 million, respectively Consistent with the Company's prior comments about new customer expectations, the Company added about 26,000 new customers in the quarter Customer transaction volume totaled $3 5 billion of which almost 90% related to merchandise sales activity
>
> Managed and owned net credit loss rates for the quarter were 8 38% and 8 87%, respectively
> "The quarter's results are obviously not what we would like to see All of us at the company are focused on returning to robust earnings and returns for our shareholders," said Dennis Alter, Chairman and CEO

93 That day, the Company's Class B common stock closed at $7 14 per share and Advanta Class A stock closed at $6 21 per share

94 On or about October 30 2008, the Company reported its financial results for the third quarter of 2008 For the third quarter, the Company reported a net loss of $17 6 million, or $0 43 per diluted share for Class A and Class B shares combined Despite the quarterly loss, Advanta continued to blame the economy, and touted its supposedly strong balance sheet The Company stated

> - Cash and liquid investments totaling $1 8 billion at quarter end or 32% of aggregate owned and securitized receivables

- Advanta Bank Corp total risk-based and Tier 1 capital ratios of 24 5% and 22 3%, respectively
- Advanta Corp equity together with subordinated debt for trust preferred securities to managed receivables of 12 0% and to owned receivables of 92 3%
- Business Cards ending managed receivables of $5 6 billion and owned receivables of $0 7 billion
- Business Cards managed net interest yield of 11 46% and owned net interest yield of 8 24%
- Customer transaction volume of $3.3 billion, 89% of which was merchandise sales volume
- Business Cards managed net credit loss rate of 10.0% and owned net credit loss rate of 10 6%
- The reported results do not include an estimated $1 6 million pretax charge for its portion of the recent settlement between Visa and Discover

"This economy has dealt small business owners a tough hand," said Dennis Alter, Chairman and CEO "Not only are consumers spending less money with them, but their options for funding business inventories and obligations have shrunk Although this has flowed through to us in the form of rising credit losses, our balance sheet is strong and we continue to manage through this uncertain economy "

95 On this day, the Company's Class B common stock closed at $3 74 per share

96 On or about January 29, 2009, Advanta announced its financial results for the fourth quarter and full year 2008 For the full year, the Company reported a net loss of $43 8 million, or $1 08 per diluted share for Class A and Class B shares combined For the fourth quarter, the Company reported a net loss of $46 9 million, or $1 16 per combined diluted share Additionally, the Company stated

- Cash and liquid investments increased by $0.8 billion while deposits grew by $0.5 billion At year end, cash and liquid investments were 53% of aggregate owned and securitized receivables

- Advanta Bank Corp total risk-based and Tier 1 capital ratios increased to 38.4% and 35 4%, respectively

- Advanta Corp equity together with subordinated debt for trust preferred securities to managed receivables increased slightly to 12 2% and to owned receivables increased to 120 7%

- The fair value estimates of the Company's retained interests in securitizations decreased by $36.4 million with about two-thirds of the adjustment related to increased market credit spreads that resulted in higher discounts on these assets.

- The allowance for receivable losses increased to 20 3% of Business Cards owned receivables at quarter end, after building reserves for credit losses on principal receivables by $11 4 million

- Business Cards ending managed receivables decreased to $5 0 billion with owned receivables decreasing to $0 5 billion

- Business Cards managed net interest yield expanded to 12 45% and owned net interest yield declined to 7 04%

- Customer transaction volume declined to $2 9 billion
- Business Cards managed net credit loss rate rose to 12 0% and owned net credit loss rate rose to 14 1%

- Business Card operating expenses include a $3 3 million asset impairment charge related to certain acquisition-related software and other assets based on the Company's expectations for future account originations

- The consolidated results include the impact of a $2 2 million reserve reduction for the Company's proportionate share of the amounts funded by Visa in Visa's litigation escrow

The Company also announced that it is taking actions in response to the continued economic downturn

The Board of Directors has approved a reduction in the Company's regular quarterly cash dividends The new rates

> will apply to its next dividend declaration. As a result of this action, future quarterly dividends declared for its Class A Common Stock will decrease from 17 71 cents to 2 cents per share and future quarterly dividends declared for its Class B Common Stock will decrease from 21 25 cents to 2.5 cents per share
>
> In addition, the Company is taking steps to significantly reduce operating expenses to a level that is more commensurate with its anticipated portfolio size and scale of business activities in 2009 Cost reductions will result from actions such as slowing marketing activities, structuring the organization to be more efficient and reducing staffing levels beyond those previously announced related to its offshoring initiative Flowing from this, the Company will have approximately 300 fewer employees and operating expenses for 2009 are expected to be between 20% and 25% lower than those reported for 2008

97. On this day, the Company's Class B common stock closed at $0 70 per share and Advanta Class A stock closed at $1 96 per share

98 On or about April 30, 2009, the Company reported its first quarter 2009 financial results For the quarter, the Company reported a net loss of $75 9 million, or $1.87 per diluted Class B share Additionally, the Company stated

> Noteworthy activity and details for the first quarter, compared to the fourth quarter of 2008, include
>
> - Cash and liquid investments totaled $2 2 billion at the end of the quarter or 47% of owned and securitized receivables
> -
> - Advanta Bank Corp total risk-based and Tier 1 capital ratios of 21 8% and 19 7%, respectively, continue to be significantly above required ratios to be considered well capitalized
>
> - Advanta Corp equity together with subordinated debt for trust preferred securities to managed receivables decreased slightly to 11 3% and to owned receivables decreased to 96 6%

- A retained interests in securitizations valuation charge of $17 6 million was recorded to increase the discount rates on these assets associated with recent trust performance trends and downgrades

- The allowance for receivable losses increased to 21 6% of Business Cards owned receivables at quarter end, after building reserves for credit losses on principal receivables by $14.6 million

- Business Cards ending managed receivables decreased to $4 7 billion with owned receivables increasing to $549 million

- Business Cards managed net interest yield declined to 11 19% and owned net interest yield declined to 1 62%

- Customer transaction volume declined to $2.5 billion

- Business Cards managed net credit loss rate rose to 15 9% and the owned net credit loss rate rose to 20 1% The managed and owned 12 month lagged net credit loss rates were 12 2% and 10 7%, respectively

Also, Advanta Capital Trust I has $100 million of trust preferred securities which are backed by the Company's junior subordinated long term debt The Company expects to make a tender offer for all of the trust preferred securities The securities have recently traded at under 10% of face value and the tender price will be related to those trades The Company's purchase and retirement of these securities would increase the Company's stockholders' equity and reduce future expenses The terms of the trust preferred securities provide that semi-annual payments on the securities can be deferred at the Company's election and that no payments of dividends can be made on the Company's common or preferred stocks during the deferral period The Company has elected to defer payments on the trust preferred securities and to suspend payment of common and preferred dividends, which were largely curtailed earlier in the year

99 On this day, the Company's Class B common stock closed at $1 17 per share and Advanta Class A stock closed at $0 78 per share

100 On May 11, 2009, Advanta issued a press release entitled "Advanta Announces Plans to Maximize Capital and Dramatically Reduce Risk " The press release stated·

> Advanta Corp (NASDAQ ADVNB; ADVNA) today announced its Board of Directors has approved a plans designed to dramatically limit the Company's credit loss exposure and maximize its capital and its liquidity measures.
>
> As a result of the deteriorating economic environment, the Company would expect the negative performance trends, if not abated with this plans, to result in losses that would erode its capital Therefore, the Company envisions the following
>
> - The Company's securitization trust will go into early amortization based on May's performance Early amortization will officially be determined on June 10
>
> - Since the securitizations will not be permitted to fund new receivables after June 10, the Company will shut down all credit card accounts to future use at that time Neither Advanta Bank Corp nor any other Advanta-related entity will fund activity on its balance sheet from the accounts Therefore, the Company will not take any off-balance sheet receivables onto its balance sheet. Shutting down the accounts will not accelerate payments required from cardholders on existing balances
>
> - In early amortization almost all of the receipts from cardholders are required to be paid to the securitization trust's noteholders and to the Company's seller's interest (its on-balance sheet share of the receivables) The securitization trust's notes are obligations of the trust and not of any Advanta entity The Company is only at risk with respect to the off-balance sheet obligations to the

extent of its residual interests.

- Advanta Bank Corp. will use up to $1 4 billion to make a cash tender offer for Advanta Business Card Master Trust Class A senior notes at a price between 65% and 75% of their face value in a modified Dutch Auction

- Advanta Corp will make a cash tender offer for any or all of the $100 million of 8 99% Capital Securities issued by Advanta Capital Trust I at 20% of their face value.

- The Company will continue to service and collect the securitization trust's credit card receivables and its own receivables This, along with taking appropriate actions to adjust expenses to be consistent with these activities, will be the Company's first priority The Company will be free to do new business in the future to the extent it chooses, but it does not expect to do so in a significant way until implementation of the plans is well under way

- Advanta Corp 's senior retail investment notes are unlimited obligations of Advanta Corp and will remain outstanding and continue to be issued in the ordinary course The benefits of the plans to the Company are designed to benefit the senior retail note program holders as well as the Company's shareholders

The Company previously disclosed that it expected to use tools at its disposal to avoid early amortization of the securitization trust unless it concluded there was a better plans to maximize its capital and liquidity The Company has now concluded that the plans outlined here is that better plans

101 On this day, the Company's Class B common stock closed at $1 55 per share and Advanta Class A stock closed at $1 13 per share

102 The next day, on May 12, 2009, *Bloomberg com* published an article entitled "Advanta's Card-Lending Shutdown May Imperil Customers" The article stated

> Advanta Corp , the credit-card issuer for small businesses, may leave 1 million customers scrounging to find new lenders and debt holders facing losses of 35 percent after the company shut down accounts to preserve capital
>
> Advanta will cease lending June 10 after uncollectible debt reached 20 percent as of March 31, according to a statement and filings yesterday by the Spring House, Pennsylvania-based firm. The lender earmarked $1 4 billion to buy back securitized card loans with offers of 65 cents to 75 cents on the dollar
>
> Credit-card company profits suffered as the recession pushed U S unemployment to 8 9 percent in April Defaults on cards historically track the jobless rate, and analysts have been concerned that the industry's average for bad loans would breach 10 percent and set a record Advanta decided to cut off customers after "charge-offs" rose to twice that threshold, from 9 6 percent at year-end
>
> "The question is how many business owners depend solely on their Advanta credit card," said William Dunkelberg, chief economist at the National Federation of Independent Business While most probably have other sources of credit, self-employed entrepreneurs may have trouble getting a new card, he said "Credit is harder to find than it's ever been in this expansion," said Dunkelberg, whose biography lists him as a former Advanta director
>
> **Stock Declines**
> The company's A-shares dropped 28 cents, or 25 percent, to 85 cents at 4 p m in Nasdaq Stock Market trading Advanta, which had $2 4 billion in deposits as of March 31, reported three consecutive quarterly losses and its shares have plunged from about $30 in June 2007 The recession affected Advanta's customers across the country, Chief Financial Officer Philip Browne has said
>
> "We'll be shutting down accounts for future transaction activities, but many of the customers will maintain balances

and pay us off over time," Browne said yesterday in a telephone interview "We'll have to service and collect on that, and that will be the first order of business for the company "

More than 90 percent of Advanta's small business customers will have "adequate" access to alternative credit after the company halts lending, Browne said

Citing the recession, Advanta said it's planning to "maximize capital and dramatically reduce risk " While the company has "no indication" if debt investors will accept the buyback offer, the price is "relatively consistent with recent trading levels of the bonds," Browne said

No Public Actions

Advanta's credit-card unit is chartered and regulated in Utah and has "no corrective actions that are public," said G Edward Leary, the state commissioner of financial institutions He declined to say whether any non-public actions were taken against the company

This would be the first so-called early amortization of a trust since 2003, according to JPMorgan Chase & Co analyst Christopher Flanagan

"Early amortization has been viewed as a catastrophic event for issuers," Scott Valentin, an analyst at Friedman Billings Ramsey & Co , said today in a research note Advanta's filing said that the charge-off rate for uncollectible loans may increase after accounts are closed Valentin said that's likely because "the cards have substantially less utility to cardholders," cutting the incentive to keep up with payments

"They're hoping they can stay alive barely until the environment changes," said David Robertson, president of the Nilson Report, the Carpinteria, California-based industry newsletter This is "a big sign that the credit-card industry has problems that are going to be around for several years "

Workforce Slashed

Advanta was the 11th-biggest U S credit-card issuer at the end of 2008 with about $5 billion in outstanding balances, and the only major lender focused on small business borrowers, Robertson said In the first quarter the company slashed the workforce by about 300 employees, or 36

> percent, from 841 as of Dec 31, 2008. Calls inquiring about the future of current employees weren't returned
>
> The company's woes aren't likely to spread to other asset-backed issuers, said JPMorgan's Flanagan Advanta's "precarious liquidity and capital position" make the lender more vulnerable to deteriorating credit than its stronger counterparts, Flanagan said in a May 8 report
>
> Credit-card companies can take steps to protect investors and avoid having to wind down trusts, including removing overdue accounts from the pool and increasing the cash cushion that comes with the securities to shield bondholders from losses Bank of America Corp , Citigroup Inc , General Electric Co and JPMorgan have already taken steps to protect their securitized assets as delinquencies surge, according to JPMorgan data
>
> **Needs Capital**
> Advanta relied on the asset-backed securities market for funding, and has been unable to raise cash through securitization since June 2008, according to Bloomberg data It is shut out of the Federal Reserve's Term Asset-Backed Securities Loan Facility, or TALF, because of ratings cuts on its bonds
>
> Credit card-backed debt eligible for purchase with TALF loans must be rated AAA Moody's Investors Service has assigned "junk" ratings to Advanta's senior unsecured and subordinated debt The trust preferred securities rating of Advanta Capital Trust I was cut to C from Caa3 in April by Moody's, citing a "high degree of uncertainty" that investors will get repaid because of Advanta's "weak financial condition "
>
> Today, Standard & Poor's cut its rating on Advanta to CC from CCC and assigned a negative outlook to the company

103 That day, Advanta's Class B common stock closed at $1 09 per share and Advanta Class A stock closed at $0 85 per share

The Truth Emerges About Advanta's Business Practices

104. On June 8, 2009, Advanta issued a press release entitled "Advanta Announces Termination of Its Cash Tender Offer for Class A Senior Notes " The press release stated

> Advanta Corp (NASDAQ ADVNB, ADVNA) today announced that Advanta Bank Corp (the "Bank') has terminated its previously announced cash tender offer for up to $1 4 billion of Advanta Business Card Master Trust's Class A senior notes (the "ABS Notes Tender Offer") which was made on May 11, 2009 The Bank is terminating the ABS Notes Tender Offer because it recently has been determined that a regulatory condition to the tender offer will not be satisfied The tender offer consideration will not be paid or become payable to senior note asset-backed holders who validly tendered their notes in connection with this offer As promptly as practical, all tendered notes will be returned to the holders thereof. This termination has no impact on the Company's ability to proceed with its previously announced cash tender offer for any and all of the $100 million of outstanding Advanta Capital Trust I 8 99% Capital Securities.
>
> As a result of the termination of the ABS Notes Tender Offer, the Company will not be able to complete all of the components of the plans it previously announced which together were intended to limit the Company's credit loss exposure and maximize its capital and its liquidity measures Although the Company does not expect to fully realize its objectives of maximizing its capital and its liquidity measures, it still expects to realize the limitation of its credit loss exposure This is expected to be achieved as a result of early amortization of the Company's securitization trust, which is anticipated to begin this month, and the closing of all customer accounts to future use that was effective May 30, 2009
>
> ***In addition, the Company expects the Bank to enter into an agreement with its regulators in the near term about its operations.*** [Emphasis added]

105 On this day, Advanta's Class B common stock closed at $0 81 per share and Advanta Class A stock closed at $0 82 per share The next day, June 9, 2009,

Advanta's Class B common stock closed at $0.7184 per share and Advanta Class A stock closed at $0 64 per share.

106. On or about June 24, 2009, Advanta entered into a Stipulation and Consent to the Issuance of an Order to Cease and Desist with counsel for the Federal Deposit Insurance Corporation ("FDIC") The FDIC had served on Advanta a Notice of Charges and of Hearing that detailed unsafe or unsound banking practices The FDIC filed its Order to Cease and Desist on June 30, 2009

107 On July 1, 2009, *Bloomberg com* published an articled entitled "Advanta Faces Deposit Halt, $35 Million Restitution" This article provided detail on the Cease and Desist Order issued by the FDIC The article stated

> Advanta Corp , the credit-card lender that shut down its small-business accounts, was ordered by regulators to plans on halting bank operations and pay customers $35 million because of allegedly "unsound" practices
>
> Advanta must give the Federal Deposit Insurance Corp a plans that "provides for the termination of the bank's deposit- taking operations and deposit insurance after the bank's deposits are repaid in full" within 30 days of yesterday, according to a federal filing today by the Spring House, Pennsylvania-based company
>
> The lender cut off almost 1 million customer credit-card accounts in May after defaults surged to 20 percent at the end of the first quarter Advanta's bank unit held $2 39 billion in deposits as of March 31 Repaying depositors could take several years and Advanta is allowed to submit a plans to continue handling deposits during that period, the filing said
>
> Customer accounts remain fully insured and the company's ability to service its managed credit-card accounts and receivables isn't affected, the filing said A call to Advanta spokeswoman Amy Holderer wasn't immediately returned The FDIC ordered Advanta to cease "unsafe or unsound banking practices" tied to marketing of cash-back reward

> programs and pricing strategies on business cards Restitution may cost $14 million for customers affected by the cash-back program and $21 million for the pricing strategy dispute, the filing said The order included a $150,000 penalty
>
> **Advanta Agrees**
> The company said it consented to the order and didn't admit wrongdoing Advanta accounted for the cash-back restitution in last year's third quarter and expects another charge in this year's second quarter to cover the pricing strategy compensation The bank must begin making restitution payments within 60 days of June 30
>
> Regulators restricted Advanta's use of cash assets, payment of dividends and transactions that would "materially alter the bank's balance sheet composition and taking of brokered deposits," the company said The cease and desist order, effective June 30, gives Advanta 30 days to submit a plans to "achieve and maintain sufficient capital "
>
> The company has posted three consecutive quarterly losses totaling $142 million, more money than it made in the preceding eight quarters combined Advanta in January cut its dividend to 2 cents and fired 300 employees, and in April reported that 12 percent of its owned credit-card receivables were 30 or more days delinquent
>
> Advanta fell by less than a cent to 42 cents at 4 15 p m New York time in Nasdaq Stock Market trading The stock has plunged more than 90 percent in the past 12 months

108 On this day, the Company's Class B common stock closed at $0 39 per share and Advanta Class A stock closed at $0 422 per share

109 The next day, July 2, 2009, the FDIC announced that it had reached a settlement with Advanta for deceptive and unfair business practices The related press release stated

> Today the Federal Deposit Insurance Corporation (FDIC) announced a settlement with Advanta Bank Corporation, Draper, Utah (Advanta), for deceptive and unfair practices

in violation of section 5 of the Federal Trade Commission (FTC) Act

Under the settlement, Advanta has agreed to an order to cease and desist, to pay restitution, and to pay a civil money penalty in the amount of $150,000 In addition, restitution of approximately $14 million will be paid to businesses that used Advanta's Cash Back Reward program and $21 million to accountholders whose accounts were repriced In agreeing to the issuance of the order, Advanta did not admit or deny any liability

Advanta's "Cash Back Reward" program advertised a percentage of cash back on certain purchases by business credit card accountholders Due to the tiered structure of the cash back payments, however, the advertised percentage was not available for all purchases As a result, it was effectively impossible to earn the stated percentage of cash back reward payments The FDIC concluded that the Bank's solicitations were likely to mislead a reasonable customer and that the representations were material and that therefore, the Bank engaged in a pattern of deceptive acts or practices in violation of Section 5

In addition, numerous complaints were filed regarding Advanta's substantial annual percentage rate (APR) increases on the accounts of small business owners and professionals, who had neither exceeded their credit limits nor were delinquent in making payments on their accounts. The FDIC determined that Advanta's rate increases had been implemented in an unfair manner, that Advanta failed to adequately notify accountholders that their APR had increased, the amount of the increase, the reason for the increase, the procedures to opt-out and the consequences of an opt-out The repricing caused substantial injury to customers, withheld and/or provided inadequate information that could have enabled the customer to reasonably avoid the injury, and provided no benefit to the customer or competition

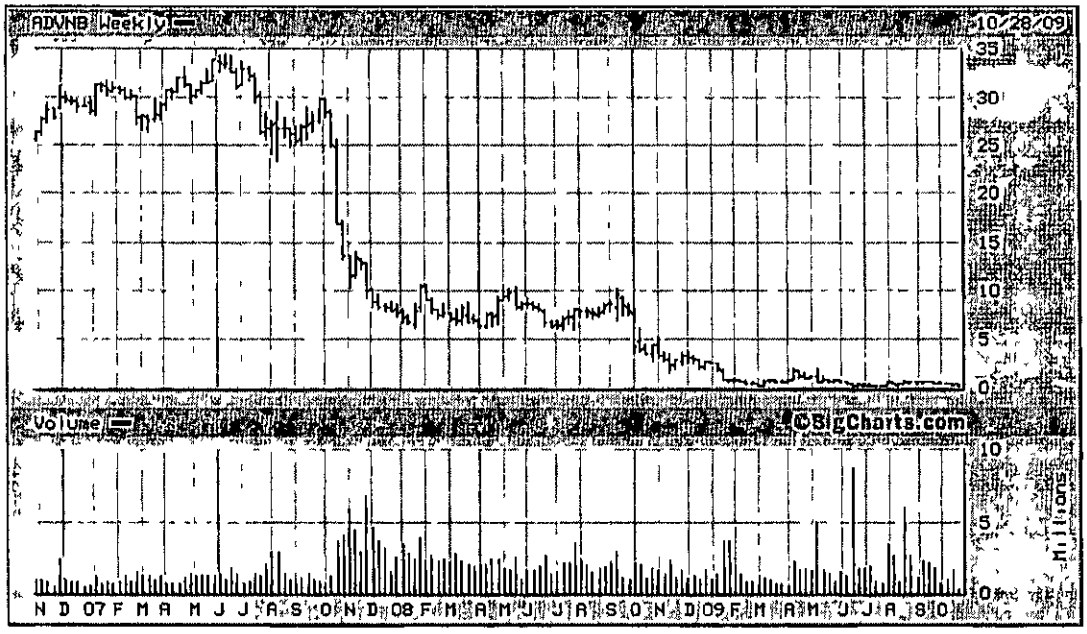
"The Advanta settlement demonstrates the FDIC's commitment to having banks take responsibility for ensuring that they do not engage in unfair or deceptive acts or practices in connection with the banking products and services they offer," said FDIC Board member Thomas J Curry "Any person doing business with an insured

> depository institution can expect to be treated fairly, and any such entity that engages in unfair or deceptive acts or practices should be aware that the FDIC will pursue such practices with all of the legal authority at our disposal "

110 On this day, Advanta's Class B common stock closed at $0 39 per share and Advanta Class A stock closed at $0 42 per share

111 As described further herein, Defendants, as fiduciaries of the Plans were obligated to continuously ensure that the Plans' investment alternatives—including Advanta common stock—were prudent investments of the Plans' assets However, Defendants failed to do so—to the substantial detriment of the Plans and its participants

112 Since the beginning of the Class Period through the present, the Plans' imprudent investments in Lincoln National common stock have been decimated, as indicated below



Source http //www bigcharts com

Defendants Knew or Should Have Known That Advanta Stock Was an Imprudent Investment for the Plans, Yet Misled Plan participants

113 During the Class Period, although they knew or should have known that the Company's stock was an imprudent Plans investment, Defendants did nothing to protect the heavy investment of Plan participants in Advanta stock

114 As a result of the enormous erosion of the value of Company stock, the Plans' participants suffered unnecessary and unacceptable losses

115. Because of their high ranking positions within the Company and/or their status as Plans fiduciaries, Defendants knew or should have known of the existence of the above-mentioned problems

116 Defendants knew or should have known that, due to the Company's exposure to losses stemming from the problems described above, the Company stock price would suffer and devastate participants' investments once the truth became known Yet, Defendants failed to protect the Plans and their participants from foreseeable losses

117 Rather, during the Class Period, despite its obligation to prudently manage the Plans' assets—including the Plans' heavy investment in Advanta stock—the Company and Company insiders misrepresented the Company's true financial condition, thereby precluding Plan participants from properly assessing the prudence of investing in Company stock

118 As a result of Defendants' knowledge of and, at times, implication in creating and maintaining public misconceptions concerning the true financial health of the Company, any generalized warnings of market and diversification risks that Defendants made to the Plans' participants regarding the Plans' investment in Advanta

stock did not effectively inform the Plans' participants of the past, immediate, and future dangers of investing in Company stock

119 In addition, upon information and belief, Defendants failed to adequately review the performance of the other fiduciaries of the Plans to ensure that they were fulfilling their fiduciary duties under the Plans and ERISA. Defendants also failed to conduct an appropriate investigation into whether Advanta stock was a prudent investment for the Plans and, in connection therewith, failed to provide the Plans' participants with information regarding Advanta's problems so that participants—to the extent that they were permitted—could make informed decisions regarding whether to include Advanta stock in their Plan accounts

120 An adequate (or even cursory) investigation by Defendants would have revealed to a reasonable fiduciary that investment by the Plans in Advanta stock was clearly imprudent A prudent fiduciary acting under similar circumstances would have acted to protect participants against unnecessary losses, and would have made different investment decisions

121 Because Defendants knew or should have known that Advanta was not a prudent investment option for the Plans, they had an obligation to protect the Plans and their participants from unreasonable and entirely predictable losses incurred as a result of the Plans' investment in Advanta stock

122 Defendants had available to them several different options for satisfying this duty, including, among other things making appropriate public disclosures as necessary, divesting the Plans of Advanta stock, discontinuing further contributions to and/or investment in Advanta stock under the Plans, consulting independent fiduciaries

regarding appropriate measures to take in order to prudently and loyally serve the participants of the Plans, and/or resigning as fiduciaries of the Plans to the extent that as a result of their employment by Advanta they could not loyally serve the Plans and its participants in connection with the Plans' acquisition and holding of Advanta stock

123 Despite the availability of these and other options, Defendants failed to take adequate action to protect participants from losses resulting from the Plans' investment in Advanta stock In fact, Defendants continued to invest and to allow investment of the Plans' assets in Company stock even as Advanta's problems came to light

At Least Certain of the Defendants Suffered From Conflicts of Interest

124 Advanta's SEC filings, including Form DEF 14A Proxy Statements, during the Class Period make clear that a portion of certain officers' compensation, including defendants Alter, Rosoff and Browne was in the form of stock awards and option awards This was the case for the fiscal years ended December 31, 2006, 2007 and 2008 In 2008, Defendant Alter's total compensation exceeded $5 5 million, Defendant Rosoff's total compensation exceeded $2 4 million, and Defendant Browne's total compensation exceeded $1 1 million *See* Advanta Definitive Proxy Statement filed with the SEC on or about April 28, 2009

125 Because the compensation of at least some of the defendants was significantly tied to the price of Advanta stock, at least certain of the Defendants had incentive to keep the Plans' assets heavily invested in Advanta stock on a regular, ongoing basis Elimination of Company stock as an investment option/vehicle for the Plans would have reduced the overall market demand for Advanta stock and sent a

negative signal to Wall Street analysts, both results would have adversely affected the price of Advanta stock, resulting in reduced compensation for at least certain of the defendants

126 Some Defendants may have had no choice in tying their compensation to Advanta stock (because compensation decisions were out of their hands), but defendants did have the choice of whether to keep the Plan participants' and beneficiaries' retirement savings tied up to a large extent in Advanta stock or whether to properly inform participants of material negative information concerning the above-outlined Company problems

127 These conflicts of interest put certain of Defendants in the position of having to choose between their own interests as executives and stockholders, and the interests of the Plans participants and beneficiaries, whose interests the Defendants were obligated to loyally serve with an "eye single" to the Plans *See generally Mertens v Hewitt Assoc*, 508 U S 248, 251-52, 124 L Ed 2d 161, 113 S Ct 2063 (1993), *Hahnemann Univ Hosp v All Shore, Inc*, 514 F 3d 300, 309 (3d Cir 2008), 29 U S C § 1104(a)(1)(B)

128 During the Class Period, certain of defendants chose to protect their own interests by selling millions of dollars of their personal holdings of Company stock Throughout the Class Period, Company insiders sold 598,890 shares of their Advanta stock for proceeds of over $26 6 million

129 Defendant Rosoff reaped over $11 5 million from selling his personal holdings in Company stock, as follows.

Date	Shares Traded	Trade Price	Proceeds
4/26/2007	250,000	46 230	11,557,500 00

130 During the Class Period, Defendant Browne reaped over $2 7 million from selling his personal holdings in Company stock, as follows

Date	Shares Traded	Trade Price	Proceeds
11/1/2006	200	39 360	7,872 00
11/1/2006	1,050	39 350	41,317 50
11/1/2006	350	39 240	13,734 00
11/1/2006	400	39 330	15,732 00
11/15/2006	300	42 950	12,885 00
11/15/2006	200	42 760	8,552 00
11/15/2006	400	42 750	17,100 00
11/15/2006	150	42 720	6,408 00
11/15/2006	350	42 700	14,945 00
11/15/2006	300	42 650	12,795 00
11/15/2006	300	42 640	12,792 00
12/1/2006	2,190	45 170	98,922 30
12/1/2006	200	45 140	9,028 00
12/1/2006	100	45 130	4,513 00
12/1/2006	100	45 110	4,511 00
12/1/2006	2,519	45 050	113,480 95
12/1/2006	100	45 040	4,504 00
12/1/2006	100	45 030	4,503 00
12/1/2006	400	45 020	18,008 00
12/1/2006	200	45 010	9,002 00
12/1/2006	1,277	45 000	57,465 00
12/6/2006	600	44 600	26,760 00
12/6/2006	1,400	44 490	62,286 00
12/20/2007	13	43 390	564 07
12/20/2007	100	43 380	4,338 00
12/20/2007	100	43 360	4,336 00
12/20/2007	187	43 300	8,097 10
12/20/2007	100	43 290	4,329 00
12/20/2007	150	43 280	6,492 00
12/20/2007	100	43 270	4,327 00
12/20/2007	650	43 250	28,112 50
12/20/2007	600	43 140	25,884 00
1/3/2007	2,000	43 490	86,980 00
1/10/2007	3,125	46 000	143,750 00
1/17/2007	2,000	46 000	92,000 00
1/17/2007	100	46 700	4,670 00
1/17/2007	300	46 620	13,986 00
1/17/2007	1,600	46 600	74,560 00
2/7/2007	400	46 490	18,596 00
2/7/2007	346	46 450	16,071 70
2/7/2007	1,254	46 350	58,122 90
2/21/2007	96	45 450	4,363 20
2/21/2007	100	45 430	4,543 00

2/21/2007	100	45 420	4,542 00
2/21/2007	550	45 400	24,970 00
2/21/2007	1,154	45 350	52,333 90
3/7/2007	600	40 450	24,270 00
3/7/2007	350	40 380	14,133 00
3/7/2007	850	40 360	34,306 00
3/7/2007	200	40 320	8,064 00
3/21/2007	250	43 000	10,750 00
3/21/2007	500	42 950	21,475 00
3/21/2007	100	42 930	4,293 00
3/21/2007	1,150	42 920	49,358 00
4/4/2007	568	45 150	25,645 20
4/4/2007	1,432	45 000	64,440 00
4/18/2007	94	46 880	4,406 72
4/18/2007	256	46 870	11,998 72
4/18/2007	1,350	46 850	63,247 50
4/18/2007	300	46 700	14,010 00
5/2/2007	500	45 230	22,615 00
5/2/2007	450	45 190	20,335 50
5/2/2007	1,050	45 050	47,302 50
5/4/2007	640	44 780	28,659 20
5/16/2007	203	46 130	9,364 39
5/16/2007	295	46 110	13,602 45
5/16/2007	1,502	46 100	69,242 20
5/23/2007	9	49 060	441 54
5/23/2007	100	49 050	4,905 00
5/23/2007	1,455	49 040	71,353 20
6/6/2007	750	50 070	37,552 50
6/6/2007	50	50 050	2,502 50
6/6/2007	400	50 040	20,016 00
6/6/2007	50	50 030	2,501 50
6/6/2007	250	49 980	12,495 00
6/6/2007	500	49 850	24,925 00
6/20/2007	400	34 080	13,632 00
6/20/2007	200	34 070	6,814 00
6/20/2007	500	34 050	17,025 00
6/20/2007	500	34 040	17,020 00
6/20/2007	1,400	33 970	47,558 00
7/5/2007	300	32 550	9,765 00
7/5/2007	200	32 650	6,530 00
7/5/2007	100	32 640	3,264 00
7/5/2007	400	32 570	13,028 00
7/5/2007	200	32 560	6,512 00
7/5/2007	400	32 500	13,000 00
7/5/2007	400	32 630	13,052 00
7/5/2007	300	32 620	9,786 00
7/5/2007	100	32 610	3,261 00
7/5/2007	300	32 600	9,780 00

7/5/2007	300	32 580	9,774 00
7/18/2007	31	32 150	996 65
7/19/2007	100	31 030	3,103 00
7/19/2007	500	30 990	15,495 00
7/19/2007	200	30 980	6,196 00
7/19/2007	169	30 970	5,233 93
7/19/2007	100	30 570	3,057 00
7/19/2007	1,900	30 540	58,026 00
8/1/2007	900	26 800	24,120 00
8/1/2007	300	26 380	7,914 00
8/1/2007	100	26 370	2,637 00
8/1/2007	100	26 360	2,636 00
8/1/2007	400	26 350	10,540 00
8/1/2007	100	26 330	2,633 00
8/1/2007	100	26 320	2,632 00
8/1/2007	400	26 300	10,520 00
8/1/2007	600	26 200	15,720 00
8/1/2007	100	26 470	2,647 00
8/1/2007	500	26 450	13,225 00
8/1/2007	525	26 400	13,860 00
8/15/2007	1,875	25 330	47,493 75
8/15/2007	1,125	24 200	27,225 00
9/5/2007	200	26 040	5,208 00
9/5/2007	175	25 980	4,546 50
9/5/2007	256	25 850	6,617 60
9/5/2007	1,169	25 800	30,160 20
9/5/2007	38	25 770	979 26
9/5/2007	121	25 760	3,116 96
9/5/2007	541	25 750	13,930 75
9/6/2007	200	25 900	5,180 00
9/6/2007	93	25 800	2,399 40
9/6/2007	207	25 750	5,330 25
9/19/2007	400	28 600	11,440 00
9/19/2007	148	28 410	4,204 68
9/19/2007	2,452	28 400	69,636 80
10/3/2007	800	29 000	23,200 00
10/3/2007	400	28 750	11,500 00
10/3/2007	100	28 740	2,874 00
10/3/2007	200	28 710	5,742 00
10/3/2007	600	28 650	17,190 00
10/3/2007	19	28 630	543 97
10/3/2007	419	28 610	11,987 59
10/3/2007	462	28 600	13,213 20
Total	**69,940**		**$2,726,007.23**

131 Thus, certain of the Defendants' interests were not aligned with those of the Plaintiff and the Class, whose assets were decimated by continued investments in Company stock, as Advanta's share price plummeted

CLAIMS FOR RELIEF UNDER ERISA

132 At all relevant times, Defendants were and acted as fiduciaries within the meaning of ERISA § 3(21)(A), 29 U S C § 1002(21)(A)

133 ERISA § 502(a)(2), 29 U S C §1132(a)(2), provides, in pertinent part, that a civil action may be brought by a participant for relief under ERISA § 409, 29 U S C §1109

134 ERISA § 409(a), 29 U S C §1109(a), "Liability for Breach of Fiduciary Duty," provides, in pertinent part, that any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary

135 ERISA § 404(a)(1)(A) and (B), 29 U S C § 1104(a)(1)(A) and (B), provides, in pertinent part, that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims

136 These fiduciary duties under ERISA § 404(a)(1)(A) and (B) are referred to as the duties of loyalty, exclusive purpose and prudence and are the "highest known to the law." *Donovan v Bierwirth*, 680 F 2d 263, 272 n. 8 (2d Cir 1982) They entail, among other things

a The duty to conduct an independent and thorough investigation into, and continually to monitor, the merits of all the investment alternatives of a plan,

b A duty to avoid conflicts of interest and to resolve them promptly when they occur A fiduciary must always administer a plan with an "eye single" to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor, and

c A duty to disclose and inform, which encompasses (1) a negative duty not to misinform, (2) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful, and (3) a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries

137 ERISA § 405(a), 29 U S C § 1105 (a), "Liability for breach by co-fiduciary," provides, in pertinent part, that

> [I]n addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances (A) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach, (B) if, by his failure to comply with section

> 404(a)(1), 29 U S C §1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach, or (C) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach

138. Plaintiff therefore brings this action under the authority of ERISA §502(a) for Plans-wide relief under ERISA § 409(a) to recover losses sustained by the Plans arising out of the breaches of fiduciary duties by the Defendants for violations under ERISA §404(a)(1) and ERISA §405(a).

COUNT I

Failure To Prudently and Loyally Manage the Plans' Assets (Breaches of Fiduciary Duties in Violation Of ERISA § 404 and § 405 by all Defendants)

139 Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein

140 At all relevant times, as alleged above, all Defendants were fiduciaries within the meaning of ERISA § 3(21)(A), 29 U S C § 1002(21)(A) in that they exercised discretionary authority or control over the administration and/or management of the Plans or disposition of the Plans' assets

141 Under ERISA, fiduciaries who exercise discretionary authority or control over management of a Plans or disposition of a Plans' assets are responsible for ensuring that investment options made available to participants under a Plan are prudent Furthermore, such fiduciaries are responsible for ensuring that assets within the Plans are prudently invested Defendants were responsible for ensuring that all investments in the Company's stock in the Plans were prudent and that such investment was consistent with

the purpose of the Plans. Defendants are liable for losses incurred as a result of such investments being imprudent

142 A fiduciary's duty of loyalty and prudence requires it to disregard plans documents or directives that it knows or reasonably should know would lead to an imprudent result or would otherwise harm plan participants or beneficiaries ERISA § 404(a)(1)(D), 29 U S C § 1104(a)(1)(D). Thus, a fiduciary may not blindly follow plans documents or directives that would lead to an imprudent result or that would harm plan participants or beneficiaries, nor may it allow others, including those whom they direct or who are directed by the plans, including plans trustees, to do so

143 Defendants' duty of loyalty and prudence also obligates them to speak truthfully to participants, not to mislead them regarding the Plans or its assets, and to disclose information that participants need in order to exercise their rights and interests under the Plans This duty to inform participants includes an obligation to provide participants and beneficiaries of the Plans with complete and accurate information, and to refrain from providing inaccurate or misleading information, or concealing material information, regarding Plans investments/investment options such that participants can make informed decisions with regard to the prudence of investing in such options made available under the Plans

144. Defendants breached their duties to prudently and loyally manage the Plans' assets During the Class Period these Defendants knew or should have known that, as described herein, the Advanta common stock was not a suitable and appropriate investment for the Plans Investment in Company stock during the Class Period clearly did not serve the Plans' stated purpose Yet, during the Class Period, despite their

knowledge of the imprudence of the investment, Defendants failed to take any meaningful steps to protect Plan participants from the inevitable losses that they knew would ensue as the non-disclosed material problems, concerns and business slowdowns took hold and became public

145 Defendants further breached their duties of loyalty and prudence by failing to divest the Plans of Advanta stock when they knew or should have known that it was not a suitable and appropriate Plans investment

146. Defendants breached their duties of loyalty and prudence by failing to ensure that participants liquidated their Advanta common stock investments in each of the Plans and transferred the sale proceeds to the other investment options available in the 401(k)/profit sharing component of the Plans With actual or constructive knowledge that Plan participants did not have full and complete information about the Company's problems, and thus were unable to make fully informed decisions about whether to retain their holdings in Company stock, Defendants had the fiduciary obligation to either inform Plan participants of the need to take action to protect their financial interests or, if necessary, to liquidate ESOP's holdings of Company stock on participants' behalf to ensure that they did not suffer a financial loss

147 Defendants also breached their duties of loyalty and prudence by failing to provide complete and accurate information regarding the Company's true financial condition and the Company's concealment of the same and, generally, by conveying inaccurate information regarding the Company's future outlook During the Class Period, upon information and belief, the Company fostered a positive attitude toward the Company's stock, and/or allowed participants in the Plans to follow their natural bias

towards investment in the equities of their employer by not disclosing negative material information concerning investment in the Company's stock As such, participants in the Plans could not appreciate the true risks presented by investments in the Company's stock and therefore could not make informed decisions regarding their investments in the Plans

148 Defendants also breached their co-fiduciary obligations by, among their other failures knowingly participating in, or knowingly undertaking to conceal, the other Defendants failure to disclose crucial information regarding the Company's operations and artificial inflation of the price of the Company stock Defendants had or should have had knowledge of such breaches by other Plans fiduciaries, yet made no effort to remedy them

149 As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plans, and indirectly Plaintiff and the Plans' other participants and beneficiaries, lost a significant portion of their retirement investment Had Defendants taken appropriate steps to comply with their fiduciary obligations, participants could have liquidated some or all of their holdings in Company stock and thereby eliminated, or at least reduced, losses to the Plans

150 Pursuant to ERISA § 502(a), 29 U S C § 1132(a) and ERISA § 409, 29 U S C § 1109(a), Defendants in this Count are liable to restore the losses to the Plans caused by their breaches of fiduciary duties alleged in this Count

COUNT II

Breach of Duty to Avoid Conflicts of Interest
(Breaches of Fiduciary Duties in Violation of ERISA §§ 404 and 405 by all Defendants)

151. Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein

152 At all relevant times, as alleged above, Defendants were fiduciaries within the Plans within meaning of ERISA § 3(21)(A), 29 U S C § 1002(21)(A) Consequently, they were bound by the duties of loyalty, exclusive purpose and prudence

153 ERISA § 404(a)(1)(A), 29 U S C § 1104(a)(1)(A), imposes on Plans fiduciaries a duty of loyalty, that is, a duty to discharge his duties with respect to a Plans solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries

154 Defendants breached their duty to avoid conflicts of interest and to promptly resolve them by, *inter alia* failing to timely engage independent fiduciaries who could make independent judgments concerning the Plans' investments in the Company's own securities, and by otherwise placing their own and/or the Company's interests above the interests of the participants with respect to the Plans' investment in the Company's securities

155. As a consequence of Defendants' breaches of fiduciary duty, the Plans suffered tens of millions of dollars in losses If Defendants had discharged their fiduciary duties to prudently manage and invest the Plans' assets, the losses suffered by the Plans would have been minimized or avoided Therefore, as a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plans, and indirectly Plaintiff and the Plans' other participants and beneficiaries, lost a significant portion of their retirement investments

156 Pursuant to ERISA § 502(a), 29 U S.C § 1132(a), and ERISA § 409, 29 U S C § 1109(a), Defendants in this Count are liable to restore the losses to the Plans caused by their breaches of fiduciary duties alleged in this Count

COUNT III

Failure to Adequately Monitor Other Fiduciaries and Provide Them with Accurate Information (Breaches of Fiduciary Duties in Violation of ERISA § 404 by Advanta and the Director Defendants)

157 Plaintiff incorporates the allegations contained in the previous paragraphs of this Complaint as if fully set forth herein

158 At all relevant times, as alleged above, Advanta and the Director Defendants were fiduciaries, within the meaning of ERISA § 3(21)(A), 29 U S C § 1002(21)(A)

159 At all relevant times, as alleged above, the scope of the fiduciary responsibility of Advanta and the Director Defendants included the responsibility to appoint, evaluate, and monitor other fiduciaries, including, without limitation, the Administrative Committee and other Company officers, employees and agents to whom fiduciary responsibilities were delegated

160 The duty to monitor entails both giving information to and reviewing the actions of the monitored fiduciaries In this case, that means that the monitoring fiduciaries, Advanta and the Director Defendants, had the duty to

(1) Ensure that the monitored fiduciaries possess the needed credentials and experience, or use qualified advisors and service providers to fulfill their duties They must be knowledgeable about the operations of

the Plans, the goals of the Plans, and the behavior of the Plans' participants,

(2) Ensure that the monitored fiduciaries are provided with adequate financial resources to do their job,

(3) Ensure that the monitored fiduciaries have adequate information to do their job of overseeing the Plans' investments,

(4) Ensure that the monitored fiduciaries have ready access to outside, impartial advisors when needed,

(5) Ensure that the monitored fiduciaries maintain adequate records of the information on which they base their decisions and analysis with respect to the Plans' investments, and

(6) Ensure that the monitored fiduciaries report regularly to the monitoring fiduciaries The monitoring fiduciaries must then review, understand, and approve the conduct of the hands-on fiduciaries

161 Under ERISA, a monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment of a Plans' assets, and must take prompt and effective action to protect a plan and its participants when they are not In addition, a monitoring fiduciary must provide the monitored fiduciaries with complete and accurate information in their possession that they know or reasonably should know that the monitored fiduciaries must have in order to prudently manage a plan and its assets

162 Advanta and the Director Defendants breached their fiduciary monitoring duties by, among other things, (a) failing to ensure that the monitored fiduciaries had

access to knowledge about the Company's business problems alleged above, which made Company stock an imprudent retirement investment, and (b) failing to ensure that the monitored fiduciaries completely appreciated the huge risk of significant investment of the retirement savings of rank and file employees in Company stock, an investment that was imprudent and subject to inevitable and significant depreciation Advanta and the Director Defendants knew or should have known that the fiduciaries they were responsible for monitoring were (i) continuing to invest the assets of the Plans in Advanta common stock when it no longer was prudent to do so, and (ii) imprudently allowing the Plans to continue offering Advanta stock as an investment alternative Despite this knowledge, Advanta and the Director Defendants failed to take action to protect the Plans, and concomitantly the Plans' participants, from the consequences of these fiduciaries' failures

163 In addition, Advanta and the Director Defendants, in connection with their monitoring and oversight duties, were required to disclose to the monitored fiduciaries accurate information about the financial condition of Advanta that they knew or should have known that these Defendants needed to make sufficiently informed decisions By remaining silent and continuing to conceal such information from the other fiduciaries, these Defendants breached their monitoring duties under the Plans and ERISA

164 Advanta and the Director Defendants are liable as co-fiduciaries because they knowingly participated in the each other's fiduciary breaches as well as those by the monitored fiduciaries, they enabled the breaches by these Defendants, and they failed to make any effort to remedy these breaches, despite having knowledge of them

165. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plans, and indirectly the Plaintiff and the Plans' other participants and beneficiaries, lost a significant portion of their retirement investments

166 Pursuant to ERISA § 502(a), 29 U S C § 1132(a) and ERISA § 409, 29 U S.C § 1109(a), Defendants in this Count are liable to restore the losses to the Plans caused by their breaches of fiduciary duties alleged in this Count

CAUSATION

167 The Plans suffered tens of millions of dollars in losses because substantial assets of the Plans were imprudently invested, or allowed to be invested by Defendants, in Company stock during the Class Period, in breach of Defendants' fiduciary duties, reflected in the diminished account balances of the Plans' participants

168 Had Defendants properly discharged their fiduciary and/or co-fiduciary duties, the Plans and its participants would have avoided a substantial portion of the losses that they suffered through the Plans' continued investment in Company stock

REMEDY FOR BREACHES OF FIDUCIARY DUTY

169 As noted above, as a consequence of Defendants' breaches, the Plans suffered significant losses

170 ERISA § 502(a), 29 U S.C § 1132(a) authorizes a plan participant to bring a civil action for appropriate relief under ERISA § 409, 29 U S C § 1109 Section 409 requires "any person who is a fiduciary who breaches any of the duties imposed upon fiduciaries to make good to such plans any losses to the plans " Section 409 also authorizes "such other equitable or remedial relief as the court may deem appropriate "

171 With respect to calculation of the losses to a plan, breaches of fiduciary duty result in a presumption that, but for the breaches of fiduciary duty, the participants and beneficiaries in the plan would not have made or maintained its investments in the challenged investment and, where alternative investments were available, that the investments made or maintained in the challenged investment would have instead been made in the most profitable alternative investment available In this way, the remedy restores the values of the plan's assets to what they would have been had the plan been properly administered

173 Plaintiff, the Plans, and the Class are therefore entitled to relief from Defendants in the form of (1) a monetary payment to the Plans to make good to the Plans the losses to the Plans resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial based on the principles described above, as provided by ERISA § 409(a), 29 U S C § 1109(a), (2) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as provided by ERISA §§ 409(a) and 502(a), 29 U S C §§ 1109(a) and 1132(a), (3) reasonable attorney fees and expenses, as provided by ERISA § 502(g), 29 U S C § 1132(g), the common fund doctrine, and other applicable law, (4) taxable costs and (5) interests on these amounts, as provided by law; and (6) such other legal or equitable relief as may be just and proper

174 Each Defendant is jointly liable for the acts of the other Defendants as a co-fiduciary

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for

A A Declaration that the Defendants, and each of them, have breached their ERISA fiduciary duties to the participants,

B An Order compelling the Defendants to make good to the Plans all losses to the Plans resulting from Defendants' breaches of their fiduciary duties, including losses to the Plans resulting from imprudent investment of the Plans' assets, and to restore to the Plans all profits the Defendants made through use of the Plans' assets, and to restore to the Plans all profits which the participants would have made if the Defendants had fulfilled their fiduciary obligations,

C Imposition of a Constructive Trust on any amounts by which any Defendant was unjustly enriched at the expense of the Plans as the result of breaches of fiduciary duty;

D Actual damages in the amount of any losses the Plans suffered, to be allocated among the participants' individual accounts in proportion to the accounts' losses,

E An Order that Defendants allocate the Plans' recoveries to the accounts of all participants who had any portion of their account balances invested in the common stock of Advanta maintained by the Plans in proportion to the accounts' losses attributable to the decline in Advanta's stock price,

F An Order awarding costs pursuant to 29 U S C § 1132(g),

G An Order awarding attorneys' fees pursuant to 29 U S C § 1132(g) and the common fund doctrine; and

H An Order for equitable restitution and other appropriate equitable monetary relief against the Defendants

DATED October 29, 2009

Respectfully submitted,

JHM6596

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Attorneys for Plaintiff and the Proposed Class

JS 44 (Rev 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM)

I. (a) PLAINTIFFS

Matthew A Ragan

(b) County of Residence of First Listed Plaintiff Montgomery
(EXCEPT IN U S PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Barroway Topaz Kessler Meltzer & Check, LLP
280 King of Prussia Rd , Radnor, PA 19087 (610) 667-7706

DEFENDANTS

Advanta Corp , Dennis Alter, Max Botel, Dana Becker Dunn, Ronald Lubner, William A Rosoff, Phillip M Browne, et al

County of Residence of First Listed Defendant
(IN U S PLAINTIFF CASES ONLY)

NOTE IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U S Government Plaintiff
- ☒ 3 Federal Question (U S Government Not a Party)
- ☐ 2 U S Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer w/Disabilities - Employment
- ☐ 446 Amer w/Disabilities - Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence
- Habeas Corpus
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R R & Truck
- ☐ 650 Airline Regs
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☒ 791 Empl Ret Inc Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 463 Habeas Corpus Alien Detainee
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U S Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900Appeal of Fee Determination Under Equal Access to Justice
- ☐ 950 Constitutionality of State Statutes

V ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U S Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity)
ERISA sections 409 and 502, 29 U S C sections 1109 and 1132

Brief description of cause
Breach of fiduciary duty

VII. REQUESTED IN COMPLAINT.

☑ CHECK IF THIS IS A CLASS ACTION UNDER F R C P 23

DEMAND $

CHECK YES only if demanded in complaint
JURY DEMAND ☑ Yes ☐ No

VIII RELATED CASE(S) IF ANY (See instructions) JUDGE _____ DOCKET NUMBER _____

DATE
10/29/2009

SIGNATURE OF ATTORNEY OF RECORD
Joseph H Meltzer

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG JUDGE _____

UNITED STATES DISTRICT COURT **APPENDIX F**

FOR THE EASTERN DISTRICT OF PENNSYLVANIA— DESIGNATION FORM to be used by counsel to indicate the category of the case for the purpose of assignment to appropriate calendar

Address of Plaintiff 84 Harlow Circle, Ambler, PA 19002
Address of Defendant Spring House, Pennsylvania
Place of Accident, Incident or Transaction Spring House, Pennsylvania
Does this civil action involve a nongovernmental corporate party with any parent corporation and any publicly held corporation owning 10% or more of its stock?
(Attach two copies of the Disclosure Statement Form in accordance with Fed R Civ P 7 1(a)) Yes☐ No☒

Does this case involve multidistrict litigation possibilities? Yes☐ No☒

RELATED CASE, IF ANY

Case Number _____ Judge _____ Date Terminated

Civil cases are deemed related when yes is answered to any of the following questions

1 Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? Yes☐ No☒

2 Does this case involve the sameissue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court? Yes☐ No☒

3 Does this case involve the validity or infringement of a patent already in suit or anyearlier numbered case pending or within one year previously terminated action in this court? Yes☐ No☒

CIVIL (Place _ in ONE CATEGORY ONLY)

A *Federal Question Cases*

1 ☐ Indemnity Contract, Marine Contract, and All Other Contracts
2 ☐ FELA
3 ☐ Jones Act-Personal Injury
4 ☐ Antitrust
5 ☐ Patent
6 ☐ Labor-Management Relations
7 ☐ Civil Rights
8 ☐ Habeas Corpus
9 ☐ Securities Act(s) Cases
10 ☐ Social Security Review Cases
11 ☒ All other Federal Question Cases
(Please specify) 29 U S C §§ 1109 and 1132, ERISA §§ 409 and 502

B *Diversity Jurisdiction Cases*

1 ☐ Insurance Contract and Other Contracts
2 ☐ Airplane Personal Injury
3 ☐ Assault, Defamation
4 ☐ Marine Personal Injury
5 ☐ Motor Vehicle Personal Injury
6 ☐ Other Personal Injury (Please specify)
7 ☐ Products Liability
8 ☐ Products Liability— Asbestos
9 ☐ All other Diversity Cases
(Please specify)

ARBITRATION CERTIFICATION

(Check appropriate Category)

I, Joseph H Meltzer, Esq, counsel of record do hereby certify

☒ Pursuant to Local Civil Rule 53 2, Secton 3(c)(2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of $150,000 00 exclusive of interest and costs,

☐ Relief other than monetary damages is sought

DATE October 29, 2009 Joseph H Meltzer, Attorney-at-Law 80136 Attorney I D #

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F R C P 38

I certify that, to my knowledge, the within case is not related to any case now pending or within one year previously terminated action in this court except as noted above

DATE October 29, 2009 Joseph H Meltzer, Attorney-at-Law 80136 Attorney I D #

CIV 609 (4/03)

UNITED STATES DISTRICT COURT **APPENDIX F**

FOR THE EASTERN DISTRICT OF PENNSYLVANIA— DESIGNATION FORM to be used by counsel to indicate the category of the case for the purpose of assignment to appropriate calendar

Address of Plaintiff 84 Harlow Circle, Ambler, PA 19002
Address of Defendant Spring House, Pennsylvania
Place of Accident, Incident or Transaction Spring House, Pennsylvania
Does this civil action involve a nongovernmental corporate party with any parent corporation and any publicly held corporation owning 10% or more of its stock?
(Attach two copies of the Disclosure Statement Form in accordance with Fed R Civ P 7 1(a)) Yes☐ No☒

Does this case involve multidistrict litigation possibilities? Yes☐ No☒

RELATED CASE, IF ANY

Case Number: _____ Judge _____ Date Terminated

Civil cases are deemed related when yes is answered to any of the following questions

1 Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? Yes☐ No☒

2 Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court? Yes☐ No☒

3 Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action in this court? Yes☐ No☒

CIVIL (Place __ in ONE CATEGORY ONLY)

A *Federal Question Cases*

1 ☐ Indemnity Contract, Marine Contract, and All Other Contracts
2 ☐ FELA
3 ☐ Jones Act-Personal Injury
4 ☐ Antitrust
5 ☐ Patent
6 ☐ Labor-Management Relations
7 ☐ Civil Rights
8 ☐ Habeas Corpus
9 ☐ Securities Act(s) Cases
10 ☐ Social Security Review Cases
11 ☒ All other Federal Question Cases
(Please specify) 29 U S C §§ 1109 and 1132, ERISA §§ 409 and 502

B *Diversity Jurisdiction Cases*

1 ☐ Insurance Contract and Other Contracts
2 ☐ Airplane Personal Injury
3 ☐ Assault, Defamation
4 ☐ Marine Personal Injury
5 ☐ Motor Vehicle Personal Injury
6 ☐ Other Personal Injury (Please specify)
7 ☐ Products Liability
8 ☐ Products Liability— Asbestos
9 ☐ All other Diversity Cases
(Please specify)

ARBITRATION CERTIFICATION

(Check appropriate Category)

I, Joseph H. Meltzer, Esq., counsel of record do hereby certify

☒ Pursuant to Local Civil Rule 53 2, Section 3(c)(2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of $150,000 00 exclusive of interest and costs,

☐ Relief other than monetary damages is sought

DATE October 29, 2009 Joseph H Meltzer, Attorney-at-Law 80136 Attorney I D #

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F R C P 38

I certify that, to my knowledge, the within case is not related to any case now pending or within one year previously terminated action in this court except as noted above.

DATE October 29, 2009 Joseph H Meltzer, Attorney-at-Law 80136 Attorney I D #

CIV. 609 (4/03)

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CASE MANAGEMENT TRACK DESIGNATION FORM

MATTHEW A RAGAN, individually and on behalf of all others similarly situated, Plaintiff, v ADVANTA CORP , DENNIS ALTER, MAX BOTEL, DANA BECKER DUNN, RONALD LUBNER, WILLIAM A ROSOFF, PHILLIP M BROWNE, PAUL JEFFERS and DOES 1-10, Defendants	**CIVIL ACTION NO.** **CLASS ACTION COMPLAINT** **JURY TRIAL DEMANDED**

In accordance with the Civil Justice Expense and Delay Reduction Plan of this court, counsel for plaintiff shall complete a case Management Track Designation Form in all civil cases at the time of filing the complaint and serve a copy on all defendants (See § 1 03 of the plan set forth on the reverse side of this form) In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a case management track designation form specifying the track to which that defendant believes the case should be assigned

SELECT ONE OF THE FOLLOWING CASE MANAGEMENT TRACKS:

(a) Habeas Corpus – Cases brought under 28 U S C §2241 through §2255 ( )

(b) Social Security – Cases requesting review of a decision of the Secretary of Health and Human Services denying plaintiff Social Security Benefits ( )

(c) Arbitration – Cases required to be designated for arbitration under Local Civil Rule 53 2 ( )

(d) Asbestos – Cases involving claims for personal injury or property damage from exposure to asbestos ( )

(e) Special Management – Cases that do not fall into tracks (a) through (d) that are commonly referred to as complex and that need special or intense management by the court (See reverse side of this form for a detailed explanation of special management cases) (x)

(f) Standard Management – Cases that do not fall into any one of the other tracks ( )

Oct 29, 2009
Date

Joseph H Meltzer, Attorney for Plaintiff
Telephone 610-667-7706 FAX Number 610-667-7056
E-Mail Address jmeltzer@btkmc com

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Paula Hiatt, as a representative of the Advanta Corp Employee Stock Ownership Plan and the Advanta Corp. Employee Savings Plan, and on behalf of a class of similarly situated participants in the Plans,	:	
Plaintiff,	:	**CLASS ACTION COMPLAINT**
Advanta Corp., Dennis Alter, Max Botel, Dana Becker Dunn, Ronald Lubner, William A. Rosoff, Phillip M. Browne, Paul Jeffers and John Does 1-10	:	**NO.**
Defendants.	:	JURY TRIAL DEMANDED

Plaintiff Paula Hiatt ("Plaintiff"), as a representative of the Advanta Corp. Employee Stock Ownership Plan ("ESOP Plan") and the Advanta Corp. Employee Savings Plan ("Savings Plan," and, together with the ESOP Plan, "Plans"), and only to the extent deemed necessary by the Court, on behalf of a class of similarly situated participants in the Plans (the "Participants"), by her attorneys, alleges the following for her Complaint ("Complaint").

INTRODUCTION

1. Plaintiff brings this action against Advanta Corp. ("Advanta") and certain individuals who were Plan fiduciaries as a representative of the Plans and, only to the extent deemed necessary by the Court, on behalf of a class of all Participants in the Plans for whose individual accounts the Plans invested in shares of an Advanta common stock fund (the "Fund") from October 31, 2006 to the present (the "Class Period"). Plaintiff brings this action on behalf of the Plans and the Plans' Participants and beneficiaries pursuant to § 502(a)(2) and (3) of the Employee Retirement Income Security Act ("ERISA"), 29 U S C. § 1132(a)(2) and (3)

2 As more fully set forth below, Defendants breached their fiduciary duties owed to the Plans and the Participants, including those fiduciary duties set forth in ERISA § 404, 29 U.S.C. § 1104, and Department of Labor Regulations, 29 C F.R. § 2550 As a result of these breaches, Defendants are liable to the Plans for all losses resulting from each such breach of fiduciary duty. Plaintiff also seeks equitable relief.

3. Plaintiff alleges that Defendants imprudently invested the Plans' assets in the Fund and imprudently invested Fund assets in Advanta common stock throughout the Class Period despite the fact that they at least should have known that such investment was imprudent because, as explained in detail below: (a) Advanta failed to accrue losses for large amounts of impaired credit card receivables; (b) Advanta's customer default rate would be substantially higher than the industry average by 2009 due to the Company's failure to verify its customers' abilities to pay; (c) Advanta's credit receivables were excessively risky because it issued credit cards to small business owners without verifying income, (d) customers were leaving and would continue to leave the Company due to, among other things, Advanta's drastic increase of interest rates and its manipulation of the cash reward program; and (e) Advanta's portfolio would have large charges to reflect impairments due to Advanta's failure to correctly account for its delinquent customers and credit trends

4 Plaintiff alleges that it was imprudent to permit the Plan to invest in the Fund and the Fund to invest in Advanta stock because they were excessively risky investments due to the fact that the prices of shares of the Fund and Company stock were artificially inflated and/or because of the Company's impaired financial circumstances. Plaintiff also alleges that Defendants breached their fiduciary duties by negligently failing to disclose material information

necessary for Participants to make informed decisions concerning the Plan's assets and benefits and for investing in the Fund.

5 This action is brought on behalf of the Plans and seeks to recover losses for the Plans for which Defendants are liable pursuant to ERISA §§ 409 and 502, 29 U.S C §§ 1109 and 1132. Because Plaintiff's claims apply to the Plans, including all participant accounts invested in Company stock during the Class Period, and because ERISA specifically authorizes participants such as Plaintiff to sue for relief for the Plans for breaches of fiduciary duty such as those alleged herein, Plaintiff brings this action on behalf of the Plans and - only to the extent it may be deemed necessary by the Court - as a class action on behalf all participants and beneficiaries of the Plans during the proposed Class Period

JURISDICTION AND VENUE

6. Plaintiff's claims arise under and pursuant to ERISA § 502, 29 U.S.C § 1132

7 This Court has jurisdiction over this action pursuant to ERISA § 502(e)(1), 29 U.S C § 1132(e)(1).

8 Venue is proper in this District pursuant to ERISA § 502(e)(2), 29 U S C § 1132(e)(2), because this is a District where the Plans were administered, where breaches of fiduciary duty took place and/or where one or more Defendants reside or may be found

PARTIES

9. **Plaintiff Paula Hiatt** is a resident of the state of Utah. Plaintiff was a Participant in the Savings Plan at all times relevant to the Complaint and maintained an investment in the Fund in her individual account in that Plan during the Class Period.

10. **Defendant Advanta** is a Delaware corporation headquartered in Spring House, Pennsylvania Advanta is both the sponsor and administrator of the Plans. On information and

belief, Advanta, directed the Plan Trustee concerning the investment of Plan assets in the Fund and the investment of Fund assets in Advanta stock Upon information and belief, the Plan Administration Committee met infrequently and spent very little time on matters relating to administration of the Plan and the Plan's investments Rather, upon information and belief, these jobs were performed by Advanta's employees acting in the scope of their day-to-day duties and, in particular, by Advanta's human resources, legal, corporate communications, finance and treasury personnel. On information and belief, Advanta's employees monitored Plan investments and communicated with Participants concerning Plan investments and investment risk and return characteristics, including the Fund. Upon information and belief, the Committee Members were appointed and served on the Committee as part of and in the ordinary course of their job responsibilities without any additional compensation. Consequently, the Company is responsible and liable for their actions. Accordingly, Advanta was a fiduciary of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U.S C § 1002(21)(A), because it exercised discretionary authority or control over Plan management and/or authority or control over the management or disposition of Plan assets.

11 **Defendant Dennis Alter ("Alter")** served as the Company's Chairman of the Board of Directors and Chief Executive Officer during the Class Period. On information and belief, his responsibilities included appointing and monitoring senior management at Advanta, including the employees who were appointed to the Plan Administrative Committee and employees who were responsible for the day to day administration of the Plans including senior human resources, legal, corporate communications, finance and treasury personnel Defendant Alter was a fiduciary of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U.S.C §

1002(21)(A), because he exercised discretionary authority or control over Plan management and/or authority or control over the management or disposition of Plan assets.

12. **Defendant Advanta's Board of Directors ("Board")** had the duty to appoint and monitor the members of the Plan Administrative Committee. The following members of the Board and Compensation Committee are named as Defendants:

a. **Defendant Max Botel ("Botel"),**

b. **Defendant Dana Becker Dunn ("Dunn"),**

c. **Defendant Ronald Lubner ("Lubner")**, and

d. **Defendant William A. Rosoff ("Rosoff").**

Defendants Alter, Botel, Dunn, Lubner and Rosoff, are collectively referred to as the "Director Defendants." The Director Defendants were thus fiduciaries of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A), because they exercised discretionary authority or control over Plan management and/or authority or control over the management or disposition of Plan assets.

13. **Defendant Advanta Plan Administrative Committee (the "Administrative Committee")** is charged with the day-to-day management and administration of the Plans and/or the management and disposition of the Plans' assets. The Administrative Committee is comprised of Advanta employees/officers appointed by the Board The Administrative Committee

14. **Defendant Philip M. Browne ("Browne")** served as Senior Vice President and Chief Financial Officer of Advanta during the Class Period. In his capacity as CFO, Browne knew or at the very least should have known the facts alleged herein. During the Class Period, Defendant Browne signed the 2006, 2007 and 2008 Form 11-K submissions for the Plans on

behalf of the Company, as a "Member of the Committee Administering the Plan." Defendant Browne was a fiduciary of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U S C. § 1002(21)(A), because he exercised discretionary authority or control over Plan management and/or authority or control over the management or disposition of the Plans' assets.

15. **Defendant Paul Jeffers** served as Vice President, Human Resources, of Advanta during the Class Period. During the Class Period, Defendant Jeffers signed each of the Plans' Form 5500 submissions to the IRS and Dept. of Labor on behalf of the Company, as Plan Administrator. On information and belief, Jeffers was a member of the Administrative Committee. Defendant Jeffers was a fiduciary of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U.S.C § 1002(21)(A), because he exercised discretionary authority or control over Plan management and/or authority or control over the management or disposition of the Plans' assets

16 **Defendants John Does 1-30** are members of the Committee or any other committees responsible for managing or monitoring the Plans and the Plan investments (collectively with Jeffers and Browne, "Committee Members") whose names are not currently known

17 Upon information and belief, the Committee Members were all Advanta senior officers and employees who served on the Committee without additional compensation in the ordinary course of their employment and who exercised authority or control over the Plan, Plan assets and/or the Fund. As a result of their senior positions within the Company, they knew or should have known all of the facts alleged herein.

THE PLANS

18 At all times relevant to this Complaint, the Plans were Employee Benefit Plans within the meaning of ERISA § 3(3) and 3(2)(A), 29 U.S.C. § 1002(3) and 1002(2)(A), and "Employee Pension Benefit Plans" within the meaning of ERISA §3(2)(A), 29 U.S.C. § 1002(2)(A).

19. The Plans were "Eligible Individual Account Plans" within the meaning of ERISA §407(d)(3), 29 U.S.C. §1 107(d)(3), and "Qualified Cash or Deferred Arrangement Plans" within the meaning of I.R.C. § 401(k), 26 U.S.C. § 401(k).

20. The Plans were "Defined Contribution" and "Individual Account" plans within the meaning of ERISA § 3(34), 29 U.S.C. § 1002(34), in that the Plans provided for individual accounts for each Participant and for benefits based solely upon the amount contributed to the Participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other Participants which could be allocated to such Participant's accounts

21 The Plans were voluntary contribution Plans whereby Participants elected to contribute a portion of their compensation to the Plans ("Employee Contributions") The Company also made contributions to the Plans on behalf of its employee Participants ("Matching Contributions")

22 The ESOP Plan is generally available to employees of Advanta and its subsidiaries who have reached 21 years of age with one year of service

23 The ESOP Plan is administered by the Plan Administrative Committee.

24 The ESOP Plan invested assets in the Fund which invested assets in Advanta Class A common stock

25. At December 31, 2006, the ESOP Plan held $37,073,699 in Advanta Class A stock. By December 31, 2007, the ESOP Plan held only $10,113,880 in Advanta Class A stock. See 2007 Form 5500.

26 The Savings Plan invested assets in the Fund along with other mutual funds and other investment vehicles.

27. The Savings Plan is administered by the Administrative Committee.

28. Employees are eligible to participate in the Savings Plan when they have reached 21 years of age and have had six months of service with the Company.

29 In 2008, participants could elect to contribute to the Savings Plan up to 75% of their eligible compensation. Advanta's contributions were equal to 50% of each employee's contributions to the Plan up to 5% of each employee's eligible compensation (so that the initial maximum contribution by Advanta would be 2.5% of an employee's eligible contribution) See 2008 Form 11-K

30 The Savings Plan was restated effective January 1, 2009 to provide for matching contributions equal to 100% of employee contributions up to 4% of an employee's eligible compensation See 2008 Form 11-K

31 On October 1, 2008, Schwab Retirement Plans Services, Inc. replaced Wilmington Trust Company as the Trustee of the Savings Plan. See 2008 Form 11-K

32 The Savings Plan has been heavily invested in Advanta stock. At December 31, 2006, the Savings Plan held approximately $7,654,030 in Advanta Class B common stock and $315,304 in Advanta Class A common stock At December 31, 2007, the Savings Plan held approximately $2,678,692 in Advanta Class B common stock and $91,834 in Advanta Class A

common stock At December 31, 2008, the Savings Plan held approximately $932,309 in Advanta Class B common stock and $14,745 in Advanta Class A common stock

CLASS ACTION ALLEGATIONS

33. Plaintiff brings this action as a class action only to the extent deemed necessary by the Court pursuant to Rules 23(a), (b)(1), and/or (b)(2) of the Federal Rules of Civil Procedure on behalf of the Plans, himself/herself and the following class of persons similarly situated (the "Class"):

> All persons, except Defendants and their immediate family members, who were participants in or beneficiaries of the Advanta Corp Employee Stock Ownership Plan and/or the Advanta Corp. Employee Saving Plan at any time between October 31, 2006 and the present (the "Class Period") and whose Plan accounts included investments in Advanta common stock.

34. The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time, and can only be ascertained through appropriate discovery, Plaintiff believes there are hundreds of members of the Class who participated in, or were beneficiaries of, the Plans during the Class Period and whose Plan accounts included investment in Advanta stock According to the 2007 Form 5500 submissions for the Plans, as of December 31, 2006, the ESOP had approximately 700 participants and the Employee Savings Plan had approximately 1,100 participants

35 Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class Among the questions of law and fact common to the Class are

a. whether Defendants each owed a fiduciary duty to the Plans, Plaintiff and members of the Class,

b. whether Defendants breached their fiduciary duties to the Plans, Plaintiff and members of the Class by failing to act prudently and solely in the interests of the Plans and the Plans' participants and beneficiaries;

c whether Defendants violated ERISA; and

d. whether the Plans and members of the Class have sustained damages and, if so, what is the proper measure of damages

36. Plaintiff's claims are typical of the claims of the members of the Class because Plaintiff, the Plans and the other members of the Class each sustained damages arising out of Defendants' wrongful conduct in violation of federal law as complained of herein

37. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class actions, complex, and ERISA litigation. Plaintiff has no interests antagonistic to or in conflict with those of the Plans or the Class.

38. Class action status in this ERISA action is warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests

39. Class action status is also warranted under the other subsections of Rule 23(b) because. (i) prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants; and (ii) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole

DEFENDANTS' FIDUCIARY STATUS

40. At all times relevant to this Complaint, Defendants were fiduciaries of the Plans because:

(a) they were so named; and/or

(b) they exercised authority or control respecting management or disposition of the Plans' assets; and/or

(c) they exercised discretionary authority or discretionary control respecting management the Plans; and/or

(d) they had discretionary authority or discretionary responsibility in the administration of the Plans.

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

41. In that regard, a person is a fiduciary even if a plan does not name him as such or by its terms assign fiduciary duties to him where by his conduct he engages in fiduciary activities The test for whether a person (or entity) is a fiduciary is functional and based on actual conduct Those who have control over management of a plan or plan assets are fiduciaries regardless of the labels or duties assigned to them by the language of a plan. Moreover, in order to fulfill the express remedial purpose of ERISA, the definition of "fiduciary" is to be construed broadly.

42. A fiduciary may not avoid his fiduciary responsibilities under ERISA by relying solely on the language of the plan documents While the basic structure of a plan may be specified within limits by the plan sponsor, the fiduciary may not follow the plan document if to do so leads to an imprudent result under ERISA § 404(a)(1)(d), 29 U.S.C. § 1104(a)(1)(D).

43 On information and belief, the Committee and Committee Members (including Defendants Jeffers and Browne) were named fiduciaries of the Plans and/or were fiduciaries because they had and exercised fiduciary authority or control over the management and disposition of the Plans' assets, including the selection and monitoring of the Plans' Investment Options including the Fund and the Fund's investment in Advanta stock. On information and belief, the Committee and Committee Members had the ability and fiduciary responsibility to prepare and disseminate written communications to Participants containing information to be used by Participants in managing their Plan investments, such as investing in the Fund

44. Consequently, in light of the foregoing powers, duties, responsibilities, and actions, the Committee and Committee Members were, on information and belief, both named fiduciaries of the Plans pursuant to ERISA § 402(a)(1), 29 U S.C. § 1102(a)(1), and de facto fiduciaries within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), in that they exercised discretionary authority or discretionary control with respect to management of the Plans, exercised authority or control with respect to management or disposition of the Plans' assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plans

45 Advanta is a fiduciary because, on information and belief, Advanta actually managed, administered and operated the Plans, exercised authority or control over the management and disposition of the Plans' assets and disseminated the Plans communications to Participants. In particular

a. Upon information and belief, Advanta, through its treasury, human resources, and legal departments, directed the Plan Trustee concerning the investment of Plan assets in the Fund and the investment of Fund assets in Advanta stock.

b. Upon information and belief, the Committee met infrequently and spent very little time on matters relating to administration of the Plan and the Plan's investments. Rather, upon information and belief, these jobs were performed by Advanta's employees acting in the scope of their day-to-day duties and, in particular, by Advanta's human resources, legal, corporate communications, finance and treasury personnel. On information and belief, Advanta's employees monitored Plan investments and communicated with Participants concerning Plan investments and investment risk and return characteristics, including the Fund.

c. Upon information and belief, the Committee Members were appointed and served on the Committee as part of and in the ordinary course of their job responsibilities without any additional compensation. Accordingly, the Company is responsible and liable for their actions.

46. Alter is a fiduciary because, as a Board Member, he had the power and authority to appoint the Committee Members Moreover, on information and belief, Defendant Alter exercised additional authority and control over the Plan and the Plans' investments, including the Plans' investments in the Fund, by exercising control over the Committee and its members since, as employees of Advanta, they acted at his direction as the Company's CEO. Consequently, in light of his foregoing duties, responsibilities, and actions, Alter was a fiduciary of the Plans within the meaning of ERISA § 3(21), 29 U.S C § 1002(21), during the Class Period in that he exercised discretionary authority or discretionary control with respect to management of the Plans, exercised authority or control with respect to management or disposition of the Plans' assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

47. The Board Members were fiduciaries since, according to the ESOP Plan's Form 2007 Annual Return, the Board was responsible for selecting, monitoring and removing members of the Plans' Administrative Committee. Consequently, in light of his foregoing duties, responsibilities, and actions, Alter was a fiduciary of the Plans within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that he exercised discretionary authority or discretionary control with respect to management of the Plans, exercised authority or control with respect to management or disposition of the Plans' assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plans.

FIDUCIARY DUTIES UNDER ERISA

48 The Statutory Requirements. ERISA imposes strict fiduciary duties upon plan fiduciaries. ERISA § 404(a), 29 U.S.C. § 1104(a), states, in relevant part, that

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of providing benefit to participants and their beneficiaries; and defraying reasonable expenses of administering the plan; with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims; by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and Title IV

49 The Duty of Loyalty ERISA imposes on a plan fiduciary the duty of loyalty--that is, the duty to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to participants and their beneficiaries . ."

50. The duty of loyalty entails a duty to avoid conflicts of interest and to resolve them promptly when they occur A fiduciary must always administer a plan with an "eye single" to

the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor.

51. The Duty of Prudence. Section 404(a)(1)(B) also imposes on a plan fiduciary the duty of prudence--that is, the duty "to discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man, acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . ."

52 The Duty to Inform The duties of loyalty and prudence include the duty to disclose and inform. These duties entail· 1) a negative duty not to misinform, 2) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and 3) a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries. These duties to disclose and inform recognize the disparity that may exist, and in this case did exist, between the training and knowledge of the fiduciaries, on the one hand, and the Participants, on the other.

53 Pursuant to the duty to inform, fiduciaries of the Plans were required under ERISA to furnish certain information to Participants. Defendants were required to furnish the Summary Plan Description ("SPD") and a Prospectus to Participants. The SPD, the Prospectus and all information contained or incorporated therein constitutes a representation in a fiduciary capacity upon which Participants were entitled to rely in determining the identity and responsibilities of fiduciaries under the Plans and in making decisions concerning their benefits and investment and management of assets allocated to their accounts·

> The format of the summary plan description must not have the effect of misleading, misinforming or failing to inform participants and beneficiaries. Any description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of benefits, provided that adjacent to the benefit description the page on which the restrictions are described is noted.

29 C.F.R. § 2520.102-2(b). Here, upon information and belief, Defendants purported to make that required disclosure concerning the Fund by incorporating by reference into the Plans' Prospectus and/or SPD, all of Advanta's filings under Sections 13(a) and (c), 14 and/or 15 of the Securities Exchange Act.

54. The Duty to Investigate and Monitor Investment Alternatives. With respect to a pension plan such as the Plans, the duties of loyalty and prudence also entail a duty to conduct an independent investigation into, and continually to monitor, the merits of the investment alternatives in the Plans including employer securities, to ensure that each investment is a suitable option for the Plans.

55. The Duty to Monitor Appointed Fiduciaries. Fiduciaries who have the responsibility for appointing other fiduciaries have the further duty to monitor the fiduciaries thus appointed. The duty to monitor entails both giving information to and reviewing the actions of the appointed fiduciaries. In a 401(k) plan such as the Plans the monitoring fiduciaries must therefore ensure that the appointed fiduciaries:

(a) possess the needed credentials and experience, or use qualified advisors and service providers to fulfill their duties,

(b) are knowledgeable about the operations of the Plans the goals of the Plans and the behavior of Plans' participants;

(c) are provided with adequate financial resources to do their jobs;

(d) have adequate information to do their jobs of overseeing the Plans' investments with respect to company stock;

(e) have access to outside, impartial advisors when needed;

(f) maintain adequate records of the information on which they base their decisions and analysis with respect to Plans' investment options; and

(g) report regularly to the monitoring fiduciaries.

The monitoring fiduciaries must then review, understand, and approve the conduct of the hands-on fiduciaries.

56. The Duty Sometimes to Disregard Plan Documents A fiduciary may not avoid his fiduciary responsibilities by relying solely on the language of the plan documents. While the basic structure of a plan may be specified, within limits, by the plan sponsor, the fiduciary may not blindly follow the plan document if to do so leads to an imprudent result or if such is the result of a lack of loyalty. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

57 Co-Fiduciary Liability. A fiduciary is liable not only for fiduciary breaches within the sphere of his own responsibility, but also as a co-fiduciary in certain circumstances ERISA § 405(a), 29 U.S.C. § 1105(a), states, in relevant part, that·

> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; or

(2) if, by his failure to comply with section 404(a)(1) in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

58. Non-Fiduciary Liability. Under ERISA non-fiduciaries who knowingly participate in a fiduciary breach may themselves be liable for certain relief under ERISA § 502(a)(3), 29 U S C § 1132(a)(3)

SUBSTANTIVE ALLEGATIONS

59. Advanta is an issuer of credit cards, particularly MasterCard and Visa, to professionals and small businesses in the United States The Company issued cards through its subsidiary, Advanta Bank Corp. ("Advanta Bank") In addition to the credit cards, Advanta offers credit protection and insurance products that provide coverage for disability, involuntary unemployment and loss of life, among other things Moreover, the Company provides deposit products, including retail and large denomination certificates of deposit and money accounts The Company was founded in 1951 and was formerly known as TSO Financial Corp., changing its name to Advanta Corp in 1988

60 Throughout the Class Period, Defendants knew or should have known that Advanta common stock was an imprudent Plans investment, because. (a) the Company's assets contained large amounts of impaired credit card receivables for which Advanta had not accrued losses, (b) Advanta's customer default rate would be nearly six times that of the industry average by 2009 due to the Company's failure to verify its customers' ability to pay, (c) due to Advanta's

practice of issuing credit cards to small business owners without verifying income, the Company's credit receivables were excessively risky; (d) customers were and would continue to leave the Company due to, among other things, Advanta's drastic increase of interest rates and its manipulation of the cash reward program; and (e) the Company's portfolio would have large charges to reflect impairments, due to Advanta's failure to correctly account for its delinquent customers and credit trends.

61. Nevertheless, Defendants failed to protect the Plans' assets—which were imprudently invested in Advanta stock.

62. On October 31, 2006, the Company announced its financial results for the third quarter of 2006. Advanta reported quarterly net income of $21.1 million, or $0.73 per diluted share for Class A and Class B shares combined, and announced that Advanta Business Cards earned net income of $20.7 million for the quarter, as compared to $16.2 million for the third quarter of 2005. The Company also stated that

> "I am happy to report strong profits again this quarter and to share with you that our portfolio is performing well and growing. Not only are we continuing to attract a large number of new high credit quality, profitable customers through our focused marketing efforts, but we are able to leverage our infrastructure costs through this growth," said Dennis Alter, Chairman and CEO. "During the quarter, new bankruptcy filings remained lower than we anticipated, and we are increasing our guidance for 2006 full year earnings from continuing operations to a range of $2 78 to $2 83 per combined diluted share primarily due to the lower net credit losses we now expect for the full year."
>
> ***
>
> During the third quarter of 2006, Advanta Business Cards customers exceeded the 1 million mark while ending managed receivables of $4 6 billion grew 29% over the same quarter last year. Owned Business Cards receivables were $1.2 billion at quarter end, reflecting growth of 46% over those reported at the same quarter end last year. Transaction volume for the quarter was $3.1 billion, exceeding third quarter 2005 volume by 23%.

63. In a conference call with investors later that day, Defendant Rosoff spoke of the Company's "solid foundation for originated high credit quality customers," and Defendant Alter maintained that the high earnings for the quarter were due to "lower credit losses."

64 On this day, Advanta Class B stock closed at $26.16 per share and Advanta Class A stock closed at $29.93 per share

65. On January 25, 2007, Advanta announced its financial result for the fourth quarter 2006 and fiscal year 2006. Advanta reported full year 2006 net income from continuing operations to be $84.2 million, or $2.86 per diluted share for Class A and Class B shares combined. The Company also stated that:

> "Our 2006 full year Business Cards earnings increased by over 50%, and our managed receivables grew by almost 39%; we added 56% more new customers, and our managed net credit loss rate dropped by 230 basis points to 3.41% We had a great year! Most importantly we continued to strengthen and build on the foundation for the burgeoning results we expect to see going forward," said Dennis Alter, Chairman and CEO
>
> Ending managed receivables grew to $5 2 billion at December 31, 2006, with full year new customers totaling approximately 371,000. Ending owned receivables grew 29% during the year to $1.1 billion, and the full year net credit loss rate on owned receivables decreased 218 basis points to 3.19%. 2006 customer transaction volume totaled $12.3 billion, a 26% increase over 2005 For the fourth quarter, Advanta reported net income of $18.2 million or $0 62 per combined diluted share, including a $0.01 per share asset valuation gain associated with the Company's venture capital portfolio.

66 Later that day, during a conference call with investors, Defendant Alter spoke of his confidence for 2007, 2008 "and beyond," and Defendant Rosoff stated that profits from new customers "are expected to make our 2008 income shoot up by more than 40% . ."

67 On that day, Advanta's Class B common stock closed at $31 11 per share and Advanta Class A stock closed at $28.96 per share.

68. On April 24, 2007, Advanta reported its financial results for the first quarter of 2007. The Company reported quarterly net income of $21.4 million, or $0 72 per diluted share for Class A and Class B combined. Additionally, according to a Company press release·

> "We had a very good start to 2007," said Dennis Alter, Chairman and CEO. "Strong earnings, low credit losses and delinquencies, and the addition of new high credit quality customers continued to mark our performance."
>
> Ending managed receivables grew to $5.6 billion at March 31, 2007 with ending owned receivables totaling $1.1 billion. During the quarter, approximately 97,000 new customers were added and transaction volume of $3.4 billion reflected growth of 24% over the comparable quarter of 2006. The managed net credit loss rate decreased 32 basis points to 3 3% and the owned net credit loss rate decreased by 43 basis points to 3 1%

69. On this day, Advanta's Class B common stock closed at $31.36 per share and Advanta Class A stock closed at $28.84 per share.

70 On July 31, 2007, Advanta reported its financial results for the second quarter of 2007 The Company reported net income from continuing operations of $0.51 per diluted share for Class A and Class B shares combined, $0.03 higher than the first quarter Additionally, the Company stated:

> "The powerful dynamics we have described in the business are once again demonstrated by the performance in the quarter," said Dennis Alter, Chairman and CEO
>
> Ending managed receivables grew to $6.0 billion at quarter end with ending owned receivables totaling $1.1 billion During the quarter, 103,000 new customers were added and transaction volume increased to $3.7 billion The managed net credit loss rate was 3 48% and the owned net credit loss rate was 3.06%

71 Later that day, during a conference call with investors, Defendant Rosoff assured participants that Advanta was reviewing and "completely complying" with all new credit card regulations

72. On this day, Advanta Class B common stock closed at $25.66 per share and Advanta Class A stock closed at $23 49 per share

73 On October 25, 2007, Advanta announced its financial results for the third quarter of 2007. The Company reported third quarter 2007 net income of $22.1 million, or $0.50 per diluted share for Class A and Class B shares combined. Additionally, the Company announced:

> Ending managed receivables grew to $6.2 billion at quarter end with ending owned receivables totaling $1 2 billion During the quarter, over 74,000 new customers were added and transaction volume totaled $3.6 billion. The managed net credit loss rate was 3.87% and the owned net credit loss rate was 3.52%.
>
> "Over the past years, we've been planning for a potentially more difficult environment by focusing on high credit quality customers," said Dennis Alter Chairman and CEO. "This strategy continues to look good to us now "

74 On this day, Advanta's Class B common stock closed at $17.69 per share and Advanta Class A stock closed at $15 67 per share

75 On November 27, 2007, the Company held a conference call with analysts and investors. Two days later, on November 29, 2007, the Company filed a Form 8-K with the SEC detailing the call. In particular, the Company referenced the economic climate and its expected effect on Advanta However, the Company created the impression that all current and future hardship was due to external circumstances, and not due to specific actions and policies that Company had undertaken. The Company's Form 8-K stated·

With respect to fiscal year 2007, management addressed the impact of the current economic environment on business performance Specifically, management addressed, among other things, the following items during the conference call:

Since the Company announced third quarter 2007 earnings results, delinquency buckets have been negatively impacted as a higher percentage of customers than anticipated have rolled into delinquency and a lower percentage of delinquent customers have made payments. Management indicated that, consistent with what other credit card issuers are anticipating, the

Company now believes that these higher delinquency rates, and therefore charge-off trends, will continue for some time before they improve.

The Company indicated that if current entry rates and collections rates for delinquent customers continue for the rest of this year, or get modestly worse, it expects 2007 earnings per share from continuing operations to be between $1.90 and $2.00 per combined diluted share. This is lower than the Company's previous guidance range of $2.10 and $2.17 per combined diluted share. Management further noted that if there were more than modest worsening in delinquency entry rates and/or collections rates, then earnings per share would be less.

The Company indicated that, based on current collection rates and recovery expectations, the managed net charge-off rate is expected to be about 3.75% for the 2007 fiscal year, as compared to its most recent estimate of 3.6% to 3.7% for the year. Based on the same assumptions, the owned net charge-off rate is expected to be about 3.4% for the 2007 fiscal year, as compared to the Company's most recent estimate of 3.25% to 3.35% for the year.

The Company confirmed that it is on track with its previously announced guidance for receivable and transaction volume growth for 2007

The Company expects to acquire approximately 330,000 new customers in fiscal year 2007. The Company indicated that its marketing campaigns continue to do well and that management is pleased with the results of its marketing investments.

The Company noted that it has not factored anything into its 2007 earnings guidance range related to the Visa/American Express litigation settlement since it is still being evaluated The Company discussed this litigation settlement and its potential impact on the Company's financial results in a Current Report on Form 8-K filed with the SEC on November 16, 2007.

With respect to expectations for 2008, the Company stated that it would not be providing guidance for earnings or other 2008 financial measures at this time. Management commented that it believes it is prudent not to give guidance for 2008 at this time given the degree of volatility and uncertainty in the current economic environment. Management stated that the Company expects to be profitable and to continue to pay its quarterly dividend at its present level.

Following the Company's prepared remarks, there was a question and answer session with institutional investors and analysts. Management responded to questions about various items, including the following:

With respect to credit trends in the current portfolio, management indicated that the deteriorating credit trends were not limited to any specific segments of the portfolio and that the trends are being experienced throughout the portfolio

There were questions about various aspects of the Company's business, plans and expectations, including, among others, questions about plans for managing growth, marketing

campaigns, expectations for credit quality and the possibility of authorizing a stock buyback. The Company reiterated that it would not give guidance for 2008 and, consistent with that, management declined to speculate or offer predictions in any of these areas.

However, management indicated that it plans to continue to monitor all aspects of the business, including these areas, and to evaluate opportunities and make prudent decisions that are focused on the long-term health of the business.

76 The Company's Class B common stock closed at $11 06 per share and Advanta Class A stock closed at $10.08 per share on November 27, 2007, $9.52 per share and $8.86 per share, respectively, on November 28, 2007 and $9 51 and $8.74 per share, respectively, on November 29, 2007.

77 On January 30, 2008, Advanta reported its financial results for the fourth quarter and full year 2007. The Company reported full year 2007 net income from continuing operations of $71 million, or $1 61 per diluted share for Class A and Class B share combined, and fourth quarter earnings of $0.17 per share. The Company highlighted its disappointment with the economic climate, yet gave no indication that it had acted improperly. The Company stated:

> During the year, the Company acquired approximately 335,000 new customers Managed receivables grew approximately 22% to $6 3 billion in 2007 Owned receivables were $1.0 billion at year end, approximately 9% lower than December 31, 2006 Transaction volume of $14.4 billion for 2007 increased 17% from the prior year. For the full year, the managed net credit loss rate was 3 71% and the owned net credit loss rate was 3.39%. These net credit loss rates compare to the 2006 rates of 3.41% and 3.19%, respectively
>
> "Our decision to focus exclusively on the small business market almost 7 years ago has enabled us to build a profitable, sustainable business over the long haul Although we're disappointed with the impact of the current economy on our recent results, we believe the small business market will continue to provide opportunities for us going forward," said Dennis Alter, Chairman and CEO

78 That day, the Company's Class B common stock closed at $9.18 per share and Advanta Class A stock closed at $8.00 per share.

79 On April 30, 2008, the Company reported its financial results for the first quarter of 2008 Advanta reported first quarter net income $18 4 million, or $0.44 per diluted share for Class A and Class B shares combined Additionally, the Company stated.

> Managed and owned net credit losses for the quarter were 6.43% and 6.53%, respectively. Managed receivables ended the quarter at $6.3 billion while owned receivables totaled almost $1.0 billion. New customers added were just over 67,000, and transaction volume was $3.4 billion.
>
> "We are managing the business diligently through this down cycle, with the goal of minimizing risk and improving our results," said Dennis Alter, Chairman and CEO "We have strong liquidity, flexible funding options, and the same determination that has moved us through down cycles over the past six decades "

80. That day, Advanta's Class B common stock closed at $8.78 per share and Advanta Class A stock closed at $7 58 per share

81. On or about July 29, 2008, Advanta reported its financial results for the second quarter of 2008. The Company reported second quarter net income of $4.0 million, or $0.10 per diluted share for Class A and Class B shares combined Additionally, the Company stated

> At the end of the quarter, managed and owned receivables totaled $6 1 billion and $851 million, respectively. Consistent with the Company's prior comments about new customer expectations, the Company added about 26,000 new customers in the quarter. Customer transaction volume totaled $3 5 billion of which almost 90% related to merchandise sales activity
>
> Managed and owned net credit loss rates for the quarter were 8.38% and 8 87%, respectively.
>
> "The quarter's results are obviously not what we would like to see All of us at the company are focused on returning to robust earnings and returns for our shareholders," said Dennis Alter, Chairman and CEO

82 That day, the Company's Class B common stock closed at $7 14 per share and Advanta Class A stock closed at $6.21 per share.

83. On or about October 30, 2008, the Company reported its financial results for the third quarter of 2008. For the third quarter, the Company reported a net loss of $17.6 million, or $0.43 per diluted share for Class A and Class B shares combined. Despite the quarterly loss, Advanta continued to blame the economy, and touted its supposedly strong balance sheet The Company stated:

> Cash and liquid investments totaling $1.8 billion at quarter end or 32% of aggregate owned and securitized receivables.
>
> Advanta Bank Corp total risk-based and Tier 1 capital ratios of 24.5% and 22 3%, respectively. Advanta Corp. equity together with subordinated debt for trust preferred securities to managed receivables of 12.0% and to owned receivables of 92 3%.
>
> Business Cards ending managed receivables of $5.6 billion and owned receivables of $0 7 billion. Business Cards managed net interest yield of 11.46% and owned net interest yield of 8 24% Customer transaction volume of $3 3 billion, 89% of which was merchandise sales volume.
>
> Business Cards managed net credit loss rate of 10.0% and owned net credit loss rate of 10.6%. The reported results do not include an estimated $1.6 million pretax charge for its portion of the recent settlement between Visa and Discover
>
> "This economy has dealt small business owners a tough hand," said Dennis Alter, Chairman and CEO. "Not only are consumers spending less money with them, but their options for funding business inventories and obligations have shrunk. Although this has flowed through to us in the form of rising credit losses, our balance sheet is strong and we continue to manage through this uncertain economy "

84 On this day, the Company's Class B common stock closed at $3 74 per share

85 On or about January 29, 2009, Advanta announced its financial results for the fourth quarter and full year 2008. For the full year, the Company reported a net loss of $43.8 million, or $1 08 per diluted share for Class A and Class B shares combined. For the fourth

quarter, the Company reported a net loss of $46 9 million, or $1.16 per combined diluted share.

Additionally, the Company stated:

> Cash and liquid investments increased by $0.8 billion while deposits grew by $0.5 billion. At year end, cash and liquid investments were 53% of aggregate owned and securitized receivables.
>
> Advanta Bank Corp. total risk-based and Tier 1 capital ratios increased to 38.4% and 35.4%, respectively
>
> Advanta Corp. equity together with subordinated debt for trust preferred securities to managed receivables increased slightly to 12 2% and to owned receivables increased to 120.7%.
>
> The fair value estimates of the Company's retained interests in securitizations decreased by $36.4 million with about two-thirds of the adjustment related to increased market credit spreads that resulted in higher discounts on these assets.
>
> The allowance for receivable losses increased to 20 3% of Business Cards owned receivables at quarter end, after building reserves for credit losses on principal receivables by $11 4 million.
>
> Business Cards ending managed receivables decreased to $5.0 billion with owned receivables decreasing to $0.5 billion.
>
> Business Cards managed net interest yield expanded to 12 45% and owned net interest yield declined to 7 04%.
>
> Customer transaction volume declined to $2.9 billion. Business Cards managed net credit loss rate rose to 12.0% and owned net credit loss rate rose to 14.1%
>
> Business Card operating expenses include a $3.3 million asset impairment charge related to certain acquisition-related software and other assets based on the Company's expectations for future account originations
>
> The consolidated results include the impact of a $2.2 million reserve reduction for the Company's proportionate share of the amounts funded by Visa in Visa's litigation escrow
>
> The Company also announced that it is taking actions in response to the continued economic downturn.

The Board of Directors has approved a reduction in the Company's regular quarterly cash dividends. The new rates will apply to its next dividend declaration. As a result of this action, future quarterly dividends declared for its Class A Common Stock will decrease from 17.71 cents to 2 cents per share and future quarterly dividends declared for its Class B Common Stock will decrease from 21.25 cents to 2.5 cents per share.

In addition, the Company is taking steps to significantly reduce operating expenses to a level that is more commensurate with its anticipated portfolio size and scale of business activities in 2009. Cost reductions will result from actions such as slowing marketing activities, structuring the organization to be more efficient and reducing staffing levels beyond those previously announced related to its offshoring initiative. Flowing from this, the Company will have approximately 300 fewer employees and operating expenses for 2009 are expected to be between 20% and 25% lower than those reported for 2008.

86 On this day, the Company's Class B common stock closed at $0.70 per share and Advanta Class A stock closed at $1.96 per share.

87 On or about April 30, 2009, the Company reported its first quarter 2009 financial results For the quarter, the Company reported a net loss of $75.9 million, or $1.87 per diluted Class B share. Additionally, the Company stated:

Noteworthy activity and details for the first quarter, compared to the fourth quarter of 2008, include·

Cash and liquid investments totaled $2.2 billion at the end of the quarter or 47% of owned and securitized receivables.

Advanta Bank Corp. total risk-based and Tier 1 capital ratios of 21 8% and 19 7%, respectively, continue to be significantly above required ratios to be considered well capitalized.

Advanta Corp. equity together with subordinated debt for trust preferred securities to managed receivables decreased slightly to 11 3% and to owned receivables decreased to 96 6% A retained interests in securitizations valuation charge of $17 6 million was recorded to increase the discount rates on these assets associated with recent trust performance trends and downgrades.

The allowance for receivable losses increased to 21.6% of Business Cards owned receivables at quarter end, after building reserves for credit losses on principal receivables by $14.6 million.

Business Cards ending managed receivables decreased to $4.7 billion with owned receivables increasing to $549 million.

Business Cards managed net interest yield declined to 11.19% and owned net interest yield declined to 1.62%.

Customer transaction volume declined to $2.5 billion Business Cards managed net credit loss rate rose to 15.9% and the owned net credit loss rate rose to 20.1%. The managed and owned 12 month lagged net credit loss rates were 12.2% and 10 7%, respectively.

Also, Advanta Capital Trust I has $100 million of trust preferred securities which are backed by the Company's junior subordinated long term debt. The Company expects to make a tender offer for all of the trust preferred securities. The securities have recently traded at under 10% of face value and the tender price will be related to those trades The Company's purchase and retirement of these securities would increase the Company's stockholders' equity and reduce future expenses. The terms of the trust preferred securities provide that semi-annual payments on the securities can be deferred at the Company's election and that no payments of dividends can be made on the Company's common or preferred stocks during the deferral period. The Company has elected to defer payments on the trust preferred securities and to suspend payment of common and preferred dividends, which were largely curtailed earlier in the year

88 On this day, the Company's Class B common stock closed at $1.17 per share and Advanta Class A stock closed at $0 78 per share

89 On May 11, 2009, Advanta issued a press release entitled "Advanta Announces Plans to Maximize Capital and Dramatically Reduce Risk." The press release stated

> Advanta Corp (NASDAQ. ADVNB; ADVNA) today announced its Board of Directors has approved a plans designed to dramatically limit the Company's credit loss exposure and maximize its capital and its liquidity measures
>
> As a result of the deteriorating economic environment, the Company would expect the negative performance trends, if not abated with this plans, to result in losses that would erode its capital. Therefore, the Company envisions the following.

The Company's securitization trust will go into early amortization based on May's performance. Early amortization will officially be determined on June 10.

Since the securitizations will not be permitted to fund new receivables after June 10, the Company will shut down all credit card accounts to future use at that time. Neither Advanta Bank Corp nor any other Advanta-related entity will fund activity on its balance sheet from the accounts. Therefore, the Company will not take any off-balance sheet receivables onto its balance sheet. Shutting down the accounts will not accelerate payments required from cardholders on existing balances.

In early amortization almost all of the receipts from cardholders are required to be paid to the securitization trust's noteholders and to the Company's seller's interest (its on-balance sheet share of the receivables). The securitization trust's notes are obligations of the trust and not of any Advanta entity The Company is only at risk with respect to the off-balance sheet obligations to the extent of its residual interests.

Advanta Bank Corp will use up to $1.4 billion to make a cash tender offer for Advanta Business Card Master Trust Class A senior notes at a price between 65% and 75% of their face value in a modified Dutch Auction

Advanta Corp. will make a cash tender offer for any or all of the $100 million of 8 99% Capital Securities issued by Advanta Capital Trust I at 20% of their face value

The Company will continue to service and collect the securitization trust's credit card receivables and its own receivables This, along with taking appropriate actions to adjust expenses to be consistent with these activities, will be the Company's first priority. The Company will be free to do new business in the future to the extent it chooses, but it does not expect to do so in a significant way until implementation of the plans is well under way

Advanta Corp 's senior retail investment notes are unlimited obligations of Advanta Corp. and will remain outstanding and continue to be issued in the ordinary course. The benefits of the plans to the Company are designed to benefit the senior retail note program holders as well as the Company's shareholders.

The Company previously disclosed that it expected to use tools at its disposal to avoid early amortization of the securitization trust unless it concluded there was a better plans to maximize its capital and liquidity. The Company has now concluded that the plans outlined here is that better plans.

90. On this day, the Company's Class B common stock closed at $1.55 per share and Advanta Class A stock closed at $1 13 per share.

91. The next day, on May 12, 2009, Bloomberg.com published an article entitled "Advanta's Card-Lending Shutdown May Imperil Customers." The article stated:

> Advanta Corp , the credit-card issuer for small businesses, may leave 1 million customers scrounging to find new lenders and debt holders facing losses of 35 percent after the company shut down accounts to preserve capital.
>
> Advanta will cease lending June 10 after uncollectible debt reached 20 percent as of March 31, according to a statement and filings yesterday by the Spring House, Pennsylvania-based firm. The lender earmarked $1.4 billion to buy back securitized card loans with offers of 65 cents to 75 cents on the dollar.
>
> Credit-card company profits suffered as the recession pushed U.S unemployment to 8 9 percent in April. Defaults on cards historically track the jobless rate, and analysts have been concerned that the industry's average for bad loans would breach 10 percent and set a record. Advanta decided to cut off customers after "charge-offs" rose to twice that threshold, from 9.6 percent at year-end.
>
> "The question is how many business owners depend solely on their Advanta credit card," said William Dunkelberg, chief economist at the National Federation of Independent Business While most probably have other sources of credit, self-employed entrepreneurs may have trouble getting a new card, he said "Credit is harder to find than it's ever been in this expansion," said Dunkelberg, whose biography lists him as a former Advanta director.
>
> Stock Declines
>
> The company's A-shares dropped 28 cents, or 25 percent, to 85 cents at 4 p.m. in Nasdaq Stock Market trading. Advanta, which had $2.4 billion in deposits as of March 31, reported three consecutive quarterly losses and its shares have plunged from about $30 in June 2007 The recession affected Advanta's customers across the country, Chief Financial Officer Philip Browne has said.
>
> "We'll be shutting down accounts for future transaction activities, but many of the customers will maintain balances and pay us off over time," Browne said yesterday in a telephone interview. "We'll have to service and collect on that, and that will be the first order of business for the company."

More than 90 percent of Advanta's small business customers will have "adequate" access to alternative credit after the company halts lending, Browne said.

Citing the recession, Advanta said it's planning to "maximize capital and dramatically reduce risk." While the company has "no indication" if debt investors will accept the buyback offer, the price is "relatively consistent with recent trading levels of the bonds," Browne said.

No Public Actions

Advanta's credit-card unit is chartered and regulated in Utah and has "no corrective actions that are public," said G. Edward Leary, the state commissioner of financial institutions. He declined to say whether any non-public actions were taken against the company.

This would be the first so-called early amortization of a trust since 2003, according to JPMorgan Chase & Co. analyst Christopher Flanagan

"Early amortization has been viewed as a catastrophic event for issuers," Scott Valentin, an analyst at Friedman Billings Ramsey & Co., said today in a research note Advanta's filing said that the charge-off rate for uncollectible loans may increase after accounts are closed. Valentin said that's likely because "the cards have substantially less utility to cardholders," cutting the incentive to keep up with payments.

"They're hoping they can stay alive barely until the environment changes," said David Robertson, president of the Nilson Report, the Carpinteria, California-based industry newsletter This is "a big sign that the credit-card industry has problems that are going to be around for several years "

Workforce Slashed

Advanta was the 11th-biggest U.S credit-card issuer at the end of 2008 with about $5 billion in outstanding balances, and the only major lender focused on small business borrowers, Robertson said. In the first quarter the company slashed the workforce by about 300 employees, or 36 percent, from 841 as of Dec. 31, 2008 Calls inquiring about the future of current employees weren't returned.

The company's woes aren't likely to spread to other asset-backed issuers, said JPMorgan's Flanagan. Advanta's "precarious liquidity and capital position" make the lender more vulnerable to deteriorating credit than its stronger counterparts, Flanagan said in a May 8 report.

Credit-card companies can take steps to protect investors and avoid having to wind down trusts, including removing overdue accounts from the pool and increasing the cash cushion that comes with the securities to shield bondholders from losses. Bank of America Corp., Citigroup Inc., General Electric Co. and JPMorgan have already taken steps to protect their securitized assets as delinquencies surge, according to JPMorgan data.

Needs Capital

Advanta relied on the asset-backed securities market for funding, and has been unable to raise cash through securitization since June 2008, according to Bloomberg data. It is shut out of the Federal Reserve's Term Asset-Backed Securities Loan Facility, or TALF, because of ratings cuts on its bonds.

Credit card-backed debt eligible for purchase with TALF loans must be rated AAA Moody's Investors Service has assigned "junk" ratings to Advanta's senior unsecured and subordinated debt. The trust preferred securities rating of Advanta Capital Trust I was cut to C from Caa3 in April by Moody's, citing a "high degree of uncertainty" that investors will get repaid because of Advanta's "weak financial condition "

Today, Standard & Poor's cut its rating on Advanta to CC from CCC and assigned a negative outlook to the company.

92. That day, Advanta's Class B common stock closed at $1.09 per share and Advanta Class A stock closed at $0 85 per share.

93. On June 8, 2009, Advanta issued a press release entitled "Advanta Announces Termination of Its Cash Tender Offer for Class A Senior Notes." The press release stated·

Advanta Corp (NASDAQ ADVNB; ADVNA) today announced that Advanta Bank Corp (the "Bank') has terminated its previously announced cash tender offer for up to $1 4 billion of Advanta Business Card Master Trust's Class A senior notes (the "ABS Notes Tender Offer") which was made on May 11, 2009 The Bank is terminating the ABS Notes Tender Offer because it recently has been determined that a regulatory condition to the tender offer will not be satisfied. The tender offer consideration will not be paid or become payable to senior note asset-backed holders who validly tendered their notes in connection with this offer. As promptly as practical, all tendered notes will be returned to the holders thereof. This termination has no impact on the Company's ability to proceed with its previously announced cash tender offer for any and all of the $100 million of outstanding Advanta Capital Trust I 8.99% Capital Securities.

As a result of the termination of the ABS Notes Tender Offer, the Company will not be able to complete all of the components of the plans it previously announced which together were intended to limit the Company's credit loss exposure and maximize its capital and its liquidity measures. Although the Company does not expect to fully realize its objectives of maximizing its capital and its liquidity measures, it still expects to realize the limitation of its credit loss exposure This is expected to be achieved as a result of early amortization of the Company's securitization trust, which is anticipated to begin this month, and the closing of all customer accounts to future use that was effective May 30, 2009.

In addition, the Company expects the Bank to enter into an agreement with its regulators in the near term about its operations.

94. On this day, Advanta's Class B common stock closed at $0.81 per share and Advanta Class A stock closed at $0.82 per share The next day, June 9, 2009, Advanta's Class B common stock closed at $0 7184 per share and Advanta Class A stock closed at $0 64 per share

95. On or about June 24, 2009, Advanta entered into a Stipulation and Consent to the Issuance of an Order to Cease and Desist with counsel for the Federal Deposit Insurance Corporation ("FDIC") The FDIC had served on Advanta a Notice of Charges and of Hearing that detailed unsafe or unsound banking practices The FDIC filed its Order to Cease and Desist on June 30, 2009.

96 On July 1, 2009, Bloomberg com published an articled entitled "Advanta Faces Deposit Halt, $35 Million Restitution." This article provided detail on the Cease and Desist Order issued by the FDIC. The article stated.

Advanta Corp., the credit-card lender that shut down its small-business accounts, was ordered by regulators to plan on halting bank operations and pay customers $35 million because of allegedly "unsound" practices

Advanta must give the Federal Deposit Insurance Corp. a plan that "provides for the termination of the bank's deposit- taking operations and deposit insurance after the bank's deposits are repaid in full" within 30 days of yesterday, according to a federal filing today by the Spring House, Pennsylvania-based company

The lender cut off almost 1 million customer credit-card accounts in May after defaults surged to 20 percent at the end of the first quarter Advanta's bank unit held $2 39 billion in deposits as of March 31. Repaying depositors could take several years and Advanta is allowed to submit a plans to continue handling deposits during that period, the filing said.

Customer accounts remain fully insured and the company's ability to service its managed credit-card accounts and receivables isn't affected, the filing said. A call to Advanta spokeswoman Amy Holderer wasn't immediately returned. The FDIC ordered Advanta to cease "unsafe or unsound banking practices" tied to marketing of cash-back reward programs and pricing strategies on business cards. Restitution may cost $14 million for customers affected by the cash-back program and $21 million for the pricing strategy dispute, the filing said. The order included a $150,000 penalty.

Advanta Agrees

The company said it consented to the order and didn't admit wrongdoing. Advanta accounted for the cash-back restitution in last year's third quarter and expects another charge in this year's second quarter to cover the pricing strategy compensation. The bank must begin making restitution payments within 60 days of June 30

Regulators restricted Advanta's use of cash assets, payment of dividends and transactions that would "materially alter the bank's balance sheet composition and taking of brokered deposits," the company said The cease and desist order, effective June 30, gives Advanta 30 days to submit a plans to "achieve and maintain sufficient capital."

The company has posted three consecutive quarterly losses totaling $142 million, more money than it made in the preceding eight quarters combined. Advanta in January cut its dividend to 2 cents and fired 300 employees, and in April reported that 12 percent of its owned credit-card receivables were 30 or more days delinquent.

Advanta fell by less than a cent to 42 cents at 4 15 p m New York time in Nasdaq Stock Market trading. The stock has plunged more than 90 percent in the past 12 months.

97 On this day, the Company's Class B common stock closed at $0 39 per share and Advanta Class A stock closed at $0.422 per share.

98. The next day, July 2, 2009, the FDIC announced that it had reached a settlement with Advanta for deceptive and unfair business practices. The related press release stated:

> Today the Federal Deposit Insurance Corporation (FDIC) announced a settlement with Advanta Bank Corporation, Draper, Utah (Advanta), for deceptive and unfair practices in violation of section 5 of the Federal Trade Commission (FTC) Act.
>
> Under the settlement, Advanta has agreed to an order to cease and desist, to pay restitution, and to pay a civil money penalty in the amount of $150,000. In addition, restitution of approximately $14 million will be paid to businesses that used Advanta's Cash Back Reward program and $21 million to accountholders whose accounts were repriced In agreeing to the issuance of the order, Advanta did not admit or deny any liability.
>
> Advanta's "Cash Back Reward" program advertised a percentage of cash back on certain purchases by business credit card accountholders. Due to the tiered structure of the cash back payments, however, the advertised percentage was not available for all purchases. As a result, it was effectively impossible to earn the stated percentage of cash back reward payments. The FDIC concluded that the Bank's solicitations were likely to mislead a reasonable customer and that the representations were material and that therefore, the Bank engaged in a pattern of deceptive acts or practices in violation of Section 5
>
> In addition, numerous complaints were filed regarding Advanta's substantial annual percentage rate (APR) increases on the accounts of small business owners and professionals, who had neither exceeded their credit limits nor were delinquent in making payments on their accounts. The FDIC determined that Advanta's rate increases had been implemented in an unfair manner, that Advanta failed to adequately notify accountholders that their APR had increased, the amount of the increase, the reason for the increase, the procedures to opt-out and the consequences of an opt-out. The repricing caused substantial injury to customers, withheld and/or provided inadequate information that could have enabled the customer to reasonably avoid the injury, and provided no benefit to the customer or competition.
>
> "The Advanta settlement demonstrates the FDIC's commitment to having banks take responsibility for ensuring that they do not engage in unfair or deceptive acts or practices in connection with the banking products and services they offer," said FDIC Board member Thomas J. Curry. "Any person doing business with an insured depository institution can expect to be treated fairly, and any such entity that engages in unfair or deceptive acts or practices should be aware that the FDIC will pursue such practices with all of the legal authority at our disposal."

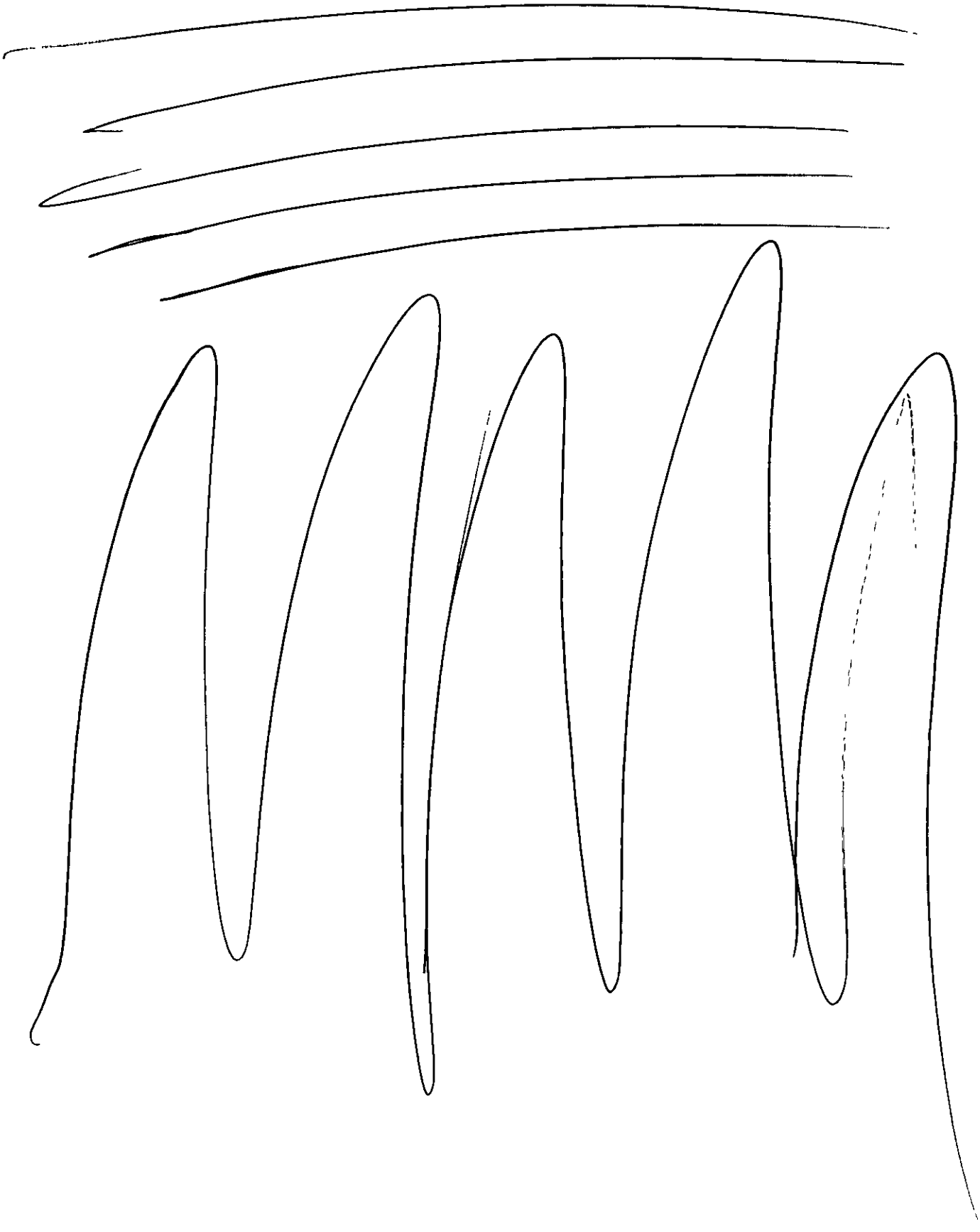
99 On this day, Advanta's Class B common stock closed at $0.39 per share and Advanta Class A stock closed at $0.42 per share.

100. As described further herein, Defendants, as fiduciaries of the Plans were obligated to continuously ensure that the Plans' investment alternatives—including Advanta common stock—were prudent investments of the Plans' assets However, Defendants failed to do so—to the substantial detriment of the Plans and its participants.

101 Since the beginning of the Class Period through the present, the Plans' imprudent investments in Advanta common stock have been decimated

102. Principle indicators of investment risk typically relied upon by fiduciaries and investment professionals are the credit ratings issued by national credit rating agencies Standard & Poor, Moody's and Fitch.

103 At the start of the Class Period all of the national credit agencies had rated Advanta below "investment grade," a high risk, speculative investment. The national credit rating agencies then repeatedly further downgraded Advanta over the course of the Class Period - evidencing an increasing risk and higher probability of default - as follows:



Credit Agency Rating Chart

Moody's	S&P	Fitch	
Aaa	AAA	AAA	Prime
Aa1	AA+	AA+	High Investment Grade
Aa2	AA	AA	
Aa3	AA-	AA-	
A1	A+	A+	Upper Medium Investment Grade
A2	A	A	
A3	A-	A-	
Baa1	BBB+	BBB+	Lower Medium Investment Grade
Baa2	BBB	BBB	
Baa3	BBB-	BBB-	
Ba1	BB+	BB+	Non Investment grade Speculative
Ba2	BB	BB	
Ba3	BB-	BB-	
B1	B+	B+	Highly Speculative
B2	B	B	
B3	B-	B-	
Caa1	CCC+	CCC	Substantial risks
Caa2	CCC		Extremely speculative
Caa3	CCC-		In default with little prospect for recovery
Ca	CC		
/	D	DDD	In default

Advanta Credit Rating Downgrades

Moody's

Senior Secured Debt
- 10/31/06 rated B1
- 4/20/07 raised to Ba3
- 12/12/08 cut to B1
- 1/30/09 cut to Caa1
- 4/30/09 cut to Caa3

Subordinated Debt
- 10/31/06 rated B3
- 4/20/07 raised to B2
- 12/12/08 cut to B3
- 1/30/09 cut to Caa3
- 4/30/09 cut to Ca

S&P

Long Term Foreign Issuer Credit
- 10/31/06 rated BB-
- 10/30/08 cut to B+
- 1/30/09 cut to B-
- 4/30/09 cut to CCC
- 5/12/09 cut to CC
- 7/17/09 cut to WR*

Fitch

Long Term Issuer Default Rating
- 10/31/06 rated BB-
- 4/30/09 cut to CC
- 6/10/09 cut to C
- 6/16/09 cut to RD**
- 10/23/09 cut to WD*

* "WR" and "WD" denote a withdrawn rating

** "RD" denotes a partial default

104. Thus, throughout the Class Period, Advanta stock was highly risky and consistently went from bad to worse.

Defendants Should Have Known That Advanta Stock Was an Imprudent Investment for the Plans

105. Because of their high ranking positions within the Company and/or their status as the Plans' fiduciaries, Defendants knew or at least should have known of the existence of the above-mentioned problems.

106. For example, Defendants should have known that, due to the Company's exposure to losses stemming from the problems described above, the Company stock price would suffer and devastate Participants' retirement investments once the truth became known. Yet, Defendants failed to protect the Plans and their participants from foreseeable losses.

107 Rather, during the Class Period, despite its obligation to prudently manage the Plans' assets—including the Plans' heavy investment in Advanta stock—the Company and Company insiders misrepresented the Company's true financial condition, thereby precluding Plan participants from properly assessing the prudence of investing in Company stock.

108 As a result of Defendants' role in creating and maintaining public misconceptions concerning the true financial health of the Company, any generalized warnings of market and diversification risks that Defendants made to the Plans' participants regarding the Plans' investment in Advanta stock did not effectively inform the Plans' participants of the past, immediate, and future dangers of investing in Company stock.

109. In addition, upon information and belief, Defendants failed to adequately review the performance of the other fiduciaries of the Plans to ensure that they were fulfilling their fiduciary duties under the Plans and ERISA Defendants also failed to conduct an appropriate investigation into whether Advanta stock was a prudent investment for the Plans and, in connection therewith, failed to provide the Plans' participants with information regarding Advanta's problems so that participants—to the extent that they were permitted—could make informed decisions regarding whether to include Advanta stock in their Plan accounts.

110. An adequate (or even cursory) investigation by Defendants would have revealed to a reasonable fiduciary that investment by the Plans in Advanta stock was clearly imprudent. A prudent fiduciary acting under similar circumstances would have acted to protect participants against unnecessary losses, and would have made different investment decisions.

111. Because Defendants should have known that Advanta was not a prudent investment option for the Plans, they had an obligation to protect the Plans and their participants from unreasonable and entirely predictable losses incurred as a result of the Plans' investment in Advanta stock

112. Defendants had available to them several different options for satisfying this duty, including, among other things· making appropriate public disclosures as necessary; divesting the Plans of Advanta stock, discontinuing further contributions to and/or investment in Advanta stock under the Plans; consulting independent fiduciariesregarding appropriate measures to take in order to prudently and loyally serve the participants of the Plans, and/or resigning as fiduciaries of the Plans to the extent that as a result of their employment by Advanta they could

not loyally serve the Plans and its participants in connection with the Plans' acquisition and holding of Advanta stock.

113 Despite the availability of these and other options, Defendants failed to take adequate action to protect participants from losses resulting from the Plans' investment in Advanta stock. In fact, Defendants continued to invest and to allow investment of the Plans' assets in Company stock even as Advanta's problems came to light.

114. As a result of the enormous erosion of the value of Company stock, the Plans' participants suffered unnecessary and unacceptable losses.

CAUSES OF ACTION

A. Count I: Failure to Prudently and Loyally Manage the Plans and Assets of the Plans

115 Plaintiff incorporates by reference the paragraphs above.

116. This Count alleges fiduciary breach against all Defendants (the "Prudence Defendants).

117 As alleged above, during the Class Period, the Prudence Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S C. § 1102(a)(1), or de facto fiduciaries within the meaning of ERISA § 3(21)(A), 29 U S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence

118. As alleged above, the scope of the fiduciary duties and responsibilities of the Prudence Defendants included managing the assets of the Plans for the sole and exclusive benefit of the Plans' Participants and beneficiaries and with the care, skill, diligence, and prudence required by ERISA. The Prudence Defendants were directly responsible for, among other things,

selecting prudent investment options, eliminating imprudent options and directing the trustee regarding the same, evaluating the merits of the Plans' investments on an ongoing basis, and taking all necessary steps to ensure that the Plans' assets were at all times invested prudently.

119. Yet, contrary to their duties and obligations under the Plans' documents and ERISA, the Prudence Defendants failed to loyally and prudently manage the assets of the Plans. Specifically, during the Class Period, these Defendants knew or should have known that the Fund was no longer a suitable and appropriate investment for the Plans, but was, instead, an imprudent investment in light of the Company's fundamental weaknesses and the excessive risk associated with an investment in Advanta stock.

120. Nonetheless, during the Class Period, these Defendants failed to act to protect the Plans and their participants and inter alia continued to permit the Plans to offer the Fund as an investment option for Employee and Matching Contributions and continued to permit the Plans to invest those contributions in the Fund and permit the Fund to invest in Company stock. They did so despite the fact that they knew or should have known that the prices of Fund and Company stock shares were excessively risky

121 The Prudence Defendants were obliged to prudently and loyally manage all of the Plans' assets. However, their duties of prudence and loyalty were especially significant with respect to Company stock because: (a) company stock is a particularly risky and volatile investment, even in the absence of company misconduct; and (b) Participants tend to underestimate the likely risk and overestimate the likely return of investment in company stock

122. The Prudence Defendants had a duty to follow a regular, appropriate systematic procedure to evaluate the prudence of investing in the Fund, but either had no such procedure or

failed to follow it Moreover, they failed to conduct and act on the results of an appropriate investigation of the merits of continued investment in the Fund. Such an investigation would have revealed to a reasonably prudent fiduciary the imprudence of continuing to make and maintain investment in the Fund under these circumstances.

123 The Prudence Defendants breached their fiduciary duty respecting the Plans' investment in Company stock described above, under the circumstances alleged herein, in that a prudent fiduciary acting under similar circumstances would have made different investment decisions.

124 The Prudence Defendants were obligated to discharge their duties with respect to the Plans with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

125. According to United States Department of Labor ("DOL") regulations and case law interpreting this statutory provision, a fiduciary's investment or investment course of action is prudent if (a) he has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and (b) he has acted accordingly.

126. According to DOL regulations, "appropriate consideration" in this context includes, but is not necessarily limited to:

(a) A determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action; and

(b) Consideration of the following factors as they relate to such portion of the portfolio:

(i) The composition of the portfolio with regard to diversification;

(ii) The liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan, and

(iii) The projected return of the portfolio relative to the funding objectives of the plan

127 Given the conduct of the Company as described above, the Prudence Defendants could not possibly have acted prudently when they continued to invest the Plans' assets in Company stock because, among other reasons:

(a) The Prudence Defendants knew of and/or failed to investigate the failures of and dangers to the Company as alleged above; and

(b) The risk and volatility associated with the investment in Company stock during the Class Period was by far above and beyond the normal, acceptable risk associated with investment in company stock.

116 This abnormal investment risk could not have been known by the Plans' Participants, and the Prudence Defendants knew that it was unknown to them, as it was to the market generally, because the fiduciaries never disclosed it

128. Knowing of this extraordinary risk, and knowing the Participants did not know it, and given the volatility in the Company's stock the Prudence Defendants had a duty to avoid permitting the Plans or any Participant from investing the Plans' assets in the Fund or Company stock.

129. Further, knowing that the Plans were not adequately diversified, but were heavily invested in Company stock, the Prudence Defendants had a heightened responsibility to divest the Plans of Company stock if it became or remained imprudent.

130 The Prudence Defendants breached their fiduciary duties by, inter alia, failing to engage appropriate independent advisors who could make independent judgments concerning the Plans' investment in the Company, failing to notify appropriate federal agencies, including the DOL, of the facts and circumstances that made Company stock an unsuitable investment for the Plans, failing to take such other steps as were necessary to ensure that Participants' interests were loyally and prudently served, with respect to each of these above failures, doing so in order to avoid adversely impacting their own compensation or drawing attention to the Company's condition and inappropriate practices; and by otherwise placing their own and the Company's interests above the interests of the Participants with respect to the Plans' investment in Company stock

131. As a consequence of the Prudence Defendants' breaches of fiduciary duty alleged in this Count, the Plans suffered tremendous losses. If the Prudence Defendants had discharged

their fiduciary duties to prudently invest the Plans' assets, the losses suffered by the Plans would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plans, and indirectly Plaintiff and the other Class members, lost millions of dollars of retirement savings.

132. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and (a)(3), the Prudence Defendants are liable to restore the losses to the Plans caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

B. Count II: Failure to Monitor Fiduciaries

133. Plaintiff incorporates by reference the allegations above

134 This Count alleges fiduciary breach against the Alter and the other Board Members (the "Monitoring Defendants").

135. As alleged above, upon information and belief, during the Class Period the Monitoring Defendants were a de facto fiduciary within the meaning of ERISA § 3(21)(A), 29 U.S C § 1002(21)(A). Thus, he was bound by the duties of loyalty, exclusive purpose, and prudence

136. As alleged above, the scope of the fiduciary responsibilities of the Monitoring Defendants included the responsibility to appoint, remove, and, thus, monitor the performance of the Committee Members.

137 Under ERISA, a monitoring fiduciary must ensure that monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and

holding of a plan's assets, and must take prompt and effective action to protect the plan and participants when they are not.

138. The monitoring duty further requires that appointing fiduciaries have procedures in place so that on an ongoing basis they may review and evaluate whether the "hands-on" fiduciaries are doing an adequate job (for example, by requiring periodic reports on their work and the plan's performance, and by ensuring that they have a prudent process for obtaining the information and resources they need). In the absence of a sensible process for monitoring their appointees, the appointing fiduciaries would have no basis for prudently concluding that their appointees were faithfully and effectively performing their obligations to the plan's participants or for deciding whether to retain or remove them.

139. Furthermore, a monitoring fiduciary must provide the monitored fiduciaries with complete and accurate information in their possession that they know or reasonably should know that the monitored fiduciaries must have in order to prudently manage the plan and the plan's assets, or that may have an extreme impact on the plan and the fiduciaries' investment decisions regarding the plan.

140. The Monitoring Defendants breached their fiduciary monitoring duties by, among other things:

(a) failing, at least with respect to the Plans' investment in Company stock, to properly monitor their appointees, to properly evaluate their performance, or to have any proper system in place for doing so, and standing idly by as the Plans suffered enormous losses as a result of appointees' imprudent actions and inaction with respect to Company stock;

(b) failing to ensure that the monitored fiduciaries appreciated the true extent of Company's inappropriate business practices, and the likely impact of such practices on the value of the Plans' investment in Company stock;

(c) to the extent any appointee lacked such information, failing to provide complete and accurate information to all of their appointees such that they could make sufficiently informed fiduciary decisions with respect to the Plans' assets and, in particular, the Plans' investment in the Fund, and

(d) failing to remove appointees whose performance was inadequate in that they continued to permit the Plans to make and maintain investments in the Fund despite the practices that rendered Company stock an imprudent investment during the Class Period

141 As a consequence of the Monitoring Defendants' breaches of fiduciary duty, the Plans suffered tremendous losses. If they had discharged their fiduciary monitoring duties as described above, the losses suffered by the Plans would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plans and indirectly Plaintiff and the other Class members, lost millions of dollars of retirement savings.

142 Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and (a)(3), the Monitoring Defendants are liable to restore the losses to the Plans caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate

C. Count III: Co-Fiduciary Liability

143 Plaintiff incorporates by reference the allegations above

144. This Count alleges co-fiduciary liability against all Defendants (the "Co-Fiduciary Defendants").

145. As alleged above, during the Class Period the Co-Fiduciary Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or de facto fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence

146. As alleged above, ERISA § 405(a), 29 U S C. § 1105(a), imposes liability on a fiduciary, in addition to any liability which he may have under any other provision, for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if he knows of a breach and fails to remedy it, knowingly participates in a breach, or enables a breach. The Co-Fiduciary Defendants breached all three provisions.

147. Knowledge of a Breach and Failure to Remedy ERISA § 405(a)(3), 29 U.S.C. § 1105(a)(3), imposes co-fiduciary liability on a fiduciary for a fiduciary breach by another fiduciary if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach Upon information and belief, each Defendant knew of the breaches by the other fiduciaries and made no efforts, much less reasonable ones, to remedy those breaches. In particular, they did not communicate their knowledge of the Company's improper activity to the other fiduciaries

148. In particular, because Alter knew of the Company's failures and inappropriate business practices, he also knew that the Prudence Defendants were breaching their duties by continuing to invest in Company stock. Yet, he failed to undertake any effort to remedy these breaches and, instead, compounded them by downplaying the significance of the Company's

failed and inappropriate business practices and obfuscating the risk that the practices posed to the Company, and, thus, to the Plans.

149 Knowing Participation in a Breach. ERISA § 405(a)(1), 29 U S.C. § 1105(a)(1), imposes liability on a fiduciary for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach. Alter knowingly participated in the breaches of the Prudence Defendants because, as alleged above, he had actual knowledge of the facts that rendered Company stock an imprudent retirement investment and, yet, ignoring his oversight responsibilities, permitted the Prudence Defendants to breach their duties Moreover, as alleged above, each of the Defendants participated in the management of the Plans' improper investment in the Fund and, upon information and belief, knowingly participated in the improper management of that investment by the other Defendants

150 Enabling a Breach ERISA § 405(a)(2), 29 U.S.C. § 1105(a)(2), imposes liability on a fiduciary if, by failing to comply with ERISA § 404(a)(1), 29 U S.C. §1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled another fiduciary to commit a breach.

151 Alter's failure to monitor the Prudence Defendants enabled those Defendants to breach their duties

152 As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plans, and indirectly Plaintiff and the Plans' other Participants and beneficiaries, lost millions of dollars of retirement savings.

153. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109, 1132(a)(2) and (a)(3), the Co-Fiduciary Defendants are liable to restore the losses to the Plans caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

CAUSATION

154. The Plans suffered millions of dollars in losses of vested benefits because substantial assets of the Plans were imprudently invested or allowed to be invested by Defendants in the Fund during the Class Period in breach of Defendants' fiduciary duties.

155 Had the Defendants properly discharged their fiduciary and co-fiduciary duties, including the monitoring and removal of fiduciaries who failed to satisfy their ERISA-mandated duties of prudence and loyalty, eliminating Company stock as an investment alternative when it became imprudent, and divesting the Plans of Company stock when maintaining such an investment became imprudent, the Plans would have avoided some or all of the losses that they suffered

REMEDY FOR BREACHES OF FIDUCIARY DUTY

156. The Defendants breached their fiduciary duties in that they knew or should have known the facts as alleged above and, therefore, knew or should have known that the Plans' assets should not have been invested in the Fund during the Class Period.

157 As a consequence of the Defendants' breaches, the Plans suffered a significant loss of vested benefits.

158 ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) authorizes a plan participant to bring a civil action for appropriate relief under ERISA § 409, 29 U S.C § 1109 Section 409 requires

"any person who is a fiduciary.. who breaches any of the.. duties imposed upon fiduciaries ..to make good to such plan any losses to the plan ...". Section 409 also authorizes "such other equitable or remedial relief as the court may deem appropriate .".

159 Plaintiff and the Class and the Plans are therefore entitled to relief from Defendants in the form of·

(a) a monetary payment to the Plans to make good to the Plans the loss of vested benefits to the Plans resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial based on the principles described above, as provided by ERISA § 409(a), 29 U S C § 1109(a);

(b) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as provided by ERISA §§ 409(a), 502(a)(2) and (3), 29 U S.C. §§ 1109(a), 1132(a)(2) and (3),

(c) reasonable attorney fees and expenses, as provided by ERISA § 502(g), 29 U S C § 1132(g), the common fund doctrine, and other applicable law;

(d) taxable costs and interest on these amounts, as provided by law, and

(e) such other legal or equitable relief as may be just and proper, including certification of a class in the event such is deemed required

JURY DEMAND

Plaintiff demands trial by jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for·

A. A Declaration that Defendants, and each of them, have breached their ERISA fiduciary duties to the Plans and participants;

B. An Order compelling Defendants to make good to the Plans all losses to the Plans resulting from Defendants' breaches of their fiduciary duties, including loss of vested benefits to the Plans resulting from imprudent investment of the Plans' assets; to restore to the Plans all profits the Defendants made through use of the Plans' assets; and to restore to the Plans all profits which the participants would have made if Defendants had fulfilled their fiduciary obligations;

C. Imposition of a constructive trust on any amounts by which any Defendant was unjustly enriched at the expense of the Plans as the result of breaches of fiduciary duty;

D An Order enjoining Defendants, and each of them, from any further violations of their ERISA fiduciary obligations,

E. An Order requiring Defendants to appoint one or more independent fiduciaries to participate in the management of the Plans' investment in Company stock;

F. Actual damages in the amount of any losses the Plans suffered, to be allocated among the participants' individual accounts in proportion to the accounts' losses;

G An Order awarding costs pursuant to 29 U S C. § 1132(g),

H An Order awarding attorneys' fees pursuant to the common fund doctrine, 29 U.S C. § 1132(g), and other applicable law; and

I. An Order for equitable restitution and other appropriate equitable and injunctive relief against the Defendants, including class certification if deemed necessary.

DATED: November 16, 2009

Respectfully submitted,

By: JHM 6596

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EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

PAMELA G YATES and JOANN CLAFLIN, Individually And On Behalf Of All Others Similarly Situated, Plaintiffs, vs WILLIAM A ROSOFF, MICHAEL A STOLPER, DENNIS ALTER, MAX BOTEL, DANA BECKER DUNN, RONALD LUBNER, ADVANTA CORP EMPLOYEE SAVINGS PLAN ADMINISTRATIVE COMMITTEE, PAUL JEFFERS, PHILIP M BROWNE, and JOHN DOES 1-20, Defendants.	**Civil Action:** JURY TRIAL DEMANDED CLASS ACTION

CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

Plaintiffs, on behalf of the Advanta Corp Employee Stock Ownership Plan ("Advanta ESOP Plan") and the Advanta Corp Employee Savings Plan (the "Savings Plan") (collectively, the "Plans"), covering substantially all employees of Advanta Corp , and its subsidiaries (collectively "Advanta" or the "Company"), individually and on behalf of all others similarly situated (the "Participants"), allege as follows

INTROUCTION

1 Plaintiffs bring this action on behalf of the Plans and all Participants and beneficiaries in the Plans to recover losses to the Plans for which the fiduciaries of the Plans are liable pursuant to Sections 409 and 502(a)(2) of the Employee Retirement Income Security Act ("ERISA"), 29 U S C §§ 1109 and 1132(a)(2) In addition, under ERISA § 502(a)(3), 29 U S C § 1132(a)(3), Plaintiffs seek other equitable relief from Defendants, including, without limitation,

injunctive relief and, as available under applicable law, a constructive trust, restitution, equitable tracing, and other monetary relief

2 From October 31, 2006 through the present (the "Class Period"), the Plans acquired and held shares of Advanta common stock ("Advanta Stock" or "Company Stock"), which was offered as one of the retirement saving options in the participant contribution component of the Plans

3 Defendants, each having certain responsibilities regarding the management and investment of Plans' assets, breached their fiduciary duties to the Plans and Participants by failing to prudently and loyally manage the Plans' investment in Company Stock by, among other things (i) continuing to offer Company Stock as a retirement saving option, (ii) continuing to acquire and hold shares of Company Stock in the Plans when it was imprudent to do so, (iii) failing to provide complete and accurate information to Participants regarding the Company's financial condition and the prudence of investing in Company Stock, and (iv) maintaining the Plans' pre-existing investment in Company Stock when it was no longer a prudent investment for the Plans

4 As a result of Defendants' fiduciary breaches, as alleged herein, the Plans suffered substantial losses, resulting in the depletion of millions of dollars of the retirement savings and anticipated retirement income of the Plans' Participants Under ERISA, the breaching fiduciaries are obligated to restore to the Plans the losses resulting from their fiduciary breaches

5 Because Plaintiffs' claims apply to the Participants as a whole, and because ERISA authorizes Participants such as Plaintiffs to sue for plan-wide relief for breach of fiduciary duty, Plaintiffs bring this as a class action on behalf of all Participants of the Plans

during the Class Period Plaintiffs also bring this action as a participant seeking plan-wide relief for breach of fiduciary duty on behalf of the Plans

6 In addition, because the information and documents on which Plaintiffs' claims are based are, for the most part, solely in Defendants' possession, certain of Plaintiffs' allegations are by necessity upon information and belief At such time as Plaintiffs have had the opportunity to conduct additional discovery, Plaintiffs will, to the extent necessary and appropriate, amend the Complaint or, if required, seek leave to amend to add such other additional facts as are discovered that further support each of the following Counts below

JURISDICTION AND VENUE

7 ***Subject Matter Jurisdiction.*** This is a civil enforcement action for breach of fiduciary duty brought pursuant to ERISA § 502(a), 29 U S C § 1132(a) This Court has original, exclusive subject matter jurisdiction over this action pursuant to the specific jurisdictional statute for claims of this type, ERISA § 502(e)(l), 29 U S C § 1132(e)(l). In addition, this Court has subject matter jurisdiction pursuant to the general jurisdictional statute for "civil actions arising under the laws of the United States " 28 U S C § 1331

8 ***Personal Jurisdiction*** ERISA provides for nation-wide service of process, ERISA § 502(e)(2), 29 U S C § 1132(e)(2) All of Defendants are residents of the United States, and this Court therefore has personal jurisdiction over them This Court also has personal jurisdiction over them pursuant to Fed R Civ P 4(k)(l)(A), because they all would be subject to the jurisdiction of a court of general jurisdiction in this District

9 ***Venue*** Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U S C § 1132(e)(2), because the Plans are administered in this district, some or all of the fiduciary breaches for which relief is sought occurred in this district, and/or some Defendants reside or

maintain their primary place of business in this district

PARTIES

Plaintiffs

10. ***Plaintiff Pamela G. Yates*** ("Yates") is a former Advanta employee and is a participant in the Savings Plan

11 ***Plaintiff Joann Claflin*** ("Claflin") is a former Advanta employee and is a participant in the Savings Plan

The Company

12 ***Non-party Advanta*** was formerly one of the nation's largest issuers of MasterCard and some Visa credit cards to small businesses and professionals in the United States The Company's business credit card accounts provided approved customers with unsecured revolving business credit lines Advanta is headquartered in Spring House, Pennsylvania

13 On November 8, 2009, Advanta filed for bankruptcy relief in the United States Bankruptcy Court in Delaware As a result of Advanta's filing for protection under the Bankruptcy Code, it has not been named as a defendant Plaintiffs, however, reserve the right to add Advanta as a defendant in the event Advanta is denied bankruptcy protection or if it becomes necessary to add the Company at a later date

Defendants

A. Director Defendants

14 ***Defendant William A. Rosoff*** ("Rosoff") was, at all relevant times, Vice Chairman of the Board of Directors (the "Board") and a member of the Corporate Governance Committee of the Board During the Class Period, Defendant Rosoff was a fiduciary within the

meaning of ERISA, because he exercised discretionary authority or discretionary control with respect to the appointment of the Plans fiduciaries and with respect to the management of the Plans, he possessed discretionary authority or discretionary responsibility in the administration of the Plans, and he exercised authority or control with respect to the management of the Plans' assets

15 ***Defendant Michael A. Stolper*** ("Stolper") was, at all relevant times, a member Board and a member of the Audit Committee of the Board During the Class Period, Defendant Stolper was a fiduciary within the meaning of ERISA, because he exercised discretionary authority or discretionary control with respect to the appointment of the Plans fiduciaries and with respect to the management of the Plans, he possessed discretionary authority or discretionary responsibility in the administration of the Plans, and he exercised authority or control with respect to the management of the Plans' assets

16 ***Defendant Dennis Alter*** ("Alter") was, at all relevant times, the Company's Chairman of the Board and Chief Executive Officer ("CFO") During the Class Period, Defendant Alter was a fiduciary within the meaning of ERISA, because he exercised discretionary authority or discretionary control with respect to the appointment of the Plans fiduciaries and with respect to the management of the Plans, he possessed discretionary authority or discretionary responsibility in the administration of the Plans, and he exercised authority or control with respect to the management of the Plans' assets

17 ***Defendant Max Botel*** ("Botel") was, at all relevant times, a member of the Board Defendant Botel was also a member of the Compensation Committee During the Class Period, Defendant Botel was a fiduciary within the meaning of ERISA, because he exercised discretionary authority or discretionary control with respect to the appointment of the Plans

fiduciaries and with respect to the management of the Plans, he possessed discretionary authority or discretionary responsibility in the administration of the Plans, and he exercised authority or control with respect to the management of the Plans' assets

18 ***Defendant Dana Becker Dunn*** ("Dunn") was, at all relevant times, a member of the Board During the Class Period, Defendant Dunn was a fiduciary within the meaning of ERISA, because she exercised discretionary authority or discretionary control with respect to the appointment of the Plans fiduciaries and with respect to the management of the Plans, she possessed discretionary authority or discretionary responsibility in the administration of the Plans, and she exercised authority or control with respect to the management of the Plans' assets

19 ***Defendant Ronald Lubner*** ("Lubner") was, at all relevant times, a member of the Board During the Class Period, Defendant Lubner was a fiduciary within the meaning of ERISA, because he exercised discretionary authority or discretionary control with respect to the appointment of the Plans fiduciaries and with respect to the management of the Plans, he possessed discretionary authority or discretionary responsibility in the administration of the Plans, and he exercised authority or control with respect to the management of the Plans' assets

20 Defendants Rosoff, Stolper, Alter, Botel, Dunn, and Lubner are hereinafter collectively referred to as the "Director Defendants "

B. <u>The Committee Defendants</u>

21 ***Defendant Advanta Corp. Employee Savings Plan Administrative Committee*** ("Committee") The Administrative Committee is comprised of certain Company employees/officers appointed by the Board The Administrative Committee is charged with the day-to-day management and administration of the Plans and/or management and disposition of the Plans' assets

22 ***Defendant Paul Jeffers*** ("Jeffers") served as Vice President, Human Resources, of the Company during the Class Period During the Class Period, Defendant Jeffers signed each of the Plans' Form 5500 submissions to the Internal Revenue Service ("IRS") and Department of Labor ("DOL") on behalf of the Company, as the Plans Administrator Upon information and belief, Defendant Jeffers was also a member of the Administrative Committee Defendant Jeffers was a fiduciary of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U S.C § 1002(21)(A), because he exercised discretionary authority or control over Plans management and/or authority or control over management or disposition of Plans assets

23 ***Defendant Philip M. Browne*** ("Browne") served as Senior Vice President and CFO of the Company during the Class Period During the Class Period, Defendant Browne signed the 2006, 2007 and 2008 Form 11-K submissions for the Savings Plan on behalf of the Company, as a "Member of the Committee Administering the Plan " Defendant Browne was a fiduciary of the Plans, within the meaning of ERISA Section 3(21)(A), 29 U S C § 1002(21)(A), because he exercised discretionary authority or control over Plans management and/or authority or control over management or disposition of Plans assets

24 ***Defendants John Does 1-20*** were persons who had the duty and responsibility to properly appoint, monitor and inform the members of the Committee (as defined above) and/or other persons who exercised day-to-day responsibility for the management and administration of the Plans and their assets John Does 1-20 failed to properly appoint, monitor and inform such persons in that these Defendants failed to adequately inform such persons about the true financial and operating condition of the Company or, alternatively, these Defendants did adequately inform such persons of the true financial and operating condition of the Company (including the financial and operating problems being experienced by Advanta during the Class Period

identified herein) but nonetheless continued to allow such persons to offer Advanta Stock as investment options under the Plans when the market prices of Advanta Stock was artificially inflated and when Advanta Stock was not prudent investments for Participants' retirement accounts under the Plans Liability is only asserted against each of these Defendants for such periods of time as these Defendants acted as a fiduciary with respect to the Plans

CLASS ACTION ALLEGATIONS

25 Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and the following class of persons similarly situated (the "Class")

> All persons who were Participants in or beneficiaries of the Plans at any time between October 31, 2006 and the present, inclusive (the "Class Period) and whose accounts held Company Stock or units in the Advanta Stock Fund, but excluding all named defendants and their heirs or successors in interest

26 The members of the Class are so numerous that joinder of all members is impracticable While the exact number of Class members is unknown to Plaintiffs at this time, and can only be ascertained through appropriate discovery In fact, the Form 5500 Annual Return/Report of Employee Benefit Plan for the ESOP states that there were 751 Participants in that plan as of December 31, 2007 and the Form 5500 Annual Return/Report of Employee Benefit Plan for the Savings Plan states that there were 1,102 participants as of December 31, 2007

27 Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class Among the questions of law and fact common to the Class are

(a) whether Defendants each owed a fiduciary duty to Plaintiffs and members of the Class,

(b) whether Defendants breached their fiduciary duties to Plaintiffs and members of the Class by failing to act prudently and solely in the interests of the Plans' Participants and beneficiaries, and

(c) whether Defendants violated ERISA

28 Plaintiffs' claims are typical of the claims of the members of the Class because Plaintiffs and the other members of the Class each sustained a diminution of vested benefits arising out of Defendants' wrongful conduct in violation of federal law as complained of herein

29 Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class action, ERISA, and complex civil and commercial litigation Plaintiffs have no interests antagonistic to or in conflict with those of the Class

30 Class action status in this ERISA action is warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members or the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical manner, be dispositive of the interests of the other members of the Class parties to the actions, or substantially impair or impede their ability to protect their interests

31 Class action status is also warranted under the other subsections of Rule 23(b) because (i) prosecuting separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants, (ii) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole, and (iii) questions of law or fact common to members of the Class predominate over any

questions affecting only individual members and a class action is superior to the other available methods for the fair and efficient adjudication of this controversy

32. In the alternative, Plaintiffs request that the Court allow them to proceed under ERISA Section 502(a)(2), 29 U S C. § 1132(a)(2) Section 502(a)(2), 29 U S C § 1132(a)(2) states that "[a] civil action may be brought -- " "by the Secretary [of Labor], or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title[ ]" ERISA Section 409(a), 29 U S C § 1109(a), sets forth that

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable ***to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary***, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary

(Emphasis added)

THE PLANS

A. Advanta ESOP Plan

33 The Advanta ESOP Plan claims to be an employee stock ownership plan (an "ESOP") and is generally available to employees of the Company and its subsidiaries who have reached 21 years of age with one year of service

34 The Advanta ESOP Plan invests in Advanta Class A common stock

35 At December 31, 2006, the ESOP held $37,073,699 in Advanta Class A stock By December 31, 2007, the ESOP held only $10,113,880 in Advanta Class A stock

B. The Savings Plan

36 The Savings Plan is an "employee pension benefit plan" as defined by §§ 3(3) and (3)(2)(A) of ERISA, 29 U S C §§ 1002(3) and 1002(2)(A)

37 The Savings Plan is a legal entity that can sue or be sued. ERISA § 502(d)(1), 29 U S C § 1132(d)(1)

38 In this action for breach of fiduciary duty, the Savings Plan is neither a plaintiff nor a defendant Rather, Plaintiffs request relief for the benefit of the Savings Plan and for the benefit of its Participants

39 The Savings Plan is "defined contribution plan" or "individual account" plan within the meaning of ERISA § 3(34), 29 U S C § 1002(34), in that the Savings Plan provides for individual accounts for each participant and for benefits based solely upon the amount contributed to the Participants' account, and any income, expenses, gains and losses, and any forfeitures of accounts of other Participants which may be allocated to such Participants' accounts Consequently, retirement benefits provided by the Savings Plan are based solely on the amounts allocated to each individual's account

40 The Savings Plan is a voluntary contribution plan whereby Participants make contributions to the Savings Plan and direct the Savings Plan to purchase investments with those contributions from options pre-selected by Defendants which are then allocated to Participants' individual accounts

41 The Savings Plan participants may invest their contributions and employer contributions in one or more of the investment options offered by the Savings Plan Investment income, representing interest and dividends, and changes in the fair value of investments, are credited to each participant on a daily basis based upon individual investment options selected

42 The Savings Plan's 2007 Form 11-K states in relevant part

> **Description of Plan**
>
> The Advanta Corp Employee Savings Plan (the "Plan"), as amended, was adopted effective July 1, 1983 and is a defined contribution plan available to all employees of Advanta Corp and its subsidiaries ("Advanta") who have reached age 21 with six

> months of service The Plan is subject to the provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The following description of the Plan as of December 31, 2007 provides only general information Participants should refer to the Plan document for a more complete description of the Plan's provisions
>
> Participants may elect to defer a portion of their compensation before certain taxes are deducted Advanta may elect to limit the maximum percentage a participant may contribute to the extent it determines that such limitation is necessary in order to comply with the rules for plan qualification under Sections 401(a) and (k) of the Internal Revenue Code Eligible participants could elect to contribute up to 75% of their salary in 2007 and 25% in 2006 subject to the limits under Section 401 of the Internal Revenue Code Advanta also makes matching contributions to the Plan, a portion of which is made on a per pay period basis Such employer contributions are equal to 50% of each employee's contributions to the Plan up to 5% of the employee's compensation (so that the initial maximum matching contribution by Advanta would be 2 5% of an employee's compensation) subject to certain limitations on matching contributions to highly compensated employees under applicable provisions of the Internal Revenue Code Advanta may make an additional matching contribution as of the end of the Plan year for the benefit of participants who are employed as of the last day of the Plan year Total employer contributions in 2007 were 100% of the first 5% of employees' compensation contributed to the Plan, subject to the above-referenced limitations
>
> * * *
>
> Plan participants may invest their contributions in one or more investment funds and in shares of Advanta's Class B Common Stock The Plan invests cash related to pending trades in a short-term money market fund

43 The 2007 11-K also represents that approximately $7,654,030 of the Plan's total investments of $59,491,689, or approximately 13% of the investments of the Plan, were invested in Advanta Class B common stock as of December 31, 2007 and that approximately $2,678,682 of the Plan's total investments of $56,638,445, or approximately4 7% of the investments of the Plan, were invested in Advanta Class B common stock as of December 31, 2006 The 2007 11-K further represents that during calendar year 2007, the Plan's investment in Company common stock depreciated in fair value as determined by quoted market prices by $5,993,411

B. The Plans Fiduciaries

44 ***Named Fiduciaries*** ERISA requires every plan to provide for one or more named fiduciaries of the plan pursuant to ERISA § 402(a)(1), 29 U S C § 1002(21)(A) The person named as the "administrator" in the plan instrument is automatically a named fiduciary, and in the absence of such a designation, the sponsor is the administrator ERISA § 3(16)(A), 29 U S C § 1002(16)(A)

45 ***De Facto Fiduciaries*** ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under ERISA § 402(a)(1), but also any other persons who in fact perform fiduciary functions Thus, a person is a fiduciary to the extent "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management of disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan" ERISA § 3(21)(A)(i), 29 U S C § 1002(21)(A)(i)

46 Each of the Defendants was a fiduciary with respect to the Plans and owed fiduciary duties to the Plans and their Participants under ERISA in the manner and to the extent set forth in the governing the Plans documents, through their conduct, and under ERISA

47 As fiduciaries, Defendants were required by ERISA § 404(a)(1), 29 U S C § 1104(a)(1) to manage and administer the Plans and the Plans' investments solely in the interest of the Plans' Participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims

48 Plaintiffs do not allege that each Defendant was a fiduciary with respect to all aspects of the Plans' management and administration. Rather, as set forth below, Defendants were fiduciaries to the extent of the specific fiduciary discretion and authority assigned to or exercised by each of them, and, as further set forth below, the claims against each Defendant are based on such specific discretion and authority

FACTUAL BASIS OF THE FIDUCIARY BREACHES

49 During the Class Period, Avanta failed to disclose the impact of the economic environment and the deteriorating credit trends on its business and failed to adequately and timely record losses for its impaired loans and customer delinquencies The continued deterioration of credit trends during 2007 was a major threat to Advanta's business which led to severe problems for the Company

50 As required by ERISA, Defendants issued one or more Summary Plan Descriptions ("SPDs"), each of which either referred to or incorporated by reference the documents filed by Advanta with the SEC under the federal securities laws These filings, however, contained numerous material misrepresentations and omitted to state material facts which were necessary to make the statements which were made not misleading

51 In particular, Advanta's Securities and Exchange Commission ("SEC") filings during the Class Period, including its SEC filings on Forms 10-Q and 10-K which were fiduciary communications because they were incorporated into the SPDs and circulated with the Proxy Statements, were inaccurate in that they misrepresented the truth about the Company, and failed to disclose material adverse information, including, *inter alia*, the fact that

(a) The Company failed to accrue tens of millions of dollars of losses, instead keeping those losses as "assets" on its books,

(b) Prior to and during the Class Period, Advanta was extremely aggressive in granting credit to small business and other customers without verifying the customers' ability to pay, and as a result Advanta's credit receivables were unduly risky;

(c) As a result, by the summer of 2009, Advanta customers' default rate was almost six times worse than industry average,

(d) To compensate for its loose credit approval process, Advanta failed to properly account for Advanta's continuing delinquent customers and the credit trends in the Company's portfolio, resulting ultimately in large charges to reflect impairments,

(e) In an attempt to cover for its shortcomings, Advanta and dramatically increased interest rates to the degree where even customers who paid on time suddenly saw their interest rates double or triple and manipulated its cash rewards program, thereby angering customers and causing the Company to lose good, creditworthy customers

(f) The Company was not on track to be profitable in 2008, and the Company's ongoing viability was put at risk by the above practices,

(g) as a result of (a)-(f) above, the Company's Stock was an imprudent investment for the Plans during the Class Period

52 Defendants were not obligated by ERISA or by the Plans to discharge their duty to provide information to Participants through the mechanism of incorporation of SEC filings Defendants could have fulfilled this duty by setting forth sufficient and accurate information in the SPDs themselves, and updating such information as appropriate Defendants chose, however, to adopt the mechanism of incorporation of SEC filings into the SPDs, and the SEC filings contained inaccurate information which caused loss to the Plans and the Participants as set

forth below

53 At all relevant times, Defendants should have known of the material misrepresentations and omissions, including those filed with the SEC and incorporated by reference in the SPDs

54. During the Class Period, Advanta imprudently loosened its credit standards and granted credit to customers without verifying the customers' ability to pay and ignored the devastating effect this had on its financials Advanta also imprudently engaged in improper practices with respect to its cash back rewards program and other gimmicks which led to defections of more creditworthy customers These risky practices led to losses

55 In loosening its credits credit approval process, Defendants knew or recklessly disregarded that· (i) the Company was more exposed to delinquent customer and risky credit receivables; and (ii) the Company's Class Period statements were inaccurate due to their failure to inform the market that it had not properly accounted for Advanta's continuing delinquent customers and the credit trends in its portfolio which led to large charges to reflect impairments

56 Plan Participants were neither informed of the risks inherent in maintaining their retirement investments in Advanta Stock nor of the degree to which their savings hinged on the risky credit card practices it was engaging in

57 Advanta issues business purpose credit cards to small businesses and business professionals The Company's business credit card accounts provide customers with unsecured revolving business credit lines

58 Advanta's credit card business fluctuated based on management's emphasis on two contrary forces Advanta could show growth by loosening credit standards However, loosened standards would in many instances lead to increased losses Through the years

Advanta alternatively loosened and tightened standards Investors (which included the Plans Participants) were aware of this history, but unaware during the Class Period of the extent to which Advanta had loosened standards, and were unaware of Advanta's improper practices with respect to its cash back rewards program which later led to defections of more creditworthy customers

59 In 2009, the Federal Deposit Insurance Corporation ("FDIC") issued two Cease and Desist Orders against Advanta The first cease and desist order was for Advanta's improper practices going back to 2004 "in connection with the marketing of the Cash Back Reward feature of the Bank's credit card products and acts or practices related to the repricing of credit card accounts " and "operating the Bank without effective oversight and supervision of the Bank's credit card products, that the Bank was unjustly enriched in connection with such violation or practices, and that the Bank should be required to make restitution to remedy the injuries resulting from such violations or practices " The other cease and desist order was for alleged unsafe and unsound banking practices which resulted in Advanta ceasing and desisting from "[o]perating in a manner that causes the Bank's significant financial deterioration, Operating with inadequate capital for the Bank's risk profile, and Operating in a manner that does not sustain satisfactory earnings performance to maintain sufficient capital in relation to the Bank's risk profile " The Stipulation and Consent to the issuance of the Orders to Cease and Desist were signed by Company Directors

60 On October 31, 2006, Advanta reported its third quarter 2006 financial results in a release that stated in part

> Advanta Corp today reported third quarter 2006 net income of $21 1 million or $0 73 per diluted share for Class A and Class B shares combined Advanta Business Cards earned net income of $20 7 million compared to $16 2 million for third quarter 2005

> "I am happy to report strong profits again this quarter and to share with you that our portfolio is performing well and growing Not only are we continuing to attract a large number of new high credit quality, profitable customers through our focused marketing efforts, but we are able to leverage our infrastructure costs through this growth," said Dennis Alter, Chairman and CEO. "During the quarter, new bankruptcy filings remained lower than we anticipated, and we are increasing our guidance for 2006 full year earnings from continuing operations to a range of $2 78 to $2 83 per combined diluted share primarily due to the lower net credit losses we now expect for the full year "
>
> The earnings per share guidance assumes no venture capital investment gains or losses in the fourth quarter as such amounts are based on future market conditions which cannot be reliably forecasted During the third quarter of 2006, Advanta Business Cards customers exceeded the 1 million mark while ending managed receivables of $4 6 billion grew 29% over the same quarter last year Owned Business Cards receivables were $1 2 billion at quarter end, reflecting growth of 46% over those reported at the same quarter end last year Transaction volume for the quarter was $3 1 billion, exceeding third quarter 2005 volume by 23%

61 After releasing its third quarter 2006 earnings on October 31, 2006, Advanta hosted a conference call for analysts, investors (which included the Plans Participants) and media representatives, during which chief executive officer, Dennis Alter ("Alter"), Company CFO Phil Browne ("Browne"), and President of Advanta Corp and Vice Chairman of Advanta Corp 's Board of Directors William Rosoff ("Rosoff") represented the following

> I'm happy to report today that we had another strong quarter
>
> * * *
>
> ***The reason our earnings are as high as they are this quarter, despite this increased marketing spend, is mainly because of the lower credit losses for the quarter*** Bankruptcy filings were lower than we anticipated, and recoveries were higher As a result of this, we're also increasing our 2006 earnings guidance from continuing operations to a range of $2 78 to $2 83 We now expect managed net credit losses for 2006 to be between 3 4% and 3 45% as contrasted with the range of 3 5% to 3 7% we shared during our second quarter call
>
> * * *
>
> By educating our customers on the benefits of using a business credit card, along with MasterCard and Visa working with suppliers such as utilities, landlords, and other vendors to increase acceptance of credit cards, we believe our customers will process more transactions through their cards In fact, the industry predicts

> the small business bank card purchase volumes will grow by 25% to 30% annually As you can see, it's an exceedingly good market to be in, and again because of our focus, we believe we're in a particularly well positioned place to take advantage of it.
>
> * * *
>
> **[Browne:]** Managed receivables 30 days or more delinquent of $125 3 million were 2 7% of any managed receivables, improved by $2.7 million and 85 basis points, respectively Managed receivables 90 days or more delinquent were $57 1 million, or 1 23% of any managed receivables, improved by $773,000 and 38 basis points, respectively The improvement in delinquency dollars primarily results from having a portfolio of higher credit quality customers than we did a year ago
>
> * * *
>
> **[Rosoff:]** As is evidenced in the results that Dennis and Phil just shared, ***we had another terrific quarter to add to an already terrific year. We continue to go to our solid foundation for originating high credit quality customers***, positioning the business to maximize earnings for the long haul To this end, we expect to add about 365,000 to 375,000 new customers this year, as contrasted with 237,000 new customers last year, and 131,000 new customers the year before

(Emphasis added)

62 On October 31, 2006, the Company's Stock rose 1 91% to close at $26 17 from the prior day's closing price of $25 72

63 On November 8, 2006, the Company filed its Form 10-Q for the third quarter of 2006, which included the Company's previously reported financial results The Form 10-Q was signed by Browne and included Sarbanes-Oxley certifications signed by Defendant Alter and Browne

64 On November 8, 2006 the Company's Stock rose 2 91% to close at $27 93 from the prior day's closing price of $27 14

65 On January 25, 2007, Advanta reported its fourth quarter 2006 and fiscal year 2006 financial results in a release that stated in part

> Advanta Corp today reported full year 2006 net income from continuing operations of $84 2 million or $2 86 per diluted share for Class A and Class B shares combined This includes a $0 03 per share asset valuation gain associated with the Company's

> venture capital portfolio. These results are $0.03 per combined diluted share above the high end of the Company's most recent guidance range, including $0 01 per share of venture capital gain that was not anticipated in the guidance
>
> "Our 2006 full year Business Cards earnings increased by over 50%, and our managed receivables grew by almost 39%, we added 56% more new customers, and our managed net credit loss rate dropped by 230 basis points to 3 41% We had a great year! Most importantly we continued to strengthen and build on the foundation for the burgeoning results we expect to see going forward," said Dennis Alter, Chairman and CEO
>
> Ending managed receivables grew to $5 2 billion at December 31, 2006, with full year new customers totaling approximately 371,000 Ending owned receivables grew 29% during the year to $1 1 billion, and the full year net credit loss rate on owned receivables decreased 218 basis points to 3.19%. 2006 customer transaction volume totaled $12 3 billion, a 26% increase over 2005
>
> For the fourth quarter, Advanta reported net income of $18 2 million or $0 62 per combined diluted share, including a $0 01 per share asset valuation gain associated with the Company's venture capital portfolio

66. After releasing its fourth quarter 2006 and fiscal year 2006 earnings on January 25, 2007, Advanta hosted a conference call for analysts, investors (which included the Plans Participants) and media representatives, during which Company executives represented the following

> **[ALTER:]** I am happy to report that '06 was the banner year for Advanta we've been predicting For the year, we are net income from continuing operations of $84 2 million, or $2 80 per combined diluted share, with over a 50% increase in business card earnings for 2005
>
> * * *
>
> I read recently that Americans use 700 million bank cards, about six or seven for each creditworthy adult We at Advanta don't need that many of them as customers in order to do very well That's one of the reasons ***we're so confident and bullish on our business for '07, '08, and beyond.*** By attracting only 300,000 to 400,000 new customers a year, as we plan to continue doing, we'll fuel outstanding earnings well into the future
>
> * * *
>
> We don't have to struggle for double-digit growth because we're small compared to our competition We need only a fraction of the absolute number of new customers they need each year
>
> * * *

> **[BROWNE:]** *On the credit front, our managed net credit loss rate* for the quarter was 3 4%, and for 2006 was 3 41%, which is consistent with the most recent guidance range provided We're often asked about our low portfolio credit loss rate and how our recent vintages are performing versus our older vintages The answer is that the losses in the more recent vintages are lower and the timing of the losses is very similar.
>
> * * *
>
> **[ROSOFF:]** As we said on the guidance call in November, our 2007 earnings from continuing operations are expected to be in the range of $3 15 to $3 25 per diluted share for Class A and Class B shares combined We expect to achieve these results even after taking into account the temporary impact of lower yields from introductory rate balances and the expensing of acquisition costs in the first year related to the record number of new customers added in 2006
>
> ***Then, the profits from these new customers are expected to make our 2008 income shoot up by more than 40%, based on our current projections.*** The increase is virtually all cash-based We are looking forward to realizing these profits with all of this together

(Emphasis added)

67 On February 28, 2007, Advanta filed a Form 10-K with the SEC for the fourth quarter and full year 2006, setting forth the financial results describe in the above paragraph The Form 10-K was signed by Defendants Alter, Browne and Rosoff and included Sarbanes-Oxley certifications signed by Defendants Alter and Browne

68 On February 28, 2007 the Company's Stock rose 2 54% to close at $27 86 from the prior day's closing price of $27 17

69 On April 24, 2007, Advanta announced its first quarter 2007 financial results in a release that started in part

> Advanta Corp today reported first quarter 2007 net income of $21 4 million or $0 72 per diluted share for Class A and Class B shares combined This includes a $0 01 per share asset valuation gain associated with the Company's venture capital portfolio
>
> "We had a very good start to 2007," said Dennis Alter, Chairman and CEO "Strong earnings, low credit losses and delinquencies, and the addition of new high credit quality customers continued to mark our performance "

> Ending managed receivables grew to $5 6 billion at March 31, 2007 with ending owned receivables totaling $1 1 billion During the quarter, approximately 97,000 new customers were added and transaction volume of $3.4 billion reflected growth of 24% over the comparable quarter of 2006. The managed net credit loss rate decreased 32 basis points to 3 3% and the owned net credit loss rate decreased by 43 basis points to 3.1%

70 After releasing its first quarter 2007 earnings on April 24, 2007, Advanta hosted a conference call for analysis, investors (which included the Plans Participants) and media representatives, during which Company executives represented the following

> **[ALTER:]** I'm happy to report that our year is off to a very good start Advanta Business Cards, our net income this quarter of $21 2 million, and we grew our managed receivables to $5 6 billion Transaction volume was $3 4 billion strong We attracted 97,000 new small business customers during the first quarter with an average FICO score of 726 Our credit metrics for the quarter continue to be strong and, in fact, outshined many of our competitor's metrics as a direct result of the high credit quality strategy we embraced more than six years ago
>
> * * *
>
> Because of our success and our belief that we'll continue to produce excellent results going forward, our Board approved several actions in early April, as communicated in our press release These actions include a three-for-two stock split for both the class A and class B common stock This will apply to shareholders of record as of May 25th, '07, with the stock dividend payable after the close of business on June 15th, '07
>
> * * *
>
> **[BROWNE:]** As Dennis said, we had an excellent quarter After four consecutive quarters of Advanta Business Cards management interest income hovering around $90 million plus or minus $1 million, our management interest income this quarter increased to $95 4 million In 2007 we expect to see a continued positive trend in these dollars as promotional rates on balance transfers taken by our customers in 2006 expire and convert to higher contractual go-to rates

71 On April 25, 2007 the Company's Stock rose 3 28% to close at $32 41 from the prior day's closing price of $31 38

72 On May 9, 2007, Advanta filed a form 10-Q with the SEC for the first quarter of 2007, setting forth the financial results described in the above paragraph The Form 10-Q was signed by Defendant Browne and included Sarbanes-Oxley certifications signed by Defendants

Alter and Browne

73 On May 9, 2007 the Company's Stock rose 1.09% to close at $30 40 from the prior day's closing price of $30 09.

74 On July 31, 2007, Advanta reported its second quarter 2007 financial results in the a release that stated in part

> Advanta Corp today reported second quarter 2007 net income from continuing operations of $0 51 per diluted share for Class A and Class B shares combined This is $0 03 per share higher than the first quarter It includes a $0 01 per share asset valuation gain associated with the Company's venture capital portfolio
>
> "The powerful dynamics we have described in the business are once again demonstrated by the performance in the quarter," said Dennis Alter, Chairman and CEO
>
> Ending managed receivables grew to $6 0 billion at quarter end with ending owned receivables totaling $1 1 billion During the quarter, 103,000 new customers were added and transaction volume increased to $3 7 billion The managed net credit loss rate was 3 48% and the owned net credit loss rate was 3 06%

75 On July 31, 2007, Advanta hosted a conference call for analysts, investors (which included the Plans Participants) and media representatives, during which Company executives represented the following

> **[ALTER:]** We're now halfway through the year and are pleased to report our progress for the second quarter of '07 During the quarter, Advanta Business Cards earned net income of $22 2 million Our managed receivables grew to $6 billion and our customers used their Advanta credit cards for $3 7 billion in transactions Through direct mail and the Internet, we acquired 103,000 new customers during the quarter with an average origination FICO score of 727 We've added 200,000 new customers in the first half of the year
>
> * * *
>
> **[BROWNE:]** When compared to the same quarter of last year, as expected, both risk adjusted revenue and operating expense dollars were higher, with the net result of these increases yielding slightly lower after-tax income
>
> * * *
>
> On the securitization markets, we've been having really good receptivity to our offerings Our last transaction was bought in a reverse inquiry where people came looking for our paper, which is always a positive sign And you probably saw that over the last

several months we've had actually decreases in our credit enhancement levels, which is obviously positive that the rating agencies have signed off on lower credit enhancement levels or subordinated traunch levels

* * *

[ROSOFF:] We basically have our own scoring system, so FICO is in a sense a simplistic proxy And there is everything from -- it includes all kinds of different things including D&B information and a lot of other information that we utilize in our experience with our own customers I think the most telling thing is that -- in that regard, is that we've talked about the expected annual loss rates from the newer vintages that we've done, which, correct me if I'm wrong, Phil, but are in the 3 to 3 5% range on a 5-year look-forward based on our experience And those are -- that range, it still holds for the business we're putting on

* * *

[ANALYST:] Just a quick question on the regulatory front There has been some more noise out of congress on the credit card front I'm just curious if you get a chance to review some of the -- I guess what they're talking about and if that in any way impacts current business practices?

[ROSOFF:] This is Bill As you would imagine, we're reviewing all the time and we're very on top of it We're completely complying We believe in everything we're doing now We don't anticipate any changes as a result of present rules If things change as a result of congressional proposals passing or otherwise, we've evaluated them, we have plans with respect to them, but that's all speculation at this point As long as we're on a level playing field with everybody else, our view is we'll do fine

76 On August 1, 2007 the Company's Stock rose 4 44% to close at $26 8 from the prior day's closing price of $25 66

77 On August 8, 2007, Advanta filed a form 10-Q with the SEC for the second quarter of 2007, setting forth the financial results described in the above paragraph The Form 10-Q was signed by Defendant Browne and included Sarbanes-Oxley certifications signed by Defendants Alter and Browne

78 On October 25, 2007, Advanta issued a press release entitled "Advanta's Solid Fundamentals Underlie Another Good Quarter," which stated in relevant part

Advanta Corp today reported third quarter 2007 net income of $22 1 million or $0 50 per diluted share for Class A and Class B

shares combined This is consistent with the Company's full year expectations

Ending managed receivables grew to $6 2 billion at quarter end with ending owned receivables totaling $1 2 billion During the quarter, over 74,000 new customers were added and transaction volume totaled $3 6 billion The managed net credit loss rate was 3 87% and the owned net credit loss rate was 3 52%

"Over the past years, we've been planning for a potentially more difficult environment by focusing on high credit quality customers," said Dennis Alter Chairman and CEO "This strategy continues to look good to us now "

79 On October 25, 2007, Advanta hosted a conference call for analysts, investors (which included the plans Participants) and media representatives, during which Company executives represented the following

[ALTER:] I'm happy to report that for the third quarter we earned $0 50 per combined diluted share This reflects net income from Advanta Business Cards of $22 1 million So three quarters into the year, our earnings from continuing operations were $1 49 per combined diluted share toward our guidance range of $2 10 to $2 17 We currently believe we're positioned to achieve this, but we continue to monitor retail sales, the housing market, job formation, and the general economy All of these and other economic trends have an impact on everyone, including our customers and our Company

Credit performance is certainly central to any lending business, so let me address our credit results next At the end of the quarter, our 30 days or more and 90 days or more managed delinquency rates were 3 15% and 1 41%, respectively Consistent with what the industry is experiencing, these rates are up from a year ago However, our rates are still at the lower end of those reported by other card issuers In addition to the high credit quality of our customers, we've enhanced our collection efforts and strategies using what we believe to be very sophisticated analytic techniques We believe these will further mitigate some of the possible negative effects of a weakening economy

* * *

[BROWNE:] On a year-to-date basis, we're slightly above the high end at about 3 6%, and we now expect the full-year rate to be in a range of 3 6% to 3 7%, consistent with Dennis' comments about the economy and what we are seeing with competitors This modest increase is being driven by higher losses generally in our industry segments This is a change from what we saw in the second quarter and what we spoke about at our Investor Day What we saw then was increased rates in a portion of three industry segments This is all, of course, within the context we mentioned earlier below absolute rates, which are below end of industry rates The allowance for credit losses was increased by $4

> million this quarter At the end of September, our reserve as a percentage of ending owned receivables was 4.6%
>
> Operating expenses in the third quarter totaled $68 million, which was $2 2 million higher than the same quarter of 2006 This increase includes additional variable costs to support growth in the portfolio Also, keep in mind that in the third quarter of 2006, we incurred $4 2 million of incremental customer acquisition costs associated with new prospect lists and alternate marketing creatives We did not have life costs this quarter
>
> With all of this said, our operating expense ratio has improved significantly For the third quarter, our ratio was 4 46%, compared to 5.84% a year ago It also continued to trend downward from the 4 71% we reported last quarter We're happy with the leverage we've seen this year and believe we can leverage our fixed infrastructure further over time
>
> * * *
>
> **[ROSOFF:]** Here's what I would like to leave you with What we have seen in the third quarter and looking forward is what we said in Investor Day last month I will repeat now what I said then We have built an engine to prevail in good times and bad A business built around high credit quality customers that anyone would want regardless of the environment That does not mean that we are unaffected by the economy, we are But we are positioned by design for strength in a weaker economy and to strive over the long haul

80 On November 8, 2007, Advanta filed a form 10-Q with the SEC for the third quarter of 2007, setting forth the financial results described in the above paragraph The Form 10-Q was signed by Defendant Browne and included Sarbanes-Oxley certifications signed by Defendants Alter and Browne

81 Then on November 27, 2007, Advanta held a conference call with analysts and investors (which included the Plans Participants) to discuss earnings and financial expectations for the Company and subsequently filed a Form 8-K with the SEC on November 29, 2007, which stated in part

> On November 27, 2007, Advanta Corp (the "Company" or "Advanta") management held a conference call at 9 00 a m Eastern time to discuss business performance, including updated information on earnings and other financial expectations for 2007, as described below Management stated that the Company would not be providing guidance for 2008 at this time due to the volatility and uncertainty of the economy

The conference call was publicly announced in a press release issued by the Company on November 20, 2007 The call was broadcast for the public simultaneously over the Internet through www advanta com or investorcalendar com, and replays of the call are available for the next 90 days on both of these websites.

With respect to fiscal year 2007, management addressed the impact of the current economic environment on business performance Specifically, management addressed, among other things, the following items during the conference call

- Since the Company announced third quarter 2007 earnings results, delinquency buckets have been negatively impacted as a higher percentage of customers than anticipated have rolled into delinquency and a lower percentage of delinquent customers have made payments Management indicated that, consistent with what other credit card issuers are anticipating, the Company now believes that these higher delinquency rates, and therefore charge-off trends, will continue for some time before they improve

- The Company indicated that if current entry rates and collections rates for delinquent customers continue for the rest of this year, or get modestly worse, it expects 2007 earnings per share from continuing operations to be between $1 90 and $2 00 per combined diluted share This is lower than the Company's previous guidance range of $2 10 and $2 17 per combined diluted share Management further noted that if there were more than modest worsening in delinquency entry rates and/or collections rates, then earnings per share would be less

- The Company indicated that, based on current collection rates and recovery expectations, the managed net charge-off rate is expected to be about 3 75% for the 2007 fiscal year, as compared to its most recent estimate of 3 6% to 3 7% for the year Based on the same assumptions, the owned net charge-off rate is expected to be about 3 4% for the 2007 fiscal year, as compared to the Company's most recent estimate of 3 25% to 3 35% for the year

- The Company confirmed that it is on track with its previously announced guidance for receivable and transaction volume growth for 2007

- The Company expects to acquire approximately 330,000 new customers in fiscal year 2007 The Company indicated that its marketing campaigns continue to do well and that management is pleased with the results of its marketing investments

The Company noted that it has not factored anything into its 2007 earnings guidance range related to the Visa/American Express litigation settlement since it is still being evaluated The Company discussed this litigation settlement and its potential impact on the Company's financial results in a Current Report on Form 8-K filed with the SEC on November 16, 2007

With respect to expectations for 2008, the Company stated that it would not be providing guidance for earnings or other 2008 financial measures at this time Management commented that it believes it is prudent not to give guidance for 2008 at this time

> given the degree of volatility and uncertainty in the current economic environment Management stated that the Company expects to be profitable and to continue to pay its quarterly dividend at its present level
>
> Following the Company's prepared remarks, there was a question and answer session with institutional investors and analysts Management responded to questions about various items, including the following·
>
> With respect to credit trends in the current portfolio, management indicated that the deteriorating credit trends were not limited to any specific segments of the portfolio and that the trends are being experienced throughout the portfolio
>
> There were questions about various aspects of the Company's business, plans and expectations, including, among others, questions about plans for managing growth, marketing campaigns, expectations for credit quality and the possibility of authorizing a stock buyback The Company reiterated that it would not give guidance for 2008 and, consistent with that, management declined to speculate or offer predictions in any of these areas However, management indicated that it plans to continue to monitor all aspects of the business, including these areas, and to evaluate opportunities and make prudent decisions that are focused on the long-term health of the business

82 After these disclosures, Advanta Stock dropped 9 57% on November 27, 2007 and 13 92% on November 28, 2007, closing on November 28, 2007 at $9 52 per share, after as low as $9 35 per share on November 18, 2007, a decline of 72% from Advanta's Class Period high of $34 07 per share in June 2007

83 The Company's poor credit quality and the fact that it effectively chased away many of its best customers continue to render the Company Stock an imprudent retirement investment to date

84 On May 12, 2009, the Company filed a Form 8-K with the SEC The May 12, 2009 Form 8-K contained as an exhibit a press release the Company issued on May 11, 2009 entitled "Advanta Announces Plan to Maximize Capital and Dramatically Reduce Risk" The press release stated that

> Advanta Corp (NASDAQ ADVNB, ADVNA) today announced its Board of Directors has approved a plan designed to dramatically

limit the Company's credit loss exposure and maximize its capital and its liquidity measures.

As a result of the deteriorating economic environment, the Company would expect the negative performance trends, if not abated with this plan, to result in losses that would erode its capital Therefore, the Company envisions the following

- The Company's securitization trust will go into early amortization based on May's performance Early amortization will officially be determined on June 10

- Since the securitizations will not be permitted to fund new receivables after June 10, the Company will shut down all credit card accounts to future use at that time Neither Advanta Bank Corp nor any other Advanta-related entity will fund activity on its balance sheet from the accounts Therefore, the Company will not take any off-balance sheet receivables onto its balance sheet Shutting down the accounts will not accelerate payments required from cardholders on existing balances

- In early amortization almost all of the receipts from cardholders are required to be paid to the securitization trust's noteholders and to the Company's seller's interest (its on-balance sheet share of the receivables) The securitization trust's notes are obligations of the trust and not of any Advanta entity The Company is only at risk with respect to the off-balance sheet obligations to the extent of its residual interests

- Advanta Bank Corp will use up to $1 4 billion to make a cash tender offer for Advanta Business Card Master Trust Class A senior notes at a price between 65% and 75% of their face value in a modified Dutch Auction

- Advanta Corp will make a cash tender offer for any or all of the $100 million of 8 99% Capital Securities issued by Advanta Capital Trust I at 20% of their face value

- The Company will continue to service and collect the securitization trust's credit card receivables and its own receivables This, along with taking appropriate actions to adjust expenses to be consistent with these activities, will be the Company's first priority The Company will be free to do new business in the future to the extent it chooses, but it does not expect to do so in a significant way until implementation of the plan is well under way

- Advanta Corp 's senior retail investment notes are unlimited obligations of Advanta Corp and will remain outstanding and continue to be issued in the ordinary course The benefits of the plan to the Company are designed to benefit the senior retail note program holders as well as the Company's shareholders

The Company previously disclosed that it expected to use tools at its disposal to avoid early amortization of the securitization trust unless it concluded there was a better plan to maximize its capital and liquidity The Company has now concluded that the plan outlined here is that better plan

85 Also on May 12, 2009, Bloomberg com published an article entitled "Advanta's Card-Lending Shutdown May Imperil Customers" which reported that

> Advanta Corp , the credit-card issuer for small businesses, may leave 1 million customers scrounging to find new lenders and debt holders facing losses of 35 percent after the company shut down accounts to preserve capital
>
> Advanta will cease lending June 10 after uncollectible debt reached 20 percent as of March 31, according to a statement and filings yesterday by the Spring House, Pennsylvania-based firm The lender earmarked $1 4 billion to buy back securitized card loans with offers of 65 cents to 75 cents on the dollar
>
> Credit-card company profits suffered as the recession pushed U S unemployment to 8 9 percent in April Defaults on cards historically track the jobless rate, and analysts have been concerned that the industry's average for bad loans would breach 10 percent and set a record Advanta decided to cut off customers after "charge-offs" rose to twice that threshold, from 9 6 percent at year-end
>
> "The question is how many business owners depend solely on their Advanta credit card," said William Dunkelberg, chief economist at the National Federation of Independent Business While most probably have other sources of credit, self-employed entrepreneurs may have trouble getting a new card, he said "Credit is harder to find than it's ever been in this expansion," said Dunkelberg, whose biography lists him as a former Advanta director
>
> Stock Declines
>
> The company's A-shares dropped 28 cents, or 25 percent, to 85 cents at 4 p m in Nasdaq Stock Market trading Advanta, which had $2 4 billion in deposits as of March 31, reported three consecutive quarterly losses and its shares have plunged from about $30 in June 2007 The recession affected Advanta's customers across the country, Chief Financial Officer Philip Browne has said
>
> "We'll be shutting down accounts for future transaction activities, but many of the customers will maintain balances and pay us off over time," Browne said yesterday in a telephone interview "We'll have to service and collect on that, and that will be the first order of business for the company "
>
> More than 90 percent of Advanta's small business customers will have "adequate" access to alternative credit after the company halts lending, Browne said
>
> Citing the recession, Advanta said it's planning to "maximize capital and dramatically reduce risk " While the company has "no indication" if debt investors will accept the buyback offer, the price is "relatively consistent with recent trading levels of the bonds," Browne said

No Public Actions

Advanta's credit-card unit is chartered and regulated in Utah and has "no corrective actions that are public," said G Edward Leary, the state commissioner of financial institutions He declined to say whether any non-public actions were taken against the company

This would be the first so-called early amortization of a trust since 2003, according to JPMorgan Chase & Co analyst Christopher Flanagan.

"Early amortization has been viewed as a catastrophic event for issuers," Scott Valentin, an analyst at Friedman Billings Ramsey & Co , said today in a research note Advanta's filing said that the charge-off rate for uncollectible loans may increase after accounts are closed Valentin said that's likely because "the cards have substantially less utility to cardholders," cutting the incentive to keep up with payments

"They're hoping they can stay alive barely until the environment changes," said David Robertson, president of the Nilson Report, the Carpinteria, California-based industry newsletter This is "a big sign that the credit-card industry has problems that are going to be around for several years "

Workforce Slashed

Advanta was the 11th-biggest U S credit-card issuer at the end of 2008 with about $5 billion in outstanding balances, and the only major lender focused on small business borrowers, Robertson said In the first quarter the company slashed the workforce by about 300 employees, or 36 percent, from 841 as of Dec 31, 2008 Calls inquiring about the future of current employees weren't returned

The company's woes aren't likely to spread to other asset- backed issuers, said JPMorgan's Flanagan Advanta's "precarious liquidity and capital position" make the lender more vulnerable to deteriorating credit than its stronger counterparts, Flanagan said in a May 8 report

Credit-card companies can take steps to protect investors and avoid having to wind down trusts, including removing overdue accounts from the pool and increasing the cash cushion that comes with the securities to shield bondholders from losses Bank of America Corp , Citigroup Inc , General Electric Co and JPMorgan have already taken steps to protect their securitized assets as delinquencies surge, according to JPMorgan data

Needs Capital

Advanta relied on the asset-backed securities market for funding, and has been unable to raise cash through securitization since June 2008, according to Bloomberg data It is shut out of the Federal Reserve's Term Asset-Backed Securities Loan Facility, or TALF, because of ratings cuts on its bonds

Credit card-backed debt eligible for purchase with TALF loans must be rated AAA Moody's Investors Service has assigned "junk" ratings to Advanta's senior unsecured and subordinated

> debt The trust preferred securities rating of Advanta Capital Trust I was cut to C from Caa3 in April by Moody's, citing a "high degree of uncertainty" that investors will get repaid because of Advanta's "weak financial condition "
>
> Today, Standard & Poor's cut its rating on Advanta to CC from CCC and assigned a negative outlook to the company

86 In response to the news, the Company's Stock fell by more than half of its value, a decrease of $1 55 per share, to close at $1 09 per share

87 On June 8, 2009, the Company filed a Form 8-K with the SEC The June 8, 2009 Form 8-K contained as an exhibit a press release the Company issued on the same day entitled "Advanta Announces Plan to Maximize Capital and Dramatically Reduce Risk" The press release stated that

> Advanta Bank Corp (the "Bank') has terminated its previously announced cash tender offer for up to $1 4 billion of Advanta Business Card Master Trust's Class A senior notes (the "ABS Notes Tender Offer") which was made on May 11, 2009 The Bank is terminating the ABS Notes Tender Offer because it recently has been determined that a regulatory condition to the tender offer will not be satisfied The tender offer consideration will not be paid or become payable to senior note asset-backed holders who validly tendered their notes in connection with this offer As promptly as practical, all tendered notes will be returned to the holders thereof This termination has no impact on the Company's ability to proceed with its previously announced cash tender offer for any and all of the $100 million of outstanding Advanta Capital Trust I 8 99% Capital Securities
>
> As a result of the termination of the ABS Notes Tender Offer, the Company will not be able to complete all of the components of the plan it previously announced which together were intended to limit the Company's credit loss exposure and maximize its capital and its liquidity measures Although the Company does not expect to fully realize its objectives of maximizing its capital and its liquidity measures, it still expects to realize the limitation of its credit loss exposure This is expected to be achieved as a result of early amortization of the Company's securitization trust, which is anticipated to begin this month, and the closing of all customer accounts to future use that was effective May 30, 2009
>
> In addition, the Company expects the Bank to enter into an agreement with its regulators in the near term about its operations

88 Company Stock fell to $0 72 per share on the news

89 On September 18, 2009 the Company filed a Form 8-k in which it advised that on

September 15, 2009 it had received a deficiency letter from the NASDAQ Stock Market, LLC stating that for 30 consecutive business days the bid price for the Company's Class A Common Stock and Class B Common Stock has closed below the minimum $1 00 per share required by NASDAQ rules for continued listing

90 By November 3, 2009, as a result of the above, the Company's Stock prices had declined to $0 31 per share, depriving the Plans Participants of a significant amount of their savings

THE LAW UNDER ERISA

91 ERISA § 502(a)(2), 29 U S C. § 1132(a)(2), provides, in pertinent part, that a civil action may be brought by a participant for relief under ERISA § 409, 29 U S C § 1109

92 ERISA § 409(a), 29 U S C § 1109(a), "Liability for Breach of Fiduciary Duty," provides, in pertinent part, that any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

93 ERISA § 404(a)(l)(A) and (B), 29 U S C § 1104(a)(l)(A) and (B), provides, in pertinent part, that a fiduciary shall discharge his duties with respect to a plan solely in the interest of the Participants and beneficiaries, for the exclusive purpose of providing benefits to Participants and their beneficiaries, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims

94 These fiduciary duties under ERISA § 404(a)(1)(A) and (B) are referred to as the duties of loyalty, exclusive purpose and prudence, and are the "highest known to the law" They entail, among other things

(a) the duty to conduct an independent and thorough investigation into, and continually to monitor, the merits of all the investment alternatives of a plan, including in this instance the Plans, which invested in Advanta Stock, to ensure that each investment is a suitable option for the Plans,

(b) the duty to avoid conflicts of interest and to resolve them promptly when they occur A fiduciary must always administer a plan with an "eye single" to the interests of the Participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the Plans' sponsor, and

(c) a duty to disclose and inform, which encompasses (i) a negative duty not to misinform, (ii) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful, and (iii) a duty to convey complete and accurate information material to the circumstances of Participants and beneficiaries

95 ERISA § 405(a), 29 U S C § 1105(a), "Liability for breach by co-fiduciary," provides, in pertinent part, that " [i]n addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances (1) if he participates knowingly in, or knowingly fails to disclose, an act or omission of such other fiduciary, knowing such act or omission is a breach, (2) if, by his failure to comply with section 404(a)(1), 29 U S C § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to

96 Plaintiffs therefore bring this action under the authority of ERISA § 502(a)(2) for plan-wide relief under ERISA § 409(a) to recover losses sustained by the Plans arising out of the breaches of fiduciary duties by Defendants for violations under ERISA § 404(a)(1) and ERISA § 405(a)

DEFENDANTS' FIDUCIARY STATUS

97 ERISA requires every plan to provide for one or more named fiduciaries who will have "authority to control and manage the operation and administration of the plan " § 402(a)(1), 29 U S C § 1102(a)(1)

98 During the Class Period, all of the Defendants acted as fiduciaries of the Plans pursuant to § 3(21)(A) of ERISA, 29 U S C § 1002(21)(A) and the law interpreting that section As outlined herein, Defendants all had discretionary authority and control with respect to the management of the Plans and/or the management or disposition of the Plans' investments and assets, and/or had discretionary authority or responsibility for the administration of the Plans

99 During the Class Period, Defendants' direct and indirect communications with the Plans' Participants included statements regarding investments in Company Stock Upon information and belief, these communications included, but were not limited to, SEC filings, annual reports, press releases, Company presentations made available to the Plans' Participants via the Company's website and the plan-related documents which incorporated and/or reiterated these statements Defendants also acted as fiduciaries to the extent of this activity

100 In addition, under ERISA, in various circumstances, non-fiduciaries who knowingly participate in fiduciary breaches may themselves be liable To the extent any of the

Defendants are held not to be fiduciaries, they remain liable as non-fiduciaries who knowingly participated in the breaches of fiduciary duty described below

CAUSATION

101 Upon information and belief, the Plans suffered millions of dollars in losses in Plans benefits because substantial assets of the Plans were imprudently invested or allowed to be invested by Defendants in Advanta Stock during the Class Period, in breach of Defendants' fiduciary duties These losses to the Plans were reflected in the diminished account balances of the Plans' Participants

102 Defendants are responsible for losses in the Plans benefits caused by the Participants' direction of investment in Advanta Stock, because Defendants failed to take the necessary and required steps to ensure effective and informed independent participant control over the investment decision-making process, as required by ERISA § 404(c), 29 U S C § 1104(c), and the regulations promulgated thereunder Defendants provided inaccurate and incomplete information to the Plans Participants regarding the true health and ongoing profitability of the Company, thereby misrepresenting the Company's soundness as an investment vehicle As a consequence, Participants could not exercise independent control over their investments in Advanta Stock, and Defendants remain liable under ERISA for losses caused by such investment

103 Had Defendants properly discharged their fiduciary and/or co-fiduciary duties, including the provision of full and accurate disclosure of material facts concerning investment in Advanta Stock, eliminating such Company Stock as an investment alternative when it became imprudent, and divesting the Plan from its holdings of Advanta Stock when maintaining such an

investment became imprudent, the Plans would have avoided a substantial portion of the losses that it suffered

104 Also, reliance is presumed in an ERISA breach of fiduciary duty case Nevertheless, to the extent that reliance is an element of the claim, Plaintiffs relied to their detriment on the misstatements and omissions that Defendants made to the Plans Participants

REMEDY FOR BREACHES OF FIDUCIARY DUTY

105 Defendants breached their fiduciary duties in that they knew or should have known the facts as alleged above, and therefore knew or should have known that the Plans' assets should not have been invested in Advanta Stock during the Class Period. As a consequence of Defendants' breaches, the Plans suffered significant losses

106 ERISA § 502(a)(2), 29 U S C § 1132(a)(2) authorizes a plan participant to bring a civil action for appropriate relief under ERISA § 409, 29 U S C. § 1109 Section 409 requires "any person who is a fiduciary who breaches any of the duties imposed upon fiduciaries to make good to such plan any losses to the plan " Section 409 also authorizes Asuch other equitable or remedial relief as the court may deem appropriate "

107 With respect to calculation of the losses to a plan, breaches of fiduciary duty result in a presumption that, but for the breaches of fiduciary duty, the Participants and beneficiaries in the Plans would not have made or maintained their investments in the challenged investment and, where alternative investments were available, that the investments made or maintained in the challenged investment would have instead been made in the most profitable alternative investment available In this way, the remedy restores the values of the Plans' assets to what they would have been if the Plans had been, properly administered

108 Plaintiffs and the Class are therefore entitled to relief from Defendants in the form of: (a) a monetary payment to the Plans to make good to the Plans the losses to the Plans resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial based on the principles described above, as provided by ERISA § 409(a), 29 U S C § 1109(a), (b) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as provided by ERISA §§ 409(a) and 502(a)(2-3), 29 U S C §§ 1109(a) and 1132(a)(2-3), (c) reasonable attorney fees and expenses, as provided by ERISA § 502(g), 29 U S C § 1132(g), the common fund doctrine, and other applicable law, (d) taxable costs, (e) interest on these amounts, as provided by law, and (f) such other legal or equitable relief as may be just and proper

109 Under ERISA, each defendant is jointly and severally liable for the losses suffered by the Plans in this case

CAUSES OF ACTION

FIRST CLAIM: INVESTMENT IN ADVANTA COMMON STOCK (AGAINST ALL DEFENDANTS)

110 Plaintiffs reallege and incorporate herein by reference the allegations set forth above

111 Pursuant to ERISA § 409(a), 29 U S C § 110(a), any fiduciary who breaches any of the responsibilities, obligations or duties imposed by ERISA § 404 shall be personally liable to make good to a plan any losses to that plan resulting from each breach and shall be subject to such other equitable and remedial relief as the court may deem appropriate

112 Pursuant to ERISA § 404, Defendants had a duty to discharge their duties with respect to the Plans solely in the interests of the Participants and for the exclusive purpose of providing benefits to the Participants Defendants' selection, monitoring, and continuation of the investment alternatives under the Plans were subject to the above-described fiduciary duties By

their continuing to offer Advanta Stock as an investment under the Plans, when Advanta's true adverse financial and operating condition was being concealed, Defendants breached each of these fiduciary duties

113 As a consequence of Defendants' breaches, the Plans suffered losses

114 Defendants are individually liable to make good to the Plans any losses to the Plans resulting from each breach.

115 Pursuant to ERISA § 502(a)(3), 11 U S C § 1132(a)(3), the Court should also award appropriate equitable relief, including in the form of restitution

SECOND CLAIM: MISREPRESENTATION AND NONDISCLOSURE (AGAINST ALL DEFENDANTS)

116 Plaintiffs reallege and incorporate herein by reference the allegations set forth above

117 Pursuant to ERISA § 409(a), 29 U S C § 110(a), any fiduciary who breaches any of the responsibilities, obligations or duties imposed by ERISA § 404 shall be personally liable to make good to a plan any losses to that plan resulting from each breach and shall be subject to such other equitable and remedial relief as the court may deem appropriate

118 Pursuant to ERISA § 404, Defendants had a duty to discharge their duties with respect to the Plans solely in the interests of the Participants and for the exclusive purpose of providing benefits to the Participants

119 Defendants breached these fiduciaries in that they made material misrepresentations and nondisclosures as alleged above

120 The Plans Participants relied upon, and are presumed to have relied upon, Defendants' material misrepresentations and nondisclosures to their detriment

121 As a consequence of Defendants' material misrepresentations and misleading omissions, the Plans suffered losses.

122 Defendants are individually liable to make good to the Plans any losses to the Plans resulting from each breach

123 Pursuant to ERISA § 502(a)(3), 11 U S C § 1132(a)(3), the Court should also award appropriate equitable relief, including in the form of restitution

THIRD CLAIM: DIVIDED LOYALTY
(AGAINST THE INDIVIDUAL DEFENDANTS ONLY)

124 Plaintiffs reallege and incorporate herein by reference the allegations set forth above.

125 Pursuant to ERISA § 409(a), 29 U S C § 110(a), any fiduciary who breaches any of the responsibilities, obligations or duties imposed by ERISA § 404 shall be personally liable to make good to a plan any losses to that plan resulting from each breach and shall be subject to such other equitable and remedial relief as the court may deem appropriate

126 Pursuant to ERISA § 404, Defendants had a duty to discharge their duties with respect to the Plans solely in the interests of the Participants and for the exclusive purpose of providing benefits to the Participants

127 Defendants breached their fiduciary obligations when they acted in their own interests rather than solely in the interests of the Participants and Beneficiaries

128 As a consequence of these breaches, the Plans suffered losses

129 Defendants are individually liable to make good to the Plans any losses to the Plans resulting from each breach

130 Pursuant to ERISA § 502(a)(3), 11 U S C § 1132(a)(3), the Court should also award appropriate equitable relief, including in the form of restitution

FOURTH CLAIM: MISMANAGEMENT OF PLAN ASSETS
(AGAINST ALL DEFENDANTS)

131 Plaintiffs reallege and incorporate herein by reference the allegations set forth above

132 Pursuant to ERISA § 409(a), 29 U S C § 110(a), any fiduciary who breaches any of the responsibilities, obligations or duties imposed by ERISA § 404 shall be personally liable to make good to a plan any losses to that plan resulting from each breach and shall be subject to such other equitable and remedial relief as the court may deem appropriate

133 Pursuant to ERISA § 404(a)(1), 29 U S C § 1104(a)(1), Defendants were required to discharge their duties with respect to the Plans solely in the interests of the Participants with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and of like aims, and to diversify investments in the Plans so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so

134 Defendants breached these duties in that the Plans invested in Advanta Stock when the price of Advanta Stock was artificially inflated and when Advanta Stock was not a prudent retirement investment, thereby failing to diversify assets so as to minimize the risk of large losses

135 As a consequence of these breaches, the Plans suffered losses

136 Defendants are individually liable to make good to the Plans any losses to the Plans resulting from each breach

137 Pursuant to ERISA § 502(a)(3), 11 U S C § 1132(a)(3), the Court should also award appropriate equitable relief, including in the form of restitution

FIFTH CLAIM: BREACH OF THE DUTY TO PROPERLY APPOINT, MONITOR AND INFORM THE COMMITTEE AND MEMBERS OF THE COMMITTEE (AGAINST THE MONITORING DEFENDANTS ONLY)

138 Plaintiffs reallege and incorporate herein by reference the allegations set forth above

139 Defendants Rosoff, Stolper, Alter, Botel, Dunn, and Lubner (the "Monitoring Defendants") had the duty and responsibility to properly appoint, monitor and inform the members of the Committee and/or other persons who exercised day-to-day responsibility for the management and administration of the Plans and their assets

140 The Monitoring Defendants failed to properly appoint, monitor and inform such persons in that the Monitoring Defendants failed to adequately inform such persons about the true financial and operating condition of the Company or, alternatively, the Monitoring Defendants did adequately inform such persons of the true financial and operating condition of the Company (including the financial and operating problems being experienced by Advanta during the Class Period identified herein) but nonetheless continued to allow such persons to offer Advanta Stock as an investment option under the Plans even though the market price of Advanta Stock was artificially inflated and even though Advanta Stock was not a prudent investment for Participants' retirement accounts under the Plans

141 As a consequence of these breaches, the Plans suffered losses

142 The Monitoring Defendants are individually liable to make good to the Plans any losses to the Plans resulting from each breach

143 Pursuant to ERISA § 502(a)(3), 11 U S C § 1132(a)(3), the Court should also award appropriate equitable relief, including in the form of restitution

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for:

A Declaration that Defendants, and each of them, have breached their ERISA fiduciary duties to the participants,

B Declaration that Defendants, and each of them, are not entitled to the protection of ERISA § 404(c)(1)(B), 29 U S C § 1104(c)(1)(B),

C An Order compelling Defendants to make good to the Plans all losses to the Plans resulting from Defendants' breaches of their fiduciary duties, including losses to the Plans resulting from imprudent investment of the Plans' assets, and to restore to the Plans all profits Defendants made through use of the Plans' assets, and to restore to the Plans all profits which the Participants would have made if Defendants had fulfilled their fiduciary obligations,

D Imposition of a Constructive Trust on any amounts by which any Defendants was unjustly enriched at the expense of the Plans as the result of breaches of fiduciary duty,

E An Order requiring Defendants to appoint one or more independent fiduciaries to participate in the management of the Plans' investment in Advanta Stock,

F Actual damages in the amount of any losses the Plans suffered, to be allocated among the Participants' individual accounts in proportion to the accounts' losses

G An Order awarding costs pursuant to 29 U S C § 1132(g),

H An Order for equitable restitution and other appropriate equitable and injunctive relief against Defendants

JURY TRIAL DEMANDED

Plaintiffs demand a trial by jury of all issues so triable.

Dated. December 2, 2009

DONOVAN SEARLES, LLC

By: _____
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Attorneys for Plaintiffs

EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Matthew A Ragan, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v

Advanta Corp , Dennis Alter, Max Botel, Dana Becker Dunn, Ronald Lubner, William A Rosoff, Phillip M Browne, Paul Jeffers and Does 1-10,

Defendants

Civil Action No 2 09cv04974-CMR

Paula Hiatt, as a representative of the Advanta Corp Employee Stock Ownership Plan and the Advanta Corp Employee Savings Plan, and on behalf of a class of similarly situated participants in the Plans,

Plaintiff,

v

Advanta Corp , Dennis Alter, Max Botel, Dana Becker Dunn, Ronald Lubner, William A Rosoff, Phillip M Browne, Paul Jeffers and John Does 1-10

Defendants

Civil Action No 2 09cv05467-CMR

MOTION FOR ENTRY OF [PROPOSED] PRETRIAL ORDER NO. 1 CONSOLIDATING CASES, APPOINTING INTERIM CLASS COUNSEL AND ESTABLISHING PRETRIAL PROCEDURES

Pursuant to Rules 23(g) and 42(a) of the Federal Rules of Civil Procedure, plaintiffs Matthew Ragan and Paula Hiatt ("Plaintiffs"), through their undersigned counsel, respectfully move this Court for entry of [Proposed] Pretrial Order No 1 (the "Proposed Order") consolidating cases, appointing the law firms of Barroway Topaz Kessler Meltzer & Check, LLP

and Izard Nobel LLP as Interim Class Counsel and establishing a preliminary schedule of proceedings, and in support of this motion, aver as follows

1 Plaintiffs filed complaints against Advanta Corporation ("Advanta" or the "Company") and related ERISA fiduciaries, collectively, "Defendants," on behalf of participants in, and beneficiaries of the Advanta Corp Employee Stock Ownership Plan (the "ESOP Plan") and the Advanta Corp Employee Savings Plan (the "ESP Plan"), collectively the "Plans "

2 In their Complaints, Plaintiffs allege that Defendants breached their fiduciary duties to Plaintiffs and other members of the proposed class in connection with the Plans' investment in Advanta common stock, including, *inter alia*, failing to act solely in the interest of the Plans' participants and beneficiaries, and failing to exercise the care, skill, prudence, loyalty and diligence in administering the Plans and investment of their assets mandated under §§ 404 and 405 of ERISA, 29 U S C §§ 1104 and 1105

3 The Complaints seek relief pursuant to Sections 409 and 502(a)(2) and (3) of the Employee Retirement Income Security Act of 1974, 29 U S C §§ 409 and 1132(a)(2) and (3), on behalf of the Plans, alleging, *inter alia*, that Defendants are responsible for restoring losses sustained by the Plans as a result of Defendants' breaches of their fiduciary duties

4 In accordance with Rules 23(g) and 42(a) and the recommendations of the *Annotated Manual for Complex Litigation* (4th ed 2006), Plaintiffs submit for the Court's consideration a Proposed Order which provides for (1) the consolidation of actions subsequently filed in or transferred to this District asserting claims under ERISA with the same or similar factual allegations contained in Plaintiff's complaint, (2) the appointment of Barroway Topaz Kessler Meltzer & Check, LLP and Izard Nobel LLP as Interim Class Counsel, and (3) a preliminary schedule for these proceedings

5 This Motion is based on the enclosed Proposed Order, the accompanying Memorandum of Law, the Declaration of Edward W Ciolko, the Declaration of Robert A Izard and all papers and pleadings in this action

Dated November 24, 2009

Respectfully submitted,

BARROWAY TOPAZ KESSLER MELTZER & CHECK, LLP

/s/ Joseph H Meltzer
Joseph H Meltzer
Edward W Ciolko
280 King of Prussia Rd
Radnor, PA 19087
Tel (610) 667-7706
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Robert A Izard
IZARD NOBEL LLP
29 So Main Street, Suite 215
West Hartford, CT 06107
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Fax (860) 493-6290

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Entry of [Proposed] Pretrial Order No 1 Consolidating Cases, Appointing Interim Class Counsel and Establishing Pretrial Procedures was served upon all counsel of record via ECF on this 24th day of November, 2009

By /s/ Joseph H Meltzer
Joseph H Meltzer
Barroway Topaz Kessler Meltzer
& Check, LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Matthew A Ragan, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

Civil Action No 2 09cv04974-CMR

v

Advanta Corp , Dennis Alter, Max Botel, Dana Becker Dunn, Ronald Lubner, William A Rosoff, Phillip M Browne, Paul Jeffers and Does 1-10,

Defendants

Paula Hiatt, as a representative of the Advanta Corp Employee Stock Ownership Plan and the Advanta Corp Employee Savings Plan, and on behalf of a class of similarly situated participants in the Plans,

Plaintiff,

Civil Action No 2 09cv05467-CMR

v

Advanta Corp , Dennis Alter, Max Botel, Dana Becker Dunn, Ronald Lubner, William A Rosoff, Phillip M Browne, Paul Jeffers and John Does 1-10

Defendants

[additional caption follows]

[PROPOSED] REVISED PRETRIAL ORDER NO. 1 CONSOLIDATING CASES, APPOINTING INTERIM CLASS COUNSEL AND ESTABLISHING PRETRIAL PROCEDURES

Pamela G Yates and Joann Claflin, Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v

William A Rosoff, Michael A Stolper, Dennis Alter, Max Botel, Dana Becker Dunn, Ronald Lubner, Advanta Corp Employee Savings Plan Administrative Committee, Paul Jeffers, Philip M Browne, and John Does 1-20,

Defendants

Civil Action No 2 09cv5746-CMR

WHEREAS, the above-captioned actions (the "ERISA Actions") allege breaches of fiduciary duties by Advanta Corporation and its participating subsidiaries and affiliates ("Advanta" or the "Company") and related ERISA fiduciaries (collectively, "Defendants"), on behalf of participants in, and beneficiaries of, the Advanta Corp Employee Stock Ownership Plan (the "ESOP Plan") and the Advanta Corp Employee Savings Plan (the "ESP Plan") (collectively the ' Plans"), established as a benefit for the Company's employees, and

WHEREAS, appointment of Interim Class Counsel and a case management plan for class actions is appropriate and consistent with the Federal Rules of Civil Procedure and the recommendations of the *Manual for Complex Litigation* (4th ed 2004) and FED R CIV P 23(g),

NOW, THEREFORE, THE COURT ORDERS as follows

I. CONSOLIDATION OF SUBSEQUENT OR TRANSFERRED ACTIONS

When a case that arises out of the same operative facts as the ERISA Actions is hereinafter filed in or transferred to this Court, it is hereby consolidated pursuant to FED R CIV

P 42(a) The ERISA Actions shall be hereinafter referred to as *In re Advanta Corp ERISA Litigation*, Case No 09-CV-04974

When a case that arises out of the same operative facts as this action is hereinafter filed in or transferred to this Court, the Clerk of this Court shall

(a) File a copy of this Order in the separate file for such action,

(b) Mail a copy of this Order to the attorneys for the plaintiff(s) in the newly-filed or transferred case and to any new defendant(s) in the newly-filed or transferred case, and

(c) Make the appropriate entry in this action

The Court requests the assistance of counsel in calling to the attention of the Clerk of this Court the filing or transfer of any case that might properly be consolidated as part of this litigation

II. APPLICATION OF THIS ORDER TO SUBSEQUENT CASES

This Order shall apply to each class action assigned to the undersigned alleging claims similar to those set forth in these actions and brought on behalf of participants in or beneficiaries of the Plans This Order shall apply to each such case which is subsequently filed in or transferred to this Court and which is assigned to the undersigned, unless a party objecting to the consolidation of that case or to any other provision of this Order serves an application for relief from this Order or from any of its provisions within ten (10) days after the date on which the Clerk mails a copy of this Order to the counsel of that party The provisions of this Order shall apply to such action pending the Court's ruling on the application

III. APPOINTMENT OF INTERIM CLASS COUNSEL

The Court designates Barroway Topaz Kessler Meltzer & Check, LLP to act as Interim Class Counsel for the Plaintiffs in this action and all subsequently filed, related actions consolidated herewith, with the responsibilities hereafter described

Interim Class Counsel shall have the authority over the following matters on behalf of plaintiff and the putative class in this action

(a) directing, coordinating, and supervising the prosecution of plaintiff's claims in the action, including the drafting and filing of an Amended Class Action Complaint (the "Amended Complaint"), the briefing of any motion(s) to dismiss by any defendant(s), as well as any class certification motion and any matters pertaining thereto,

(b) initiating and conducting discovery, including, without limitation, coordinating discovery with defendants' counsel, preparing written interrogatories, requests for admissions, and requests for production of documents,

(c) directing and coordinating the examination of witnesses in depositions,

(d) retaining experts,

(e) communicating with the Court,

(f) communicating with defense counsel, and

(g) conducting settlement negotiations

No motion shall be initiated or filed on behalf of any plaintiff in this action except through Interim Class Counsel

Service of pleadings and other papers by defendants shall be made only upon Barroway Topaz Kessler Meltzer & Check, LLP, who is authorized and directed to accept service on behalf of plaintiffs in this action and any later actions that may be consolidated herewith

Barroway Topaz Kessler Meltzer & Check, LLP is appointed Interim Class Counsel for the putative plaintiff class pursuant to Rule 23(g) of the Federal Rules of Civil Procedure in the above-captioned case

IV. SCOPE OF ORDER

The terms of this Order shall not have the effect of making any person, firm or entity a party to any action in which he, she, or it has not been named, served or added as such in accordance with the Federal Rules of Civil Procedure The terms of this Order and the consolidation ordered herein shall not constitute a waiver by any party of any claims or defenses to any action

V. PRELIMINARY SCHEDULE OF PROCEEDINGS

On March 19, 2010, the parties executed a Stipulation and Order Regarding Case Management in the consolidated ERISA Action ("Stipulation") which was faxed to the Court The Stipulation, including the Preliminary Schedule of Proceedings set forth therein, is hereby incorporated and adopted in this Order In particular, the following preliminary schedule applies

ERISA Plaintiffs will file a Consolidated ERISA Complaint forty five (45) days after the entry of this Order, assuming receipt of the production of core ERISA documents and information pursuant to ERISA § 104(b)(4) described in paragraph A 2 of the Stipulation by thirty (30) days after entry of this Order The Consolidated ERISA Complaint shall be the operative complaint and shall supersede all complaints filed in any of the ERISA Actions consolidated herein Pending filing and service of the Consolidated ERISA Complaint, Defendants shall have no obligation to move, answer, or otherwise respond to the initial complaints in the ERISA Actions or any complaint in ERISA cases subsequently consolidated However, if a plaintiff in a subsequently filed or transferred case is permitted by the Court to use a separate complaint, each Defendant shall have sixty (60) days from the date the Court grants such permission within which to answer, plead or otherwise move with respect to that complaint

Defendants shall have sixty (60) days from the filing and service of the Consolidated ERISA Complaint to move, answer or otherwise respond ERISA Plaintiffs shall have forty-five (45) days to oppose any dispositive motion brought by Defendants directed at the Consolidated ERISA Complaint The Defendants shall have another thirty (30) days to file and serve any reply Additionally, ERISA Plaintiffs need not file a motion for class certification within the time period prescribed in Local R Civ P 23 1(c) Following Defendants' answer to the Consolidated ERISA Complaint or the Court's denial of Defendants' motion to dismiss the Consolidated ERISA Complaint, whichever occurs first, counsel for the ERISA Plaintiffs and Defendants shall meet and confer and provide the Court with a fulsome proposed pre-trial schedule, including the date by which ERISA Plaintiffs will move for class certification

SO ORDERED, this ____ day of March, 2010

Honorable Cynthia M Rufe
United States District Judge

EXHIBIT E

C
Only the Westlaw citation is currently available.

United States Bankruptcy Court,
D. Delaware.
In re HAWKEYE RENEWABLES, LLC, et al., FN1
Debtors.

FN1. The Debtors in these chapter 11 cases, along with the last four (4) digits of each Debtor's federal tax identification number, are: Hawkeye Renewables, LLC (3162) and Hawkeye Intermediate, LLC (5356). The Debtors' corporate headquarters and service address is: 224 S. Bell Avenue, Ames, Iowa 50010.

No. 09-14461 (KJC).
June 2, 2010.

L. Katherine Good, Mark D. Collins, Tyler D. Semmelman, Richards, Layton & Finger, P.A., Wilmington, DE, for Debtors.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (I) APPROVING THE DEBTORS' (A) DISCLOSURE STATEMENT PURSUANT TO SECTIONS 1125 AND 1126(b) OF THE BANKRUPTCY CODE, (B) SOLICITATION OF VOTES AND VOTING PROCEDURES, AND (C) FORMS OF BALLOTS, AND (II) CONFIRMING THE JOINT PLAN OF REORGANIZATION OF HAWKEYE RENEWABLES, LLC, ET AL. UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

KEVIN J. CAREY, United States Bankruptcy Judge.

***1** WHEREAS Hawkeye Renewables, LLC (" *Renewables* ") and its parent, Hawkeye Intermediate, LLC (" *Intermediate* "), as debtors and debtors in possession (collectively, the " *Debtors* "), have proposed and filed with the United States Bankruptcy Court for the District of Delaware (the " *Court* ") (A) the Joint Prepackaged Plan of Reorganization of Hawkeye Renewables, LLC, et al. Under Chapter 11 of the Bankruptcy Code, dated November 24, 2009 (the " *Initial Prepackaged Plan* ") [D.I. 4], (B) the Joint Plan of Reorganization of Hawkeye Renewables, LLC, et al. Under Chapter 11 of the Bankruptcy Code, dated May 25, 2010 [D.I. 332], which modifies the Initial Prepackaged Plan (as further modified at the hearing held before this Court on June 1, 2010, the " *Plan of Reorganization* ") and a copy of which is annexed hereto as *Exhibit A,* and that certain supplement to the Plan of Reorganization, filed with the Court on March 12, 2010 (as the documents contained therein have been or may be further amended or supplemented, the " *Plan Supplement* ") [D.I. 220, 334] and (B)(i) the Disclosure Statement for Debtors' Joint Prepackaged Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, dated November 24, 2009, (the " *Disclosure Statement* ") [D.I. 5], and (ii) appropriate ballots for voting on the Initial Prepackaged Plan (the " *Ballots* "), in the forms attached as *Exhibit 6* to the Affidavit of Service and Declaration of Christina F. Pullo on behalf of Epiq Bankruptcy Solutions, LLC Regarding Voting and Tabulation of Ballots Accepting and Rejecting the Debtors' Joint Prepackaged Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, sworn to on December 18, 2009 (the " *Voting Certification* ") [D.I. 6], having been duly transmitted to holders of Claims FN2 in compliance with the procedures (the " *Solicitation Procedures* ") set forth in the Voting Certification; and

FN2. Unless otherwise defined herein, capitalized terms shall have the meanings ascribed to such terms in the Prepackaged Plan. The rules of construction in section 102 of the Bankruptcy Code shall apply to this Confirmation Order.

WHEREAS the Court entered an Order (I) Scheduling a Combined Hearing to Consider (A) Approval of the Disclosure Statement, (B) Approval of Solicitation Procedures and Form of Ballots,

and (C) Confirmation of the Prepackaged Plan; (II) Establishing a Deadline to Object to the Disclosure Statement and the Prepackaged Plan; (III) Approving the Form and Manner of Notice Thereof; and (IV) Granting Related Relief (the "*Initial Scheduling Order* ") [D.I. 50], which, among other things, scheduled the hearing to approve the Disclosure Statement for March 3, 2010 at 3:00 p.m. (prevailing Eastern Time), to be immediately followed by a hearing to consider confirmation of the Initial Prepackaged Plan (together, the "*Confirmation Hearing* "): and

WHEREAS the Court entered an Agreed Scheduling Order which amended, in part, the Initial Scheduling Order (the "*Revised Scheduling Order* ") [D.I. 164] and rescheduled the Confirmation Hearing for March 18, 2010, at 10:00 a.m. (prevailing Eastern Time); and

WHEREAS, pursuant to the Initial Scheduling Order, due notice of the Confirmation Hearing has been given to holders of Claims against the Debtors and other parties in interest in compliance with title 11 of the United States Code (the " *Bankruptcy Code* "), the Federal Rules of Bankruptcy Procedure (the "*Bankruptcy Rules* "), the Initial Scheduling Order, and the Solicitation Procedures, as set forth in the (i) Voting Certification and (ii) the affidavits of service filed with the Court, including the Affidavit/Declaration of Service of Paul Belobritsky of Epiq Bankruptcy Solutions, LLC re: Notice of Hearing Regarding (I) Commencement of Chapter 11 Cases, (II) Combined Hearing to Approve Adequacy of Disclosure Statement and Prepetition Solicitation Procedures and to Confirm Prepackaged Plan, and (III) Establishment of Objection Deadline, dated December 28, 2009 [D.I. 53] (collectively, the "*Notice Affidavits* "); and

***2** WHEREAS such notice is sufficient under the circumstances and no further notice is required; and

WHEREAS the Confirmation Hearing has been held before this Court on March 18-19, 2010, and April 12, 2010; and

WHEREAS the Court has entered the Order Determining that (I) Resolicitation of the Prepackaged Plan, as Modified, Is Not Required, and (II) the Prepackaged Plan, as Modified, Meets the Requirements of Sections 1122 and 1123 of the Bankruptcy Code, dated June 3, 2010; and

NOW, THEREFORE, based on the Court's consideration of the entire record of the Chapter 11 Cases and the Confirmation Hearing, including (A) the Disclosure Statement, Plan of Reorganization, and the Voting Certification, (B) the Debtors' Memorandum of Law in Support of Its Request for an Order (I) Approving the Debtors' (a) Disclosure Statement Pursuant to Sections 1125 and 1126(b) of the Bankruptcy Code, (b) Solicitation of Votes and Voting Procedures, and (c) Forms of Ballots, and (II) Confirming the Joint Prepackaged Plan of Reorganization of Hawkeye Renewables, LLC, et al., Under Chapter 11 of the Bankruptcy Code, dated March 12, 2010, (the "*Confirmation Brief* ") and all other responses filed in support thereof, (C) the Declarations of (i) Timothy B. Callahan, dated March 12, 2010, and (it) Michael Genereux, dated March 12, 2010, each in support of confirmation of the Prepackaged Plan, (collectively, the "*Confirmation Declarations* "), (D) the Notice Affidavits, and (E)(i) one objection having been filed to the approval of the Disclosure Statement and confirmation of the Initial Prepackaged Plan by Wilmington Trust FSB (the "*Second Lien Agent* ") [D.I. 187] (the "*Objection* "), (ii) the Debtors' Response to the Objection of Wilmington Trust FSB, as Second Lien Agent, to the Debtors' (I) Disclosure Statement and (II) Joint Prepackaged Chapter 11 Plan, and (iii) the Objection to the approval of the Disclosure Statement and confirmation of the Initial Prepackaged Plan having been overruled, or withdrawn, in all respects; and on the arguments of counsel and the evidence presented at the Confirmation Hearing; and the Court having found and determined that the Disclosure Statement should be approved and the Plan of Reorganization should be confirmed

as reflected by the Court's rulings made herein and at the Confirmation Hearing; and after due deliberation and sufficient cause appearing therefor, the Court hereby FINDS, DETERMINES, AND CONCLUDES that:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. *Findings and Conclusions.* The findings and conclusions set forth herein and in the record of the Confirmation Hearing constitute the Court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, as made applicable herein by Bankruptcy Rules 7052 and 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

***3** B. *Jurisdiction, Venue, Core Proceeding (28 U.S.C. §§ 157(b)(2), 1334(a)).* The Court has jurisdiction over the Debtors' chapter 11 cases pursuant to 28 U.S.C. § 1334, Approval of the Disclosure Statement and confirmation of the Plan of Reorganization are core proceedings pursuant to 28 U.S.C. § 157(b) and this Court has jurisdiction to enter a final order with respect thereto. The Debtors are eligible debtors under section 109 of the Bankruptcy Code. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The Debtors are plan proponents in accordance with section 1121(a) of the Bankruptcy Code.

C. *Chapter 11 Petitions.* On December 21, 2009 (the "*Petition Date*"), each Debtor commenced with this Court a voluntary case under chapter 11 of the Bankruptcy Code (the "*Chapter 11 Cases*"). The Debtors are authorized to continue to operate their business and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed pursuant to section 1104 of the Bankruptcy Code. No statutory committee of unsecured creditors has been appointed pursuant to section 1102 of the Bankruptcy Code. Further, in accordance with an order of this Court dated December 22, 2009 [D.I. 36], the Debtors' cases are being jointly administered pursuant to Bankruptcy Rule 1015(b).

D. *Judicial Notice.* The Court takes judicial notice of the docket of the Chapter 11 Cases maintained by the Clerk of the Court, including all pleadings and other documents filed, all orders entered, and all evidence and arguments made, proffered, or adduced at the hearings held before the Court during the pendency of the Chapter 11 Cases.

E. *Burden of Proof.* The Debtors have the burden of proving the elements of sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence. Each Debtor has met such burden.

F. *Adequacy of Disclosure Statement.* The Disclosure Statement (a) is accurate and contains sufficient information of a kind necessary to satisfy the disclosure requirements of all applicable nonbankruptcy law, including the Securities Act of 1933, as amended (the "*Securities Act*";) and Section 10(b) of, and Rule 10b-5 promulgated under, the Securities Exchange Act of 1934, as amended (the "*Exchange Act*"), (b) contains "adequate information" (as such term is defined in section 1125(a)(1) and used in section 1126(b)(2) of the Bankruptcy Code) with respect to the Debtors, the Plan of Reorganization, and the transactions specified therein, and (c) is approved in all respects.

G. *Voting.* As evidenced by the Voting Certification, votes to accept or reject the Initial Prepackaged Plan have been solicited and tabulated fairly, in good faith, and in a manner consistent with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "*Local Rules*"), and applicable nonbankruptcy law.

***4** H. *Solicitation.* Prior to the Petition Date, the Initial Prepackaged Plan, the Disclosure State-

ment, and the Ballots, and, subsequent to the Petition Date, notice of the Confirmation Hearing, were transmitted and served in compliance with the Bankruptcy Rules, including Bankruptcy Rules 3017 and 3018, the Local Rules, and the Initial Scheduling Order. The forms of the Ballots adequately addressed the particular needs of the Chapter 11 Cases and were appropriate for holders of First Lien Credit Agreement Claims against Renewables that are Secured Claims (Class 3A) and Second Lien Credit Agreement Claims against Renewables (Class 4A)-the Classes of Claims entitled to vote to accept or reject the Initial Prepackaged Plan. The period during which the Debtors solicited acceptances to accept or reject the Initial Prepackaged Plan was reasonable in the circumstances of the Chapter 11 Cases and enabled holders to make an informed decision to accept or reject the Initial Prepackaged Plan, The Debtors were not required to solicit votes from the holders of Other Priority Claims against Renewables (Class 1A), Other Priority Claims against Intermediate (Class IB), and Other Secured Claims (Class 2), as each such Class is Unimpaired under the Plan of Reorganization. The Debtors also were not required to solicit votes from the holders of Deficiency portion of First Lien Credit Agreement Claims against Renewables (Class 3B), First Lien Credit Agreement Claims against Intermediate (Class 3C), Second Lien Credit Agreement Claims against Intermediate (Class 4B), General Unsecured Claims against Renewables (Class 5A), General Unsecured Claims against Intermediate (Class 5B), Equity Interests in Renewables (Class 6), and Equity Interests in Intermediate (Class 7) as these Classes receive no recovery under the Plan of Reorganization and are deemed to reject the Plan of Reorganization. As described in and as evidenced by the Voting Certification and the Notice Affidavits, the transmittal and service of the Initial Prepackaged Plan, the Disclosure Statement, the Ballots, and the notice of the Confirmation Hearing, (all of the foregoing, the " *Solicitation* ") was timely, adequate, and sufficient under the circumstances. The Solicitation of votes to accept or reject the Initial Prepackaged Plan complied with the Solicitation Procedures, was appropriate and satisfactory based on the circumstances of the Chapter 11 Cases, and was in compliance with the provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules, and any other applicable rules, laws, and regulations. In connection therewith, the Debtors and any and all affiliates, members, managers, shareholders, partners, employees, attorneys, and advisors of the foregoing are entitled to the protection of section 1125(e) of the Bankruptcy Code.

I. *Modifications of the Initial Prepackaged Plan.* The modifications made to the Initial Prepackaged Plan and embodied in the Plan of Reorganization comply in all respects with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019 and no additional solicitation is required.

***5** J. *Notice.* As is evidenced by the Voting Certification and the Notice Affidavits, the transmittal and service of the Initial Prepackaged Plan, the Disclosure Statement, and the Ballots were adequate and sufficient under the circumstances, and all parties required to be given notice of the Confirmation Hearing (including the deadline for filing and serving objections to confirmation of the Initial Prepackaged Plan) have been given due, proper, timely, and adequate notice in accordance with the Initial Scheduling Order and in compliance with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and applicable nonbankruptcy law, and such parties have had an opportunity to appear and be heard with respect thereto. No other or further notice is required.

K. *Plan Supplement.* On March 12, 2010, the Debtors filed the Plan Supplement, which includes, among other things, the following documents: (a) the list of executory contracts to be rejected by the Debtors; (b) LLC Agreement; (c) New Secured Term Loan Agreement; (d) Amended Organizational Documents; (e) Amended DG Marketing Agreement; (f) Amended Ethanol Marketing Agreement; (g) Amended Management Agreement; and (h) designation of executive officers and the Board of

Managers, as provided in Section 5.7 of the Plan of Reorganization. On May 26, 2010, the Debtors filed their Notice of Revised Exhibit 2 to Plan Supplement, which notified parties in interest that the proposed LLC Agreement of Reorganized Renewables had been modified. All materials included in the Plan Supplement comply with the terms of the Plan of Reorganization, and the filing and notice of such documents is good and proper in accordance with the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules and no other or further notice is or shall be required.

Compliance with the Requirements of Section 1129 of the Bankruptcy Code

L. *Plan Compliance with the Bankruptcy Code (11 U.S.C. § 1129(a)(1))*. The Plan of Reorganization complies with all applicable provisions of the Bankruptcy Code and, as required by Bankruptcy Rule 3016, the Plan of Reorganization is dated and identifies the Debtors as proponents, thereby satisfying section 1129(a)(1) of the Bankruptcy Code.

(a) *Proper Classification (11 U.S.C. §§ 1122, 1123(a)(1))*. In addition to Administrative Expense Claims, Compensation and Reimbursement Claims, and Priority Tax Claims, which need not be classified, Section 3 of the Plan of Reorganization classifies twelve Classes of Claims and Equity Interests. The Claims and Equity Interests placed in each Class are substantially similar to other Claims and Equity Interests, as the case may be, in each such Class. Valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Equity Interests designated by the Plan of Reorganization, and such Classes do not unfairly discriminate between holders of Claims and Equity Interests. The Plan of Reorganization therefore satisfies sections 1122 and 1123(a)(1) of the Bankruptcy Code.

***6** (b) *Specified Unimpaired Classes (11 U.S.C. § 1123(a)(2))*. Sections 3, 4.1, and 4.2 of the Plan of Reorganization specify that Class 1A (Other Priority Claims against Renewables) and Class IB (Other Priority Claims against Intermediate) and Class 2 (Other Secured Claims) are not impaired under the Plan of Reorganization within the meaning of section 1124 of the Bankruptcy Code, thereby satisfying section 1123(a)(2) of the Bankruptcy Code.

(c) *Specified Treatment of Impaired Classes (11 U.S.C. § 1123(a)(3))*. Sections 3, 4.3, 4.4, 4.5, 4.6, and 4.7 of the Plan of Reorganization designate Class 3A (First Lien Credit Agreement Claims against Renewables that are Secured Claims), Class 3B (Deficiency portion of the First Lien Credit Agreement Claims against Renewables), Class 3C (First Lien Credit Agreement Claims against Intermediate), Class 4A (Second Lien Credit Agreement Claims against Renewables), Class 4B (Second Lien Credit Agreement Claims against Intermediate), Class 5A (General Unsecured Claims against Renewables), Class 5B (General Unsecured Claims against Intermediate), Class 6 (Equity Interests in Renewables), and Class 7 (Equity Interests in Intermediate) as impaired within the meaning of section 1124 of the Bankruptcy Code and specify the treatment of the Claims and Equity Interests in those Classes, thereby satisfying section 1123(a)(3) of the Bankruptcy Code.

(d) *No Discrimination (11 U.S.C. § 1123(a)(4))*. The Plan of Reorganization provides for the same treatment by the Debtors for each Claim or Equity Interest in each respective Class unless the holder of a particular Claim or Equity Interest has agreed to a less favorable treatment of such Claim or Equity Interest, thereby satisfying section 1123(a)(4) of the Bankruptcy Code.

(e) *Implementation of the Plan of Reorganization (11 U.S.C. § 1123(a)(5))*. The Plan of Reorganization provides adequate and proper means for the implementation of the Plan of Reorganization, thereby satisfying section 1123(a)(5) of the Bankruptcy Code, including, without limitation, (i) the issuance of the New Membership Interests to the holders of the First Lien Credit Agreement Claims in Class 3A, (ii) the transfer of any New Membership Interests from holders of the First Lien Credit

Agreement Claims in Class 3A to the Second Lien Credit Agreement Claims in Class 4A, (iii) the execution of the New Secured Term Loan Agreement, (iv) cancellation of existing agreements and securities, (v) the merger or liquidation of Intermediate, (vi) new marketing agreements for ethanol and distillers grains, and (vii) any necessary or optional corporate action.

(f) *Non-Voting Equity Securities/Allocation of Voting Power (11 U.S.C. § 1123(a)(6))*. The amended and restated certificates of incorporation and other organizational documents of Reorganized Renewables prohibit the issuance of non-voting equity securities, thereby satisfying section 1123(a)(6) of the Bankruptcy Code.

(g) *Designation of Directors and Officers (11 U.S.C. § 1123(a)(7))*. The Plan Supplement describes the officers and board of managers of Reorganized Renewables that will serve as of the Effective Date. Section 5.7 of the Plan of Reorganization contains provisions with respect to the manner of selection of managers and officers of Reorganized Renewables that are consistent with the interests of creditors, equity security holders, and public policy, thereby satisfying section 1123(a)(7) of the Bankruptcy Code.

***7** (h) *Impairment/Unimpairment of Classes of Claims and Equity Interests (11 U.S.C. § 1123(b)(1))*. As permitted by section 1123(b)(1) of the Bankruptcy Code, Section 3 of the Plan of Reorganization designates (i) Class 3A (First Lien Credit Agreement Claims against Renewables that are Secured Claims), Class 3B (Deficiency portion of First Lien Credit Agreement Claims against Renewables), Class 3C (First Lien Credit Agreement Claims against Intermediate), Class 4A (Second Lien Credit Agreement Claims against Renewables), Class 4B (Second Lien Credit Agreement Claims against Intermediate), Class 5A (General Unsecured Claims against Renewables), Class 5B (General Unsecured Claims against Intermediate), Class 6 (Equity Interests in Renewables), and Class 7 (Equity Interests in Intermediate) as Impaired, and (ii) Class 1A (Other Priority Claims against Renewables), Class 1B (Other Priority Claims against Intermediate) and Class 2 (Other Secured Claims) as Unimpaired.

(i) *Assumption and Rejection (11 U.S.C. § 1123(b)(2))*. Section 8.1 of the Plan of Reorganization and the Schedule of Rejected Contracts in the Plan Supplement addresses the assumption and rejection of executory contracts and unexpired leases and meets the requirements of section 365(b) of the Bankruptcy Code.

(j) *Additional Plan Provisions (11 U.S.C. § 1123(b)(6))*. Each of the provisions of the Plan of Reorganization are appropriate and consistent with the applicable provisions of the Bankruptcy Code.

(k) *Cure of Defaults (11 U.S.C. § 1123(d))*. Section 8.3 of the Plan of Reorganization provides for the satisfaction of default claims associated with each executory contract and unexpired lease to be assumed pursuant to the Plan of Reorganization in accordance with section 365(b)(1) of the Bankruptcy Code. Except to the extent that different treatment has been agreed to by the non-debtor party or parties to any executory contract or unexpired lease to be assumed pursuant to section 8.1 of the Plan of Reorganization, within thirty (30) days after the Confirmation Date, the Debtors shall, pursuant to the provisions of sections 1123(a)(5)(G) and 1123(b)(2) of the Bankruptcy Code and consistent with the requirements of section 365 of the Bankruptcy Code, file and serve a pleading with the Bankruptcy Court listing the cure amounts, if any, of all executory contracts or unexpired leases to be assumed. The parties to such executory contracts or unexpired leases to be assumed by the Debtors shall have fifteen (15) days from service to object to the cure amounts listed by the Debtors, If there are any objections filed, the Bankruptcy Court shall hold a hearing. The Debtors shall retain their right to reject any of their executory contracts or unexpired leases, including contracts or leases that are subject to a dispute concerning amounts necessary to cure any defaults. Thus, the Plan of Reorganization com-

plies with section 1123(d) of the Bankruptcy Code.

M. *The Debtors' Compliance with the Bankruptcy Code (11 U.S.C. § 1129(a)(2))*. The Debtors have complied with the applicable provisions of the Bankruptcy Code. Specifically:

***8** (a) Each of the Debtors is an eligible debtor under section 109 of the Bankruptcy Code;

(b) The Debtors have complied with applicable provisions of the Bankruptcy Code, except as otherwise provided or permitted by orders of the Bankruptcy Court; and

(c) The Debtors have complied with sections 1125 and 1126(b), the Bankruptcy Rules, the Local Rules, applicable nonbankruptcy law, the Initial Scheduling Order, and all other applicable law, in transmitting the Initial Prepackaged Plan, the Disclosure Statement, the Ballots, and related documents and notices and in soliciting and tabulating the votes to accept or reject the Initial Prepackaged Plan.

N. *Plan of Reorganization Proposed in Good Faith (11 U.S.C. § 1129(a)(3))*. The Debtors have proposed the Plan of Reorganization (including all other documents and agreements necessary to effectuate the Plan of Reorganization) in good faith and not by any means forbidden by law, thereby satisfying section 1129(a)(3) of the Bankruptcy Code. The Debtors' good faith is evident from the facts and record of the Chapter 11 Cases, the Disclosure Statement, the Confirmation Declarations, and the record of the Confirmation Hearing and other proceedings held in the Chapter 11 Cases. The Plan of Reorganization, which was developed after many months of analysis and negotiations involving the Debtors, certain first lien lenders under the First Lien Credit Agreement (the "*Steering Committee* " and together with the First Lien Agent, the "*First Lien Secured Parties* "), and certain second Hen lenders under the Second Lien Credit Agreement (together with the Second Lien Agent, the "*Second Lien Secured Parties* "), was proposed with the legitimate and honest purpose of maximizing the value of the Debtors' estates and effectuating a successful reorganization of the Debtors. The Plan of Reorganization (including all documents necessary to effectuate the Plan of Reorganization) was developed and negotiated in good faith and at arm's-length among representatives of the Debtors, the First Lien Secured Parties, and the Second Lien Agent Further, the Plan of Reorganization's classification, indemnification, exculpation, release, and injunction provisions have been negotiated in good faith and at arm's-length, are consistent with sections 105, 1122, 1123(b)(6), 1123(b)(3)(A), 1129, and 1142 of the Bankruptcy Code, and are each necessary for the Debtors' successful reorganization.

O. *Payment for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4))*. Any payment made or to be made by the Debtors for services or for costs and expenses in or in connection with the Chapter 11 Cases, or in connection with the Plan of Reorganization and incident to the Chapter 11 Cases, has been approved by, or is subject to the approval of, the Court as reasonable, thereby satisfying section 1129(a)(4) of the Bankruptcy Code.

P. *Directors, Officers, and Insiders (11 U.S.C. § 1129(a)(5))*. The Debtors have complied with section 1129(a)(5) of the Bankruptcy Code. The identity and affiliations of the persons proposed to serve as the initial managers and officers of Reorganized Renewables after confirmation of the Plan of Reorganization have been fully disclosed, and the appointment to, or continuance in, such offices of such persons is consistent with the interests of holders of Claims against and Equity Interests in the Debtors and with public policy.

***9** Q. *No Rate Changes (11 U.S.C. § 1129(a)(6))*. After confirmation of the Plan of Reorganization, the Debtors' business will not involve rates established or approved by, or otherwise subject to, any governmental regulatory commission. Thus, section 1129(a)(6) of the Bankruptcy Code is not applicable to the Chapter 11 Cases.

R. *Best Interest of Creditors (11 U.S.C. § 1129(a)(7))*. The Plan of Reorganization satisfies section 1129(a)(7) of the Bankruptcy Code. The Confirmation Declarations, the liquidation analysis provided in the Disclosure Statement, and the other evidence proffered or adduced at the Confirmation Hearing (i) are persuasive and credible, (ii) have not been controverted by other evidence, and (iii) establish that each holder of an Impaired Claim or Equity Interest either has accepted the Plan of Reorganization or will receive or retain under the Plan of Reorganization, on account of such Claim or Equity Interest, property of a value, as of the Effective Date, that is not less than the amount that such holder would receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code on such date.

S. *Acceptance by Certain Classes (11 U.S.C. § 1129(a)(8))*. Class 1A (Other Priority Claims against Renewables), Class 1B (Other Priority Claims against Intermediate), and Class 2 (Other Secured Claims) are Classes of Unimpaired Claims that are conclusively presumed to have accepted the Initial Plan of Reorganization in accordance with section 1126(f) of the Bankruptcy Code. Class 3A (First Lien Credit Agreement Claims against Renewables that are Secured Claims) voted to accept the Initial Plan of Reorganization in accordance with sections 1126(b) and (c) of the Bankruptcy Code, without regard to the votes of insiders of the Debtors. Class 4A (Second Lien Credit Agreement Claims against Renewables) has voted to reject the Initial Plan of Reorganization. Class 3B (Deficiency portion of First Lien Credit Agreement Claims against Renewables), Class 3C (First Lien Credit Agreement Claims against Intermediate), Class 4B (Second Lien Credit Agreement Claims against Intermediate), Class 5A (General Unsecured Claims against Renewables), Class 5B (General Unsecured Claims against Intermediate), Class 6 (Equity Interests in Renewables), and Class 7 (Equity Interests in Intermediate) are Impaired by the Initial Prepackaged Plan and are not entitled to receive or retain any property under the Initial Prepackaged Plan and, therefore, are deemed to have rejected the Initial Prepackaged Plan pursuant to section 1126(g) of the Bankruptcy Code. As found and determined in paragraph BB below, pursuant to section 1129(b)(1) of the Bankruptcy Code, the Plan of Reorganization may be confirmed notwithstanding the fact that Classes 3B, 3C, 4A, 4B, 5A, 5B, 6, and 7 are Impaired and are deemed to have rejected or have rejected the Initial Prepackaged Plan.

T. Treatment of Administrative Expense Claims, Compensation and Reimbursement Claims, and Priority Tax Claims (11 U.S.C. § 1129(a)(9)). The treatment of Allowed Administrative Expense Claims and Allowed Compensation and Reimbursement Claims pursuant to Sections 2.1 and 2.2 of the Plan of Reorganization satisfies the requirements of section 1129(a)(9)(A) of the Bankruptcy Code. The treatment of Priority Tax Claims pursuant to Section 2.3 of the Plan of Reorganization satisfies the requirements of section 1129(a)(9)(C) of the Bankruptcy Code.

***10** U. *Acceptance by Impaired Class (11 U.S.C § 1129(a)(10))*. Holders of First Lien Credit Agreement Claims against Renewables that are Secured Claims (Class 3A) voted to accept the Initial Plan of Reorganization, thereby satisfying the requirements of section 1129(a)(10) of the Bankruptcy Code.

V. *Feasibility (11 U.S.C. § 1129(a)(11))*. The information in the Disclosure Statement and the Confirmation Declarations and the evidence proffered or adduced at the Confirmation Hearing (i) is persuasive and credible, (ii) has not been controverted by other evidence, and (iii) establishes that the Plan of Reorganization is feasible and that based on the financial wherewithal of the Debtors and the Debtors' obligations under the Plan of Reorganization, there is a reasonable prospect of Reorganized Renewables being able to meet its Financial obligations under the Plan of Reorganization and operate its business in the ordinary course and that confirmation of the Plan of Reorganization is

not likely to be followed by the liquidation or the need for further financial reorganization of Reorganized Renewables, thereby satisfying the requirements of section 1129(a)(11) of the Bankruptcy Code.

W. *Payment of Statutory Fees (11 U.S.C. § 1129(a)(12))*. The Plan of Reorganization provides that on the Effective Date, and thereafter as may be required, the Debtors shall pay all fees payable pursuant to section 1930 of title 28 of the United States Code, thereby satisfying section 1129(a)(12) of the Bankruptcy Code.

X. *Continuation of Retiree Benefits (11 U.S.C § 1129(a)(13))*. Section 8.7 of the Plan of Reorganization provides that on and after the Effective Date, Reorganized Renewables may: (1) honor, in the ordinary course of business, any contracts, agreements, policies, programs, and plans, in each case to the extent disclosed in the Disclosure Statement or the first day pleadings, for, among other things, compensation, health care benefits, disability benefits, deferred compensation benefits, travel benefits, savings, severance benefits, retirement benefits, welfare benefits, workers' compensation insurance, and accidental death and dismemberment insurance for the managers, officers, and employees of any of the Debtors who served in such capacity at any time, and (2) honor, in the ordinary course of business, Claims of employees employed as of the Effective Date for accrued vacation time arising prior to the Petition Date; *provided, however,* that the Debtors' or Reorganized Renewables' performance of any employment agreement will not entitle any person to any benefit or alleged entitlement under any policy, program, or plan that has expired or been terminated before the Effective Date, or restore, reinstate, or revive any such benefit or alleged entitlement under any such policy, program, or plan. Nothing in the Plan of Reorganization limits, diminishes, or otherwise alters Reorganized Renewables's defenses, claims, causes of action, or other rights with respect to any such contracts, agreements, policies, programs, and plans. Notwithstanding the foregoing, pursuant to section 1129(a)(13) of the Bankruptcy Code, on and after the Effective Date, all retiree benefits (as that term is defined in section 1114 of the Bankruptcy Code), if any, shall continue to be paid in accordance with applicable law. Accordingly, the Plan of Reorganization satisfies the requirements of section 1129(a)(13) of the Bankruptcy Code.

***11** Y. *No Domestic Support Obligations (11 U.S.C. § 1129(a)(14))*. The Debtors are not required by a judicial or administrative order, or by statute, to pay a domestic support obligation. Accordingly, section 1129(a)(14) of the Bankruptcy Code is inapplicable to the Chapter 11 Cases.

Z. *Debtors Are Not Individuals (11 U.S.C. § 1129(a)(15))*. The Debtors are not individuals, and accordingly, section 1129(a)(15) of the Bankruptcy Code is inapplicable to the Chapter 11 Cases,

AA. *No Applicable Nonbankruptcy Law Regarding Transfers (11 U.S .C. § 1129(a)(16))*. The Debtors are each a moneyed, business, or commercial corporation, and accordingly, section 1129(a)(16) of the Bankruptcy Code is inapplicable to the Chapter 11 Cases.

BB. *Fair and Equitable: No Unfair Discrimination (11 U.S.C. § 1129(b))*. Classes 3B, 3C, 4A, 4B, 5A, 5B, 6, and 7 are deemed to have rejected or rejected the Initial Prepackaged Plan. Based on the evidence proffered, adduced, and presented by the Debtors in the Confirmation Declarations and at the Confirmation Hearing, the Plan of Reorganization does not discriminate unfairly and is fair and equitable with respect to the aforementioned Classes, as required by sections 1129(b)(1) and (b)(2) of the Bankruptcy Code, No holder of any Claims or Equity Interests junior to a Class of Claims or Equity Interests will receive or retain any property under the Plan of Reorganization on account of such junior interest, including the holders of Equity interests in Renewables (Class 6) and the holders of Equity Interests in Intermediate (Class 7), and no holder of a Claim in a Class senior to such Classes

is receiving more than 100% recovery on account of its Claim, including the holders of First Lien Credit Agreement Claims against Renewables that are Secured Claims (Class 3A). Thus, the Plan of Reorganization may be confirmed notwithstanding the rejection of the Initial Prepackaged Plan by Class 4A and the deemed rejection of the Initial Prepackaged Plan by Classes 3B, 3C, 4B, 5A, 5B, 6, and 7.

CC. *Principal Purpose of the Plan (11 U.S.C. § 1129(d)).* The principal purpose of the Plan of Reorganization is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act, and no governmental entity has objected to the confirmation of the Plan of Reorganization on any such grounds. Therefore, the Plan of Reorganization satisfies the requirements of section 1129(d) of the Bankruptcy Code.

DD. *Only One Plan (11 U.S.C. § 1129(c)).* The Plan of Reorganization is the only plan filed in each of these cases, and accordingly, section 1129(c) of the Bankruptcy Code is inapplicable in the Chapter 11 Cases.

EE. *Good Faith Solicitation (11 U.S.C. § 1125(e)).* Based on the record before the Court in Confirmation Declarations and the record of the Chapter 11 Cases, (i) the Debtors are hereby deemed to have solicited acceptances of the Initial Prepackaged Plan and the Plan of Reorganization in good faith and in compliance with the applicable provisions of the Bankruptcy Code, including, without limitation, sections 1125(a) and (e) of the Bankruptcy Code, and any applicable non-bankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with such solicitation and (ii) the Debtors, the First Lien Secured Parties, and the Second Lien Secured Parties and each of their respective managers, officers, employees, affiliates, agents, financial advisors, investment bankers, professionals, accountants, and attorneys are hereby deemed to have participated in good faith and in compliance with the applicable provisions of the Bankruptcy Code in the offer and issuance of any New Membership Interests and New Secured Term Loans, and therefore are not, and on account of such offer, issuance, and solicitation will not be, liable at any time for any violation of any applicable law, rule or regulation governing the solicitation of acceptances or rejections of the Initial Prepackaged Plan, the Plan of Reorganization, or the offer and issuance of any New Membership Interests and New Secured Term Loans, and are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code and, to the extent such parties are listed therein, the exculpation provisions set forth in Section 11.5 of the Plan of Reorganization,

***12** FF. *Implementation.* All documents necessary to implement the Plan of Reorganization, including those contained in the Plan Supplement and all other relevant and necessary documents have been developed and negotiated in good faith and at arm's-length and shall, on completion of documentation and execution, be valid, binding, and enforceable agreements and not be in conflict with any federal or state law.

GG. *Injunction, Exculpation, and Releases.* The Court has jurisdiction under sections 1334(a) and (b) of title 28 of the United States Code to approve the injunction, exculpation, and releases set forth in the Plan of Reorganization including but not limited to those contained in Section 11 thereof. Section 105(a) of the Bankruptcy Code permits issuance of the injunction and approval of the releases and exculpation set forth in the Plan of Reorganization including but not limited to those contained in Section 11 thereof. The Debtors have established here based on the record in the Chapter 11 Cases and the evidence presented in the Confirmation Declarations and at the Confirmation Hearing that such provisions (i) were integral to the formulation and implementation of the Plan of Reorganization, as provided in section 1123 of the Bankruptcy Code, (ii) confer substantial benefits on the Debtors' estates, (iii) are fair, equitable, and reasonable, and (iv) are in the best interests of the Debt-

ors, their estates, and parties in interest.

HH. Pursuant to section 1123(b)(3) of the Bankruptcy Code, the releases, exculpation, and injunction set forth in the Plan of Reorganization and implemented by this Confirmation Order are fair, equitable, reasonable, and in the best interests of the Debtors, Reorganized Renewables and their estates, creditors, and equity holders. The releases of non-Debtors under the Plan of Reorganization are fair to holders of Claims and are necessary to the proposed reorganization, thereby satisfying the requirements of *In re Continental Airlines, Inc.,* 203 F.3d 203, 214 (3d Cir.2000). Such releases are given in exchange for and are supported by fair, sufficient, and adequate consideration provided by each and all of the parties receiving such releases. The Confirmation Declarations and the record of the Confirmation Hearing and these Chapter 11 Cases are sufficient to support the releases, exculpation, and injunction provided for in Section 11 of the Plan of Reorganization. Accordingly, based on the record of the Chapter 11 Cases, the representations of the parties, or the evidence proffered, adduced, or presented in the Confirmation Declarations and at the Confirmation Hearing, the Court finds that the injunction, exculpation, and releases set forth in Section 11 of the Plan of Reorganization are consistent with the Bankruptcy Code and applicable law. The failure to implement the injunction, release, and exculpation provisions of the Plan of Reorganization would seriously impair the Debtors' ability to confirm the Plan of Reorganization.

***13** II *Satisfaction of Confirmation Requirements.* Based on the foregoing, the Plan of Reorganization satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code.

JJ. *Implementation.* All documents necessary to implement the Plan of Reorganization, including those contained in the Plan Supplement, and all other relevant and necessary documents have been negotiated in good faith and at arm's-length and shall, on completion of documentation and execution, be valid, binding, and enforceable agreements and not be in conflict with any federal or state law.

KK. *Good Faith.* The Debtors and the First Lien Secured Parties and each of their respective members, officers, directors, agents, financial advisers, attorneys, employees, equity holders, partners, affiliates, and representatives, will be acting in good faith if they proceed to (1) consummate the Plan of Reorganization and the agreements, transactions, and transfers contemplated thereby and (2) take the actions authorized and directed by this Confirmation Order.

LL. *Successors to the Debtors.* Reorganized Renewables constitutes a successor to the Debtors under the Plan of Reorganization and, consequently, pursuant to section 1145(a) of the Bankruptcy Code, section 5 of the Securities Act of 1933 and any State or local law requiring registration for offer or sale of a security or registration or licensing of an issuer of, underwriter of or broker or dealer in, a security do not apply to the offer or sale of the Class A Units, Class B Units. Class C Units, and Class D Units of Reorganized Renewables pursuant to the Plan of Reorganization.

MM. *Withdrawal of Second Lien Agent Objection.* Based on the modifications made to the Initial Prepackaged Plan, as embodied in the Plan of Reorganization, and the Plan Supplement, the Second Lien Agent has withdrawn its Objection to the Initial Prepackaged Plan and Disclosure Statement.

NN. *No Other Objections.* Other than the Objection, no other objections to the Prepackaged Plan, Plan of Reorganization or Disclosure Statement were filed with this Court.

OO. *Retention of Jurisdiction.* The Court may properly, and on the Effective Date shall, retain exclusive jurisdiction over all matters arising out of, and related to, the Chapter 11 Cases, including the matters set forth in Section 12 of the Plan of Reorganization and section 1142 of the Bankruptcy Code.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. *Findings of Fact and Conclusions of Law.* The above-referenced findings of fact and conclusions of law are hereby incorporated by reference as though fully set forth herein and shall constitute findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable herein by Bankruptcy Rule 9014. To the extent that any finding of facts shall be determined to be a conclusion of law, it shall be deemed so, and vice versa.

***14** 2. *Notice of the Confirmation Hearing.* Notice of the Confirmation Hearing complied with the terms of the Initial Scheduling Order, was appropriate and satisfactory based on the circumstances of the Chapter 11 Cases, and was in compliance with the provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules.

3. *Solicitation.* The solicitation of votes to accept or reject the Initial Prepackaged Plan complied with the Solicitation Procedures, was appropriate and satisfactory based on the circumstances of the Chapter 11 Cases, and was in compliance with the provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and applicable nonbankruptcy law.

4. *Ballots.* The forms of Ballots annexed to the Voting Certification are in compliance with Bankruptcy Rule 3018(c), as modified, conform to Official Form Number 14, and are approved in all respects.

5. *Plan Modification.* Modifications made to the Initial Prepackaged Plan following the solicitation of votes thereon satisfied the requirements of section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019.

6. *The Disclosure Statement.* The Disclosure Statement (a) contains accurate and adequate information of a kind generally consistent with the disclosure requirements of applicable nonbankruptcy law, including the Securities Act, the Exchange Act and applicable rules promulgated thereunder, (b) contains "adequate information" (as such term is defined in section 1125(a)(1) and used in section 1126(b)(2) of the Bankruptcy Code) with respect to the Debtors, the Plan of Reorganization, and the transactions contemplated therein, and (c) is approved in all respects. To the extent that the Debtors' solicitation of acceptances of the Initial Prepackaged Plan, the Plan of Reorganization or the issuance of the New Membership Interests and New Secured Term Loans is deemed to constitute an offer of new securities, the Debtors are exempt from the registration requirements of the Securities Act (and of any equivalent state securities or "blue sky" laws) with respect to such solicitation under section 4(2) of the Securities Act and Regulation D promulgated thereunder. Section 4(2) exempts from registration under the Securities Act all "transactions by an issuer not involving any public offering." 15 U.S.C. § 77d(2). The Debtors have complied with the requirements of section 4(2) of the Securities Act and Regulation D, as the prepetition Solicitation involved a private offering exempt from the registration requirements of the Securities Act. Further, the offering of New Membership Interests and New Secured Term Loans was extended only to those creditors who certified that they are "Accredited Investors" as defined in Regulation D under the Securities Act.

7. *Confirmation of the Plan of Reorganization.* The Plan of Reorganization and each of its provisions shall be, and hereby are, CONFIRMED under section 1129 of the Bankruptcy Code. The documents contained in the Plan Supplement are authorized and approved. The terms of the Plan of Reorganization, including the Plan Supplement, are incorporated by reference into, and are an integral part of, this Confirmation Order.

***15** 8. *General Authorizations.* The Plan of Reorganization was approved by each of the boards of

managers of the Debtors. Except to the extent provided in the appropriate provisions of the Delaware Limited Liability Company Act and section 1142(b) of the Bankruptcy Code, upon the Effective Date, all actions contemplated by the Plan of Reorganization shall be deemed authorized and approved in all respects, including (i) adoption or assumption, as applicable, of executory contracts and unexpired leases, (ii) selection of the managers and officers for Reorganized Renewables, (iii) the distribution of the New Membership Interests, (iv) the execution and entry into the New Secured Term Loan Agreement, and (v) all other actions contemplated by the Plan of Reorganization (whether to occur before, on or after the Effective Date). All matters provided for in the Plan of Reorganization involving the corporate structure of the Debtors or Reorganized Renewables, and any corporate action required by the Debtors or Reorganized Renewables in connection with the Plan of Reorganization shall be deemed to have occurred and shall be in effect, without any requirement of further action by the security holders, managers, or officers of the Debtors or Reorganized Renewables. On or (as applicable) prior to the Effective Date, the appropriate officers of the Debtors or Reorganized Renewables (including, any vice-president, president, chief executive officer, treasurer, or chief financial officer of any Debtor or Reorganized Renewables), as applicable, shall be authorized and directed to issue, execute, and deliver the agreements, documents, securities, and instruments specified or referred to in the Plan of Reorganization (or necessary or desirable to effect the transactions specified in the Plan of Reorganization) in the name of and on behalf of Reorganized Renewables, including (i) the Amended Organizational Documents, (ii) the New Secured Term Loan Agreement, and (iii) any and all other agreements, documents, securities, and instruments relating to the foregoing. The authorizations and approvals contemplated by Section 5.13 of the Plan of Reorganization shall be effective notwithstanding any requirements under nonbankruptcy law.

9. *Binding Effect.* On the date of and following entry of this Confirmation Order and subject to the occurrence of the Effective Date, the provisions of the Plan of Reorganization shall bind and inure to the benefit of the Debtors, Reorganized Renewables, all holders of Claims against and Equity Interests in the Debtors (irrespective of whether such Claims or Equity Interests are Impaired under the Plan of Reorganization or whether the holders of such Claims or Equity Interests have accepted the Plan of Reorganization), any and all non-Debtor parties which are party to executory contracts and unexpired leases with any of the Debtors, any other party in interest in the Chapter 11 Cases, and the respective heirs, executors, administrators, successors, or assigns, if any, of any of the foregoing.

***16** 10. *Vesting of Assets.* On the Effective Date, pursuant to sections 1141(b) and (c) of the Bankruptcy Code, all property of the Estates shall vest in Reorganized Renewables free and clear of all Claims, liens, encumbrances, charges, and other interests, except as provided herein. Reorganized Renewables may operate its business and may use, acquire, and dispose of property free of any restrictions of the Bankruptcy Code or the Bankruptcy Rules and in all respects as if there were no pending cases under any chapter or provision of the Bankruptcy Code, except as provided in the Plan of Reorganization.

11. *Implementation of the Plan of Reorganization.* On the Effective Date or as soon as reasonably practicable thereafter, Reorganized Renewables shall be authorized to take all actions as may be necessary or appropriate to effect any transaction described in, approved by, contemplated by, or necessary to effectuate the Plan of Reorganization, including: (1) the execution and delivery of the appropriate agreements or other documents of merger, consolidation, or reorganization containing terms that are consistent with the terms of the Plan of Reorganization and that satisfy the requirements of applicable law; (2) the execution and delivery of the appropriate instruments of transfer, assignment,

assumption, or delegation of any property, right, liability, duty, or obligations on terms consistent with the terms of the Plan of Reorganization; (3) the filing of the appropriate certificates of incorporation, merger, or consolidation with the appropriate governmental authorities pursuant to applicable law; and (4) all other actions that Reorganized Renewables determines are necessary or appropriate.

12. Each of the officers of Reorganized Renewables shall be authorized, in accordance with his or her authority under the resolutions of the applicable board of managers, to execute, deliver, file, or record such contracts, instruments, releases, indentures, and other agreements or documents and take such actions as may be necessary or appropriate to effectuate and further evidence the terms and conditions of the Plan of Reorganization.

13. *Compliance with Section 1123(a)(6) of the Bankruptcy Code.* The adoption and filing by Reorganized Renewables of the Amended Organizational Documents is hereby authorized, ratified, and approved.

14. *Issuance of New Membership Interests.* The issuance of the New Membership Interests is in the best interests of the Debtors, their estates, and parties in interest Reorganized Renewables is hereby authorized to issue the New Membership Interests without the need for any further corporate action and without any further action by a holder of Claims or Interests. The New Membership Interests shall consist of the Class A Units, the Class B Units, the Class C Units, and the Class D Units. At the close of business on the Effective Date, the Class A, Class B and Class C Units shall be issued to the holders of the Class 3A First Lien Credit Agreement Claims; *provided, however,* that the Class B and Class C Units shall be immediately transferred to the holders of Class 4A Second Lien Credit Agreement Claims. The Class D Units, if any, shall be issued on account of the Management Incentive Program.

***17** 15. All of the New Membership Interests issued pursuant to the Plan of Reorganization shall be duly authorized, validly issued, and, if applicable, fully paid and non assessable. Each distribution and issuance referred to in Section 4 of the Plan of Reorganization shall be governed by the terms and conditions set forth herein applicable to such distribution or issuance and by the terms and conditions of the instruments evidencing or relating to such distribution or issuance, which terms and conditions shall bind each entity receiving such distribution or issuance.

16. The LLC Agreement is deemed to be an "original limited liability company agreement" as such term is used in the Delaware Limited Liability Company Act, 6 Del. C. § 18-101 et seq., as amended. Upon the Effective Date, the LLC Agreement shall be deemed to become valid, binding, and enforceable in accordance with its terms, and each holder of New Membership Interests shall be bound thereby, in each case, without need for execution by any party thereto other than Reorganized Renewables.

17. *Exemption from Securities Law.* Pursuant to section 1145 of the Bankruptcy Code, the offering, issuance, and distribution of any New Membership Interests and any and all settlement agreements incorporated herein shall be exempt from, among other things, the registration requirements of section 5 of the Securities Act and any other applicable law requiring registration prior to the offering, issuance, distribution, or sale of the New Membership Interests. In addition, under section 1145 of the Bankruptcy Code, any New Membership Interests and any and all settlement agreements incorporated therein shall be freely tradable by the recipients thereof, subject to (1) the provisions of section 1145(b)(1) of the Bankruptcy Code relating to the definition of an underwriter in section 2(a)(11) of the Securities Act, (2) compliance with any rules and regulations of the Securities and Exchange Commission, if any, applicable at the time of any future transfer of any the New Membership Interests or instruments, (3) the restrictions, if any, on

the transferability of the New Membership Interests and instruments, and (4) applicable regulatory approval.

18. *New Secured Term Loans.* The New Notes Secured Term Loans and the respective terms and provisions of the New Secured Term Loan Agreement are approved. The incurrence of obligations under the New Secured Term Loans by Reorganized Renewables is authorized without the need for any further corporate action or without any further action by a holder of Claims or Interests.

19. Each of the Debtors and Reorganized Renewables, as the case may be, is authorized to undertake any and all acts and actions required to implement the New Secured Term Loans delivered in connection therewith, including without limitation, entering, executing, delivering, filing, or recording the New Secured Term Loan Agreement, and no board or shareholder vote shall be required with respect thereto except as expressly contemplated or required by the New Secured Term Loan Agreement. The parties to the New Secured Term Loan Agreement are authorized and empowered to take such steps and to execute such instruments and documents as may be necessary or required to assist in the implementation of all transactions contemplated thereby. The automatic stay imposed pursuant to section 362 of the Bankruptcy Code is vacated and modified to the extent necessary to permit (without further application to the Court) the execution, delivery, filing, and recordation of the New Secured Term Loan Agreement and all transactions contemplated thereby. On the Effective Date, the liens securing the New Secured Term Loans shall be legal, valid, binding, and enforceable liens, and the New Secured Term Loan Agreement shall constitute the legal, valid, and binding obligations of Reorganized Renewables. The obligations of the Debtors and Reorganized Renewables, as the case may be, under the New Secured Term Loan Agreement shall, upon execution, constitute legal, valid, binding, and authorized obligations, enforceable in accordance with their terms and not in contravention of any state or federal law. As of the Effective Date, the liens securing the New Secured Term Loans shall constitute duly perfected first priority liens upon the assets of Reorganized Renewables and shall be deemed to be created, valid, and perfected without any requirement of filing or recording of financing statements, mortgages, or other evidence of such security interests, liens, and mortgages and without any approvals or consents from governmental entities or any other persons and regardless of whether or not there are any errors, deficiencies, or omissions in any property descriptions attached to any filing and no further act shall be required for perfection of such liens and security interests. Neither the obligations arising under or in connection with the New Secured Term Loan Agreement, nor the respective liens securing the same, shall constitute a preferential transfer or fraudulent conveyance under applicable federal or state laws and will not subject the agents, trustees, lenders, purchasers, or assignees thereunder to any liability by reason of incurrence of such obligation or grant of such liens under applicable federal or state laws, including, but not limited to, successor or transferee liability. In the event an order dismissing any of the Chapter 11 Cases is at any time entered, the liens securing the New Secured Term Loans shall not be affected and shall continue in full force and effect in all respects and shall maintain their priorities and perfected status as provided in the New Secured Term Loan Agreement until all obligations in respect thereof shall have been paid and satisfied in full.

***18** 20. *Professional Compensation.* Notwithstanding anything to the contrary in the Plan of Reorganization, all entities seeking an award by the Bankruptcy Court of compensation for services rendered or reimbursement of expenses incurred through and including the Confirmation Date under section 503(b)(2), (3), (4), or (5) of the Bankruptcy Code (i) shall file their respective final applications for allowance of compensation for services rendered and reimbursement of expenses incurred ("*Final Fee Application* ") no later than the date that is forty-five (45) days after the Effective Date,

and (ii) be paid in full from Reorganized Renewables' Cash on hand in such amounts as are allowed by the Bankruptcy Court (A) on the later of (x) the Effective Date, or (y) the date on which the order relating to any such Allowed Administrative Expense Claim is entered, or (B) on such other terms as may be mutually agreed on between the holder of such an Allowed Administrative Expense Claim and the Debtors or, on and after the Effective Date, Reorganized Renewables. Reorganized Renewables is authorized to pay compensation for services rendered or reimbursement of expenses incurred after the Confirmation Date and until the Effective Date in the ordinary course and without the need for Bankruptcy Court approval.

21. Except as otherwise specifically provided in the Plan of Reorganization, from and after the Effective Date, Reorganized Renewables shall, in the ordinary course of business and without any further notice to or action, order, or approval of the Bankruptcy Court, pay in Cash the reasonable legal, professional, or other fees and expenses related to implementation and consummation of the Plan of Reorganization incurred by Reorganized Renewables. Upon the Effective Date, any requirement that Professionals comply with sections 327 through 331 and 1103 of the Bankruptcy Code in seeking retention or compensation for services rendered after such date shall terminate, and Reorganized Renewables may employ and pay any Professionals in the ordinary course of business without any further notice to or action, order, or approval of the Bankruptcy Court.

22. *Objections to Final Fee Applications.* All objections to any Final Fee Applications shall be filed with the Court, together with proof of service hereof, and served upon the applicant and the notice Parties, so as to be received not later than 4:00 p.m. (prevailing Eastern Time) on the date that is five (5) Business Days prior to the hearing on the Final Fee Applications.

23. *Administrative Expenses.* Subject to the terms and conditions of any interim or final order of the Bankruptcy Court authorizing the use of cash collateral, administrative expenses incurred by the Debtors or Reorganized Renewables after the Effective Date, including Claims for professional fees and expenses, shall not be subject to application and may be paid by the Debtors or Reorganized Renewables, as the case may be, in the ordinary course of business and without further Bankruptcy Court approval.

***19** 24. Notwithstanding anything to the contrary or any requirements in the preceding paragraph, on the Effective Date, Reorganized Renewables shall promptly pay in Cash in full reasonable and documented fees and expenses incurred by the First Lien Agent in connection with the restructuring described herein, including, without limitation, the fees and expenses of Akin Gump Strauss Hauer & Feld LLP, one law firm to serve as local counsel to the First Lien Agent, and Capstone Advisory Group, LLC, as counsel and financial advisor to the First Lien Agent, respectively. All amounts distributed and paid to the foregoing parties pursuant to the Plan of Reorganization shall not be subject to setoff, recoupment, reduction or allocation of any kind and shall not require the filing or approval of any fee application.

25. Notwithstanding anything to the contrary or any requirements in paragraph 23 herein, on the Effective Date, Reorganized Renewables shall promptly pay in Cash, up to the amount of the Fee Cap, the reasonable and documented fees and expenses incurred by the Second Lien Agent in connection with the restructuring described herein, including, without limitation, the fees and expenses incurred of Kasowitz, Benson, Torres, & Friedman LLP and Oppenheimer & Co., Inc., as counsel and financial advisor to the Second Lien Agent, respectively. The fees and expenses incurred by the Second Lien Agent in connection with administering the distributions under the Plan for holders of Second Lien Credit Agreement Claims shall be counted against the Fee Cap. All amounts distributed and paid to the foregoing parties pursuant to

the Plan of Reorganization shall not be subject to setoff, recoupment, reduction or allocation of any kind and shall not require the filing or approval of any fee application.

26. *Payment of Statutory Fees.* All fees payable pursuant to section 1930 of title 28 of the United States Code shall be paid on the Effective Date and thereafter as may be required.

27. *Discharge of Claims and Termination of Equity Interests.* As of the Effective Date, pursuant to Section 11.2 of the Plan of Reorganization and except as otherwise provided therein, the distributions, rights, and treatment that are provided in the Plan of Reorganization shall be in full and final satisfaction, settlement, release, and discharge, effective as of the Effective Date, of all Claims, Equity Interests, and causes of action of any nature whatsoever, including any interest accrued on Claims or Equity Interests from and after the Petition Date, whether known or unknown, against, liabilities of, liens on, obligations of, rights against, and Interests in, the Debtors or any of their assets or properties, regardless of whether any property shall have been distributed or retained pursuant to the Plan of Reorganization on account of such Claims and Equity Interests, including demands, liabilities, and causes of action that arose before the Effective Date, any contingent or non-contingent liability on account of representations or warranties issues on or before the Effective Date, and all debts of the kind specified in sections 502(g), 502(h), or 502(i) of the Bankruptcy Code, in each case whether or not: (1) a proof of claim or interest based upon such Claims, debt, right, or Equity Interest is filed or deemed filed pursuant to section 501 of the Bankruptcy Code; (2) a Claim or Equity Interest based upon such Claim, debt, right, or Equity Interest is Allowed pursuant to section 502 of the Bankruptcy Code; or (3) the holder of such a Claim or Equity Interest has accepted the Plan of Reorganization. The Confirmation Order shall be a judicial determination of the discharge of all Claims and Interests subject to the Effective Date occurring, except as otherwise expressly provided by the Plan of Reorganization.

***20** 28. *Binding Release, Injunction, and Exculpation Provisions.* All release and exculpation provisions embodied in the Plan of Reorganization, including but not limited to those contained in Sections 11.4, 11.7, and 11.8 of the Plan of Reorganization, are approved and shall be effective and binding on all persons and entities, to the extent provided herein. Except as otherwise provided in the Plan of Reorganization or in any contract, instrument, release, or other agreement or document created pursuant to the Plan of Reorganization, on the Effective Date and concurrently with the applicable distributions made pursuant to the Plan of Reorganization and, in the case of a Secured Claim, satisfaction in full of the portion of the Secured Claims that is Allowed as of the Effective Date, all mortgages, deeds of trust, Liens, pledges, or other security interest against any property of the Estates shall be fully released and discharged, and all of the right, title, and interest of any holder of such mortgages, deeds of trust, Liens, pledges, or other security interests shall revert to Reorganized Renewables and its successors and assigns.

29. *Term of Injunctions or Stays.* Pursuant to Section 11.3 of the Plan of Reorganization, unless otherwise provided, all injunctions or stays arising under or entered during the Chapter 11 Cases under section 105 or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, shall remain in full force and effect until the later of the Effective Date and the date indicated in the order providing for such injunction or stay. On entry of the Confirmation Order, all holders of Claims and Equity Interests and other parties in interest, along with their respective present of former employees, agents, officers, directors, or principals, shall be enjoined from taking any actions to interfere with the implementation or consummation of the Plan of Reorganization.

30. *Release of Liens.* Except as otherwise provided in the Plan of Reorganization or in any contract, instrument, release, or other agreement or

document created pursuant to the Plan of Reorganization, on the Effective Date and concurrently with the applicable distributions made pursuant to the Plan of Reorganization and, in the case of a Secured Claim, satisfaction in full of the portion of the Secured Claim that is Allowed as of the Effective Date, all mortgages, deeds of trust, Liens, pledges, or other security interests against any property of the Estates shall be fully released and discharged, and all of the right, title, and interest of any holder of such mortgages, deeds of trust, Liens, pledges, or other security interests shall revert to Reorganized Renewables and its successors and assigns.

31. *Environmental Claims.* Nothing in the Plan of Reorganization, the Confirmation Order, and any implementing Plan of Reorganization documents discharges, releases, precludes, or enjoins (i) any environmental liability to any governmental unit that is not a Claim as such term is defined in section 101 of the Bankruptcy Code or (ii) any environmental Claim of any governmental unit arising on or after the Effective Date. The Debtors and Reorganized Renewables reserve the right to assert that any environmental liability is a Claim that arose on or prior to the Confirmation Date and that such Claim has been discharged and/or released under sections 524 and 1141 of the Bankruptcy Code. In addition, nothing in the Plan of Reorganization discharges, releases, precludes, or enjoins any environmental liability to any governmental unit that any entity would be subject to as the owner or operator of property after the Effective Date.

***21** 32. *IRS Claims.* Further, notwithstanding any provision to the contrary in the Plan of Reorganization, this Confirmation Order, and any implementing Plan of Reorganization documents, nothing shall: (1) affect the ability of the Internal Revenue Service ("*IRS* ") to pursue to the extent allowed by non-bankruptcy law any non-debtors for any liabilities that may be related to any federal tax liabilities owed by the Debtors; and (2) affect the rights of the IRS to assert setoff and recoupment. To the extent the allowed IRS Priority Tax Claims are not paid in full in cash on the Effective Date, payments of the allowed IRS Priority Tax Claims shall be paid in equal quarterly installments over a period not to exceed five years from the petition date and interest shall accrue on such claims from the Effective Date at the rate and method set forth in 26 U.S.C. Sections 6621 and 6622.

33. *Settlement of Certain Claims.* Pursuant to Bankruptcy Rule 9019, and in consideration for the classification, distribution, releases, and other benefits provided under the Plan of Reorganization, on the Effective Date, the provisions of the Plan of Reorganization shall constitute a good faith compromise and settlement of all Claims or controversies resolved pursuant to the Plan of Reorganization. All Plan of Reorganization distributions made to creditors holding Allowed Claims in any Class are intended to be and shall be final, and no Plan of Reorganization distribution to the holder of a Claim in one Class shall be subject to being shared with or reallocated to the holders of any Claim in another Class by virtue of any prepetition collateral trust agreement, shared collateral agreement, subordination agreement, or other similar inter-creditor arrangement.

34. *Assumption or Rejection of Contracts and Leases.* Pursuant to Section 8.1 of the Plan of Reorganization, except as otherwise provided in the Plan of Reorganization, or in any contract, instrument, release, indenture, or other agreement or document entered into in connection with the Plan of Reorganization, as of the Effective Date, all executory contracts and unexpired leases to which any of the Debtors are parties are hereby assumed except for an executory contract or unexpired lease that (i) previously has been assumed or rejected pursuant to Final Order, (ii) previously expired or terminated by its own terms, (iii) is specifically designated as a contract or lease to be rejected on the Schedule of Rejected Contracts scheduled in the Plan Supplement, which schedule shall be in form and substance acceptable to the First Lien Agent with the

consent of the Required Lenders or (iv) is the subject of a separate motion to assume or rejected such executory contract or unexpired lease filed by the Debtors under section 365 of the Bankruptcy Code prior to the Confirmation Date. This Confirmation Order shall constitute an order of the Bankruptcy Court under sections 365 and 1123(b) of the Bankruptcy Code approving the contract and lease assumptions or rejections described above, as of the Effective Date.

***22** 35. *Authorization of Certain Agreements.* On the Effective Date, Reorganized Renewables is authorized and directed, without any requirement of further action by the equity holders or board of managers of the Debtors, to perform under (i) the Amended DG Marketing Agreement, (ii) the Amended Ethanol Marketing Agreement, and (iii) the Amended Management Agreement, which shall supersede and replace all existing agreements between Renewables, HEH and Gold.

36. *Merger or Liquidation of Intermediate.* Prior to the close of business on the Effective Date, without any requirement of further action by the equity holders or board of managers of the Debtors, Intermediate shall either liquidate or merge with and into Reorganized Renewables being the surviving entity at the option of the First Lien Agent with the consent of the Required Lenders.

37. *Conditions to Effective Date.* The Plan of Reorganization shall not become effective until the conditions set forth in Section 9.2 of the Plan of Reorganization have been satisfied or waived pursuant to section 9.4 of the Plan of Reorganization.

38. *Retention of Jurisdiction.* Notwithstanding the entry of this Confirmation Order or the occurrence of the Effective Date, pursuant to Section 12 of the Plan of Reorganization and sections 105 and 1142 of the Bankruptcy Code, this Court shall retain exclusive jurisdiction over all matters arising in, arising under, and related to the Chapter 11 Cases to the fullest extent as is legally permissible; *provided, however,* that, on and subsequent to the Effective Date, this Court shall not retain jurisdiction over any disputes, rights, claims, interests or controversies under the New Secured Term Loan Agreement and the exercise of the respective rights or remedies of the parties thereunder.

39. *Indemnification Obligations.* Any obligations of the Debtors pursuant to any separate indemnification agreements with the managers and officers serving on the Petition Date or pursuant to their operating agreement or other organizational documents to indemnify managing members, members of the board of managers and officers serving on the Petition Date with respect to actions, suits, and proceedings against such parties, shall not be discharged or impaired by confirmation of the Plan of Reorganization and such obligations shall be deemed and treated as executory contracts assumed by the Debtors hereunder and shall continue as obligations of Reorganized Renewables. The Debtors shall reject all such agreements that apply to managers no longer serving in their capacity as such as of the Petition Date.

40. *Exemption from Certain Fees and Taxes.* Pursuant to section 1146(c) of the Bankruptcy Code , any transfers of property pursuant to the Plan of Reorganization shall not be subject to any document recording tax, stamp tax, conveyance fee, intangibles or similar tax, mortgage tax, real estate transfer tax, mortgage recording tax or other similar tax or governmental assessment in the United States. The appropriate state or local governmental officials or agents must forego the collection of any such tax or governmental assessment and to accept for filing and recordation instruments or other documents pursuant to such transfers of property without the payment of any such tax or governmental assessment.

***23** 41. *Amendments.* With the consent of the First Lien Agent and the Required Lenders, the Plan of Reorganization may be amended, modified, or supplemented by the Debtors or Reorganized Renewables in the manner provided for by section 1127 of the Bankruptcy Code or as otherwise per-

mitted by law without additional disclosure pursuant to section 1125 of the Bankruptcy Code; provided, however, to the extent any amendment, modification or supplementation to the Plan of Reorganization adversely affects Holders of Second Lien Credit Agreement Claims or the Second Lien Agent, the Second Lien Agent must also consent to such amendment, modification or supplementation, which consent shall not be unreasonably withheld. In addition, after the Confirmation Date, the Debtors may institute proceedings in the Bankruptcy Court to remedy any defect or omission or reconcile any inconsistencies in the Plan of Reorganization or the Confirmation Order, with respect to such matters as may be necessary to carry out the purposes and effects of the Plan of Reorganization; provided, however, to the extent any amendment, modification or supplementation to the Plan of Reorganization adversely affects Holders of Second Lien Credit Agreement Claims or the Second Lien Agent, the Second Lien Agent must also consent to such amendment, modification or supplementation, which consent shall not be unreasonably withheld. Prior to the Effective Date, the Debtors may make appropriate technical adjustments and modifications to the Plan of Reorganization, with the consent of the First Lien Agent and the Required Lenders, without further order or approval of the Bankruptcy Court.

42. *Reversal/Stay/Modification/Vacatur of Confirmation Order.* If any or all of the provisions of this Confirmation Order or the Plan of Reorganization are hereafter reversed, modified, vacated, or stayed by subsequent order of this Court or any other court, such reversal, stay, modification, or vacatur shall not affect the validity or enforceability of any act, obligation, indebtedness, liability, priority, security interest granted or lien incurred or undertaken by the Debtors or Reorganized Renewables, as applicable, prior to the occurrence of such reversal, stay, modification, or vacatur. Notwithstanding any such reversal, stay, modification, or vacatur of this Confirmation Order, any such act or obligation incurred or undertaken pursuant to, or in reliance on, this Confirmation Order prior to the occurrence of such reversal, stay, modification, or vacatur shall be governed in all respects by the provisions of this Confirmation Order and the Plan of Reorganization or any amendments or modifications thereto.

43. *Provisions of Plan of Reorganization and Confirmation Order Nonseverable and Mutually Dependent.* The provisions of the Plan of Reorganization and this Confirmation Order, including the findings of fact and conclusions of law set forth herein, are nonseverable and mutually dependent.

***24** 44. *Governing Law.* Except to the extent that the Bankruptcy Code or other federal law is applicable, or to the extent an exhibit to the Plan of Reorganization or Plan Supplement provides otherwise (in which case the governing law specified therein shall be applicable to such exhibit), the rights, duties, and obligations arising under the Plan of Reorganization shall be governed by, and construed and enforced in accordance with, the laws of the State of New York without giving effect to the principles of conflict of laws thereof.

45. *Applicable Nonbankruptcy Law.* Pursuant to sections 1123(a) and 1142(a) of the Bankruptcy Code, the provisions of this Confirmation Order, the Plan of Reorganization and related documents or any amendments or modifications thereto shall apply and be enforceable notwithstanding any otherwise applicable nonbankruptcy law.

46. *Waiver of Filings.* Any requirement under section 521 of the Bankruptcy Code or Bankruptcy Rule 1007 obligating the Debtors to file any list, schedule, or statement with the Court or the Office of the United States Trustee for the District of Delaware (except for monthly operating reports or any other post-confirmation reporting obligation to the United States Trustee), is hereby waived as to any such list, schedule, or statement not filed as of the Confirmation Date.

47. *Documents, Mortgages, and Instruments.*

Each federal, state, commonwealth, local, foreign, or other governmental agency is hereby authorized to accept any and all documents, mortgages, and instruments necessary or appropriate to effectuate, implement or consummate the transactions contemplated by the Plan of Reorganization and this Confirmation Order.

48. *Governmental Approvals Not Required.* This Confirmation Order shall constitute all approvals and consents required, if any, by the laws, rules, or regulations of any state or other governmental authority with respect to the implementation or consummation of the Plan of Reorganization and Disclosure Statement, any documents, instruments, or agreements, and any amendments or modifications thereto, and any other acts referred to in, or contemplated by, the Plan of Reorganization and the Disclosure Statement.

49. *Notice of Confirmation Order and Occurrence of Effective Date.* In accordance with Bankruptcy Rules 2002 and 3020(c), as soon as reasonably practicable after the Effective Date, the Debtors shall serve notice of the entry of this Confirmation Order, substantially in the form annexed hereto as *Exhibit B,* to all parties who hold a Claim or Equity Interest in these cases, including the United States Trustee. Such notice is hereby approved in all respects and shall be deemed good and sufficient notice of entry of this Confirmation Order and the occurrence of the Effective Date,

50. *Substantial Consummation.* On the Effective Date, the Plan of Reorganization shall be deemed to be substantially consummated under sections 1101 and 1127 of the Bankruptcy Code.

***25** 51. *Inconsistency.* To the extent of any inconsistency between this Confirmation Order and the Plan of Reorganization, this Confirmation Order shall govern.

52. *Successor to the Debtors.* Reorganized Renewables shall be deemed the successor of the Debtors under the Plan of Reorganization pursuant to section of 1145(a) of the Bankruptcy Code.

53. *No Waiver.* The failure to specifically include any particular provision of the Plan of Reorganization in this Confirmation Order shall not diminish the effectiveness of such provision nor constitute a waiver thereof, it being the intent of this Court that the Plan of Reorganization is confirmed in its entirety and incorporated herein by this reference.

Bkrtcy.D.Del.,2010.
In re Hawkeye Renewables, LLC
Slip Copy, 2010 WL 2745975 (Bkrtcy.D.Del.)

END OF DOCUMENT

EXHIBIT F

Slip Copy, 2010 WL 3493027 (Bkrtcy.D.Del.)
(Cite as: 2010 WL 3493027 (Bkrtcy.D.Del.))

Only the Westlaw citation is currently available.

United States Bankruptcy Court,
D. Delaware.
In re EBHI HOLDINGS, INC., et al.,[FN1] Debtors.

FN1. The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: EBHI Holdings, Inc. f/k/a Eddie Bauer Holdings, Inc., a Delaware corporation (2352); Amargosa, Inc. f/k/a Eddie Bauer, Inc., a Delaware corporation (9737); Gobi Fulfillment Services, Inc. f/k/a Eddie Bauer Fulfillment Services, Inc., a Delaware corporation (0882); Arabian Diversified Sales, LLC f/k/a Eddie Bauer Diversified Sales, LLC, a Delaware limited liability company (1567); Gibson Services, LLC f/k/a Eddie Bauer Services, LLC, an Ohio limited liability company (disregarded); Karakum International Development, LLC f/k/a Eddie Bauer International Development, LLC, a Delaware limited liability company (1571); Simpson Information Technology, LLC f/k/a Eddie Bauer Information Technology, LLC, a Delaware limited liability company (disregarded); Sandy Financial Services Acceptance Corporation f/k/a Financial Services Acceptance Corporation, a Delaware corporation (7532); and Sonoran Acceptance Corporation f/k/a Spiegel Acceptance Corporation, a Delaware corporation (7253). The mailing address for EBHI Holdings, Inc. is 10401 N.E. 8th Street, Suite 500, Bellevue, WA 98004.

No. 09-12099 (MFW).
March 18, 2010.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CONFIRMING FIRST AMENDED JOINT PLAN OF LIQUIDATION OF EBHI HOLDINGS, INC., ET AL.

MARY F. WALRATH, United States Bankruptcy Judge.

INTRODUCTION

1** The above-captioned debtors and debtors-in-possession (collectively, the "Debtors*** ") having proposed the *First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al.* dated January 26, 2010 [docket no. 1269], and as described herein (including all exhibits thereto, and as modified hereby, the "***Plan*** ");[FN2] the Court having entered its *Order (A) Approving the Disclosure Statement, (B) Establishing the Voting Record Date, Voting Deadline and Other Dates, (C) Approving Procedures for Soliciting, Receiving and Tabulating Votes on the Plan and for Filing Objections to the Plan and (D) Approving the Manner and Forms of Notice and Other Related Documents* dated January 28, 2010 [docket no. 1289] (the "***Disclosure Statement Order*** "), by which the Court, among other things, approved the Debtors' *Disclosure Statement for the First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al.* [docket no. 1270] (the "***Disclosure Statement*** "), established procedures for the solicitation and tabulation of votes to accept or reject the Plan, scheduled a hearing on confirmation of the Plan and approved related notice procedures; Kurtzman Carson Consultants, LLC ("***KCC*** "), the Debtors' notice, claims and solicitation agent in respect of the Plan, having filed the *Certification of Michael J. Paque with Respect to the Tabulation of Votes on the First Amended Joint Plan of Liquidation of EBHI Holdings, Inc., et al.* [docket no. 1435] (the "***Voting Affidavit*** ") on March 15, 2010; the Court having established in the Disclosure Statement Order March 18, 2010 at 3:00 p.m. Eastern Time as the date and time of the hearing pursuant to section 1129 of title 11 of the United States Code, 11 U.S.C. §§ 101-1330 (the " ***Bankruptcy Code*** "), to consider confirmation of the Plan (the " ***Confirmation Hearing*** "); affidavits of service of the solicitation materials with respect to the Plan

having been executed by KCC with respect to the mailing of notice of the Confirmation Hearing and solicitation materials in respect of the Plan in accordance with the Disclosure Statement Order (collectively, the "***Affidavits of Service*** ") and having been filed with the Court on or about February 16, 2010; verification of publication of the *Notice of (A) Plan Confirmation Hearing, (B) Objection and Voting Deadlines and (C) Solicitation and Voting Procedures* (the "***Affidavit of Publication*** ") having been filed with the Court on February 10, 2010 with respect to the publication of notice of the Confirmation Hearing and certain related matters in the national edition of *USA Today* in accordance with the Disclosure Statement Order; the Court having reviewed the Plan, the Disclosure Statement, the Disclosure Statement Order, the Voting Affidavit, the Affidavits of Service, the Affidavit of Publication, and the other papers before the Court in connection with the confirmation of the Plan; the Court having heard the statements of counsel in support of and in opposition to confirmation at the Confirmation Hearing, as reflected in the record at the Confirmation Hearing; the Court having considered all testimony presented and evidence admitted at the Confirmation Hearing; the Court having taken judicial notice of the papers and pleadings on file in these Chapter 11 Cases; and the Court finding that (i) notice of the Confirmation Hearing and the opportunity of any party in interest to object to Confirmation was adequate and appropriate, in accordance with Bankruptcy Rule 2002(b) and the Disclosure Statement Order, as to all parties to be affected by the Plan and the transactions contemplated thereby and (ii) the legal and factual bases set forth in the applicable papers and at the Confirmation Hearing, and as set forth in this Confirmation Order, establish just cause for the relief granted herein; the Court hereby makes the following Findings of Fact, Conclusions of Law and Order: FN3

FN2. Unless otherwise specified, capitalized terms and phrases used herein have the meanings assigned to them in the Plan. The rules of interpretation set forth in Section I.C of the Plan shall apply to these Findings of Fact, Conclusions of Law and Order (this "***Confirmation Order*** "). In addition, in accordance with Section I.A of the Plan, any term used in the Plan or this Confirmation Order that is not defined in the Plan or this Confirmation Order, but that is used in the Bankruptcy Code or the Bankruptcy Rules (each as hereinafter defined), shall have the meaning given to that term in the Bankruptcy Code or the Bankruptcy Rules, as applicable. If there is any direct conflict between the terms of the Plan and the terms of this Confirmation Order, the terms of this Confirmation Order shall control. A copy of the Plan is attached hereto as *Exhibit A* and incorporated herein by reference.

FN3. This Confirmation Order constitutes the Court's findings of fact and conclusions of law under Fed.R.Civ.P. 52, as made applicable herein by Bankruptcy Rules 7052 and 9014. Any finding of fact shall constitute a finding of fact even if it is stated as a conclusion of law, and any conclusion of law shall constitute a conclusion of law even if it is stated as a finding of fact.

I. FINDINGS OF FACT.

A. JURISDICTION AND CORE PROCEEDING.

***2** The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The Debtors were and are qualified to be debtors under section 109 of the Bankruptcy Code.

B. VENUE.

On June 17, 2009 (the "***Petition Date*** "), the Debtors commenced their reorganization cases by filing voluntary petitions for relief under chapter 11 of the Bankruptcy Code. Venue in the District of

Delaware of the Chapter 11 Cases was proper as of the Petition Date and continues to be proper pursuant to 28 U.S.C. § 1408 and 1409.

C. COMPLIANCE WITH THE REQUIREMENTS OF SECTION 1129 OF THE BANKRUPTCY CODE.

1. Section 1129(a)(1)-Compliance of the Plan with Applicable Provisions of the Bankruptcy Code.

The Plan complies with all applicable provisions of the Bankruptcy Code, as required by section 1129(a)(1) of the Bankruptcy Code, including sections 1122 and 1123 of the Bankruptcy Code.

a. Sections 1122 and 1123(a)(1)-(4)-Classification and Treatment of Claims and Interests.

Pursuant to sections 1122(a) and 1123(a)(1) of the Bankruptcy Code, Article 3 of the Plan designates Classes of Claims and Interests, other than for Administrative Expense Claims and Priority Tax Claims.[FN4] As required by section 1122(a), each Class of Claims and Interests contains only Claims or Interests that are substantially similar to the other Claims or Interests within that Class. The Plan contains seven Classes of Claims and Interests, designated as Classes 1 through 7. Class 7 is further subclassified into two subclasses, designated as Class 7A and Class 7B. Such classification is proper under section 1122(a) of the Bankruptcy Code because such Claims and Interests have differing rights among each other and against the Debtors' assets or differing interests in the Debtors. Pursuant to section 1123(a)(2) of the Bankruptcy Code, Article 4 of the Plan specifies all Classes of Claims and Interests that are not Impaired under the Plan and specifies all Classes of Claims and Interests that are Impaired under the Plan. Pursuant to section 1123(a)(3) of the Bankruptcy Code, Article 5 of the Plan specifies the treatment of all Claims and Interests under the Plan. Pursuant to section 1123(a)(4) of the Bankruptcy Code, Article 5 of the Plan also provides the same treatment for each Claim or Interest within a particular Class, unless the holder of a Claim or Interest agrees to less favorable treatment of its Claim or Interest. The Plan therefore complies with sections 1122 and 1123(a)(1)-(4) of the Bankruptcy Code.

FN4. Pursuant to section 1123(a)(1) of the Bankruptcy Code, Administrative Expense Claims and Priority Tax Claims are not required to be classified. Sections 2.1 and 2.4 describe the treatment under the Plan of Administrative Expense Claims and Priority Tax Claims, respectively.

b. Section 1123(a)(5)-Adequate Means for Implementation of the Plan.

Article 7 and various other provisions of the Plan provide adequate means for the Plan's implementation. Those provisions relate to, among other things: (i) the establishment of the Liquidating Trust; (ii) the cancellation of the Indenture; (iii) substantive consolidation of certain Claims against the Debtors for Plan purposes; (iv) the dissolution of the Debtors; and (v) the closing of the Chapter 11 Cases. The Plan therefore complies with section 1123(a)(5) of the Bankruptcy Code.

c. Section 1123(a)(6)-Prohibition Against the Issuance of Nonvoting Equity Securities and Adequate Provisions for Voting Power of Classes of Securities.

***3** Because the Plan contemplates (i) the transfer of all of the Debtors' assets to the Liquidating Trust, (ii) the dissolution of the Debtors' corporate existences as soon as practicable after the Effective Date, (iii) the cancellation of the Indenture, and (iv) the issuance of no new securities, the Plan does not expressly provide for the inclusion in the charters of the Debtors a provision prohibiting the issuance of nonvoting equity securities. Nonetheless, because the Plan does not provide for the issuance of any securities, the issuance of nonvoting securities is impossible. Therefore, the Plan satisfies the requirement of section 1123(a)(6) of the Bankruptcy Code.

d. Section 1123(a)(7)-Selection of Directors and

Officers in a Manner Consistent with the Interest of Creditors and Equity Security Holders and Public Policy.

As soon as practicable after the Effective Date, each of the Debtors will be dissolved for all purposes without the necessity for any other or further actions to be taken by or on behalf of the Debtors or payments to be made in connection therewith; *provided, however,* that pursuant to section 1124(b) of the Bankruptcy Code, after the Effective Date the Liquidating Trustee shall be authorized to file each Debtor's final tax returns, and shall be authorized to file and shall file with the official public office for keeping corporate records in each Debtor's state of incorporation a certificate of dissolution or equivalent document. Such a certificate of dissolution may be executed by the Liquidating Trustee without need for any action or approval by the shareholders or Board of Directors of any Debtor. Following Confirmation and prior to the occurrence of the Effective Date, the then-current officers and directors of each of the Debtors shall continue in their respective capacities and the Debtors shall execute such documents and take such other action as is necessary to effectuate the transactions provided for in the Plan. On and after the Effective Date, all such officers and directors shall be deemed to have resigned. The Liquidating Trustee has ample liquidation experience and was chosen by the Creditors' Committee. The Liquidating Trust Committee that oversees the Liquidating Trustee will be comprised of members appointed by the Creditors' Committee. The Plan therefore complies with section 1123(a)(7) of the Bankruptcy Code, as appropriate for a liquidating plan, in a manner consistent with the interests of creditors and equity security holders and public policy.

e. Section 1123(b)(1)-(2)-Impairment of Claims and Interests and Assumption, Assumption and Assignment or Rejection of Executory Contracts and Unexpired Leases.

In accordance with section 1123(b)(1) of the Bankruptcy Code, Article 4 of the Plan impairs or leaves unimpaired, as the case may be, each Class of Claims and Interests. In accordance with section 1123(b)(2) of the Bankruptcy Code, Article 6 of the Plan provides for the rejection of all executory contracts and unexpired leases of the Debtors as of the Effective Date, except for those executory contracts and unexpired leases that (a) are assumed pursuant to the Plan, (b) have been assumed, assumed and assigned or rejected pursuant to previous orders of the Bankruptcy Court, or (c) are the subject of a pending motion before the Bankruptcy Court with respect to the assumption or assumption and assignment or rejection of such executory contracts and unexpired leases. The Debtors specifically designated certain executory contracts or unexpired leases to be assumed in Exhibit 3 to the Plan and have not further amended Exhibit 3 to the Plan. The Plan is therefore consistent with sections 1123(b)(1)-(2) of the Bankruptcy Code.

f. Section 1123(b)(3)-Retention, Enforcement and Settlement of Claims held by the Debtors.

***4** Pursuant to section 1123(b)(3) of the Bankruptcy Code, except as otherwise provided in the Plan or this Confirmation Order, after the transfer of the Assets to the Liquidating Trust pursuant to Section 7.2.3 of the Plan, the Liquidating Trustee (and to the extent retained by the Liquidating Trust to perform such work, any other Person) will have the right to enforce any and all causes of action against any Entity and rights of the Debtors that arose before or after the Petition Date, including but not limited to the rights and powers of a trustee and debtor-in-possession, against any Entity whatsoever, including but not limited to all avoidance powers granted to the Debtors under the Bankruptcy Code and all causes of action and remedies granted pursuant to sections 502, 506, 510, 541, 542, 543, 544, 545, 547 through 551 and 553 of the Bankruptcy Code, but excluding Released Claims; *provided, however,* that, pursuant to Section 8.1 of the Plan as amended by this Order, the Pre-Petition Term Agent will have the right, on behalf of the Pre-Petition Term Lenders, to (i) enforce Liens on the Term Lender Assets or (ii) pursue any and all causes of action to preserve, recoup, or recover any

Term Lender Assets, in each case against any Entity whatsoever (so long as it is not a Released Claim), including, but not limited to, exercising the rights and powers of a trustee and debtor-in-possession solely with respect to the Term Lender Assets and the Pre-Petition Term Agent shall be deemed to have standing with respect to the exercise of such rights and powers.

Unless otherwise ordered by the Court after notice and a hearing, from and after the Effective Date of the Plan, the Liquidating Trust, through the Liquidating Trustee, shall be the sole representative of the Debtors' Estates for all purposes, including, without limitation, investigating, settling, compromising, objecting to, and litigating in the Court or on appeal (or pursuant to a withdrawal of the reference of jurisdiction) objections to Claims, regardless of whether such objections were filed by the Debtors or the Creditors' Committee, except as it may relate to the Pre-Petition Term Agent's rights to enforce Liens on the Term Lender Assets or pursue causes of action to preserve, recoup, or recover any Term Lender Assets, in which case the Pre-Petition Term Agent may pursue its rights pursuant to Section 8.1 of the Plan as amended by this Order. Objections to any Administrative Expense Claims, including Claims of all Professionals or other Entities requesting compensation or reimbursement of expenses pursuant to Bankruptcy Code sections 327 , 328, 330, 331, 503(b) or 1103 for services rendered on or before the Effective Date (including any compensation requested by any Professional or any other Entity for making a substantial contribution in the Chapter 11 Cases) must be Filed and served on the claimant no later than ninety (90) days after the Administrative Expense Claims Bar Date, which date may be extended by application to the Bankruptcy Court. Objections to any Claim other than an Administrative Expense Claim must be Filed and served on the claimant no later than the later of (x) ninety (90) days after the date the Claim is Filed or (y) ninety (90) days after the Effective Date or such other date as may be ordered from time to time by the Court. No other deadlines by which objections to Claims must be Filed have been established in these Chapter 11 Cases. In light of the foregoing, the Plan is consistent with section 1123(b)(3) of the Bankruptcy Code.

g. Section 1123(b)(4)-Sale of All or Substantially All of the Property of the Estate.

***5** Consistent with section 1123(b)(4) of the Bankruptcy Code, the Plan effectuates the distribution of the proceeds of the sale of all or substantially all property of the Estates under the Plan or previous sale orders of the Court. The Plan is therefore consistent with section 1123(b)(4) of the Bankruptcy Code.

h. Section 1123(b)(5)-Modification of the Rights of Holders of Claims.

Article 5 of the Plan modifies or leaves unaffected, as the case may be, the rights of holders of each Class of Claims, and therefore, the Plan is consistent with section 1123(b)(5) of the Bankruptcy Code.

i. Section 1123(b)(6)-Other Provisions Not Inconsistent with Applicable Provisions of the Bankruptcy Code; Substantive Consolidation.

The Plan includes additional appropriate provisions that are not inconsistent with applicable provisions of the Bankruptcy Code, including: (i) the provisions of Article 7 of the Plan regarding the means for implementing the Plan; (ii) the provisions of Article 6 of the Plan governing the assumption, assumption and assignment or rejection of executory contracts and unexpired leases; (iii) the provisions of Article 9 of the Plan governing distributions on account of Allowed Claims, particularly as to the timing and calculation of amounts to be distributed; (iv) the provisions of Section 7.1 of the Plan with respect to the substantive consolidation of the Debtors with respect to the treatment of all Claims and Interests except for General Secured Claims in Class 2; (v) the provisions of Section 11.4 of the Plan regarding the injunction with respect to claims and interests treated under the Plan; (vi) the provisions of Sections 11.5 and 11.6 of the Plan regarding the releases with respect to the

Debtor Releasees and the Creditor Releasees; (vii) the provisions of Section 11.8 of the Plan regarding the limitation on future funding by the Pre-Petition Term Agent and the Pre-Petition Term Lenders; and (viii) the provisions of Article 12 of the Plan regarding retention of jurisdiction by the Court over certain matters after the Effective Date. The Plan is therefore consistent with section 1123(b)(6) of the Bankruptcy Code.

j. Section 1123(d)-Cure of Defaults.

Section 6.3 of the Plan provides for the satisfaction of cure amounts associated with each Remaining Contract to be assumed pursuant to the Plan in accordance with section 365(b)(1) of the Bankruptcy Code. The Plan is therefore in compliance with section 1123(d) of the Bankruptcy Code.

2. Section 1129(a)(2)-Compliance with Applicable Provisions of the Bankruptcy Code.

The Debtors have complied with all applicable provisions of the Bankruptcy Code, as required by section 1129(a)(2) of the Bankruptcy Code, including section 1125 of the Bankruptcy Code and Bankruptcy Rules 3017 and 3018. The Disclosure Statement and the procedures by which the ballots for acceptance or rejection of the Plan were solicited and tabulated were fair, properly conducted and in accordance with sections 1125 and 1126 of the Bankruptcy Code, Bankruptcy Rules 3017 and 3018 and the Disclosure Statement Order. Consistent with Section 11.3 of the Plan, the Debtors and their respective members, officers, directors, shareholders, employees, representatives, advisors, attorneys, financial advisors, investment bankers, or agents, as applicable, have acted in "good faith," within the meaning of section 1125(e) of the Bankruptcy Code . The Plan therefore complies with section 1129(a)(2) of the Bankruptcy Code.

3. Section 1129(a)(3)-Proposal of the Plan in Good Faith.

***6** The Debtors proposed the Plan in good faith and not by any means forbidden by law. In determining that the Plan has been proposed in good faith, the Court has examined the totality of the circumstances surrounding the formulation of the Plan. Based on the Disclosure Statement and the evidence presented at the Confirmation Hearing, the Court finds and concludes that the Plan has been proposed with the legitimate and honest purpose of liquidating the Debtors' estates and maximizing the returns available to creditors of the Debtors. Moreover, the Plan itself and the arms' length negotiations among the Debtors, the Creditors' Committee, the Pre-Petition Term Lenders and the Debtors' other constituencies leading to the Plan's formulation, as well as the overwhelming support of creditors for the Plan, provide independent evidence of the Debtors' good faith in proposing the Plan.

4. Section 1129(a)(4)-Bankruptcy Court Approval of Certain Payments as Reasonable.

Section 2.3 of the Plan provides that, on or prior to the Administrative Expense Claims Bar Date, each Professional shall File with the Bankruptcy Court its final fee application seeking final approval of all fees and expenses from the Petition Date through the Effective Date. Within ten (10) days after entry of a Final Order with respect to its final fee application, the Liquidating Trustee shall pay the Allowed Claims of each Professional solely from Cash in the Carve-Out Escrow or from Other Assets Proceeds.

The Court will review the reasonableness of such applications under sections 328 and 330 of the Bankruptcy Code and any applicable case law. The Court has authorized periodic payment of the fees and expenses of Professionals incurred in connection with these Chapter 11 Cases. All such fees and expenses, however, remain subject to final review for reasonableness by the Court. Thus, the Plan complies with section 1129(a)(4) of the Bankruptcy Code.

5. Section 1129(a)(5)-Disclosure of Identity of Proposed Management, Compensation of Insiders and Consistency of Management Proposals with the Interests of Creditors and Public Policy.

Section 7.2 of the Plan provides that, on the Ef-

fective Date, the Debtors shall execute the Liquidating Trust Agreement. The Liquidating Trustee shall be Larry Waslow, a restructuring professional designated by the Creditors' Committee. The appointment of the Liquidating Trustee is consistent with the interests of holders of Claims and Interests and with public policy. The Plan therefore complies with section 1129(a)(5) of the Bankruptcy Code.

6. Section 1129(a)(6)-Approval of Rate Changes.

After the Confirmation Date, the Debtors will not have any businesses involving the establishment of rates over which any regulatory commission has or will have jurisdiction. Therefore, the provisions of section 1129(a)(6) do not apply to the Plan.

7. Section 1129(a)(7)-Best Interests of Holders of Claims and Interests.

***7** With respect to each Impaired Class of Claims or Interests of the Debtors, each holder of a Claim or Interest in such Impaired Class has either (a) accepted or is deemed to have accepted the Plan, or (b) will receive or retain under the Plan on account of such Claim or Interest property of a value, as of the Effective Date, that is not less than the amount such holder would receive or retain if the Debtors were liquidated on the Effective Date under chapter 7 of the Bankruptcy Code on an individual or consolidated basis. The Plan therefore complies with section 1129(a)(7) of the Bankruptcy Code.

8. Section 1129(a)(8)-Acceptance of Plan by Impaired Class.

Pursuant to sections 1124 and 1126 of the Bankruptcy Code: (a) as indicated in Section 4.1 of the Plan, Classes 1 and 2 are not Impaired by the Plan; (b) pursuant to the Plan's terms, Classes 1 and 2 are deemed to have accepted the Plan; and (c) as indicated in the Voting Affidavit, the requisite number and amount of creditors and claims in each of Class 3 and Class 4 as required by section 1126(c) of the Bankruptcy Code voted to accept the Plan. Because the holders of Claims and Interests in Classes 5, 6, 7A and 7B will not receive or retain any property on account of such Claims or Interests, Classes 5, 6, 7A and 7B are deemed not to have accepted the Plan pursuant to section 1126(g) of the Bankruptcy Code. Notwithstanding the lack of compliance with section 1129(a)(8) of the Bankruptcy Code with respect to Classes 5, 6, 7A and 7B, the Plan is confirmable because, as described in *Section I.C.14* below, the Plan, as modified, satisfies the "cramdown" requirements of section 1129(b) of the Bankruptcy Code with respect to such Classes. Therefore, although the Plan does not meet the requirements of section 1129(a)(8) of the Bankruptcy Code, it can be confirmed under the provisions of section 1129(b) of the Bankruptcy Code.

9. Section 1129(a)(9)-Treatment of Claims Entitled to Priority Pursuant to Section 507(a) of the Bankruptcy Code.

a. Article 2 of the Plan provides for treatment of Administrative Expense Claims and Priority Tax Claims, subject to certain bar date provisions consistent with Bankruptcy Rules 3002 and 3003, in the manner required by section 1129(a)(9) of the Bankruptcy Code.

b. Except as set forth in Section I.C.9.c of this Confirmation Order, pursuant to Section 2.1 of the Plan, each holder of an Allowed Administrative Expense Claim will receive on account of such Allowed Administrative Expense Claim and in full satisfaction, settlement, release and discharge of and in exchange for such Allowed Administrative Expense Claim, (a) Cash equal to the unpaid portion of such Allowed Administrative Expense Claim, or (b) such other treatment as to which the Debtors and the holder of such Allowed Administrative Expense Claim have agreed upon in writing.

c. Pursuant to Section 2.1 of the Plan, Allowed Administrative Expense Claims with respect to liabilities incurred by the Debtors in the ordinary course of business during the Chapter 11 Cases shall be paid in the ordinary course of business in accordance with the terms and conditions of any agreement or course of dealing relating thereto and

Professional Claims shall be paid in accordance with Section 2.3 of the Plan; *provided; however,* that any payments made on account of an Allowed Administrative Expense Claim shall be made solely from Other Assets Proceeds.

***8** d. Under Section 2.4 of the Plan, each holder of an Allowed Priority Tax Claim, at the sole option of the Debtors, shall be entitled to receive on account of such Allowed Priority Tax Claim, in full satisfaction, settlement, release and discharge of and in exchange for such Allowed Priority Tax Claim, (a) in accordance with Bankruptcy Code section 1129(a)(9)(C), equal Cash payments made on the Effective Date or as soon as practicable thereafter in recognition of the applicable claims reconciliation process set forth in the Plan and on the last Business Day of every three (3) month period following the Effective Date, over a period not exceeding six (6) years after the assessment of the tax on which such Claim is based, totaling the principal amount of such Claim plus simple interest on any outstanding balance, compounded annually from the Effective Date, calculated at the interest rate available on ninety (90) day United States Treasuries on the Effective Date; (b) such other treatment agreed to by the holder of such Allowed Priority Tax Claim and the Debtors on or prior to the date ninety (90) days after the Effective Date, provided such treatment is on more favorable terms to the Debtors, as the case may be, than the treatment set forth in subsection (a) hereof; or (c) payment in full, in Cash to all holders of Allowed Priority Tax Claims that have not agreed to less favorable terms made on the Effective Date or as soon thereafter as is practicable in recognition of the applicable claims reconciliation process set forth in the Plan; *provided, however,* that any payment made on account of an Allowed Priority Tax Claim shall be made solely from Other Assets Proceeds.

e. Pursuant to Section 2.5.2 of the Plan, all requests for payment of Claims by a Governmental Unit (as defined in Bankruptcy Code section 101(27)) for Taxes (and for interest and/or penalties or other amounts related to such Taxes) for any tax year or period, all or any portion of which occurs or falls within the period from and including the Petition Date through and including the Effective Date, and for which no bar date has otherwise been previously established, must be Filed on or before the later of: (a) sixty (60) days following the Effective Date; or (b) to the extent applicable, ninety (90) days following the filing of a tax return for such Taxes (if such Taxes are assessed based on a tax return) for such tax year or period with the applicable Governmental Unit. Any holder of a Claim for Taxes that is required to File a request for payment of such Taxes and other amounts due related to such Taxes and which does not File such a Claim by the applicable bar date shall be forever barred from asserting any such Claim against any of the Debtors or any non-Debtor member of the Debtors' consolidated tax group, the Estates, the Liquidating Trust, the Liquidating Trustee or any other Entity, or their respective property, whether any such Claim is deemed to arise prior to, on, or subsequent to the Effective Date, and shall receive no distribution under the Plan or otherwise on account of such Claim.

***9** f. Pursuant to Section 5.1 of the Plan, each holder of an Allowed Other Priority Claim will receive on the Effective Date, or as soon thereafter as is reasonably practicable in recognition of the applicable claims reconciliation process set forth in the Plan, (a) Cash equal to the amount of such Allowed Other Priority Claim, or (b) such other treatment as to which the Debtors and the holder of such Allowed Other Priority Claim have agreed upon in writing; *provided, however,* that any payment made on account of an Allowed Other Priority Claim shall be made solely from Other Assets Proceeds.

g. In light of the foregoing, the Plan complies with section 1129(a)(9) of the Bankruptcy Code.

10. Section 1129(a)(10)-Acceptance by At Least One Impaired Non-Insider Class.

As indicated in the Voting Affidavit and as reflected in the record of the Confirmation Hearing,

at least one non-insider Class of Claims or Interests that is Impaired under the Plan has voted to accept the Plan. Each of Class 3 and Class 4 are Impaired and have voted to accept the Plan. The Plan therefore complies with section 1129(a)(10) of the Bankruptcy Code.

11. Section 1129(a)(11) Feasibility of the Plan.

Based on the testimony at the Confirmation Hearing regarding the value of the Debtors' Assets, including, without limitation, the Term Lender Assets and the Other Assets, the Plan sets forth means of payment of the Debtors' obligations under the Plan in accordance with the Bankruptcy Code and the Bankruptcy Rules and is feasible. As the Plan and the Liquidating Trust Agreement provide for the liquidation of all of the Debtors' remaining assets, confirmation cannot be followed by any liquidation in addition to that prescribed by the Plan or the Liquidating Trust Agreement, nor would confirmation be followed by the need for further financial reorganization. The Plan therefore complies with section 1129(a)(11) of the Bankruptcy Code.

12. Section 1129(a)(12)-Payment of Bankruptcy Fees.

Section 2.2 of the Plan provides that, on or before the Effective Date, all fees due and payable pursuant to 28 U.S.C. § 1930, as determined by the Court at the Confirmation Hearing, shall be paid in full, in Cash, solely from Other Assets Proceeds. The Plan therefore complies with section 1129(a)(12) of the Bankruptcy Code.

13. Section 1129(a)(13)-Retiree Benefits.

The Debtors are not obligated to pay retiree benefits (as defined in section 1114(a) of the Bankruptcy Code) and thus are in compliance with section 1129(a)(13) of the Bankruptcy Code.

14. Section 1129(b)-Confirmation of the Plan Over the Non-Acceptance of Impaired Classes.

Pursuant to section 1129(b)(1) of the Bankruptcy Code, the Plan may be confirmed notwithstanding that Claims and Interests in Classes 5, 6, 7A and 7B are Impaired and are deemed not to have accepted the Plan pursuant to section 1126(g) of the Bankruptcy Code. Nonetheless, the Plan meets the "cramdown" requirements for confirmation under § 1129(b) of the Bankruptcy Code. Other than the requirement in section 1129(a)(8) of the Bankruptcy Code with respect to Classes 5, 6, 7A and 7B, all of the requirements of section 1129(a) of the Bankruptcy Code have been met. The Plan does not discriminate unfairly and is fair and equitable with respect to Classes 5, 6, 7A and 7B. No holders of Claims and Interests junior to the Claims and Interests in Classes 5, 6, 7A and 7B will receive or retain any property on account of their Claims and Interests, and no holders of Claims or Interests senior to the Claims and Interests in Classes 5, 6, 7A and 7B are receiving more than full payment on account of the Claims and Interests in such Classes. The Plan therefore is fair and equitable and does not discriminate unfairly with respect to each of these Classes, and therefore complies with section 1129(b) of the Bankruptcy Code.

15. Section 1129(d)-Purpose of Plan.

***10** The primary purpose of the Plan is not avoidance of taxes or avoidance of the requirements of Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e, and there has been no objection filed by any governmental unit asserting such avoidance. The Plan therefore complies with section 1129(d) of the Bankruptcy Code.

16. Modifications to the Plan.

To the extent the terms of this Confirmation Order may be construed to constitute modifications to the Plan (the "***Plan Modifications*** "), such Plan Modifications do not materially or adversely affect or change the treatment of any Claim against or Interest in any Debtor. Accordingly, pursuant to Bankruptcy Rule 3019, the Plan Modifications do not require additional disclosure under section 1125 of the Bankruptcy Code or the solicitation of acceptances or rejections under section 1126 of the Bankruptcy Code. Disclosure of the Plan Modifications on the record at the Confirmation Hearing constitutes due and sufficient notice thereof under

the circumstances of these Chapter 11 Cases. All references to the Plan in this Confirmation Order shall be to the Plan as so modified.

17. Good Faith Participation.

Based upon the record before the Court, the Debtors, the Creditors' Committee, the Pre-Petition Term Agent, the Pre-Petition Term Lenders, and their respective members, officers, directors, shareholders, employees, representatives, advisors, attorneys, financial advisors, investment bankers and agents have acted in good faith within the meaning of section 1125(e) of the Bankruptcy Code in compliance with the provisions of the Bankruptcy Code and Bankruptcy Rules in connection with all their respective activities relating to the Chapter 11 Cases, and the negotiation and pursuit of confirmation of the Plan, and are entitled to the protections afforded by section 1125(e) of the Bankruptcy Code and, to the extent set forth in Section III.H of this Confirmation Order, the exculpatory and injunctive provisions set forth in Article 11 of the Plan.

II. CONCLUSIONS OF LAW.

A. JURISDICTION AND VENUE.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The Debtors were and are qualified to be debtors under section 109 of the Bankruptcy Code. Venue of the Chapter 11 Cases in the United States District Court for the District of Delaware was proper as of the Petition Date, pursuant to 28 U.S.C. § 1408, and continues to be proper.

B. COMPLIANCE WITH SECTION 1129 OF THE BANKRUPTCY CODE.

As set forth in Section I.C above, the Plan complies in all respects with the applicable requirements of section 1129 of the Bankruptcy Code.

C. APPROVAL OF EXCULPATION AND LIMITATION OF LIABILITY PROVIDED UNDER THE PLAN AND CERTAIN OTHER MATTERS.

1. Except as specifically set forth in Section III.H below, pursuant to section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019(a), those exculpations, releases, limitations of liability, waivers, and injunctions that are specifically set forth in the Plan, including in Article 11 of the Plan, (a) are approved as integral parts of the Plan; (b) are fair, equitable, reasonable and in the best interests of the Debtors and their respective Estates and the holders of Claims and Interests; (c) are approved as fair, equitable and reasonable, pursuant to, among other authorities, section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019(a); and (d) are effective and binding in accordance with their terms.

***11 2.** In approving the exculpations, releases, limitations of liability and injunctions as described above, the Court has considered: (a) whether an identity of interest between the Debtors and the releasees exists, such that a suit against the releasees is a suit against the Debtors or would deplete assets of the estates; (b) the substantial contribution of the releasees since the Petition Date; (c) the essential nature of Sections 11.3 to 11.8 of the Plan and Section III.H below to the approval of the Plan; and (d) that a substantial majority of the creditors support the Plan. *See In re Zenith Electronics Corp.,* 241 B.R. 92, 110 (Bankr.D.Del.1999) (considering similar factors to determine if release of a third party should be allowed as part of a plan).

3. In approving the exculpations, releases, limitations of liability and injunctions described above of and from such potential claims, as described above, the Court has also considered: (a) the balance of the likelihood of success of claims asserted by the Debtors or other claimants against the likelihood of success of the defenses or counterclaims possessed by the Debtors, other claimants or other potential defendants; (b) the complexity, cost and delay of litigation that would result in the absence of these settlements, compromises, releases,

waivers, discharges and injunctions; (c) the acceptance of the Plan by an overwhelming majority of the holders of Claims, as set forth in the Voting Affidavit; and (d) that the Plan, which gives effect the other compromises, releases, waivers, discharges and injunctions set forth in the Plan, is the product of extensive arms' length negotiations among the Debtors, the Creditors' Committee and other parties in interest. *See Protective Comm. Stockholders of TMT Trailer Ferry Inc. v. Anderson,* 390 U.S. 414, 424 (1968) (citing factors such as those set forth above to be evaluated by courts in determining whether a settlement as a whole is fair and equitable); *accord Myers v. Martin (In re Martin),* 91 F.3d 389, 394 (3d Cir.1996) (setting forth similar factors to be considered in evaluating the reasonableness of a settlement).

D. AGREEMENTS AND OTHER DOCUMENTS.

The Debtors have disclosed all material facts relating to the various contracts, instruments, releases, indentures and other agreements or documents and plans to be entered into, executed and delivered, adopted or amended by them in connection with the Plan, including, without limitation, the Liquidating Trust Agreement, attached as exhibits to the Plan (collectively, the "***Plan Documents*** "). Pursuant to section 303 of the General Corporation Law of the State of Delaware and any comparable provision of the business corporation laws of any other state (collectively, the "***State Reorganization Effectuation Statutes*** "), as applicable, no action of the Debtors' Boards of Directors or the Liquidating Trustee will be required to authorize the Debtors to enter into, execute and deliver, adopt or amend, as the case may be, the Plan Documents, and following the Effective Date, each of the Plan Documents will be a legal, valid and binding obligation of the Debtors, enforceable against the Debtors in accordance with the respective terms thereof. Each of the Plan Documents also shall be enforceable against the Liquidating Trust and the Liquidating Trustee from and after the Effective Date.

E. ASSUMPTIONS, ASSUMPTIONS AND ASSIGNMENTS AND REJECTIONS OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES.

***12** Each pre- or post-Confirmation assumption, assumption and assignment or rejection of an executory contract or unexpired lease pursuant to Article 6 of the Plan, including any pre- or post-Confirmation assumption, assumption and assignment or rejection effectuated as a result of any amendment to Article 6 to the Plan, shall be legal, valid and binding upon the applicable Debtor and all non-debtor parties to such executory contract or unexpired lease, all to the same extent as if such assumption, assumption and assignment or rejection had been effectuated pursuant to an appropriate authorizing order of the Court entered prior to the Confirmation Date under section 365 of the Bankruptcy Code.

III. ORDER.

ACCORDINGLY, THE COURT HEREBY ORDERS THAT:

A. CONFIRMATION OF THE PLAN.

The Plan is confirmed in each and every respect pursuant to section 1129 of the Bankruptcy Code; *provided, however,* that if there is any direct conflict between the terms of the Plan and the terms of this Confirmation Order, the terms of this Confirmation Order shall control. All objections and other responses to, and statements and comments regarding, the Plan, other than those withdrawn with prejudice in their entirety prior to, or on the record at, the Confirmation Hearing are either (a) resolved or sustained on the terms set forth herein or (b) overruled.

The failure specifically to identify or refer to any particular provision of the Plan, the Liquidating Trust Agreement or any other agreement approved by this Confirmation Order in this Confirmation Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the Plan, the Liquidating Trust Agreement and all other agreements approved by this Confirmation

Order are approved in their entirety.

B. EFFECTS OF CONFIRMATION.

1. Binding Nature of Plan Terms.

Notwithstanding any otherwise applicable law, from and after the entry of this Confirmation Order, the terms of the Plan and this Confirmation Order shall be deemed binding upon (i) the Debtors, (ii) any and all holders of Claims or Interests (irrespective of whether such Claims or Interests are Impaired under the Plan or whether the holders of such Claims or Interests accepted, rejected or are deemed to have accepted or rejected the Plan), (iii) any and all non-debtor parties to executory contracts and unexpired leases with any of the Debtors, and the compromises, releases, waivers, discharges and injunctions described in Section II.C above, and (iv) the respective heirs, executors, administrators, successors or assigns, if any, of any of the foregoing.

2. Dissolution of Debtors.

As soon as practicable after the Effective Date, each of the Debtors will be dissolved for all purposes without the necessity for any other or further actions to be taken by or on behalf of the Debtors or payments to be made in connection therewith; *provided, however,* that pursuant to section 1142(b) of the Bankruptcy Code, after the Effective Date, the Liquidating Trustee shall be authorized to File each Debtor's final tax returns, and shall be authorized to File and shall File with the official public office for keeping corporate records in each Debtor's state of incorporation a certificate of dissolution or equivalent document. Such a certificate of dissolution may be executed by the Liquidating Trustee without need for any action or approval by the shareholders or Board of Directors of any Debtor.

3. The Liquidating Trust.

***13** a. On the Effective Date, the Debtors, on their own behalf and on behalf of the Beneficiaries, shall execute the Liquidating Trust Agreement and take all steps necessary to establish the Liquidating Trust.

b. On the Effective Date, each of the Debtors shall transfer and assign all of its respective Assets to the Liquidating Trust free and clear of all Liens, Claims, interests and encumbrances. Title to all Assets contributed to the Liquidating Trust shall vest in the Liquidating Trust on the Effective Date following the transfer. All of the Term Lender Assets transferred to the Liquidating Trust shall be transferred subject to the Liens of the Pre-Petition Term Agent in favor of the Pre-Petition Term Lenders, and the Carve-Out Escrow shall be transferred subject to the Carve Out.

c. On and after the Effective Date, the Liquidating Trustee shall succeed to all applicable privileges of the Debtors, including, *inter alia,* the attorney-client privilege, and the Liquidating Trustee shall be authorized to exercise or waive any such privilege; *provided, however,* that the Pre-Petition Term Agent shall succeed to all applicable privileges of the Debtors that relate solely to any and all causes of action to preserve, recoup, or recover any Term Lender Assets, and the Pre-Petition Term Agent shall be authorized to exercise or waive any such privilege.

d. For all purposes under the Plan and the Plan Documents, the Liquidating Trust shall act through the Liquidating Trustee.

4. Transfer of Equity Interests in Canadian Subsidiaries.

On the Effective Date, (i) the Debtors' equity interests in Tenere of Canada, Inc. and Yuma Customer Services and (ii) the Debtors' claims against such entities arising from any intercompany claims, loans, notes, transfers or other obligations shall be transferred by the Debtors to the Liquidating Trust, and continue to be subject to the Liens of the Pre-Petition Term Agent in favor of the Pre-Petition Term Lenders. The Liquidating Trustee (or his duly appointed successor) shall exercise his powers as the sole shareholder to appoint himself as the sole

officer and director of Tenere of Canada, Inc. and Yuma Customer Services, Inc.

5. Approval of Executory Contract and Unexpired Lease Provisions and Related Procedures.

The executory contract and unexpired lease provisions of Article 6 of the Plan are specifically approved. Any executory contracts and unexpired leases of the Debtors not assumed and assigned to the Purchaser or rejected prior to the Effective Date or with respect to the which the Debtors have not Filed a Notice of Assumption and Assignment prior to the Effective Date (the "***Remaining Contracts*** ") shall be rejected pursuant to Section 6.5 of the Plan unless assumed or assumed and assigned pursuant to Section 6.2 of the Plan. Notwithstanding anything in Article 6 of the Plan to the contrary, to the extent the Debtors have Filed a Notice of Assumption and Assignment prior to the Effective Date with respect to an executory contract or unexpired lease to be assumed and assigned to the Purchaser, but the Bankruptcy Court has not yet entered an order approving such assumption and assignment and fixing the cure amount therefor, any cure amount not assumed by the Purchaser in connection with the 363 Sale shall be paid solely from the Cure Escrow Deposit Account in accordance with the Sale Order.

***14** As of the Effective Date, the Debtors shall assume or assume and assign, as applicable, pursuant to Bankruptcy Code section 365, each of the Remaining Contracts of the Debtors that are identified in Exhibit 3 to the Plan that have not expired under their own terms prior to the Effective Date.

Any monetary defaults under each Remaining Contract to be assumed under the Plan shall be satisfied, pursuant to Bankruptcy Code section 365(b)(1), in either of the following ways: (a) by payment of the amount of such monetary default, in Cash and in full on the Effective Date solely from the Cure Escrow Deposit Account or from Other Assets Proceeds; or (b) by payment of the monetary default amount on such other terms as may be agreed to by the Debtors and the non-Debtor parties to such Remaining Contract solely from the Cure Escrow Deposit Account or from Other Assets Proceeds. In the event of a dispute regarding (i) the amount or timing of any cure payments, (ii) the ability of the Debtors on or prior to the Effective Date and the Liquidating Trustee after the Effective Date, or an assignee thereof to provide adequate assurance of future performance under the Remaining Contract to be assumed or assumed and assigned, as applicable, or (iii) any other matter pertaining to assumption or assumption and assignment of the Remaining Contract to be assumed, the Debtors prior to and on the Effective Date and the Liquidating Trustee after the Effective Date shall pay all required cure amounts, first from the Cure Escrow Deposit Account, until exhausted, and then from Other Assets Proceeds, promptly following the entry of a Final Order resolving the dispute. To the extent that any funds released from the Cure Escrow Deposit Account have been, or are, paid to the Pre-Petition Term Agent, for the benefit of the Pre-Petition Term Lenders, such funds shall not be subject to any claims of the non-Debtor parties to Remaining Contracts that are subsequently assumed.

Except as otherwise expressly set forth herein, all objections, if any, relating to the assumption, assumption and assignment, or rejection of Remaining Contracts, including but not limited to objections as to adequate assurance of future performance and/or cure amounts, are overruled. Notice of the time fixed for filing objections to such assumption, assumption and assignment, or rejection was adequate, pursuant to the terms of the Disclosure Statement Order and in accordance with the precepts of due process.

Failure to assert arrearages, damages or objections in the manner described in the Disclosure Statement Order shall constitute consent to the proposed assumption, revestment, cure or assignment on the terms and conditions provided in the Plan and in this Confirmation Order, including an acknowledgement that the proposed assumption and/or assignment provides adequate assurance of fu-

ture performance and that the amount identified for "cure" in Exhibit 3 to the Plan is the amount necessary to cover any and all outstanding defaults under the Remaining Contract to be assumed, as well as an acknowledgement and agreement that no other defaults exist under such Remaining Contract.

***15** Except for those executory contracts and unexpired leases that (i) are assumed pursuant to the Plan, (ii) have been previously assumed, assumed and assigned or rejected pursuant to previous orders of the Court, irrespective of whether such assumption or rejection has yet to occur on the Effective Date, or (iii) are the subject of a pending motion before the Court with respect to the assumption or assumption and assignment of such executory contracts and unexpired leases as of the Effective Date, all executory contracts and unexpired leases of the Debtors shall be rejected pursuant to section 365 of the Bankruptcy Code.

6. Prosecution of Litigation Claims by the Liquidating Trust.

On and after the Effective Date, the Creditors' Committee shall be dissolved. The Liquidating Trustee, as the legal representative of the Liquidating Trust, shall be authorized without further order to pursue and liquidate all Litigation Claims and, in connection therewith he shall be deemed substituted as the plaintiff and a party in interest in the place and stead of the Creditors' Committee or the Debtors pursuant to Fed.R.Civ.P. 25 and Bankruptcy Rules 7025 and 9014, in any and all actions, proceedings, contested matters, applications and motions; *provided, however,* that, pursuant to Section 8.1 of the Plan as amended by this Order, the Pre-Petition Term Agent will have the right, on behalf of the Pre-Petition Term Lenders, to (i) enforce Liens on the Term Lender Assets or (ii) pursue any and all causes of action to preserve, recoup, or recover any Term Lender Assets, in each case against any Entity whatsoever (so long as it is not a Released Claim), including, but not limited to, exercising the rights and powers of a trustee and debtor-in-possession solely with respect to the Term Lender Assets and the Pre-Petition Term Agent shall be deemed to have standing with respect to the exercise of such rights and powers.

C. CLAIMS, BAR DATES AND OTHER CLAIMS MATTERS.

1. Bar Dates for Administrative Expense Claims Other Than Tax Claims.

Other than with respect to (i) Administrative Expense Claims for which the Bankruptcy Court previously has established a bar date, and (ii) Tax Claims addressed in Section III.C.2 below, any and all requests for payment or proofs of Administrative Expense Claims, including Claims of all Professionals or other Entities requesting compensation or reimbursement of expenses pursuant to Bankruptcy Code sections 327, 328, 330, 331, 503(b) or 1103 for services rendered on or before the Effective Date (including any compensation requested by any Professional or any other Entity for making a substantial contribution in the Chapter 11 Cases), must be Filed and served on the Liquidating Trustee and its counsel no later than the Administrative Expense Claims Bar Date. Objections to any such Administrative Expense Claims must be Filed and served on the claimant no later than ninety (90) days after the Administrative Expense Claims Bar Date, which date may be extended by application to the Bankruptcy Court. The Liquidating Trustee shall use reasonable efforts to promptly and diligently pursue resolution of any and all disputed Administrative Expense Claims.

***16** Holders of Administrative Expense Claims, including all Professionals or other Entities requesting compensation or reimbursement of expenses pursuant to Bankruptcy Code sections 327, 328, 330, 331, 503(b) or 1103 for services rendered on or before the Effective Date (including any compensation requested by any Professional or any other Entity for making a substantial contribution in the Chapter 11 Cases), that are required to File a request for payment or proof of such Claims and that do not File such requests or proofs of Claim on or

before the Administrative Expense Claims Bar Date shall be forever barred from asserting such Claims against any of the Debtors, their Estates, the Liquidating Trust, the Liquidating Trustee, any other Person or Entity, or any of their respective property.

2. Bar Dates for Tax Claims.

All requests for payment of Claims by a Governmental Unit (as defined in Bankruptcy Code section 101(27)) for Taxes (and for interest and/or penalties or other amounts related to such Taxes) for any tax year or period, all or any portion of which occurs or falls within the period from and including the Petition Date through and including the Effective Date, and for which no bar date has otherwise been previously established, must be Filed on or before the later of: (a) sixty (60) days following the Effective Date; or (b) to the extent applicable, ninety (90) days following the filing of a tax return for such Taxes (if such Taxes are assessed based on a tax return) for such tax year or period with the applicable Governmental Unit. Any holder of a Claim for Taxes that is required to File a request for payment of such Taxes and other amounts due related to such Taxes and which does not File such a Claim by the applicable bar date shall be forever barred from asserting any such Claim against any of the Debtors or any non-Debtor member of the Debtors' consolidated tax group, the Estates, the Liquidating Trust, the Liquidating Trustee or any other Entity, or their respective property, whether any such Claim is deemed to arise prior to, on, or subsequent to the Effective Date, and shall receive no distribution under the Plan or otherwise on account of such Claim; *provided, however,* that any payment made on account of such Claim shall be made solely from Other Assets Proceeds.

3. Bar Date for Rejection Damages Claims and Related Procedures.

If the rejection of an executory contract or unexpired lease pursuant to Section 6.5 of the Plan gives rise to a Claim for damages by the other party or parties to the executory contract or unexpired lease, such Claim must be Filed within thirty (30) days after the mailing of notice of the entry of the Confirmation Order or such Claim shall receive no distribution under the Plan or otherwise on account of such Claim; *provided, however,* that any payment made on account of such Claim shall be made solely from Other Assets Proceeds.

4. Effect of Confirmation: 11 U.S.C. § 1141(d)(3) .

***17** The Plan cannot discharge the Debtors because: (i) the Plan provides for the liquidation of all or substantially all of the property of the Estates; (ii) the Debtors will not engage in business after the consummation of the Plan; and, (iii) the Debtors would be denied a discharge under 11 U.S.C. § 727(a) if these cases were cases under chapter 7 of the Bankruptcy Code. Accordingly, this Court is not required to either grant or deny a discharge to any of the Debtors.

D. ACTIONS IN FURTHERANCE OF THE PLAN.

The approvals and authorizations specifically set forth in this Confirmation Order are nonexclusive and are not intended to limit the authority of the Debtors prior to and on the Effective Date and the Liquidating Trustee after the Effective Date to take any and all actions necessary or appropriate to implement, effectuate and consummate, among other things, the Plan, the Liquidating Trust Agreement, this Confirmation Order or the transactions contemplated thereby or hereby. In addition to the authority to execute and deliver, adopt or amend, as the case may be, the contracts, instruments, releases and other agreements specifically granted and approved in this Confirmation Order, the Debtors prior to and on the Effective Date and the Liquidating Trustee after the Effective Date are authorized and empowered, without further action in the Court, to take any and all such actions as they may determine are necessary or appropriate to implement, effectuate and consummate, among other things, the Plan, the Liquidating Trust Agreement, this Confirmation Order or the transactions contemplated thereby or

hereby. Pursuant to section 1142 of the Bankruptcy Code, and the State Reorganization Effectuation Statutes, no action of the Debtors' Boards of Directors or the Liquidating Trustee shall be required for any Debtor to enter into, execute and deliver, adopt or amend, as the case may be, any of the contracts, instruments, releases and other agreements or documents and plans to be entered into, executed and delivered, adopted or amended in connection with the Plan and, following the Effective Date, each of such contracts, instruments, releases and other agreements shall be a legal, valid and binding obligation of the applicable Debtor, enforceable against such Debtor and its successors (including the Liquidating Trust) in accordance with its terms subject only to bankruptcy, insolvency and other similar laws affecting creditors' rights generally and to general equitable principles. The Debtors prior to and on the Effective Date and the Liquidating Trustee after the Effective Date are authorized to execute, deliver, File or record such contracts, instruments, financing statements, releases mortgages, deeds, assignments, leases, applications, registration statements, reports or other agreements or documents and take such other actions as they may determine are necessary or appropriate to effectuate and further evidence the terms and conditions of the Plan, this Confirmation Order and the transactions contemplated thereby or hereby, all without further application to or order of the Court and whether or not such actions or documents are specifically referred to in the Plan, the Disclosure Statement, the Disclosure Statement Order, this Confirmation Order or the exhibits to any of the foregoing. The signature of any officer of any Debtor prior to or on the Effective Date and the Liquidating Trustee or his designee after the Effective Date on a document executed in accordance with this Section III.D shall be conclusive evidence of such Person's determination that such document and any related actions are necessary and appropriate to effectuate and/or further evidence the terms and conditions of the Plan, this Confirmation Order or the transactions contemplated thereby or hereby. Any officer of any Debtor prior to or on the Effective Date and the Liquidating Trustee or his designee after the Effective Date are authorized to certify or attest to any of the foregoing actions. Pursuant to section 1142 of the Bankruptcy Code, to the extent that, under applicable nonbankxuptcy law, any of the foregoing actions would otherwise require the consent or approval of the stockholders or directors of any of the Debtors, this Confirmation Order shall constitute such consent or approval, and such actions are deemed to have been taken by unanimous action of the directors and stockholders of the appropriate Debtor. After the Effective Date, the Liquidating Trustee, on one hand, and the Pre-Petition Term Agent and Pre-Petition Term Lenders, on the other hand, shall cooperate in good faith with respect to the liquidation of the Term Lender Assets and the Other Assets.

E. INDEMNIFICATION.

***18** The exculpations, injunctions, releases and limitations of liability contained in Article 11 of the Plan are approved to the extent set forth in Section III.H below, are incorporated herein to the extent approved, are so ordered and shall be immediately effective on the Effective Date of the Plan without further act or order.

F. RESOLUTION OF CERTAIN FORMAL AND INFORMAL OBJECTIONS TO CONFIRMATION.

Formal and informal objections to Confirmation are hereby resolved on the terms and subject to the conditions set forth below. The compromises and settlements contemplated by the resolution of such objections are fair, equitable and reasonable, are in the best interests of the Debtors, their respective Estates and Creditors and are expressly approved pursuant to Bankruptcy Rule 9019.

1. For purposes of clarification, Section 9.6 of the Plan is not intended to, and does not, limit the right of holders of Allowed General Secured Claims to receive post-Petition Date interest if they are oversecured. Nothing herein alters the relative priority of any secured claims on any collateral securing the rights of the holders of Allowed General

Secured Claims, the Pre-Petition Term Agent, and the Pre-Petition Term Lenders.

2. The Debtors acknowledge that Travelers Casualty and Surety Company of America (the " ***Surety Company*** ") asserts a General Secured Claim under the Plan to the extent of the value of its collateral or other rights, including, but not limited to, those of equitable subrogation, or otherwise; however, such acknowledgement does not constitute an admission by the Debtors of the validity or amount of any such claim. The Plan shall not and does not prejudice, impair, waive, limit or otherwise affect the respective rights, claims and defenses of the Surety Company regarding any bonds, indemnity agreements and the collateral, if any, that secures its claims; *provided, however,* that nothing contained herein or in the Plan shall impair the Debtors', Pre-Petition Term Agent's, or the Pre-Petition Term Lenders' ability to object to, or dispute any rights, claims and defenses asserted by the Surety Company against the bonds, indemnity agreements and he collateral, if any, that secures its claims. Except for the releases of the Releasees, the Plan does not release, compromise, or otherwise affect in any way, the Surety Company's rights against any indemnitor or third party, whether arising under contract, under statute or by way of assignment or subrogation, equitable or otherwise. The Plan reserves all of the Debtors', Pre-Petition Term Agent's, Pre-Petition Term Lenders' and Surety Company's rights and defenses (including by way of subrogation or any other surety rights or defenses available in law or equity) against any Entity or Person other than the Debtors and Releasees with respect to any claim arising under the bonds.

3. For purposes of clarification, nothing provided for in this Confirmation Order, the Plan or Liquidating Trust Agreement shall modify, amend, supersede or otherwise alter any parties' rights or obligations arising under either the Section 506(c) Stipulation or the Committee Settlement Stipulation; *provided, however,* that Section 1(f) of the Committee Settlement Stipulation shall be superseded in all respects by Section 1.76(f) of the Plan (*i.e.,* the definition of "Other Assets").

19** 4. Notwithstanding any provision to the contrary in the Plan, this Confirmation Order and any documents implementing the Plan, nothing shall: (1) affect the rights of the Internal Revenue Service ("IRS*** ") to pursue to the extent allowed by nonbankruptcy law any non-Debtors for any liabilities that may be related to any federal tax liabilities owed by the Debtors; (2) affect the ability of the Bureau of Customs and Border Protection (" ***Customs*** ") to make demand on, be paid by or otherwise pursue any sureties that are jointly and severally liable with the debtors for any debt owed to Customs and furthermore, nothing shall release or discharge any claims against non-Debtor third parties or enjoin or restrain Customs from enforcing any action against non-Debtor third parties that may arise as a result of the exercise of any Customs' police and regulatory power; or (3) affect the IRS' and Customs' rights or ability to assert setoff and recoupment or the Debtors', the Pre-Petition Term Agent's, the Pre-Petition Term Lenders', and/or the Creditors' Committee's rights or ability to object to such setoff and recoupment. The Allowed Priority Tax Claim of the IRS in the amount of approximately $11,118.50, plus interest accruing after the Effective Date at the rate and method set forth in 26 U.S.C. Sections 6621 and 6622, (" ***IRS Claim*** ") shall be paid by offsetting the IRS Claim against the refund of overpaid U.S. Corporation Income Taxes for the 2005 tax year owed to the Debtors by the IRS in the amount of approximately $201,762.00 plus interest ("***Refund*** "), and the balance of the Refund shall be paid to the Debtors as soon as reasonably practicable following the Confirmation Hearing, but in no event later than April 29, 2010. To the extent the Allowed Customs Priority Tax Claims are not paid in full in cash on the Effective Date from Other Assets Proceeds or satisfied from any letters of credit or other security for such Allowed Claims, payments of the Allowed Customs Priority Tax Claims will be paid in equal quarterly installments over a period not to exceed

five years from the petition date and interest shall accrue on such claims from the Effective Date at the rate and method set forth in 26 U.S.C. sections 6621 and 6622 solely from setoff, recoupment, claims against sureties, or Other Assets Proceeds. To the extent the IRS or Customs has a valid, perfected secured claim, such claim shall accrue interest after the Effective Date at the rate and method set forth in 26 U.S.C. sections 6621 and 6622. Further, the Debtors, the Reorganized Debtors and the Liquidating Trustee agree that they will timely file or cause to be filed all required federal tax returns, that the IRS shall not be bound by any characterization of any transaction or the valuation of any asset for tax purposes, and that they shall otherwise comply with the provisions of the Internal Revenue Code. The deadline for the IRS to file its administrative expense claims, if any, shall be 120 days from the date of filing with the IRS of the last federal tax return which affects the postpetition period of the Debtors' Chapter 11 Cases.

***20** 5. After the Effective Date, the Liquidating Trustee, upon the reasonable request of, and at the expense of, the Pre-Petition Term Agent, shall execute and deliver any documents and take any actions reasonably necessary to effectuate the rights or abilities of the Pre-Petition Term Agent granted pursuant to Section 8.1 of the Plan as amended by this Confirmation Order.

G. ADDITIONAL MODIFICATIONS TO THE PLAN.

1. Section 8.1.

Section 8.1 of the Plan is hereby amended and restated by deleting such Section in its entirety and replacing it with:

> **Transfer and Enforcement of Causes of Action.** Pursuant to section 1123(b)(3) of the Bankruptcy Code, except as otherwise provided in this Plan or the Confirmation Order, after transfer of the Assets to the Liquidating Trust pursuant to Section 7.2.3 hereof, the Liquidating Trustee (and to the extent retained by the Liquidating Trust to perform such work, any other Person) will have the right to enforce any and all causes of action against any Entity and rights of the Debtors that arose before or after the Petition Date, including but not limited to the rights and powers of a trustee and debtor-in-possession, against any Entity whatsoever, including but not limited to all avoidance powers granted to the Debtors under the Bankruptcy Code and all causes of action and remedies granted pursuant to sections 502, 506, 510, 541, 542, 543, 544, 545, 547 through 551 and 553 of the Bankruptcy Code, but excluding Released Claims; *provided, however,* the Pre-Petition Term Agent will have the right, on behalf of the Pre-Petition Term Lenders, to (i) enforce Liens on the Term Lender Assets or (ii) pursue any and all causes of action to preserve, recoup, or recover any Term Lender Assets, in each case against any Entity whatsoever (so long as it is not a Released Claim), including but not limited to exercising the rights and powers of a trustee and debtor-in-possession solely with respect to the Term Lender Assets and the Pre-Petition Term Agent shall be deemed to have standing with respect to the exercise of such rights and powers.

2. Article 12.

Article 12 of the Plan is hereby amended by (i) deleting the word “and” from the end of paragraph (q), (ii) changing the period to a semicolon at the end of paragraph (r), (iii) inserting the word “and” at the end of paragraph (r), and (iii) adding to the end of such Article 12:

> (s) Hear and determine matters relating to the Pre-Petition Term Agent's enforcement of Liens on the Term Lender Assets or pursuit of any and all causes of action to preserve, recoup, or recover any Term Lender Assets for the benefit of the Pre-Petition Term Lenders.

H. EXCULPATION, INJUNCTION, LIMITATION OF LIABILITY AND CONSOLIDATION OF UNSECURED CLAIMS.

1. Exculpation.

The exculpation set forth in Section 11.3 of the Plan is approved as to the Debtors, the Creditors' Committee (solely with respect to its conduct as a committee and not with respect to the actions of its members as individual creditors), the Pre-Petition Term Agent, the Pre-Petition Term Lenders, the Indenture Trustee and such parties' respective present members (with respect to members of the Creditors' Committee, solely with respect to each member's conduct in furtherance of its, his, or her duties as a member of the Creditors' Committee, and not with respect to the actions of such members as individual creditors), officers, directors, shareholders, employees, representatives, advisors, attorneys, financial advisors, investment bankers and agents and any of such parties' successors and assigns, with respect to any Claim, obligation, cause of action or liability to one another or to any holder of a Claim or an Interest, or any other party in interest, or any of their respective officers, directors, shareholders, members and/or enrollees, employees, representatives, advisors, attorneys, financial advisors, investment bankers, agents, or Affiliates, or any of their successors or assigns, for any act or omission in connection with, relating to, or arising out of, the Chapter 11 Cases, the negotiation and pursuit of confirmation of the Plan, the consummation of the Plan, or the administration of the Plan or the property to be distributed under the Plan, except for their gross negligence or willful misconduct, and such parties in all respects shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities (if any) under the Plan and this Confirmation Order.

***21** Notwithstanding any other provision of the Plan or this Confirmation Order, neither any holder of a Claim or Interest, or other party in interest, nor any of their respective officers, directors, shareholders, members and/or enrollees, employees, representatives, advisors, attorneys, financial advisors, investment bankers, agents or Affiliates, and no successors or assigns of the foregoing, shall have any right of action against any Debtor or the Creditors' Committee (solely in its capacity as a committee, and not in each particular member's capacity as an individual creditor), the Pre-Petition Term Agent, the Pre-Petition Term Lenders, or any of such parties' respective present members (with respect to members of the Creditors' Committee, solely with respect to the capacity of each member in furtherance of its, his, or her duties as a member of the Creditors' Committee, and not in each particular member's capacity as an individual creditor), officers, directors, shareholders, employees, representatives, advisors, attorneys, financial advisors, investment bankers or agents or such parties' successors and assigns, for any act or omission in connection with, relating to, or arising out of, the Chapter 11 Cases, the negotiation and pursuit of confirmation of the Plan, the consummation of the Plan, or the administration of the Plan or the property to be distributed under the Plan, except for such Persons' gross negligence or willful misconduct.

2. Injunction.

Except as otherwise specifically provided in the Plan or this Confirmation Order, all Entities who have held, hold or may hold claims, rights, causes of action, liabilities or any equity interests based upon any act or omission, transaction or other activity of any kind or nature related to the Debtors or the Chapter 11 Cases that occurred prior to the Effective Date, other than as expressly provided in the Plan or this Confirmation Order, regardless of the filing, lack of filing, allowance or disallowance of such a Claim or Interest and regardless of whether such Entity has voted to accept the Plan, and any successors, assigns or representatives of such Entities shall be precluded and permanently enjoined on and after the Effective Date from (a) the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree or order with respect to any Claim, Interest or any other right or claim against the Debtors, or any assets of the Debtors which such Entities possessed or may possess prior to the Effective Date, (b) the cre-

ation, perfection or enforcement of any encumbrance of any kind with respect to any Claim, Interest or any other right or claim against the Debtors or any assets of the Debtors which they possessed or may possess prior to the Effective Date, and (c) the assertion of any Claims that are released hereby.

3. Releases.

The releases by the Debtors and by each present and former holder of a Claim or Interest who voted in favor of the Plan, as set forth in Sections 11.5 and 11.6 of the Plan, are approved as to the Debtor Releasees and the Creditor Releasees with respect to any claims, demands, indebtedness, agreements, promises, debts, rights, causes of action, obligations, suits, judgments, damages or liabilities of any nature whatsoever (other than rights to enforce obligations of the Debtors or the Debtor Releasees, as applicable, under the Section 506(c) Stipulation, the Committee Settlement Stipulation, the orders of the Bankruptcy Court, the Plan and the securities, contracts, instruments, releases and other agreements and documents delivered in connection therewith), whether liquidated or unliquidated, suspected or claimed, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or in part on any matter, cause, thing, act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtors, the Chapter 11 Cases, or the Plan against any of the Debtor Releasees or the Creditor Releasees, as applicable.

4. Limitation of Liability.

***22** The limitation of liability set forth in Section 11.7 of the Plan is approved as to, and limits the liability of, the Debtors, the Liquidating Trustee, the Pre-Petition Term Agent, the Pre-Petition Term Lenders, the Creditors' Committee, the Indenture Trustee and such parties' respective members, officers, directors, employees, advisors, attorneys, professionals and agents to any holder of a Claim or Interest for any act or omission in connection with, related to, or arising out of, the Chapter 11 Cases, the negotiation and pursuit of confirmation of the Plan, the consummation of the Plan or any contract, instrument, release or other agreement or document created in connection with the Plan, or the administration of the Plan or the property to be distributed under the Plan, except for gross negligence or willful misconduct.

Each Person who voted in favor of the Plan shall be deemed to have specifically consented to the releases and injunctions set forth in the Plan and in this Confirmation Order.

5. Limitation on Future Funding.

Except as expressly set forth in the Global Stipulations, under no circumstances shall the Pre-Petition Term Agent and the Pre-Petition Term Lenders be liable for any future funding or payments to the Debtors' Estates, including, without limitation, for the payment of any claims arising from any deficit of the Working Capital Adjustment Escrow, the Carve-Out Escrow, the Additional Deposit Account, or the Cure Escrow Deposit Account, to satisfy any obligations arising to the beneficiaries of such accounts. The Debtors' Estates shall be responsible for any anticipated or unanticipated deficits arising with respect to the foregoing, including any costs or claims associated with this liquidation of the Debtors, and none of the foregoing such claims shall be chargeable to, or the responsibility of, the Pre-Petition Term Agent or the Pre-Petition Term Lenders.

6. Substantive Consolidation of Claims against Debtors.

The Plan is premised on the substantive consolidation of all of the Debtors with respect to the treatment of all Claims and Interests except for the General Secured Claims in Class 2, on and after the Effective Date. The Plan does not contemplate substantive consolidation of the Debtors with respect to the Class 2 Claims, which shall be deemed to apply separately with respect to the Plan proposed by each Debtor. On the Effective Date, (a) all Class 6

Intercompany Claims will be eliminated (except to the extent such claims are by a Debtor against a non-Debtor Affiliate or a non-Debtor subsidiary); (b) all Assets and liabilities of the Debtors will be merged or treated as though they were merged (except to the extent they secure any Allowed General Secured Claim); (c) all guarantees of the Debtors of the obligations of any other Debtor and any joint or several liability of any of the Debtors shall be eliminated; and (d) each and every Claim or Interest (except for General Secured Claims) against any Debtor shall be deemed Filed against the consolidated Debtors and all Claims (except for General Secured Claims) Filed against more than one Debtor for the same liability shall be deemed one Claim against any obligation of the consolidated Debtors.

***23** Effective upon and after the Effective Date, the Court hereby orders the substantive consolidation of the Debtors to the extent set forth in Article 7 of the Plan and this Confirmation Order.

I. SUBSTANTIAL CONSUMMATION.

The substantial consummation of the Plan, within the meaning of section 1127 of the Bankruptcy Code, is deemed to occur on the first date distributions are made in accordance with the terms of the Plan to holders of any Allowed Claims.

J. RETENTION OF JURISDICTION.

Notwithstanding the entry of the Confirmation Order and the occurrence of the Effective Date and the transfer of Assets to the Liquidating Trust, the Bankruptcy Court shall retain jurisdiction over the Liquidating Trust, the Trust Estate and the Liquidating Trustee. The Court shall retain such jurisdiction over the Chapter 11 Cases after the Effective Date as is legally permissible, including jurisdiction to:

(a) Allow, disallow, determine, liquidate, classify, estimate or establish the priority or secured or unsecured status of any Claim or Interest, including the resolution of any request for payment of any Administrative Expense Claim and the resolution of any and all objections to the allowance or priority of all Claims and Interests;

(b) Hear and determine any and all causes of action against any Person and rights of the Debtors that arose before or after the Petition Date, including, but not limited to, the rights and powers of a trustee and debtor-in-possession, against any Person whatsoever, including, but not limited to, all avoidance powers granted to the Debtors under the Bankruptcy Code and all causes of action and remedies granted pursuant to sections 502, 506, 510, 541, 542, 543, 544, 545, 547 through 551 and 553 of the Bankruptcy Code;

(c) Grant or deny any applications for allowance of compensation for professionals authorized pursuant to the Bankruptcy Code or the Plan, for periods ending on or before the Effective Date;

(d) Resolve any matters relating to the assumption, assumption and assignment or rejection of any executory contract or unexpired lease to which any Debtor is a party or with respect to which any of the Debtors may be liable, including, without limitation, the determination of whether such contract is executory for the purposes of section 365 of the Bankruptcy Code, and hear, determine and, if necessary, liquidate any Claims arising therefrom;

(e) Enter orders approving the Debtors' or the Liquidating Trust's post-Confirmation sale or other disposition of Assets;

(f) Ensure that distributions to holders of Allowed Claims are accomplished pursuant to the provisions of the Plan and the Liquidating Trust Agreement;

(g) Decide or resolve any motions, adversary proceedings, contested or litigated matters and any other matters and grant or deny any applications involving any Debtor that may be pending in the Chapter 11 Cases on the Effective Date;

(h) Hear and determine matters concerning state, local or federal taxes in accordance with sec-

tions 346, 505 or 1146 of the Bankruptcy Code;

***24** (i) Enter such orders as may be necessary or appropriate to implement or consummate the provisions of the Liquidating Trust Agreement, the Plan and the Confirmation Order;

(j) Hear and determine any matters concerning the enforcement of the provisions of Article 11 of the Plan and any other exculpations, limitations of liability or injunctions contemplated by the Plan;

(k) Resolve any cases, controversies, suits or disputes that may arise in connection with the consummation, interpretation or enforcement of the Liquidating Trust Agreement, the Plan or the Confirmation Order;

(l) Permit the Debtors, to the extent authorized pursuant to section 1127 of the Bankruptcy Code, to modify the Plan or any agreement or document created in connection with the Plan, or remedy any defect or omission or reconcile any inconsistency in the Plan or any agreement or document created in connection with the Plan;

(m) Issue injunctions, enter and implement other orders or take such other actions as may be necessary or appropriate to restrain interference by any entity with consummation, implementation or enforcement of the Liquidating Trust Agreement, the Plan or the Confirmation Order;

(n) Enforce any injunctions entered in connection with or relating to the Plan or the Confirmation Order;

(o) Enter and enforce such orders as are necessary or appropriate if the Confirmation Order is for any reason modified, stayed, reversed, revoked or vacated, or distributions pursuant to the Liquidating Trust Agreement or the Plan are enjoined or stayed;

(p) Determine any other matters that may arise in connection with or relating to the Plan or any agreement or the Confirmation Order;

(q) Enter any orders in aid of prior orders of the Bankruptcy Court;

(r) Enter a final decree closing the Chapter 11 Cases; and

(s) Hear and determine matters relating to the Pre-Petition Term Agent's enforcement of Liens on the Term Lender Assets or pursuit of any and all causes of action to preserve, recoup, or recover any Term Lender Assets for the benefit of the Pre-Petition Term Lenders.

K. CONTINUATION OF AUTOMATIC STAY.

In furtherance of the implementation of the Plan, except as otherwise provided in the Plan, all injunctions or stays provided for in the Chapter 11 Cases pursuant to sections 105 or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, shall remain in full force and effect and apply to all creditors and Beneficiaries holding claims against the Debtors, the Estates, the Assets, the Liquidating Trustee, the Liquidating Trust and the Trust Assets until the Final Distribution Date.

L. EXEMPTION FROM CERTAIN TRANSFER TAXES.

Pursuant to section 1146(c) of the Bankruptcy Code, the issuance, transfer or exchange of any Security or the making or delivery of any instrument of transfer under this Plan may not be taxed under any law imposing a stamp tax, use tax, sales tax or similar tax.

M. REVERSAL.

***25** If any or all of the provisions of this Confirmation Order are hereafter reversed, modified or vacated by subsequent order of this Court or any other court, such reversal, modification or vacatur shall not affect the validity or enforceability of the acts or obligations incurred or undertaken under or in connection with the Plan prior to the Debtors' receipt of written notice of such order. Notwithstanding any such reversal, modification or vacatur of this Confirmation Order, any such act or obligation

incurred or undertaken pursuant to, and in reliance on, this Confirmation Order prior to the effective date of such reversal, modification or vacatur shall be governed in all respects by the provisions of this Confirmation Order and the Plan and all related documents or any amendments or modifications thereto.

N. NOTICE OF ENTRY OF CONFIRMATION ORDER.

1. The Debtors are directed to serve a notice of the entry of this Confirmation Order and the establishment of bar dates for certain Claims hereunder, substantially in the form of *Exhibit B* attached hereto and incorporated herein by reference (the " ***Confirmation Notice*** "), on all parties that received notice of the Confirmation Hearing, no later than 15 Business Days after the Confirmation Date and such service shall be deemed to comply with the requirements of Bankruptcy Rules 2002(a)(7), 2002(f)(3) and (f)(7), 2002(1), 3002(c)(4) and 3020(c)(2).

2. Pursuant to Bankruptcy Rule 9008, the Debtors are directed to publish the Confirmation Notice once in the national edition of *USA Today* no later than 15 Business Days after the Confirmation Date.

Bkrtcy.D.Del.,2010.
In re EBHI Holdings, Inc.
Slip Copy, 2010 WL 3493027 (Bkrtcy.D.Del.)

END OF DOCUMENT

EXHIBIT G

Not Reported in B.R., 2006 WL 616243 (Bkrtcy.D.Del.)
(Cite as: 2006 WL 616243 (Bkrtcy.D.Del.))

H

Only the Westlaw citation is currently available.

United States Bankruptcy Court,
D. Delaware.
In re: KAISER ALUMINUM CORPORATION, a Delaware corporation, et al., Debtors.

No. 02-10429(JKF), 7312.
Feb. 6, 2006.

Ian Connor Bifferato, Bifferato, Gentilotti, Biden & Balick, Daniel J. Defranceschi, Jason M. Madron, Kimberly D. Newmarch, Michael Joseph Merchant, Paul Noble Heath, John Henry Knight, Richards, Layton & Finger, Megan Nancy Harper, Patrick Michael Leathem, Morris, James, Hitchens & Williams LLP, James L. Patton, Sharon M. Zieg, Young, Conaway, Stargatt & Taylor, Michael F. Bonkowski, Wilmington, DE, Marc T. Foster, Richard F. Rescho, Law Offices of Christopher E. Grell, Oakland, CA, Patricia Williams Prewitt, Locke Liddell & Sapp LLP, Houston, TX, for Debtors.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CONFIRMATION OF THE SECOND AMENDED JOINT PLAN OF REORGANIZATION OF KAISER ALUMINUM CORPORATION, KAISER ALUMINUM & CHEMICAL CORPORATION AND CERTAIN OF THEIR DEBTOR AFFILIATES, AS MODIFIED

FITZGERALD, Bankruptcy J.

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INTRODUCTION

***1** WHEREAS, Kaiser Aluminum Corporation ("KAC"), Kaiser Aluminum & Chemical Corporation ("KACC"), Akron Holding Corporation, Kaiser Aluminum & Chemical Investment, Inc., Kaiser Aluminium International, Inc., Kaiser Aluminum Properties, Inc., Kaiser Aluminum Technical Services, Inc., Kaiser Bellwood Corporation, Kaiser Micromill Holdings, LLC, Kaiser Texas Micromill Holdings, LLC, Kaiser Sierra Micromills, LLC, Kaiser Texas Sierra Micromills, LLC, Oxnard Forge Die Company, Inc., Alwis Leasing LLC, Kaiser Center, Inc., KAE Trading, Inc. ("Kaiser Trading"), Kaiser Aluminum & Chemical Investment Limited (Canada), Kaiser Aluminum & Chemical of Canada Limited (Canada), Kaiser Bauxite Company ("KBC"), Kaiser Center Properties, Kaiser Export Company and Texada Mines Ltd. (Canada) (collectively, the "Reorganizing Debtors" and, as reorganized entities after emergence, the "Reorganized Debtors"), twenty-two of the above-captioned debtors and debtors in possession, proposed the Second Amended Joint Plan of Reorganization of Kaiser Aluminum Corporation, Kaiser Aluminum & Chemical Corporation and Certain of Their Debtor Affiliates, dated September 7, 2005, as modified (as it may be further modified, the "Plan"); FN1

FN1. Unless otherwise specified, capitalized terms and phrases used herein have the meanings assigned to such terms and phrases in the Plan. The rules of interpretation set forth in Section 1.2.a of the Plan shall apply to these Findings of Fact and Conclusions of Law (the "Findings and Conclusions"). In addition, in accordance with Section 1.1 of the Plan, any term used in the Plan or these Findings and Conclusions that is not defined in the Plan or herein, but that is used in the Bankruptcy Code or the Bankruptcy Rules, shall have the meaning given to that term in the Bankruptcy Code or the Bankruptcy Rules, as applicable.

A copy of the Plan (without the exhibits thereto) is attached to the Confirmation Order as Exhibit A and incorporated herein by reference.

WHEREAS the Court, on September 8, 2005, entered its Order (A) Approving Proposed Disclosure Statement, (B) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Proposed Joint Plan of Reorganization and (C) Scheduling a Hearing on Confirmation of Proposed Joint Plan of Reorganization and Approving Related Notice Procedures (D.I.7320) (the "Disclosure Statement Order"), by which the Court, among other things, approved the Reorganizing Debtors' proposed disclosure statement (the "Disclosure Statement"), established procedures for the solicitation and tabulation of votes to accept or reject the Plan and scheduled a hearing to consider Confirmation of the Plan for January 9, 2006 at 9:00 a.m., to be continued on January 10, 2006 if necessary (the "Confirmation Hearing");

WHEREAS affidavits of service executed by Kathleen M. Logan with respect to the mailing of notice of the Confirmation Hearing and solicitation materials in respect of the Plan in accordance with the Disclosure Statement Order (collectively, the "Affidavits of Service") and were filed with the Court on September 19, 2005 (D.I.7390-93), October 14, 2005 (D.I.7514, 7516, 7522-26) and November 10, 2005 (D.I.7686);

WHEREAS the Affidavit of Andrew Novak (D.I.7773) (the "Publication Affidavit") was filed with the Court on November 21, 2005, regarding the publication of the Notice of (A) Deadline for Casting Votes to Accept or Reject Proposed Joint Plan of Reorganization, (B) Hearing to Consider Confirmation of Proposed Joint Plan of Reorganization and (C) Related Matters in certain magazines and newspapers as set forth in the Disclosure Statement Order;

WHEREAS, Logan & Company, Inc., the Court-appointed solicitation and tabulation agent in respect of the Plan, filed the Declaration of Kathleen M. Logan Certifying the Methodology for the Tabulation of Votes on, and the Results of Voting with Respect to, the Second Amended Joint Plan of Reorganization of Kaiser Aluminum Corporation, Kaiser Aluminum & Chemical Corporation and Certain of Their Debtor Affiliates (D.I.7812) (the "Voting Declaration") on November 29, 2005, attesting to the results of the tabulation of the

properly executed and timely received Ballots for the Plan as follows:

***2** *Subclass 2A Claimants.* The Reorganizing Debtors received 279 acceptances out of 286 votes from holders of Claims under Subclass 2A (Senior Note and 7-3/4% SWD Revenue Bond Convenience Claims), with Subclass 2A claimants who voted in favor of the Plan holding Claims in the amount of $2,317,000 for voting purposes, such acceptances being 97.55 percent in number and 97.07 percent in principal amount of all ballots received from holders of Subclass 2A Claims (Voting Decl. ¶¶ 18-19);

Subclass 2B Claimants. The Reorganizing Debtors received 530 acceptances out of 571 votes from holders of Claims under Subclass 2B (Other Convenience Class Claims) with Subclass 2B claimants who voted in favor of the Plan holding Claims in the amount of $2,289,307 for voting purposes, such acceptances being 92.82 percent in number and 92.49 percent in principal amount of all ballots received from holders of Subclass 2B Claims (Voting Decl. ¶¶ 18-19);

Class 4 Claimants. The Reorganizing Debtors received 1 acceptance out of 1 vote from holders of Claims under Class 4 (Canadian Debtor PBGC Claims) with Class 4 claimants who voted in favor of the Plan holding Claims in the amount of $616,000,000 for voting purposes, such acceptances being 100 percent in number and 100 percent in principal amount of all ballots received from holders of Class 4 Claims (Voting Decl. ¶¶ 18-19);

Class 5 Claimants. The Reorganizing Debtors received 197,820 acceptances out of 198,127 votes from holders of Claims under Class 5 (Asbestos Personal Injury Claims) with Class 5 claimants who voted in favor of the Plan holding Claims in the amount of $993,949,450 for voting purposes, such acceptances being 99.84 percent in number and 99.97 percent in principal amount of all ballots received from holders of Class 5 Claims (Voting Decl. ¶¶ 18-19);

Class 6 Claimants. The Reorganizing Debtors received 296 acceptances out of 296 votes from holders of Claims under Class 6 (CTPV Personal Injury Claims) with Class 6 claimants who voted in favor of the Plan holding Claims in the amount of $296 for voting purposes, such acceptances being 100 percent in number and 100 percent in principal amount of all ballots received from holders of Class 6 Claims (Voting Decl. ¶¶ 18-19);

Class 7 Claimants. The Reorganizing Debtors received 1,764 acceptances out of 1,773 votes from holders of Claims under Class 7 (NIHL Personal Injury Claims) with Class 7 claimants who voted in favor of the Plan holding Claims in the amount of $1,764 for voting purposes, such acceptances being 99.49 percent in number and 99.49 percent in principal amount of all ballots received from holders of Class 7 Claims (Voting Decl. ¶¶ 18-19);

Class 8 Claimants. The Reorganizing Debtors received 2,667 acceptances out of 2,674 votes from holders of Claims under Class 8 (Silica Personal Injury Claims) with Class 8 claimants who voted in favor of the Plan holding Claims in the amount of $2,667 for voting purposes, such acceptances being 99.74 percent in number and 99.74 percent in principal amount of all ballots received from holders of Class 8 Claims (Voting Decl. ¶¶ 18-19);

***3** *Subclass 9B Claimants.* The Reorganizing Debtors received 345 acceptances out of 372 votes from holders of Claims under Subclass 9B (Other Unsecured Claims) with Subclass 9B claimants who voted in favor of the Plan holding Claims in the amount of $1,153,864,132 for voting purposes, such acceptances being 92.74 percent in number and 99.26 percent in principal amount of all ballots received from holders of Subclass 9B Claims (Voting Decl. ¶¶ 18-19);

WHEREAS objections to Confirmation of the Plan (collectively, the "Objections") were filed by (a) the official committee of retired employees (the "Retirees' Committee") (D.I.7699), (b) the United States of America, on behalf of the Internal Revenue Service (the "IRS") (D.I.7705), (c) the Comptroller of Public Accounts of the State of Texas (the "Texas Comptroller") (D.I.7706), (d) Law Debenture Trust Company of New

York ("Law Debenture") (D.I.7707), (e) the Public Utility District No. 1 of Clark County d/b/a Clark Public Utilities ("Clark") (D.I.7711), (f) Santown Limited Partnership ("Santown") (D.I.7714), (g) the United States Trustee (the "U.S. Trustee") (D.I.7715), (h) Elizabeth Black (D.I.7743), (i) Patty Greiner (D.I.7830) and (j) certain insurance companies (collectively, the "Insurers") (D.I.7834, 7836, 7839, 7840, 7843, 7847, 7851, 8046);

WHEREAS the Objections of the Retirees' Committee, the IRS, the Texas Comptroller and Santown were each resolved prior to the Confirmation Hearing;

WHEREAS the United States Department of Justice, on behalf of certain federal agencies, raised an informal Objection to Confirmation of the Plan, which was resolved by the parties by the inclusion of certain language in the Confirmation Order;

WHEREAS Sherwin Alumina, L.P. filed a reservation of rights and conditional Objection to Confirmation of the Plan (D.I.8033), which it withdrew at the Confirmation Hearing;

WHEREAS the U.S. Trustee withdrew its Objection (D.I.7960);

WHEREAS the Objection of Santown was resolved by the inclusion of certain language in the Confirmation Order;

WHEREAS the Creditors' Committee filed a Pre-Hearing Brief in Support of the Plan (D.I.7961) (the "Creditors' Committee's Brief") and a reply to Sherwin's conditional objection (D.I.8056), the Reorganizing Debtors filed a memorandum of law in support of Confirmation of the Plan and in response to certain of the Objections (D.I.7967) (the "Memorandum of Law") and a reply to Sherwin's conditional objection to the Plan (D.I.8068), the Reorganizing Debtors and the official committee of asbestos claimants (the "Asbestos Committee") filed a joint memorandum of law in response to the Insurers' Objections (D.I.7966) (the "Joint Response") and Anne M. Ferazzi, the legal representative for future silica and coal tar pitch volatile claimants (the "Silica and CTPV Representative"), and Martin J. Murphy, the legal representative for future asbestos claimants (the "Asbestos Representative"), each filed a joinder to the Joint Response (D.I.7962, 7968);

***4** WHEREAS the Insurers filed three replies (D.I.8057, 8058, 8060) in support of their Objections;

WHEREAS the declarations of Edward F. Houff (D.I.8066), Blake O'Dowd (D.I.8067), Anne M. Ferazzi (D.I.8063) and Martin J. Murphy (D.I.8065) were submitted in support of the Plan (collectively, the "Declarations") and received into evidence without objection, and although all parties and participants were afforded an opportunity to conduct cross-examination at the hearing, no one elected to do so (Tr. of Jan. 9, 2006 Hr'g at 20-24);

WHEREAS the Court has reviewed the Plan, the Disclosure Statement, the Disclosure Statement Order, the Voting Declaration and the Declaration of Kathleen M. Logan filed on January 6, 2006 (D .I. 8097), the Affidavits of Service, the Publication Affidavit, the Objections, the Memorandum of Law, the Joint Response, the Creditors' Committee's Brief, the Insurers' replies in further support of their Objections, the Declarations and the other papers before the Court in connection with the Confirmation of the Plan;

WHEREAS the Court heard the statements of counsel in support of and in opposition to Confirmation at the Confirmation Hearing, as reflected in the record made at the Confirmation Hearing;

WHEREAS the Court has considered all evidence presented at the Confirmation Hearing;

WHEREAS the Court has taken judicial notice of the papers and pleadings on file in these chapter 11 cases;

WHEREAS the Court, after due deliberation and for sufficient cause, finds that the evidence admitted in support of the Plan at the Confirmation Hearing is persuasive and credible;

NOW, THEREFORE, the Court hereby enters the

following Findings of Fact and Conclusions of Law with respect to Confirmation of the Plan .[FN2]

> FN2. These Findings and Conclusions constitute the Court's findings of fact and conclusions of law under Fed.R.Civ.P. 52, as made applicable herein by Bankruptcy Rules 7052 and 9014. Any finding of fact shall constitute a finding of fact even if it is referred to as a conclusion of law, and any conclusion of law shall constitute a conclusion of law even if it is referred to as a finding of fact. Citations to the Bankruptcy Code and Rules are to the sections and rules as numbered and in effect prior to October 17, 2005.

I. FINDINGS OF FACT.

A. JURISDICTION AND VENUE.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and this Court has jurisdiction to enter a final order with respect thereto, except to the extent of the requirements of Section 524(g) of the Bankruptcy Code for issuance or affirmance of the Confirmation Order by the United States District Court for the District of Delaware (the "District Court").

B. MODIFICATIONS TO THE PLAN.

The Reorganizing Debtors filed three sets of modifications to the Plan, which are set forth in: (a) the Motion for Entry of Stipulation and Agreed Order Regarding Plan Modifications and Potential Confirmation Objections by Certain Insurance Companies (D.I.7659) (the "First Modifications"); (b) the Motion for Entry of an Order (I) Approving Settlement with Sherwin Alumina, L.P. and (II) Authorizing Related Modifications to Second Amended Joint Plan of Reorganization (D.I.7796) (the "KBC Modifications"); and (c) the Amended Notice of Filing of Third Modification to the Second Amended Joint Plan of Reorganization of Kaiser Aluminum Corporation, Kaiser Aluminum & Chemical Corporation and Certain of Their Debtor Affiliates (D.I.7965) (the "Third Modifications" and, together with the First Modifications and the KBC Modifications, the "Modifications"). The Court approved the First Modifications pursuant to the Stipulation and Agreed Order entered on November 15, 2005 (D.I.7718). On December 19, 2005, the Court approved the KBC Modifications (D.I.7993), but directed the Reorganizing Debtors to serve on general unsecured creditors in Subclass 9B a notice describing the impact of the KBC Modifications on Subclass 9B creditors and providing such creditors with an opportunity to object to confirmation of the Plan on the basis that the Plan includes the KBC Modifications and providing those creditors who timely submitted a vote in Subclass 9B to accept the Plan with an opportunity to change their votes. On December 21, 2005, the Reorganizing Debtors filed their Notice of Filing and Service on Holders of Subclass 9B General Unsecured Claims of Notice of: (A) Modifications to Second Amended Joint Plan of Reorganization of Kaiser Aluminum Corporation, Kaiser Aluminum & Chemical Corporation and Certain of Their Debtor Affiliates, as Modified; and (B) Deadline for Changing Previous Votes on Plan and Objecting to Modifications Filed by Kaiser Aluminum Corporation (D.I.8002). On December 27, 2005, the Reorganizing Debtors filed the affidavit of Kathleen M. Logan (D.I.8027) (the "KBC Affidavit of Service"), evidencing service of the KBC Modifications Notice on Subclass 9B creditors, which took place on December 21 and December 22, 2005. No objections to the KBC Modifications have been filed. And on January 6, 2006, the Reorganizing Debtors filed the Declaration of Kathleen M. Logan (D.I.8097) (the "Voting Change Declaration"), evidencing that no creditor who timely submitted a vote in Subclass 9B to accept the Plan elected to change such vote. Accordingly, the Modifications, including the KBC Modifications, may be approved as part of the confirmation process. (*See* Tr. of Jan. 9, 2006 Hr'g at 30.)

C. COMPLIANCE WITH THE REQUIREMENTS OF SECTION 1129 OF THE BANKRUPTCY CODE.

1. Section 1129(a)(1)-Compliance of the Plan with Applicable Provisions of the Bankruptcy Code.

***5** The Plan complies with all applicable provisions

of the Bankruptcy Code, as required by section 1129(a)(1) of the Bankruptcy Code, including sections 1122 and 1123 of the Bankruptcy Code. (Houff Decl. ¶¶ 39-49.) The Plan fully complies with each requirement of section 1123(a) of the Bankruptcy Code. (Houff Decl. ¶ 43.) Article II of the Plan designates fifteen classes of Claims and Interests. (Plan art. II; Houff Decl. ¶ 43.) Section 3.2 of the Plan specifies that Classes 1, 3, 10 and 15 are not impaired under the Plan. (Plan § 3.2; Houff Decl. ¶ 43.) Section 3.3 of the Plan specifies that Claims and Interests in Classes 2, 4, 5, 6, 7, 8, 9, 11, 12, 13 and 14 are impaired and describes the treatment of each such Class. (Plan § 3.3; Houff Decl. ¶ 43.) Further, the treatment of each Claim or Interest within a Class is the same as the treatment of each other Claim or Interest in such Class, unless the holder of a Claim or Interest agrees to less favorable treatment on account of its Claim or Interest. (Houff Decl. ¶ 43.)

a. Sections 1122 and 1123(a)(1)-(4)-Classification and Treatment of Claims and Interests.

i. The Plan constitutes a separate plan of reorganization for each of the Reorganizing Debtors. The Plan meets the classification requirements of section 1122(a) of the Bankruptcy Code. Article II of the Plan classifies Claims and Interests into fifteen separate categories. (Plan art. II; Houff Decl. ¶ 43.) In particular, Article II of the Plan segregates into separate Classes Unsecured Priority Claims (Class 1), Convenience Claims (Class 2), Secured Claims (Class 3), Canadian Debtor PBGC Claims (Class 4), Asbestos Personal Injury Claims (Class 5), CTPV Personal Injury Claims (Class 6), NIHL Personal Injury Claims (Class 7), Silica Personal Injury Claims (Class 8), General Unsecured Claims (Class 9), Canadian Debtor Claims (Class 10), Intercompany Claims (Class 11), KAC Old Stock Interests (Class 12), Kaiser Trading Old Stock Interests (Class 13), KACC Old Stock Interests (Class 14) and Other Old Stock Interests (Class 15). (*Id.*) The groupings reflect the diverse characteristics of those Claims and Interests, and the legal rights under the Bankruptcy Code of each of the holders of Claims or Interests within a particular Class are substantially similar to other holders of Claims or Interests within that Class. (Houff Decl. ¶¶ 39-42.)

ii. Due to their entitlement to priority status under section 507 of the Bankruptcy Code, Unsecured Priority Claims have been separately classified in Class 1. (Plan § 2.1; Houff Decl. ¶ 40.) In accordance with section 1122(b) of the Bankruptcy Code, Convenience Claims (consisting of every unsecured claim, except any Claim in respect of 6-1/2% RPC Revenue Bonds or Senior Subordinated Notes, that falls below the applicable threshold amount) have been separately classified in Class 2 for administrative convenience. (Plan § 2.2; Houff Decl. ¶ 40.) Specifically, Subclass 2A (Senior Note and 7-3/4% SWD Revenue Bond Convenience Claims) includes all Senior Note Claims and 7-3/4% SWD Revenue Bond Claims for which the stated principal amount of the securities underlying the allowed amount of each such Claim is either equal to or less than $15,000, and Subclass 2B includes all Unsecured Claims other than Senior Note Claims, 7-3/4% SWD Revenue Bond Claims, 6-1/2% RPC Revenue Bonds and Senior Subordinated Note Claims for which (a) with respect to 7.60% SWD Revenue Bond Claims, the stated principal amount of the securities underlying the allowed amount of each such Claim is either equal to or less than $30,000 or (b) with respect to any such Claim other than a 7.60% SWD Revenue Bond Claim, the allowed amount of such Claim is equal to or less than $30,000. (*Id.*)

***6** iii. Based on their secured status, Secured Claims have been separately classified in Class 3. (Plan § 2.3; Houff Decl. ¶ 41.) Unsecured Claims in Class 4 (Canadian Debtor PBGC Claims) and Class 10 (Canadian Debtor Claims) have been separately classified because such Claims have been asserted against the Canadian Debtors, which are not being substantively consolidated with the other Reorganizing Debtors for purposes of implementing the Plan, and the Plan classifies the Canadian Debtor PBGC Claims separately from the other Canadian Debtor Claims based on the fact that the PBGC Claims are allowed against each of the Reorganizing Debtors and are receiving the treatment negotiated in the PBGC Settlement Agreement. (Plan § 2 .4; Houff Decl. ¶ 41.) Asbestos Personal Injury Claims, CTPV Personal Injury Claims, NIHL Personal Injury Claims and Silica Personal Injury Claims have been

separately classified in, respectively, Classes 5, 6, 7 and 8 due to the distinctive bases for such claims. (Plan § 2.5-2.8; Houff Decl. ¶ 41.) Moreover, due to their unique nature, Class 11 Intercompany Claims have been classified separately from the Class 9 general Unsecured Claims. (Plan § 2.9, 2.11; Houff Decl. ¶ 41.)

iv. Finally, the four Classes of Interests are comprised of (a) the Interests and Claims in respect of the KAC Old Stock (Class 12), (b) the Interests and Claims in respect of the Old Stock of Kaiser Trading (Class 13), (c) the Interests and Claims in respect of the Old Stock of KACC (Class 14) and (d) the Interests in any Debtor other than the Interests in Classes 12, 13 or 14 (Class 15). (Plan § 2.12-2.15; Houff Decl. § 42.) The Interests in the Debtors have been segregated into these four Classes according to the differing nature of such Interests. (Houff Decl. ¶ 42.)

b. Section 1123(a)(5)-Adequate Means for Implementation of the Plan.

i. Article IV of the Plan and various other provisions of the Plan provide adequate means for the Plan's implementation, including: (a) except as otherwise provided in the Plan and subject to the Restructuring Transactions, the continued corporate existence of the Reorganizing Debtors and the vesting of assets in the Reorganized Debtors under Section 4.1 of the Plan; (b) the consummation of the Restructuring Transactions in connection with Section 4.2 of the Plan; (c) the creation of, and transfer of certain assets to, the Funding Vehicle Trust for the benefit of the PI Trusts and the appointment of the Funding Vehicle Trustees according to Section 5.1 of the Plan; (d) the creation of the PI Trusts, the transfer of certain assets to the Asbestos PI Trust and the Silica PI Trust and the appointment of the PI Trusts' respective Trustees and Trust Advisory Committees, as detailed in Sections 5.2 through 5.5 of the Plan; (e) the issuance of New Common Stock in Reorganized KAC for distribution in satisfaction of certain Claims under Section 4.3.d of the Plan; (f) the preservation of rights of action by, and release of certain rights of action against, the Reorganized Debtors, as described in Section 4.5 of the Plan; (g) the assumption, assumption and assignment or rejection of Executory Contracts and Unexpired Leases to which any Reorganizing Debtor is a party, as stated in Article VI of the Plan; (h) the cancellation of the Senior Note Indentures and the discharge of obligations thereunder, subject to certain rights of the Indenture Trustees that will remain in effect, as detailed in Section 4.12 of the Plan; and (i) the substantive consolidation of KAC, KACC, Akron Holding Corporation, Kaiser Aluminum & Chemical Investment, Inc., Kaiser Aluminium International, Inc., Kaiser Aluminum Properties, Inc., Kaiser Aluminum Technical Services, Inc., Bellwood, Kaiser Micromill Holdings, LLC, Kaiser Texas Micromill Holdings, LLC, Kaiser Sierra Micromills, LLC, Kaiser Texas Sierra Micromills, LLC, Oxnard Forge Die Company, Inc., Alwis Leasing LLC, Kaiser Center, Inc., Kaiser Trading, Kaiser Center Properties and Kaiser Export Company, as provided in Sections 1.1(195), 9.1 and 9.2 of the Plan. (Plan art. VI, §§ 4.1, 4.2, 4.3.d, 4.5, 4.12, 5.1, 5.2-5.5, 1.1(195), 9.1, 9.2; Houff Decl. ¶ 44.) In accordance with the KBC Modifications, the Plan also provides for the substantive consolidation of KBC with the Substantively Consolidated Debtors solely for the limited purpose of treating any Unsecured Claims against KBC as Claims in Subclass 9B for purposes of distributions to be made under the Plan. (KBC Modification at 2; Houff Decl. ¶ 44.)

c. Section 1123(a)(6)-Prohibition Against the Issuance of Nonvoting Equity Securities and Adequate Provisions for Voting Power of Classes of Securities.

***7** Section 4.3.a(i) of the Plan provides that the Certificates of Incorporation of Reorganized KAC, Reorganized Kaiser Trading and each other Reorganized Debtor will, among other things, prohibit the issuance of nonvoting equity securities to the extent required under section 1123(a) of the Bankruptcy Code. (Plan § 4.3.a(i); Houff Decl. ¶ 45.) This prohibition is reflected in Article IV, Section 1 of the Amended and Restated Articles of Incorporation of Reorganized KAC and the Amended and Restated Articles of Incorporation of Reorganized Kaiser Trading, which are Plan Exhibits 4.3a(i) and (ii). (Plan Ex. 4.3.a(i), 4.3.a(ii); Houff Decl. ¶ 45.)

d. Section 1123(a)(7)-Selection of Directors and Officers in a Manner Consistent with the Interests of Cred-

itors and Equity Security Holders and Public Policy.

i. The Plan ensures that the selections of the officers and directors of Reorganized KAC, Reorganized Kaiser Trading and the other Reorganized Debtors is consistent with the interests of creditors and equity security holders and with public policy. (Houff Decl. ¶ 46.) Sections 1.1(176) and 4.3.b of the Plan provide that the initial board of directors for Reorganized KAC will be comprised of the following: (a) the chief executive officer; (b) four persons designated by the USW; and (c) five persons designated by the Search Committee. (Plan § 1.1(176), 4.3.b; Houff Decl. ¶ 46.) The Search Committee consisted of two persons designated by the Reorganizing Debtors, two persons designated by the Creditors' Committee and one person designated jointly by the Asbestos Committee, the Asbestos Representative and the Silica and CTPV Representative. (Plan § 1.1(176); Houff Decl. ¶ 46.) Accordingly, nine of the ten initial directors of Reorganized KAC were selected by creditor representatives or a committee the majority of which is comprised of creditor representatives. (Houff Decl. ¶ 46.) In addition, Section 4.3.b of the Plan provides that the initial members of the board of directors and initial officers of Reorganized Kaiser Trading will be selected jointly by the Asbestos Committee, the Asbestos Representative and the Silica and CTPV Representative. (Plan § 4.3.b; Houff Decl. ¶ 46.)

ii. In light of the foregoing, the manner of selection of the initial directors, managers, trustees and officers of the Reorganized Debtors, as set forth in the certificates of incorporation and bylaws or similar constituent documents of the applicable Reorganized Debtor and applicable state law, are consistent with the interests of the holders of Claims and Interests and public policy.

e. Section 1123(b)(1)-(2)-Impairment of Claims and Interests and Assumption, Assumption and Assignment or Rejection of Executory Contracts and Unexpired Leases.

In accordance with section 1123(b)(1) of the Bankruptcy Code, Article III of the Plan provides for the impairment of certain classes of Claims and Interests, while leaving other Classes unimpaired. (Plan art. III; Houff Decl. ¶ 47.) The Plan thus modifies the rights of the holders of certain Claims and Interests and leaves the rights of others unaffected. (Houff Decl. ¶ 47.) In accordance with section 1123(b)(2) of the Bankruptcy Code, Article VI of the Plan provides for the assumption, assumption and assignment or rejection of certain Executory Contracts and Unexpired Leases to which the Reorganized Debtors are parties; *provided, however,* that the Debtors or Reorganized Debtors reserve the right, at any time prior to the Effective Date, to add or delete any Executory Contract or Unexpired Lease to be assumed, assumed and assigned or rejected to or from the applicable exhibit to the Plan. (Plan art. VI; Houff Decl. ¶ 47.)

f. Section 1123(b)(3)-Retention, Enforcement and Settlement of Claims Held by the Debtors.

***8** In accordance with section 1123(b)(3) of the Bankruptcy Code, Section 4.5 of the Plan provides for the retention and enforcement of possible claims or causes of action by the Reorganized Debtors. (Plan § 4.5; Houff Decl. ¶ 47.)

g. Section 1123(b)(5)-Modification of the Rights of Holders of Claims.

Article III of the Plan modifies or leaves unaffected, as the case may be, the rights of holders of each class of Claims and Interests. (Plan art. III; Houff Decl. ¶ 47.)

h. Section 1123(b)(6)-Other Provisions Not Inconsistent with Applicable Provisions of the Bankruptcy Code.

In accordance with section 1123(b)(6) of the Bankruptcy Code, the Plan includes additional appropriate provisions that are not inconsistent with the applicable provisions of the Bankruptcy Code, including: (a) the provisions of Article VII of the Plan governing distributions on account of Allowed Claims; (b) the provisions of Article V of the Plan providing for (i) the creation of the Funding Vehicle Trust and the PI Trusts and (ii) the appointment of the Funding Vehicle Trustees and the PI Trusts' respective Trustees and Trust Advisory Committees; (c) the provisions of Article VIII of the Plan establishing procedures for resolving Disputed Claims and making distributions on account of such Disputed Claims once resolved; (d) the provisions of Article XII of the Plan regarding the release of Claims, the termina-

tion of Interests and injunctions against certain actions; (e) the provisions of Article IX of the Plan regarding the substantive consolidation of certain of the Reorganizing Debtors; and (f) the provisions of Article XIII of the Plan regarding retention of jurisdiction by the Court over certain matters after the Effective Date. (Plan art. V, VII, IX, XII, XIII; Houff Decl. ¶ 48.)

i. Section 1123(d)-Cure of Defaults.

Article VI of the Plan provides for the satisfaction of Cure Amount Claims associated with each Executory Contract and Unexpired Lease to be assumed pursuant to the Plan in accordance with section 365(b)(1) of the Bankruptcy Code. (Plan art. VI.) Additionally, in accordance with Section 3.2.b of the Plan, certain Claims will be Reinstated. (Plan § 3.2.b.) All Cure Amount Claims and Reinstated Claims will be determined in accordance with the underlying agreements and applicable nonbankruptcy law, and pursuant to the procedures established herein or, to extent applicable, any separate orders of the Court.

2. Section 1129(a)(2)-Compliance with Applicable Provisions of the Bankruptcy Code.

The Reorganizing Debtors have complied with all applicable provisions of the Bankruptcy Code, as required by section 1129(a)(2) of the Bankruptcy Code, including section 1125 of the Bankruptcy Code and Bankruptcy Rules 3017 and 3018. The Disclosure Statement and the procedures by which the Ballots for acceptance or rejection of the Plan were solicited and tabulated were fair, properly conducted and in accordance with sections 1125 and 1126 of the Bankruptcy Code, Bankruptcy Rules 3017 and 3018 and the Disclosure Statement Order. (Houff Decl. ¶¶ 50-51.) Consistent with Section 14.2 of the Plan, the Debtors, the Reorganized Debtors, the DIP Lenders, the Indenture Trustees, the Creditors' Committee, the Asbestos Committee, the Asbestos Representative, the Silica and CTPV Representative, the PBGC, and the Retirees' Committee and their respective directors, managers, trustees, officers, employees, agents, members and professionals, as applicable, have all acted in "good faith," within the meaning of section 1125(e) of the Bankruptcy Code.

3. Section 1129(a)(3)-Proposal of the Plan in Good Faith.

***9** The Reorganizing Debtors proposed the Plan in good faith and not by any means forbidden by law. In determining that the Plan has been proposed in good faith, the Court has examined the totality of the circumstances surrounding the formulation of the Plan. (*See* Houff Decl. ¶¶ 18-37, 55; O'Dowd Decl. ¶¶ 4-7; Murphy Aff. ¶ 15-17; Ferrazi Decl. ¶ 25.) Based on the evidence presented at the Confirmation Hearing, the Court finds and concludes that the Plan has been proposed with the legitimate and honest purpose of reorganizing the business affairs of each of the Reorganizing Debtors and maximizing the returns available to creditors. (Houff Decl. ¶ 54; O'Dowd Decl. ¶ 8.) Consistent with the overriding purpose of chapter 11 of the Bankruptcy Code, the Plan is designed to allow the Reorganizing Debtors to reorganize by resolving certain pending disputes and proceedings and providing the Reorganized Debtors with a capital structure that will allow them to satisfy their obligations with sufficient liquidity and capital resources and to fund necessary capital expenditures and otherwise conduct their businesses. (Houff Decl. ¶ 37; O'Dowd Decl. ¶ 8-10.) Moreover, the Plan itself and the arms' length negotiations among the Reorganizing Debtors, the Creditors' Committee, the Asbestos Committee, the Asbestos Representative, the Silica and CTPV Representative, the PBGC, the Retirees' Committee, the Unions and the Debtors' other constituencies leading to the Plan's formulation, as well as the overwhelming support of creditors for the Plan, provide independent evidence of the Reorganizing Debtors' good faith in proposing the Plan. (Houff Decl. ¶ 36; Voting Decl. at 6.)

4. Section 1129(a)(4)-Court Approval of Certain Payments as Reasonable.

a. In accordance with section 1129(a)(4) of the Bankruptcy Code, all fees to which parties may be entitled in connection with the Bankruptcy Cases, including Professionals' Fee Claims, are subject to the approval of the Court (Houff Decl. ¶ 56.) Section 3.1 of the Plan provides for the payment of Allowed Administrative Claims, including Professionals' Fee Claims, and makes all such payments subject to Court approval and the standards of the Bankruptcy Code. (Plan § 3.1.a;

Houff Decl. ¶ 56.) The Court has authorized the interim payment of the fees and expenses incurred by Professionals in connection with the Bankruptcy Cases. (*See* Revised Administrative Order Establishing Procedures for Interim Compensation and Reimbursement of Expenses of Professionals (D.I.1122) at 6; Houff Decl. ¶ 56.) All such fees and expenses, however, remain subject to final review for reasonableness by the Court. (*Id.*)

b. In connection with the foregoing, Article XIII of the Plan provides that the Court will retain jurisdiction after the Effective Date to hear and determine all applications for allowance of compensation or reimbursement of expenses authorized pursuant to the Bankruptcy Code or the Plan. (Plan art. XIII; Houff Decl. ¶ 56.)

5. Section 1129(a)(5)-Disclosure of Identity of Proposed Management, Compensation of Insiders and Consistency of Management Proposals with the Interests of Creditors and Public Policy.

***10** In the Disclosure Statement, Notice of Filing by Debtors and Debtors in Possession Kaiser Aluminum Corporation, Kaiser Aluminum & Chemical Corporation and Certain of Their Debtor Affiliates of Certain Information Regarding the Initial Board of Directors of Reorganized Kaiser Aluminum Corporation in Accordance with the Second Amended Joint Plan of Reorganization and Section 1129(a)(5) of the Bankruptcy Code (D.I.7651) and Exhibit 4.3.b to the Plan, the Reorganizing Debtors have disclosed all necessary information regarding the Reorganized Debtors' officers and directors, including their names, ages, positions, affiliations and qualifications and, for the officers of Reorganized KAC, who may constitute insiders, the compensation paid or to be paid. FN3 (Houff Decl. ¶ 57.) In addition, the names of the individuals expected to serve as the initial directors and officer of Reorganized Kaiser Trading have been disclosed in the Notice of Filing By Debtors and Debtors in Possession Kaiser Aluminum Corporation, Kaiser Aluminum & Chemical Corporation and Certain of Their Debtor Affiliates of Certain Information Regarding the Initial Board of Directors of Reorganized Kaiser Trading in Accordance with the Second Amended Joint Plan of Reorganization and Section 1129(a)(5) of the Bankruptcy Code (D.I.8042), dated December 29, 2005. (*Id.*) The appointment or continuance of the proposed directors and officers is consistent with the interests of the holders of Claims and Interests and with public policy.

> FN3. As noted on the record at the Confirmation Hearing, a director designated by the USW, George Becker, has asked to be replaced but has agreed to serve until his replacement has been identified. (*See* Tr. of Jan. 9, 2006 Hr'g at 17.)

6. Section 1129(a)(6)-Approval of Rate Changes.

The Debtors' current businesses do not involve the establishment of rates over which any regulatory commission has or will have jurisdiction after Confirmation. (Houff Decl. ¶ 59.)

7. Section 1129(a)(7)-Best Interests of Holders of Claims and Interests.

With respect to each impaired Class of Claims or Interests for each Reorganizing Debtor, each holder of a Claim or Interest in such impaired Class has accepted or is deemed to have accepted the Plan or, as demonstrated by the liquidation analyses included as Exhibit II to the Disclosure Statement, will receive or retain under the Plan on account of such Claim or Interest property of a amount, as of the Effective Date, that is not less than the value such holder would receive or retain if the Reorganizing Debtors were liquidated on the Effective Date under chapter 7 of the Bankruptcy Code. (Houff Decl. ¶¶ 60-61; O'Dowd Decl. ¶¶ 12-20.)

8. Section 1129(a)(8)-Acceptance of the Plan by Each Impaired Class.

a. Pursuant to section 1129(a)(8) of the Bankruptcy Code, all classes of Claims and Interests, other than Subclass 9A and Classes 12 and 14, have either accepted the Plan or are unimpaired. (Houff Decl. ¶ 62; Voting Decl. at 6.) Specifically, Subclasses 2A, 2B and 9B and Classes 4, 5, 6, 7 and 8, the only classes entitled to vote on the Plan, each overwhelmingly voted to accept the Plan. (*Id.*) Classes 1, 3, 10 and 15 are unimpaired under the Plan and, therefore, are deemed to have accepted the Plan. (Plan § 3.2; Houff Decl ¶ 62; Disclos-

ure Statement Order ¶ H.) In addition, although the holders of Class 11 Claims will receive or have received the treatment set forth in the Intercompany Claims Settlement and holders of Class 13 Claims and Interests will receive or retain no property on account of their Claims and Interests, as applicable, the holders of Claims and Interests in Classes 11 and 13 are deemed to have accepted the Plan pursuant to its express terms because those classes are comprised solely of the Reorganizing Debtors and the Other Debtors. (Plan § 3.3.h, 3.3.j; Houff Decl. ¶ 62; Disclosure Statement Order ¶ H.) Accordingly, section 1129(a)(8) of the Bankruptcy Code has been satisfied with respect to all Classes of Claims and Interests other than Subclass 9A and Classes 12 and 14. (Houff Decl. ¶ 62.)

***11** b. Under the Plan, holders of Claims and Interests in Subclass 9A, Class 12 or Class 14 will receive or retain no property on account of their Claims and Interests. (Plan § 3.3.g, 3.3.i, 3.3.k; Houff Decl. ¶ 63.) Accordingly, pursuant to section 1126(g) of the Bankruptcy Code, Subclass 9A and Classes 12 and 14 are deemed to have rejected the Plan. (*Id.*) Nonetheless, as explained in Section I.C.14 below, the Plan satisfies the cramdown requirements of section 1129(b) of the Bankruptcy Code necessary to obtain confirmation of the Plan, notwithstanding the deemed rejection of the Plan by Subclass 9A and Classes 12 and 14.

9. Section 1129(a)(9)-Treatment of Claims Entitled to Priority Pursuant to Section 507(a) of the Bankruptcy Code.

a. The Plan also meets the requirements regarding the payment of Administrative Claims, Priority Claims and Priority Tax Claims, as set forth in section 1129(a)(9) of the Bankruptcy Code. (Houff Decl. ¶ 64.)

b. Section 3.1.a(i) of the Plan provides that, subject to certain Bar Dates and unless otherwise agreed by the holder of an Administrative Claim and the applicable Reorganizing Debtor or Reorganized Debtor, all Allowed Administrative Claims will be paid in full in cash: (a) on the Effective Date or (b) if the Administrative Claim is not allowed as of the Effective Date, 30 days after the date on which such Administrative Claim becomes allowed by a Final Order or a Stipulation of Amount and Nature of Claim. (Plan § 3.1.a(i); Houff Decl. ¶ 64.) Pursuant to Plan Section 3.1.a(iii), Administrative Claims based on liabilities incurred by a Reorganizing Debtor in the ordinary course of its business-including Administrative Trade Claims and Administrative Claims of governmental units for Taxes, including Tax audit Claims related to tax years commencing after the Petition Date, and Allowed Administrative Claims arising from the contracts and leases of the kind described in Section 6.6 of the Plan-will be paid by the applicable Reorganized Debtor pursuant to the terms and conditions of the particular transaction giving rise to such Administrative Claims, without any further action by the holders of such Administrative Claims. (*Id.*) Section 3.1.a(iv) of the Plan provides that, unless otherwise agreed by the DIP Lenders, pursuant to the DIP Financing Facility, Allowed Administrative Claims under or evidenced by the DIP Financing Facility will be paid in full in Cash on or before the Effective Date. (Plan § 3.1.a(iv); Houff Decl. ¶ 64.)

c. Section 3.1.b(i) of the Plan provides that, unless otherwise agreed by the holder of a Priority Tax Claim and the applicable Reorganizing Debtor or Reorganized Debtor, each holder of an Allowed Priority Tax Claim will receive, in full satisfaction of its Priority Tax Claim, deferred Cash payments over a period not exceeding six years from the date of assessment of such Priority Tax Claim on the terms set forth in the Plan. (Plan § 3.1.b(i); Houff Decl. ¶ 65.) In addition, section 3.1.b(i) of the Plan permits the Reorganized Debtors to pay any Allowed Priority Tax Claim, or any remaining balance of such Priority Tax Claim, in full at any time on or after the Effective Date, without premium or penalty. (*Id.*)

10. Section 1129(a)(10)-Acceptance By at Least One Impaired, Non-Insider Class.

***12** As indicated in the Voting Declaration and as reflected in the record of the Confirmation Hearing, at least one Class of Claims that is impaired under the Plan has voted to accept the Plan, determined without including the acceptance by any insider, with respect to all Reorganized Debtors under the Plan. (Voting Decl. at 6; Houff Decl. ¶ 66.)

11. Section 1129(a)(11)-Feasibility of the Plan.

Although the Reorganizing Debtors' businesses operate in highly competitive industries and markets, and although it is impossible to predict with certainty the precise future profitability of the Reorganizing Debtors' businesses or the industries and markets in which the Reorganizing Debtors operate, as demonstrated by the Reorganizing Debtors' financial projections contained in the Disclosure Statement and the evidence in the record, Confirmation of the Plan is not likely to be followed by the liquidation of, or the need for further financial reorganization of the Reorganizing Debtors, the Reorganized Debtors or any successor to the Reorganized Debtors under the Plan. (Disclosure Statement at 195; Houff Decl. ¶ 67-69; O'Dowd Decl. ¶ 21-28.) Upon the Effective Date, the Reorganized Debtors will have sufficient operating cash and liquidity to meet their financial obligations under the Plan and to fund ongoing business operations. (O'Dowd Decl. ¶ 28; Houff Decl. ¶ 32.)

12. Section 1129(a)(12)-Payment of Bankruptcy Fees.

Section 3.1.a(ii) of the Plan provides for the payment in full in Cash on or before the Effective Date of the fees due to the U.S. Trustee, in accordance with section 1129(a)(12) of the Bankruptcy Code. (Plan § 3.1.a(ii); Houff Decl. ¶ 70.)

13. Section 1129(a)(13)-Retiree Benefits.

The Plan satisfies the requirements of 1129(a)(13) of the Bankruptcy Code, which requires that a plan provide for the payment of retiree benefits, as such benefits may have been modified pursuant to section 1114 of the Bankruptcy Code. (Houff Decl. ¶ 71 .) The Plan continues the implementation of certain settlement agreements, which, among other things, modified retiree benefits pursuant to section 1114 of the Bankruptcy Code. (Houff Decl. ¶ 71; O'Dowd Decl. ¶ 6(b); Disclosure Statement at 48-50.) Pursuant to Section 3.1.a.(vi) of the Plan, on the Effective Date, Reorganized KAC will contribute (a) to the Union VEBA 11,439,900 shares of New Common Stock plus cash equal to the initial contributions, if any, and (b) to the Salaried VEBA 1,940,100 shares of New Common Stock plus cash equal to the initial VEBA contributions, if any. (Plan § 3.1.a(vi); Houff Decl. ¶ 71.) Thereafter, Reorganized KAC will make the applicable profit-sharing contributions to the Union VEBA and the Salaried VEBA. (*Id.*)

14. Section 1129(b)-Confirmation of the Plan Over the Nonacceptance of Impaired Classes.

a. Pursuant to section 1129(b)(1) of the Bankruptcy Code, the Plan may be confirmed notwithstanding that Subclass 9A and Classes 12 and 14 are impaired and deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. 11 U.S.C. § 1129(b)(1). First, the Plan satisfies the "fair and equitable" requirements of section 1129(b)(2)(C) with respect to Subclass 9A because: (a) no holder of any Claim or Interest that is junior to the Senior Subordinated Note Claims of creditors in Subclass 9A will receive or retain any property under the Plan on account of such junior claim or interest; and (b) as evidenced by the valuations and estimates contained in the Disclosure Statement, no Class of Claims or Interests senior to the Senior Subordinated Note Claims in Subclass 9A will receive more than full payment on account of the Claims or Interests in such Class. (*See* Plan art. III; Houff Decl. ¶ 72.) The Plan also satisfies the standards of section 1129(b) with respect to Classes 12 and 14 because: (a) no Claim or Interest junior to, as applicable, the KAC Old Stock Interests in Class 12 or the KACC Old Stock Interests in Class 14 will receive or retain any property under the Plan on account of such junior Claim or Interest; and (b) as evidenced by the valuations and estimates contained in the Disclosure Statement, no Class of Claims or Interests senior to, as applicable, the KAC Old Stock Interests in Class 12 or the KACC Old Stock Interests in Class 14 will receive more than full payment on account of the Claims or Interests of such Class. (*Id.*)

***13** b. Second, under the circumstances of these cases, the Plan does not unfairly discriminate against the holders of Claims in Subclass 9A or the holders of Interests in Classes 12 and 14. The Senior Subordinated Note Claims in Subclass 9A are legally distinct from other Claims and Interests and are properly classified in a separate Subclass in light of the contractual subordination provisions contained in the Senior Subordinated

Indenture. (Plan § 3.3.g; Houff Decl. ¶ 73.) In fact, no distributions can be made to holders of Senior Subordinated Note Claims because, in accordance with the contractual subordination provisions of the Senior Subordinated Note Indenture, the aggregate amount of consideration that would otherwise be payable to the holders of Senior Subordinated Note Claims must be distributed to holders of Allowed Senior Note Claims, who, pursuant to the 7-3/4% SWD Revenue Bond Settlement, agreed to share a portion of such consideration with holders of Allowed 7-3/4% SWD Revenue Bond Claims. (*Id.*) Likewise, the KAC Old Stock Interests and the KACC Old Stock Interests in Classes 12 and 14, respectively, are legally distinct from other Claims and Interests and are properly classified in separate classes. (Plan § 3.3.i, 3.3.k; Houff Decl. ¶ 73.) Equity interests, the KAC Old Stock Interests and the KACC Old Stock Interests are not entitled to any distributions unless all creditors of KAC and KACC are satisfied in full or otherwise agree, and no such agreement exists. (Houff Decl. ¶ 73.) Accordingly, the requirements of section 1129(b) are satisfied with respect to Subclass 9A and Classes 12 and 14.

15. Section 1129(d)-Purpose of Plan.

The principal purpose of the Plan is not avoidance of taxes or avoidance of the requirements of Section 5 of the Securities Act, and there has been no request filed by any governmental unit asserting such avoidance.

D. THE ASBESTOS PI TRUST AND THE ASBESTOS PI CHANNELING INJUNCTION COMPLY WITH SECTION 524(g) OF THE BANKRUPTCY CODE.

The Plan comports with the Bankruptcy Code's requirements for issuance of an injunction to enjoin entities from taking legal action to recover, directly or indirectly, payment in respect of asbestos-related claims or demands against the Reorganized Debtors.

1. The Asbestos PI Trust Satisfies the Requirements of Section 524(g)(2)(B)(i) of the Bankruptcy Code.

a. The Asbestos PI Channeling Injunction is to be implemented in connection with the establishment of the Asbestos PI Trust and is essential to the Plan and the Reorganizing Debtors' reorganization efforts. (Houff Decl. ¶ 104.)

b. Pursuant to Section 5.2 of the Plan, on the Effective Date, the Asbestos PI Trust will assume all liability and responsibility for all Asbestos Personal Injury Claims. (Plan § 5.2.e; Houff Decl. ¶ 81; Murphy Aff. ¶ 20.) As set forth in the Disclosure Statement and reflected in the record of the Confirmation Hearing, as of the Petition Date, approximately 104,000 unresolved Asbestos Personal Injury Claims were pending against Reorganizing Debtor KACC. (Disclosure Statement at 67; Houff Decl. ¶ 81.)

***14** c. Section 5.2 of the Plan provides that the Asbestos PI Trust will be funded in part by the securities of two of the Reorganized Debtors under the Plan: (i) 94 percent of the common stock of Kaiser Trading, one of the Reorganizing Debtors under the Plan and (ii) the *pro rata* distribution of New Common Stock in Reorganized KAC on account of the Asbestos PI Trust's interests in 70.5 percent of the KFC Claim (which is an Allowed General Unsecured Claim in Subclass 9B). (Plan § 5.2.d; Houff Decl. ¶ 82.) As a result, with respect to Reorganized Kaiser Trading, the Asbestos PI Trust will own a majority of Reorganized Kaiser Trading's common stock and, with respect to Reorganized KAC and Reorganized KACC, the Asbestos PI Trust will own a majority of the common stock of a subsidiary. (Houff Decl. ¶ 83.) Additionally, as set forth in Exhibits 4.3.a(i) and 4.3.a(ii) to the Plan, the Asbestos PI Trust will also have all rights to receive dividends or other distributions on account of the Asbestos PI Trust's ownership of the securities in Kaiser Trading and Reorganized KAC described above. (Plan Ex. 4.3.a(i), 4.3.a.(ii); Houff Decl. ¶ 82.)

d. Section 5.2 of the Plan also provides that the Asbestos PI Trust will use its assets to pay and satisfy Asbestos Personal Injury Claims in accordance with the Plan, the PI Trust Funding Agreement and the Asbestos PI Trust Agreement. (Plan § 5.2.a(i); Houff Decl. ¶ 84.)

2. The Asbestos PI Trust Satisfies the Requirements of Section 524(g)(2)(B)(ii) of the Bankruptcy Code.

a. As set forth in the Disclosure Statement and reflected in the record of the Confirmation Hearing,

between 1970 and the Petition Date, approximately 247,000 asbestos-related personal injury lawsuits were asserted against KACC, and approximately 104,000 Asbestos Personal Injury Claims remained unresolved as of the Petition Date. (Houff Decl. ¶ 87; Disclosure Statement at 67.) The Reorganizing Debtors' asbestos-related liabilities arise from former operations of KACC, almost entirely from KACC's former Kaiser Refractories division. (*Id.*) Based on the long latency period of asbestos-related diseases and the substantial number of asbestos-related personal injury lawsuits that had been asserted in the past and that remained unresolved on the Petition Date, KACC will likely be subject to substantial future Demands for payment arising from the same conduct or events that gave rise to the Asbestos Personal Injury Claims. (Houff Decl. ¶ 87.)

b. Moreover, due to the long latency period for asbestos-related diseases and the substantial number of asbestos-related personal injury lawsuits that had been asserted in the past and that remained unresolved on the petition date, the Reorganizing Debtors are unable to determine the actual amounts, numbers and timing of future Demands against KACC in respect of alleged asbestos-related personal injuries. (Houff Decl. ¶ 87.)

c. If the holders of asbestos-related Demands are able to pursue such Demands outside of the Asbestos Distribution Procedures, the holders of such Demands would have to liquidate their claims through settlements or the tort system on an individual basis, which, because of the vagaries inherent in litigation, could produce inconsistent awards. (Houff Decl. ¶ 89; Murphy Aff. ¶ 24.) Moreover, with ever-diminishing funds available to pay asbestos-related Demands, there is a risk that Demands would initially all be paid in full as they are settled or liquidated in the tort system but that, at some point in the future, Demands would go unsatisfied. (Houff Decl. ¶ 89.) Accordingly, the pursuit of asbestos-related Demands against KACC outside the Asbestos Distribution Procedures contemplated by the Plan would likely threaten the Plan's purpose to deal equitably with Asbestos Personal Injury Claims, including future asbestos-related Demands. (Houff Decl. ¶ 89.)

***15** d. Further, as part of the confirmation process in these cases, the Reorganizing Debtors included the terms of the Asbestos PI Channeling Injunction, including provisions therein barring actions against any Protected Party, in both the Plan and the Disclosure Statement. (Plan § 1.1(36); Disclosure Statement at 115; Houff Decl. ¶ 90.) The Reorganizing Debtors also designated a separate class, Class 5 under the Plan, for all Asbestos Personal Injury Claims, and of the holders of Asbestos Personal Injury Claims in Class 5 that voted, 99.84 percent of such holders voted in favor of the Plan. (Plan § 2.5; Voting Decl. at 6; Houff Decl. ¶ 90.)

e. Also, as set forth in Section 5.2.a(i) of the Plan, the Asbestos PI Trust will pay Asbestos Personal Injury Claims in accordance with the Asbestos Distribution Procedures, which contain mechanisms that provide reasonable assurance that the Asbestos PI Trust will value, and be in a financial position to pay, present Asbestos Personal Injury Claims and future asbestos-related Demands that involve similar claims in substantially the same manner. (Plan § 5.2.a(i); Houff Decl. ¶ 91-92; Murphy Aff. ¶ 28-29.)

3. The Extension of the Asbestos PI Channeling Injunction to Third Parties Is Appropriate.

a. Sections 1.1(36) and 10.2 of the Plan contemplates that the Asbestos PI Channeling Injunction will be extended to protect the following:

i. any entity that, pursuant to the Plan or after the Effective Date, becomes a direct or indirect transferee of, or successor to, any assets of the Reorganizing Debtors, the Other Debtors, the Reorganized Debtors, other Kaiser Companies, the Funding Vehicle Trust or a PI Trust (but only to the extent that liability is asserted to exist as a result of its becoming such a transferee or successor) (Plan § 1.1(161)c; Houff Decl. ¶ 94.a); and

ii. any entity that, pursuant to the Plan or after the Effective Date, makes a loan to any of the Reorganizing Debtors, the Reorganized Debtors, the Other Debtors, other Kaiser Companies, the Funding Vehicle Trust or a PI Trust or to a successor to, or transferee of any of the respective assets of, the Reorganizing Debtors, the Other Debtors, the Reorganized Debtors, other Kaiser Companies, the Funding Vehicle Trust or a PI Trust (but

only to the extent that liability is asserted to exist by reason of such entity's becoming such a lender or to the extent any pledge of assets made in connection with such a loan is sought to be upset or impaired) (Plan § 1.1(161)d; Houff Decl. 94.b).

b. The Plan also provides that the Asbestos PI Channeling Injunction will bar certain actions against any Protected Party. (Houff Decl. ¶ 95.) Each Protected Party under the Plan is either identifiable from the definition or is a member of an identifiable group. (See Plan § 1.1(161); Houff Decl. ¶ 95.) In addition to the groups identified in paragraphs 3.a.i and 3.a.ii above, the Reorganizing Debtors, the Reorganized Debtors and the other Kaiser Companies, the Plan defines Protected Party to include the following-

***16** i. as to Channeled Personal Injury Claims, each Settling Insurance Company; and

ii. each entity to the extent he, she or it is alleged to be directly or indirectly liable for the conduct of, Claims against or Demands on any Reorganizing Debtor, Other Debtor, Reorganized Debtor or PI Trust on account of Channeled Personal Injury Claims by reason of one or more of the following:

a) such entity's ownership of a financial interest in any Reorganizing Debtor, Other Debtor or Reorganized Debtor or any past or present affiliate (collectively, "Affiliates") or predecessor in interest (collectively, "Predecessors") of any of the foregoing;

b) such entity's involvement in the management of any Reorganizing Debtor, Other Debtor, Reorganized Debtor, Affiliate or Predecessor;

c) such entity's service as a director, officer, employee, accountant (including an independent certified public accountant), advisor, attorney, investment banker, underwriter, consultant or other agent of any Reorganizing Debtor, Other Debtor, Reorganized Debtor, Affiliate or Predecessor or any entity that owns or at any time has owned a financial interest in any Reorganizing Debtor, Other Debtor or Reorganized Debtor, Affiliate or Predecessor; or

d) such entity's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of any Reorganizing Debtor, Other Debtor, Reorganized Debtor, Affiliate or Predecessor or any entity that owns or at any time has owned a financial interest in any Reorganizing Debtor, Other Debtor, Reorganized Debtor, Affiliate or Predecessor.

(Plan § 1.1(161); Houff Decl. ¶ 95.)

c. Accordingly, consistent with section 524(g)(4)(A)(ii) of the Bankruptcy Code, the Asbestos PI Channeling Injunction bars actions against third parties only where such parties are alleged to be directly or indirectly liable for the conduct of, claims against, or demands on the Debtors by reason of:

i. the third party's ownership of a financial interest in any Reorganizing Debtor, Other Debtor, Reorganized Debtor, or past or present affiliate or predecessor in interest of any Reorganizing Debtor, Other Debtor or Reorganized Debtor;

ii. the third party's involvement in the management of the Debtors or a predecessor in interest to one or more of the Debtors or service as an officer, director or employee of (i) the Debtors, (ii) a past or present affiliate of the Debtors, (iii) a predecessor in interest to the Debtors, or (iv) an entity that owned a financial interest in the Debtors or their past or present affiliates or predecessors in interest;

iii. the third party's provision of insurance to the Debtors or a related party; or

iv. the third party's involvement in a transaction changing the corporate structure, or in a loan or other financial transaction affecting the financial condition, of the Debtors or a related party. (Houff Decl. ¶ 96.)

d. The extension of the Asbestos PI Channeling Injunction to third parties is consistent with the Bankruptcy Code. Consistent with section 524(g)(4)(A)(ii) of the Bankruptcy Code, the Asbestos PI Channeling Injunction bars actions against third parties only where such parties are alleged to be directly or indirectly liable

for the conduct of, Claims against, or Demands on, the Debtors.

4. Entry of the Asbestos PI Channeling Injunction Is Fair and Equitable with Respect to Future Asbestos Claimants.

***17** a. The Reorganizing Debtors, on behalf of the Protected Parties, are contributing $13 million plus the PI Insurance Assets to the Funding Vehicle Trust. (Plan §§ 1.1(151), 5.1.d(i); Houff Decl. ¶ 98; Murphy Aff. ¶ 22.) The Asbestos PI Trust will be entitled to receive from the Funding Vehicle Trust 94 percent of the cash received by the Funding Vehicle Trust net of expenses of the Funding Vehicle Trust and certain amounts payable pursuant to the Plan and the PI Trust Funding Agreement to the other PI Trusts. (Houff Decl. ¶ 98; Murphy Aff. ¶ 22.) The PI Insurance Assets are comprised of "the rights to receive proceeds from Included PI Trust Insurance Policies in respect of Channeled Personal Injury Claims" as well as "any Cash paid or to be paid pursuant to settlement agreements with any PI Insurance Company entered into prior to the Effective Date in respect of Included PI Trust Insurance Policies and allocable to payment of Channeled Personal Injury Claims." (Plan § 1.1(145); Houff Decl. ¶ 98.) The Debtors have received approximately $14 million in cash from settlements consummated with certain Insurance Companies prior to 2005 regarding coverage for Channeled Personal Injury Claims. (Houff Decl. ¶ 98; Murphy Aff. ¶ 22.) In addition, in 2005 the Reorganizing Debtors reached settlements, for an aggregate of more than $375 million, payable over time, but subject to certain termination conditions, with certain other insurance companies. (*Id.*) The face value of the Included PI Trust Insurance Policies for which a settlement has not yet been reached aggregates more than $1 billion. (*Id.*)

b. In addition, the Reorganizing Debtors are contributing to the Asbestos PI Trust 94 shares of common stock of Reorganized Kaiser Trading, which constitutes 94 percent of the outstanding equity interest in such entity, and 70.5 percent of the KFC Claim in accordance with the Intercompany Claims Settlement. (Plan § 5.2.d; Houff Decl. ¶ 98; Murphy Aff. ¶ 22.) In light of the substantial contributions to be made to the Asbestos PI Trust on behalf of the Protected Parties, entry of the Asbestos PI Channeling Injunction, and the naming of the Protected Parties therein, is fair and equitable with respect to persons that might subsequently assert future asbestos-related Demands.

E. THE SILICA, CTPV AND NIHL PI CHANNELING INJUNCTIONS AND THE CHANNELED PI INSURANCE ENTITY INJUNCTION EACH SATISFY THE REQUIREMENTS OF SECTION 105(a) OF THE BANKRUPTCY CODE.

1. In conjunction with the resolution of the Reorganizing Debtors' Silica, CTPV, and NIHL tort liabilities and the establishment of the PI Trusts, the Plan provides for the issuance of (a) the Silica PI Channeling Injunction, (b) the CTPV PI Channeling Injunction and (c) the NIHL PI Channeling Injunction, which will enjoin certain suits, claims, and actions against Protected Parties. (Houff Decl. ¶ 100; Ferazzi Decl. ¶ 35.) The issuance of the Silica, CTPV and NIHL Channeling Injunctions and the extension of those injunctions to non-debtor Protected Parties are essential to the implementation of the Plan and the resolution of the Debtors' tort liabilities, including the resolution of asbestos-related liabilities. (Houff Decl. ¶ 100; Ferazzi Decl. ¶ 39.) Additionally, the Plan provides for a Channeled PI Insurance Entity Injunction. (Plan § 12.2.c; Houff Decl. ¶ 100.) The Channeled PI Insurance Entity Injunction enjoins all entities (except the Funding Vehicle Trust, the PI Trusts or the Reorganized Debtors) that hold or assert, now or in the future, a Channeled Personal Injury Claim from taking any actions to collect or recover on such a claim against a PI Insurance Company. (*Id.*) The Channeled PI Insurance Entity Injunction will not be issued for the benefit of any PI Insurance Company and no PI Insurance Company will be a third-party beneficiary of the Channeled PI Insurance Entity Injunction. (Plan § 12.2.c; Houff Decl. ¶ 100.) The Channeled PI Insurance Entity Injunction does not relieve any non-debtor third party of liability and is necessary solely to facilitate the Plan's provisions for the satisfaction of Channeled Personal Injury Claims. (Houff Decl. ¶ 100.)

***18** 2. The channeling injunctions and each PI

Trust's portion of the total funding to be provided to the PI Trusts under the Plan were the product of extensive negotiations among the Debtors, the Asbestos Committee, the Asbestos Representative, the Silica and CTPV Representative, counsel for certain present holders of Silica Personal Injury Claims, counsel for certain present holders of CTPV Personal Injury Claims and counsel for certain present holders of NIHL Personal Injury Claims. (Houff Decl. ¶ 101; Ferazzi Decl. ¶¶ 24-25; Murphy Aff. ¶¶ 15-16.) The success of these negotiations is evidenced by the overwhelming support for the Plan by holders of Channeled Personal Injury Claims. (Voting Decl. at 6; Houff Decl. ¶ 101.) No creditor or holder of a Channeled Personal Injury Claim has objected to the Silica, CTPV and NIHL PI Channeling Injunctions or the extension of those injunctions to the non-debtor Protected Parties. (Houff Decl. ¶ 101.) In addition, holders of Silica and NIHL Personal Injury Claims voted in favor of the Plan by more than 99 percent in both number and amount of claims voted and 100 percent of the holders of CTPV Personal Injury Claims that cast a Ballot voted to accept the Plan. (Voting Decl. at 6; Houff Decl. ¶ 101.)

3. There is a shared identity of interests between the Reorganizing Debtors and the Protected Parties. (Houff Decl. ¶ 102 .) In addition to the Settling Insurance Companies, the nondebtor Protected Parties generally include affiliates of the Reorganizing Debtors, predecessors in interest of the Debtors, entities that currently own or formerly owned a financial interest in the Reorganizing Debtors, past or present directors, officers, employees, professionals or agents of the Debtors or their affiliates and entities that were involved in a financial transaction affecting the financial condition of the Reorganizing Debtors or their affiliates. (Plan § 1.1(161); Houff Decl. ¶ 102.) There is a shared identity of interests between the Reorganizing Debtors and these nondebtor Protected Parties because a lawsuit against any of these non-debtor parties seeking to hold them liable in respect of the Reorganizing Debtors' alleged liability for a Channeled Personal Injury Claim would either give rise to some form of claim for indemnity against the Reorganizing Debtors or deplete the Reorganizing Debtors' insurance coverage. (Houff Decl. ¶ 102.)

4. The Silica PI Trust, the CTPV PI Trust and the NIHL PI Trust will be funded through substantial financial and other contributions by or on behalf of the non-debtor Protected Parties. (Houff Decl. ¶ 103.) The Silica PI Trust will be funded by 6 percent of the stock of Reorganized Kaiser Trading, 4.5 percent of the KFC Claim and 6 percent of the PI Insurance Assets minus expenses and certain other amounts. (Houff Decl. ¶ 103; Ferazzi Decl. ¶¶ 31-32.) The CTPV PI Trust will receive the lesser of $8,488,000 or an amount based on the number of allowed present CTPV Claims. (Houff Decl. ¶ 103; Ferazzi Decl. ¶ 33.) The NIHL PI Trust will receive a minimum of $19,512,000 and may receive additional amounts depending on the number of allowed CTPV Claims and other factors. (Houff Decl. ¶ 103.) There were extensive negotiations among the Asbestos Committee, the Asbestos Representative, the Silica and CTPV Representative, counsel for certain holders of present Silica Personal Injury Claims, certain holders of present CTPV Personal Injury Claims and certain holders of NIHL Personal Injury Claims regarding the allocation of the PI Trust Assets and the NIHL PI Trust. (*Id.;* Ferazzi Decl. ¶¶ 24-25; Murphy Aff. ¶¶ 15-16.)

***19** 5. The channeling injunctions are essential to the implementation of the Plan and the resolution of the Reorganizing Debtors' tort liabilities. (Houff Decl. ¶ 104; Ferazzi Decl. ¶ 39.) Present and future silica claimants and most asbestos injury claimants have recourse to the Reorganizing Debtors' products liability insurance coverage, and CTPV, NIHL and certain asbestos injury claimants have recourse to the Reorganizing Debtors' premises insurance coverage. (Houff Decl. ¶ 104.) For this reason, among others, the Silica, CTPV and NIHL Channeling Injunctions are necessary to address all of the Reorganizing Debtors' mass tort liabilities on an equitable basis. (*Id.*) In the absence of the PI Channeling Injunctions, the holders of Silica, CTPV and NIHL Personal Injury Claims could litigate their claims in the tort system and separately pursue the available insurance coverage, which would not only result in inconsistent awards among similarly situated

claimants (*e.g.,* similarly situated silica claimants) but also the depletion of insurance coverage, which must be shared among various types of personal injury claimants, in favor one or more of these tort creditor groups. (*Id.;* Ferazzi Decl. ¶ 38.) Similarly, the Channeled PI Insurance Entity Injunction is necessary to preserve the PI Trust Assets and to protect the Funding Vehicle Trust so that it can pursue the insurance coverage litigation and negotiate settlements with insurers for the benefit of the PI Trusts and all holders of Channeled Personal Injury Claims. (*Id.*) Absent the Channeled PI Insurance Entity Injunction, individual claimants could separately assert claims against PI Insurance Companies, thereby depleting the available insurance that must be shared among the PI Trusts and impeding the Funding Vehicle Trusts' ability to negotiate settlements. (*Id.*)

6. As noted above, the Debtors have received approximately $14 million in cash from settlements consummated with certain Insurance Companies prior to 2005 regarding coverage for Channeled Personal Injury Claims. (Houff Decl. ¶ 98; Murphy Aff. ¶ 22.) In addition, in 2005 the Reorganizing Debtors reached settlements, for an aggregate of more than $375 million, payable over time, but subject to certain termination conditions, with certain other insurance companies. (*Id.*) Pursuant to the Plan, these settlement proceeds will be contributed to the Funding Vehicle Trust for the benefit of the PI Trusts. (Plan § 5.1.d.) Each of the PI Channeling Injunctions is essential in obtaining the substantial funds these settlements provide for the benefit of the PI Trusts and to facilitate any additional potential settlements with other insurance companies. (Houff Decl. ¶ 105; Ferazzi Decl. ¶ 37.)

7. The Classes impacted by the issuance of the channeling injunctions have voted overwhelmingly in support of the Plan. (Voting Decl. at 6; Houff Decl. ¶ 106.) No creditor or holder of a Channeled Personal Injury Claim objected to the channeling injunctions or the extension of those injunctions to the non-debtor Protected Parties, and holders of Silica, CTPV and NIHL Personal Injury Claims have voted overwhelming in favor of the Plan. (*Id.*) One hundred percent of CTPV Personal Injury Claims (Class 6) and over 99 percent of NIHL Personal Injury Claims (Class 7) and Silica Personal Injury Claims (Class 8), both in amount of Claims and in number of Claim holders that cast Ballots, have voted to accept the Plan. (*Id.*) Additionally, the Reorganizing Debtors fully disclosed the scope of the proposed channeling injunctions and described in detail the entities that would be protected by the injunctions. (Houff Decl. ¶ 106; Disclosure Statement at 114-19; Ferazzi Decl. ¶ 38.)

***20** 8. The Plan establishes trust distribution procedures ("TDPs") for each of Silica, CTPV and NIHL claims. (Plan § 5.3.a, 5.4.a, 5.5.a; Houff Decl. ¶ 107; Ferazzi Decl. ¶¶ 40, 58.) The TDPs provide for the equitable treatment of all present and future claimants. (Houff Decl. ¶ 107; Ferazzi Decl. ¶¶ 40, 58.) The TDPs establish procedures for processing and paying Channeled Personal Injury Claims on an impartial, first-in-first-out basis, with the intention of paying all claimants over time as equivalent a share as possible of the value their claims. (Houff Decl. ¶ 107; Ferazzi Decl. ¶¶ 44, 60.) Once liquidated, each Channeled Personal Injury Claim will be paid by the appropriate trust. (Houff Decl. ¶ 107.)

9. Furthermore, the distribution procedures for each of these Classes of Channeled Personal Injury Claims permit the holder of such a Claim, including an Indirect Channeled Personal Injury Claim, to institute a lawsuit in the tort system against the applicable PI Trust, subject to certain conditions, procedures and limitations set forth in the applicable distribution procedures, if the dispute cannot be resolved in non-binding arbitration. (Houff Decl. ¶ 108; Plan Ex. 1.1(34) § 5.11; Plan Ex. 1.1(66) § 5.7; Plan Ex. 1.1(129) § 5.7; Plan Ex. 1.1(186) § 5.11.) Each of the PI Trust's distribution procedures contemplate that non-settling claimants that litigate their claims in the tort system may present any judgment obtained to the applicable PI Trust for payment. (Houff Decl. ¶ 108; Plan Ex. 1.1(34) § 7.7; Plan Ex. 1.1(66) § 7.7; Plan Ex. 1.1(129) § 7.7; Plan Ex. 1.1(186) § 7.7.) The funding of the PI Trusts and the allocation of those funds were the result of extensive negotiations among the Debtors, the Asbestos Committee, the Asbes-

tos Representative, the Silica and CTPV Representative, counsel for certain holders of present Silica Personal Injury Claims, counsel for certain holders of present CTPV Personal Injury Claims and counsel for certain holders of NIHL Personal Injury Claims. (*Id.*) Thus, the Plan not only provides the necessary mechanisms for paying Claims in each of the Classes of Channeled Personal Injury Claims (including separate trusts, trustees, and distribution procedures), but also implements an allocation of funds to each of the PI Trusts that is adequate and fair.

10. For all the foregoing reasons, the issuance of the Silica, CTPV and NIHL Channeling Injunctions and the Channeled PI Insurance Entity Injunction, as well as the treatment of Silica, CTPV and NIHL Personal Injury Claims, including future silica and CTPV Demands, is appropriate under the Bankruptcy Code.

F. SATISFACTION OF CONDITIONS TO CONFIRMATION.

1. Section 10.1 of the Plan contains conditions precedent to Confirmation that must be satisfied or duly waived pursuant to Section 10.3 of the Plan. The conditions precedent set forth in Sections 10.1.a. through 10.1.c of the Plan have been satisfied.

***21** 2. Concerning the establishment of the Funding Vehicle Trust, the PI Trusts and issuance of the PI Channeling Injunctions, the Court specifically finds:

a. The PI Channeling Injunctions are to be implemented in connection with the establishment of the PI Trusts (Plan art. V; Houff Decl. at 38-52);

b. As of the Petition Date, certain of the Reorganizing Debtors had been named as defendants in personal injury or wrongful death damage actions seeking recovery for damages in respect of Channeled Personal Injury Claims (Houff Decl. ¶ 87; Disclosure Statement at 67);

c. On the Effective Date, each PI Trust shall assume the liabilities of the Reorganizing Debtors with respect to applicable Channeled Personal Injury Claims (Plan §§ 5.2.e, 5.3.e, 5.4.d, 5.5.d);

d. The Asbestos PI Trust will be funded in part by 94 percent of the common stock of Kaiser Trading, and all rights to receive dividends or other distributions on account of such common stock (Plan § 5.2.d; Houff Decl. ¶ 98; Murphy Aff. ¶ 22);

e. The Silica PI Trust will be funded in part by 6 percent of the common stock of Kaiser Trading, and all rights to receive dividends or other distributions on account of such common stock (Houff Decl. ¶ 103; Ferazzi Decl. ¶¶ 31);

f. Each PI Trust will use its assets or income to pay applicable Channeled Personal Injury Claims (Plan §§ 5.2.a(i), 5.3.a(i), 5.4.a(i), 5.5.a(i));

g. The Reorganizing Debtors are likely to be subject to substantial future Demands for payment arising out of the same or similar conduct or events that gave rise to the Asbestos Personal Injury Claims, the CTPV Personal Injury Claims and the Silica Personal Injury Claims, that are addressed by the respective PI Channeling Injunctions (Houff Decl. ¶ 87; Ferazzi Decl. ¶ 38);

h. The actual amounts, numbers and timing of future Demands cannot be determined (Houff Decl. ¶ 88, Ferazzi Decl. ¶ 22);

i. Pursuit of Channeled Personal Injury Claims, including Demands, outside the procedures prescribed by the Plan is likely to threaten the Plan's purpose to deal equitably with Claims and future Demands (Houff Decl. ¶ 89; Ferazzi Decl. ¶ 38);

j. The terms of the PI Channeling Injunctions, including any provisions barring actions against third parties, are set out in conspicuous language in the Plan and in the Disclosure Statement (Plan §§ 1.1(36), (68), (131), (188), (161); Disclosure Statement at 114-19.)

k. Other than with respect to NIHL Personal Injury Claims, which do not include Demands, pursuant to Court orders or otherwise, each PI Trust shall operate through mechanisms such as structured, periodic or supplemental payments, pro rata distributions, matrices or periodic review of estimates of the numbers and values of applicable Channeled Personal Injury Claims or other comparable mechanisms that provide reasonable assur-

ance that such Trust will value, and be in a financial position to pay, applicable present Channeled Personal Injury Claims and future Channeled Personal Injury Claims and Demands that involve similar Claims in substantially the same manner (Houff Decl. ¶¶ 91-93, 107; Murphy Aff. ¶ 28; Ferazzi Decl. ¶¶ 57, 63);

***22** l. Each of the Asbestos Representative and the Silica and CTPV Representative was appointed by this Court as part of the proceedings leading to the issuance of the respective PI Channeling Injunction for the purpose of, among other things, protecting the rights of persons that might subsequently assert Demands of the kind that are addressed in such Injunction, and transferred to and assumed by the applicable PI Trust (Murphy Aff. ¶ 5; Ferazzi Decl. ¶ 1);

m. The inclusion of each Reorganizing Debtor or beneficiary within the protection afforded by the respective PI Channeling Injunction is fair and equitable with respect to the persons that might subsequently assert Demands against each such Reorganized Debtor or beneficiary in light of the benefits provided, or to be provided, to the applicable PI Trust on behalf of such Reorganized Debtor or such beneficiary (Houff Decl. ¶ 98-99; Ferazzi Decl. ¶ 39);

n. The Plan complies with section 524(g) of the Bankruptcy Code in all respects (Houff Decl. at 38-46; Tr. of Jan. 9, 2006 Hr'g at 124);

o. The transfer of rights to proceeds from the Included PI Trust Insurance Policies to the Funding Vehicle Trust for the benefit of the PI Trusts is valid and enforceable and transfers such rights under the Included PI Trust Insurance Policies as the Reorganizing Debtors may have, subject to any and all PI Insurer Coverage Defenses. (Tr. of Jan. 9, 2006 Hr'g at 58, 60-68, 86-88, 91, 110-12.) The discharge and release of the Reorganizing Debtors and Reorganized Debtors from all Claims, and the injunctive protection provided to the Reorganizing Debtors, Reorganized Debtors and Protected Parties with respect to Demands as provided in the Plan, these Findings and Conclusions and the Confirmation Order shall not affect the liability of any PI Insurance Company except (i) to the extent that any such insurance company is also a Settling Insurance Company or (ii) that all PI Insurer Coverage Defenses are preserved; and

p. The PI Channeling Injunctions are essential to the Plan and the Reorganizing Debtors' reorganization efforts (Houff Decl. ¶ 104; Ferazzi Decl. ¶ 39).

G. SUBSTANTIVE CONSOLIDATION.

There are no pending objections to (i) the substantive consolidation of the Substantively Consolidated Debtors or (ii) the substantive consolidation of the Estates of KBC and the Substantively Consolidated Debtors solely in order to treat any Unsecured Claims against KBC as Claims in Subclass 9B for purposes of distributions to be made under the Plan, as set forth in the KBC Modifications. Substantive consolidation as provided under Article IX of the Plan, as modified, is solely for the purpose of implementing the Plan, including for purposes of voting, Confirmation and distributions to be made under the Plan. (Plan § 9.1.) The proposed substantive consolidation of the Substantively Consolidated Debtors is consistent with the Intercompany Claims Settlement, section 5 of which specifically permitted the substantive consolidation of certain of the Debtors. (Houff Decl. ¶ 75.) Moreover, all of the Substantively Consolidated Debtors are interrelated companies operating under KAC and KACC, which entities are the Substantively Consolidated Debtors' ultimate parent companies for tax and business purposes, and the deemed substantive consolidation will promote efficiency and decrease costs in the implementation of the Plan. (*Id.*) In addition, with respect to the substantive consolidation of KBC with the Substantively Consolidated Debtors solely in order to treat any Unsecured Claims against KBC as Claims in Subclass 9B for purposes of distributions to be made under the Plan, the only two creditors of KBC's estate, the PBGC and Sherwin, have specifically consented to the provisions regarding the limited substantive consolidation of KBC with the Substantively Consolidated Debtors. (Houff Decl. ¶ 76.) Furthermore, notice of the KBC Modifications and an opportunity to object thereto and to change the creditor's vote on the Plan was given to all known creditors in Subclass 9B of the Plan. (KBC Aff. of Serv.

¶ 3.) No creditor objected to the KBC Modifications, and no creditor who timely submitted a vote in Subclass 9B to accept the Plan elected to change such vote. (Voting Change Decl. ¶ 5.) In the absence of any creditor objection to the deemed substantive consolidation, and in light of the overwhelming creditor support for the Plan, the deemed substantive consolidation of the Substantively Consolidated Debtors and the limited substantive consolidation of the Estates of KBC and the Substantively Consolidated Debtors is consensual. And for the foregoing reasons, the substantive consolidation provided for in the Plan, as modified, is in the best interests of the Reorganizing Debtors' Estates and creditors.

II. CONCLUSIONS OF LAW.

A. JURISDICTION AND VENUE.

***23** The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The Reorganizing Debtors were and are qualified to be debtors under section 109 of the Bankruptcy Code. Venue of the Reorganization Cases in the United States Court for the District of Delaware was proper as of the Petition Date, pursuant to 28 U.S.C. § 1408, and continues to be proper.

B. MODIFICATIONS TO THE PLAN.

The Modifications (1) do not adversely change, in any material respect, the treatment under the Plan of any Claims or Interests, (2) comply in all respects with Bankruptcy Rule 3019 and (3) to the extent the KBC Modifications do not comply with Bankruptcy Rule 3019, they comply with section 1127(d) of the Bankruptcy Code. (Tr. of Jan. 9, 2006 Hr'g at 30.) Accordingly, pursuant to section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, all holders of Claims that have accepted or are conclusively presumed to have accepted the Plan as filed on September 8, 2005 are deemed to have accepted the Plan, as modified by the Modifications.

C. EXEMPTIONS FROM SECURITIES LAWS.

1. Pursuant to section 1125(e) of the Bankruptcy Code, the Reorganizing Debtors' transmittal of solicitation materials, their solicitation of acceptances of the Plan and their offering, issuance and distribution of the New Common Stock pursuant to the Plan are not, and will not be, governed by or subject to any otherwise applicable law, rule or regulation governing the solicitation of acceptance of a plan of reorganization or the offer, issuance, sale or purchase of securities.

2. Pursuant to section 1145(a)(1) of the Bankruptcy Code, the offering, issuance and distribution of the New Common Stock pursuant to the Plan, including without limitation Section 7.8.e thereof, are, and will be, exempt from section 5 of the Securities Act of 1933, as amended (the "Securities Act"), and any state or local law requiring registration for offer or sale of a security or registration or licensing of an issuer or underwriter of, or broker or dealer in, a security.

3. Pursuant to, and to the fullest extent permitted under, section 1145 of the Bankruptcy Code, the resale of any New Common Stock will be exempt from section 5 of the Securities Act and any state or local law requiring registration for offer or sale of a security or registration or licensing of an issuer or underwriter or, or broker or dealer in, a security.

D. EXEMPTIONS FROM TAXATION.

Pursuant to section 1146(c) of the Bankruptcy Code , the issuance, transfer or exchange of any security contemplated by the Plan, or the making or delivery of any instrument of transfer under the Plan, may not be taxed under any law imposing a stamp tax or similar tax.

E. COMPLIANCE WITH SECTION 1129 OF THE BANKRUPTCY CODE.

As set forth in Section I.C above, the Plan complies in all respects with the applicable requirements of section 1129 of the Bankruptcy Code.

F. COMPLIANCE WITH SECTION 524(g) OF THE BANKRUPTCY CODE.

***24** As set forth in Section I.D above, the Plan complies in all respects with the applicable requirements of section 524(g) of the Bankruptcy Code.

G. OBJECTIONS TO THE PLAN.

1. The Insurers' Objections.

The Insurers object to the Reorganizing Debtors' transfer of their rights to proceeds from the Included PI Trust Insurance Policies to the Funding Vehicle Trust for the benefit of the PI Trusts and also argue that the manner in which the Asbestos PI Trust will be funded under the Plan does not comply with the funding requirements under section 524(g) of the Bankruptcy Code. As referenced above, the Court concludes that the transfer of rights to proceeds from the Included PI Trust Insurance Policies to the Funding Vehicle Trust for the benefit of the PI Trusts is valid and enforceable and transfers such rights under the Included PI Trust Insurance Policies as the Reorganizing Debtors may have, subject to any and all PI Insurer Coverage Defenses. (Tr. of Jan. 9, 2006 Hr'g at 58, 60-68, 86-88, 91, 110-12.) Section 1123(a)(5) of the Bankruptcy Code expressly permits the transfer of the Reorganizing Debtors' rights to proceeds from the Included PI Trust Insurance Policies under the Plan and preempts any anti-assignment provisions of the Included PI Trust Insurance Policies. (Tr. of Jan. 9, 2006 Hr'g at 110-12.) Additionally, the Court concludes that, as discussed above, the Plan complies with the funding requirements of section 524(g). (Tr. of Jan. 9, 2006 Hr'g at 123-24.) Accordingly, the Court finds that the Insurers' Objections should be overruled. (Tr. of Jan. 9, 2006 Hr'g at 88, 91, 111-12, 124.)

2. Law Debenture's Objection.

Law Debenture's Objection is overruled for the reasons the Court articulated on the record at the Confirmation Hearing and on the record at the May 2, 2005 hearing relating to confirmation of the Alumina Subsidiary Plans. (Tr. of Jan. 9, 2006 Hr'g at 40-41, 43, 46-48, 51-55; Tr. of Jan. 10, 2006 Hr'g at 27-31; Tr. of May 2, 2005 Hr'g at 47-49, 53-57.)

3. Other Objections.

The Court concludes that all other objections to the Plan not otherwise withdrawn at or prior to the Confirmation Hearing should be overruled for the reasons the Court articulated on the record at the Confirmation Hearing (*see* Tr. of Jan. 9, 2006 Hr'g at 32, 33, 35-37) and/or set forth in the Reorganizing Debtors' Memorandum of Law in support of confirmation of the Plan.

H. TRANSFER OF BOOKS AND RECORDS TO THE FUNDING VEHICLE TRUST AND RETENTION OF KACC'S FORMER COUNSEL.

Plan Section 5.1(d)(ii) provides that Reorganized KACC will transfer the books and records of the Debtors that pertain to Channeled Personal Injury Claims to the Funding Vehicle Trust, which may re-transfer or supply copies of such books and records to the PI Trusts. In addition, the Funding Vehicle Trust may retain the professional services of KACC's former counsel. The transfer of these materials is essential to implementation of the Funding Vehicle Trust and the preservation of its assets. (Houff Decl. ¶ 78.) The transfer of books and records from the Reorganizing Debtors to the Funding Vehicle Trust and its retention of KACC's former counsel shall not waive or destroy any privilege pertaining to such books, records and professional services. The Reorganizing Debtors and the Funding Vehicle Trust and PI Trusts share common if not identical legal interests, and the surrender of any privileged documents or the retention of former counsel does not terminate or waive any privileges related to those interests.

I. APPROVAL OF THE RELEASES PROVIDED UNDER THE PLAN.

***25** The releases set forth in Section 4.5 of the Plan, including the releases of nondebtor parties pursuant to the general releases in Section 4.5(b), are (a) integral to the terms, conditions and settlements contained in the Plan, (b) appropriate in connection with the Reorganization of the Reorganizing Debtors and (c) supported by reasonable consideration. In light of all of the circumstances, the releases in Section 4.5 of the Plan are fair to the releasing parties.

J. ASSUMPTIONS, ASSUMPTIONS AND ASSIGNMENTS AND REJECTIONS OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES.

Each pre- or post-Confirmation assumption, assumption and assignment or rejection of an Executory Contract or Unexpired Lease pursuant to Article VI of

the Plan, including any pre- or post-Confirmation assumption, assumption and assignment or rejection effectuated as a result of any amendment to Exhibits 6.1 of 6.3 to the Plan, as contemplated by Article VI of the Plan, shall be legal, valid and binding upon the applicable Debtor or Reorganized Debtor and all nondebtor parties to such Executory Contract or Unexpired Lease, all to the same extent as if such assumption, assumption and assignment or rejection had been effectuated pursuant to an appropriate authorizing order of the Court entered before the Confirmation Date under section 365 of the Bankruptcy Code.

Bkrtcy.D.Del.,2006.
In re Kaiser Aluminum Corp.
Not Reported in B.R., 2006 WL 616243 (Bkrtcy.D.Del.)

END OF DOCUMENT

EXHIBIT H

LEXSEE 2003 BANKR. LEXIS 1401

In re: WORLDCOM, Inc., et al., Debtors.

Chapter 11, Case No. 02-13533 (AJG) (Jointly Administered)

UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2003 Bankr. LEXIS 1401

October 31, 2003, Decided

NOTICE: [*1] NOT FOR PUBLICATION

DISPOSITION: Findings of fact and conclusions of law (1) approving (i) substantive consolidation and (ii) settlements under debtors' modified second amended joint plan of reorganization, and (2) confirming debtors' modified second amended joint plan of reorganization.

COUNSEL: WorldCom, Inc., Debtor, dba MCI WORLDCOM, Inc. dba LDDS WorldCom, represented by Adam P. Strochak, Weil, Gotshal & Manges, LLP, Washington, DC. Alfredo R. Perez, Weil Gotshal & Manges, Houston, TX. Alice B. Eaton, Simpson Thacher & Bartlett, New York, NY. Andrew C. McElmeel, Stinson Morrison Hecker, LLP, Omaha, NE. Bruce H. White, Patton Boggs LLP, Dallas, TX. Carren B. Shulman, Heller Ehrman White & McAuliffe LLP, New York, NY. Carrie McGuire, Stinson Morrison Hecker, LLP, Washington, DC. Darryl M. Bradford, Jenner & Block, LLC, Chicago, IL. David A. Handzo, Jenner & Block, Washington, DC. Eric R. Markus, Wilmer, Cutler & Pickering, Washington, DC. Greta A. McMorris, Stinson Morrison Hecker LLP, Kansas City, MO. Lori R. Fife, Weil, Gotshal & Manges, New York, NY. Lori O. Locke, Stinson Morrison Hecker, LLP, Kansas City, MO. Marcia L. Goldstein, Weil Gotshal & Manges, New York, NY. Mark A. Shaiken, Stinson Morrison Hecker, LLP, Kansas City, MO. Martin J. Bienenstock, Weil, Gotshal & Manges LLP, New York, NY. Megan Fahey, Jenner & Block, Chicago, IL. Patricia A. Konopka, Stinson Morrison Hecker, LLP, Kansas City, MO. Sam Della Fera, Jr., Gibbons, Del Deo, Dolan, [*2] Griffinger & Vecchione, P.C., Newark, NJ. Sharon L. Stolte, Stinston Morrison Hecker LLP, Overland Park, KS. Stephen D. Lerner, Squire Sanders & Dempsey LLP, Cincinnati, OH. Stephen A. Youngman, Weil, Gotshal & Manges, LLP, Dallas, TX. Thomas R. Califano, Piper Marbury Rudnick & Wolfe LLP, New York, NY. Timothy W. Walsh, Piper Rudnick, LLP, New York, NY.

Carolyn S. Schwartz, U.S. Trustee, represented by Greg M. Zipes, Office of the United States Trustee, New York, NY. Mary Elizabeth Tom, Office of the U.S. Trustee, New York, NY.

United States Trustee, U.S. Trustee, Mary Elizabeth Tom, Office of the U.S. Trustee, New York, NY. Pamela Jean Lustrin, United States Trustee, New York, NY.

Call-Net Carrier Services, Inc., Interested Party, represented by George B. South, King & Spalding, New York, NY.

S-Connect, Inc. and Gary Bryan, Interested Party, represented by Jeff J. Friedman, Katten Muchin Zavis Rosenman, New York, NY.

Market Front Associates Limited Partnership, Interested Party, represented by Michael J. Levin, Barger & Wolen, LLP, New York, NY.

Cambrian Communications LLC, Interested Party, represented by Raniero D'Aversa, Mayer, Brown, Rowe & Maw, [*3] New York, NY.

Iowa Public Employees Retirement System, Alan G. Hevesi, Comptroller of the State of New York, Interested Parties, represented by Ira M. Levee, Michael S. Etkin, Lowenstein Sandler, P.C., Roseland, NJ.

Unofficial Committee of Noteholders of Intermedia Communications, Inc., Interested Party, represented by Alan W. Kornberg, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY.

SunTrust Bank, Indenture Trustee for the Intermedia Senior and Subordinate Notes, Interested Party, represented by Barbra R. Parlin, Peter Alan Zisser, Sandra E. Mayerson, Holland & Knight, LLP, New York, NY.

State of Oklahoma, Interested Party, represented by Joseph P. Gappa, Oklahoma Tax Commission, Oklahoma City, OK. Neal S. Mann, New York State Attorney General's Office, New York, NY.

State of Indiana, Alabama Securities Commission, State of West Virginia, Commonwealth of Massachusetts, Interested Parties, Neal S. Mann, New York State Attorney General's Office, New York, NY.

Inntraport Intraport Corp. f/k/a Intelnet International Corp., New York State Common Retirement Fund, Alan G. Hevesi, Interested Party, represented by Ira M. Levee, Lowenstein Sandler, [*4] P.C., Roseland, NJ.

Abbott Litigants, Interested Party, Michael S. Etkin, Lowenstein Sandler, P.C., Roseland, NJ.

SBC Communications Inc., Interested Party, represented by Anthony D. Boccanfuso, Arnold & Porter, New York, NY.

Sprint Spectrum L.P., Interested Party, represented by Daniel J. Flanigan, Polsinelli Shalton & Welte, PC., Kansas City, MO.

WorldCom Fee and Expense Review Committee, c/o Van Greenfield, Chairman, Interested Party, represented by Ira S. Dizengoff, Akin, Gump, Strauss, Hauer & Feld, LLP, New York, NY. Rebecca E.W. Wegner, Foley & Lardner, Milwaukee, WI.

Hispanic Information & Telecommunications Network, Inc., Interested Party, represented by James J. Tancredi, Day, Berry & Howard, LLP, Hartford, CT.

Jamestown TSA, L.P., Interested Party, represented by Peter Alan Zisser, Holland & Knight, LLP, New York, NY.

1941 Roland Clarke Place Limited Partnership, c/o Pitney Hardin Kipp & Szuch LLP, Interested Party, represented by Richard M. Meth, Pitney Hardin Kipp & Szuch LLP, Morristown, NJ.

Stella A. Pappas, Interested Party, represented by Wendy Kraus, Paul, Hastings, Janofsky & Walker, LLP, New York, NY.

Arthur Andersen [*5] LLP, Interested Party, represented by Steven J. Reisman, Curtis, Mallet-Prevost, Colt & Mosle LLP, New York, NY.

Liquidity Solutions, Inc., Interested Party, represented by Jeffrey D. Vanacore, Arent Fox Kintner Plotkin & Kahn, PLLC, New York, NY.

Official Committee of Unsecured Creditors of WorldCom, Inc., Creditor Committee, represented by A. Brent Truitt, Hennigan Bennett & Dorman, LLP, Los Angeles, CA. Daniel H. Golden Akin, Gump, Strauss, Hauer & Feld, LLP, New York, NY. Ira S. Dizengoff, Akin, Gump, Strauss, Hauer & Feld, LLP, New York, NY. Mark R. Somerstein, Kelley Drye & Warren LLP, New York, NY.

JUDGES: Arthur J. Gonzalez, UNITED STATES BANKRUPTCY JUDGE.

OPINION BY: Arthur J. Gonzalez

OPINION

FINDINGS OF FACT AND CONCLUSIONS OF LAW (1) APPROVING (i) SUBSTANTIVE CONSOLIDATION AND (ii) THE SETTLEMENTS UNDER DEBTORS' MODIFIED SECOND AMENDED JOINT PLAN OF REORGANIZATION, DATED OCTOBER 21, 2003, AND (2) CONFIRMING DEBTORS' MODIFIED SECOND AMENDED JOINT PLAN OF REORGANIZATION, DATED OCTOBER 21, 2003

On September 8, 9, 12, 15, 16, 17 and 19, 2003 and October 14, 15, 21 and 30 2003, this Court held [1] a confirmation hearing (the "Confirmation Hearing") to consider a plan of reorganization [*6] under chapter 11 of the Bankruptcy Code jointly proposed by WorldCom, Inc. and certain of its direct and indirect subsidiaries, as debtors and debtors in possession (collectively, the "Debtors"). During the course of the Confirmation Hearing, the Debtors filed Debtors' Second Amended Joint Plan of Reorganization, dated September 12, 2003, which was subsequently modified. Debtors thereafter filed Debtors' Modified Second Amended Joint Plan Of Reorganization Under Chapter 11 Of The Bankruptcy Code, dated October 21, 2003 ("Modified Second Amended Plan"). [2]

1 This Court has subject matter jurisdiction over these cases under *28 U.S.C. §§ 157(a) and 1334(b)* and under the July 10, 1984 "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York (Ward, Acting C.J.). This is a core matter under *28 U.S.C. § 157(b)(2)(L)*. This Memorandum of Decision constitutes findings of fact and conclusions of law under *Fed. R. Civ. P. 52*, as made applicable by *Fed. R. Bankr. P. 7052* and *Fed. R. Bankr. P. 9014*. To the extent any of the findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the conclusions of law constitute findings of fact, they are adopted as such.

[*7]

2 Capitalized terms used in this Memorandum of Decision that are not otherwise defined herein shall have the same meanings ascribed to them in the Modified Second Amended Plan.

The Court has reviewed and considered the Modified Second Amended Plan, all affidavits submitted, as well as the testimony proffered and adduced, the exhibits admitted into evidence at the Confirmation Hearing and the arguments of counsel presented at the Confirmation Hearing. The Court has also considered all objections to confirmation of the Plan. This Court is cognizant of the compromises and settlements of the parties, and other relevant factors affecting these Chapter 11 Cases, and takes judicial notice of the entire record. Based upon the following findings of fact and conclusions of law, the Court will approve substantive consolidation, approve the settlements under the Modified Second Amended Plan and confirm the Modified Second Amended Plan and herein disposes of all objections to confirmation not otherwise previously resolved or withdrawn.

I. FINDINGS OF FACT

A. BACKGROUND, THE PLAN, AND [*8] SOLICITATION AND NOTICE

(i) Background

The Debtors current corporate structure results from a series of prepetition mergers and acquisitions including that involving WorldCom, Inc. and MCI Communications Corporation ("MCIC" and the merger with WorldCom Inc., sometimes referred to as the "Merger").

On July 21, 2002 (the "Commencement Date") and November 8, 2002, WorldCom, Inc. and 221 of its direct and indirect subsidiaries commenced voluntary cases under the Bankruptcy Code. By Orders, dated July 22, 2002 and November 12, 2002, the Debtors' Chapter 11 Cases were consolidated for procedural purposes and are being jointly administered. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to *sections 1107(a) and 1108* of the Bankruptcy Code. On July 29, 2002, the United States Trustee for the Southern District of New York (the "United States Trustee") appointed the statutory committee of unsecured creditors (the "Creditors' Committee"). No trustee has been appointed in these Chapter 11 Cases.

On October 29, 2002 this Court entered an Order Pursuant to Bankruptcy *Rule 3003(c)(3)* Establishing the Deadline for Filing [*9] Certain Proofs of Claim and Approving the Form and Manner of Notice Thereof (the "Bar Date Order"). (Docket No. 1780.) The Bar Date Order established 5:00 p.m. (Eastern Time) on January 23, 2003 (the "Bar Date") as the deadline for filing proofs of claims in the Debtors' cases, subject to specified exceptions.

(ii) The Plan

On May 23, 2003, the Debtors filed with this Court the proposed Debtors' Disclosure Statement Pursuant to *Section 1125 of the Bankruptcy Code*, dated May 23, 2003 (the "Disclosure Statement") and Debtors' Joint

Plan of Reorganization Under Chapter 11 of the Bankruptcy Code (the "May 23 Plan"). (Debtors' Ex. 274.)

On May 28, 2003, after due notice and a hearing held on May 19, 2003 and May 22, 2003, this Court entered an order (the "May 28 Disclosure Statement Order"), which, among other things, approved the Disclosure Statement, finding that it contained "adequate information" within the meaning of *section 1125 of the Bankruptcy Code* and established procedures for the Debtors' solicitation of votes on the May 23 Plan. (Docket No. 6110.) In accordance with the May 28 Disclosure Statement Order, on June 12, 2003 the Debtors commenced the solicitation of [*10] votes on the May 23 Plan. (Debtors' Ex. 301, June 18, 2003 Sullivan Aff.)

On July 9, 2003, the Debtors filed with this Court the proposed Supplement to Debtors' Disclosure Statement Pursuant to *Section 1125 of the Bankruptcy Code*, dated May 23, 2003 (the "First Supplement") and Debtors' Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, dated July 9, 2003 (the "July 9 Plan"). (Debtors' Ex. 273.) The modifications to the May 23 Plan embodied in the July 9 Plan related to the incorporation of the Bank Settlement (described below) and the creation of the corresponding Class 3A, a revision to the SEC Settlement, and the clarification of certain implementation provisions. The First Supplement provided disclosure with respect thereto.

On July 11, 2003, after due notice and a hearing held on July 9, 2003, this Court entered an order (the "First Supplemental Disclosure Statement Order"), which, among other things, approved the First Supplement, finding that the First Supplement, together with the Disclosure Statement, contained "adequate information" within the meaning of *section 1125 of the Bankruptcy Code*, established procedures for the Debtors' solicitation [*11] of votes by holders of Claims in Class 3A and the distribution of the First Supplement and the July 9 Plan to parties in interest, authorized any creditor to change its vote previously cast on the May 23 Plan, and extended the deadline for filing objections to confirmation based upon the Bank Settlement from July 28, 2003 to August 4, 2003. (Docket No. 7297.) In accordance with the First Supplemental Disclosure Statement Order, on July 11, 2003 the Debtors commenced the solicitation of votes of holders of Claims in Class 3A on the July 9 Plan (which amended the May 23 Plan), and commenced the distribution of the First Supplement and July 9 Plan to parties in interest. (Debtors' Ex. 301, July 25, 2003 Sullivan Aff.)

On July 31, 2003, the Court entered an Order: (1) Directing Debtors to File a Second Supplement to Debtors' Disclosure Statement; (2) Setting Objection Deadline Related Thereto; and (3) Extending Voting Deadlines and Adjourning Date for Commencement of Confirmation Hearing (the "July 31 Order"). Pursuant to the July 31 Order, the Court directed the Debtors to file a second supplement to the Disclosure Statement in respect of certain newly commenced governmental investigations [*12] and actions, extended the deadline for casting votes on the Amended Plan to August 26, 2003 and adjourned the hearing to consider confirmation of the Amended Plan to September 8, 2003. (Docket No. 7961.)

On August 6, 2003, pursuant to the July 31 Order, the Debtors filed with the Court the proposed Second Supplement to Debtors' Disclosure Statement Pursuant to *Section 1125 of the Bankruptcy Code*, dated May 23, 2003 (the "Second Supplement"), which notified parties of the voting and objection deadlines established by the July 31 Order, provided disclosure in respect of then-recent investigations and actions by certain governmental agencies and departments, and set forth the Debtors' position with respect to the allegations raised thereby, the potential impact, if any, on the Debtors' estates, and other related information. (Debtors' Ex. 272.)

On August 7, 2003, after due notice and a hearing held on August 6, 2003, this Court entered an order (the "Second Supplemental Disclosure Statement Order"), which, among other things, approved the Second Supplement, finding that the Second Supplement, together with the Disclosure Statement and the First Supplement, contained "adequate information" [*13] within the meaning of *section 1125 of the Bankruptcy Code*, established procedures for the Debtors' distribution of the Second Supplement to parties in interest, authorized any creditor to change its vote previously cast on the May 23 Plan or the Amended Plan, and extended the deadline for filing objections to confirmation based upon the Bank Settlement from July 28, 2003 to August 4, 2003. (Docket No. 8128.) In accordance with the Second Supplemental Disclosure Statement Order, on August 9, 2003 the Debtors commenced the distribution of the Second Supplement to parties in interest. (Debtors' Ex. 301, August 22, 2003 Sullivan Aff.)

On August 29, 2003, the Certification of Jane Sullivan with Respect to the Tabulation of Votes on the Plan of Reorganization, sworn to on August 29, 2003 (the "Initial Vote Certification") was filed with the Court on behalf of the Debtors' voting and tabulation agent, Innisfree M&A Incorporated. (Debtors' Ex. 302, Docket No. 8603.) The July 9 Plan was accepted by holders of more than two-thirds in amount and more than one-half in number of Claims voted in each Class entitled to vote. (Debtors' Ex. 302.)

The hearing to consider confirmation of the July 9 [*14] Plan commenced on September 8, 2003. Among the parties that had interposed objections to confirmation were the Ad Hoc MCI Trade Claims Committee, the Ad Hoc Committee of Dissenting Bondholders, Platinum Partners Value Arbitrage Fund, L.P. ("Platinum"), Deutsche Bank Securities, Inc. ("Deutsche"), and HSBC Bank USA ("HSBC"). (Docket Nos. 8033, 7938, 7939, 8038, 7707, 8011.) On September 9, 2003, the Debtors informed the Court that agreements had been reached with the Ad Hoc MCI Trade Claims Committee and the Ad Hoc Committee of Dissenting Bondholders, as well as with other objectors such as Platinum, Deutsche, and HSBC, pursuant to which, among other things, the Debtors would further amend the July 9 Plan and such objections would be withdrawn.

On September 12, 2003, the Debtors filed with this Court the proposed Third Supplement to Debtors' Disclosure Statement Pursuant to *Section 1125 of the Bankruptcy Code*, dated May 23, 2003 (as thereafter modified, the "Third Supplement") and Debtors' Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, dated September 12, 2003 (the "September 12 Plan"). (Debtors' Ex. 335.) The modifications to the July 9 Plan embodied [*15] in the September 12 Plan reflect the resolution of issues with the Ad Hoc MCI Trade Claims Committee, the Ad Hoc Committee of Dissenting Bondholders, HSBC, and other objectors such as Platinum and Deutsche that had asserted unique reliance arguments based upon their pre-merger trade claims, and include a settlement regarding the treatment of MCIC Subordinated Debt Claims, a reduction to the recovery by the holders of MCIC Senior Debt Claims, a contribution of plan consideration by the holders of MCIC Senior Debt Claims and MCIC Subordinated Debt Claims, and provision for additional recoveries to Class 6 creditors that can establish that their Claims qualify as MCI Pre-merger Claims. The Third Supplement provided disclosure with respect thereto and related provisions and addressed the extent to which (if at all) the modifications would affect creditor recoveries.

On September 12, 2003, after due notice by announcement of the Court on the record on September 9, 2003 and a hearing held on September 11, 2003 and September 12, 2003, this Court entered an order (the "Third Supplemental Disclosure Statement Order," and collectively with the Disclosure Statement Order, the First Supplemental [*16] Disclosure Statement Order, and the Second Supplemental Disclosure Statement Order, the "Disclosure Statement Orders"), which, among other things, approved the Third Supplement, finding that the Third Supplement, together with the Disclosure Statement, the First Supplement, and the Second Supplement, contained "adequate information" within the meaning of *section 1125 of the Bankruptcy Code*, established procedures for the Debtors' distribution of the Third Supplement and the September 12 Plan to parties in interest, authorized any creditor to change its vote previously cast on the May 23 Plan or the July 9 Plan and established October 8, 2003 as the deadline therefor, and established September 30, 2003 as the deadline for filing objections to confirmation based upon the modifications reflected in the September 12 Plan. (Docket No. 8893.) In accordance with the Third Supplemental Disclosure Statement Order, on September 15, 2003 the Debtors commenced the distribution of the Third Supplement and September 12 Plan to parties in interest. (Debtors' Ex. 301, September 19, 2003 Sullivan Aff.) [3]

3 On September 19, 2003, the September 12 Plan was modified to incorporate a settlement among the Debtors, the Committee, and an Ad Hoc Committee of Intermedia Preferred Stockholders (the "Intermedia Preferred Settlement"). Notice of such modification was filed on September 24, 2003.

[*17] On October 10, 2003, the Supplemental Certification of Jane Sullivan with Respect to the Tabulation of Votes on the Plan of Reorganization, sworn to on October 10, 2003 (the "Supplemental Vote Certification," and together with the Initial Vote Certification, the "Vote Certifications") was filed with the Court on behalf of the Debtors' voting and tabulation agent, Innisfree M&A Incorporated. (Debtors' Ex. 338; Docket No. 9355.) The September 12 Plan was accepted

by holders of more than two-thirds in amount and more than one-half in number of Claims voted in each Class entitled to vote. (Debtors' Ex. 338.)

At the October 15, 2003, the Court heard evidence and oral argument in respect of the remaining objections to the September 12 Plan. The objectors raised various arguments in opposition to the September 12 Plan, including that the classification of WorldCom General Unsecured Claims, MCI Pre-merger Claims, and Ad Hoc MCI Trade Claims Committee Claims together in one Class violated *section 1123(a)(4) of the Bankruptcy Code.*

On October 20, 2003, the Court ruled concerning the objections based on *section 1123(a)(4) of the Bankruptcy Code* (the "October 20 Ruling"). In the October 20 [*18] Ruling, the Court held that Class 6 of the September 12 Plan did not comply with the requirements of *section 1123(a)(4) of the Bankruptcy Code.* The Court directed the Debtors to separately classify WorldCom General Unsecured Claims, the MCI Pre-merger Claims, and the members of the Ad Hoc MCI Trade Claims Committee. Although the class of Ad Hoc Trade Claims receives the same treatment as the WorldCom General Unsecured Claims under the September 12 Plan, the Court preferred separate classification of those classes for voting purposes because of the Court's concern that the members of the Ad Hoc Trade Claims Committee could, arguably, unduly influence the outcome of the vote if the two groups were merged into one class. The Court also directed that the constituency of the MCI Pre-merger Claim class would be determined by a creditor election to opt into that class. Finally, the Court directed the Debtors to advise the Court as to whether the Debtors intended to re-solicit the holders of the newly separately-classified claims or whether the Debtors would seek to confirm the September 12 Plan, as modified, under *section 1129(b) of the Bankruptcy Code* with respect to these Classes.

In compliance [*19] with the October 20 Ruling, on October 21, 2003, the Debtors advised the Court that they would seek confirmation of the Plan under *section 1129(b) of the Bankruptcy Code.* At such time, the Court scheduled a hearing to consider confirmation of the Plan under *section 1129(b) of the Bankruptcy Code* for October 30, 2003.

On October 21, 2003 the Debtors filed the Debtors' Modified Second Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, dated October 21, 2003 (the "Modified Second Amended Plan"), which modifies the September 12 Plan by, *inter alia*, reclassifying the Claims in former Class 6 (WorldCom General Unsecured Claims) into Classes 6, 6A, and 6B. The Modified Second Amended Plan, thus, separately classifies (i) into Class 6A, MCI Pre- merger Claims, which are Claims arising solely from an individual transaction or series of transactions that was fully completed on or before September 13, 1998, the holders of which relied on the separate credit of MCIC or any subsidiary of MCIC as of that date, (ii) into Class 6B, solely for voting purposes, Ad Hoc MCI Trade Claims Committee Claims, which are the General Unsecured Claims of the Ad Hoc MCI Trade Chim [*20] Committee and (iii) into Class 6, all other General Unsecured Claims against the WorldCom Debtors. [4]

> 4 As set forth by the Debtors on the record at the October 21, 2003 hearing, the other modifications include a modification to the Exculpation Provision, which was agreed to by the Debtors, the Committee and the United States Trustee, and conforming changes relating to the Intermedia Preferred Settlement, none of which implicates or adversely impacts creditor recoveries.

Each holder of an Allowed Class 6 WorldCom General Unsecured Claim will receive the same treatment under the Plan consisting of (i) 7.14 shares of New Common Stock for each one thousand ($ 1,000) dollars of such holder's Allowed WorldCom General Unsecured Claim and (ii) Cash in an amount equal to .1785 multiplied by the Allowed amount of such WorldCom General Unsecured Claim. Each holder of an Allowed Class 6A MCI Pre-merger Claim will receive the same treatment under the Plan consisting of (i) 7.14 shares of New Common Stock for each [*21] one thousand ($ 1,000) dollars of such holder's Allowed MCI Pre-merger Claim and (ii) Cash in an amount equal to .4215 multiplied by the Allowed amount of such MCI Pre-merger Claim. The Claims of the Ad Hoc MCI Trade Claims Committee Claims are separately classified in Class 6B solely for voting purposes and not for treatment purposes. Holders of Claims in Class 6B will receive the same treatment as Class 6 creditors. They will also receive additional value from the contributions from the holders of Claims in Classes 9 and 10.

Although the original Class 6 (which included Class 6A Claims) overwhelmingly accepted the plan, Classes 6

and 6A are deemed to have voted to reject for purposes of seeking confirmation of the Modified Second Amended Plan pursuant to *section 1129(b) of the Bankruptcy Code.* The Class 6B Ad Hoc MCI Trade Claims Committee Claims are deemed to be an "accepting" Class because the members of the Ad Hoc MCI Trade Claims Committee have agreed to the treatment and to support the Modified Second Amended Plan pursuant to the Integrated Settlement and related stipulations.

The Modified Second Amended Plan constitutes the "Plan."

(iii) Solicitation And Notice

[*22] The Disclosure Statement (Debtors' Ex. 274), the First Supplement (Debtors' Ex. 273), the Second Supplement (Debtors' Ex. 272), the Third Supplement (Debtors' Ex. 335), the Plan (Debtors' Ex. 335; Docket No. 9004), the Ballots (Docket Nos. 6110, 7297, 8893), the notice of the Confirmation Hearing (Docket No. 6110), and the Disclosure Statement Orders (Docket Nos. 6110, 7297, 8128, 8893) (as applicable, the "Solicitation Materials") were transmitted and served in compliance with the Bankruptcy Rules and the Disclosure Statement Orders. As described in the Affidavits of Service of Innisfree M&A Incorporated, sworn to by Jane Sullivan on June 18, 2003, July 8, 2003, July 25, 2003, July 30, 2003, August 22, 2003, September 19, 2003 and September 26, 2003 (each a "Sullivan Affidavit" and collectively, the "Sullivan Affidavits") (Debtors' Ex. 301), (i) the transmittal and service of the Solicitation Materials were adequate and sufficient under the circumstances of these Chapter 11 Cases, and (ii) adequate and sufficient notice of the Confirmation Hearing (including the July 28, 2003, August 4, 2003, August 19, 2003, September 30, 2003 and October 27, 2003 deadlines for filing and serving [*23] objections to confirmation) and other requirements, deadlines, hearings and matters described in the Disclosure Statement Orders were provided in compliance with the Bankruptcy Rules and the Disclosure Statement Orders, and no other or further notice is required.

In addition, Debtors appropriately served Notice of Modifications to Debtors' Second Amended Plan of Reorganization dated September 19, 2003, which among other things, revealed that Debtors agreed to provide a 5% recovery to the holders of Intermedia Preferred Stock and that such modification did not have an adverse effect upon the recovery of any class of creditors. (Docket No. 9066)

The Objectors at the October 15, 2003 hearing on confirmation included America West Airlines, Inc. ("America West"), CIT Lending Services Corporation ("CIT"), Next Factors, Inc. [5] ("Next Factors"), the United States Trustee for the Southern District of New York ("United States Trustee"), and Wells Fargo Bank, N.A. ("Wells Fargo"). [6] The Objector at the October 30, 2003 hearing on confirmation was Liquidity Solutions Inc ("LSI"). [7]

5 Next Factors' denial of receipt of the Third Supplement is insufficient to rebut the presumption of its receipt of same. There is a rebuttable presumption that the addressee of a properly addressed and mailed notice receives that notice. *Hagner v. United States, 285 U.S. 427, 430, 76 L. Ed. 861, 52 S. Ct. 417 (1932)*. A party must do more than merely deny receipt of the mailing; its testimony or affidavit of non-receipt is insufficient, standing alone, to rebut the presumption. *In re Ms. Interpret, 222 B.R. 409, 413 (Bankr. S.D.N.Y. 1998)*; *In re Adler, Coleman Clearing Corp., 204 B.R. 99, 105 (Bankr. S.D.N.Y. 1997)*. The Court has reviewed certain Assignment of Claims filed in this case and the address used by Next Factors therein is identical to the address used by the Debtors to serve Next Factors. Indeed, Next Factor's counsel has used that same address in his submissions with this Court. Because Next Factors was provided with proper notification of the deadline to file objections to the Plan and failed to file its objection by such objection deadline and because Next Factors has failed to provide sufficient justification or excuse for such failure, Next Factors is barred from objecting to the Second Amended Plan. In any event, the Court believes that the Court's conclusions, as set forth in the text, are sufficient to overrule Next Factors objections on the merits.

[*24]

6 The America West and CIT objections to confirmation of the Plan were later withdrawn pursuant to stipulations and agreed orders between the Debtors and America West and between the Debtors and CIT.

7 For the reasons set forth more fully at the hearing, LSI offered no convincing excuse or

evidence for its failure to abide by the objection deadline. Moreover, the Court finds that allowing LSI's to file an untimely objection that, inter alia, sought a continuance of the hearing would prejudice the Debtors at this stage of the case. The Court therefore did not have to consider its objection. Nevertheless, the Court believes that the Court's conclusions, as set forth in the text, are sufficient to overrule LSI's objections on the merits.

The Disclosure Statement, the First Supplement, the Second Supplement, and the Third Supplement provide to holders of Claims against and Equity Interests in the Debtors "adequate information" within the meaning of *section 1125 of the Bankruptcy Code.* Votes on the Plan were solicited after disclosure to holders of Claims against and Equity Interests [*25] in the Debtors of "adequate information" as defined in *section 1125 of the Bankruptcy Code.* The procedures used to distribute and tabulate the Ballots were fair, properly conducted, and in accordance with the Disclosure Statement Orders and all applicable Bankruptcy Rules.

B. SUBSTANTIVE CONSOLIDATION

The Plan provides for the substantive consolidation of the WorldCom Debtors and the separate substantive consolidation of the Intermedia Debtors. (Plan §§ 5.01, 5.02.)

(i) The Debtors' Operations

The WorldCom enterprise is comprised of over 400 legal entities. (Debtors' Ex. 268.) Of these, 222 are debtors in these Chapter 11 Cases.

Historically, all the Debtors operated under common senior management. This has continued during the Chapter 11 Cases, with the appointment of Michael Capellas as Chairman of the Board of Directors and Chief Executive Officer for all of the Debtors. (Debtors' Ex. 202.) Debtors never prepared separate legal entity financial statements for public financial reporting purposes. (9/15/03 Tr. at 100.) The Debtors historically have done all public financial reporting on a consolidated basis. *(See, e.g.,* Debtors' Ex. 226.) The Debtors [*26] likewise filed consolidated federal income tax returns. *(See, e.g.,* Debtors' Ex. 271.)

(ii) Transfer Of Assets From WorldCom, Inc. to MCIC

After the 1998 acquisition of, and merger with, MCIC, WorldCom substantially restructured its corporate organization.

Through a series of restructuring transactions in December 1998, June 1999 and September 1999, the Debtors transferred significant assets from WorldCom, Inc. to MCIC and its subsidiaries, including the following:

. WorldCom, Inc. transferred all shares of Management Company to MCIC.

. WorldCom, Inc. transferred several of its direct subsidiaries into UUNET, an indirect legacy WorldCom subsidiary. As a result of this transfer, UUNET Technologies, Inc. ("UUNET") held all of the internet operations of the Company and UUNET's direct subsidiary held all of the value-added assets and operations.

. IDB WorldCom, Inc. ("IDBWC"), a direct subsidiary of WorldCom, Inc., and a direct subsidiary of IDBWC Inc. were merged with and into MCIC.

. MCIC conveyed most of the assets and employees of the former IDBWC and its subsidiary to other subsidiaries of MCIC.

. MFS Communications Company ("MFSCC"), [*27] a legacy WorldCom subsidiary, was merged with and into MCIC.

. MCIC conveyed all assets of the former MFSCC to Network Services but did not transfer any liabilities. This transfer resulted in legacy WorldCom subsidiaries that were former subsidiaries of MFSCC, such as UUNET, becoming indirect subsidiaries of Network Services.

. WorldCom conveyed its interest in WorldCom Pacific LLC to MCIC, and MCIC merged Pacific into MCIWC Communications.

. Network Services conveyed its sales-related assets and employees as well as the interconnection agreements of the former MFSCC to MCIWC Communications.

. WorldCom Network Services, Inc. ("WNS"), a legacy WorldCom subsidiary, was merged with and into Network Services.

(See Debtors' Exs. 33-95, 113-22, 144-65 and 331 and Creditors' Committee's Ex. 2.)

(iii) Operational Integration of the Debtors

In furtherance of the post-merger corporate restructuring efforts, the Debtors continued and expanded operational integration of the various legal entities. Although each of the Debtors exists as a separate legal entity, WorldCom's business, both before and after the MCI merger, was and is organized along operational [*28] and functional lines rather than by legal entities. (9/15/03 Tr. at 29-30.)

Debtors are comprised of two general types of business units - sales units and operating units. (9/15/03 Tr. at 28-29.) The Debtors' sales and marketing functions are organized along three major sales channels - International, Business and Consumer. International is everything outside the United States. Business markets covers everything from small- and medium-sized businesses to the largest global account customers. Consumer, or mass markets, covers residential customers and very small businesses. (Deposition of Fred M. Briggs ("Briggs Dep.") at 80.)

The Debtors' operating units provide services and support to the sales units. The operating units include: Operations and Technology, Finance, Human Resources, Purchasing, Legal, and Marketing. (9/15/03 Tr. at 29; Declaration of Matthew Johnson ("Johnson Decl.") P 1.)

Although the operations of all the Debtors are integrated, the finances of the 17 Intermedia Debtors were not integrated with those of the remaining Debtors. After the 2001 acquisition of Intermedia by WorldCom, the Intermedia Debtors continued to prepare separate financial statements, annual [*29] reports and other filings with the Securities and Exchange Commission. Those filings, however, are done on a consolidated basis for all of the Intermedia entities. (Debtors' Exs. 319, 320, 327.)

(iv) Network Operations Are Integrated

The Debtors operate a fully-integrated telecommunications network. The Debtors' Operations and Technology unit builds, maintains, supports, operates and acquires network capacity on behalf of the entire enterprise without regard to separate legal entities. The only notable exception is the Skytel paging business, which operates a separate network. (Briggs Dep. at 24-25, 34-37, 91.)

The integrated network platforms, products and services provided by the Operations and Technology unit support all three of the major sales channels and provide network services to the entire enterprise. (Briggs Dep. at 80, 91-92; Debtors' Exs. 121-22.) The costs of building, operating and maintaining the Debtors' telecommunications network are allocated to the major sales channels for management reporting purposes. (Briggs Dep. at 82-83.)

(v) Procurement Operations Are Integrated

The Debtors operate a centralized procurement department. The purchasing [*30] department purchased the vast majority of all capital and non-capital items that were acquired by any of the Debtors. (Johnson Decl. P 3.)

The Debtors' centralized purchasing department performs, among others, the following primary functions: (a) determines that certain goods or services are needed for the Debtors' family of companies or receives an internal request for goods or services; (b) identifies potential vendors that could supply the good or services; (c) negotiates with those vendors; (d) awards contracts to the winning vendors; and (e) actually buys, through the centralized procurement department's purchase order, the goods or services needed within the Debtors' organization. (Johnson Decl. P 4.)

The centralized purchasing department does not send the purchase orders on behalf of any particular legal entity. The Debtors' standard purchase order provides that, "This purchase is made by WorldCom Purchasing, LLC as agent for the Subsidiaries of MCI WORLDCOM, Inc." Purchase orders did not reference the particular legal entity with which the vendor was transacting business. (Johnson Decl. P 5 & Ex. A; Debtors' Exs.

249-64.)

The centralized procurement department does not know [*31] what legal entity will receive or use the goods or services that it purchases. As a result, the Debtors' centralized procurement department does not communicate to the vendors that any particular legal entity is acquiring the goods or services or will be financially responsible for the vendor's invoice for the goods or services. (Johnson Decl. P 6; Briggs Dep. at 44.)

The invoices vendors submit for goods or services they sold to the Debtors under a purchase order are paid by the Debtors' centralized accounts payable department - not by any particular legal entity. The checks paying these invoices identify only the ultimate parent corporation (that is, WorldCom, Inc.). (Johnson Decl. P 7.)

Numerous trade creditors have filed exactly the same claim against multiple Debtors. This has resulted from the creditors' inability to determine which particular Debtor is the proper entity against which a proof of claim should be filed. Many creditors have filed the same claim against all 222 Debtors. (Johnson Decl. P 8; Debtors' Ex. 248.)

(vi) Cash Management Functions Are Integrated

The Debtors operate a centralized cash management system which handles substantially all cash received [*32] by, and paid by, all of the Debtors. The Debtors' treasury department does not manage the enterprise's cash on a legal entity basis. Rather, it tracks to bank accounts. (Deposition of Mary Chastka at 15 hereafter "Chastka Dep.")

The Debtors have several hundred bank accounts. (Chasika Dep. at 16.) There is no correlation between legal entities and bank accounts. *(Id.* at 18.)

Customer payments generally are made to lockbox accounts. The lockbox accounts are swept on a daily basis and all funds therein are transferred to the Debtors single cash concentration account. (Chastka Dep. at 16-17, 22.)

The funds in the concentration account are then sent out to cover drafts on the Debtors' various disbursement accounts, which pay payroll expenses, vendor invoices, employee benefits and all other operational expenses of the enterprise. (Chastka Dep. at 22-23.)

Any surplus of cash in the concentration account is invested overnight in one of several money market accounts. (Chastka Dep. at 23.)

External sources of cash, such as bank borrowing, are deposited directly into the concentration account. (Chastka Dep. at 79-80.)

(vii) Actions During the Chapter 11 Cases

The Debtors [*33] and their major creditor constituencies, including the Creditors' Committee, appear to have recognized from the start of these Chapter 11 Cases that the ability to create separate legal entity financial statements, as well as the existence of substantial intercompany claims, were important issues in connection with evaluating the need for substantive consolidation of the estates. (9/15/03 Tr. at 217-19.)

The Creditors' Committee retained FTI Consulting Inc. ("FTI") as its forensic accountant and charged FTI with investigating intercompany accounts, among other things. (9/15/03 Tr. at 95-96.) The Debtors cooperated with this effort, providing documents, access to the company's accounting systems, and access to key accounting and financial personnel. (9/15/03 Tr. at 223-25.) FTI served as a fact-finder, sharing the results of its investigations with the Creditors' Committee, as well as the Debtors, in a series of reports. (Creditors' Committee's Exs. 2-4; 9/15/03 Tr. at 95, 224.)

In addition, the Debtors provided all major creditor constituencies with equal access to financial data, establishing a data room in their Washington, DC offices where documents and access to the Essbase financial [*34] system (described below) were available. (9/15/03 Tr. at 223-24.)

As a result of the substantial investigations that have taken place, the Debtors' historical accounting systems are well understood and there is an extensive record demonstrating the many historical deficiencies that make it impossible for the Debtors to prepare accurate and reliable separate legal entity financial statements on a historical basis.

(viii) The Debtors' Complex Accounting System

The Debtors' accounting systems are very complex and not well integrated. (9/15/03 Tr. at 30.) The Debtors

have multiple ledger systems, the largest of which is SAP (a general ledger system). There are two SAP systems - one for domestic operations and one for international operations. (9/15/03 Tr. at 30-31.) These two systems, however, did not effectively communicate. (9/15/03 Tr. at 102-03.)

In addition, some of the Debtors business units operate on a Lawson system, while still others operate on an Oracle system. (9/15/03 Tr. at 31.) These various systems are aggregated in a system referred to as Essbase which consolidates all of the financial data into one system. (9/15/03 Tr. at 31.)

There are multiple accounting [*35] systems that feed these general ledgers, including approximately sixty-five billing systems that feed the general ledger system through a variety of processes, both automated and manual. (9/15/03 Tr. at 31-32.)

There are also twenty-three accounts receivable systems that feed the billing systems. The accounts receivable systems also have hundreds of front-end systems (such as order entry, provisioning, call record tracking and rating). (9/15/03 Tr. at 32.) None of the accounts are reconciled to the general ledger. For example, the sixty-five billing systems and the twenty-three AR systems were never reconciled at the sub ledger. (9/15/03 Tr. at 45.)

There are approximately 20,000 general ledger accounts and sub accounts that are used to capture transactions for specific items such as service, general and administrative and balance sheets. (9/15/03 Tr. at 32.)

There is no specific accounting for legal entities in SAP; instead accounting is by company code. There are more than 1,100 company codes notwithstanding that there are only approximately 400 legal entities. (9/15/03 Tr. at 33.)

Debtors maintained their financial books on a general ledger company code basis, not on a legal [*36] entity basis. (9/15/03 Tr. at 99.) Each company code does not represent a separate legal entity as there are multiple company codes for each legal entity. In addition, there are company codes that do not represent legal entities. (9/15/03 Tr. at 33.) There exists no current accurate or complete map which ties these company codes to legal entities. (9/15/03 Tr. at 33.)

The ownership of assets, the receipt of revenues and the incurrence of expenses are accounted for in this complex accounting system. The Debtors, however, do not have records of the assets that are owned by each of the separate legal entities. (9/15/03 Tr. at 78-79.) The Debtors are unable to determine the ownership of the assets on a separate entity separate debtor basis. (9/15/03 Tr. at 138.)

(ix) Intercompany Accounting

Intercompany accounts are used to track transactions between related companies. There are approximately 1,400 intercompany accounts and various sub general ledger systems. The Debtors actively use approximately 300 to 320 of these accounts. (9/15/03 Tr. at 55.) Millions of transactions have flowed through these intercompany accounts and there are aggregate balances of approximately $ 1,000,000,000,000 [*37] (one trillion) in these accounts. (9/15/03 Tr. at 55.)

For the month of November 2002, there were over six hundred thousand transactions alone. This equates to over seven million transactions per year. (9/15/03 Tr. at 104.)

W-100 is an account counterparty in the SAP system. When the SAP system was interacting with another general ledger company code that did not have an SAP company code, the system would record the transaction in the W-100 account. The transaction in W-100 reflects the transaction that should be booked in another general ledger system, such as Lawson. (9/15/03 Tr. at 112-13.)

W-100 does not represent a distinct legal entity, and where such an account was listed as the counterparty it does not provide any relevant information concerning the actual identity of the counterparty. (9/15/03 Tr. at 113.)

The Debtors never checked to see that W-100 entries were actually made in the Lawson ledgers because such a control never existed. (9/15/03 Tr. at 114.)

As of March 12, 2003, FTI, was able to identify counterparties for only about two thirds of the $ l,000,000,000,000 or so of intercompany accounts. (9/15/03 Tr. at 114-15.)

From a consolidated standpoint, intercompany [*38] accounts should offset to zero in a properly functioning accounting system. The Debtors, however, never

systematically balanced their intercompany accounts and the accounts therefore have a significant net out-of-balance. (9/15/03 Tr. at 55-56.)

As a basic accounting principle, the total amount of intercompany payables should equal the total amount of intercompany receivables. However, as of the Commencement Date, the sum of the receivables and payables for all of the entities did not equal zero but was out of balance by approximately $ 233,000,000. (9/15/03 Tr. at 108.)

At the end of 2000, the intercompany accounts, on an consolidated basis, were out of balance by a receivable amount of approximately $ 115,000,000. By the end of 2001, that out-of-balance had flipped and the accounts were out of balance by a payable amount of about $ 175,000,000. And then in June of 2002, the out-of-balance had flipped again and the accounts were out of balance by a receivable of approximately $ 275,000,000. (9/15/03 Tr. at 56-57.)

These are net figures in which out-of-balances on the receivables side are offset against out-of-balances on the payables side. The actual aggregate out of balance is [*39] in the billions of dollars. (9/15/03 Tr. at 57-58.) Therefore, the intercompany account balances between legal entities cannot be accurately determined. (9/15/03 Tr. at 128.) Without internal controls in place, the likelihood of material errors occurring is significant. As a result, there is no way to rely on the systems to generate accurate legal entity information or accurate intercompany transactions information by legal entity. (9/15/03 Tr. at 130.)

Intercompany transactions were recorded without regard for the proper general ledger and the Debtors often failed to record significant entries in their intercompany accounts. (9/15/03 Tr. at 132-33.) For example, FTI found the following three large errors: (i) an entry for $ 4,300,000,000 where cash was improperly stated in a legal entity as well as an intercompany account; (ii) an error in excess of $ 8,000,000,000 involving transfer pricing entries; and (iii) an error in excess of $ 5,000,000,000 in which transfer pricing charges were incorrectly recorded as an intercompany liability. (9/15/03 Tr. at 132; Creditors' Committee's Ex. 36 at 12.) In addition, FTI also found that a billion dollar correcting entry was never made relating [*40] to intercompany transfer pricing and that interest was not charged on all intercompany accounts. (9/15/03 Tr. at 133; Creditors' Committee's Ex. 36 at 13.)

Without knowing the intercompany receivables and the intercompany payables, the Debtors cannot prepare accurate separate legal entity financial statements as of the bankruptcy filing. (9/15/03 Tr. at 135-36.) The Debtors cannot review the accuracy of each of the underlying intercompany transactions to determine if they were appropriately entered and charged to the correct legal entities because of a lack of documentation, lack of personnel with institutional knowledge and improper historic controls. (9/15/03 Tr. at 60.)

As the Debtors acquired entities, performed restructurings and consolidated their ledgers, the integrity of the intercompany accounts was impaired. (9/15/03 Tr. at 80-81.) While lack of information regarding intercompany accounts is not a significant issue on a consolidated basis, on a legal entity basis they could not simply be written-off because there has to be an intercompany payable and receivable attached to specific legal entities. (9/15/03 Tr. at 82-83.)

(x) The Debtors Are Unable to Create Accurate [*41] **or Reliable Historical Separate Legal Entity Financial Statements**

Accurate and reliable separate entity historical financial statements cannot be created and the data in the Debtors' financial system are an unreliable base from which to prepare accurate separate legal entity financial statements. (9/15/03 Tr. at 135-38, 140-42.)

All of the Debtors' current restatement efforts are focused on generating restated financials on a consolidated basis, not on an entity-by-entity basis. (9/15/03 Tr. at 35, 41.) Virtually the entire accounting staff of the Debtors has turned over since June 2002. Approximately 400 new professionals have been hired. (9/15/03 Tr. at 44.)

Debtors have established that it would not be possible to restate results for each legal entity because the Debtors did not manage their business by legal entity, there was never a review of financial statements by legal entity on a timely basis, there was a lack of controls or policies in place by legal entity, no intercompany reconciliations were performed and the work force was not trained on the importance of doing legal entity accounting. (9/15/03 Tr. at 36, 41.) Reconstruction of legal entity books and records is [*42] further impossible

due to the lack of documentation for some transactions and the loss of individuals with institutional knowledge. (9/15/03 Tr. at 60.)

(xi) Lack of Historic Internal Controls

KPMG conducted an exhaustive and detailed analysis of the Debtors' internal accounting controls in preparation of its audit of the Debtors' 2000, 2001 and 2002 restated consolidated financial statements. (9/15/03 Tr. at 40-41; Debtors' Ex. 195.)

As a result of that analysis KPMG identified ten "material weaknesses" in the Debtors' internal financial controls and operations which it formalized in its June 3, 2003 letter to management and which was filed by the Debtors as part of a Form 8-K on or about June 9, 2003:

> 1.1 **The Company needs to increase the experience and depth of its financial management and accounting personnel.** The Company has several key financial management and numerous other accounting positions that remain vacant. These positions are critical to record, process, summarize and report financial data consistent with assertions of management in the financial statements and internal management reports.
>
> 1.2 **The Company needs to implement procedures** [*43] **and controls to review, monitor and maintain general ledger accounts.** Significant efforts will be required to implement procedures and controls to ensure the maintenance and integrity of the general ledger. All general ledger accounts should be assigned to individuals who would be responsible for documenting the composition of ending balances and for determining that activity in those accounts is appropriate. Those individuals would also be responsible for reconciling account balances to underlying ledgers.
>
> 1.3 **The Company must implement procedures to ensure that reconciliations between subsidiary ledgers and the general ledger are performed.** During our review of a substantial number of general ledger accounts, including accounts receivable, various liability accounts and property, plant and equipment, we noted that the Company has not historically consistently reconciled the subsidiary ledgers to the general ledger. We also noted that the Company has not consistently reconciled numerous cash accounts.
>
> 1.4 **The Company's consolidation process is highly automated and extremely complex.** We have found that the process is largely undocumented, and only a few individuals [*44] have a limited understanding of only certain parts of the process.
>
> 1.5 **Significant improvement needs to be made in segregation of duties, responsibilities and management review controls.** We noted certain accounting personnel have had the ability and responsibility to post and reconcile accounts under their control without an independent review. This lack of segregation of duties allowed accounting personnel to manipulate financial information that went undetected. Additionally, procedures need to be implemented to ensure that management personnel with appropriate knowledge and understanding review reconciliations and other financial information.
>
> 1.6 **Policies, procedures and standardization of internal controls need to be implemented.** There is a severe lack of policies, procedures and standardization of operating and financial controls and a general lack of documentation related to existing controls. These basic control weaknesses allowed journal entries to be posted without adequate support and documentation. Management should develop Company-wide standards of internal control to document its commitment to compliance with applicable laws and

regulations, reliable [*45] operational and financial reporting and integrity of business activities and records. Good internal controls are fundamental to the Company achieving its key initiatives and goals. Such Company-wide standards of internal control should be applicable to all subsidiaries, units, groups and departments worldwide. The standards generally should reflect control objectives and not attempt to describe specific procedures required in each business.

1.7 **The Company's operating management must be provided with appropriate financial information and appropriate procedures must be in place such that operating management is confident that financial information being used to manage their businesses is ultimately included in the Company's externally reported financial information.** In the past, the Company's process for management reporting and review limited operating management's access to financial information. This was particularly noted in revenue, line costs and property, plant and equipment. Through well defined management reporting supported by strong budget to actual analysis, together with confidence in the financial reporting process, operating management can be assured that externally [*46] reported results are consistent with actual operating results.

1.8 **Review, monitoring and oversight of the global business units needs to be increased.**

1.9 **Sufficient analysis and documentation of non-routine transactions needs to occur.** Examples of non-routine transactions are derivatives and Indefeasible Rights of Use (IRUs). In a number of cases we noted that non-routine transactions were not identified or otherwise brought to the attention of and reviewed by accounting personnel with the appropriate level of expertise to properly analyze and account for these transactions. In addition, in some cases inappropriate accounting decisions were reached such as in the accounting for Avantel, Embratel and certain capitalized costs. We are also informed that management had not performed an impairment analysis of its long-lived assets nor could we find documentation as to where impairment was considered or analysis performed.

1.10 The items identified in Section 4 *Accounting Matters* require the attention of appropriate levels of financial management and must be addressed in the Company's preparation of its restated financial statements.

(Debtors' [*47] Ex. 195.)

KPMG identified specific areas of concern under each of these broad topics which relate to the inability of the Debtors to generate accurate and reliable separate financial statements by legal entity. For example, KPMG found that:

1.3.1 Reconciliations throughout the revenue generating process were not performed, documented or analyzed in a timely manner to ensure that the accounting records are complete and accurate.

1.3.3 A formal process had not been established to ensure that cash transfers between accounts receivable platforms were properly reconciled in both the accounts receivable subledgers and the general ledger.

1.3.12 The unapplied cash account was inappropriately used to record unreconciled differences between accounts receivable platforms and the general ledger regardless of the nature of the differences. Policies and procedures to monitor and reconcile the unapplied cash general ledger account to accounts receivable platforms and subsidiary

ledgers should be developed and implemented.

1.4.2 Organizational and account structures in the general ledger system (SAP) do not match the structural configuration of the consolidation tool (Essbase). [*48] Therefore, SAP and Essbase do not necessarily match the Company's operational legal structure as old and non-operating or non-consolidating companies still exist in SAP and Essbase.

1.4.3 The legal entity structure documented by the Company does not currently match the operational legal structure within SAP and Essbase.

1.4.4 The Company does not appear to have established or documented policies and procedures to ensure the proper recording of elimination journal entries.

In addition to KPMG's findings, in its Report of Investigation dated March 31, 2003, the Special Investigative Committee of the Board of Directors of WorldCom, Inc. found that many of the accounting records were in disarray or non-existent and that Arthur Andersen, the Debtors' predecessor auditors, did not perform any testing to justify reliance on WorldCom's internal controls. (Debtors' Ex. 267, at 26.)

(xii) Remediation of Internal Controls and Accounting Restatement

The Debtors have established teams and developed plans to remediate the internal control weaknesses identified by KPMG on a going-forward basis and have retained a significant team of professionals from Deloitte & Touche [*49] to conduct a complete assessment of the Debtors' internal control environment, remediate the internal control weaknesses identified in the KPMG letter, and develop remediation plans for any other weaknesses that may be discovered. (9/15/03 Tr. at 52.)

Developing appropriate controls on a going-forward basis, however, will not enable the Debtors to recreate accurate and reliable separate legal entity financial statements on a historical basis for each of the Debtors. (9/15/03 Tr. at 53.) The Debtors do, however, intend to produce reliable, restated financial results on a consolidated basis for the 2000 through 2002 time period and have devoted significant resources toward that end. (9/15/03 Tr. at 38-40.) The Debtors have made substantial progress on the restatement project. Most of the project teams have detailed action plans and are very close to completing their tasks. (9/15/03 Tr. at 61.) KPMG has been auditing each area of the restatement as it has been concluded. (9/15/03 Tr. at 38, 61.)

(xiii) Benefits of Substantive Consolidation

In addition to the fact that the Debtors simply are not able to produce accurate and reliable separate legal entity financial statements [*50] on a historical basis, substantive consolidation provides significant benefits to the creditor constituency as a whole.

WorldCom operates in a highly competitive industry. (9/15/03 Tr. at 215-16.) There was substantial consensus among major creditor constituencies that a speedy emergence from chapter 11 was in the best interest of the Debtors and all creditors, a view shared by the Debtor's senior management and professionals. (9/15/03 Tr. at 215-16, 242, 249.)

Absent substantive consolidation, there likely 'would be massive intercreditor litigation regarding the validity and enforceability of intercompany claims, as well as litigation under chapter 5 of the Bankruptcy Code regarding intercompany payments and transfers of billion of dollars in assets that occurred in the various restructuring transactions. (9/15/03 Tr. at 225, 254-46.) The costs attendant to litigation of these intercreditor disputes, both in terms of out of pocket transactional costs and the diminution of enterprise value that likely would result from a prolonged stay in chapter 11, would have a material adverse effect on all creditor recoveries and the chances of a successful reorganization. (Transcript of Hearing [*51] held on September 16, 2003 ("9/16/03 Tr.") at 74-87.)

C. THE SETTLEMENTS

The Plan incorporates and provides for three compromises and settlements (the "Settlements") under *Rule 9019 of the Federal Rules of Bankruptcy Procedure* (the "Bankruptcy Rule(s)") referred to as The Intermedia Settlement, The Bank Settlement and The MCIC Settlement:

. Intermedia Settlement. This settlement resolves all issues relating to (a) the validity, enforceability and priority of the Intermedia Intercompany Note (as defined below), including certain claims and causes of action that WorldCom, Inc. may have to avoid the Intermedia Intercompany Note as a fraudulent transfer or to recover payments of principal and interest thereon as preferential transfers and (b) the transfer of certain assets of Intermedia to the WorldCom Debtors (the "Intermedia Settlement"). (9/16/03 Tr. at 8 1-87; Plan § 5.06; Disclosure Statement at 41-49.) Under the Intermedia Settlement, WorldCom, Inc. will transfer $ 1,029,000,000 in value, [8] in the form of notes and stock (the "Intermedia Settlement Consideration"), to Intermedia in complete satisfaction of any claims related [*52] to the Intermedia Intercompany Note. (9/16/03 Tr. at 82; Notice of Amendment to Debtors' Second Amended Plan of Reorganization, Docket No. 9004.) Pursuant to the Plan, the Intermedia Settlement Consideration will be distributed to holders of Intermedia Senior Debt Claims (for an estimated recovery of 93.5%), and Intermedia Subordinated Debt Claims (for an estimated recovery of 46.4%). (Disclosure Statement at 43; Plan §§ 4.11-4.15; Notice of Amendments to Debtors' Second Amended Plan of Reorganization, Docket No. 9004.) In addition, the WorldCom Debtors will fund the distributions under the Plan to holders of allowed Intermedia General Unsecured Claims (for an estimated recovery of 83.2%). (9/16/03 Tr. at 90, 96.)

. Bank Settlement. This is a settlement with the Ad Hoc Bank Committee of all issues relating to (i) the claims of twenty-five institutional lenders [9] (the "Banks") arising under (a) the $ 2.65 billion 364-day revolving credit facility dated as of June 8, 2001 (the "364-Day Facility"), between WorldCom, Inc., as borrower, and the Banks, as lenders and (b) the $ 1.6 billion revolving credit facility (the "Revolving Credit Facility"), dated as of June 8, 2001, between [*53] WorldCom, Inc., as borrower and certain of the Banks, as lenders and (ii) any and all causes of action that the Banks have against the Debtors, the Reorganized Debtors, or any of their respective current or former officers or directors relating to or arising from the 364-Day Facility and the Revolving Credit Facility, including without limitation, the Constructive Trust Action and the Maryland Action (as defined below) (the "Bank Settlement"). Pursuant to the Bank Settlement, under the Plan, the Banks (whose claims are classified in Class 3A) will receive a pro rata share of New Notes of the reorganized Debtors in the aggregate principal amount of $ 75,000,000. Distribution of the New Notes pursuant to the Bank Settlement is contingent upon the Banks dismissing the Constructive Trust Action and obtaining from the Banks party to the Maryland Action (the "MD Banks") a dismissal with prejudice of the Maryland Action. [10]

. MCIC Settlement. This is a settlement with the Ad Hoc Committee of MCIC Noteholders of all issues relating to the defenses of the holders of Senior MCIC Notes to the substantive consolidation of the WorldCom Debtors (the "MCIC Settlement"). Pursuant to the [*54] MCIC Settlement, the holders of MCIC Senior Debt Claims will receive a recovery under the Plan on the principal amount of their outstanding claims equal to 80 cents on the dollar, (9/15/03 Tr. at 2 16-27; Plan § 5.06(c)), which recovery is reduced to 79.2% after giving effect to additional proposed settlements reached in these cases. (Second Amended Plan, Docket No. 8900.)

(9/15/03 Tr. at 213-15; Disclosure Statement, at 41-49; Supplement to Disclosure Statement, at 1-4.)

8 On September 15, 2003, the Debtors

announced that, based upon negotiations among representatives of the Intermedia Preferred Stock Interests, the Creditors' Committee and the Debtors, an additional $ 29 million in cash would be transferred to Intermedia to provide a 5 percent recovery to holders of Intermedia Preferred Stock Interests. As a result, the objection filed by OZ Management, L.L.C. and OZF Management L.P. (together, "Och-Ziff') - a holder of Intermedia Preferred Interests - was withdrawn.

9 The institutional lenders include ABN Amro Bank, N.V., Allfirst Bank, Arab Bank PLC, Banca de Roma S.P.A., Banco Bilbao Vizcaya Argentaria, S.A., The Bank of Nova Scotia, The Bank of Tokyo-Mitsubishi, Ltd., New York Branch, Bank One, NA, Bayerische Landesbank, New York Branch, BNP Paribas, Deutsche Bank AG, New York Branch, Fleet National Bank, Fortis Capital Corp., The Governor & Company of the Bank of Scotland, Lloyds TSB Bank PLC, Mizuho Corporate Bank, Ltd., Norddeutsche Landesbank Girozentrale, New York Branch, The Royal Bank of Scotland PLC, New York Branch, UFJ Bank Limited, New York Branch, Wells Fargo Bank, National Association, Westdeutsche Landesbank Girozentrale, New York Branch and Westpac Banking Corporation.

[*55]

10 The Banks have agreed to pay to the MD Banks approximately $ 15 million in order to obtain the dismissal of the Maryland Action. First Supplement at 2.

The Settlements embodied in the Plan reflect the culmination of extensive, good faith arm's length negotiations with the Covered Parties, the major economic parties in interest, and are based upon analyses of the issues undertaken by the Debtors' and the Creditors' Committee's professionals and analysts, and by the professionals for other parties in interest. (9/15/03 Tr., testimony of Frank Savage.)

(i) The Intermeda Settlement

On July 1, 2001, WorldCom, Inc. consummated the acquisition (the "Intermedia Merger") of Intermedia Communications, Inc. ("Intermedia"). *(See* Debtors' Exs. 304-06.) WorldCom, Inc. acquired Intermedia for approximately $ 12 billion in value, including cash, a note, stock and the assumption of long-term debt, pursuant to the merger of a wholly-owned subsidiary of WorldCom, Inc. with and into Intermedia. *(See* Debtors' Exs. 304-06 and 318.)

In connection with the Intermedia Merger, stockholders [*56] of Intermedia received one share of WorldCom group stock (57.1 million WorldCom group shares in the aggregate) and 1/25th of a share of MCI group stock (or 2.3 million MCI group shares in the aggregate) for each share of Intermedia common stock they owned. Holders of Intermedia preferred stock, other than Intermedia's 13.5% Series B Redeemable Exchangeable Preferred Stock due 2009, received in exchange for their Series B securities one share of a class or series of WorldCom, Inc. preferred stock, having terms substantially identical to the exchanged Series B securities. *(See* Debtors' Exs. 304-06 and 318.)

To consummate the Intermedia Merger, WorldCom, Inc. created and capitalized Wildcat Acquisition Corp. ("Wildcat"), a wholly-owned subsidiary of WorldCom, Inc. Specifically, WorldCom, Inc. issued to WildCat a note, due June 15, 2009 in the aggregate principal amount of $ 7,074,929,250, bearing interest at the rate of 7.69% per annum, payable semiannually (the "Intermedia Intercompany Note") and paid to Wildcat $ 70,750 in cash in exchange for shares of Wildcat Junior Preferred Stock, par value $ 1.00 per share, having an aggregate liquidation preference of $ 7,075,000,000. Pursuant [*57] to the merger agreement, Wildcat was then merged with and into Intermedia, resulting in (i) the shares of Wildcat Junior Preferred Stock becoming shares of Intermedia Junior Preferred Stock and (ii) the transfer of the cash and Intermedia Intercompany Note to Intermedia. *(See* Debtors' Exs. 304-06 and 309.)

The issuance and transfer of the Intermedia Intercompany Note enabled Intermedia to remain in compliance with the indenture covenants contained in its outstanding bond debt, including certain capitalization requirements (Creditors' Committee's Ex. 4.)

Following the Intermedia Merger and until the Commencement Date, WorldCom, Inc. recorded up to $ 1,390,000,000 in prepayments on the Intermedia Intercompany Note and Intermedia recorded approximately $ 434,592,000 in interest payments. (Transcript of hearing held on September 16, 2003 ("9/16/03 Tr.") at 75-77; Creditors' Committee's Ex. 4.) These payments were allocated to various debt redemptions of Intermedia and for general corporate

purposes, including funding of the Digex, Inc. business plan. Most of these payments were made in installments within the one year preceding the Commencement Date. (Creditors' Committee's Ex. 4.)

[*58] As of the Commencement Date, approximately $ 5.6 billion was outstanding under the Intermedia Intercompany Note. (Creditors' Committee's Ex. 4; 9/16/03 Tr. at 81.) During the Chapter 11 Cases, the Debtors reviewed the Intermedia Intercompany Note, the circumstances under which it arose, and the prepetition payments recorded. Based upon this review, the Debtors determined that WorldCom, Inc. may be able to assert fraudulent conveyance or preference theories to void the Intermedia Intercompany Note, recover the prepetition payments, or reduce the amounts owed by WorldCom, Inc. to Intermedia thereunder. (9/16/03 Tr. at 81, 87.)

When the Debtors shared their views with the interested constituents, the Ad Hoc Committee of WorldCom Noteholders supported the Debtors' arguments. Certain significant Intermedia investors - the Ad Hoc Committee of Intermedia Noteholders and the Matlin Patterson Investors - disputed these contentions as well as the amount of the prepayments by WorldCom, Inc., whether the prepayments in fact were made, and if made, the purposes for which they were used. (9/16/03 Tr. at 84-86.)

The Intermedia Intercompany Note is an asset of the Intermedia estate. The validity [*59] and enforceability of the Intermedia Intercompany Note would greatly impact the recovery to Intermedia creditors as the remaining assets of Intermedia do not have significant value. *(See* Ex. C to Disclosure Statement.)

Litigation of the issues surrounding the Intermedia Note - including fraudulent transfer and preference theories, would require complex factual and legal determinations of, among other things, solvency, valuation and the proper application of *section 502(d) of the Bankruptcy Code*, implicating extensive discovery, expert witness investigations, and a lengthy multi-faceted trial, with a risk for the Debtors of a potential for a loss on all issues. (9/16/03 Tr. at 74-87.)

Although the Debtors' restated consolidated balance sheets for year-end 2001 show that the WorldCom Debtors were insolvent based on book values calculated on a GAAP basis, given the ongoing financial restatement process, the Debtors did not during the Chapter 11 Cases, and were not in a position to, undertake a traditional fraudulent transfer solvency analysis or even determine solvency on a book value basis with respect to WorldCom, Inc. as of July 1, 2001. (9/16/03 Tr. at 209-13.)

Although Intermedia's [*60] restated financial consolidated statements for year-end 2002 show that the Intermedia Debtors were insolvent on a consolidated basis based on book values calculated on a GAAP basis, they do not resolve the question of Intermedia's insolvency on the date of the Intermedia Merger. (9/16/03 Tr. at 213-15.)

In the absence of a consensual resolution of the Intermedia Intercompany Note issues, the Debtors' ability to propose a consensual chapter 11 plan would have been diminished significantly. Protracted litigation and the delay in the reorganization process would adversely affect asset values and the amounts available for distribution to all creditors. (9/16/03 Tr. at 74-87.)

The present benefits of settling these issues for an amount less than the full face amount of the Intermedia Intercompany Note far outweigh any benefit that may accrue from an extended and protracted litigation. By settling all issues surrounding the Intermedia Intercompany Note, the Debtors weighed their relative risks of litigation and the benefits of settling, including, but not limited to, their ability to emerge from chapter 11 quickly and the benefit to their chapter 11 estates. (9/16/03 Tr. at 86-92.)

The [*61] Debtors and the Creditors' Committee, with the assistance of their respective counsel and financial advisors, have carefully evaluated all aspects of the Intermedia Settlement (including exploration of alternatives to the settlement) and determined that the Intermedia Settlement is fair and reasonable. (9/16/03 Tr. at 89-91.)

The $ 1,029,000,000 to be distributed in satisfaction of the Intermedia Note is a fair compromise of the issues surrounding the Intermedia Intercompany Note. [11] It represents approximately one-half of the recovery that would have been realized by the Intermedia estate if the validity and enforceability of the Intermedia Intercompany Note were entirely upheld by a final judicial determination of the issues. (9/16/03 Tr. at 89.) Such an analysis does not even take into account

potential recoveries of alleged preferential transfers. (9/16/03 Tr. at 81, 82.)

> 11 The total consideration was increased by $ 29,000,000 as a consequence of the Intermedia Preferred Settlement.

The Intermedia [*62] Settlement is the result of extensive, good-faith arm's length negotiations among the Covered Parties over a period of forty. five to sixty days. (9/16/03 Tr. at 77-80, 87, 92.) Absent the Intermedia Settlement, it is likely that the Ad Hoc Committee of Intermedia Noteholders and the Intermedia Preferred Shareholders would oppose the Plan. Such a result would likely unduly delay confirmation of the Plan, and reduce recoveries to creditors.

Pursuant to the Objection to Confirmation of WorldCom's Plan of Reorganization, dated July 30, 2003, filed by Dr. Seymour Licht, as supplemented (the "Licht Objection"), Dr. Licht has interposed an objection to the Intermedia Settlement. Philip S. Braunstein joined in Dr. Licht's objection. Dr. Licht and Mr. Braunstein assert claims against WorldCom, Inc. (Licht Obj. at 1; Braunstein Obj. at 1.) Dr. Licht and Mr. Braunstein's claims are classified in Class 5 (WorldCom Senior Note Claims) under the Plan. Dr. Licht and Mr. Braunstein do not assert any claims against any Intermedia Debtors.

The Intermedia Settlement is supported by the Creditors' Committee. (Memorandum of Law of Creditors' Committee in Support of Confirmation, Docket No. 8648.) Class [*63] 5, which includes Dr. Licht's and Mr. Braunstein's WorldCom Senior Note Claims voted overwhelmingly in amount and number to accept the Plan. (Debtors' Ex. 302.)

(ii) The Bank Settlement

On May 16, 2002, WorldCom, Inc. drew on its revolving credit facility (the "Credit Facility") in advance of its expiration and converted the $ 2.65 billion borrowing into a term loan, thereby extending the repayment period to June 7, 2003. *(See* Debtors' Ex. 276 PP 39-51.) On June 25, 2002, the Company issued a press release stating that certain of its historical transactions were not made in accordance GAAP, requiring a restatement of its earnings. *(See* Debtors' Ex. 276 P 57.)

On July 12, 2002, the Banks commenced an action against WorldCom, Inc. in the Supreme Court for the State of New York, County of New York (the "Constrirtive Trust Action"), seeking damages of approximately $ 2,500,000,000. *(See* Debtors' Ex. 276.) The Constructive Trust Action relates to the 364-Day Facility, pursuant to which twenty-seven lenders (including the Banks) established the Credit Facility to enable WorldCom, Inc. to borrow, repay and reborrow monies up to a maximum amount outstanding [*64] of $ 2.65 billion. *(See* Debtors' Ex. 276 P 32.)

Each lender's obligation to lend its portion of the total amount of the Credit Facility was subject to WorldCom, Inc.'s making and abiding by certain terms, conditions, representations, warranties and covenants contained in the governing credit agreement and in compliance certificates and other documents to be provided by WorldCom, Inc. to the lenders pursuant to the credit agreement. *(See* Debtors' Ex. 276 P 33.)

The Banks alleged that WorldCom, Inc. procured funding under the Credit Facility based upon fraudulent representations concerning, *inter alia*, the accuracy of WorldCom, Inc.'s financial statements. Specifically, the Banks alleged that WorldCom, Inc. represented that its then-current financials were prepared in accordance with GAAP, and that on this basis, the Banks and the other lenders funded the Credit Facility. (Debtors' Ex. 276.)

The Banks' complaint in the Constructive Trust Action requested the imposition of a constructive trust over, and payment of damages equal to, the proceeds of the Credit Facility, that is, approximately $ 2,650,000,000. The Banks immediately sought a temporary [*65] restraining order, preventing WorldCom, Inc. from "transferring, using, concealing or otherwise dissipating" the approximately $ 2,650,000,000 drawn down by WorldCom, Inc. thereunder. *(See* Debtors' Ex. 276.)

The New York Supreme Court rejected the Banks' request for a temporary restraining order, stating that the Banks, as creditors, were not entitled to priority over other creditors, and expressing concern that the cash lent to WorldCom, Inc. under the Credit Facility may have been "commingled" with other cash proceeds. However, that court made no final determination. (Debtors' Ex. 278.)

The Constructive Trust Action was removed to the United States District Court for the Southern District of New York, after which the Debtors and the Banks entered

into a stipulation, which provided that the parties would not take any steps to prosecute or defend the Constructive Trust Action for a period of 70 days from July 18, 2002. In addition, WorldCom, Inc. agreed not to transfer or dissipate any stock of its subsidiaries, or any claims it may have against its subsidiaries for a period of 80 days from July 18, 2002. *(See* Debtors' Ex. 281.)

The Constructive Trust Action was thereafter [*66] stayed as a result of the commencement of WorldCom's chapter 11 case. *11 U.S.C. § 362(a)*. The Banks did not move this Court to modify the stay to proceed with the Constructive Trust Action. However, on August 7, 2002, certain Banks filed a Complaint in the Circuit Court for Montgomery County, Maryland (the "Maryland Action") against WorldCom, Inc.'s then Senior Vice President and Treasurer, seeking $ 2,150,000,000 in damages for alleged acts of negligence and negligent misrepresentation allegedly committed in her capacity as an officer of WorldCom, Inc. The Banks alleged that the truthfulness, accuracy, aid correctness of the representations made in connection with the draw-down of the Credit Facility were affirmed by the treasurer. The Debtors sought and received a stay of the Maryland Action from this Court. *(See* Debtors' Ex. 277.)

Beginning prior to April 19, 2003 and continuing extensively thereafter, the Debtors conducted negotiations with the Banks in an effort to settle the Constructive Trust Action and the Maryland Action, and to resolve all causes of action against the Debtors, or any of their respective current or former officers or directors [*67] relating to or arising from the 364-Day Facility and the Credit Facility, and the funding of any amounts thereunder. (9/15/03 Tr. at 227-31.)

The Banks contended that the lowest intermediate balance to which its trust could attach was between $ 150,000,000 and $ 250,000,000, while the Debtors asserted that a constructive trust would be denied. The agreement to resolve the Constructive Trust Action and the Maryland Action for $ 75 million in New Notes (an incremental recovery to the Banks of $ 48 million) was the result of a negotiation between those two positions. It represents less than half the amount the Banks would receive if they succeeded in the Constmctive Trust Action. (9/15/03 Tr. at 227-31.)

The distribution of New Notes pursuant to the Bank Settlement will reduce, dollar for dollar, the unsecured portion of the aggregate amount of any claims by the Banks. As a result, the Banks' overall recovery under the Plan is increased by approximately $ 48 million. (Plan §§ 1.12, 1.13, 4.04.) No party in interest objected to the Bank Settlement. [12]

12 Wells Fargo Bank has filed an objection to the Plan. The Debtors and Wells Fargo have stipulated to adjudicate that objection in the context of the claims objection process Wells Fargo, however, preserved its right to, and in fact did, object to Debtors' settlement with the Intermedia Preferred Shareholders.

[*68] The Bank Settlement is the result of extensive, good-faith arm's-length negotiations. (9/15/03 Tr. at 229-30.) Absent the Bank Settlement, the complexity, cost and delay of litigation to address the issues resolved by the Bank Settlement would be substantial. The Debtors and the Creditors' Committee, with the assistance of their respective counsel and financial advisors, have carefully evaluated all aspects of the Bank Settlement (including exploration of alternatives to the settlement) and determined that the Bank Settlement is fair and reasonable. (9/15/03 Tr. at 230-31.)

Absent the Bank Settlement, it is likely that the Banks would oppose the Plan. Such a result would likely unduly delay confirmation of the Plan and reduce recoveries to creditors.

(iii) The MCIC Settlement

In September 1998, WorldCom, Inc. completed a $ 40 billion acquisition of MCIC and its affiliates (collectively with MCIC, "MCI") pursuant to the merger of MCIC with and into a wholly-owned subsidiary of WorldCom, Inc. (Debtors' Exs. 235, 226.)

Several series of public notes issued by MCIC prior to the merger (the MCIC Senior Notes and the MCIC Subordinated Notes) were unaffected by the Merger. The MCIC [*69] Senior Notes represent MCIC Senior Debt Claims (Class 9 under the Plan) arising under the (i) senior debt indenture, dated October 15, 1989, between MCIC and the MCIC Senior Notes Indenture Trustee, which provided for the issuance of the 7-1/2% Senior Notes due August 20, 2004; 8-1/4% Senior Debentures dues January 20, 2023; 7-3/4% Senior Debentures due March 15, 2024; and 7-3/4% Senior Debentures due March 23, 2025 and (ii) the senior debt indenture, dated February 17, 1995, between MCIC and the MCIC Senior

Notes Indenture Trustee, which provided for the issuance of the 6.95% Senior Notes due August 15, 2006; 6-1/2% Senior Notes due April 15, 2010; and 7.125% Debentures due June 15, 2027. *(See* Plan §§ 1.64, 1.65.)

At the inception of the Debtors' Chapter 11 Cases, an informal committee of holders of MCIC Senior Notes (the "Ad Hoc Committee of MCIC Senior Noteholders") contended that the WorldCom Debtors should not be substantively consolidated with the MCI Debtors. (9/15/03 Tr. at 216-28.)

During the course of the cases, the Debtors determined that a settlement with the MCI Senior Noteholders was appropriate and of benefit to the estate in light of their particular arguments [*70] with respect to substantive consolidation and the Debtors' objective to achieve a consensus among major classes of creditors. The MCIC Settlement enabled the Debtors to propose a plan of reorganization supported by the Creditors' Committee and the representatives of 90% of the debt of the consolidated enterprise. (9/15/03 Tr. at 220-25.)

After extensive negotiation, the Debtors, the Creditors' Committee, the Ad Hoc Committee of WorldCom Noteholders, the Matlin Patterson Investors and the Ad Hoc Committee of MCIC Senior Noteholders agreed to the MCIC Settlement, pursuant to which holders of MCIC Senior Debt Claims would receive a recovery, in New Notes, of 80% of the principal amount of their debt. [13] (9/15/03 Tr. at 216-27.)

13 As a result of the subsequent settlement with the Ad Hoc MCI Trade Claims Committee, this recovery is reduced to 79.2%.

In agreeing to the settlement, the Debtors considered the effect of the contractual subordination provision contained in the governing indentures and the resulting [*71] "roll-up" to the holders of the MCIC Senior Debt Claims of any recovery that holders of MCIC Subordinated Debt Claims would receive. Analytically, the MCIC Settlement represented a distribution pursuant to the Plan to all MCIC bondholders (including the holders of MCIC Subordinated Debt Claims) of approximately 62 cents per dollar on account of their claims, with the holders of the MCIC Senior Debt Claims receiving the benefit of the distribution that would have been payable to the holders of the MCIC Subordinated Debt Claims, absent their indentures' governing subordination provisions. (Disclosure Statement at 47.) [14]

14 Since the initial settlement, the parties agreed to a recovery to holders of MCIC Subordinated Debt Claims of approximately 44%.

The holders of the MCIC Senior Debt Claims asserted that absent substantive consolidation, they were entitled to payment in full of their claims, including pre- and post-petition interest, equaling roughly 113% of their principal amount due. The Debtors and the [*72] Ad Hoc Committee of WorldCom Noteholders asserted that under a substantive consolidation plan, the MCIC Senior Debt Claims were only entitled to a 35% recovery. (Disclosure Statement at 47.)

The MCIC Settlement was the result of extensive, good faith arm's-length negotiations among the Covered Parties that took place over four or five months. (9/15/03 Tr. at 217, 221.) The MCIC Senior Debt Claims are an entire class under the Plan. (Plan § 4.10.) Absent the MCIC Settlement, the complexity, cost and delay of litigation to address the issues resolved by such settlement would be substantial.

The Debtors and the Creditors' Committee, with the assistance of their respective counsel and financial advisors, have carefully evaluated all aspects of the MCIC Settlement (including exploration of alternatives to the settlement) and determined that the MCIC Settlement is fair and reasonable. (9/15/03 Tr. at 223-26.) Absent the MCIC Settlement, there would not have been a consensual plan. The MCIC Senior Noteholders asserted that they would have rejected the Plan and would have opposed it. Such a result would have significantly complicated and delayed any confirmation hearing and potentially [*73] reduced recoveries to creditors.

D. *SECTION 1129* OF THE BANKRUPTCY CODE

(i) *1129(a)(1)*

The Debtors are the proponents of the Plan. (Debtors' Ex. 335.)

The reliance by creditors upon the creditworthiness of MCIC or any of its subsidiaries in extending credit to an MCIC entity prior to the Merger is distinct from the reliance by creditors upon the creditworthiness of the Debtors (including MCIC and its subsidiaries after the Merger) in extending credit to a Debtor following the Merger. The Plan separately classifies WorldCom General Unsecured Claims and MCI Pre- merger Claims

based upon the unique reliance and prejudice arguments that have been asserted by holders of MCI Pre-merger Claims that extended credit to an MCIC entity prior to the Merger. The Claims of the Ad Hoc MCI Trade Claims Committee Claims in Class 6B are separately classified solely for voting purposes and not for treatment purposes. Claims in Class 6B will receive the same treatment as Claims in Class 6.

The Debtors separately classified the MCIC Senior Debt Claims and MCIC Subordinated Debt Claims based upon the contractual subordination provisions in the MCIC Subordinated Notes Indenture.

Pursuant to [*74] the Plan, the subordination provisions in the MCIC Subordinated Notes Indenture will be cancelled on the Effective Date. The cancellation of the subordination provisions on the Effective Date is necessary to protect the holders of MCIC Subordinated Debt Claims from the risk that holders of MCIC Senior Debt Claims would seek to enforce subordination with respect to their recoveries under the Second Amended Plan.

Article II of the Plan provides for the treatment of Administrative Expense Claims and Priority Tax Claims, and Article III of the Plan designates Classes of Claims and Classes of Equity Interests.

Article III of the Plan specifies Class 1 and Class 3 as unimpaired and Classes 2, 3A, 4, 5,6, 6A, 6B, 7, 8,9, 10, 11, 12, 13, 14 and 15 as impaired.

Article IV of the Plan specifies the treatment of each impaired Class of Claims and Equity Interests.

The Plan provides the same treatment for each Claim or Equity Interest in a Class.

Pursuant to the July 9 Plan, each holder of an MCIC Senior Debt Claim was entitled to receive New Notes in an amount equal to .80 multiplied by the Allowed principal amount of such holder's MCIC Senior Debt Claim. (Debtors' Ex. 273.) Prior o its modification, [*75] holders of Class 9 MCIC Senior Debt Claims voted to accept the July 9 Plan. (Debtors' Ex. 302.) Pursuant to the Plan, each holder of an MCIC Senior Debt Claim is entitled to receive New Notes in an amount equal to .792 multiplied by the Allowed principal amount of such holder's MCIC Senior Debt Claim as a result of their contribution to the Ad Hoc MCI Trade Claims Committee (the "MCI Senior Contribution"). Such reduced recovery was subject to Class 9 having an opportunity to reconsider its prior vote. As set forth in the Sullivan Vote Certification, Class 9 voted overwhelmingly to accept the Plan and make the MCI Senior Contribution. It is, therefore, apparent that the MCI Senior Contribution is not coming from or diminishing the estate, but rather, is coming from and diminishing the previously accepted recovery of the holders of MCIC Senior Debt Claims.

Pursuant to the Plan, the Debtors cannot compel the holders of MCIC Subordinated Debt Claims to contribute any of their recovery to the Ad Hoc MCI Trade Claims Committee. Rather, the contribution by the holders of MCIC Subordinated Debt Claims to the Ad Hoc MCI Trade Claims Committee (the "MCI Subordinated Contribution," and together [*76] with the MCI Senior Contribution, the "Contributions") was expressly contingent upon the acceptance of the Plan byClass 10. (Debtors' Exs. 335, 339.) If Class 10 had voted to reject the Plan and the Debtors had crammed down the Plan on the holders of Class 10 Claims, no contribution from Class 10 would have been made or could have been compelled. Class 10 has overwhelmingly voted to accept to the Plan, and thus, to make the MCI Subordinated Contribution to the Ad Hoc MCI Trade Claims Committee. It is, therefore, apparent that the MCI Subordinated Contribution is not coming from or diminishing the estate, but rather, is coming from and diminishing the recovery of the holders of MCIC Subordinated Debt Claims.

If the Contributions were not made, the amounts represented thereby would not inure to the benefit of any WorldCom General Unsecured Claim, but rather would be paid under the Plan and remain available to the Classes contributing the respective amounts. The Contributions do not in any way implicate or diminish the recoveries of Classes 6, 6A and 6B creditors.

Absent the Contributions, the Ad Hoc MCI Trade Claims Committee could pursue its objection to the Plan. Although the Plan [*77] contains a condition to effectiveness that the Contributions be made, such condition can be waived.

The Plan provides adequate means for its implementation.

Section 9.03 of the Plan provides that the Certificates

of Incorporation and Bylaws for each of the Reorganized Debtors that are corporations shall prohibit the issuance of nonvoting equity securities.

Article IX of the Plan contains provisions with respect to the manner of selection of officers and directors of the Reorganized Debtors that are consistent with the interests of creditors, equity security holders, and public policy.

(ii) ***1129(a)(2)***

Pursuant to the Disclosure Statement Orders entered after due notice and hearings, the Court approved the Disclosure Statement, First Supplement, Second Supplement and Third Supplement pursuant to *section 1125 of the Bankruptcy Code* as containing "adequate information" of a kind and in sufficient detail to enable hypothetical, reasonable investors typical of the Debtors' creditors to make an informed judgment whether to accept or reject the Plan. On August 29, 2003 and October 10, 2003, the Vote Certifications were filed on behalf of the Debtors' Court-appointed voting and [*78] tabulation agent.

As set forth in the Vote Certifications, the Disclosure Statement and May 23 Plan, the First Supplement and July 9 Plan, the Second Supplement and the Third Supplement and the Plan, together with the additional solicitation materials approved by the Court in the Disclosure Statement Orders, were transmitted to each creditor that was entitled to vote, as well as to other parties in interest in this case. The Debtors did not solicit the acceptance or rejection of the Plan by any creditor prior to the transmission of the Disclosure Statement.

Creditors that were not entitled to vote to accept or reject the Plan and equity interest holders (who are deemed to reject the Plan) were provided with certain nonvoting materials approved by the Court in compliance with the Disclosure Statement Orders.

Because the Debtors have determined to pay holders of Allowed Secured Tax Claims in Class 2 in cash, in full, plus interest required under *section 506(b)*, Class 2 is unimpaired and Claims in Class 2 are conclusively presumed to have accepted the Plan.

Classes 3A, 4, 5, 9, 10, 11, 12 and 13 of the Plan are impaired and were entitled to vote to accept or reject the Plan. Classes [*79] 6 and 6A are impaired and are deemed to have voted to reject the Plan. Class 6B is impaired, however, because the members of the Ad Hoc MCI Trade Claims Committee has already agreed to support the Plan by virtue of a stipulation with the Debtors, among others, Class 6B is conclusively presumed to have voted to accept the Plan. (Docket No. 9132.)

The Debtors solicited acceptances or rejections of the Plan from the holders of all Allowed Claims in each Class of impaired claims that are to receive distributions under the Plan and that are otherwise not deemed to reject the Plan.[15] Classes 7, 8 and 15 of the Plan will not receive any distributions under the Plan, and therefore, Claims and Equity Interests in such Classes are deemed to have rejected the Plan. Class 14, which is impaired but will receive a distribution under the plan, is deemed to reject the Plan. The Plan has been accepted by creditors holding in excess of two-thirds in amount and one half in number of the Allowed Claims voted in each of Classes 3A, 4, 5, 9, 10, 11, 12 and 13 of the Plan.

15 n15 Prior to the Court's October 20 Ruling requiring the separate classification of the various Class 6 groups, the former Class [*80] 6 was solicited as an impaired class and voted to accept the Plan.

(iii) ***1129(a)(3)***

On June 13, 2003, the Ad Hoc MCI Trade Claims Committee filed a notice of appeal from the Order, dated June 4, 2003, Authorizing the Debtors to Assume as Amended Certain Executory Contracts with Electronic Data Systems Corporation and EDS Information Services LLC (the "EDS Appeal"). (Docket No. 6524.) On July 31, 2003, the Ad Hoc Committee of Dissenting Bondholders filed an objection to the July 9 Plan and a memorandum of law in support thereof (together, the "Dissenting Bondholder Objection"). (Docket Nos. 7938, 7939.) On August 4, 2003, the Ad Hoc MCI Trade Claims Committee filed an objection to the July 9 Plan (the "Trade Claims Committee Objection"). (Docket No. 8033.) The issues raised in the Dissenting Bondholder Objection and the Trade Claims Committee Objection were vigorously disputed by the Debtors. (Docket No. 8650.)

On August 18, 2003, the Ad Hoc Committee of Dissenting Bondholders and the Ad Hoc MCI Trade Claims Committee each filed a notice of appeal from the

Order of the Court, dated August 6, 2003, Approving the Settlement with the Securities and Exchange Commission. (Docket [*81] Nos. 8305, 8287.) On September 5, 2003, HSBC Bank USA ("HSBC"), the indenture trustee under the MCIC Subordinated Notes Indenture, also filed a Notice of Appeal from the Final Judgment of the United States District Court for the Southern District of New York approving the settlement with the Securities and Exchange Commission (collectively, the "SEC Appeals," and together with the EDS Appeal, the "Appeals").

Prior to the September 8, 2003 Confirmation Hearing, Platinum, Deutsche, and certain other objectors (collectively, the "Pre-merger Objectors") filed objections to the July 9 Plan asserting that they were pre-Merger creditors whose reliance arguments deserved recognition on a basis similar to the MCIC Senior Debt Claims. Prior to the Confirmation Hearing, the Debtors and, among other parties, the Ad Hoc Committee of Dissenting Bondholders, the Ad Hoc MCI Trade Claims Committee and the Pre-merger Objectors engaged in substantial discovery in preparation for such hearing.

The Confirmation Hearing commenced on September 8, 2003 at which time the Court was informed that the Debtors, the Committee, the Ad Hoc Committee of Dissenting Bondholders and the Ad Hoc MCI Trade Claims Committee [*82] had been engaged in negotiations and that an opportunity for further discussions could enable the parties to resolve the issues raised in the Dissenting Bondholder Objection and the Trade Claims Committee Objection. (Confirmation Hearing Transcript ("Tr.") at 40 (Sept. 8).) Based upon these representations, the Court adjourned the remainder of the day's hearing to allow the parties to continue negotiations. (9/8/03 Tr. at 41.)

On September 9, 2003, the Court was informed that, following extensive arm's length, good faith negotiations, agreements had been reached with the Ad Hoc Committee of Dissenting Bondholders and the Ad Hoc MCI Trade Claims Committee. The Debtors also announced resolutions with the Pre-merger Objectors on September 9 and 12, 2003. Pursuant to such agreements, (i) the Debtors would further amend the July 9 Plan to embody the Integrated Settlement (as defined in the Debtors' Memorandum Of Law In Support Of Confirmation Of Debtors' Second Amended Joint Plan Of Reorganization Under Chapter 11 Of The Barkruptcy Code, Dated September 12, 2003 And In Response To Certain Objections Thereto, dated October 13, 2003), (ii) stipulations with the Ad Hoc Committee of Dissenting [*83] Bondholders and Ad Hoc MCI Trade Claims Committee would be entered into by the Debtors, the Committee, and other creditor representatives, and (iii) the Ad Hoc Committee of Dissenting Bondholders and Ad Hoc MCI Trade Claims Committee would withdraw their objections. In addition, (i) the Ad Hoc Committee of Dissenting Bondholders, the Ad Hoc MCI Trade Claims Committee, and HSBC would abate their respective SEC Appeals and (ii) the Ad Hoc MCI Trade Claims Committee would abate the EDS Appeal. (Debtors' Exs. 339, 340.)

The Debtors' prompt emergence from chapter 11 is crucial to the continuing viability of the Debtors' businesses. The modifications to the July 9 Plan eliminate significant litigation surrounding confirmation and eliminate the Appeals, paving the way for the Debtors' expeditious emergence from chapter 11. The agreements embodied in the Plan are effectuated by modifications to the July 9 Plan. The Contributions to the Ad Hoc MCI Trade Claims Committee are outside the scope of the administration of the estates.

The Plan is the product of extensive, arm's-length negotiations among the Debtors, the Committee and significant creditor constituencies in an effort to obtain a [*84] resolution of the issues in these cases and enable the Debtors to formulate and propose a plan of reorganization that would provide the most value to the Debtors' creditors. (9/15/03 Tr. at 2 14-58.) The provisions of the Plan were derived based upon analyses of the issues undertaken by the Debtors' and the Committee's professionals and analysts, and by the professionals for other parties in interest. (9/15/03 Tr. testimony of Frank Savage.) The Covered Parties have acted in good faith within the meaning of *section 1125(e) of the Bankruptcy Code.*

The inclusion of the Exculpation Provision and the Obligation to Defend Provision in the Plan was an essential element of the Plan formulation process and negotiations with respect to each of the settlements contained in the Plan. (Docket Nos. 9409, Declaration of Mark A. Neporent ("Neporent Decl.") P 5.) The settlements, in turn, are key components of the nearly fully consensual Plan. (Docket No. 9409, Neporent Decl. P 5.) The inclusion of the Exculpation Provision and the

Obligation to Defend Provision in the Plan were vital to the successful negotiation of the terms of the Plan in that without such provisions, the Covered Parties would [*85] have been less likely to negotiate the terms of the settlements and the Plan. (Docket No. 9409, Neporent Decl. P 5.)

Each of the Covered Parties bargained for its respective inclusion in the Exculpation Provision and the Obligation to Defend Provision as part of the various compromises that form the basis of the Plan. (Docket No. 9409, Neporent Decl. P 5.) The Covered Parties relied upon the benefits proposed to be provided in the Exculpation Provision and the Obligation to Defend Provision in deciding to support the Plan. (Docket No. 9409, Neporent Decl. P 5.)

The Debtors do not believe that the Obligation to Defend provision creates material liability or adversely impacts their "fresh start." Entering into the Obligation to Defend provision is a reasonable exercise of the Debtors' business judgment.

(iv) ***1129(a)(4)***

All payments made or to be made by the Debtors, or by a person issuing securities or acquiring property under the Plan, for services or for costs and expenses in or in connection with the Chapter 11 Cases, or in connection with the Plan and incident to the Chapter 11 Cases, have been approved by, or are subject to the approval of the Court as reasonable.

[*86] **(v)** ***1129(a)(5)***

On August 29, 2003 the Debtors disclosed that Michael D. Capellas, Dennis R. Beresford, W. Grant Gregory, Judith Haberkorn, Laurence Harris, Eric Holder, Nicholas deB. Katzenbach, David Matlin and C.B. Rogers, Jr. will comprise the initial Board of Directors of Reorganized WorldCom. The Debtors, in consultation with the Committee, will add up to three additional directors to the Board of Directors of Reorganized WorldCom prior to the Effective Date. The Debtors also disclosed the affiliations of each of the foregoing members of the initial Board of Directors of Reorganized WorldCom. (Debtors' Ex. 303.)

On September 5, 2003, the Debtors disclosed that Robert Blakely and Richard R. Roscitt will comprise the initial Board of Directors of each of the other Reorganized Debtors. The Debtors also disclosed the affiliations of each of the foregoing members of the initial Boards of Directors of each of the other Reorganized Debtors. (Docket No. 8650.)

(vi) ***1129(a)(6)***

The Plan does not provide for rate changes by any of the Reorganized Debtors.

(vii) ***1129(a)(7)***

In a hypothetical liquidation of the WorldCom Debtors under chapter 7 of the Bankruptcy [*87] Code, the estimated liquidation proceeds realized would approximate $ 6.5 billion. (9/15/03 Tr. at 202; Debtors' Ex. 333.) In that case, general unsecured creditors of the WorldCom Debtors would receive no recovery on account of their Claims and holders of administrative and priority claims would receive approximately a 92 percent recovery on account of their Claims.(9/15/03 Tr. at 203.)

In a hypothetical liquidation of the Intermedia Debtors under chapter 7 of the Bankruptcy Code, the estimated liquidation proceeds realized would approximate $ 140 million. (9/15/03 Tr. at 203; Debtors Ex. 333.) In that case, general unsecured creditors of the Intermedia Debtors would receive no recovery on account of their Claims and holders of administrative and priority claims would receive approximately a 48.5 percent recovery on account of their Claims. (9/15/03 Tr. at 203.)

In light of the factors established by the Debtors as to substantive consolidation of the WorldCom Debtors and the Intermedia Debtors, the Debtors are not able to provide a separate liquidation analysis for each Debtor.

(viii) ***1129(a)(8)***

The Plan has been accepted by creditors holding in excess of two-thirds [*88] in amount and one-half in number of the Allowed Claims in Classes 3A, 4, 5, 9, 10, 11, 12, and 13 of the Plan. (Debtors' Ex. 338.)

Of the $ 1,714,120,000 in dollar amount of Ballots received from holders of Bank Settlement Claims eligible to vote in Class 3A, $ 1,614,120,000 in dollar amount of Ballots were cast to accept the Plan, representing acceptance of the Plan by 94.17% in dollar amount of Bank Settlement Claims voting. Of the 16 Ballots received from holders of Bank Settlement Claims eligible

to vote in Class 3A, 15 Ballots were cast to accept the Plan, representing acceptance of the Plan by 93.75% in number of Bank Settlement Claims voting. (Debtors' Ex. 338.)

Of the $ 24,565,091.14 in dollar amount of Ballots received from holders of Convenience Claims eligible to vote in Class 4, $ 19,301,067.08 in dollar amount of Ballots were cast to accept the Plan, representing acceptance of the Plan by 78.57% in dollar amount of Convenience Claims voting. Of the 3,413 Ballots received from holders of Convenience Claims eligible to vote in Class 4, 2,748 Ballots were cast to accept the Plan, representing acceptance of the Plan by 80.52% in number of Convenience Claims voting. (Debtors' [*89] Ex. 338.)

Of the $ 18,604,112,613.76 in dollar amount of Ballots received from holders of WorldCom Senior Debt Claims eligible to vote in Class 5, $ 18,422,495,649.56 in dollar amount of Ballots were cast to accept the Plan, representing acceptance of the Plan by 99.02% in dollar amount of WorldCom Senior Debt Claims voting. Of the 9,589 Ballots received from holders of WorldCom Senior Debt Claims eligible to vote in Class 5, 9,023 Ballots were cast to accept the Plan, representing acceptance of the Plan by 94.10% in number of WorldCom Senior Debt Claims voting. (Debtors' Ex. 338.)

Of the $ 1,709,080,191 in dollar amount of Ballots received from holders of MCIC Senior Debt Claims eligible to vote in Class 9, $ 1,681,044,191 in dollar amount of Ballots were cast to accept the Plan, representing acceptance of the Plan by 98.36% in dollar amount of MCIC Senior Debt Claims voting. Of the 2,017 Ballots received from holders of MCIC Senior Debt Claims eligible to vote in Class 9, 1,914 Ballots were cast to accept the Plan, representing acceptance of the Plan by 94.89% in number of MCIC Senior Debt Claims voting. (Debtors' Ex. 338.)

Of the $ 398,294,100 in dollar amount of Ballots received [*90] from holders of MCIC Subordinated Debt Claims eligible to vote in Class 10, $ 395,877,925 in dollar amount of Ballots were cast to accept the Plan, representing acceptance of the Plan by 99.39% in dollar amount of MCIC Subordinated Debt Claims voting. Of the 5,065 Ballots received from holders of MCIC Subordinated Debt Claims eligible to vote in Class 10, 4,900 Ballots were cast to accept the Plan, representing acceptance of the Plan by 96.74% in number of MCIC Subordinated Debt Claims voting. (Debtors' Ex. 338.)

Of the $ 602,307,815 in dollar amount of Ballots received from holders of Intermedia Senior Debt Claims eligible to vote in Class 11, $ 599,297,815 in dollar amount of Ballots were cast to accept the Plan, representing acceptance of the Plan by 99.50% in dollar amount of Intermedia Senior Debt Claims voting. Of the 368 Ballots received from holders of Intermedia Senior Debt Claims eligible to vote in Class 11, 366 Ballots were cast to accept the Plan, representing acceptance of the Plan by 99.46% in number of Intermedia Senior Debt Claims voting. (Debtors' Ex. 338.)

Of the $ 24,438,900.82 in dollar amount of Ballots received from holders of Intermedia General Unsecured Claims [*91] eligible to vote in Class 12, $ 24,397,826.26 in dollar amount of Ballots were cast to accept the Plan, representing acceptance of the Plan by 99.83% in dollar amount of Intermedia General Unsecured Claims voting. Of the 20 Ballots received from holders of Intermedia General Unsecured Claims eligible to vote in Class 12, 19 Ballots were cast to accept the Plan, representing acceptance of the Plan by 95.00% in number of Intermedia General Unsecured Claims voting. (Debtors' Ex. 338.)

Of the $ 164,300,000 in dollar amount of Ballots received from holders of Intermedia Subordinated Debt Claims eligible to vote in Class 13, $ 164,300,000 in dollar amount of Ballots were cast to accept the Plan, representing acceptance of the Plan by 100% in dollar amount of Intermedia Subordinated Debt Claims voting. Of the 35 Ballots received from holders of Intermedia Subordinated Debt Claims eligible to vote in Class 13, 35 Ballots were cast to accept the Plan, representing acceptance of the Plan by 100% in number of Intermedia Subordinated Debt Claims voting. (Debtors' Ex. 338.) [16]

16 Prior to the October 20 Ruling requiring separate classification of the former Class 6, of the $ 642,039,986.96 in dollar amount of Ballots received from holders of WorldCom General Unsecured Claims eligible to vote in Class 6, $ 544,663,538.61 in dollar amount of Ballots were cast to accept the Plan, representing acceptance of the Plan by 84.83% in dollar amount of WorldCom General Unsecured Claims voting. Of the 773 Ballots received from holders of WorldCom General Unsecured Claims eligible to vote in Class 6,620 Ballots were cast to accept the

Plan, representing acceptance of the Plan by 80.21% in number of WorldCom General Unsecured Claims voting. (Debtors' Ex. 338). Pursuant to the Court's October 20 Ruling, separate classes were formed for the former members of Class 6 and the Debtors elected not to re-solicit votes. Rather, the newly constituted Classes 6, and 6A are deemed to reject the Plan and the Debtors are seeking confirmation of the Plan pursuant to *section 1129(b)(1) of the Bankruptcy Code.* Class 6B is deemed to accept the Plan in connection with a stipulation reached with Debtors, among others, to support the Plan.

[*92] **(ix)** ***1129(a)(9)***

Except to the extent that the holder of an Allowed Claim of a kind specified in *section 507(a)(1) of the Bankruptcy Code* has agreed to less favorable treatment, the Plan provides that on the later of the Effective Date and the date such Administrative Expense Claim becomes an Allowed Administrative Expense Claim, or as soon thereafter as is practicable, the holder of such Claim will receive on account of such Claim, Cash in an amount equal to the Allowed amount of such Claim; *provided, however,* that Allowed Administrative Expense Claims representing liabilities incurred in the ordinary course of business by the Debtors, or liabilities arising under loans or advances to or other obligations incurred by the Debtors, shall be paid in full and performed by the Reorganized Debtors in the ordinary course of business in accordance with the terms and subject to the conditions of any agreements governing, instruments evidencing, or other documents relating to such transactions.

Section 4.01 of the Plan provides that on the later of the Effective Date and the date such Allowed Other Priority Claim becomes an Allowed Other Priority Claim, or as soon thereafter [*93] as is practicable, each holder of an Allowed Other Priority Claim will receive on account of such Claim Cash in the Allowed amount of such Claim.

Except to the extent that the holder of an Allowed Priority Tax Claim has been paid by the Debtors prior to the Effective Date or has agreed to a different treatment of such Claim, the Plan provides that each holder of an Allowed Priority Tax Claim shall receive, at the sole option of the Reorganized Debtors, Cash in an amount equal to such Allowed Priority Tax Claim on the later of the Effective Date and the date such Priority Tax Claim becomes an Allowed Priority Tax Claim, or as soon thereafter as is practicable or upon such other terms agreed to by the parties or determined by the Court to provide the holder of such Allowed Priority Tax Claim deferred Cash payments having a value, as of the Effective Date, equal to such Allowed Priority Tax Claim.

(x) ***1129(a)(11)***

The Debtors have prepared a three-year business plan and a consolidated financial forecast for the three-year period ending December 31, 2005. (Debtors' Ex. 273.) The Debtors' financial forecast reflects the anticipated financial performance of the Debtors with a [*94] properly capitalized balance sheet.(9/15/03 Tr. at 188-94.) The Debtors' financial forecast projects earnings before interest, taxes, depreciation, and amortization ranging from $ 2.67 billion in 2003 to $ 4.07 billion in 2005. The forecast further projects total net income ranging from $ 535 million in 2003 to $ 1.19 billion in 2005. (9/15/03 Tr. at 192); Debtors Ex. 332.) The Debtors' financial projections appear reasonable and achievable. (9/15/03 Tr. at 192.)

The Debtors will emerge from chapter 11 with no more than approximately $ 5.665 billion in debt. (Debtors' Ex. 335.) Based upon the Debtors' financial forecast, the Reorganized Debtors will be able to service this debt level. (9/15/03 Tr. at 192.)

No parties in interest have questioned the Debtors' three-year business plan or consolidated financial forecast, or challenged the feasibility of the Plan. No creditor has prosecuted an objection to the Plan on the basis that the Plan is likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtors.

(xi) ***1129(b)***

Acknowledgement of intercreditor contractual subordination provisions and prejudice to holders of (i) MCIC Senior [*95] Debt Claims, (ii) MCIC Subordinated Debt Claims, and (iii) MCI Pre-merger Claims resulting from the substantive consolidation of the WorldCom Debtors is a valid business justification and reasonable basis for the disparate treatment of MCIC Senior Debt Claims, MCIC Subordinated Debt Claims, MCI Pre-merger Claims (to the extent treatment of MCI Pre-merger Claims would be deemed disparate from

WorldCom General Unsecured Claims), and WorldCom General Unsecured Claims (all of which are unsecured claims against the substantively consolidated WorldCom Debtors).

The holders of Class 6 WorldCom General Unsecured Claims hold Claims against the WorldCom Debtors generally arising from transactions with WorldCom Debtors following the Merger or from transactions with WorldCom, Inc. or its subsidiaries prior to the Merger.

None of the Claims classified in Class 5 or Class 6 arises from a transaction with an MCIC entity that both predated the Merger and evidenced the reliance by the holder of such Claim on the independent creditworthiness of a pre-Merger MCIC entity.

Classes 5 and 6 are similarly situated both legally, as general unsecured Claims against the Debtors' estates, and equitably, as [*96] Claims that do not represent the holders' reliance on a pre-Merger MCIC entity.

In extending credit to the Debtors, holders of Claims in Classes 6A, 9 and 10 relied on the credit of an MCI entity prior to the Merger and, in the case of MCIC Senior Debt Claims and MCIC Subordinated Debt Claims, relied on offering memoranda and prospectuses issued by MCIC.

In formulating the Plan, the Debtors, the Committee, and various creditor constituencies negotiated a series of formal and informal settlements resulting in the structure of the proposed plan of reorganization - a structure already overwhelmingly approved by creditors voting in favor of the September 12 Plan - which provides for distribution premiums for pre-Merger MCI creditors in respect of the asserted prejudice relating to the substantive consolidation of the WorldCom Debtors.

The Plan is premised upon the substantive consolidation of the Debtors' estates and a series of settlements, including the MCIC Senior Debt Claims settlement and the Integrated Settlement, that address the asserted prejudices to pre-merger creditors of MCIC entities that would result therefrom.

As the record in these Chapter 11 Cases shows, the Debtors [*97] would be mired in litigation for an indefinite period of time if substantive consolidation were contested and, undoubtedly, appealed. Resolution of these disputes by virtue of the differing treatment of differently situated classes of unsecured creditors, as provided in the Plan, avoids potentially massive and protracted litigation over the following issues: the precise allocation of assets and liabilities among entities; the enforceability or validity of different types of intercompany claims; the amount of intercompany claims; which Debtor is liable on each of the thousands of claims for which proofs of claim were filed against multiple Debtors; and whether there were fraudulent or otherwise voidable transfers made.

Resolution of such disputes also eliminates the need for a complex solvency analyses of multiple Debtors, which cannot produce reliable separate financial statements.

The delay caused by such protracted litigation of multiple issues would undoubtedly require the Debtors to remain in chapter 11 for an indeterminable amount of time, causing irreparable harm and threatening the very reorganization of the Debtors that chapter 11 is designed to promote.

The degree of discrimination [*98] regarding Class 6 is in direct proportion to its rationale.

The Debtors' evidence has demonstrated the reasonableness and good faith of the 80.0% recovery by Class 9 MCIC Senior Debt Claims represented by the MCIC Senior Debt Clams settlement. (9/15/03 Tr. at 217, 221, 223-26.) The treatments afforded Class GA MCI Pre-merger Claims and Class 10 MCIC Subordinated Debt Claims are based upon the relative and similar reliance and prejudice arguments of the holders of such Claims.

The Debtors' determination to provide additional recovery to the holders of Class 6A Claims compared to Class 6 Claims is consistent with the distributions afforded holders of Class 9 MCIC Senior Debt Claims and Class 10 MCIC Subordinated Debt Claims and the rationale therefore.

Holders of Class 6A MCI Pre-merger Claims hold General Unsecured Claims arising from pre-Merger transactions or series of transactions in which they relied on the separate creditworthiness of a pre-Merger MCIC entity.

The enhanced recovery provided to the holders of

Class 6A MCI Pre-merger Claims is a component of the Integrated Settlement among the Debtors, the Committee, the Ad Hoc Committee of Dissenting Bondholders, and the Ad [*99] Hoc MCI Trade Claims Committee.

Prior to the formulation of the Integrated Settlement, various parties asserted that providing pre-Merger trade creditors and post-Merger trade creditors with the same distribution ignored the reliance and prejudice arguments of the holders of MCI Pre-merger Claims and was inconsistent with the principles underlying the settlement with the holders of MCIC Senior Debt Claims. (Docket No. 8038 Platinum Partners Value Arbitrage Fund L.P.'s Objection to Confirmation of the Debtors' Amended Joint Plan of Reorganization and Joinder in the Ad Hoc MCI Trade Claims Committee's Objection to Debtors' Joint Plan of Reorganization; Docket No.7709 Objection of Deutsche Bank Securities Inc. to Confirmation of the Debtors' Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code). The enhanced treatment afforded holders of Class 6A MCI Pre-merger Claims resulted from the Debtors' good-faith negotiations with these holders, the recognition of the merits of their arguments, and consideration of the relativity of their recoveries to the recoveries by the holders of Class 9 and Class 10 Claims.

Recognizing the reasonableness of the distribution of [*100] 80% to the holders of MCIC Senior Debt Claims, the parties who negotiated the Integrated Settlement agreed that the respective recoveries of 60% and approximately 47% by Classes 6A and 10, respectively, reflected the relative legal rights of such holders compared to Class 9 MCIC Senior Debt Claims as well as the other Classes of unsecured claims.

By virtue of the different contractual rights and reliance and prejudice arguments of the holders of MCIC Senior Debt Claims and MCIC Subordinated Debt Claims, discrimination among pre-Merger creditors is warranted.

The degree of discrimination regarding Class 6A is in direct proportion to its rationale.

All classes of preferred Equity Interests in the Intermedia Debtors are receiving the same treatment under the Plan.

All classes of common Equity Interests in the WorldCom Debtors are receiving the same treatment under the Plan.

All classes of common Equity Interests in the Intermedia Debtors are receiving the same treatment under the Plan.

No holder of a Claim or Equity Interest that is junior to MCIC Subordinated Debt Claims will receive or retain any property under the Plan on account of such junior Claim or Equity Interest.

Under [*101] the Plan, the only Claims against, and Equity Interests in, the Debtors that are junior to the Claims in Classes 6 and GA are the Claims in Class 7 (WorldCom Subordinated Claims) and the Equity Interests in Class 8 (WorldCom Equity Interests).

No holder of a Claim or Equity Interest that is junior to WorldCom General Unsecured Claims will receive or retain any property under the Plan on account of such junior Claim or Equity Interest.

No holder of a Claim or Equity Interest that is junior to MCI Pre-merger Claims will receive or retain any property under the Plan on account of such junior Claim or Equity Interest

No holder of a Claim or Equity Interest that is junior to WorldCom Subordinated Claims will receive or retain any property on account of such junior Claim or Equity Interest.

No holder of an Equity Interest that is junior to Intermedia Preferred Stock will receive or retain any property under the Plan on account of such junior Equity Interest.

No holder of an Equity Interest that is junior to WorldCom Equity Interests will receive or retain any property under the Plan on account of such junior Equity Interest.

No holder of an Equity Interest that is junior to Intermedia [*102] Equity Interests will receive or retain any property under the Plan on account of such junior Equity Interest.

II. CONCLUSIONS OF LAW

A. SUBSTANTIVE CONSOLIDATION

Bankruptcy courts have the general equitable power

to order substantive consolidation. *See, e.g., FDIC v. Colonial Realty Co., 966 F.2d 57, 59 (2d Cir. 1992)* (authority for substantive consolidation comes from the bankruptcy court's general equitable powers under *§ 105 of the Bankruptcy Code*); *In re Continental Vending Mach. Corp., 517 F.2d 997, 1000 (2d Cir. 1975)* (noting power to consolidate comes from equity); *In re Leslie Fay Cos., 207 B.R. 764, 779 (Bankr. S.D.N.Y. 1997)* ("Substantive consolidation derives from the bankruptcy court's general equitable powers provided in *section 105(a) of the Bankruptcy Code.*"); *Moran v. Hong Kong & Shanghai Banking Corp. (In re Deltacorp, Inc.), 179 B.R. 773, 777 (Bankr. S.D.N.Y. 1995)* (same); *In re Richton Int'l Corp., 12 B.R. 555, 557 (Bankr. S.D.N.Y. 1981)* (same), 2 *COLLIER ON BANKRUPTCY P 105.09 [1][6]*, at 105-85 (L. King 15th rev. ed. 2002) ("the authority [*103] of a bankruptcy court to order substantive consolidation derives from its general discretionary equitable powers").

The Bankruptcy Code itself contemplates that substantive consolidation may be used to effectuate a plan of reorganization. *Section 1123(a)* provides, in relevant part:

> (a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall -
>
> . . .
>
> (5) provide adequate means for the plan's implementation, such as -
>
> . . .
>
> (C) merger or consolidation of the debtor with one or more persons. . . .

11 U.S.C. § 1123(a)(5)(C); *In re Stone & Webster, Inc., 286 B.R. 532, 540-41 (Bankr. D. Del. 2002)* (noting that substantive consolidation is contemplated by *section 1123(a)(5) of the Bankruptcy Code*); *11 U.S.C. § 105(a)* ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

Substantive consolidation has the effect of consolidating the assets and liabilities of multiple debtors and treating them as if the liabilities were owed by, and the assets held by, a single legal entity. *Colonial Realty Co., 966 F.2d at 58*; [*104] *Leslie Fay, 207 B.R. at 779*. In the course of satisfying the liabilities of the consolidated debtors from the common pool of assets, intercompany claims are eliminated and guaranties from codebtors are disregarded. *Union Say. Bank v. Augie/Restivo Baking Co., Ltd. (In re Augie/Restivo Baking Co., Ltd.), 860 F.2d 515, 518 (2d Cir. 1988)*; *Deltacorp, 179 B.R. at 777* (multiple claims against consolidated debtors eliminated; creditor receives only one recovery).

As an equitable remedy, substantive consolidation is to be used to afford creditors equitable treatment and thus may be ordered when the benefits to creditors therefrom exceed the harm suffered. *Augie/Restivo, 860 F.2d at 518-19*; *see also Stone v. Eacho (In re Tip Top Tailors, Inc.), 127 F.2d 284, 288 (4th Cir. 1942)*.

Traditionally, bankruptcy courts have considered the following factors in determining whether to approve substantive consolidation:

> * The presence or absence of consolidated financial statements;
>
> * The unity of interest and ownership among various corporate entities;
>
> * The degree of difficulty in segregating and [*105] ascertaining individual assets and liabilities;
>
> * The transfers of assets without formal observance of corporate formalities;
>
> * The commingling of assets and business functions;
>
> * The profitability of consolidation at a single physical location;
>
> * The disregard of legal formalities.

See, e.g., Augie/Restivo, 860 F.2d at 518; *Soveriero v. Franklin Nat'l Bank, 328 F.2d 446, 447-48 (2d Cir. 1964)*; *In re Food Fair, Inc., 10 B.R. 123, 126 (Bankr.*

S.D.N.Y. 1981). As shown by each decision granting substantive consolidation, a decision to substantively consolidate affiliated debtors need not be supported by the presence of all such factors.

In *Augie/Restivo*, the Second Circuit synthesized the foregoing factors into two, and ruled that the existence of even one such factor may justify substantive consolidation. Specifically, the Second Circuit held that substantive consolidation is required if it is demonstrated

> (i) that the operational and financial affairs of the debtors are so entangled that the accurate identification and allocation of assets and liabilities cannot be achieved;
>
> *or*
>
> (ii) [*106] that creditors dealt with the debtors as a single economic unit and did not rely on the separate identity of a debtor in extending credit.

Augie/Restivo, 860 F.2d at 518; *see also In re 599 Consumer Elecs., Inc., 195 B.R. 244 (S.D.N.Y. 1996)* ("the Second Circuit's use of the conjunction 'or' [in *Augie/Restivo]* suggests that the two cited factors are alternatively sufficient criteria.").

When deciding whether to order substantive consolidation, the courts in this circuit also use a balancing test to determine whether the relief achieves the best results for all creditors. *Colonial Realty, 966 F.2d at 60* ("The propriety of [substantive consolidation] must, then, be determined solely in light of the principles and rules of equity"); *see also In re Affiliated Foods, Inc., 249 B.R. 770, 780 (Bankr. W.D. Mo. 2000)* (ordering substantive consolidation because "in the final analysis the benefits of consolidation substantially outweigh the harm to creditors"); *White v. Creditors Serv. Corp. (In re Creditors Serv. Corp.), 195 B.R. 680, 690 (Bankr. S.D. Ohio 1996)* ("the ultimate inquiry [for a [*107] court deciding substantive consolidation] involves a balancing of the equities based on the bankruptcy court's inherent powers pursuant to *§ 105*").

Courts have "a good deal of discretion" in determining whether substantive consolidation is appropriate. *Deltacorp, 179 B.R. at 777*. Using that discretion, numerous courts in the Second Circuit have ordered substantive consolidation in circumstances similar to those of the MCI/WorldCom Debtors and the Intermedia Debtors, including *In re I.R.C.C., Inc., 105 B.R. 237 (Bankr. S.D.N.Y. 1989)*; *In re Richton Int'l Corp., 12 B.R. 555 (Bankr. S.D.N.Y. 1981), In re Food Fair, Inc., 10 B.R. 123, 127-28 (Bankr. S.D.N.Y. 1981)*, and *In re D.H. Overmyer Co., Inc.*, 1976 WL 168421 (S.D.N.Y. 1976). Additionally, the case of *In re Affiliated Foods, Inc., 249 B.R. 770 (Bankr. W.D. Mo. 2000)*, provides a model for substantively consolidating debtors in a fact pattern similar to this case.

To prevail on substantive consolidation, the Debtors are not required to prove that an allocation of assets and liabilities to the various legal entities cannot be achieved [*108] under any circumstances. Rather, it is sufficient to demonstrate that it would be so costly and difficult to untangle the Debtors' financial affairs, such that doing so is a "practical impossibility," making substantive consolidation appropriate. *Chemical Bank New York Trust Co. v. Kheel (In re Seatrade Corp.), 369 F.2d 845, 848 (2d Cir. 1966)* (ordering substantive consolidation because of "expense and difficulty amounting to *practical impossibilily* of reconstructing the financial records of the debtors to determine intercorporate claims, liabilities and ownership of assets") (emphasis added); *see also In re Bonham, 229 F.3d 750, 766-67 (9th Cir. 2000)* (adopting *Augie/Restivo* test and stating that entanglement factor is satisfied if disentangling the debtors' affairs would be "needlessly expensive and possibly futile"); *In re Affiliated Foods, Inc., 249 B.R. at 780* (ordering substantive consolidation when separating the debtors' accounts "would be 'a real nightmare'" and achieving a separate allocation "probably would not be possible"). Alternatively, the Debtors must show that it is not possible to create *accurate* financial [*109] data for each legal entity. *Augie/Restivo, 860 F.2d at 519*.

The Court concludes that the substantive consolidation proposed in the Plan is necessary and appropriate and satisfies both prongs of the *Augie/Restivo* test.

The facts amply demonstrate that the Debtors' operational and financial affairs are so entangled that the accurate identification and allocation of assets and liabilities either could never be accomplished, or, even if it could be accomplished, would take so long and be so costly such that creditors as a whole would be

substantially harmed by the effort. Thus, disentangling the financial affairs of the Debtors is a practical impossibility. The factors that led to this conclusion are set forth in in the Court's Findings of Fact, above, but include:

> * common management and control of the Debtors;
>
> * the substantial operational integration and entanglement of the Debtors' business operations, including the creation of a unified telecommunications network that serves substantially all of the Debtor entities, the existence of centralized administrative functions, such as cash management, purchasing, human resources, and finance, and presentation [*110] of products and services to the marketplace on an integrated basis;
>
> * public financial reporting on a consolidated basis;
>
> * financial entanglement resulting from internal financial management being conducted on a business line and functional basis, rather than legal entity basis;
>
> * inability to account accurately and reliably for intercompany claims, resulting from, among other things, a lack of proper internal controls;
>
> * the Debtors' present inability to create accurate and reliable historical financial statements on a separate legal entity basis; and
>
> * acute lack of institutional knowledge and documentation making reconstruction of historical financial information on a separate legal entity basis exceedingly difficult and perhaps impossible.

The cost of disentangling the estates, if it ever could be accomplished, is not simply the out-of-pocket expenses to pay the accountants, lawyers, and other professionals, who would have to reconstruct years of financial data and litigate significant intercreditor disputes regarding the validity of intercompany claims. It also includes the enormous employee resources that would have to be devoted to the effort, detracting [*111] from business operations, as well and the incalculable diminution of enterprise value that likely would result from a protracted chapter 11 case.

The Court further concludes that a substantial portion of creditors dealt with the Debtors as a single economic unit and did not rely on the separate identity of any particular Debtor entity in extending credit. Accordingly, both prongs of the *Augie/Restivo* test have been satisfied in these cases, with respect to both the WorldCom Debtors and the Intermedia Debtors.

In the final analysis here, the benefits of substantive consolidation far outweigh any possible harm to creditors. Accordingly, use of substantive consolidation as an equitable remedy is appropriate in this case.

B. THE SETTLEMENTS

The Plan's provision for each of the Settlements is authorized by *11 U.S.C. § 1123(b)(3)* and is appropriate. Due notice of the Settlements and the hearing to be held thereon has been given and all parties in interest have had an opportunity to appear and be heard with respect thereto.

This Court is required to make an independent determination of the fairness to the Debtors and their estates of each of the [*112] settlements embodied in the Plan. *See, e.g., Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424, 20 L. Ed. 2d 1, 88 S. Ct. 1157 (1968)*; *In re W.T. Grant Co., 699 F.2d 599, 605-06 (2d Cir. 1983)*.

In approving each of the Settlements, this Court has considered, among other things:

> * the balance of the likelihood of success of claims asserted by the claimants against the likelihood of success of the defenses or counterclaims possessed by the Debtors;
>
> * the balance of the likelihood of success of claims asserted by the Debtors against the likelihood of success of the defenses or counterclaims possessed by the claimants;

> * the complexity, cost, and delay of litigation that would result in the absence of settlements;
>
> * whether any creditor of the Debtors or other party in interest has objected to the settlement and the acceptance of the Plan by a substantial majority of the holders of claims; and
>
> * the fact that the Plan, which gives effect to the settlements, is the product of extensive arm's-length and good faith negotiations between and among the Debtors and the claimants.

[*113] *See, e.g., W.T. Grant Co., 699 F.2d at 608*; *In re Drexel Burnham Lambert Group, Inc., 134 B.R. 493 (Bankr. S.D.N.Y. 1991)*; *In re Texaco Inc., 84 B.R. 893, 902 (Bankr. S.D.N.Y. 1988).*

Approval of a settlement does not require a "mini-trial" on the merits. *See also In re Purofied Down Products Corp., 150 B.R. 519, 522 (S.D.N.Y. 1993)* ("the court need not conduct a 'mini- trial' to determine the merits of the underlying litigation"). In determining whether to approve a proposed settlement, a bankruptcy court need not decide the numerous issues of law and fact raised by the settlement, but rather, should "canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness.'" *W.T. Grant Co., 699 F.2d at 608* (quoting *Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972)).*

In assessing the fairness of a compromise or settlement embodied in a plan of reorganization, the court does not have to be convinced that the compromise or settlement is the best possible agreement or that the parties have maximized their recovery. *Nellis v. Shugrue, 165 B.R. 115, 123 (S.D.N.Y. 1994).* [*114] Further, the Court is not required to assess the minutia of each and every claim being compromised. *Id.*

(i) The Intermedia Settlement

Intermedia is a Debtor and an affiliate and insider of WorldCom, Inc. *See 11 U.S.C. § l01(2)(B), l0l(31)(E).*

Because under the Plan, the estates of the Intermedia Debtors are not substantively consolidated with the estates of the WorldCom Debtors, assets of the Intermedia Debtors' estates are not available for distribution to satisfy allowed claims against WorldCom Debtors.

Pursuant to the Bar Date Order, unless otherwise ordered by the Court, Intermedia is not required to file a proof of claim in the Debtors' cases. Bar Date Order, at 3-4 ("ORDERED that the following persons or entities are **not** required to file a proof of claim on or before the Bar Date: . . . any Debtor having a claim against another Debtor. ."); *id.* at 8 ("ORDERED that entry of this Order is without prejudice to the right of the Debtors to seek a further order of this Court fixing the date by which holders of claims **not** subject to the Bar Date established herein must file such claims against one or more of the Debtors or be forever [*115] barred from. . . receiving any payment or distribution of property from the Debtors, the Debtors' estates, or their successors or assigns with respect to such claims . . . ."). Accordingly, Intermedia's claim for amounts under the Intermedia Intercompany Notes is unaffected by the Bar Date Order. [17]

> 17 While the language of the Bar Date Order could be read, as set forth in the Licht Objection, as merely affecting the timing of the filing of a claim by Intermedia, it is clear from the entire document that the intent of the Bar Date Order was that Intermedia would not be subject to the requirement to file a proof of claim, while preserving the Debtors' ability to seek a further order requiring the filing of such claim if subsequently determined to be necessary. According to the Debtors, as the claim related to the Intercompany Note was settled, the Debtors did not consider the filing of a proof of claim necessary and did not seek to have a date certain set for the filing of such claim. Under the circumstances, the filing of a proof of claim would serve no meaningful purpose.

[*116] As of the date hereof, the claim held by Intermedia against WorldCom, Inc. for amounts under the Intermedia Intercompany Note has not been either disallowed or allowed in these cases. Accordingly, the claim in respect of the Intermedia Intercompany Note may be compromised and settled pursuant to Bankruptcy *Rule 9019.*

Moreover, as the Debtors noticed the Intermedia Settlement, pursuant to *11 U.S.C. § 1123(b)(3)(A)* and Bankruptcy *Rule 9019*, for consideration by the Court in the context of the confirmation of the Plan and as the Intermedia Settlement was subject to objection in that context, the absence of a filed proof of claim relating to the claim based on the Intercompany Note did not impair the ability of any party in interest to object to the proposed treatment of the Intercompany Note or the ability of the Court to review such treatment. Indeed, Dr. Licht, who filed an objection to the procedural posture of the proceeding as well as the substantive basis for the Intermedia Settlement, participated in the Confirmation Hearing and voiced his concerns related to the treatment of the Intercompany Note under the Intermedia Settlement and the Plan

Inasmuch [*117] as an opportunity was afforded to parties in interest to object to the proposed treatment of the Intercompany Note and for the Court to review such treatment in the context of the proposed Intermedia Settlement under the Plan, Intermedia was not required to file a proof of claim before it could receive a distribution or before the dispute concerning the Intermedia Note could be settled. Upon confirmation of the Plan, which includes the Intermedia Settlement, all proceedings with respect to Intermedia's claim will be completed, thereby obviating the need to require Intermedia to submit a proof of claim by any future date.

Section 544(b) of the Bankruptcy Code, authorizes a debtor in possession to avoid any transfer of an interest of the debtor that is "voidable under applicable law." *11 U.S.C. § 544(b)(1)*; *see, e.g., Traina v. Whitney Nat'l Bank, 109 F.3d 244, 246 (5th Cir. 1997)* ("Applicable law" means state law).

In considering the Debtors' potential fraudulent transfer claims with respect to the Intermedia Intercompany Note, a conflict of law analysis must first be undertaken to determine which state's substantive law is applicable under [*118] *section 544*. In determining the choice of law issue, the federal common law choice-of-law rules would likely apply. *See, e.g., In re Best Products, 168 B.R. 35, 51 (Bankr. S.D.N.Y. 1994), aff'd, 68 F.3d 26 (2d Cir. 1995)*. The federal common law approach is to employ the law of the jurisdiction with the most significant relationship to the transaction and to the parties. *Id.* (choice of law test for torts under *§ 145 of the Restatement (Second) of Conflicts of Laws* (the "Restatement") is applicable to fraudulent conveyances). Under *section 145* of the Restatement, contacts to be taken into account include the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence, nationality, place of incorporation and place of business of the parties, and the place where the relationship, if any, between the parties is centered. Restatement, *§ 145*. Thus, under this analysis, "applicable law" could be the law of the state in which the debtor is incorporated, the transferee's principal place of business is located, the merger was negotiated and consummated, the [*119] state where the creditors are located, or the state whose law would provide the most benefit to the creditors as a group. *See Best Products, 168 B.R. at 52* (stating that the law where the majority of the creditors were located and where the transaction was negotiated and consummated would probably apply).

Although Intermedia creditors may have argued otherwise, [18] *New York Debtor and Creditor Law ("DCL"), §§ 273, 274*, may be the law applicable in such an action. Under that statute, a transfer or obligation can be avoided if the debtor did not receive fair consideration therefor and (i) the debtor was rendered insolvent by the transfer, (ii) the transfer left the debtor with unreasonably small capital, or (iii) the debtor believed when it made the transfer and incurred its obligations that it would incur debts beyond its ability to pay as they mature. An avoidance action must be commenced within six years of the date of the transfer. *DCL §§ 273, 274*.

18 Georgia law, for example, would require proof of actual intent to defraud.

[*120] The burden of proof of all elements of a fraudulent transfer action under *section 544(b) of the Bankruptcy Code*, would be on WorldCom, Inc., as the party seeking to avoid the transfer. *See, e.g., Lippe v. Bairnco Corp., 249 F. Supp. 2d 357, 376 n.6 (S.D.N.Y. 2003); American Investment Bank v. Marine Midland Bank, 191 A.D.2d 690, 595 N.Y.S.2d 537 (N.Y. App. Div. 1993)*. In that regard, WorldCom, Inc. would need to establish each element of the fraudulent transfer action by a preponderance of the evidence. *See, e.g., Lippe, 249 F. Supp. 2d at 376 n.6*.

Section 271 of the DCL provides that an entity is insolvent when "the present fair salable value of [its] assets is less than the amount that will be required to pay [its] probable liability on [its] existing debts as they become absolute and matured." There are various tests

used to determine insolvency under the DCL, none of which is generally accepted as the correct test. *In re Best Products, 168 B.R. at 52*. These tests include the balance sheet approach and the going concern approach. *Id.* In deciding whether the debtor was insolvent at the time of the alleged [*121] fraudulent transfer, New York courts value the debtor's assets at the time of the challenged transfer, not at some later time. *See In re Le Cafe Creme, Ltd., 244 B.R. 221 (Bankr. S.D.N.Y. 2000)*.

Whether a company is insolvent for fraudulent transfer purposes requires a "fair valuation" of its assets and liabilities. The determination of fair valuation is an inexact science, and there is no precise formula to determine solvency. *Constructora Maza, Inc. v. Banco de Ponce, 616 F.2d 573, 577 (1st Cir. 1980)*; *Briden v. Foley, 776 F.2d 379, 382*. A determination of insolvency should be based on appraisals and expert testimony, but appraisals are neither the exclusive nor dispositive means to make the determination. *See Lawson v. Ford Motor Company (In re Roblin Industries, Inc.), 78 F.3d 30, 34 (2d Cir. 1996)*.

Thus, to make a prima facie showing of a fraudulent transfer under *section 544 of the Bankruptcy Code*, the Debtors would be required to prove that WorldCom, Inc. was insolvent on the date of the transfer of the Intermedia Intercompany Note.

Fair consideration has two prongs - the adequacy of the consideration and good faith. *DCL § 272*; [*122] *see also Ede v. Ede, 193 A.D.2d 940, 598 N.Y.S.2d 90 (N.Y. App. Div. 1993)* (holding that fair consideration for fraudulent transfer purposes under New York law requires that the exchange be for equivalent value and be made in good faith).

The existence of reasonably equivalent value for a transfer or obligation is a question of fact. *See Branch v. Federal Deposit Insurance Corp., 825 F. Supp. 384, 399 (D. Mass. 1993)*; *In re Lawrence Paperboard, Co., 76 B.R. 866, 873 (Bankr. D. Mass. 1987)*. "Reasonable equivalence" requires a comparison of the value of what went out with the value of what was received. *Heritage Bank Tinley Park v. Steinberg (In re Grabill Corp.), 121 B.R. 983, 994 (Bankr. N.D. Ill. 1990)*; *see also In re Suburban Motor Freight, Inc., 124 B.R. 984, 997 (Bankr. S.D. Ohio 1990)* (the focus is placed on adequacy of consideration received by a debtor under the measurement test in which all aspects of the transaction are examined to calculate economic value of all the benefits and burdens to the debtor, direct or indirect; collapsing the transaction in question to look at the net effect of [*123] the overall transfer).

Courts generally find reasonably equivalent value for a transfer from a parent to its wholly owned subsidiary, because the parent, as the sole stockholder of the subsidiary corporation, receives a benefit in the form of increased stock value resulting from the increased financial strength of the parent. *See Branch v. Federal Deposit Insurance Corporation, 825 F. Supp. 384, 399-400 (D. Mass. 1993)*.

Courts have found a parent's transfer of assets to a subsidiary to be for less than reasonably equivalent value when the subsidiary was insolvent at the time of transfer. *See In re Duque Rodriguez, 77 B.R. 939, 941-42 (Bankr. S.D. Fla. 1987), aff'd, 895 F.2d 725 (11th Cir. 1990)*; *In re Chase & Sanborn Corp., 68 B.R. 530 (Bankr. S.D. Fla. 1986), aff'd, 848 F.2d 1196 (11th Cir. 1988)*; *see also In re First City Bancorporation of Texas, Inc. 1995 Bankr. LEXIS 1683, 1995 WL 710912 *18 (Bankr. N.D. Tex. 1995)*.

However, courts will also collapse multiple transactions into one to view the overall consideration received. *In re Suburban Motor Freight, Inc., 124 B.R. 984 (Bankr. S.D. Ohio 1990)* [*124] *(citing Kupetz v. Wolf. 845 F.2d 842 (9th Cir. 1988))*; *see also HBE Leasing Corp. v. Frank, 48 F.3d 623 (2d Cir. 1994)*

In order to avoid the Intermedia Intercompany Note as a fraudulent transfer pursuant to *section 544(b) of the Bankruptcy Code* and the DCL, the Debtors would have to show, among other things, that it did not receive fair consideration in return for the Intermedia Intercompany Note. This, in turn, would require a valuation of the assets received by WorldCom in exchange therefor.

To qualify as a voidable preference, a transfer must (1) benefit a creditor, (2) be on account of an antecedent debt, (3) be made while the debtor was insolvent, (4) be made within ninety days preceding the filing of the bankruptcy petition, and (5) enable the creditor to receive a larger share of the estate than if the transfer had not been made. *11 U.S.C. § 547(b)*; *see also Union Bank v. Wolas, 502 U.S. 151, 112 S. Ct. 527, 529-30, 116 L. Ed. 2d 514 (1991)*. Where the transfer was to an insider of the debtor, the ninety-day period is extended to one year preceding the filing of the bankruptcy petition. *11 U.S.C. § 547* [*125] *(b)(5)(C)*. The debtor in possession has the

burden of proving the avoidability of a transfer under *section 547(b)* by a preponderance of the evidence. *Id. § 547(g)*; *Lawson v. Ford Motor Company (In re Roblin Industries, Inc.), 78 F.3d at 34*.

Whether the principal prepayments and interest payments made during the one-year period prior to the chapter 11 filing on account of the Intermedia Intercompany Note satisfy the requirements for a preferential transfer set forth in *section 547 of the Bankruptcy Code* would require determinations of WorldCom, Inc.'s solvency at each point in time that a payment was made.

There are multiple statutory defenses that also could be raised in defense of potentially preferential transfers under *section 547(c) of the Bankruptcy Code.* Moreover, even if the Debtors were to prevail on their preference theory, complex issues attendant to the repayment of amounts by Intermedia to WorldCom, Inc. under *section 502(d) of the Bankruptcy Code* would require resolution.

Wells Fargo filed an objection to the modification of the Second Amended Plan of Reorganization as it relates to the increase of $ 29,000,000 over the $ 1,000,000,000 to be paid [*126] by the WorldCom estates to the Intermedia Debtors under the proposed settlement as set forth in the Plan. The $ 29,000,000 increase was agreed to as a resolution of the objection filed by certain preferred shareholders of Intermedia to the Intermedia Settlement. Wells Fargo's objection is limited to the modification. Wells Fargo argues among other things, [19] that the WorldCom creditors should not be burdened with the obligation to pay equity of Intermedia Debtors As the Court found at the hearing on the Intermedia Settlement when it was advised of the $ 29,000,000 increase, such amount was not significant in the context of a $ 1,000,000,000 amount to be paid by the World Coin Debtors to Intermedia and therefore not a materially adverse change. As subsequently detailed, the Intermedia Settlement, including the $ 29,000,000 modification satisfies the standards for a Bankruptcy *Rule 9019* settlement.

19 As previously noted, pursuant to stipulation, the balance of Wells Fargo's objections will be addressed when the Debtors: objection to Wells Fargo's claims are considered in the context of the claims resolution process.

[*127] Further, the issue of a payment to equity of Intermedia is an issue for the Intermedia creditors, not the WorldCom Debtors creditors. The $ 29,000,000 was agreed to by the AdHoc Committee of Intermedia Noteholders and such increase was noticed to all creditors. Pursuant to the Notice of Modifications to Debtors: Second Amended Plan of Reorganization, dated September 19, 2003, Intermedia creditors in Classes 11, 12 and 13 were informed of the 5% recovery that holders of Intermedia Preferred Stock would receive. Thus, prior to the October 8, 2003 deadline to determine whether to amend their vote, such classes were given sufficient notice of the modification providing for recovery to Class 14. Following, the October 8, 2003 deadline, the tabulation of the Intermedia creditor classes continued to show overwhelming support for confirmation. Thus, taking into consideration the notice provided Classes 11, 12 and 13 prior to the October 8, 2003 voting deadline to amend their vote, and the fact that even with the disclosure, the tabulation of votes reflecting the votes cast prior to the October 8, 2003 deadline continued to show overwhelming support to confirm the Plan, and in light of the [*128] *de minimis* amount of money at issue in comparison to the $ 1,000,000.00 available for distribution to those classes under the Intermedia Settlement, the Court deems Classes 11, 12 and 13 as having accepted the treatment of the Intermedia Preferred Shareholders and supported confirmation of the Plan, which included the modifications. There is no challenge to the validity of the vote. Thus, with respect to the Intermedia creditors, the absolute priority rule does not apply. Wells Fargo's objection is overruled.

The Intermedia Settlement is reasonable, fair and equitable and in the best interests of the Debtors, their estates and their creditors.

The Intermedia Settlement falls within the range of reasonableness, provides for the resolution of complex litigation that would likely implicate multiple appeals, and is fair and equitable and in the best interests of the Debtors, their estates, and their creditors and equity interest holders. The Intermedia Settlement has been negotiated at arm's-length and has been entered into in good faith. It is in the best interests of the Debtors to reach consensus with the major creditor groups. The Intermedia Settlement avoids costly and time-consuming [*129] litigation, paving the way toward achieving a successful reorganization of the Debtors. The avoidance of long and complicated litigation is one of the principal rationales for debtors entering into settlements with

creditors. *See In re Baldwin United Corp., 43 B.R. 888 (Bankr. S.D. Ohio 1984).*

The Intermedia Settlement removes substantial impediments to a successful restructuring and reorganization of the Debtors, furthers the Debtors' reorganization and prompt emergence from chapter 11 and reflects a reasonable balance of the risk and expense of litigation against the benefits of early resolution of the disputes and issues. *In re Teltronics Servs., Inc., 762 F.2d 185, 188-89 (2d Cir. 1985)*; *In re W.T. Grant Co., 699 F.2d at 608; In re Int'l Distrib. Ctrs., Inc., 103 B.R. at 423*. Furthermore, the Intermedia Settlement is above the lowest point in the range of reasonableness and is an exercise of the Debtors' sound business judgment.

Accordingly, the Licht Objection and Wells Fargo's objection are overruled.

(ii) The Bank Settlement

The elements of a claim for constructive trust are (i) a confidential or [*130] fiduciary relationship, (ii) a promise, express or implied, (iii) a transfer in reliance on the promise, and (iv) unjust enrichment. See *Koreag, Controle et Revision S.A. v. Refco F/X Assocs., Inc. (In re Koreag, Controle et Revision S.A.), 961 F.2d 341, 353 (2d Cir. 1992)*. However, courts use these elements merely as guideposts, not as rigid requirements. Because the doctrine of constructive trust is equitable in nature, courts focus on the fairness of the transaction. *See Simonds v. Simonds, 45 N.Y.2d 233, 243, 380 N.E.2d 189, 408 N.Y.S.2d 359 (1978).*

Litigation of the Constructive Trust Action would require a determination of complex factual and legal issues, including the Banks' ability to demonstrate each of the elements of their claim, their ability to trace the property to which such constructive trust could attach, *see United States v. Benitez, 779 F.2d 135, 140 (2d Cir. 1985)*, the amount that would be subject to the trust, where funds have been commingled, *see In re Drexel Burnham Lambert Group, Inc., 142 B.R. 633 (S.D.N.Y. 1992)*, and the Debtors' ability to invoke their avoiding powers under *section 544(a)* [*131] *of the Bankruptcy Code* to avoid any constructive trust that would be imposed in the event the Banks were to prevail on their theory.

In the event that the Banks succeeded in the Maryland Action, Ms. Mayer would have a claim for indemnification against the Debtors. The allowance of that claim could be the subject of further litigation.

The Bank Settlement is reasonable, fair and equitable and in the best interests of the Debtors, their estates and their creditors.

The Bank Settlement falls within the range of reasonableness and provides for the resolution of complex litigation that would likely implicate multiple appeals. The Bank Settlement has been negotiated at arm's-length and has been entered into in good faith. It is in the best interests of the Debtors to reach consensus with the major creditor groups. The Bank Settlement avoids costly and time-consuming litigation, paving the way toward achieving a successful reorganization of the Debtors. The avoidance of long and complicated litigation is one of the principal rationales for debtors entering into settlements with creditors. *See In re Baldwin United Corp., 43 B.R. 888 (Bankr. S.D. Ohio 1984).*

The Bank Settlement [*132] removes substantial impediments to a successful restructuring and reorganization of the Debtors, furthers the Debtors' reorganization and prompt emergence from chapter 11 and reflects a reasonable balance of the risk and expense of litigation against the benefits of early resolution of the disputes and issues. *In re Teltronics Servs., Inc., 762 F.2d 185, 188-89 (2d Cir. 1985)*; *In re W.T. Grant Co., 699 F.2d at 608*; *In re Int'l Distrib. Ctrs., Inc., 103 B.R. at 423*. Furthermore, the Bank Settlement is above the lowest point in the range of reasonableness and is an exercise of the Debtors' sound business judgment.

(iii) The MCIC Settlement

Courts have the general equitable power to order substantive consolidation. *See, e.g., Fed. Deposit Ins. Corp. v. Colonial Realty Co., 966 F.2d at 59* (authority for substantive consolidation comes from the bankruptcy court's general equitable powers under *section 105 of the Bankruptcy Code*); *In re Continental Vending Mach. Corp., 517 F.2d 997, 1000 (2d Cir. 1975).*

Substantive consolidation is appropriate if the debtors demonstrate: (i) that the operational [*133] and financial affairs of the debtors are so entangled that the accurate identification and allocation of assets and liabilities cannot be achieved *or* (ii) that creditors dealt with the debtors as a single economic unit and did not

rely on the separate identity of a debtor in extending credit. *Augie/Restivo, 860 F.2d at 518*; *see In re 599 Consumer Elec., Inc., 195 B.R. 244 (S.D.N.Y. 1996)*.

Litigation of the issues resolved by the MCIC Settlement would be highly fact-intensive, complex and protracted, involving expert analyses and detailed testimony regarding the extent of the WorldCom Debtors' accounting and operational entanglement, including complex issues attendant to millions of intercompany claims aggregating more than a trillion dollars, (Disclosure Statement at 41), as well as evidence of the extent to which each holder of an MCIC Senior Debt Claim that opposes substantive consolidation relied upon the separate legal identity of MCIC when it extended credit, *see, e.g., In re Bonham, 229 F.3d 750, 767 (9th Cir. 2000)* (under *Augie/Restivo,* the burden is on the creditors opposed to substantive consolidation to overcome [*134] presumption that they did not rely on separate credit of debtors). While the Debtors believe that even if particular creditors are able to demonstrate that they did rely on the separate credit of a particular debtor, substantive consolidation is warranted if the debtors satisfy the entanglement factor, *id.; In re 599 Consumer Elec., Inc., 195 B.R. 244 (S.D.N.Y. 1996)* ("the Second Circuit's use of the conjunction 'or' [in *Augie/Restivo]* suggests that the two cited factors are alternatively sufficient criteria"), the Ad Hoc Committee of MCIC Senior Noteholders could argue that, based upon the strength of their reliance defense, denial of substantive consolidation would yield the most equitable result for creditors.

The MCIC Settlement represents a resolution of issues with an entire class of creditors, and therefore, with the support of the Ad Hoc Committee of MCIC Senior Noteholders eliminated the risk that the Debtors would have to cramdown a plan of reorganization over the dissent of that class. *See 11 U.S.C. § 1129(b)(1)*.

The MCIC Settlement is reasonable, fair and equitable and in the best interests of the Debtors, their estates [*135] and their creditors.

The MCIC Settlement falls within the range of reasonableness, provides for the resolution of complex litigation that would likely implicate multiple appeals, and is in the best interests of the Debtors, their estates and creditors. The MCIC Settlement has been negotiated at arm's-length and has been entered into in good faith. It is in the best interests of the Debtors to reach consensus with the major creditor groups. The MCIC Settlement avoids costly and time-consuming litigation, paving the way toward achieving a successful reorganization of the Debtors. The avoidance of long and complicated litigation is one of the principal rationales for debtors entering into settlements with creditors. *See In re Baldwin United Corp., 43 B.R. 888 (Bankr. S.D. Ohio 1984)* (approving a compromise and finding that the value of a settlement was significantly enhanced and the debtors received additional value by eliminating the possibility of costly litigation).

The MCIC Settlement removes substantial impediments to a successful restructuring and reorganization of the Debtors, furthers the Debtors' reorganization and prompt emergence from chapter 11 and reflects [*136] a reasonable balance of the risk and expense of litigation against the benefits of early resolution of the disputes and issues. *In re Teltronics Servs., Inc., 762 F.2d 185, 188-89 (2d Cir. 1985)*; *In re W.T. Grant Co., 699 F.2d at 608*; *In re Int'l Distrib. Ctrs., Inc., 103 B.R. at 423*. Furthermore, the MCIC Settlement is above the lowest point in the range of reasonableness and is an exercise of the Debtors' sound business judgment.

C. *SECTION 1129 OF THE BANKRUPTCY CODE*

A debtor, as the proponent of the Plan, bears the burden of proof under *section 1129 of the Bankruptcy Code.* A debtor must meet this burden by a preponderance of the evidence. *See Heartland Federal Savings & Loan Ass 'n v. Briscoe Enterprises., Ltd. II (In re Briscoe Enterprises., Ltd. II), 994 F.2d 1160, 1165 (5th Cir. 1993)* ("The combination of legislative silence, Supreme Court holdings, and the structure of the [Bankruptcy] Code leads this Court to conclude that preponderance of the evidence is the debtor's appropriate standard of proof under both *§ 1129(a)* and in a cramdown").

The Debtors have demonstrated, by a preponderance of [*137] the evidence, that all of the subsections of *section 1129 of the Bankruptcy Code* have been satisfied with respect to the Plan.

Pursuant to *section 1129(a)(1) of the Bankruptcy Code*, a plan must "comply with the applicable provisions of [the Bankruptcy Code]." *11 U.S.C. § 1129(a)(l)*. The legislative history of *section 1129(a)(1)* explains that this

provision encompasses the requirements of *sections 1122 and 1123* governing classification of claims and contents of a plan, respectively. H.R. Rep. No. 5-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978); *In re Johns-Manville Corp., 68 B.R. 618, 629 (Bankr. S.D.N.Y. 1986), aff'd in part, rev'd in part on other grounds, 78 B.R. 407 (S.D.N.Y. 1987), aff'd, Kane v. Johns-Manville Corp. 843 F.2d 636 (2d Cir. 1988)*; *In re Toy & Sports Warehouse, Inc., 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984)*. As demonstrated below the Plan complies fully with the requirements of *sections 1122 and 1123*, as well as other applicable provisions of the Bankruptcy Code. *See 11 U.S.C. § 1127(a), (c)*.

Section 1122

Pursuant to *section* [*138] *1122(a)*, a plan may provide for multiple classes of claims or interests as long as each claim or interest within a class is substantially similar to other claims or interests in that class. *See 11 U.S.C. § 1122(a)*. The Plan adequately and properly classifies all Claims and Equity Interests. A reasonable basis exists for the classification of Claims and Equity Interests in the Plan. Claims and Equity Interests within each particular Class are substantially similar and the classification of Claims and Equity Interests in the Plan is reasonable and necessary to implement the Plan.

Consistent with the October 20 Ruling and the requirements of *section 1122*, the Plan provides for the separate classification of WorldCom General Unsecured Claims, MCI Pre-merger Claims, and Ad Hoc MCI Trade Claims Committee Claims. Each of the Claims in each particular Class is substantially similar to the other Claims in such Class. Such classification is proper.

Even if the Court were to determine that WorldCom General Unsecured Claims, MCI Pre-merger Claims, and Ad Hoc MCI Trade Claims Committee Claims are "substantially similar" to each other, *section 1122(a)* would not require [*139] that all such substantially similar claims be classified together. Rather, *section 1122(a)* requires that, if claims are classified together, then they must be substantially similar. *See In re One Times Square Associates Ltd. Partnership, 159 B.R. 695, 703 (Bankr. S.D.N.Y. 1993)*; *In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 760 (Bankr. S.D.N.Y. 1992)* A debtor need not place all substantially similar claims in the same class as long as the debtor has a reasonable basis for the separate classification. *See Times Square Associates, 159 BR. at 703*.

Based upon the existence of the subordination provisions of the MCIC Subordinated Notes Indenture and the unique prejudice and reliance arguments of holders of pre-Merger Claims, the WorldCom Debt Claims, WorldCom General Unsecured Claims, MCI Pre-merger Claims, MCIC Senior Debt Claims, and MCIC Subordinated Debt Claims are dissimilar in their legal nature and their equitable rights. The separate classification of the WorldCom Debt Claims, WorldCom General Unsecured Claims, MCI Pre-merger Claims, MCIC Senior Debt Claims, and MCIC Subordinated Debt Claims under the Plan is appropriate.

[*140] *Section 1122(b) of the Bankruptcy Code* provides: "A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience." *11 U.S.C. § 1122(b)*. Consistent with *section 1122(b)*, for administrative convenience, general unsecured claims against the Debtors in an amount of $ 40,000 or less have been classified together in Class 4.

Accordingly, the classification of claims and equity interests in the Plan complies with *section 1122 of the Bankruptcy Code.Section 1123(a)*

Section 1123(a) of the Bankruptcy Code sets forth seven requirements with which every chapter 11 plan must comply. *See 11 U.S.C. § 1123(a)*. The Plan fully complies with each such requirement.

Article II of the Plan provides for the treatment of Administrative Expense Claims and Priority Tax Claims and Article III of the Plan designates Classes of claims and Classes of equity interests as required by *section 1123(a)(l).* specify whether each Class of claims and equity interests is [*141] impaired under the Plan and the treatment of each such Class, as required by *sections 1123(a)(2) and 1123(a)(3)*, respectively.

The Plan also complies with the requirements of *section 1123(a)(4)* and the October 20 Ruling. *Section 1123(a)(4)* provides that a plan shall "provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to less favorable treatment of such particular claim or interest." Each Claim in Classes 6, 6A and 6B will receive the same treatment as other Claims in each of these Classes, unless such holder agreed to less favorable treatment. [20] As the holders of WorldCom General

Unsecured Claims, MCI Pre-merger Claims, and Ad Hoc MCI Trade Claims Committee Claims have been separately classified in Classes 6, 6A, and 6B, respectively, the Plan satisfies the requirements of *section 1123(a)(4) of the Bankruptcy Code* and addresses the Court's October 20 Ruling.

> 20 Pursuant to section 4.08(b) of the Plan, if a holder of an MCI Pre-merger Claim is a member of the Ad Hoc MCI Trade Claims Committee, then such holder's recovery will be reduced by the amount received by such holder on account of such Claim pursuant to the contributions from the holders of MCIC Senior Debt Claims and MCIC Subordinated Debt Claims set forth in Sections 4.12 and 4.13 of the Plan. The members of the Ad Hoc MCI Trade Claims Committee have consented to such treatment.

[*142] Articles V, VI, VIII, and IX and various other provisions of the Plan set forth the means for implementation of the Plan as required by *section 1123(a)(5)*. For example, the substantive consolidation provisions set forth in Sections 5.01 and 5.02 of the Plan are authorized by *section 1123(a)(5)*. *See In re Stone & Webster, Inc., 286 B.R. 532, 540-41 (Bankr. D. Del. 2002)*.

Section 9.03 of the Plan provides for the prohibition of the issuance of nonvoting equity securities in the Certificates of Incorporation and the By- laws of Reorganized WorldCom and each of the other Reorganized Debtors to ensure compliance with *section 1123(a)(6)*.

Finally, Article IX of the Plan contains provisions with respect to the manner of selection of officers and directors of Reorganized WorldCom and each of the other Reorganized Debtors that are consistent with the interests of creditors, equity security holders, and public policy in accordance with *section 1123(a)(7)*.

Section 1123(b)

Section 1123(b) of the Bankruptcy Code sets forth the permissive provisions that may be incorporated into a chapter 11 plan. The Plan is consistent with *section 1123(b)*. Specifically, pursuant [*143] to Article IV of the Plan, Classes 1 and 3 are rendered unimpaired and Class 2 and Classes 3A through 15 are impaired, as contemplated by *section 1123(b)(l)*. As contemplated by *section 1123(b)(2)*, Article VIII of the Plan provides for the assumption or rejection of the executory contracts and unexpired leases of the Debtors not previously assumed or rejected (or subject to pending requests for assumption or rejection) under *section 365 of the Bankruptcy Code*. Section 5.06 of the Plan provides for the approval, pursuant to Bankruptcy *Rule 9019*, of the Intermedia Settlement, the MCIC Settlement, and the Bank Settlement, as contemplated by *section 1123(b)(3)*. Each of the Settlements is discussed in greater detail in section I.B. above.

Based upon the foregoing, the Plan complies fully with the requirements of *sections 1122 and 1123* of the Bankruptcy Code, and thus, satisfies the requirements of *section 1129(a)(1) of the Bankruptcy Code*.**(ii) *1129(a)(2)***

Section 1129(a)(2) of the Bankruptcy Code requires that the plan proponent "comply with the applicable provisions of [the Bankruptcy Code]." *11 U.S.C. § 1129(a)(2)*. The legislative history to *section* [*144] *1129(a)(2)* reflects that this provision is intended to encompass the disclosure and solicitation requirements under *sections 1125 and 1126* of the Bankruptcy Code. *See In re Johns-Manville Corp., 68 B.R. 618, 630 (Bankr. S.D.N.Y. 1986), aff'd in part, rev'd in part on other grounds, 78 B.R. 407 (S.D.N.Y. 1987), aff'd, Kane v. Johns-Manville Corp. 843 F.2d 636 (2d Cir. 1988)*; *In re Toy & Sports Warehouse, Inc., 37 B.R. 141, 149 (Bankr. S.D.N.Y. 1984)*; H.R. Rep. No. 95-595, at 412 (1977); S. Rep. No. 95-989, at 126 (1978) ("Paragraph (2) [of *section 1129(a)*] requires that the proponent of the plan comply with the applicable provisions of chapter 11, such as *section 1125* regarding disclosure."). The Debtors have complied with the applicable provisions of title 11, including the provisions of *sections 1125 and 1126*, regarding disclosure and Plan solicitation.

Section 1125Section 1125 of the Bankruptcy Code provides in pertinent part:

> (b) An acceptance or rejection of a plan may not be solicited after the commencement of the case under [the Bankruptcy Code] from a holder of a claim or interest [*145] with respect to such claim or interest unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary or the plan, and a written

> disclosure statement approved, after notice and a hearing, by the court as containing adequate information....
>
> (c) The same disclosure statement shall be transmitted to each holder of a claim or interest of a particular class, but there may be transmitted different disclosure statements, differing in amount, detail, or kind of information, as between classes.

11 U.S.C. § 1125(b), (c).

As set forth more fully above, the Debtors did not solicit the acceptance or rejection of the Plan by any creditor prior to the transmission of the Disclosure Statement. Debtors transmitted the Disclosure Statement to each creditor that was entitled to vote to accept or reject the Plan, as well as to other parties in interest in this case, in compliance with *section 1125* and this Court's Orders. In addition, creditors that were not entitled to vote to accept or reject the Plan and equity interest holders (who are deemed to reject the Plan) were provided with certain non-voting materials approved [*146] by the Court in compliance with the Court's orders.

Additionally, the Debtors have complied with *section 1125* with respect to the Third Supplement and the Plan. In connection with soliciting votes on the September 12 Plan, the Court has already determined that the Third Supplement contains "adequate information" of the kind and in sufficient detail to enable hypothetical, reasonable investors typical of the Debtors' creditors to make an informed judgment whether to accept or reject either the September 12 Plan. The Third Supplement includes a detailed discussion of the relative rights, reliance arguments, and bases for different treatment among WorldCom General Unsecured Claims, MCI Pre-merger Claims, and Ad Hoc MCI Trade Claims Committee Claims. The September 12 Plan was solicited in accordance with the Court's prior orders and received overwhelming support from all Classes.

The Debtors are not required to re-solicit votes of holders of Claims in Classes 6, 6A, or 6B based upon the modifications to the September 12 Plan embodied in the Plan. Classes 6 and 6A are deemed to reject the Plan Class 6B is conclusively presumed to accept the Plan.

Accordingly, Debtors complied with *section* [*147] *1125 of the Bankruptcy Code.Section 1126*

Section 1126 of the Bankruptcy Code specifies the requirements for acceptance of a plan of reorganization. Under *section 1126*, only holders of allowed claims and allowed equity interests in impaired classes of claims or equity interests that will receive or retain property under a plan on account of such claims or equity interests may vote to accept or reject such plan. *See 11 U.S.C. § 1126*. As set forth in *section 1126*:

> (a) The holder of a claim or interest allowed under *section 502* of [the Bankruptcy Code] may accept or reject a plan....
>
> (f) Notwithstanding any other provision of this section, a class that is not impaired under a plan, and each holder of a claim or interest of such class, are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class from the holders of claims or interests of such class is not required.
>
> (g) Notwithstanding any other provision of this section, a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or [*148] interests to receive or retain any property under the plan on account of such claims or interests.

11 U.S.C. § 1126(a), (f), (g).

In accordance with *section 1126 of the Bankruptcy Code*, the Debtors solicited acceptances or rejections of the Plan from the holders of all Allowed claims in each Class of impaired claims that are to receive distributions under the Plan and that are not otherwise deemed to reject the Plan. Classes 1 and 3 of the Plan are unimpaired. As a result, pursuant to *section 1126(f)*, holders of claims in those Classes are conclusively presumed to have accepted the Plan. Pursuant to Section 4.02 of the Plan, the Debtors have determined to pay holders of Allowed Secured Tax Claims in Class 2 in cash, in full, plus interest required under *section 506(b)*, thereby rendering Class 2 unimpaired. As a result, Class 2 now is also

conclusively presumed to have accepted the Plan. *See 11 U.S.C. §§ 1124, 1126(f)*.

Classes 3A, 4, 5, 6, 6A, 6B, 9, 10, 11, 12, 13 and 14 of the Plan are impaired. As a result, pursuant to *section 1126(a)*, helders of Claims in such Classes that were not deemed to reject the Plan were entitled [*149] to vote to accept or reject the Plan. [21] Classes 7, 8, and 15 of the Plan will not receive any distributions under the Plan. As a result, pursuant to *section 1126(g)*, holders of claims and equity interests in such Classes are deemed to have rejected the Plan.

> 21 Classes 6, 6A and 14 were deemed to reject the Plan. Class 6B was deemed to accept the Plan, pursuant to their agreement to support the Plan in a stipulation entered with the Debtors, among others.

As to impaired classes entitled to vote to accept or reject a plan, *sections 1126(c) and 1126(d)* specify the requirements for acceptance of a plan by classes of claims and classes of equity interests, respectively:

> (c) A class of claims has accepted a plan if such plan has been accepted by creditors, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount and more than one-half in number of the allowed claims of such class held by creditors, other than any entity designated under subsection [*150] (e) of this section, that have accepted or rejected the plan.
>
> (d) A class of interests has accepted the plan if such plan has been accepted by holders of such interests, other than any entity designated under subsection (e) of this section, that hold at least two-thirds in amount of the allowed interests of such class held by holders of such interests, other than any entity designated under subsection (e) of this section, that have accepted or rejected such plan.

11 U.S.C. § 1126(c), (d).

The Plan has been accepted by creditors holding in excess of two-thirds in amount and one-half in number of the Allowed claims entitled to vote in each class.

As set forth above, Class 6 (WorldCom General Unsecured Claims) and Class 6A (MCI Pre-merger Claims) are deemed to reject the Plan. In addition, Class 7 (WorldCom Subordinated Claims), Class 8 (WorldCom Equity Interests), and Class 15 (Intermedia Equity Interests) will receive no recoveries under, and thus are deemed to have rejected, the Plan. Nevertheless, as set forth below, pursuant to *section 1129(b) of the Bankruptcy Code*, the Plan may be confirmed over the deemed rejections because the Plan does [*151] not discriminate unfairly and is fair and equitable with respect to each such Class. *See 11 U.S.C. § 1129(b)*.

The Debtors have complied with the applicable provisions of the Bankruptcy Code, including, without limitation, the disclosure and solicitation requirements under *sections 1125 and 1126* of the Bankruptcy Code. *11 U.S.C. §§ 1125, 1126, 1127(a)*. Based upon the foregoing, the requirements of *section 1129(a)(2)* have been satisfied.

(iii) *1129(a)(3)*

Section 1129(a)(3) of the Bankruptcy Code requires that a plan be "proposed in good faith and not by any means forbidden by law." *11 U.S.C. § 1129(a)(3)*. In the context of a chapter 11 plan, courts have held that "a plan is proposed in good faith if there is a likelihood that the plan will achieve a result consistent with the standards prescribed under the [Bankruptcy] Code." *In re Leslie Fay Cos., 207 B.R. 764, 781 (Bankr. S.D.N.Y. 1997)* (quoting *In re Texaco Inc., 84 B.R. 893, 907 (Bankr. S.D.N.Y.), appeal dismissed, 92 B.R. 38 (S.D.N.Y. 1988)*. "The requirement of good faith must be viewed [*152] in light of the totality of the circumstances surrounding the establishment of a chapter 11 plan. *"Leslie Fay, 207 B.R. at 781* (citations omitted). The primary goal of chapter 11 is to promote the rehabilitation of the debtor. Congress has recognized that the continuation of the operation of a debtor's business as a viable entity benefits the national economy through the preservation of jobs and continued production of goods and services. The Supreme Court similarly has recognized that "the fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources." *NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528, 79 L. Ed. 2d 482, 104 S. Ct. 1188 (1984)*; *see also In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 760 (Bankr. S.D.N.Y. 1992)*

(quoting *Bildisco)*. In addition, courts have stressed the importance of payment of creditors in Chapter 11 Cases. *See In re Ngan Gung Restaurant, 254 B.R. 566, 571 (Bankr. S.D.N.Y. 2000).*

The Plan proposed by the Debtors accomplishes these rehabilitative goals by restructuring the Debtors' [*153] obligations and providing the means through which the Debtors may continue to operate as a viable enterprise. The Plan is the result of extensive good faith, arm's-length negotiations among the Debtors, the Committee, the Ad Hoc Committee of Intermedia Noteholders, the Ad Hoc Committee of MCIC Senior Noteholders, the Ad Hoc Committee of WorldCom Noteholders, the Ad Hoc Bank Committee, the Matlin Patterson Investors and other economic parties in interest. The Plan is overwhelmingly supported by creditors and other parties in interest in this case. The support of the Plan by each of these key constituencies with divergunt interests and the Committee reflects their acknowledgment that the Plan provides fundamental fairness to creditors and equity interest holders. It is indisputable that the Plan promotes the rehabilitative objectives and purposes of the Bankruptcy Code.

Nevertheless, on October 9, 2003, the United States Trustee filed an objection that, *inter alia*, objected to the "Obligation to Defend" provision in the Plan. The United States Trustee argues that the provision is one not typically found in plans, violates the basic principle of a "fresh start" and potentially saddles [*154] the estate with unlimited liability.

The United States Trustee argues that the provision is onerous for the Debtors because it requires the Debtors to pay legal, settlement and judgment costs of the Covered Parties. The United States Trustee views this obligation as potentially impacting on the Debtors' "fresh start" because the Debtors will be responsible for an indeterminate amount of legal fees in connection with litigation involving the conduct of other parties with respect to the plan process. As a practical matter, the United States Trustee contends Debtors will be responsible for the Covered Parties gross negligence and willful misconduct because most matters are resolved prior to the entry of a final judgment. The United States Trustee also adds that the Obligation to Defend provision was incorporated after the Covered Parties had reached an agreement.

In addressing the United States Trustee's objection, the Court is mindful that the Bankruptcy Code does not prohibit the inclusion of the Obligation to Defend. Stated differently, the Bankruptcy Code does not require that this Court substitute its judgment for the judgment of the debtor in possession or other stakeholders in [*155] this case. Indeed, parties with an economic stake in the outcome of this case and the continued viability in the Reorganized Debtors have not objected to its inclusion. The issue thus appears to be whether the Court should sustain the objection to the Obligation to Defend in light of what the United States Trustee views as a provision which would undermine the integrity of the reorganization process.

As a threshold matter, the Court holds that the record amply demonstrates that not only was the Plan proposed in good faith but that the inclusion of the Obligation to Defend Provision in the Plan was an essential element of the Plan formulation process and negotiations with respect to each of the settlements contained in the Plan. *(See* Neporent Decl. P 5.) To the extent that the United States Trustee challenges the sufficiency of the record, the Court notes that the United States Trustee could have cross-examined Mark A. Neporent. On behalf of the Covered Parties, Mark A. Neporent provided in a declaration that the Obligation to Defend Provision in the Plan was vital to the successful negotiation of the Plan and that without such provision the Covered Parties would have been less [*156] likely to negotiate the terms of the settlement and Plan. The United States Trustee did not cross-examine Mr. Neporent. The uncontradicted evidence, therefore, supports the conclusion that the Obligation to Defend Provision facilitated the plan process and ultimately facilitated Debtors' reorganization and rehabilitation. The Court can find nothing untoward or indicative of a lack of good faith to sustain the United States Trustee's objection.

Concerning the United States Trustee's argument that the Obligation to Defend Provision violates the basic principle of a "fresh start" aid potentially saddles the estate with unlimited liability, the Court finds that the United States Trustee's argument is more appropriately suited to questioning the feasibility of the Plan and not to questioning Debtors' good faith. As will be discussed further below, the feasibility of the Plan has been established in accordance with the prevailing legal standard.

Moreover, if the Court were to sustain the United

States Trustee's objection, the Court would effectively be endorsing the proposition that the inclusion of the Obligation to Defend Provision somehow transformed an otherwise arm's-length plan negotiated [*157] after many months with the participation of a representative cross-section of creditor constituencies, into a plan not proposed in good faith for purposes of *section 1129(a)(3)*. Nothing that the United States Trustee relies upon supports this conclusion. Although the United States Trustee (in fulfilling her duties) is understandably concerned with the integrity of the chapter 11 reorganization process, WorldCom's case has been under the scrutiny of, among others, an active creditor body, the District Court through its appointed corporate monitor and a number of governmental entities, as well as this Court. Despite the fact that parties in interest were cognizant of the Obligation to Defend Provision, no one, other than the United States Trustee, objected or even questioned the propriety of the provision. This is not a chapter 11 case where because of its size and/or lack of creditor interest that a debtor is attempting to impose an onerous term and thereby take advantage of the lack of constituent participation. In such a situation, it is clear that the United States Trustee's scrutiny is essential. In sum, in the Court's view, the integrity of WorldCom's reorganization process was [*158] protected in this case and was not put at risk by the Obligation to Defend Provision.

Further, the Court recognizes that there are certain issues that warrant aggressive scrutiny from the United States Trustee (e.g., conflicts of interest, creditor committee member conduct, etc.) notwithstanding the level of creditor participation; however, the Court does not view the Obligation to Defend, under the circumstances of this case, as one of those instances.

Accordingly, the Court overrules the objection of the United States Trustee. The Plan has been proposed in good faith and not by any means forbidden by law.

Based upon the foregoing, the requirements of *section 1129(a)(3)* have been satisfied.

(iv) *1129(a)(4)*

Section 1129(a)(4) of the Bankruptcy Code requires that certain professional fees and expenses paid by the plan proponent, by the debtor, or by a person receiving distributions of property under the plan, be subject to approval by the Court as reasonable. Specifically, *section 1129(a)(4)* requires that:

> Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for [*159] costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to approval of, the court as reasonable.

11 U.S.C. § 1129(a)(4).

Section 1129(a)(4) has been construed to require that all payments of professional fees that are made from estate assets be subject to review and approval as to their reasonableness by the Court. *See In re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 760 (Bankr. S.D.N.Y. 1992)*; *In re Johns-Manville Corp., 68 B.R. 618, 632 (Bankr. S.D.N.Y. 1986), aff'd in part, rev'd in part on other grounds, 78 B.R. 407 (S.D.N.Y. 1987), aff'd, Kane v. Johns-Manville Corp. 843 F.2d 636 (2d Cir. 1988)*.

Pursuant to the interim application procedures established under *section 331 of the Bankruptcy Code*, the Court authorized and approved the payment of certain fees and expenses of professionals retained in this case. All such fees and expenses, as well as all other accrued fees and expenses of professionals through the Effective Date, remain subject to final review for reasonableness by the [*160] Court under *section 330 of the Bankruptcy Code. 11 U.S.C. § 330*. In addition, pursuant to *sections 503(b)(3) and (4)*, the Court must review any applications for substantial contribution to ensure compliance with the statutory requirements and that the fees requested are reasonable. Further, all payments to be made in connection with the Effective Date or which relate to the success of the reorganization or which otherwise are required to be disclosed, including any amounts to be paid to officers and directors, have been disclosed previously. Finally, the Plan provides a mechanism for the Court to approve certain payments of fees and expenses to certain indenture trustees.

The foregoing procedures for the Court's review and ultimate determination of the fees and expenses to be paid by the Debtors satisfy the objectives of *section 1129(a)(4)*. *See In re Elsinore Shore Assos., 91 B.R. 238, 268 (Bankr. D.N.J. 1988)* (requirements of *section*

1129(a)(4) satisfied where plan provided for payment of only "allowed" administrative expenses); *In re Future Energy Corp., 83 B.R. 470, 488 (Bankr. S.D. Ohio 1988)* ("Court approval of payments [*161] for services and expenses is governed by various Code provisions -- e.g., *§§ 328, 329, 330, 331 and 503(b)* - and need not be explicitly provided for in a Chapter 11 plan.").

Based upon the foregoing, the Plan complies with the requirements of *section 1129(a)(4)*.

(v) *1129(a)(5)*

Section 1129(a)(5) of the Bankruptcy Code requires that the plan proponent disclose the identity and affiliations of the proposed officers and directors of the reorganized debtors; that the appointment or continuance of such officers and directors be consistent with the interests of creditors and equity security holders and with public policy; and that there be disclosure of the identity and compensation of any insiders to be retained or employed by the reorganized debtors. *11 U.S.C. § 1129(a)(5)*.

The employment of officers and directors by the Reorganized Debtors, is consistent with the interests of creditors and is essential to the ongoing viability of the Debtors' business. The individuals associated with the prior wrongdoings of the Debtors have either resigned or have been discharged by the Debtors. The current directors have exemplary reputations, and distinguished [*162] credentials. The current officers of the Debtors are intimately familiar with the Debtors' business and are needed to maintain critical business relationships with lenders, suppliers, customers, and other parties. *See In re Apex Oil Co., 118 B.R. 683, 704-05 111 B.R. 245 (Bankr. E.D. Mo. 1990)*; *In re Toy & Sports Warehouse, Inc., 37 B.R. 141, 149-50 (Bankr. S.D.N.Y. 1984)*.

Based upon the foregoing, the Debtors have satisfied the requirements of *section 1129(a)(5)*.

(vi) *1129(a)(6)*

Section 1129(a)(6) of the Bankruptcy Code requires that any regulatory commission having jurisdiction over the rates charged by the reorganized debtor in the operation of its businesses approve any rate change provided for in the plan. *11 U.S.C. § 1129(a)(6)*.

The foregoing provision appears inapplicable in the instant cases. The Plan does not provide for rate changes by Reorganized WorldCom or any of the other Reorganized Debtors. Accordingly, such regulatory approval is unnecessary under the terms of the statute, and the requirements of *section 1129(a)(6)* are met.

(vii) *1129(a)(7)*

Section 1129(a)(7) of the Bankruptcy Code provides, in [*163] relevant part:

> With respect to each impaired class of claims or interests --
>
> (A) each holder of a claim or interest of such class --
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date . . . .

11 U.S.C. § 1129(a)(7)(A).

This section, referred to as the "best interests" test, focuses on individual dissenting creditors rather than classes of claims. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 North LaSalle St. Partnership, 526 U.S. 434, 143 L. Ed. 2d 607, 119 S. Ct. 1411 (1999)*. Under the best interests test, the court "must find that each [non-accepting] creditor will receive or retain value that is not less than the amount he would receive if the debtor were liquidated." *203 North LaSalle, 526 U.S. at 440*; *United States v. Reorganized CF&I Fabricators, Inc., 518 U.S. 213, 228, 135 L. Ed. 2d 506, 116 S. Ct. 2106 (1996)*. As *section 1129(a)(7)* makes [*164] clear, the liquidation analysis applies only to non-accepting impaired claims or equity interests.

In the instant case, the best interests test is satisfied as to each unimpaired Class of claims. Pursuant to *section 1126(f) of the Bankruptcy Code*, each holder of a claim in Classes 1 and 3 is deemed to have accepted the Plan. Moreover, because the Debtors have determined to pay claimants in Class 2, in full, in cash, plus interest required under *section 506(b)*, such Class also is rendered

unimpaired and deemed to have accepted the Plan pursuant to *section 1126(f) of the Bankruptcy Code.* Therefore, the best interests test is satisfied with respect to Classes 1, 2 and 3.

Debtors' liquidation analysis demonstrates that the values that may be realized by the holders of claims and equity interests in the respective Classes of claims and equity interests upon disposition of the Debtors' assets pursuant to a chapter 7 liquidation are significantly less than the value of the recoveries to such Classes provided for under the Plan. Specifically, the liquidation analysis demonstrates that holders of claims and equity interests in Classes 3A through 15 would not receive any distributions in a [*165] chapter 7 liquidation as there would be no funds for distribution after payment of claims having priority over general unsecured claims. The distributions to these Classes under the Plan, therefore, far exceed the distributions under a chapter 7 liquidation.

The Debtors do not have the ability to produce separate legal entity liquidation analyses, which is why the Debtors are seeking to substantively consolidate. In addition, the Bankruptcy Code and applicable case law make clear that the Debtors need not provide non-consolidated financial information in a disclosure statement relating to a substantive consolidation plan. *See In re Stone & Webster, Inc., 286 B.R. 532, 544-46 (Bankr. D. Del. 2002)*; *In re Affiliated Foods, Inc., 249 B.R. 770, 789 (Bankr. W.D. Mo. 2000)*. In fact, the Debtors are not obligated to provide information regarding any other possible or proposed plan of reorganization. *See 11 U.S.C. § 1125(a)(l)*; *see also Kirk v. Texaco Inc., 82 B.R. 678, 684 (S.D.N.Y. 1988)*; *In re Aspen Limousine Service, Inc., 193 B.R. 325, 334 (D. Colo. 1996)*.

Based upon the foregoing, the Plan [*166] satisfies the requirements of *section 1129(a)(7).*

(viii) *1129(a)(8)*

Section 1129(a)(8) of the Bankruptcy Code requires that each class of impaired claims or interests accepts the plan, as follows:

> With respect to each class of claims or interests -
>
> (A) such class has accepted the plan; or
>
> (B) such class is not impaired under the plan.

11 U.S.C. § 1129(a)(8).

Classes 1 and 3 are unimpaired under the Plan and are conclusively presumed pursuant to *section 1126(f)* to have accepted the Plan. Moreover, as a result of the Debtors' determination to pay creditors in Class 2 of the Plan, in full, in cash, plus interest required under *section 506(b)*, Class 2 also is unimpaired and conclusively presumed pursuant to *section 1126(f)* to have accepted the Plan.

Classes 3A, 4, 5, 9, 10, 11, 12, 13, which are impaired Classes of Claims, have affirmatively voted to accept the Plan. Class 6B is impaired and is deemed to have accepted the Plan because of the stipulation entered into with the Debtors, among others, to support the Plan.

Thus, as to these (i) unimpaired and (ii) impaired and accepting Classes, the requirements of *section 1129(a)(8)* [*167] have been satisfied.

Classes 6, 6A, 7, 8, 14, and 15 are deemed to have rejected the Plan. Nonetheless, as set forth below, the Plan may be confirmed under the "cram down" provisions of *section 1129(b) of the Bankruptcy Code.***(ix) *1129(a)(9)***

Unless the holder of a particular claim agrees to different treatment with respect to such claim, *section 1129(a)(9) of the Bankruptcy Code* requires that persons holding claims entitled to priority under *section 507(a)* receive specified cash payments under the plan. *See 11 U.S.C. § 1129(a)(9).* The Plan provides for payment of Claims of a kind specified in *sections 507(a)(1) through 507(a)(8)* of the Bankruptcy Code in a manner consistent with *section 1129(a)(9) of the Bankruptcy Code. 11 U.S.C. § 1129(a)(9).*

Based upon the foregoing, the Plan satisfies the requirements of *section 1129(a)(9) of the Bankruptcy Code.*

(x) *1l29(a)(10)*

Section 1129(a)(l0) of the Bankruptcy Code requires the affirmative acceptance of the Plan by at least one Class of impaired claims, "determined without including

any acceptance of the plan by any insider." *11 U.S.C. § 1129* [*168] *(a)(10)*. The Plan satisfies this requirement because more than one class of impaired claims have accepted the Plan, without including the acceptance of the Plan by insiders, if any, in any such Classes.

(xi) *1129(a)(11)*

Section 1129(a)(11) of the Bankruptcy Code requires that, as a condition precedent to confirmation, the Court determine that the Plan is feasible. Specifically, the Court must determine that:

> Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

11 U.S.C. § 1129(a)(11).

As described below, the Plan is feasible within the meaning of this provision. The feasibility test set forth in *section 1129(a)(11)* requires the Court to determine whether the Plan is workable and has a reasonable likelihood of success. *See, e.g., In re The Leslie Fay Cos., 207 B.R. 764, 788 (Bankr. S.D.N.Y. 1997)*. The Second Circuit has provided that "the feasibility standard is whether the plan offers a reasonable assurance of success. [*169] Success need not be guaranteed." *Johns-Manville Corp., 843 F.2d 636, 649 (2d Cir. 1988)*; *see also In re U.S. Truck Co., 47 B.R. 932, 944 (E.D. Mich. 1985), aff'd, 800 F.2d 581 (6th Cir. 1986)*; *In re One Times Square Assocs. Ltd. Partnership, 159 B.R. 695, 709 (Bankr. S.D.N.Y. 1993)*; *In re Texaco Inc., 84 B.R. 893, 910 (Bankr. S.D.N.Y.), appeal dismissed, 92 B.R. 38 (S.D.N.Y. 1988)*; *In re Prudential Energy Co., 58 B.R. 857, 862 (Bankr. S.D.N.Y. 1986)*. The key element of feasibility is whether there exists a reasonable probability that the provisions of the plan can be performed. The purpose of the feasibility test is to protect against speculative plans. As noted by the United States Court of Appeals for the Ninth Circuit:

> The purpose of *section 1129(a)(11)* is to prevent confirmation of visionary schemes which promise creditors and equity security holders more under a proposed plan than the debtor can possibly attain after confirmation.

Pizza of Haw., Inc. v. Shakey's, Inc. (In re Pizza of Haw., Inc.), 761 F.2d 1374, 1382 (9th Cir. 1985). [*170] However, just as speculative prospects of success cannot sustain feasibility, speculative prospects of failure cannot defeat feasibility. The mere prospect of financial uncertainty cannot defeat confirmation on feasibility grounds. *See US. Truck, 47 B.R. at 944*.

Applying the foregoing standards of feasibility, courts have identified the following factors as probative:

> (1) the adequacy of the capital structure;
>
> (2) the earning power of the business;
>
> (3) economic conditions;
>
> (4) the ability of management;
>
> (5) the probability of the continuation of the same management; and
>
> (6) any other related matters which will determine the prospects of a sufficiently successful operation to enable performance of the provisions of the plan.

Leslie Fay, 207 B.R at 789; *see also Texaco Inc., 84 B.R. at 910*; *Prudential Energy, 58 B.R. at 862-63*. The foregoing list is neither exhaustive nor exclusive. *Drexel Burnham, 138 B.R. at 763*; *cf In re US. Truck Co., 800 F.2d 581, 589 (6th Cir. 1986)*.

For purposes of determining whether the Plan satisfies the feasibility [*171] standard, the Debtors have analyzed their ability to fulfill their obligations under the Plan. As part of this analysis, the Debtors have prepared projections of their financial performance for each of the three fiscal years for the period ending December 31, 2005 (the "Projections"). The Projections establish that the Debtors will have sufficient cash to meet all of their obligations under the Plan.

Based upon information contained in the record before this Court, after making all payments required pursuant to the Plan, the Reorganized Debtors appear to be a competitive viable operating entity. Significantly, Reorganized WorldCom will have a little more than $ 5.5

billion of debt as compared to approximately $ 32 billion prior to the Commencement Date. Accordingly, the Debtors established at the Confirmation Hearing that confirmation of the Plan is not likely to be followed by liquidation or the need for further reorganization.

Based upon the foregoing, the Plan satisfies the feasibility standard of *section 1129(a)(11)*.

(xii) *1129(a)(12)*

Section 1129(a)(12) requires the payment of "all fees payable under *section 1930 [of title 28 of the United States Code*], as determined [*172] by the court at the hearing on confirmation of the plan." *11 U.S.C. § 1129(a)(12)*. *Section 507 of the Bankruptcy Code* provides that "any fees and charges assessed against the estate under *[section 1930* of] chapter 123 of title 28" are afforded priority as administrative expenses. *11 U.S.C. § 507(a)(l)*. In accordance with *sections 507 and 1129(a)(12)* of the Bankruptcy Code, the Plan provides that all such fees and charges, to the extent not previously paid, will be paid in cash on the Effective Date or as soon thereafter as is practicable. *See* Plan § § 13.05, 13.06. Thus, the Plan satisfies the requirements of *section 1129(a)(12)*.

(xiii) *1129(a)(13*)

Section 1129(a)(13) requires a plan to provide for retiree benefits at levels established pursuant to *section 1114 of the Bankruptcy Code.* The Plan provides that the Reorganized Debtors shall continue to pay all retiree benefits of the Debtors, if any, at the level established in accordance with *section 1114 of the Bankruptcy Code*, at any time prior to the Confirmation Date, for the duration of the period for which the Debtors had obligated themselves to provide such [*173] benefits. *See* Plan, § 8.10. Accordingly, the Plan satisfies the requirements of *section 1129(a)(13)*.

(xiv) *1129(b)*

Section 1129(b) allows for confirmation of a plan where the plan has not been accepted by all impaired classes of claims. *Section 1129 of the Bankruptcy Code* provides, in relevant part:

> Notwithstanding *section 510(a)* of [the Bankruptcy Code], if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

11 U.S.C. § 1129(b)(l). This procedure is known as "cram down" as it allows the Court - in cases where all requirements of *section 1129(a)* are met, other than *1129(a)(8)* - to cram down the plan notwithstanding objections as long as the Court determines that the plan is "fair and equitable" and does not "discriminate unfairly" with respect to the dissenting [*174] classes. [22]

> 22 The holders of Class 14 Intermedia Preferred Stock are receiving a distribution from the estates of Intermedia and, thus, Class 14 is not junior to Class 6A.

Under *section 1129(b) of the Bankruptcy Code*, a plan unfairly discriminates where similarly situated classes are treated differently without a reasonable basis for the disparate treatment. *See In re Buttonwood Partners, Ltd., 111 B.R 57, 63 (Bankr. S.D.N.Y. 1990)*; *In re Johns-Manville Corp., 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986), aff'd in part, rev'd in part on other grounds, 78 B.R. 407 (S.D.N.Y. 1986), aff'd, 843 F.2d 636 (2d Cir. 1988)*. Thus, if under the facts and circumstances of a particular case, there is a reasonable basis for disparate treatment of two similarly situated classes of claims or two similarly situated classes of equity interests, there is no unfair discrimination. *See, e.g. Buttonwood Partners, 111 B.R. at 63*.

To determine whether [*175] a plan discriminates unfairly, courts consider whether (1) there is a reasonable basis for discriminating, (2) the debtor cannot consummate the plan without the discrimination, (3) the discrimination is proposed in good faith, and (4) the degree of discrimination is in direct proportion to its rationale. *See Buttonwood, 111 B.R. at 63*; *In re Ambanc La Mesa Ltd. Partnership, 115 F.3d 650 (9th Cir. 1997), cert. denied, 522 U.S. 1110, 140 L. Ed. 2 105, 118 S.Ct. 1039 (1998), In re Rochem, Ltd., 58 B.R. 641 (Bankr. D.N.J. 1985)*.

A mechanism that enables the Debtors to recognize

the unique reliance and prejudice arguments of the holders of (i) MCIC Senior Debt Claims, (ii) MCIC Subordinated Debt Claims, and (iii) MCI Pre-merger Claims, which those creditors, as parties that extended credit to an MCIC entity prior to the Merger, possess in relation to the substantive consolidation of the WorldCom Debtors, is a valid business justification and reasonable basis for the disparate treatment of WorldCom General Unsecured Claims, MCI Pre-merger Claims, MCIC Senior Debt Claims, and MCIC Subordinated Debt Claims.

Because the recoveries by holders of Class 5 Claims [*176] and Class 6 Claims are equivalent, the treatment of Class 5 does not unfairly discriminate against Class 6. *See In re Johns-Manville Corp., 68 B.R. 618, 636 (Bankr. S.D.N.Y. 1986).*

It is appropriate for the Debtors to consider the relative prejudice to creditors that may have relied upon the separate credit of MCIC or its subsidiaries prior to the Merger in order to formulate a fundamentally fair chapter 11 plan. *See, e.g., Moran v. Hong Kong & Shanghai Banking Corp. (In re Deltacorp, Inc.), 179 B.R. 773, 777 & n.5 (Bankr. S.D.N.Y. 1995).*

Class 6 WorldCom General Unsecured Claims are not similarly situated to Class 6A MCI Pre-merger Claims, Class 9 MCIC Senior Debt Claims and Class 10 MCIC Subordinated Debt Claims and there is a reasonable basis for the Plan's differentiation of them. *See In re Rochem, Ltd., 58 B.R. 641, 643-44 (Bankr. D.N.J. 1985).*

The discrimination among Classes 6, 6A, 9 and 10 under the Plan is not unfair because it is appropriate, reasonably proportional to the issues of the case and necessary to the reorganization. *See In re Kliegl Bros. Universal Electric Stage Lighting Co., 149 B.R. 306, 309 (Bankr. E.D.N.Y. 1992)* [*177]

The Debtors have demonstrated that the disparity of treatment between Classes 5 and 6 on the one hand, and Classes 6A, 9 and 10 on the other hand, which is based primarily upon the relative prejudice and reliance arguments of pre-Merger creditors, is not only warranted, but necessary to achieve fundamental fairness. *See In re Buttonwood Partners, Ltd., 111 B.R. 57, 62 (Bankr. S.D.N.Y. 1990).*

The Debtors have acted in good faith in determining to provide additional recoveries to the holders of Class 6A Claims compared to recoveries Class 6 Claims.

The 35.7% distribution provided on account of Class 6 WorldCom General Unsecured Claims is both meaningful and consistent with the legal and equitable rights of similarly situated creditors and the Plan's overall distribution scheme.

The treatment afforded Class 6A does not unfairly discriminate against Class 6 and the distribution of a pre-Merger premium is "equitable for the unsecured creditors as a whole." *In re Pattni Holdings, 151 B.R. 628, 631 (Bankr. N.D. Ga. 1992).*

The Plan's provision for differing treatment among Classes 6A, 9 and 10 is reasonable because it appropriately reflects the complexities [*178] of the priorities of the Claims in these Classes *inter se. See Buttonwood Partners, 111 B.R. at 62.*

The record demonstrates that the Debtors have continuously sought to ensure that the Plan treats all creditors fairly and that the discrimination among Classes was proposed in good faith. *See Federal Deposit Insurance Corp. v. Colonial Realty Co., 966 F.2d 57, 61 (2d Cir. 1992).*

Any enhanced value received by holders of Class 6B Claims on account of contributions from other Classes is not a treatment of these Claims under the plan and does not constitute unfair discrimination. *See In re Genesis Health Ventures, Inc., 266 B.R. 591 (Bankr. D. Del. 2001),* (citing *In re SPM Mfg. Corp., 984 F.2d 1305 (1st Cir. 1993))*; *In re MCorp Financial Inc., 160 B.R. 941 (Bankr. S.D. Tex. 1993).*

The greater value received by the members of the Ad Hoc MCI Trade Claims Committee as a result of the Contributions does not violate the Bankruptcy Code, because the Contributions are the result of other creditors (holders of MCI Senior Debt Claims and MCI Subordinated Debt Claims) voluntarily sharing their recoveries under [*179] the Plan with the members of the Ad Hoc MCI Trade Claims Committee. (Debtors' Exs. 335 and 339.) The greater value received by the members of the Ad Hoc MCI Trade Claims Committee is not the result of the Debtors' distribution of estate property to such creditors. Creditors are generally free to do whatever they wish with the bankruptcy dividends they receive, including sharing them with other creditors,

so long as recoveries received under the Plan by other creditors are not impacted. *See Official Comm. of Unsecured Creditors v. Stern (In re SPM Mfg. Corp.), 984 F.2d 1305, 1313 (1st Cir. 1993)*; *In re MCorp Fin., Inc., 160 B.R. 941 (S.D. Tex. 1993)*; *In re Teligent, Inc., 282 B.R. 765 (Bankr. S.D.N.Y. 2002)*; *In re Nuclear Imaging, 270 B.R. 365 (Bankr. E.D. Pa. 2001)*; *In re Genesis Health Ventures, Inc., 266 B.R 591 (Bankr. D. Del. 2001)*; *In re White Glove, Inc.*, 1998 Bankr. LEXIS 1303, 1998 WL 731611 (Bankr. E.D. Pa. 1998); *In re Parke Imperial Canton, Ltd., 177 B.R. 544, 1994 WL 842777 (Bankr. N.D. Ohio 1994)*.

The Plan does not discriminate unfairly against Class 6 or Class 6A.

A plan is considered fair [*180] and equitable with respect to a class of unsecured claims where:

> (i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or
>
> (ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property.
>
> *11 U.S.C. § 1129(b)(2)(B)*.

No Class of Claims or Equity Interests that is junior to WorldCom General Unsecured Claims and MCI Pre-merger Claims will receive any property under the Plan on account of such Claims or Equity Interests.

The absolute priority rule is inapplicable to contributions of Plan recoveries made by certain creditors to other creditors. *See In re SPM, 984 F.2d at 1313*; *In re MCorp, 160 B.R. 941*. Agreements by creditors to share their recoveries under a plan of reorganization with other creditors need not benefit an entire class. *See, In re White Glove, Inc.*, 1998 Bankr. LEXIS 1303, 1998 WL 7311611; *In re Parke Imperial Center, 177 B.R. 544, 1994 WL 842777*. [*181] Moreover, the contributing creditor need not be a secured creditor. *See In re MCorp.*, *160 B.R. at 960*. The holding of *Official Comm. of Unsecured Creditors v. Stern (In re SPM Mfg. Corp.), 984 F.2d 1305, 1313 (1st Cir. 1993)* and its progeny affirming the propriety of contributions by certain creditors to other creditors under the Bankruptcy Code is applicable to the Contributions, which are in furtherance of a consensual plan of reorganization.

The Plan is fair and equitable with respect to Class 6 and Class 6A.

With respect to each of Classes 7, 8, 14 and 15 under the Plan, the Plan (i) does not discriminate unfairly and (ii) is fair and equitable within the meaning of 1129(b) of the Bankruptcy Code. *11 U.S.C. § 1129(b)*.

The Plan meets all of the requirements for confirmation under *sections 1127 and 1129* of the Bankruptcy Code.

The Integrated Settlement embodied in the Plan need not be approved under Bankruptcy *Rule 9019*.

The increase by $ 29,000,000,000 to the Intermedia Settlement (which will be distributed *pro rata* to the holders of Intermedia Preferred Stock) is not a material change to the Intermedia Settlement [*182] and does not adversely impact recoveries to any Class of creditors under the Plan.

Each of the objections to the July 9 Plan, September 12 Plan or the Plan not heretofore withdrawn or resolved by written or oral agreement stated and made a part of the record of the Confirmation Hearing, is overruled and denied.

III. SUMMARY

Substantive consolidation is warranted and approved. Each of the Settlements is approved. The Plan is confirmed.

An appropriate Order will be entered.

Dated: New York, New York October 31, 2003

s/Arthur I Gonzalez

UNITED STATES BANKRUPTCY JUDGE

EXHIBIT I

Slip Copy, 2010 WL 5053973 (Bkrtcy.D.Del.)
(Cite as: 2010 WL 5053973 (Bkrtcy.D.Del.))

H

Only the Westlaw citation is currently available.

United States Bankruptcy Court,
D. Delaware.
In re NEXPAK CORPORATION, et al.,[FN1] Debtors.

FN1. The Debtors are the following entities: NexPak Corporation (2207); Atlanta Precision Molding Co., LLC (4923); EPM Holdings, Inc. (4658); NexPak Holdings LLC (8844); JMC Acquisition LLC (1660); and AEI Acquisition LLC (1655).

No. 09-11244 (PJW).
May 18, 2010.

William A. Hazeltine, Sullivan Hazeltine Allinson LLC, Wilmington, DE, for Debtors.

ORDER CONFIRMING DEBTORS' SECOND AMENDED JOINT PLAN OF LIQUIDATION OF NEXPAK CORPORATION AND ITS AFFILIATED DEBTORS

PETER J. WALSH, Bankruptcy Judge.

***1** WHEREAS, on April 10, 2009, NexPak Corporation and its affiliates (the "Debtors"), the debtors and debtors in possession in the above captioned cases, each filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C §§ 101 *et seq.* (the "Bankruptcy Code"); and

WHEREAS, on September 3, 2009, the Debtors filed their *Joint Plan of Liquidation for Nexpak Corporation and Its Affiliated Debtors* (Docket No. 333) and related disclosure statement (Docket No. 334); and

WHEREAS, on September 29, 2009, the Debtors filed their *First Amended Joint Plan of Liquidation for Nexpak Corporation and Its Affiliated Debtors* (Docket No. 399) and *First Amended Disclosure Statement for First Amended Joint Plan of Liquidation for Nexpak Corporation and Its Affiliated Debtors* (Docket No. 400); and

WHEREAS, on September 30, 2009 this Court entered an *Order (I) Approving Disclosure Statement; (II) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Plan, Including (A) Approving Form and Manner of Solicitation Packages, (B) Approving Form and Manner of Notice of Confirmation Hearing, (C) Establishing Record Date and Approving Procedures for Distribution of Solicitation Packages, (D) Approving Forms of Ballots, (E) Establishing Deadline for Receipt of Ballots, and (F) Approving Procedures for Vote Tabulations; (III) Establishing Deadline and Procedures for Filing Objections to Confirmation of Plan; and (IV) Granting Related Relief* (the "Solicitation Procedures Order") (Docket No. 407). The Solicitation Procedures Order (i) approved the Disclosure Statement, pursuant to Section 1125 of the Bankruptcy Code as containing adequate information; (ii) approved the form and manner of notice of the hearing on the Disclosure Statement pursuant to Section 1125 of the Bankruptcy Code, (iii) established procedures for the solicitation and tabulation of votes to accept or reject the Plan, including approval of (a) the forms of ballots for submitting votes on the Plan, (b) the deadline for submission of ballots, (c) the contents of proposed solicitation packages to be distributed to creditors and other parties in interest in connection with the solicitation of votes on the Plan (the "Solicitation Packages"), and (d) the proposed record date for voting on the Plan, and (iv) scheduled a hearing on confirmation of the Plan; and

WHEREAS, on May 17, 2010, the Debtors filed the *Declaration of Kevin F. Dowdin Support of Confirmation of First Amended Joint Plan of Liquidation for Nexpak Corporation and Its Affiliated Debtors* (Docket No. 638); and

WHEREAS on May 18, 2010, the Debtors filed

the *Second Amended Joint Plan of Liquidation for Nexpak Corporation and Its Affiliated Debtors* (Docket No. 648) (as it may be further amended, the "Plan"); and

WHEREAS Delaware Claims Agency ("DCA"), the Debtors' claims, notice and balloting agent (the "Balloting Agent"), transmitted the Solicitation Packages in compliance with the Solicitation Procedures Order, as attested to in the various affidavits of service on file with the Court, including Docket Numbers 419 and 420 and 422; and

***2** WHEREAS, on May 18, 2010, DCA filed the Amended *Certification of Joseph L. King With Respect To the Tabulation of Votes to Accept or Reject the Debtors' First Amended Joint Plan of Liquidation Under Chapter 11 of the Bankruptcy Code* (Docket No. 643) (the "Vote Certification"), attesting to the tabulation of all ballots received by DCA from Holders of Class 3 Claims (Pre-Petition Lenders' Secured Claims) and Class 4 Claims (General Unsecured Claims) and attesting to the results of the tabulation as follows:

a. *Class 3 (Pre-Petition Lenders' Secured Claims).* Class 3 voted in favor of the Plan. In claim amount, a total of $53,216,569.39 in claims (100 %) in Class 3 voted to approve the Plan. For numerosity, the Plan was approved by 8 of 8 (100 %) of Class 3 voting creditors. No ballots were invalid.

b. *Class 4 (General Unsecured Claims).* Class 4 voted in favor of the Plan. In claim amount, a total of $2,041,794.89 in claims (99 %) in Class 4 voted to approve the Plan. For numerosity, the Plan was approved by 32 of 34 (94 %) of Class 4 voting creditors. No ballots were invalid.

WHEREAS, a hearing to consider confirmation of the Plan was held on May 18, 2010 (the "Confirmation Hearing").

NOW, THEREFORE, the Court having considered the Plan, the Declarations and Certifications discussed above, the testimony (if any) and statements of counsel in connection with and record of the Confirmation Hearing and the entire record of these chapter 11 cases, and after due deliberation thereon;

THE COURT HEREBY FINDS AND DETERMINES THAT:

A. *Jurisdiction and Core Proceeding (28 U.S.C. § 157(b)(2)).* This Court has jurisdiction under 28 U.S.C. §§ 157 and 1334 to consider confirmation of the Plan and all provisions thereof. Confirmation of the Plan is a core proceeding under 28 U.S.C. § 157(b)(2).

B. *Venue (28 U.S.C. §§ 1408 and 1409).* Venue of the Debtors' chapter 11 cases is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

C. *Judicial Notice.* The Court takes judicial notice of the docket in these chapter 11 cases maintained by the Clerk of the Court, including, without limitation, all pleadings and other documents filed, all orders entered, and all arguments made, proffered or adduced, at hearings held before the Court.

D. *Eligibility (11 U.S.C. § 109).* Each Debtor is an entity eligible for relief under Section 109 of the Bankruptcy Code.

E. *Transmittal of Solicitation Packages.* The Disclosure Statement (together with all exhibits thereto, including the Plan), the Confirmation Hearing Notice and the ballots were transmitted and served in accordance with the Solicitation Procedures Order and all applicable Bankruptcy Rules and such transmittal and service was adequate and sufficient.

F. *Substantive Consolidation.* Substantive consolidation of the Debtors for the purpose of confirming and consummating the Plan is appropriate. Specifically, the Court finds that, prior to the Petition Date, the Debtors disregarded separateness so significantly that their creditors relied on the breakdown of entity borders and treated them as one leg-

al entity because:

***3** i. Both customers, on one hand, and suppliers, service providers, vendors and other creditors, on the other, treated the Debtors as a single business and did not distinguish between the individual Debtor entities.

ii. The Debtors kept consolidated financial statements and service providers and vendors relied on the credit worthiness of the Debtors collectively.

iii. The Debtors use a single integrated purchasing system.

iv. The Debtors maintained an integrated cash management system.

v. The administrative and back-office operations were conducted jointly from the Debtors' integrated corporate headquarters in Duluth, Georgia.

vi. Necessary corporate actions of the subsidiary Debtors were generally consistent with and reflected the corporate decisions initiated and policies made by NexPak Corporation on behalf of the integrated business.

vii. The Debtors consistently held themselves out as a single, integrated business.

viii. The Pre-Petition Lenders are the Debtors' only institutional creditors. Each of the Debtors is either a borrower or a guarantor under the Pre-Petition Credit Agreement.

ix. The obligations under the Pre-Petition Credit Agreement are secured by substantially all of the assets of each of the Debtors.

G. *Plan Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(1) and (a)(2))*. The Plan complies with all applicable provisions of the Bankruptcy Code and Bankruptcy Rules, including Sections 1122 and 1123 of the Bankruptcy Code.

H. *Proper Classification (11 U.S.C. §§ 1122, 1123(a)(1))*. The Plan properly establishes separate classes of Claims and Interests in Section 3.2. Classification of these Claims or Interests is proper and consistent with Section 1122 of the Bankruptcy Code because each Claim or Interest classified in such Classes is substantially similar to the other Claims or Interests therein. The Plan thereby satisfies Section 1123(a)(1) of the Bankruptcy Code. The classification of Claims and Interests under the Plan is reasonable and necessary to implement the Plan. Additionally, Article IV of the Plan designates (but does not classify) Claims of the type described in Section 507(a)(1) of the Bankruptcy Code (Administrative Expense Claims) and Claims of the type described in Section 507(a)(8) of the Bankruptcy Code (Priority Tax Claims).

I. *Specified Treatment of Unimpaired Claims (11 U.S.C. § 1123(a)(2))*. Article V of the Plan specifies whether each Class of Claims and Interests is impaired or unimpaired under the Plan, thereby satisfying Section 1123(a)(2) of the Bankruptcy Code.

J. *Specified Treatment of Impaired Classes (11 U.S.C. § 1123(a)(3))*. Article V of the Plan sets forth the treatment of each impaired Class of Claims or Interests, thereby satisfying Section 1123(a)(3) of the Bankruptcy Code.

K. *No Discrimination (11 U.S.C. § 1123(a)(4))*. Articles IV and V of the Plan provide that the treatment of each Claim or Interest in each particular Class is the same as the treatment of any such Claim or Interest in such Class, unless the particular Holder of such Claim or Interest has agreed to a less favorable treatment of such particular Claim or Interest, thereby satisfying Section 1124(a)(4) of the Bankruptcy Code.

***4** L. *Implementation of the Plan (11 U.S.C. § 1123(a)(5))*. Article VI, provides adequate and proper means for implementation of the Plan, thereby satisfying Section 1123(a)(5) of the Bankruptcy Code.

M. *No Nonvoting Equity Securities (11 U.S.C.*

§ 1123(a)(6)). The Plan is a liquidating plan, and does not provide for the issuance of equity or other securities to creditors or equity holders. The Plan Administrator will be the sole equity holder of each of the Debtors. Thus, the requirements of Section 1123(a)(6) of the Bankruptcy Code have been satisfied.

N. *Selection of Officers, Directors or Trustee (11 U.S.C. § 1123(a)(7))*. Article IV of the Plan provides that the Plan Administrator shall be the sole officer, director and equity holder of each of the Debtors following the Effective Date. As set forth in the Plan Administrator Agreement attached as Exhibit A to the *Notice of Filing of Plan Administrator Agreement* (the "Plan Administrator Notice") (Docket No. 627) filed on May 14, 2010, Kevin I. Dowd, the Debtors' President and Chief Restructuring Officer, will serve as the Plan Administrator and will be the sole officer and director of each of the Debtors. Mr. Dowd is qualified to serve as Plan administrator due to his knowledge of the Debtors, their operations, and the wind-down of their estates. The terms of Mr. Dowd's retention as Plan Administrator have been disclosed to creditors and parties in interest through the filing of the Plan Administrator Notice. In accordance with Section 1123(a)(7) of the Bankruptcy Code, selection of the Plan Administrator is consistent with the interests of creditors, equity security holders and with public policy.

O. *Impairment/Unimpairment of Classes (11 U.S.C. § 1123(b)(1))*. In accordance with Section 1123(b)(1) of the Bankruptcy Code, Article V of the Plan impairs or leaves unimpaired, as the case may be, each Class of Claims or Interests under the Plan.

P. *Treatment of Executory Contracts and Unexpired Leases (11 U.S.C. § 1123(b)(2))*. Section 7.1. of the Plan provides, that, except as otherwise provided in the Plan, each of the executory contracts and unexpired leases to which the Debtors are a party, to the extent such contracts or leases are executory contracts or unexpired leases pursuant to Section 365 of the Bankruptcy Code, shall be deemed rejected by the Debtors on the Effective Date, unless such contract or lease (a) was previously assumed by the Debtors by order of the Court, (b) is the subject of a motion to assume by the Debtors pending on or before the Effective Date or (c) is otherwise assumed pursuant to the terms of and subject to all provisions set forth in the Plan.

Q. *Retention, Enforcement and Settlement of Claims of the Debtors (11 U.S.C. § 1123(b)(3))*. Section 6.4 of the Plan provides that, except as expressly provided in the Plan, and unless expressly waived, relinquished, exculpated, released, compromised or settled in the Settlement Stipulation, Plan, the Confirmation Order, any Final Order, or in any contract, instrument, release or other agreement entered into or delivered in connection with the Plan, the Reorganized Debtors will exclusively retain, may prosecute and/or enforce, and expressly reserve and preserve for these purposes, in accordance with Sections 1123(a)(5)(B) and 1123(b)(3) of the Bankruptcy Code, any and all Claims, demands, rights and Causes of Action whether arising under Section 5 of the Bankruptcy Code or otherwise, that the Debtors or the Estates may hold against any Person or entity. The failure of the Debtors to describe or identify a Claim, a right of action, suit, Cause of Action or proceeding in the Plan shall not constitute a waiver, release or abandonment by the Debtors or the Estates of such Claim, right of action, suit, Cause of Action or proceeding. The Reorganized Debtors shall be empowered and authorized, without approval of the Bankruptcy Court, but subject to the approval of the Pre-Petition Lenders, to settle, adjust, dispose of or abandon any Claims, rights or other Causes of Action, including any counterclaims to the extent such counterclaims are potential setoffs against the proceeds of such Causes of Action.

***5** R. *Debtors' Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(2))*. Based on the record before the Court, the Debtors and their agents have solicited votes on the Plan in good faith and in

compliance with the applicable provisions of the Bankruptcy Code and are entitled to the protections afforded by Section 1129(a)(2) of the Bankruptcy Code.

S. *Plan Proposed in Good Faith (11 U.S.C. § 1129(a)(3))*. Based on the record before the Court, the Debtors have proposed the Plan in good faith and not by any means forbidden by law, and the Debtors and their officers and directors have acted in good faith in the negotiation and formulation of the Plan, thereby satisfying Section 1129(a)(3) of the Bankruptcy Code.

T. *Payments for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4))*. Section 4.1(a) provides that only Holders of Allowed Administrative Expenses will receive payment on account of their Claims. Section 4.1(b) requires Professionals and other entities seeking an award from the Court for compensation for services rendered and/or reimbursement of expenses through and including the Effective Date under Sections 503(b)(2), 503(b)(3), 503(b)(4) or 503(b)(5) of the Bankruptcy Code to file final applications for compensation for services rendered and reimbursement of expenses. Such Claims will not be finally paid until final approval by the Court. Accordingly, Section 1129(a)(4) of the Bankruptcy Code is satisfied.

U. *Directors, Officers, and Insiders (11 U.S.C. § 1129(a)(5))*. As set forth in Paragraph O of this Order, the Debtors have complied with Section 1129(a)(5) of the Bankruptcy Code. Mr. Dowd is qualified to serve as Plan Administrator. The powers granted to Mr. Dowd as Plan Administrator under the Plan are consistent with applicable state law and the provisions of the Bankruptcy Code concerning liquidation proceedings. The appointment of the Plan Administrator is consistent with the interests of Holders of Claims and Interests and with public policy.

V. *No Rate Changes (11 U.S.C. § 1129(a)(6))*. The transactions contemplated by the Plan do not involve any rates established or approved by, or otherwise subject to, any governmental regulatory commission. Thus, Section 1129(a)(6) of the Code is inapplicable.

W. *Best Interests of Creditors Test (11 U.S.C. § 1129(a)(7))*. The Plan satisfies Section 1129(a)(7) of the Bankruptcy Code. Specifically, with respect to each Impaired Class, each Holder of a Claim or Interest either has accepted the Plan or will receive or retain under the Plan on account of such Claim or Interest property of a value, as of the Effective Date, that is not less than such Holder would receive pursuant to a liquidation under Chapter 7 of the Bankruptcy Code.

X. *Acceptance of Plan by Each Impaired Class (11 U.S.C. § 1129(a)(8))*. Classes 1 (Priority Non-Tax Claims) and 2 (Other Secured Claims) are not impaired by the Plan and are conclusively presumed to have voted to accept the Plan. Class 5 (Pre-Petition Lenders' Deficiency Claims) will not retain any value or receive any distribution under the Plan but is deemed to have accepted the Plan consistent with the Settlement Stipulation. Class 6 (Interests) will not retain any value or receive any distribution under the Plan and is deemed to reject the Plan. Class 3 (Pre-Petition Lenders' Secured Claims) and Class 4 (General Unsecured Claims) are impaired by the Plan and entitled to vote on the Plan. As attested in the Vote Certification, Classes 3 and 4 have voted to accept the Plan.

***6** Y. *Treatment of Administrative and Priority Tax Claims (11 U.S.C. § 1129(a)(9))*. Articles 4.1 and 4.2 of the Plan satisfy the requirements of Section 1129(a)(9)(A), (B) and (C) of the Bankruptcy Code.

Z. *Impaired Class Approval (11 U.S.C. § 1129(a)(10))*. As attested in the Vote Certification, more than one half in number and two-thirds in dollar amount of voting creditors in Class 3(Pre-Petition Lenders' Secured Claims) and Class 4 (General Unsecured Claims) who were entitled to accept or reject the Plan have voted to accept the Plan. Therefore, Section 1129(a)(10) of the Bank-

ruptcy Code is satisfied.

AA. *Feasibility (11 U.S.C. § 1129(a)(11)).* The Debtors have sufficient Assets, and the Plan provides adequate means with which, to satisfy any required distributions on account of Administrative Claims, Priority Tax Claims, Class 1 (Priority Non-Tax Claims), Class 2 (Other Secured Claims), Class 3 (Pre-Petition Lenders' Secured Claims) and Class 4 (General Unsecured Claims). The Plan properly provides for the means for the Plan Administrator to complete the liquidation of the estates and to make the distributions to creditors according to the Plan and the relative priorities of the parties. Also, as the Plan provides for the liquidation of the Debtors, confirmation of the Plan is not likely to be followed by the need for further financial reorganization of the Debtors. Thus, Section 1129(a)(11) of the Bankruptcy Code has been satisfied.

BB. *Payment of Fees (11 U.S.C. § 1129(a)(12)).* Article 6.6 of the Plan provides that, on and after the Effective Date, all fees due and payable pursuant to 28 U.S.C. § 1930 shall be paid quarterly, thereby satisfying Section 1129(a)(12) of the Bankruptcy Code.

CC. *Continuation of Retiree Benefits (11 U.S.C. § 1129(a)(13)).* The Debtors are not obligated, now or in the future, to pay "retiree benefits" as such term is defined in Section 1114 of the Bankruptcy Code. Accordingly, Section 1129(a)(13) is inapplicable.

DD. *Fair and Equitable; No Unfair Discrimination (11 U.S.C. § 1129(b)).* The Plan does not "discriminate unfairly" and is fair and equitable with respect to each Impaired Class of Claims or Interests that has not voted to accept the Plan. Classes 1 (Priority Non-Tax Claims) and 2 (Other Secured Claims) are not impaired by the Plan and are conclusively presumed to have voted to accept the Plan. As attested in the Vote Certification, Classes 3 and 4 have voted to accept the Plan. Class 5 is not receiving any distribution under the Plan but is deemed to have accepted the Plan consistent with the Settlement Stipulation. Class 6 (Interests) will not retain any value or receive any distribution under the Plan and is deemed to reject the Plan. The Plan does not unfairly discriminate against Holders of Interests in Class 6. Because Class 6 is the only Class of Interest Holders, a reasonable basis exists for separately classifying the Class 6 Interested Holders. The Plan is fair and equitable with respect to Class Interest Holders because no holder of a Claim or Interest that is junior to the Interests in Class 6 will receive any property on account of such Interests. Accordingly, the Plan satisfies the absolute priority rule of Section 1129(b)(2) of the Code and is fair and equitable with respect to Class 6.

***7** EE. *Principal Purpose of the Plan (11 U.S.C. § 1129(d)).* The principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933.

FF. *Only One Plan (11 U.S.C. § 1129(c)).* Other than the Plan (including previous versions thereof), no plan has been filed in this chapter 11 case, thereby satisfying the requirements of Section 1129(c) of the Bankruptcy Code.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. *Confirmation.* The Plan is hereby confirmed pursuant to Section 1129 of the Bankruptcy Code. A copy of the Plan is attached hereto as Exhibit A.

2. *Capitalized Terms.* Capitalized terms not otherwise defined herein have the meanings given to them in the Plan; provided, however, that if there is any direct conflict between the terms of the Plan and the terms of this Order, the terms of this Order shall control.

3. *Objections.* All of the objections to confirmation of the Plan and all reservation of rights included therein that have not been resolved, withdrawn or rendered moot are overruled.

4. *Binding Effect.* Except as otherwise provided in Section 1141(d) of the Bankruptcy Code, immediately upon the entry of this Order, the provisions of the Plan shall bind any Holders of Claims or Interests and their respective successors and assigns, whether or not such Holder of a Claim or Interest is impaired under the Plan and whether or not such holder has accepted the Plan.

5. *Plan Classification Controlling.* The classifications of Claims and Interests for purposes of the distributions to be made under the Plan shall be governed solely by the terms of the Plan. The classifications set forth on the ballots tendered to the Debtors' creditors in connection with voting on the Plan (a) were set forth on the ballots solely for purposes of voting to accept or reject the Plan, (b) do not necessarily represent and in no event shall be deemed to modify or otherwise affect, the actual classifications of such Claims under the Plan or for distribution purposes and (c) shall not be binding on the Debtors, their estates or the Plan Administrator.

6. *Rejection of Executory Contracts and Unexpired Leases.* Except as otherwise provided in the Plan, each of the executory contracts and unexpired leases to which the Debtors are a party, to the extent such contracts or leases are executory contracts or unexpired leases pursuant to Section 365 of the Bankruptcy Code, are hereby rejected by the Debtors, unless such contract or lease (a) was previously assumed by the Debtors by order of the Court, (b) is subject of a motion to assume pending on or before the Effective Date or (c) is otherwise assumed pursuant to the terms of and subject to all provisions set forth in the Plan; provided, however, that nothing contained herein or in Article VII of the Plan shall constitute an admission by the Debtors that such contract or lease is an executory contract or unexpired lease or that the Debtors or their successors and assigns have any liability thereunder.

***8** 7. *Injunction.* Except as otherwise expressly provided in the Plan, all Persons who have held, hold, or may hold Claims against or Interests in the Debtors and any successors, assigns or representatives of such Person shall be precluded and permanently enjoined on and after the Effective Date from (a) commencing or continuing in any manner any Claim, action or other proceeding of any kind with respect to any Claim, Interest or any other right against the Debtors or their estates which they possessed or may have possessed prior to the Confirmation Date, (b) the enforcement, attachment, collection or recovery by any manner or means of any judgment, award, decree, or order with respect to any Claim, Interest or other right against the Debtors or their estates which they possessed or may have possessed prior to the Confirmation Date, (c) creating, perfecting or enforcing any encumbrance of any kind with respect to any Claim, Interest, or any other right against the Debtors or their estates which they possessed or may have possessed prior to the Confirmation Date, and (d) asserting any Claims other than as provided in the Plan. Nothing contained in this Order or in Section 8.2 of the Plan shall prohibit the holder of a timely-filed proof of Claim or Interest from litigating its right to seek to have such Claim or Interest declared an Allowed Claim or Interest and paid in accordance with the distribution provisions of the Plan, or enjoin or prohibit the interpretation or enforcement by the holder of such Claim or Interest of any of the obligations of the Debtors or the Plan Administrator under the Plan.

8. *Exculpation and Limitation of Liability.* The Debtors, the Creditors' Committee, NexBank and the Pre-Petition Lenders, and their respective officers, directors, employees, members, attorneys, accountants, consultants and agents, shall (a) not have or incur any liability to any person or entity for any act or omission in connection with the Chapter 11 Cases and/or arising out of their formulation, implementation, confirmation, consummation or administration of the Plan (including solicitation or rejection thereof) or the treatment or administration of the property to be distributed under the Plan, except if such act or omission is determined in a Final Order to reflect bad faith or consti-

tute gross negligence, willful misconduct or willful fraud, and (b) in all respects, shall be entitled to rely upon the advice of counsel with respect to their duties and responsibilities under the Plan, and (c) shall be fully protected in acting or in refraining from acting in accordance with such advise; provided, however, that nothing contained herein shall relieve any of the foregoing of any liability of any kind or nature related to any act or omission prior to the Petition Date

9. *Release of Officers and Directors.* In addition to the Releases provided for in the Settlement Stipulation and Settlement Order, the Debtors also shall unconditionally and forever release the Debtors' agents, advisors, accountants, attorneys, and other representatives (including the Debtors' current directors, officers, employees, members and Professionals) and the Creditors' Committee, NexBank and the Pre-Petition Lenders, and their respective officers, directors, employees, members, attorneys, accountants, consultants and agents, from all claims, obligations, suits, judgments, damages, rights, Causes of Action, and liabilities whatsoever, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, existing on the Effective Date or thereafter arising in law, equity or otherwise that are based in whole or in party upon any act or omission, transaction, event, or other occurrence taking place on or after the Petition Date and before the Effective Date and in any way relating to the Debtors or the Chapter 11 Cases or the Plan. In furtherance of the foregoing, the Confirmation Order will constitute an injunction permanently enjoining the commencement or prosecution by any entity, derivatively or otherwise, of any Claim, demand, debt, liability, Cause of Action, right, or Interest released and waived pursuant to the Plan against such entities and individuals.

***9** 10. *Release of Liens.* Except as otherwise provided in the Plan, this Order or in any document, instrument or other agreement created in connection with the Plan, on the Effective Date, all mortgages, deeds of trust, liens or other security interests against the property of the Estates shall be released.

11. *Appointment of Plan Administrator.* From and after the Effective Date, the Plan Administrator is appointed to serve in accordance with the terms of the Plan and the terms of that certain Plan Administrator Agreement, all of which are hereby approved. Upon the Effective Date, the Plan Administrator shall be appointed as the Chief Executive Officer ("CEO"), sole director or managing member, and sole equity holder of each of the Reorganized Debtors, as set forth in more detail in the Plan, including without limitation Article VI thereof, and shall carry out the duties and obligations of the CEO and sole director or managing member as set forth in the Plan.

12. *Effectuating Documents and Actions.* Without further Court approval, the Plan Administrator is authorized to execute, deliver, file or record such contracts, instruments, releases and other agreements or documents and take such actions as may be necessary or appropriate to effectuate and implement the provisions of the Plan. The Plan Administrator is authorized to perform the following duties: (i) liquidate the Debtors' remaining assets; (ii) prepare and file tax returns on behalf of the Debtors and Reorganized Debtors, including the right to request a determination of tax liability as set forth in Section 505 of the Bankruptcy Code; (iii) request and receive W-9 federal tax forms (as necessary) from any party who is entitled to receive a Distribution on account of a Claim or Interest; (iv) prosecute and resolve Causes of Action; (v) reconcile, object to and resolve Claims and make Distributions under the Plan; (vi) pay post-confirmation fees due to the Office of the United States Trustee; (vii) respond to inquiries of Claim and Interest Holders; and (viii) dissolve each of the Debtors and Reorganized Debtors under applicable law as appropriate, pursuant to the Plan.

13. *Continued Corporate Existence.* The Board of Directors shall be reconstituted on the Effective

Date and shall consist solely of the Plan Administrator. From and after the Effective Date, the Debtors shall continue to exist for the purpose of liquidating and winding up their estates. As soon as practicable after the Effective Date and pursuant to the Plan, after the liquidation and winding up of the Debtors' estates and the completion of distributions under the Plan, the Plan Administrator shall file certificates of dissolution in the applicable state of incorporation and the Debtors shall dissolve and cease to exist.

14. *Rights, Powers and Duties of the Reorganized Debtors.* The Reorganized Debtors shall retain and have all the rights, powers and duties necessary to carry out its responsibilities under the Plan, which shall be carried out by the Plan Administrator on behalf of the Debtors.

***10** 15. *Preservation of Rights of Action; Settlement of Causes of Action.* Except as otherwise provided in the Plan, this Order, the Settlement Stipulation or in any contract, instrument, release, agreement or other document entered into in connection with the Plan, in accordance with Section 1123(b) of the Bankruptcy Code, all Claims, Causes or Rights of Action of the Debtors, the Debtors' estates or the Plan Administrator shall be preserved.

16. *Dissolution of Creditors' Committee.* Subject to the terms of Article 6.2(f) of the Plan, on the Effective Date, the Creditors' Commit tee shall dissolve, and its members shall be released and discharged from all further authority, duties, responsibilities and obligations relating to and arising from the Chapter 11 Cases. The retention and employment of the Professionals retained by the Creditors' Commit tee shall terminate as of the Effective Date, provided, however, that the Creditors' Commit tee shall exist, and its Professionals shall be retained and their fees and expenses paid by the Reorganized Debtors after such date with respect to filing applications for compensation and reimbursement of expenses pursuant to Section 330 and 331 of the Bankruptcy Code.

17. *Revesting of Property.* On the Effective Date, pursuant to Section 1141(b) and (c) of the Bankruptcy Code, the Assets of the Debtors shall automatically vest in the Reorganized Debtors, free and clear of all claims, liens, charges, interests or other encumbrances, except as specifically provided otherwise in the Plan.

18. *Exemption from Certain Transfer Taxes.* To the maximum extent provided under Section 1146(c) of the Bankruptcy Code and applicable law, (a) any transfers from the Debtors to the Reorganized Debtors pursuant to the Plan, (b) the issuance, transfer or exchange of any security or the making or delivery of any instrument of transfer pursuant to the Plan, or (c) any sale of any of the Debtors' assets occurring upon or after the Effective Date by the Reorganized Debtors shall all be deemed to be in furtherance of the Plan and shall not be subject to any stamp tax or similar tax. All appropriate state or local governmental officials shall forego the collection of any such stamp or similar tax and shall accept for filing and recordation any applicable instruments or documents without the payment of any such stamp tax or similar tax.

19. *Stay.* Unless otherwise provided in the Plan, all injunctions or stays provided for in these Chapter 11 Cases pursuant to Sections 105 and 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, shall remain in full force and effect until the later of (a) closing of the Chapter 11 Cases or (b) dissolution of the Debtors.

20. *Deadline for Filing Administrative Expenses Claims and Fee Claims.* Pursuant to the Bar Date Order, holders of Administrative Expense Claims arising on or before August 15, 2009 (other than claims of Professionals) were required to file Requests for Payment of Administrative Expense Claims on or before October 15, 2009. Holders of Administrative Expense Claims arising from August 16, 2009 through the Effective Date (other than claims of the Debtors' Professionals) must file requests for payment of administrative expense

claims on or before thirty (30) days after the Effective Date. All Professionals or other entities seeking an award from the Bankruptcy Court for compensation for services rendered and/or reimbursement of expenses through and including the Effective Date under Sections 503(b)(2), 503(b)(3), 503(b)(4) or 503(b)(5) of the Bankruptcy Code must file their respective final applications for compensation for services rendered and reimbursement of expenses on or before thirty (30) days after the Effective Date. The final applications may include requests for compensation for services rendered and/or reimbursement of expenses incurred following the Effective Date in preparing the final applications.

***11** 21. *Rejection Damages Bar Date.* Claims arising out of the rejection of an executory contract or unexpired lease that have been rejected pursuant to the Plan and/or Confirmation Order must be filed with the Bankruptcy Court by no later than thirty (30) days after the Effective Date. The Holders of Claims not timely filed pursuant to this paragraph shall not be entitled to any distribution under the Plan or otherwise from the Reorganized Debtors.

22. *Findings of Fact and Conclusions of Law.* The determinations, finding, judgments, decrees and orders set forth herein constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. Each finding of fact set forth herein, to the extent it is or may be so deemed a conclusion of law, shall also constitute a conclusion of law. Each conclusion of law set forth herein, to the extent it is or may be so deemed a finding of fact, shall also constitute a finding of fact.

23. *Jurisdiction of the Court.* Following the Effective Date, the Bankruptcy Court shall, except as otherwise provided by applicable law or the Confirmation Order, retain jurisdiction of the Chapter 11 Cases pursuant to the provisions of Chapter 11 of the Bankruptcy Code to the fullest extent permitted by law, until the entry of a final decree closing the Chapter 11 Cases, including without limitation the subject matters set forth in Article X of the Plan.

24. *Effectiveness of Order.* Notwithstanding Bankruptcy Rules 3020(e) and 6004(h) or any other provision of the Bankruptcy Code or Bankruptcy Rules, this Order shall be effective immediately upon its entry, and the period in which an appeal must be filed shall commence immediately upon the entry hereof.

25. *Notice of Confirmation Order and Effective Date.* The Debtors shall serve a Notice of Entry of Confirmation Order and Effective Date on those parties on whom the Confirmation Hearing Notice was served. Such service constitutes good and sufficient notice pursuant to Bankruptcy Rules 2002(f)(7) and 3020(c).

26. *Modification of the Plan.* Subject to the restrictions on Plan modifications set forth in Section 1127 of the Bankruptcy Code, the Debtors may alter, amend or modify the Plan before substantial consummation. Substantial consummation of the Plan shall be deemed to occur on the Effective Date. Further, the provisions of Federal Rule of Civil Procedure 62(a) and Bankruptcy Rules 3020(e) and 7062 shall not apply to this Order and the Debtors are authorized to consummate the Plan immediately upon entry of this Order.

27. *References to Plan Provisions.* The failure to specifically include or reference any particular provision of the Plan in this Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the Plan be confirmed in its entirety.

28. *Integration of Confirmation Order Provisions.* The provisions of this Confirmation Order are integrated with each other and are non-severable and mutually dependent.

***12** 29. *Reversal.* If any or all of the provisions of this Order are hereafter reversed, modified or vacated by subsequent order of this Court or any other

court, such reversal, modification or vacatur shall not affect the validity of the acts or obligations incurred or undertaken under or in connection with the Plan prior to the Debtors' receipt of written notice of any such order. Notwithstanding any such reversal, modification or vacatur of this Order, any such act or obligation incurred or undertaken pursuant to, and in reliance on, this Order prior to the effective date of such reversal, modification or vacatur shall be governed in all respects by the provisions of this Order and the Plan or any amendments or modifications thereto.

Bkrtcy.D.Del.,2010.
In re NexPak Corp.
Slip Copy, 2010 WL 5053973 (Bkrtcy.D.Del.)

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