IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	Chapter 11
	)	
	)	
ADVANTA CORP., et al.,	)	Case No. 09-13931(KJC)
	)	Courtroom 5
	)	824 Market Street
Debtors.	)	Wilmington, Delaware
	)	
	)	February 10, 2011
	)	1:07 p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE KEVIN J. CAREY
UNITED STATES BANKRUPTCY JUDGE

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WILMINGTON, DELAWARE, THURSDAY, FEBRUARY 10, 2011, 1:07 PM

THE CLERK: All rise. You may be seated.

THE COURT: Good afternoon, everyone.

MR. LEMONS: Good afternoon.

MR. ETKIN: Good afternoon.

MR. LEMONS: Good afternoon, Rob Lemons from Weil on behalf of the debtors.

As Your Honor knows, we're here this afternoon to seek confirmation of the debtors' Chapter 11 plan that has been -- has nearly unanimous support from the debtors' creditors.

Before starting my presentation, Your Honor, I would like to proffer the testimony of the three witnesses who signed the declarations that we filed on Tuesday. Those witnesses are William Rosoff, the president and vice-chairman of the board of Advanta Corp; Joseph Bondi, managing director of Alvarez & Marsal, which is the debtors' financial advisor; and Jeffrey Stein of of the Garden City Group, the debtors' voting agent.

Mr. Rosoff and Mr. Bondi are here in the courtroom today and Mr. Stein is on the phone. If -- if called to testify, each would offer as his direct testimony the facts stated in his declaration and each is available for cross-examination today.

Accordingly, I would ask Your Honor to admit into

evidence the testimony of each of their declarations.

THE COURT: Is there any objection?

(No verbal response.)

THE COURT: I hear none. The declarations at Docket Numbers 1147, 115 -- I'm sorry -- 1154 and 1155 are admitted without objection.

Does anyone wish to examine any one of the three declarants?

(No verbal response.)

THE COURT: I hear no response.

MR. LEMONS: Your Honor, the confirmation brief that we filed on Tuesday goes through, in detail, why the plan satisfies each of the confirmation requirements of the bankruptcy code. Rather than belaboring that and going through each of those requirements today, I would like to rely on the brief and instead spend a few minutes giving a high-level overview of the plan and then turn to the objections.

Of course, if Your Honor has any questions or would like me to provide a more detailed explanation of anything I'm happy to address that.

THE COURT: All right.

MR. LEMONS: The plan we're seeking to confirm today is relatively straight forward. It provides for the liquidation of nearly all of the debtors' assets. This

would be accomplished, Your Honor, by transferring those assets to trusts established for each debtor, or in the case of subgroup of the debtors for them collectively.

From there, the trustee of each trust will administer those assets and make distributions to the creditors of the applicable debtors who will receive beneficial interests in the trusts.

Upon the plan's effective date, the transfer of most of the debtors' assets to the trusts are -- or and the transfer of most of the debtors' assets to the trust, the majority of the debtors will be dissolved. The only debtors who are going to survive will be Advanta Corp and Advanta Service Corp. They'll survive to hold, among other things, some interests in a credit card partnership that may be impractical to liquidate in the short term.

The liquidating trustee for each trust will be FTI who is the committee's financial advisor and it's currently contemplated that there will be a Delaware Trustee who will be Wilmington Trust.

Each trust will have a trust advisory board consisting of three members. The debtors, I guess -- I just want to clarify this. The debtors, in consultation with the committee, are still considering some aspects of the trust's organization and may make certain technical changes prior to the plan effective date to the trust agreements, and these

might include changes to make them either common law or statutory trusts in the appropriate jurisdiction. This -- this may, obviate the need for a Delaware trustee, depending on what the parties decide to do.

This will not, however, change the appointment of FTI or potentially an individual employed by FTI if it's determined that the liquidating trustee has to be a natural person as the liquidating trustee. It also won't change the identity of the initial trust advisory board members.

We will also be making a change -- one of the changes to the trust documents will be to specifically permit the trusts and the remaining Advanta corporations to enter into shared services agreements to minimize administrative costs.

I think the most important thing, Your Honor, is that none of these potential changes will affect any of the creditors or equity holders' rights. These are really what I would call purely technical changes to make sure we have the right type of trusts set up.

The classification of the creditors under the plan is simple and it's based on the priority of their claims. Administrative priority and secured creditors will be paid in full. Advanta Corp and the other consolidated debtors have the following four classes of other unsecured creditors, and I'll name them in descending order of

priority. They are the retail noteholders who are entitled to be paid in full before payment of claims of subordinated noteholders. They are the general unsecured creditors, followed by the subordinated noteholders, and finally creditors whose claims are subordinated under Section 510 of the bankruptcy code.

The other debtors each have two classes of unsecured creditors: The general unsecured creditors and creditors whose claims are subordinated. I think it's worth noting that we're not aware of any subordinated claims for those other debtors. The only ones that -- that we're aware of are at the Advanta Corp level.

There are also classes for equity interests of each of the debtors which are, of course, the most junior classes.

Your Honor, the claims are classified such that claims against each debtor with the same priority are all placed in the same class. The plans' distribution and classification scheme is consistent with the absolute priority rule, simply no claim or equity interest is entitled to any distributions until all more senior creditors have been paid in full.

I'm happy to say that the plan was accepted nearly unanimously be each class of creditors that voted on the plan. In each class that voted, the debtors received

acceptances from at least ninety-seven percent of the amount of claims that voted. In fact, more than ninety-nine percent of the amount of Advanta Corp's retail note claims and general unsecured claims that voted voted in favor of the plan, and across all of the classes the debtors received over 3,000 votes in favor of the plan and only eleven votes against it.

So, Your Honor, to the extent that a consensual plan is considered one of the primary goals of Chapter 11, I think that this plan has -- is a resounding success.

There are, despite this, a few classes that did not vote in favor of the plan, which requires the plan to be crammed down on those classes. Those classes, I think most relevant for today include the classes of creditors whose claims are subordinated under the plan.

No votes were submitted by these creditors, so although they did not technically reject the plan, they didn't affirmatively accept it either. Regardless, because of the acceptance of the plan by more senior but impaired classes and the facts that as we've described in detail in our brief, the plan does not unfairly discriminate against the non-accepting classes and doesn't provide for any distribution to classes more junior to the non-accepting classes. The debtors submit that the plan satisfies Section 1129(b)'s cram down requirements.

So that -- that, Your Honor, is my -- my overview of the plan and the votes. Unless Your Honor has questions, I'll turn to the objections.

THE COURT: I do not.

MR. LEMONS: Okay.

As Your Honor is aware, we did receive two formal objections to the plan. They were filed by the Western Pennsylvania Electrical Employees Pension Fund, who I'll refer to as the securities plaintiffs and the proposed ERISA class representatives, who I'll refer to as the ERISA plaintiffs.

These objecting groups are both represented by the same bankruptcy counsel and their objections are nearly identical except for one additional ground asserted by the ERISA plaintiffs.

Both groups of claims are classified under the plan in Class 6A which is comprised of subordinated claims against Advanta Corp and the other consolidated debtors.

The objections are based on four contentions: The first is that the plan allegedly doesn't provide sufficient notice of and court approval prior to the destruction by the trust of the debtors' books and records;

Second is that the plan allegedly doesn't indicate with enough clarity that the plaintiffs' actions against non-debtors are not being released and enjoined.

These first two, as I'll mention in just a second, have -- have, I believe, been resolved, which leaves two unresolved objections: One, that the plan does not allow the plaintiffs to prosecute claims against the debtors and receive distributions to the extent of insurance proceeds prior to the more senior creditors being paid in full;

And, two, and this is the one that's only with respect to the ERISA plaintiffs, that the plan improperly subordinates the ERISA plaintiffs' claims against the debtors.

We -- we did address each of these objections in our brief, but I would like to make a couple of points if it's okay with Your Honor.

THE COURT: It is.

MR. LEMONS: Okay.

Just first with respect to the first two objections, the destruction of books and records and the plaintiffs actions against the debtors, we've made changes in the plan and confirmation order which are reflected in the proposed confirmation order and amended plan and plan supplement that we filed on Tuesday to address those issues and provide comfort to the objectors and also to the Underland plaintiffs who did not object because of these changes.

I'm not -- unless Your Honor wants me to I'm not going to go through those, but those, effectively, among other things, provide that the parties will get at least seventeen days notice before the trust -- trustee will seek -- or will seek court approval to destroy books and records and also clarifies that the plan, among other things, doesn't enjoin the actions against directors and officers in the pending litigations.

THE COURT: I reviewed the most recent submissions and I don't have any questions about that.

MR. LEMONS: Okay.

So turning to the ERISA plaintiffs' objection that the plans' classification of their claims as subordination -- or -- yeah, their objection of the classification of the claims as subordinated claims, Your Honor, this objection flies -- in our view flies completely in the face of Section 510(b) of the bankruptcy code and the existing case law.

I'm not going to belabor this and spend a lot of time on it because I know Your Honor has recently considered an almost identical issue in Touch America. I'll just say that it's obvious from the face of the ERISA plaintiffs' plan objection and proof of claim that their claims are based on the diminution and value of the price of Advanta stock that was purchased by the employee plans in which they

were participants.

That they're asserting breaches of fiduciary duties under ERISA really doesn't change that the facts underlying the complaints are the loss of value of equity issued by the debtors. And, of course, the plaintiffs would have benefited if that equity had increased in value.

In short, if their claims are subordinated they will have received the upside of an equity investment with the downside protection afforded to claims that didn't receive the same benefit of that upside. They shouldn't get to have it both ways and the creditors who did not share in that upside of the equity holders shouldn't have to share in -- in their recoveries.

Finally, just to address one other contention they make with respect to this, there's really no need for an adversary proceeding or evidentiary hearing on this issue. The bankruptcy rules permit subordination to be effectuated by a Chapter 11 plan without an adversary proceeding. The issue really is a pure legal issue. It can be determined simply by looking at the pleadings and the proof of claim filed by the ERISA plaintiffs which, I believe, is effectively what this Court did in Touch America when it ruled on summary judgment.

Finally, Your Honor, there's really no unfairness here because the ERISA plaintiffs have had months of notice

that the plan would subordinate their claims and are here in court today to argue why it should not.

THE COURT: Well, a new procedural unfairness anyway.

MR. LEMONS: Well, I don't think there's any substantive unfairness either, but --

THE COURT: By that I meant the expectations of those who are involved here I'm sure are disappointed.

MR. LEMONS: Yeah. I'm -- I'm sure they are, Your Honor. And I'm certainly not trying to minimize the fact that people suffered an economic loss. This -- this really has to do with the -- as does the next issue, with the priority of recoveries among people who all suffered losses.

THE COURT: Understood.

MR. LEMONS: Okay.

THE COURT: It's the pain allocation process.

MR. LEMONS: Yes.

And that leaves, Your Honor, the last ground for objection, which is the ERISA and securities' plaintiffs' contention that the plan should allow them to prosecute claims against Advanta and receive distributions to the extent of available insurance proceeds.

Your Honor, I'm really not sure how this is a plan objection. As set forth in our brief and as I've

discussed some here today, the plan meets all of Chapter 11's confirmation requirements. It's overwhelmingly supported by the creditors who are senior to the plaintiffs here.

As Your Honor noted, they are disappointed and if Your Honor agrees with us about their subordinated status they'll be even more disappointed, but the fact that they're subordinated -- or, I'm sorry -- disappointed about this doesn't give them the right to any recovery.

They don't have a security interest or other property interest in the debtors' interest in the policies or the proceeds. They have no right to the value of these policies and proceeds. All they have is an asserted subordinated claim, the treatment of which under the plan is permitted by Section 1129 of the bankruptcy code and is entirely consistent with the absolute priority rule. They simply don't have a right to any recovery until all senior creditors have been paid in full.

And, also, just to be clear, the plan does not discharge the plaintiffs' claims. Their proofs of claim remain on the register. If there are sufficient assets to satisfy all senior claims, the plaintiffs' claims, to the extent they survive any objections by the trustee, will be entitled to a distribution. The plaintiffs' simply haven't been able to point to any provision of Section 1129 that the

plan fails to satisfy due to their inability to receive distributions now.

I think, Your Honor, that, in my view, should be dispositive of this objection, but if that weren't enough, I think it's important to note that if the plaintiffs are allowed to proceed against the debtors now and to receive distributions to the extent of insurance coverage, it will erode recoveries of senior creditors.

First, the debtors' defense expenses are -- will undoubtedly be costly. We don't know what they are, but these are our class action lawsuits involving securities and I don't think it's a -- fair to assume that it will be cheap.

Those defense costs are not going to be covered by the insurance policies because the debtors first have to exhaust the policies' retention amounts. The retention amounts range from 100,000 to $200 million per claim -- I'm sorry -- $2 million per claim, depending on the type of claim. And the debtors' defense costs here are going to reduce the senior creditors' recoveries dollar for dollar up to these retention amounts at least.

Your Honor, the senior creditors should -- recoveries shouldn't be reduced even by a dollar to facilitate recoveries of subordinated creditors. It's just -- you know, that would completely contravene the absolute

priority rule.

Additionally, because of these retention amounts, we don't even know if the insurers would provide coverage for judgments in excess of the retention amounts without the debtors actually making payments to the plaintiffs up to the retention amounts before any coverage would be provided. Under the plan, of course, this won't happen until all senior creditors are paid in full, and if it did happen earlier, that would, of course, again, erode the recoveries of the senior creditors to permit the subordinated creditors to receive distributions.

And, finally, and because this is last it certainly does not mean it's insignificant, these policies also provide coverage to the directors and officers who are defendants in pending lawsuits, two of whom were filed by the plaintiffs here; one was filed by the Underland plaintiffs. And, in fact, one of the main purposes of the policies is to protect the assets of the directors and officers, and this is reflected in the fact that the policies have priority provisions that preclude payments on behalf of the debtors until all payments have been made on behalf of the directors and officers.

This means that the debtors won't be entitled to any insurance coverage until all amounts are paid on behalf of the officers and directors. We don't know what amounts,

whether for defense costs or to satisfy any judgments the insurers could be required to pay on behalf of directors and officers.

As I discussed a few -- a few minutes ago, the directors and officers aren't being released from third party causes of action. In fact, we -- we've bent over backwards, partially prompted by the plaintiffs to make this clear. The debtors have timely provided notices of possible insurable events to their carriers and any lawsuits arising out of those events that haven't yet been filed, including potentially lawsuits that the FDIC might bring against any directors and officers.

As Your Honor may recall, when we cut our settlement with the FDIC it -- it certainly did not release its claims against D's and O's. Those could be covered by the insurance as well.

To the extent that the policies do reach their coverage limits, including as a result of any amounts that would be paid to the plaintiffs on account of their subordinated claims against the debtors, any additional losses of the directors and officers will result in indemnification claims of the directors and officers against the debtors. This is under the provisions of the -- Advanta Corp's bylaws.

And these claims may or may not be subordinated.

I'm, of course, familiar with Your Honor's decision in Touch America subordinating certain of those claims. But at this point it's too early to know when known of these claims has yet been liquidated. And it's certainly possible that they won't be subordinated. The FDIC litigation, for example, may have nothing to do with securities' law claims.

And, again, each senior creditors' recoveries would be eroded to the extent that the indemnification claims are not subordinated and would share pari passu with the senior creditors.

As I said earlier, just to finish up, I don't think that demonstrating these harms to senior creditors' recoveries is even necessary because the plaintiffs have enough property interests in the debtors' rights under these policies and the subordinated claims of these plaintiffs are being treated by the plan in the manner permissible by the bankruptcy code.

So in summary, Your Honor, I think there's -- there's nothing unfair or wrong about requiring the plaintiffs to wait to continue to prosecute their claims or receive any distributions until the senior creditors have been paid in full. I think that's exactly what it means to be subordinated and they shouldn't be allowed to avoid the consequences of the subordination to obtain distributions before the satisfaction of the senior claims.

So accordingly, Your Honor, we submit that the objections should be overruled in their entirety and would seek the confirmation of the plan so that we can begin to make distributions to the debtors' senior creditors who are entitled to be paid first.

THE COURT: Thank you.

MR. LEMONS: You're welcome.

THE COURT: I'll hear from the objectors next.

MR. ETKIN: I think that means only me, Your Honor.

THE COURT: It does. Good to see you again, Mr. Etkin.

MR. ETKIN: Good to see you, Judge.

For the record, Michael Etkin of Lowenstein Sandler on behalf of the securities' lead plaintiffs in the class and the ERISA lead plaintiffs in the class.

THE COURT: May I first ask you to address and confirm, or not, that two of the four areas that the debtors identified as subject to objection have been resolved.

MR. ETKIN: They have been resolved, Your Honor.

THE COURT: Okay.

With respect to the remaining two --

MR. ETKIN: Yes.

THE COURT: -- let me just say this. I've read the submissions, which have been -- which are extensive and

I think pretty clearly set out what the legal issues are. It always gives me pause when, after I've reviewed the submissions, but before I take the bench when it strikes me that one party seems so right -- in here that would be the debtor in its arguments and it always makes me a little nervous that I missed something. So tell me what I've missed.

(Laughter.)

MR. ETKIN: Difficult way to start an argument, Your Honor, but --

THE COURT: Well, look --

MR. ETKIN: -- I'll do the best --

THE COURT: -- I -- you know, I thought it only fair to --

MR. ETKIN: I'll do the best I can.

THE COURT: -- tell you where I was.

MR. ETKIN: I -- and I appreciate that, Your Honor.

And I can -- and I can certainly understand that with respect to the issue of the 510(b) subordination as it relates to the ERISA claims.

THE COURT: Yeah. I mean, pretty close to the decision that I rendered in -- in Touch America.

MR. ETKIN: Well, and there's an interesting aspect of that, Your Honor, which I would like to point out

in a second that I don't want to dwell on it too long. I know that I'm -- I'm swimming upstream with respect to that issue.

And although I can respectfully disagree with the Court's conclusion and this -- this issue has not been tested as I -- as I -- to the extent I'm aware, in the appellate courts, I don't know that this is the opportunity to do that or not. But we obviously take a different view with respect to the ERISA claims as compared to the securities' claims of my other clients where there's no issue as to the 510(b) subordination.

And just to -- just to fill out the record a little bit, Your Honor, we did discuss it in our papers. We don't believe that this is an issue of diminution in value from the standpoint of the essence of the claims. It may be an element of the damages ultimately, but this is a case where the debtors owe a statutory duty, a fiduciary duty under ERISA, and that duty has been breached.

It just so happens that the stock at issue here is Advanta stock. If it was some other stock of XYZ corporation and they breached their fiduciary duty in precisely the same way as alleged in the complaint, there would not be an issue of 510(b) subordination.

So there are some real concerns about -- about all of this. The cases are legion that distinguish between

ERISA claims and securities' claims. You don't necessarily have to have securities' law violations in order to have violations under ERISA. And we've touched upon those arguments. I just wanted to place them on the record. For purposes of today we understand Your Honor's decision in Touch America.

And to get back to that for a second, this is what I find a little odd, and we did point it out in our papers. Our claims aren't liquidated yet either, just like whatever indemnification claims have been filed by the directors and officers. So it's not whether the claims have been liquidated or not that's critical in determining whether 510(b) applies or not.

And I find it strange, to say the least, that the debtors have taken the position that the very creditors who are the subject of Your Honor's Touch America decision, because that decisions related to the directors and officers' claims for indemnification, not the underlying ERISA claims themselves, that for some reason there's a question as to whether those claims, at least as they relate to the ERISA litigation, or at least as they relate to the securities litigation, or at least as they relate to the Underland litigation, why those claims aren't subordinated and why there's a question as to whether those claims should be subordinated and should be treated exactly the same way

as our claims are treated under the plan.

What makes it even a little more disturbing is that the existence of those indemnification claims are being propped up as a basis to oppose the other objection that we levied against the plan regarding the ability to go after the debtors solely to the extent of insurance.

THE COURT: Well, in part, I guess they're doing that.

MR. ETKIN: Well, I don’t know if -- the debtors haven't indicated any other claims. The bar dates has come and gone. I don't know how directors and officers after the bar date could now lodge new indemnification claims against the debtor in this case, nor is there any mention of 502(e)(1)(b) which allows for the expungement of unliquidated contingent indemnification claims.

THE COURT: Well, I -- I suppose you might have just given a preview of what may yet come. But I don't -- I don't think that's necessarily for today.

MR. ETKIN: Well, it -- it is in terms of the other unresolved objection and that is the objection that relates to the ability to proceed against the debtor to the extent of insurance and why the existence of indemnification claims that haven't been filed yet, that haven't been subordinated or -- despite the Touch America decision.

I mean, the debtor hasn't pointed out any other

claims or any other claims against the policies other than the three pieces of litigation that are the subject of the informal issues raised by Underland and resolved by the new language and my two sets of clients. There's no one else out there.

And to the extent that the unknown is being created as a straw man to say that, well, you don't know what's going to happen and we don't know what indemnification claims the debtors going to have to answer to down the road and whether they'll be subordinated or not, you know, that's for tomorrow, too. That's not for today. It may not even be for tomorrow. It may be non-existent given the existence of a bar date, given the fact the insurance policies, at least as far as the insurance policies are concerned, that they are for a particular period and as far as I know most of the D and O policies that I've come across are claims made policies and if you don’t make a claim during the policy period you're out of luck.

I did not interrupt Mr. Lemons' argument because I didn't think it was appropriate to do so. But I think he was shifting, with respect to, again, the second issue, Your Honor, from argument into testifying regarding terms of the insurance policies and what they provide and what the retention is and whether -- whether there are or aren't

provisions as there are in many policies. I haven't seen these policies. We got certain information from the debtors regarding the policies, but not full copies of the policies themselves. They're not in evidence before Your Honor today.

Normally, in these policies there are provisions regarding what happens to self-insured retentions in the event of a bankruptcy, whether they still can be relied upon by the carrier, whether they are an impediment to coverage in the event of a -- of the filing of a Chapter 11. Most policies that I have dealt with have at least some language that relates to that.

So I don't know that the Court can or should rely upon those -- what purport to be evidentiary statements by counsel in determining the bona fides of the second objection that we -- that we raised. I think --

THE COURT: Well, let me ask this. And I think -- I know the debtor argued it and I think you acknowledged it in your papers, that there was no direct right to go against the policy or the insurer for these claims.

MR. ETKIN: Absolutely correct, Your Honor.

THE COURT: Okay.

MR. ETKIN: That -- and that -- that's one of the points. We -- if we had a direct right to the insurance I wouldn't be here making this objection. The only right that

we have, similar to really a personal injury plaintiff, Your Honor, not very different, the only right we have is to assert the claim and proceed with the claim against the debtor and then have the carrier answer to that claim.

THE COURT: And it's -- it's not disputed either that the policies constitute properties of the estate, is it?

MR. ETKIN: The policies constitute property of the estate, not the proceeds and the --

THE COURT: Understanding that rights are -- different rights are allocated differently, presumably, under the policies.

MR. ETKIN: Well, the cases are legion in this district and elsewhere that make the fundamental distinction between the policies themselves and the proceeds.

THE COURT: Understood.

MR. ETKIN: And Mr. Lemons did point out and I'll get to it in a moment -- I don't want to take too much time, Your Honor -- but Mr. Lemons did point out the existence of these priority of payments provisions under each of the policies. We did get redacted versions. I don't know which policies they apply to or not. All I can do is read what I -- what I received. And --

THE COURT: Well, let me ask this, Mr. Etkin. As an objector you would have had discovery rights. I recall

that there was an issue in connection with the approval of the disclosure statement concerning how much of the information concerning the policy terms should be disclosed and that was ultimately -- out -- it was ultimately resolved by the debtors' agreement to provide certain information outside of -- of the disclosure statement. But you could have asked. I don't know whether you did ask, whether you did serve discovery. But you -- you would have had that right.

MR. ETKIN: We did not serve discovery, Your Honor.

THE COURT: Okay.

MR. ETKIN: So as a result, the actual policy is not before you. I don't know, whether the debtors would have reacted any differently than they did when we first asked for the policies. But that's really neither here nor there. To answer your question directly we did not ask for any discovery.

THE COURT: All right.

MR. ETKIN: But getting to the priority of payment provisions, and I -- I hesitate to jump around too much here because there are a lot of sub-issues in this -- in this -- in this second issue and I have moved beyond the subordination issue. I think I've said my peace with respect to that, Your Honor.

THE COURT: All right.

MR. ETKIN: That -- that's really all there is to say.

But the concern that policy -- that if we're allowed to proceed against the debtor to essentially liquidate the claim and then determine whether there are any insurance proceed -- or settle the claim and then determine whether there are any insurance proceeds available to deal with the claim against the debtor because, again, that's all we're asking for. You know, there's -- in Mr. Lemons' presentation he keeps talking about distributions from the -- distributions as if they were distributions from the estate where a claim is paid by virtue of existing insurance.

While I agreed and agree that the policy is property of the estate, the proceeds are not property of the estate. And what -- and what --

THE COURT: Well, not -- not necessarily property of the estate.

MR. ETKIN: Well, in this case, the --

THE COURT: Some -- some -- depending upon the coverage, some may be.

MR. ETKIN: That -- that is correct, Your Honor. In this case they are not property of the estate. That issue has never been really determined by the Court and the

Court has not been asked to resolve that issue up until now, I guess.

But when you look at the decisions that have come down regarding that issue, and we really didn't raise that issue in our objection, but it was raised in the response, Courts look to whether there are priority of payment provisions as one of the tell-tale signs as to whether the proceeds are property of the estate because if in the first instance the policies reserve to the individual directors and officers' rights to utilize the proceeds to cover their liability, it has been a pretty easy call for Court to determine that they are not property of the estate.

I would just respectfully suggest, Your Honor, that you look at the motions filed by Weil Gotshal in the Leeman case regarding allowance of the use of the use of the proceeds to funds payments to directors and officers and see what position Weil Gotshal took in that case as it relates to whether the proceeds were property of the estate or not and look at their reliance on the existence of priority of payment provisions to take the position that all they were looking for was a comfort order in that case since they viewed the fact that the proceeds were not property of the estate.

THE COURT: You're not suggesting there are positional conflicts involved here, are you?

MR. ETKIN: I'm just -- I'm just -- in the words of Jack Webb, just stating the facts, Judge.

(Laughter)

MR. ETKIN: So, the point that the -- that Mr. Lemons was making was, you know, if we -- if we went ahead and liquidated our claim against the debtor, but limiting any recovery to existing insurance proceeds, that -- that might increase the amount of indemnification claims against the estate from the directors and officers who wouldn't have enough left to cover their liability in the existing litigation.

Well, frankly, Your Honor, that just can't happen by virtue of the terms of the policies at least as far as we know and what we were provided because these priority of payment provisions say that you first have to deal with the liability of the directors and officers.

So the point is that to the extent there's entity coverage under these policies, which is what we're talking about, whether it be the fiduciary policies or the D and O policies, to the extent that there's entity coverage and there's proceeds available for that entity coverage, the debtor has no interest in those proceeds other than to utilize them to satisfy obligations that -- that it might have or liability that it might have for which those policies were intended to cover.

So I really think it's another red herring, Your Honor, that -- that there may be these -- these indemnification claims that rise to the level of -- of general unsecured claims and are not subordinated, despite the fact that we really haven't seen any of those claims out there and I don't know what the proofs of claims of the directors and officers say with respect to that. But there are just a host of problems, hypothetical's, road blocks that -- that really at least tell me that those are arguments without -- without substance.

We're not looking to jump ahead of the line here, Your Honor, with respect to priority. This is not an issue of the absolute priority rule under the code. If that were the case, then, you know, any time the debtor has insurance for whatever that argument would be made and it's -- it's not.

THE COURT: Well, let's -- let's address -- let's put those issues aside for the moment and talk about the debtors' other argument which is, look, if we're forced to defend these actions now, we're spending real dollars under the self-insured retention provisions and for every dollar that we spend it's a dollar less for distributions to creditors who are indeed senior, assuming I find that your claim is -- is a subordinate claim under 510.

It seems to me that's a -- that's a pertinent

argument.

MR. ETKIN: It's a pertinent argument premised upon a fact that is not in evidence and that debtors' counsel is not capable of placing into evidence from the standpoint of admissible evidence on the record of what the policies say and provide as it relates to the self-insured retention. I don't believe that this Court can and should rely upon argument of counsel to make that kind of factual determination.

I will say to Your Honor that to the extent that the debtor may have an administrative -- what would amount to perhaps an administrative obligation to pay fees on a going forward basis, that would be pertinent. But I don't know if that fact is properly before Your Honor and I don't know if the debtor has met their burden of proving that fact or even properly putting that fact in front of Your Honor.

So, yes, I agree with the premise that it's -- that it would be pertinent. Again, it's in the aggregate according to the debtor a two-million-dollar self-insured retention on one of the policies and 500 on the other if I recall the papers, but that -- that, frankly, Your Honor, is all we have.

Your Honor, the debtor went out of its way -- Mr. Lemons went out of his way to discuss and -- and admit, confirm that this is a liquidating plan and the debtors are

not entitled to a discharge, yet the problem that we have stems from Section 10.3 of the plan, which is the injunction provision which, when you read it, at least from where I sit, it looks and smells like a discharge injunction to me. So the idea that the debtor is -- indicates that they're not getting a discharge or entitled to a discharge under 1141 because it's a liquidating plan is belied by the fact that they're seeking, essentially, what amounts to a discharge injunction through Section 10.3 of the plan.

Our position is quite simple. We believe that we're -- that regardless of any distributions under the plan -- and I might say as an aside, Your Honor, and maybe take some liberties in saying this, that the debtor would be hard pressed to stand up before Your Honor and indicate that there's much of a possibility, maybe, you know, the term health reasons comes to mind that subordinated creditors in Class 6A and below will receive any distribution ultimately under the plan. And that is what it is.

But to the extent that there's a sure -- insurance available for particular claims and these particular claims in the form of fiduciary insurance and D and O insurance, and that the debtor is insured, and the extent to which we can proceed to liquidate our claim in the same proceeding as we're moving forward against the non-debtors with respect to the same insurance, and limit any

recovery to any available insurance proceeds, and if there aren't any we get nothing, that in the context of a liquidating plan where the debtor is not entitled to a discharge is -- is -- not only is it not farfetched, we believe it's -- it's appropriate.

THE COURT: Well, the question normally comes up, actually before confirmation when class plaintiffs ask for relief from the stay to liquidate the claim, and there it's a timing issue understanding that in many circumstances the claims got to be liquidated somewhere. It's just a matter of when I say it can be done and where.

Here, though, when you're dealing with the subordinated claim, it may be, as you say, that there's never distribution to be had. So the question then is, okay. Should it be, as to the debtor, liquidated at all ever, and it may be that -- well, that's the question in my mind.

MR. ETKIN: Well, it's -- it's a good question, one that I've thought of myself, Your Honor --

THE COURT: Well, then I know it's a good question.

MR. ETKIN: No. No. No. No. Then I guess it's time to question it. But the -- the point there, what -- what I think about when looking at that issue is -- and interestingly enough I've entered into agreements in cases

where we don't know whether there's going to be a distribution to subordinated creditors and we just hold off and wait until we know one way or the other because nobody wants to spend money litigating the merits of a claim that's not going to be entitled to a distribution.

But, again, that's precisely the point. I don't think we would ever seek to liquidate this claim in the bankruptcy proceeding other than to access available insurance. And, yes, we could have moved to lift the stay. The few times that I've tried to do that, Your Honor, I've -- I've met with a similar lack of success and I've been told to wait. So my -- my knee jerk reaction is -- these days is simply to wait.

But if -- if there were an issue with regard to the liquidation of the claim we would then be dealing with issues of withdrawal of the reference and transfer of the claim to the -- to the district court and, you know, all kinds of litigation that would be a waste of time, certainly, for the debtor because if they have no dog in this fight from the standpoint of whether they're going to have to come out of pocket, and if they ever come out of pocket with respect to this claim it will only be after all senior creditors are paid in full. So they certainly don't care about fighting that fight.

The idea of having to fight that fight in a

liquidating case where there is no discharge, where the only potential -- the only practical potential recovery against -- with respect to the claims against the debtor would be the result of available insurance coverage, I'm -- I was kind of surprised at the -- at the level of the dispute that the debtors put up with respect to this.

Anecdotally, Your Honor, there have been times in other cases where debtors have agreed to it. They just want -- they just want to get rid of us. We're the -- we're the unwanted stepchild in these cases, Your Honor. We're just a pain in the neck and they don't want us around. We're not going to get any recovery anyway because, certainly, in the context of securities' cases there's no issue as to subordination and -- and if the securities are equity securities we're at the lower rung of the ladder.

So we don't have an economic stake in the bankruptcy proceeding. We simply want to preserve our rights to proceed with claims to the extent that there's insurance coverage to pay for those claims in the event there's a determination that somebody has done something wrong.

And that's exactly where we are here. We're -- the debtors in their papers, they say they're -- that we're seeking a distribution now. We're not seeking a distribution from this bankruptcy estate. You know, the

insurance proceeds is not -- it's not like it's a fund of money that's going to drop down into the DIP account and then get distributed to creditors pursuant to the absolute priority rule. That's not how it works. The insurance is there to, in this case, first deal with claims against the directors and officers, and if there's anything left, according to the priority of payments provision, then it could be used to satisfy liability of the debtors pursuant to the -- to entity coverage, which is usually Side C coverage. I'm not sure what it is here.

So it is not -- it is not at -- either out of the ordinary, unreasonable or -- or -- and it's not as if it's not envisioned in a case where there's -- where you're dealing with a liquidation and where the debtor, again, is not entitled to a discharge.

We know that we're not entitled to the insurance proceeds by virtue of any contractual relationship. We understand that we don't have a security interest with respect to the insurance proceeds. But that's really not the point. The -- we're not talking about dealing with assets of this debtor that are going to be marshaled by the various liquidating trustees to distribute to creditors pursuant to the plan. We're talking about insurance the same way, again, that personal injury plaintiffs talk about insurance and we're facing a discharge injunction in Section

10.3 which says that we're permanently enjoined from proceeding with our claims against the debtor --

THE COURT: Well --

MR. ETKIN: -- regardless of what happens.

THE COURT: -- let me explore something with you.

The debtor says this is not a confirmation issue and but for the plan injunction, it likely wouldn't be. I think you're probably right that the record on what the coverage is is not well enough developed for me to be determining those rights in connection with confirmation, and it's -- and the debtors proposed a plan that's otherwise met the standards, I think.

So what if the discharge -- the injunction provisions were to provide that the confirmation order is without prejudice for you to come back and seek leave to pursue liquidation of the claim, you know, at some time post-confirmation?

MR. ETKIN: Let me start by saying that I don’t want to hold up -- it's not our purpose to hold up confirmation of this plan.

THE COURT: I can tell you you're not going to.

MR. ETKIN: I know that.

(Laughter)

MR. ETKIN: I know that. I know that. I at least knew that much walking in here.

So I understand that and we don't want to do that. You know, the -- that's a sensible suggestion. My concern, I guess, thinking out loud, Your Honor, is that I don't know what standard we would have to meet. Would we have to come in and essentially seek relief from the discharge injunction under the plan? I don't think that's particularly a fair standard to have to meet. I've been before Your Honor long enough to be able to know that -- that we'll -- we'll get a fair hearing with respect to these issues. So I'm inclined --

THE COURT: Oh, you say that to all the judges, don't you, Mr. Etkin?

MR. ETKIN: Not really, Your Honor. Sometimes I just don't say anything.

(Laughter)

MR. ETKIN: But I think in this case as long as there's some carve-out which acknowledges the issue and that the issue has not been fully vetted yet, and that Your Honor is prepared to listen to this issue on perhaps a more fulsome record under different circumstances, I don't think that's -- that's a resolution that I can -- that I can be uncomfortable with.

THE COURT: There. You've beaten me into submissions, Mr. Etkin.

I will give you the chance to speak with the

debtor about this outside of my presence once I've heard from everyone else who wants to be heard in connection with confirmation.

Thank you.

MR. ETKIN: Thank you, Your Honor.

THE COURT: All right.

Does anyone else wish to be heard in connection with confirmation of the plan?

(No verbal response.)

THE COURT: I hear no further response.

Well, Mr. Lemons, I'm inclined at this point to take a break to see if you can work something out in the way of language with Mr. Etkin and then we'll reconvene and dispose of confirmation and the related items on the agenda.

How much time would you like?

MR. LEMONS: Fifteen minutes, Your Honor.

THE COURT: Very well. We'll take a fifteen-minute break.

(Recess.)

THE CLERK: All rise. You may be seated.

MR. ETKIN: Well, Your Honor, I'm smiling which is good for us all.

We -- we used the time a little more than we initially asked for productively to work out language to go into the plan. I'm going to try to read my Rube Goldberg

sort of version of the language, but before I do I should just state that -- that the actual final, final words of this -- this language will be, you know, subject to checking with the plaintiffs' counsel to make sure everyone's fine with it and also fixing some defined terms which I'll use sort of loosely in this.

So, Your Honor, what the parties have agreed is to add a new Subsection 10.3(c) to the plan, so that would go in with 10.3 which is the section that currently contains the injunctive language. And the language would say:

"Notwithstanding the foregoing, the ERISA and securities' plaintiffs shall retain the ability to file a motion after the effective date with the bankruptcy court seeking authorization to liquidate any claims that they have asserted against the debtors in proofs of claim timely filed in these Chapter 11 cases solely to the extent of and for the limited purpose of pursuing the collection of any applicable insurance proceeds.

"The ERISA and securities' plaintiffs shall not be entitled to any discovery in connection with such motion other than, (1) copies of the applicable insurance policies which would be provided subject to an appropriate protective

order and, (2) notices of circumstance delivered by or on behalf of the debtors provided that the debtors and the liquidating trusts and trustees shall reserve all rights to oppose discovery of the notices."

And before I go on reading it's not written down in here, but just to make clear for the record the debtors have agreed that they will provide the insurance policies subject to an appropriate protective order. The reservation is on the notices of circumstance because -- because among other things those may be subject to privilege.

The language would then go on, Your Honor, to say that:

"Nothing in the plan or the confirmation order shall constitute a determination with respect to the merits of the motion described above, and all parties rights including those described in Section 8.9 of the plan are hereby reserved."

And 8.9 is the section that reserves all parties' rights with respect to who owns the proceeds of the insurance policies.

THE COURT: All right.

Mr. Etkin.

MR. ETKIN: Your Honor, first of all, thank you for your efforts on this and I think that this -- this does

it. But we -- because it's hard to read and there are some -- you know, perhaps some little things that need to be done, we agreed that we would share -- or the debtor would share the final language with us to take a look at and -- and I assume them submit the confirmation order once the change is made under certification of counsel.

THE COURT: All right. Thank you.

Does anyone else wish to be heard on that issue?

(No verbal response)

THE COURT: I hear no response.

MR. LEMONS: So, Your Honor, that really concludes our -- our presentation with respect to the plan and I believe now we have an uncontested plan and would respectfully request that Your Honor enter the confirmation order, I guess, after we making the changes that we discussed with Mr. Etkin and, also, the confirmation order will -- as it will be shown in the blackline to you will have a few very, very minor non-substantive changes, like the insertion of docket numbers and making a term capitalized that was mistakenly not.

THE COURT: All right.

Well, based upon the record that's been made, the resolution of most of the objections and my overruling now for the record the objections concerning subordination of the ERISA claims, I'm prepared to approve confirmation of

the plan.

I'll await submission of an order under certification.

MR. LEMONS: Thank you, Your Honor.

THE COURT: Is there anything further for today?

MR. LEMONS: No, Your Honor.

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

MR. LEMONS: Thank you.

(Whereupon at 2:46 p.m., the hearing was adjourned)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Sherri Breach February 15, 2011

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UNITED STATES BANKRUPTCY COURT
District of Delaware

In Re:
Advanta Corp., et al.,
Welsh & McKean Roads
P.O. Box 844
Spring House, PA 19477
EIN: 23−1462070
Teacher Service Organization, Inc.
TSO Financial Corp.

Chapter: 11

Case No.: 09−13931−KJC

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

A transcript of the proceeding held on 2/10/2011 was filed on 2/16/2011 . The following deadlines apply:

The parties have 7 days to file with the court a *Notice of Intent to Request Redaction* of this transcript. The deadline for filing a *request for redaction* is 3/9/2011 .

If a request for redaction is filed, the redacted transcript is due 3/21/2011 .

If no such notice is filed, the transcript may be made available for remote electronic access upon expiration of the restriction period, which is 5/17/2011 unless extended by court order.

To review the transcript for redaction purposes, you may purchase a copy from the transcriber (see docket for Transcriber's information) or you may view the document at the clerk's office public terminal.

Clerk of Court

Date: 2/16/11

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