

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<i>In re</i>	)	Chapter 11
)	
ADVANTA CORP., <i>et al.</i>,	)	Case No. 09-13931 (KJC)
)	
Debtors.	)	(Jointly Administered)
)	
	)	Hearing Date: September 20, 2011 at 10:00 a.m.
	)	Objection Deadline: July 14, 2011 at 4:00 p.m.

**MOTION OF CLASS CLAIMANTS FOR (I) ABSTENTION, AND (II)
MODIFICATION OF THE PLAN INJUNCTION TO LITIGATE CLASS CLAIMS**

Creditors Michael and Shellie Gilmor (POC No. 2696), Michael and Lois Harris (POC 2681), Joseph and Amy Black (POC No. 2595), William and Carole Hudson (POC No. 2874), Bruce and Mary James (POC No. 2869), William and Marion Jones (POC No. 2863), Debra Mooney (POC No. 2735), Leo E. Parvin, Jr. (POC No. 2754), Derrick and Alethia Rockett (POC No. 2778), John and Jeanne Rumans (POC No. 2782), Raye Ann Varns (POC No. 2815), David and Nicole Warkentien (POC No. 2823), Jeffrey Weathersby (POC No. 2824), and Patricia Ann Worthy (POC No. 2835) on behalf of themselves, and with class counsel, on behalf of the class of Missouri homeowners in the certified class action lawsuit pending in the United States District Court for the Western District of Missouri, styled *Gilmor v. Preferred Credit Corp., et al.*, Case No. 10-0189-CV-W-ODS (the “*Gilmor* Class Action”); Aric Watson (POC No. 2610), on behalf of himself, and with class counsel, on behalf of the class of Missouri homeowners in the certified class action lawsuit pending in the Circuit Court of Clay County, Missouri, styled *Baker v. Century Financial Group, Inc., et al.*, Case No. CV100-4294 (the “*Baker* Class Action”); and all other creditors who filed Proofs of Claim as unnamed class members of the certified borrower

class in the *Gilmor* Class Action (collectively, the “Class Claimants”)¹ hereby respectfully move the Court to abstain from hearing the individual and class claims that the Class Claimants have asserted against Debtor Advanta Mortgage Corp. USA (“Advanta”) in this case. Class Claimants further request that the Court modify the discharge injunction provisions of the Court’s Confirmation Order (as defined herein) so as to allow the Class Claimants to continue to pursue their claims against Advanta to final judgment in the *Gilmor* and *Baker* Class Actions,² with directions to the parties to return to this Court for purposes of enforcing the final judgments pursuant to the confirmed Chapter 11 plan.

I. INTRODUCTION

This motion (the “Abstention Motion”) has been filed in conjunction with the Class Claimants’ response to the *Seventh Omnibus Objection (Substantive) to Claims Against Advanta Mortgage Corp. USA Based on Certain Class Action Litigation Claims* filed by FTI Consulting, Inc., in its capacity as Trustee of the AMCUSA Trust (“Trustee”) [Docket No. 1254].³ Through its Omnibus Objection, the Trustee seeks summary dismissal of all 261 claims the Class Claimants have asserted against Advanta in this Court. For the reasons stated in the Class Claimants’ Omnibus Response filed concurrently herewith, there is no basis in law or fact for such summary dismissal. Accordingly, all of Class Claimants’ claims will need to be

¹ Excluding the five duplicative claims disallowed per the Fifth Omnibus Objection, there are 433 Class Claimants and 261 related proofs of Claim. The names of each Class Claimant, and the number and amount of their respective proofs of Claim, are listed in Exhibit A attached to the Trustee’s Omnibus Objection. [Docket No. 1254].

² The “*Gilmor* and *Baker* Class Actions,” as well as all other capitalized terms used but not defined herein, are described in greater detail in the Class Claimants’ concurrently filed Response to the Seventh Omnibus Objection [Docket No. 1299].

³ *Seventh Omnibus Objection (Substantive) to Claims Against Advanta Mortgage Corp. USA Based on Certain Class Action Litigation Claims filed by FTI Consulting, Inc., in its capacity as Trustee of the AMCUSA Trust* [Docket No. 1254], and the *Class Claimants’ Response to the Seventh Omnibus Objection (Substantive)* [Docket No. 1299] shall hereinafter be referred to, respectively, as the “Omnibus Objection” and “Omnibus Response.”

adjudicated either in this Court or in the *Gilmor* and *Baker* Class Actions now pending, respectively, in the United States District Court for the Western District of Missouri and the Circuit Court of Clay County, Missouri. For the reasons stated below, the Court should abstain from exercising its jurisdiction over the adjudication of these claims and modify the Plan Injunction to allow the Class Claimants' to continue pursuing their claims against Advanta in the *Gilmor* and *Baker* Class Actions in order to obtain final judgments that can then be enforced in this Court pursuant to the confirmed Chapter 11 plan.

II. JURISDICTION

This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue for this proceeding is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

III. BACKGROUND

A. The Missouri Class Actions

1. As set forth in more detail in Class Claimants' Omnibus Response, the Class Claimants are named plaintiffs and/or members of a certified class of Missouri borrowers in the *Gilmor* and *Baker* Class Actions now pending, respectively, in the United States District Court for the Western District of Missouri and the Circuit Court of Clay County, Missouri. See Class Claimants' Omnibus Response, pp. 2-5, and exhibits referenced therein.

2. The plaintiffs in the *Gilmor* and *Baker* Class Actions assert claims for violations of the Missouri Second Mortgage Loans Act, Mo. Rev. Stat. §§ 408.231 *et seq.* (the "MSMLA") against Preferred Credit Corp. and Century Financial Group, Inc., as the originators of the second mortgage loans at issue, and over hundred and forty additional defendants who subsequently acquired, held or serviced those loans, including Advanta. *Id.*

3. The Class Claimants' claims are based on specific provisions in the MSMLA, which places limits on the type and amount of loan fees that can be "directly or indirectly charged, contracted for or received in connection with any second mortgage loan[s]" secured by Missouri residential real estate, and further prohibits the collection and receipt of interest in connection with such illegal second mortgage loans (*e.g.*, loans for which illegal loan fees have been directly or indirectly charged, contracted for or received). *See* Mo.Rev.Stat. § 408.233.1 (emphasis added); Mo.Rev.Stat. §§ 408.231, 408.236 and 408.562; *Mitchell v. Residential Funding*, 334 S.W.3d 477, 501(Mo. App. 2010); *Thomas v. U.S. Bank Nat'l Ass'n ND*, 575 F.3d 794, 796 n. 1 (8th Cir. 2009), *cert. denied*, ___ U.S. ___, 130 S. Ct. 3505, 177 L. Ed.2d 1091 (2010); *see also* Class Claimants' Omnibus Response, at pp. 2-3.

4. The parties in both the *Baker* and *Gilmer* Class Actions have engaged in extensive pre-trial discovery during the course of the last decade. During this time, depositions of all the named plaintiffs (except those just recently added in the *Gilmer* case) and numerous representatives of the defendants have been completed. In addition, the plaintiffs alone have served well over two hundred sets of discovery in these cases. The primary purpose of this discovery has been to determine the history and status of the hundreds of loans at issue, including the loans of the Class Claimants here. Such discovery has also been necessary to determine the identity of the numerous holders, assignees and servicers who have dealt with these loans over the years, most of which the Class Claimants obtained in the 1990s. While some discovery is still needed for these purposes, most of the discovery needed for trial has been completed.

5. Based on the *Scheduling and Trial Order* issued by the court in the *Gilmer* Class Action, pre-trial discovery trial must be completed by December 30, 2011, and the trial is set to

commence on July 12, 2012. *See Scheduling and Trial Order*, issued on November 11, 2010, attached as **Exhibit 1**. Although a trial has not yet been set in the *Baker* Class Action, the plaintiffs anticipate that they will be ready for trial in the near future.

6. As also noted in the Class Claimants' Omnibus Response, the *Gilmor* and *Baker* Class Actions represent just two of eleven such class action lawsuits filed in the Missouri courts on behalf of Missouri homeowners who obtained second mortgage loans secured by Missouri real estate in the late 1990s and early 2000s (the "Missouri Class Actions"). *See* Class Claimants' Omnibus Response, pp. 5-7, and exhibits referenced therein.

7. Each of the Missouri Class Actions involves virtually identical claims for violations of the MSMLA by the mortgage lenders, purchaser-assignees and servicers of the Missouri second mortgage loans.⁴ All eleven Missouri Class Actions were originally filed in Missouri state court, but four of the lawsuits have been removed by the defendants to the Western District of Missouri. *See* Class Claimants' Omnibus Response, at p. 5-6. One of the Missouri Class Actions, the "*Washington* Class Action," is currently on appeal before the United States Court of Appeals for the Eighth Circuit. *Id.*

8. Over the last decade, both the plaintiffs and the defendants in the Missouri Class Actions have appealed a number of lower court rulings to both the state and federal appellate courts in Missouri, including one petition for a writ of certiorari to the United States Supreme Court. *Id.* As a result, numerous legal issues related to the scope and application of the MSMLA have been resolved and determined in the Missouri Class Actions. However, while this litigation—and in particular the Missouri Court of Appeals' recent *Mitchell* decision—has gone a

⁴ Several defendants are named in one or more in these cases, including some of the defendants in the *Gilmor* and *Baker* Class Actions.

long way toward resolving most of the key legal issues arising the Missouri Class Actions, additional litigation directly relevant to the Class Claimants' claims may yet need to be resolved by the Missouri courts.

9. The litigation conducted so far in the Missouri Class Actions, including several appeals to the Missouri and federal appellate courts, has been instrumental in resolving most, but not necessarily all, of the factual and legal issues raised in the Missouri Class Actions. These appeals have also been one of the primary reasons for the delay in bringing the Missouri Class Actions to trial, as the Missouri judges in these cases will often reserve judgment on certain pending legal issues until a pending appeal has been resolved.⁵ Nevertheless, most of this litigation, including the jurisdictional issues, are now resolved and, therefore, most of the Missouri Class Actions, including *Gilmor* and *Baker*, are now to a point where they can and will be resolved or tried in the near future.

B. Advanta's Bankruptcy

8. As noted by the Trustee in the Omnibus Objection, Advanta filed its petition under chapter 11 of title 11 of Bankruptcy Code on November 8, 2009. As the Trustee has also noted, May 14, 2010 was established as the deadline to file proofs of claim against Advanta, but the Court, with the Debtors' agreement, extended the time for the Class Claimants to file their Proofs of Claim by forty-five (45) days. *See Order Extended the Time Within Which Proofs of Claims May Be Filed* [Docket No. 587].

⁵ The refusal of some of the defendants to identify assignees and provide loan files relevant to unnamed members of the certified class has also caused additional delay in these cases. As noted in Class Claimants' Omnibus Response, some of this discovery will be needed for the claims asserted against Advanta here. *See Omnibus Objection*, at p. 5 ("Advanta also acted as a loan servicer for and collected loan payments from borrowers for an as yet undetermined number of the estimated 524 Missouri second mortgage loans at issue in the *Baker* Class Action ..."). As also noted in Class Claimants' Omnibus Response, the fact that each of these cases has been removed multiple times by the defendants, only to be remanded, has also caused a good deal of the delay. *Id.*, at pp. 2, 4.

9. The Class Claimants filed all of their Proofs of Claim on June 28, 2010.
10. On November 2, 2010, Advanta and the other debtors in this consolidated case filed the *Joint Plan Under Chapter 11 of the Bankruptcy Code* (as modified on February 28, 2011) [Docket No. 1185] (the “Plan”).
11. On or about February 11, 2011, this Court entered its *Order Confirming Debtors' Joint Plan Under Chapter 11 of the Bankruptcy Code, As Modified* [Docket No. 1173] (the “Confirmation Order”). On March 1, 2011, a notice of the effective date of the Plan, which is February 28, 2011, was filed with the Bankruptcy Court [Docket No. 1191].
12. Pursuant to Section 5A of the Plan, the AMCUSA Trust was established with the sole purpose of liquidating and distributing the assets of the AMCUSA Trust in accordance with applicable law, with no objective to continue or engage in the conduct of a trade or business. Plan, at § 5.4(b).
13. Section 5.4(g) of the Plan specifically provides that the Trustee has the right, power and duty “in [the Trustee’s] reasonable business judgment, to reconcile and object to Claims against the Debtors or the applicable Liquidating Trust, and manage, control, prosecute and/or settle on behalf of the applicable Estate and/or Liquidating Trust[,] objections to Claims on account of which the [Trustee] (as Disbursing Agent) will be responsible (if Allowed) for making distributions under the Plan.” Plan, at § 5.4(g).
14. Pursuant to Section 10.3 of the Plan, the Court entered a discharge injunction (the “Plan Injunction”) in the Confirmation Order, which provides in relevant part as follows:
 - (a) ... all Persons who have held, hold or may hold Claims or Equity Interests and all other parties in interest ... are permanently enjoined, from and after the Effective Date, from (i) commencing or continuing in any manner any action or

other proceeding of any kind (whether directly, derivatively or otherwise) against [Advanta] related to a Claim ...

(b) All Causes of Action against [Advanta] that are not otherwise released under the Plan ... shall be channeled to the applicable Trust and be subject to the jurisdiction of the Bankruptcy Court. Any Cause of Action brought against any Trust or any Trustee may only be brought before and heard by the Bankruptcy Court.

IV. LAW AND ARGUMENT

For the reasons stated below, the Court should abstain from exercising its jurisdiction over the Class Claimants' claims and modify the Plan Injunction to allow these claims to be adjudicated in the Missouri courts.

A. Abstention is Warranted in this Case

The Court's decision to abstain from hearing the Class Claimants' 261 claims is governed by 28 U.S.C. § 1334(c)(1). Section 1334(c)(1) provides as follows:

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

In interpreting whether to abstain under Section 1334(c)(1), courts have identified the following relevant factors to examine:

- (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention;
- (2) the extent to which state law issues predominate over bankruptcy issues;
- (3) the difficulty or unsettled nature of the applicable state law;
- (4) the presence of a related proceeding commenced in state court or other

nonbankruptcy court;

- (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334;
- (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;
- (7) the substance rather than form of an asserted core proceeding;
- (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;
- (9) the burden upon the docket;
- (10) the likelihood that the commencement of the proceeding in the bankruptcy court involves forum shopping by one of the parties;
- (11) the existence of a right to a jury trial; and
- (12) the presence in the proceeding of nondebtor parties.

See, e.g., In re RNI Wind Down Corporation, 348 B.R. 286, 295-96 (Bankr. D. Del. 2008) (citing *In re Sun Healthcare Group*, 267 B.R. 673, 678-79 (Bankr. D. Del. 2000)).

However, evaluating the twelve factors is not merely a mathematical exercise of discerning how many factors favor the moving party. *Id.*; *Trans World Airlines, Inc. v. Karabu Corp.*, 196 B.R. 711, 715 (Bankr. D. Del. 1996). Accordingly, the courts have not developed a precise framework to address how many, or which, factors are required for permissive abstention to be appropriate. They have instead applied these twelve factors on a case-by-case basis to determine if abstention is appropriate. *Id.*; *Valley Media, Inc. v. Toys R Us, Inc. (In re Valley Media, Inc.)*, 289 B.R. 27, 30 (Bankr. D. Del. 2003); *Omna Med. Partners v. Carus Healthcare, P.A. (In re Omna Med. Partners)*, 257 B.R. 666, 669 (Bankr. D. Del. 2000); *Continental Airlines, Inc. v. Aven (In re Continental Airlines)*, 156 B.R. 441, 443-44 (Bankr. D. Del. 1993);

Total Technical Services, Inc. v. Stackfleth (In re Total Technical Services, Inc.), 142 B.R. 96 (Bankr. D. Del. 1992).

For these same reasons, the federal courts are given broad discretion in deciding whether to abstain from hearing state law claims under 28 U.S.C. § 1334(c)(1). *See Matter of Gober*, 100 F.3d 1195, 1206 (5th Cir. 1996); *see also Hopkins v. Plant Insulation Co.*, 342 B.R. 703, 710 (D. Del. 2006) (“in its discretion, the Court may abstain from hearing a case over which it has jurisdiction pursuant to the discretionary abstention principles set forth in Section [1334(c)(1)].”).

In this matter, the relevant abstention factors weigh decidedly in favor of abstention by this Court. Specifically:

1. Efficient Administration.

The Court’s abstention from hearing the Class Claimants’ 261 claims against Advanta (the “Class Claims”) in favor of having those claims resolved in the Missouri Class Actions would almost certainly contribute to the efficient administration of the Debtor’s estate. Attempting to adjudicate these 261 Class Claims against Advanta in this Court would not only be extremely impractical, it would also impose an unwieldy burden on this Court and the parties. Unlike this Court, the Missouri courts have been dealing with the factual and legal issues underlying the Class Claims for the last decade. The Missouri courts in which the *Gilmor* and *Baker* Class Actions are now pending have also handled a great deal of class discovery between the plaintiffs and Advanta, as well as its many co-defendants, which will be directly relevant to the claims asserted against Advanta here. These courts have also addressed and resolved a multitude of contentious discovery disputes and other pretrial matters directly relevant to the Class Claims. Thus, absent abstention, both the parties and this Court, which is understandably unfamiliar with the factual discovery needed and the somewhat complex factual and legal issues

raised by the Class Claims, would necessarily have to duplicate a great deal of time, effort and expense in order to adjudicate these claims separately in this Court.

Equally significant, because the Class Claims against Advanta, and the corresponding issues of Missouri law raised by them, are virtually identical to the claims in the Missouri Class Actions, Advanta has, up until now, relied almost exclusively on its many co-defendants to take the lead in vigorously defending the claims asserted in the *Gilmor* and *Baker* Class Actions. Thus, the Trustee would be required to take on the *entire* burden, and the considerable expense, of defending these claims separately if the Court chooses to exercise its jurisdiction over these claims. Both the plaintiffs and the Trustee would also be required to incur considerable effort and expense to re-do much of the same discovery already completed in the *Gilmor* and *Baker* Class Actions. In addition, the parties would no doubt have to re-litigate some of the same discovery disputes and other pre-trial issues which have already been resolved by the Missouri courts.

Finally, while most of the substantive legal issues arising under Missouri law have been resolved by the Missouri courts over the course of the last decade, a few legal issues and *all* of the factual issues would still need to be decided by this Court if the Class Claims are resolved here. Thus, a decision not to abstain would create the real potential for inconsistent rulings, and potentially duplicative and perhaps unnecessary appeals relating to many of the same contested legal issues the Missouri courts have already addressed, or may yet have to address, in the Missouri Class Actions. In contrast to the multiple appeals taken in the Missouri Class Actions, which to date have been pursued exclusively by other defendants even though they impact Advanta, the sole cost of this additional litigation would necessarily have to be borne by the Trustee.

The Missouri courts, both trial and appellate, are obviously much more familiar with the interrelated claims against both Advanta and the other defendants in the *Gilmor* and *Baker* Class Actions, as well as the evolving status of Missouri law relevant to those claims. As a result, the Missouri courts are clearly in a much better position to more efficiently and effectively address any disputed state law issues that will need to be determined in order to resolve the Class Claims. More importantly, these Missouri courts are unquestionably in a better position to resolve and determine these disputed state law issues with finality.

This factor therefore weighs heavily in favor of a decision to abstain in this case.

2. Nature and Extent State Law Issues (Factors 2 & 3).

Because the 261 Class Claims are based on Missouri state law, and because Missouri state law issues predominate, the second and third factors provide similarly compelling reasons for abstention. As discussed in more detail in the Class Claimants' Omnibus Response, the Class Claims are based *solely* on violations of the MSMLA. *See* Class Claimants' Omnibus Response, at pp. 12-20. Moreover, despite the clear language of the MSMLA, the legal issues relating to that Missouri law have been contested by the defendants, thus necessitating multiple appeals. *Id.* The defendants' aggressive defense of these claims has thus necessitated multiple appeals. While these appeals have for the most part only served to clarify and strengthen the class plaintiffs' claims,⁶ they have also made the resolution of these claims difficult.

As also noted in the Class Claimants' Omnibus Response, Advanta is actually one of no fewer than ten loan servicers named as defendants in the *Gilmor* and *Baker* Class Actions. *Id.*, at fn. 3 & 4. Thus, the factual and legal issues underlying the claims against these other servicers,

⁶ As noted in the Class Claimants' Omnibus Objection, the recent *Mitchell* decision, which became final on April 28, 2011, has now put essentially all of the substantive issues relating to the plaintiffs' MSMLA claims to rest. *See* Omnibus Objection, at pp. 17-23.

which are virtually identical to those underlying the claims against Advanta, will necessarily have to be decided in the Missouri courts, no matter what happens here. Thus, a decision not to abstain would, again, create a real potential for inconsistent rulings, as well as potentially duplicative and perhaps unnecessary appeals. Accordingly, both the nature and substance of the Class Claims, as well as the difficulties created by the vigorous defense of the Missouri Class Actions being made by the other defendants, provide compelling reasons for the Court's decision on abstention in this case. *See e.g., Continental Bank N.A. v. Modansky*, 755 F. Supp. 812, 815 (N.D. Ill. 1991) (interest of justice is better served when claims are heard before court familiar with applicable law); *Anderson v. Thompson*, 634 F. Supp. 1201, 1205 (D. Mont. 1986) ("If questions of substantive law are raised in a particular action, it is viewed as advantageous to have these issues decided in [the courts] sitting in the state whose substantive law governs.").

These factors therefore also favor abstention.

3. The Presence of Related Proceedings (Factor 4).

While the related Missouri class litigation affecting the Class Claims has been protracted, both the *Gilmor* and *Baker* Class Actions are finally to a point where they can and will be tried or otherwise resolved fairly soon. Equally important, and despite the protracted nature of this litigation, the Missouri courts have now resolved and determined many of the discovery disputes and substantive legal issues that have delayed and frustrated the parties' past efforts to resolve the claims asserted in the *Gilmor* and *Baker* Class Actions, as well as the other related Missouri Class Actions. The Missouri courts are thus in a much better position to resolve the factual and legal issues that will directly impact the resolution of the Class Claims.

This factor therefore also favors abstention.

4. Jurisdictional Basis (Factor 5).

There is of course no question that this Court has jurisdiction over the Class Claims pursuant to 28 U.S.C. § 1334 and the Confirmation Order. However, the limited equitable relief requested here is consistent with that jurisdiction and does not seek to diminish the Court's ultimate jurisdiction over the Class Claims in any way. This factor is therefore neutral.

5. Degree of Relatedness or Remoteness and the Substance Rather than Form of an Asserted Core Proceeding (Factors 6 & 7).

The Class Claims, and the related Missouri class litigation from which they stem, are not related in any way to Advanta's bankruptcy. Indeed, the claims underlying the Class Claims were brought in Missouri court nine (9) years before these bankruptcy proceedings began. In addition, and apart from the fact that they need to be liquidated, the Missouri law claims against Advanta under the MSMLA are exceedingly remote from, and in fact completely foreign to, these bankruptcy proceedings.

Moreover, the Plan has now been confirmed by the Court, Advanta has been dissolved and a trust has been established to liquidate and distribute Advanta's remaining assets. As result, the Class Claims arguably are not core proceedings under 28 U.S.C. § 157(b)(2)(A) or (O), because their resolution only affects the amount of post-confirmation assets the Trustee will have to pay on these claims from the AMCUSA Trust. Additionally, the fact that the contingent Missouri law claims underlying the Class Claims were filed well before Advanta's bankruptcy also warrants the conclusion that the Class Claims, or rather their resolution, are not actually "core" proceedings at this point either. *See In re Exide Technologies*, 544 F.3d 196, 213 (3d Cir. 2008) (the filing of a proof of claim in the debtor's bankruptcy case does not necessarily mean the claims referenced therein must be considered core proceedings under 28 U.S.C. §

157(b)(2)(B)); *In re Hallwood Energy, L.P.*, 2009 WL 2601294, at **4-5 (Bankr. S.D. Tex. Aug. 24, 2009) (state law claims that occurred pre-petition and are unrelated to necessity of debtor filing bankruptcy are not converted to core proceedings by filing claim in bankruptcy court).

These factors therefore weigh heavily in favor of abstention.

6. Feasibility of Severing State Law Claims (Factor 8).

It is of course entirely feasible to sever the adjudication of the state law claims underlying the Class Claims from these bankruptcy proceedings. Indeed, for the reasons stated above, severance of these claims would almost certainly be the most efficient and effective way to resolve them. Without question, the Missouri courts will be much better able to decide all of the factual and legal issues presented by the Class Claims, after which the parties can return to this Court for enforcement of judgments of the Missouri courts in accordance with the Plan.

This factor therefore also favors abstention.

7. Burden Upon the Docket (Factor 9).

Although the Class Claimants do not presume to know whether this Court's docket is currently "overburdened," it is no doubt fair to say that the Delaware Bankruptcy Court is one of the busiest in the country. Given the complexities of the factual and legal issues raised by the Class Claims, it is likewise fair to say that resolution of these claims in this Court will require substantial time and effort by both the Court and the parties. Indeed, resolving these claims here would almost certainly require a great deal of the duplicative discovery and the resolution of many of the very same pre-trial disputes that have already been resolved in the trial courts in Missouri.

Such duplicative and inefficient efforts can of course be completely avoided by allowing the Class Claims to be resolved in the Missouri courts. Moreover, given the fact, as noted above,

that Advanta has until now relied almost exclusively on its many co-defendants to vigorously defend the claims asserted against it in the *Gilmor* and *Baker* Class Actions, completion of the related Missouri litigation in the Missouri courts would no doubt avoid the considerable expense the Trustee would necessarily have to incur to litigate the 261 Class Claims separately here. It would also permit this Court to focus its efforts on related bankruptcy issues while the *Gilmor* and *Baker* Class Actions proceed to final judgment. Accordingly, permitting these claims to be resolved in the Missouri courts, as part of the *Gilmor* and *Baker* Class Actions, would not only avoid all the considerable problems typically associated with the type of duplicative litigation presented here, but it would also provide a direct, and not inconsiderable, benefit to both this Court and the Trustee.

8. Likelihood of Forum Shopping (Factor 10).

The Missouri Class Actions were filed well before Advanta filed for bankruptcy and but for that bankruptcy, the Class Claimants would of course not even be seeking abstention by this Court. Moreover, the Class Claims are based solely on Missouri law and, as noted, most of the same legal issues relevant to these claims have been and/or will be resolved by the Missouri courts. The Missouri courts are much more familiar with the nuances of applicable Missouri law and can thus resolve these claims much more efficiently and effectively than this or any other court. This Motion is premised solely on these perfectly valid and compelling reasons for abstention. The Class Claimants are clearly not forum shopping. Thus this factor is, at best, neutral.

9. Right to Jury Trial (Factor 11).

While the Class Claimants would not be entitled to a jury trial in this court, the fact that they would have this right in the Missouri courts is not the reason they seek abstention by this Court. Therefore, this factor is neutral.

10. Presence of Non-Debtor Parties (Factor 12).

There are literally hundreds of non-debtor parties involved in the Missouri Class Actions. As a result, a decision by this Court to resolve and determine the many and often difficult legal issues raised by the Class Claims could have an unintended effect on the claims pending in the Missouri Class Actions. Conversely, given the complexities of the legal issues, particularly those relating to the proper interpretation of the MSMLA, the decisions of the Missouri courts in the Missouri Class Actions will likewise have a significant and perhaps determinative impact on the Class Claims, no matter where they are resolved. Simply put, the Class Claims are not isolated claims that will only affect the parties before this Court. Indeed, for all the reasons stated above, there is in fact a real potential for inconsistent legal rulings, and multiple layers of duplicative appeals, if this Court decides to hear the Class Claims here.

The presence of non-debtor parties therefore provides an extremely compelling reason for abstention here.

For the reasons stated above, analysis of the foregoing factors clearly demonstrates that the interests of justice would best be served by this Court's decision to abstain from hearing the Class Claims pursuant to 28 U.S.C. § 1334(c)(1).

B. Modification of Plan Injunction.

A bankruptcy court that issues a discharge injunction pursuant to 11 U.S.C. § 524 can modify it for good cause on the motion of the person adversely affected by it. *In re Fucilo*, 2002

WL 10098935, at *9 (Bankr. S.D.N.Y. Jan. 24, 2002) (modification of a discharge injunction issued pursuant to 11 U.S.C. § 524 is warranted and permitted in appropriate circumstances and should be analyzed pursuant to a cause standard) (citations omitted); *In re Schultz*, 251 B.R. 823, 826 (Bankr. E.D. Tex. 2000) (citations omitted). The courts in *Fucilo* and *Schultz* based this conclusion on the Seventh Circuit's decision in *In re Hendrix*, 986 F.2d 195 (7th Cir. 1993). In discussing whether or not in a bankruptcy case should be reopened so that an insurance claim could be pursued in Indiana State court, the court in *Hendrix* stated that while the Bankruptcy Code does not expressly authorized modification of a discharge injunction, “. . . any court that issues an injunction can modify it for good cause on the motion the person adversely affected by it.” *Id.* at 198. The court in *Hendrix* further stated that the court could modify an injunction that it had entered whenever the principles of equity required to do so. *Id.*

Class Claimants respectfully submit that good cause exists for modification of the Plan Injunction for the same reasons permissive abstention is warranted. Considering the predominance of Missouri law relevant to their claims, the nature and difficulty of the factual and legal issues involved, the extent to which those issues have been resolved by the Missouri courts, and the potential affect on the numerous non-debtor parties involved, as well as the efficiencies and all other equitable factors, this Court should modify the discharge injunction provisions of its Confirmation Order so as to allow the Class Claimants to continue to pursue their claims against Advanta to final judgment in the *Gilmor* and *Baker* Class Actions, with directions to the parties to return to this Court for purposes of enforcing the final judgments pursuant to the confirmed Plan.

V. CONCLUSION

For the foregoing reasons, the Class Claimants respectfully submit that the Court should enter an order, substantially in the proposed form attached hereto as **Exhibit 2**, granting the relief sought in the Motion and such other and further relief related thereto as the Court may deem just and proper.

Dated: June 27, 2010
Wilmington, Delaware

ASHBY & GEDDES, P.A.



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**ATTORNEYS FOR CREDITORS AND CLASS
COUNSEL**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<i>In re:</i>	)	Chapter 11
)	
ADVANTA CORP., <i>et al.</i>,	)	Case No. 09-13931 (KJC)
)	
Debtors.	)	(Jointly Administered)
)	
	)	Hearing Date: September 20, 2011 at 10:00 a.m.
	)	Objection Deadline: July 14, 2011 at 4:00 p.m.

**NOTICE OF MOTION OF CLASS CLAIMANTS FOR (I) ABSTENTION, AND (II)
MODIFICATION OF THE PLAN INJUNCTION TO LITIGATE CLASS CLAIMS**

PLEASE TAKE NOTICE that on June 27, 2011, the Class Claimants filed the *Motion of Class Claimants for (I) Abstention, and (II) Modification of the Plan Injunction to Litigate Class Claims* (the "Motion") with the United States Bankruptcy Court for the District of Delaware, 824 North Market Street, Wilmington, Delaware 19801 (the "Bankruptcy Court").

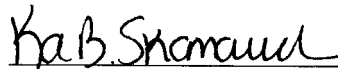
PLEASE TAKE FURTHER NOTICE that responses or objections, if any, to the Motion must be in writing, in conformity with the Federal Rules of Bankruptcy Procedure and the Local Rules of Practice and Procedure for the United States Bankruptcy Court for the District of Delaware, filed with the Bankruptcy Court and served upon, so as to be received by, the undersigned counsel for the Class Claimants on or before **July 14, 2011 at 4:00 p.m.**

PLEASE TAKE FURTHER NOTICE that this Motion is scheduled to be heard by the Court on **September 20, 2011 at 10:00 a.m.** before The Honorable Kevin J. Carey, Chief Judge, United States Bankruptcy Court for the District of Delaware, 824 North Market Street, 5th Floor, Courtroom #5, Wilmington, Delaware 19801.

IF YOU FAIL TO RESPOND IN ACCORDANCE WITH THIS NOTICE, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: June 27, 2011
Wilmington, Delaware

ASHBY & GEDDES, P.A.



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ATTORNEYS FOR CREDITORS AND CLASS
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IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MICHAEL P. and SHELLIE GILMOR,)
et al.,)

Plaintiffs,)

vs.)

Case No. 10-0189-CV-W-ODS

PREFERRED CREDIT CORP., et al.,)

Defendants.)

SCHEDULING AND TRIAL ORDER

On October 22, 2010, the parties filed their jointly proposed scheduling order/discovery plan. They have agreed on some matters and disagreed on others. The Court has endeavored to resolve the areas of disagreement.

In addition, the parties should note that the Court has not adopted all of their agreed deadlines. The parties propose that discovery end in January 2013 and that the trial take place sometime in the second half of 2013. The Court finds this proposal to be unacceptable. The case has been languishing for far too long. Such a schedule might – *might* – be acceptable if the case had just been filed, but it has been pending for many years. The Court expects a final resolution much sooner than is reflected in the parties' submission, and the parties should plan accordingly.

Pursuant to Rules 16(b) and 26(f) of the Federal Rules of Civil Procedure, and upon consideration of the parties' views in the matter, the following schedule is hereby established:

1. Any motion to join additional parties shall be filed on or before January 15, 2011.
2. Any motion to amend the pleadings shall be filed on or before January 15, 2011.
3. The plaintiffs shall designate any expert witnesses it intends to call at trial on or before August 12, 2011, and the defendants shall designate any expert witnesses it intends to call at trial on or before September 30, 2011. This paragraph applies to all

witnesses from whom expert opinions will be elicited, regardless of whether or not the witness was specially retained to provide trial testimony.

4. All discovery disputes shall be raised with the Court on or before December 30, 2011.

5. All pretrial discovery authorized by the Federal Rules of Civil Procedure shall be completed on or before December 30, 2011. This means that all discovery shall be completed, not simply submitted, on the date specified by this paragraph. Accordingly, all discovery requests and depositions shall be submitted and/or scheduled prior to the date specified in this paragraph and shall allow sufficient time for completion within the time specified by the Federal Rules of Civil Procedure, the Local Court Rules, and/or orders of this Court. The Court reserves the right to exercise control over the taking of depositions.

6. Along with each party's designation of expert witnesses, each party shall provide the other parties with an affidavit from each expert witness designated pursuant to paragraph 3 above. See FRCP 26(a)(2)(B). The affidavit shall include a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, the qualifications of the witness (including a list of all publications authored by the witness within the preceding ten years), the compensation to be paid for the study and testimony, and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. The expert's testimony will be limited to opinions and information contained in the report and in any depositions that might be taken.

7. The plaintiffs are limited to sixty (60) depositions. The defendants, collectively, are limited to sixty (60) depositions. There will be no limit on the number of requests for admission. No more than twenty-five (25) interrogatories may be directed to any defendant.

8. All parties must identify business records they intend to "self-authenticate" pursuant to Federal Rules of Evidence 803(6), 902(11) and 902(12) on or before September 30, 2011. A Certificate of Service signifying compliance shall be filed with the Court.

9. All motions to (a) strike expert designations, (b) preclude expert testimony premised on Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), or (c) decertify the class in whole or in part shall be filed on or before February 1, 2012. The deadline for filing motions in limine does not apply to these motions. Failure to file a Daubert motion prior to this deadline will constitute a waiver of any arguments based on Daubert.

10. All dispositive motions, except those under FRCP 12(h)(2) or (3), shall be filed on or before February 1, 2012. All dispositive motions shall have a separate section wherein each statement of fact is individually numbered so that any party opposing such motion may refer specifically to a genuine issue of material fact. Suggestions in opposition to a dispositive motion shall begin with a concise listing of material facts as to which the party contends a genuine dispute exists. All motions for summary judgment shall comply with Local Rule 56.1. The non-moving party shall have twenty-one (21) days to respond to the motion for summary judgment.

11. All motions for extension of time pursuant to FRCP 6(b) or FRCP 31, 33, 34 and 36 must state:

- a. The date when the pleading, response or other action is/was first due;
- b. The number of previous extensions and the date the last extension expires;
- c. The cause for the requested extension, including a statement as to why the action due has not been completed in the allotted time; and
- d. Whether the requested extension is approved or opposed by opposing counsel (agreement by counsel to a requested extension is not binding on the Court).

12. A final pretrial conference in this case will be held at 10:00 a.m. on July 12, 2012, at the United States Courthouse in Kansas City, Missouri. Lead trial counsel shall participate in this conference. The agenda for this conference will include:

- a. Identification of facts not in dispute to which the parties will stipulate, in order to save trial time;
- b. Identification of legal and factual issues to be tried;

- c. Estimate length of trial;
- d. Determine trial schedule (hours of day - days of week - interruptions for other commitments, holidays, etc.);
- e. Explain voir dire procedure;
- f. Discuss the size of panel, number of strikes (three (3) each side - 28 U.S.C. § 1870) and need for additional jurors. (See Rules 47 and 48 FRCP);
- g. Remind counsel that there will be a recess while they exercise their peremptory challenges. Each side to have up to fifteen (15) minutes to make their strikes;
- h. Ask if counsel wish to have witnesses excluded;
- i. Ask if counsel wish to have anyone assist at counsel table;
- j. Ascertain need for special equipment such as projector, x-ray view box, etc. and advise counsel of availability of needed equipment;
- k. Establish order of trial if multiple parties;
- l. Discussion of any legal questions which must be resolved prior to trial;
- m. Discussion of any suggestions by counsel to simplify and expedite the trial;
- n. Disposition of pending motions; and
- o. Referral of case for mediation and settlement negotiations.

13. This case is scheduled for a jury trial, commencing at **8:00 a.m.** on August 13, 2012, at the United States Courthouse in Kansas City, Missouri.

14. The following documents shall be filed prior to the pretrial conference:
- a. Motions in limine shall be filed at least ten (10) working days prior to the pretrial conference. Responses to motions in limine shall be filed at least three (3) working days prior to the pretrial conference.
 - b. At least three (3) working days prior to the date the pretrial conference is to be held, the parties shall file a stipulation of any uncontroverted

facts. If no stipulated facts can be agreed upon, including facts related to the Court's subject matter or personal jurisdiction, the parties shall file a joint statement to that effect. Notwithstanding the fact that the time for discovery will have closed, a request to stipulate, if preserved in the record, will constitute a request for admission under FRCP 36 and failure to stipulate may be subject to sanctions under FRCP 37(c).

- c. At least three (3) working days prior to the date the pretrial conference is to be held, the parties shall file a stipulation as to the foundation for the admissibility of evidence (specifically, identification and authenticity), when the foundation for the exhibit is not to be contested. Notwithstanding the fact that the time for discovery will have closed, a request to stipulate, if preserved in the record, will constitute a request for admission under FRCP 36 and failure to stipulate may be subject to sanctions under FRCP 37(c).
- d. At least three (3) working days prior to the date the pretrial conference is to be held, the parties shall file a stipulation as to the *admissibility* of evidence when the admissibility of an exhibit is not to be contested.
- e. Pursuant to Local Rule 39.1, at least three (3) working days prior to the date the pretrial conference is to be held each party shall file and serve a list of all witnesses who may be called at trial. If a witness is not listed by a party, that witness will not be permitted to testify absent leave of Court and then only for the purpose of unanticipated rebuttal or impeachment. After the time for filing lists of witnesses has expired, no supplemental or amended list will be filed without leave of Court and for good cause.
- f. Pursuant to Local Rule 39.1, at least three (3) working days prior to the date the pretrial conference is to be held each party will file and serve a list of all exhibits which may be offered at trial, with said list being prepared on a form provided by the United States District Clerk's Office. Each exhibit will be designated as either "Plaintiff's" or "Defendant's," numbered with an Arabic numeral and described following the enumeration. If an exhibit consists of more than one (1) page or part, the number of pages or parts shall be included in the description. The exhibit number must be marked on each exhibit at the time of listing. It is not necessary to list exhibits to be used only for impeachment or rebuttal purposes. Except by leave of Court for good cause, no exhibit will be received in evidence which is not listed by the counsel offering the exhibit. After the time for filing lists of exhibits has expired, no supplemental or amended list of exhibits will be filed without leave of Court for good cause.

- g. Ten (10) working days before the date the pretrial conference is to be held, each party asserting an affirmative claim or claims for relief (plaintiff, third-party plaintiff, counterclaiming defendant, cross-claiming defendant, etc.) shall file and serve a designation, by page and line number, of any deposition testimony to be offered in evidence as a part of that party's case.
 - h. At least seven (7) working days prior to the date the pretrial conference is to be held, each party defending against an affirmative claim for relief shall file and serve:
 - i. Any objections to proposed deposition testimony designated by any other party; the Court will not consider objections to deposition designations unless counsel have met and conferred in a good faith effort to settle the objections;
 - ii. A designation, by page and line number, of any deposition testimony to be offered as cross-examination to deposition testimony designated by other parties; and
 - iii. A designation, by page and line number, of any deposition testimony to be offered in evidence as part of that party's case-in-chief in connection with such defense.
 - i. At least three (3) working days before the date of the pretrial conference, each party asserting an affirmative claim or claims for relief shall file and serve:
 - i. Any objections to proposed deposition testimony designated by any other party; the Court will not consider objections to deposition designations unless counsel have met and conferred in a good faith effort to settle the objections; and
 - ii. A designation, by page and line number, of any deposition testimony to be offered as cross-examination to deposition testimony designated by other parties.
15. The following documents shall be filed prior to trial:
- a. Ten (10) working days prior to trial, the parties shall jointly submit an original (without sources) and an annotated (with sources) set of proposed jury instructions. Proposed annotated instructions shall reflect the authorities upon which the instruction is based and should be taken from or drawn in the manner of *Model Civil Jury Instructions for the District of Courts of the Eighth Circuit and/or Missouri*

Approved Instructions (MAI) where available and appropriate. All instructions shall be designated as "Instruction No. ____." The annotated set shall also indicate which party proposed the instruction. Parties should also e-mail their original instructions to the Courtroom Deputy Clerk at eva_will-fees@mow.uscourts.gov. The instructions should be typed in WordPerfect if possible.

The Court prefers to receive joint instructions from the parties. Separate instructions are appropriate only when the parties cannot agree upon a specific instruction. In that instance, counsel shall state in writing the reason for the objection with authority cited as well as an alternative instruction. The deadline for submitting objections and alternative proposed instructions is five (5) working days prior to the date of trial.

- b. At least five (5) working days prior to the date of trial, counsel for each party may file a trial brief stating the factual and legal contentions for the party for whom the trial brief is filed.
- c. At least ten (10) working days prior to the date of trial, counsel for each party is requested to file a list of questions or topics for voir dire examination desired to be propounded by the Court. Objections to opposing party's voir dire questions shall be filed at least five (5) working days prior to trial.

16. The Court may place time limits on opening statements, and direct and cross-examination of all witnesses. You should be prepared to support your representations as to the length of trial.

17. In order to ensure the efficient use of time during trial, the following rules of Court will be imposed:

- a. All legal issues must be raised in advance of trial by written motions and in accordance with the scheduling order of this Court;
- b. Motions will not be heard during trial without a strong showing that counsel could not, by due diligence, have raised them sooner;
- c. Testimony will not be interrupted to deal with evidentiary matters that could have been heard in advance of trial. The Court will consider those matters during recess, at noon break, or at the end of the day. Counsel should be prepared with written authority for their positions; and

- d. Witnesses who will be testifying from exhibits or about exhibits should review them immediately prior to their testimony.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: November 5, 2010

Exhibit 2

Proposed Form of Order

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<i>In re</i>)	
	)	Chapter 11
ADVANTA CORP., <i>et al.</i> ,)	
	)	Case No. 09-13931 (KJC)
Debtors.	)	(Jointly Administered)
)	
	)	Related to Docket No. ____

**ORDER GRANTING MOTION OF CLASS CLAIMANTS FOR (I) ABSTENTION, AND
(II) MODIFICATION OF THE PLAN INJUNCTION TO LITIGATE CLASS CLAIMS**

Upon consideration of the *Motion for Abstention and Modification of the Plan Injunction to Litigate Class Claims* (the “Motion”); and due and sufficient notice of the Motion and hearing thereon having been properly given and served; and upon consideration of and due deliberation on any opposition filed and the arguments of counsel at the hearing; and having found that sufficient cause for the relief requested in the Motion exists, it is hereby **ORDERED, ADJUDGED, AND DECREED** that:

1. The Motion is GRANTED.
2. The Court hereby abstains from hearing the Trustee’s¹ objections to the Class Claims pursuant to 28 U.S.C. § 1334.
3. Relief from the Plan Injunction is hereby granted effective immediately for the Class Claimants to pursue their claims against Advanta in the *Gilmor* and *Baker* Class Actions, and any resulting appeals therefrom.
4. Upon entry of a final, non-appealable judgment or other resolution (including settlement) (the “Final Judgment”) by the Missouri state courts, the parties are directed to return

¹ All capitalized terms used but undefined herein shall have the meanings ascribed to them in the Motion.

to this Court for purposes of enforcing such judgment pursuant to the terms of the confirmed Plan.

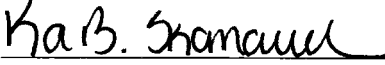
5. The Court shall retain jurisdiction over all matters concerning the enforcement of any Final Judgment between the Class Claimants and Advanta.

Dated: Wilmington, Delaware
_____, 2011

THE HONORABLE KEVIN J. CAREY
Chief Judge, United States Bankruptcy Court

CERTIFICATE OF SERVICE

I, Karen B. Skomorucha, hereby certify that on June 27, 2011, I caused one copy of the foregoing document to be served upon the parties on the attached service list via first class U.S. Mail, postage prepaid, unless otherwise indicated.



Karen B. Skomorucha (#4759)

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