

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

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In re: : Chapter 11  
 :  
ADVANTA CORP., *et al.*,<sup>1</sup> : Case No. 09-13931 (KJC)  
 :  
Debtors. : (Jointly Administered)  
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Re: Docket Nos. 323, 328, and 332

**JOINDER OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS IN  
OBJECTION TO THE MOTION TO COMPEL ADVANTA CORP. TO (I) TIMELY  
FILE A REQUEST FOR AN EXTENSION OF TIME TO FILE 2009 CONSOLIDATED  
FEDERAL INCOME TAX RETURN; OR, IN THE ALTERNATIVE, (II) ELECT TO  
CARRY BACK 2009 CONSOLIDATED NET OPERATING LOSSES FIVE YEARS**

The Official Committee of Unsecured Creditors appointed in the chapter 11 cases of Advanta Corporation (“Advanta”), *et al.* (collectively, the “Debtors”), by and through its undersigned counsel, hereby joins in *Advanta’s Objection To The Motion To Compel Advanta Corp. To (I) Timely File A Request For An Extension Of Time To File 2009 Consolidated Federal Income Tax Return; Or, In The Alternative, (II) Elect To Carry Back 2009 Consolidated Net Operating Losses Five Years (the “Motion”)*, and in support thereof, respectfully states as follows:

**PRELIMINARY STATEMENT**

1. The Committee is required to act in the best interests of the creditors of the Debtors’ estates as a whole to maximize recovery for the same. In performing its obligations, the

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<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtors’ federal tax identification number, are Advanta Corp. (2070), Advanta Investment Corp. (5627), Advanta Business Services Holding Corp. (4047), Advanta Business Services Corp. (3786), Advanta Shared Services Corp. (7074), Advanta Service Corp. (5625), Advanta Advertising Inc. (0186), Advantennis Corp. (2355), Advanta Mortgage Holding Company (5221), Advanta Auto Finance Corporation (6077), Advanta Mortgage Corp. USA (2654), Advanta Finance Corp. (8991), Great Expectations International Inc. (0440), Great Expectations Franchise Corp. (3326), and Great Expectations Management Corp. (3328), Advanta Ventures Inc. (5127), BizEquity Corp. (8960), Ideablob Corp. (0726), and Advanta Credit Card Receivables Corp. (7955).

Committee is authorized, among other things, to consult with the Debtors concerning the administration of these Bankruptcy Cases, and to independently assess and explore whether the Debtors' decisions are consistent with their fiduciary obligations. Advanta Bank Corp. ("ABC") criticizes Advanta's decision to make a tax election that results in the Debtors giving up a \$54 million federal tax refund. What ABC conveniently buries in its Motion, however, is the fact that the same election would potentially create an additional \$170 million unsecured claim against the Debtors' estates.<sup>2</sup>

2. It is the view of the Committee, after consulting with the Debtors and conducting its own diligence concerning the analysis and circumstances related to the tax election, that Advanta's decision to waive the carryback is a proper exercise of its sound business judgment and is consistent with its fiduciary obligation to maximize the value of the estates for all creditors. Advanta's exercise of its business judgment should therefore be respected. ABC's Motion to Compel, filed after 4:00 p.m. on the Friday before the Monday deadline for Advanta to file its tax return, should be summarily denied, and ABC's Complaint for Injunctive Relief, which is rendered moot, should be dismissed with prejudice.

### **BACKGROUND**

3. On November 8, 2009, (and November 20, 2009, with respect to certain of the Debtors), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"), which are being jointly administered under Case No. 09-13931 (KJC) (the "Bankruptcy Cases").

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<sup>2</sup> The Committee reserves all rights to object to any and all claims asserted by, or on behalf of, ABC against the Debtors' estates in connection with Advanta's tax election or otherwise.

4. Pursuant to sections 1107 and 1108 of the Bankruptcy Code, the Debtors continue to manage and operate their businesses as debtors-in-possession.

5. The Official Committee of Unsecured Creditors (the “Committee”) was appointed on November 24, 2009.

## **JOINDER**

### **A. Background**

6. As set forth in detail in Advanta’s Objection, upon filing its tax return on or before March 15, 2010, Advanta was required to make a decision regarding whether to waive the carryback to prior tax years of net operating losses (“NOLs”), and instead carry the NOLs forward. Should Advanta (the parent of the consolidated group that includes the other Debtors and ABC) elect to waive the right to carry back the NOLs, the Debtors would give up an immediate tax refund, but also would avoid incurring a potential \$170 million unsecured claim by ABC under that certain tax sharing agreement described in Advanta’s Objection (the “TSA”).<sup>3</sup>

7. As is discussed in full in Advanta’s Objection, the Internal Revenue Code (the “I.R.C.”), previously gave taxpayers two choices for dealing with NOLs. The taxpayer could do nothing, in which case the NOLs first would be carried back and applied to each of the two taxable years preceding the year of the loss. *See* I.R.C. § 172(b)(1)(A). The remainder of the NOLs, if any, then would be carried forward and applied against each of the next twenty taxable years following the year of the loss. *Id.* The second option allowed the taxpayer to make an affirmative irrevocable election to waive the carryback, and carry the NOLs forward to be

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<sup>3</sup> ABC refers only vaguely to the TSA in its Motion. *See* Mot., at ¶17, fn. 2 (“ABC believes that it may hold a general unsecured claim in excess of \$170,000,000, based on certain assumptions considered reasonable and depending on the amount of tax refunds that ABC ultimately may receive.”).

applied against income in future tax years. *See* I.R.C. § 172(b)(3). In 2009, however, the I.R.C. was amended to allow taxpayers to elect to carryback 2008 or 2009 NOLs for up to five years. *See* Worker, Homeownership, and Business Assistance Act of 2009, Pub. L. No. 111-92.

8. The decision to make the election belongs solely to the parent. The applicable treasury regulations give the parent the authority to act for the consolidated group with respect to tax issues. *See* Treas. Reg. § 1.1502-77. Deconsolidation requires consent of I.R.S., generally upon application by the parent. *See* Treas. Reg. §§ 1.1502-75(a)(2) and (c)(1)(i). The responsibility for filing tax returns for corporate debtors is unaltered by the filing of a bankruptcy case. *See* I.R.C. § 6012(b)(4) (“Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.”).

**B. ABC Lacks Standing To Compel Advanta To Make The Requested Election**

9. Consistent with the authority discussed above, ABC *concedes* that pursuant to the I.R.C. and corresponding regulations, only the parent can make the tax election at issue. *See* Mot., at ¶16. There is nothing in the TSA that alters this fact. *See* Debtors’ Obj., at ¶ 17. Given this background, ABC has no standing to seek the Court’s intervention with respect to Advanta’s tax return filing. Indeed, ABC’s Motion is conspicuously devoid of any authority or argument to demonstrate that ABC has standing to compel Advanta to make a specific tax election (much less one that arguably inures only to the benefit of ABC). This procedural defect, in and of itself, requires denial of ABC’s Motion.<sup>4</sup>

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<sup>4</sup> The fact that ABC waited to request this extraordinary relief until the end of the business day before Advanta’s tax return was due only reinforces the conclusion that ABC is not entitled to the relief it seeks. ABC knew long ago of Advanta’s tax deadline and its right to make the carryback election; had ABC truly believed the Court could issue the order that ABC requests, it would have sought such relief long ago.

**C. Advanta’s Decision To Waive The Carryback Is Entitled to Deference Under The Business Judgment Rule, And Is Consistent With Its Fiduciary Duty To The Creditors Of The Estates**

10. “Upon the commencement of a case in bankruptcy, all corporate property passes to an estate represented by the trustee.” *See Commodity Futures Trading Com v. Weintraub*, 471 U.S. 343, 352 (1985) (citations omitted). The trustee – here the debtor-in-possession – has the duty “to maximize the value of the estate” for all creditors. *Id.*; *see also Martin v. Myers (In re Martin)*, 91 F.3d 389, 394 (3d Cir. 1996) (“a trustee has a fiduciary relationship with *all* creditors of the estate”) (emphasis in original).

11. The decisions taken by management to further this end are protected by the business judgment rule, absent gross and palpable overreaching. *Marvel Entm’t Group, Inc. v. Mafco Holdings, Inc. (In re Marvel Entm’t Group, Inc.)*, 273 B.R. 58, 78 (D. Del. 2002) (opining that the board’s judgment concerning tax issues will not be disturbed if it can be attributed to any rational purpose, and a court will not substitute its own thinking of what is or is not “sound business judgment”). Accordingly, even assuming *arguendo* that ABC could overcome its lack of standing, ABC must also establish that Advanta’s decision was uninformed, in bad faith, or otherwise inconsistent with an “honest belief that the action taken was in the best interests of the company.” *See generally Official Comm. of Sub. Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.)*, 147 B.R. 650, 656 (S.D.N.Y. 1990) (holding that the Delaware business judgment rule has “vitality by analogy” in chapter 11, especially where a debtor is a Delaware corporation) (quotations omitted). ABC can make no such showing.

12. As is outlined in Advanta’s Objection, the board’s decision to waive the carryback was made after careful consultation with management and the Company’s professional advisors. The tax election, which ABC argues will result in a loss of a \$54 million refund, will prevent the creation of a potential \$170 million unsecured claim, which in turn will help

maximize the value of the recovery for the creditors of the Debtors' estates as a whole. In addition, as further noted by the Debtors, the waiver of the carryback permits a carryforward of the 2009 NOLs, which may provide meaningful value to the Debtors' estates as well. While ABC touts its status as an insider creditor to whom the Debtors owe a fiduciary duty, its papers notably fail to draw the clear connection that – if ABC's analysis is correct (a proposition which the Committee disputes) – the action it is seeking to compel will inure solely to the benefit of ABC, and to the detriment of all other unsecured creditors of the Debtors' estates. As such, Advanta's prudent exercise of its business judgment to elect to waive the carryback should be respected and affirmed.

*[Remainder of page intentionally left blank]*

**CONCLUSION**

**WHEREFORE**, the Committee respectfully requests that the Court deny the Motion Of Advanta Bank Corp. For Entry Of An Order Compelling Debtor Advanta Corp. To (I) Timely File A Request For An Extension Of Time To File 2009 Consolidated Federal Income Tax Return; Or, In The Alternative, (II) Elect To Carry Back 2009 Consolidated Net Operating Losses Five Years, and grant any such other and further relief it deems just and proper.

Dated: March 15, 2010  
Wilmington, Delaware

**DRINKER BIDDLE & REATH LLP**

/s/ Howard A. Cohen  
Howard A. Cohen (DE 4082)  
1100 N. Market Street, Suite 1000  
Wilmington, DE 19801  
Telephone: (302) 467-4200  
Facsimile: (302) 467-4201

Co-counsel to the Official  
Committee of Unsecured Creditors

- and -

LATHAM & WATKINS LLP  
Mitchell A. Seider (admitted pro hac vice)  
Roger G. Schwartz (admitted pro hac vice)  
885 Third Avenue, Suite 1000  
New York, NY 10003  
Telephone: (212) 906-1200  
Facsimile: (212) 751-4864  
Email: mitch.seider@lw.com  
Email: roger.schwartz@lw.com

Counsel to the Official Committee  
of Unsecured Creditors

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FOR THE DISTRICT OF DELAWARE**

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In re:	: Chapter 11
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ADVANTA CORP., <i>et al.</i> ,	: Case No. 09-13931 (KJC)
	:
Debtors.	: (Jointly Administered)
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**CERTIFICATE OF SERVICE**

I, Howard A. Cohen, hereby certify that on the 15<sup>th</sup> day of March 2010, I caused a true and correct copy of the *Joinder of the Official Committee of Unsecured Creditors in Objection to the Motion to Compel Advanta Corp. To (I) Timely File a Request for an Extension of Time to File 2009 Consolidated Federal Income Tax Return; or, in the Alternative, (II) Elect to Carry Back 2009 Consolidated Net Operating Losses Five Years* to be served on all parties by operation of the Case Management/Electronic Case Filing System for the United States Bankruptcy Court for the District of Delaware.

Dated: March 15, 2010

**DRINKER BIDDLE & REATH LLP**

/s/ Howard A. Cohen  
Howard A. Cohen (DE 4082)  
1100 N. Market Street, Suite 1000  
Wilmington, DE 19801  
Telephone: (302) 467-4200  
Facsimile: (302) 467-4201

Co-counsel to the Official  
Committee of Unsecured Creditors