IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re ADVANTA CORP., *et al.*, Debtors.	Chapter 11 Case Nos. 09-13931 (KJC), *et seq.* (jointly administered)
ADVANTA BANK CORP., Plaintiff, v. ADVANTA CORP., Defendant.	Adversary Proc. No. 10-50795-KJC

REPLY OF THE FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF ADVANTA BANK CORP., IN FURTHER SUPPORT OF MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF IN CONNECTION WITH ITS AMENDED COMPLAINT

(relates to Docket No. 8)

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MISCELLANEOUS

The Federal Deposit Insurance Corporation (the "FDIC"), as Receiver ("FDIC-R") of Advanta Bank Corp. ("ABC"), by its undersigned counsel, files this Reply In Further Support of the Motion of ABC For Declaratory and Injunctive Relief In Connection With Its Amended Complaint (the "Motion") against Advanta Corp. ("Advanta" or "Debtor").[1]

PRELIMINARY STATEMENT

1. Advanta's Objection to the Motion ("Objection") and the joinder by the Official Committee of Unsecured Creditors ("Joinder") are based entirely on a faulty premise. Both assert that Advanta reasonably chose to "forgo a tax refund of approximately $54 million (the 'Refund') . . . in order to avoid the creation of a potential unsecured claim by ABC against Advanta of up to approximately $170 million pursuant to a tax sharing agreement ['TSA'] between the parties . . . ." (Objection ¶ 2.)

2. As demonstrated below, that rationale makes no sense. By waiving the Refund, Advanta *breached the TSA* (in effect rejecting it) and thus gave rise, at minimum, to a $170 million claim by ABC that Advanta and the Creditors' Committee purportedly sought to avoid. Accordingly, Advanta waived the right to the Refund and gained *nothing* in return.

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[1] On March 19, 2010, later the same day that ABC filed the Motion, ABC was deemed insolvent and closed by the Utah Department of Financial Institutions. The FDIC was appointed as receiver of ABC and was charged with winding up its affairs. The FDIC-R has elected to withdraw the motion filed by ABC on March 12, 2010 (the "Tax Motion") as moot in light of the Debtor's filing of its consolidated return on March 14, 2010, and has elected to prosecute the present Motion. The submission of this Reply shall not in any way constitute a submission by the FDIC-R to the jurisdiction or authority of the Bankruptcy Court for the resolution of any regulatory matter involving the FDIC-R. Nor is this Motion an admission that this Court is the appropriate forum for disputes involving the FDIC-R. The filing of this Motion shall not constitute a waiver or consent by the FDIC-R of any: (a) right to sovereign immunity, where the FDIC-R is acting in its capacity as Receiver; (b) right to have any and all final orders in any and all non-core matters entered only after *de novo* review by a United States District Court Judge; (c) right to trial by jury in any proceeding as to any and all matters so triable therein, whether or not the same be designated legal or private rights, or in any case, controversy or proceeding related thereto, whether or not such jury trial right is pursuant to statute or the United States Constitution; (d) right to have the reference of this matter withdrawn by the United States District Court in any matter or proceeding subject to mandatory or discretionary withdrawal; or (e) other rights, claims, actions, defenses, setoffs, recoupments or other matters to which the FDIC-R is entitled under any agreements or at law or in equity or under the United States Constitution. All of the foregoing rights are expressly reserved and preserved, without exception, and without the intention or purpose of conceding jurisdiction in any way by this filing or by any other participation in this matter or in this case. The FDIC-R expressly reserves all rights at law and equity to assert the preemption of the Bankruptcy Court's jurisdiction and the exclusive jurisdiction provided under Title 12, as applicable, with respect to the FDIC-R.

3. Such a waiver is anything but a "routine business decision." (Objection ¶ 3.) Although Advanta may make tax elections in the ordinary course of its business, it certainly is not in the ordinary course of Advanta's business to waive a $54 million tax refund for little or no benefit. Indeed, Advanta's "lengthy consultation with its advisors and the Creditors' Committee" (Objection ¶ 22)–while stonewalling its own wholly-owned subsidiary about a decision that greatly impacted ABC's business–is further evidence that Advanta understood its waiver of the Refund was not "routine."

4. Because the transaction was outside the ordinary course, it cannot and should not be "ratified" by this Court after the fact. (Objection ¶ 4.) Rather, because there was no notice and hearing – as required by Section 363(b) of the Bankruptcy Code–before the challenged tax election was made, Advanta's election should be declared void *ab initio*.

5. In an attempt to delay the immediate relief being sought, Advanta contends that the Internal Revenue Service ("IRS") should be joined as a "required party" to the action. (Objection ¶ 4.) However, the IRS is not a required party. The FDIC-R, as receiver of ABC, has the statutory authority in these circumstances to be an agent for and to file a consolidated tax return with respect to a loss year of the Advanta affiliated group, elect to carry back losses arising in the loss year, and claim a refund of federal income taxes paid with respect to the carryback of such losses (collectively an "FDIC-R Return"). The FDIC-R has filed today a separate motion seeking a declaration from this Court that (i) the filing of a FDIC-R Return does not violate the bankruptcy stay imposed by Section 362(a) of the Bankruptcy Code or, alternatively (ii) the stay should be lifted to permit the FDIC-R to file a FDIC-R Return, as permitted by law. The IRS does not need to be joined to this action to permit the voiding of Advanta's waiver of the Refund and the filing of the FDIC-R Return claiming the Refund. Nor would the IRS be prejudiced by the carrying out of such actions.

6. Finally, the Creditors' Committee's laches argument fails. ABC did not unreasonably delay in bringing this Motion. As the evidence submitted by ABC demonstrates, ABC sought relief before this Court as soon as it became clear that there was a substantial likelihood that Advanta was going to waive the Refund.

ARGUMENT

I. ADVANTA'S WAIVER OF THE REFUND WAS NOT IN THE ORDINARY COURSE OF BUSINESS

7. The lynchpin of Advanta's and the Creditors' Committee's objection to the Motion is their claim that Advanta normally makes tax elections and creditors should reasonably expect that Advanta would "make elections that preserve value for the estate and maximize creditor recoveries." (Objection ¶ 21.) Advanta and the Creditors' Committee assert that, had Advanta not waived the Refund, "Advanta likely would have exposed itself to a general unsecured claim by ABC under the TSA of up to approximately $170 million." (Declaration of Philip M. Browne ("Browne Decl.") ¶ 9; *see also* Objection ¶¶ 2, 20, 33.) According to Advanta, "an increase in assets of only approximately $54 million would not compensate general unsecured creditors for the dilution of their recovery pool by as much as approximately $170 million, given current expectations of potential recoveries to unsecured claimants." (Objection ¶ 20.)

8. This argument is fatally flawed because, *regardless of Advanta's tax election*, ABC will have a claim of at least $170 million against Advanta's estate under the TSA. The TSA, which is attached as Exhibit A to the Motion, was intended to benefit its members through the filing of a consolidated tax return. This is made clear in the fourth introductory whereas clause of the TSA, which states:

> WHEREAS, it is the intention of the parties that if such consolidated returns are filed, each Member company should contribute its fair and

> equitable share to the taxes payable by the Affiliated Group or compensation for the reduction in the net operating loss deduction, capital loss deduction, or other tax benefit of the Affiliated Group resulting from the inclusion of the Member companies in the Affiliated Group, but that in any event, ***the filing of such consolidated returns shall be beneficial rather than disadvantageous to each Member company and that each Member company should not with respect to any year, or part thereof, for which it is a Member of the Affiliated Group be required to pay more in lieu of taxes or receive a payment in lieu of a refund less than it would have paid or received if the Member company had at all times computed and paid its tax liability on a separate return basis.*** It is intended that this will comply with the pro rata method as described in SFAS 109 and its interpretation and all consideration of regulatory accounting principles.

(Emphasis added.)

9. The TSA also states that no member shall pay more than any other member or more than the member would have paid by filing a separate return. Paragraph 2(a) of the TSA states:

> If on any Adjustment Date there is a Separate Member Tax and the tax payment then due from the Affiliated Group is in excess of the amount of the Separate Member Tax, then the Member shall pay to Advanta Corp. an amount equal to the Separate Member Tax. ***No member shall pay to Advanta Corp. an amount in excess of the amount which would have been payable on a separate company basis.***

(Emphasis added.)

10. However, by Advanta's own admission, Advanta's waiver caused ABC to lose a $54 million refund that it would have otherwise received, in addition to $116 million in cash that would have been payable to ABC had Advanta elected the carryback. (Objection ¶¶ 8, 23-25; Browne Decl. ¶ 9.) ABC thus effectively paid more than it would have paid had it filed separately, without receiving any compensation or consideration for its sacrifice.

11. The TSA further provides that where a member is injured as a result of the filing of a consolidated return, a member pays more than the other members, or a member is deprived

of a tax benefit it would otherwise receive, Advanta is to make the member whole. This remedy is articulated in Paragraph 4:

> If on any Adjustment Date the separate return computation for a Member would show a loss but not a Separate Member Refund, ***Advanta Corp. shall pay to the Member an amount equal to the amount of the loss which results in a tax benefit,*** determined in a manner consistent with the allocation of tax due to taxable Members, from those losses on the consolidated return.

(Emphasis added.)

12. By abandoning the $54 million refund that would have belonged to ABC, and by not making ABC whole, Advanta breached the TSA and gave rise to a claim by ABC that Advanta disingenuously claims it sought to avoid.[2] Waiving the Refund thus provides *no benefit* to the estate and instead deprives it of a $54 million refund to which it is entitled this year and could have been used to offset part of the $170 million claim payable to ABC pursuant to the TSA.

13. Advanta nonetheless asserts that waiving the Refund benefits Advanta's estate because the "waiver of the 2009 NOLs allows the 2009 NOL to be carried forward," which "*may* ultimately make available to Advanta a worthless stock loss (in lieu of portion of the consolidated group's net operating loss incurred by ABC)." (Objection ¶ 34) (emphasis added). However, in contrast to carrybacks, which "result in the right to a tax refund of a definite amount," carryforwards "are speculative since their value depends on the availability of future income against which to apply them." *The Official Committee of Unsecured Creditors v. PSS Steamship Co. (In re Prudential Lines, Inc.)*, 928 F.3d 565, 572 (2nd Cir. 1991). This speculative

[2] The FDIC-R has filed a proof of claim asserting this claim and others, including tort claims, against Advanta as a result of its improper waiver of the Refund to the detriment of its wholly-owned subsidiary, ABC.

but unrealized future advantage is irrelevant because, as discussed above, the waiver of the Refund gives rise to an *immediate and definite* claim by ABC under the TSA.

14. These facts put this case on all fours with *Streetman v. United States (In re Russell)*, 187 B.R. 287 (W.D. Ark. 1995). As Advanta notes, in *Streetman*, "the debtor's election to forgo carryback of his NOLs would have deprived the individual debtor's creditors of the ability to obtain a refund with *no offsetting benefit*." (Objection ¶ 27) (emphasis added). *See also U.S. v. Sims (In re Feiler)*, 218 F.3d 948, 951 (9th Cir. 2000) (affirming the bankruptcy court and district court's rulings that debtors' waiver of NOL carryback refund and election to carry the NOLs forward was a fraudulent transfer because the debtors "had deprived the bankruptcy estate of the benefit of the tax refund by waiving the carryback in order to preserve future benefits of the NOLs for themselves after bankruptcy."). Likewise, here, Advanta waived the Refund with "no offsetting benefit" because, as discussed above, the waiver gives rise to a claim by ABC in at least the same amount of ABC's claim had Advanta not waived the Refund.[3]

15. Although Advanta contends that "it is within the ordinary course of business for a parent of a consolidated tax group . . . to file a consolidated return" (Objection ¶ 15), that alone is insufficient to establish an ordinary course transaction. To the contrary, as *Streetman* holds, the court must analyze *the election itself* to determine whether it was within the hypothetical creditor's "reasonable expectations" under the so-called "vertical dimension test." 187 B.R. at 292-93. *See also IRS v. Official Comm. of Unsecured Creditors of Indus. Commer. Elec., Inc. (In re Indus. Commer. Elec., Inc.)*, 319 B.R. 35, 51 (D. Mass. 2004) (holding that debtor's filing

[3] Advanta's attempt to distinguish *Streetman* on the ground that *Streetman* involved an individual debtor as opposed to a corporate debtor (Objection ¶ 27) is thus unavailing because Advanta (like the debtor in *Streetman*) received no offsetting benefit for waiving the Refund. In addition, Advanta's statement that "*Streetman* includes almost no analysis of either the horizontal or vertical dimensions tests" is false. (Objection ¶ 28.) The court specifically held that "it is clear that Russell's forgoing of the potential refund violates the vertical dimension, or creditor expectation test." *Streetman*, 187 B.R. at 293.

of an amended tax return to reflect increase in net operating losses "[b]y no definition [could] be considered an 'ordinary course' transaction" and instead "constitute[d] a preferential transfer to a pre-petition creditor, a transaction inimical to the whole idea of bankruptcy.").

16. Indeed, one of the cases cited by both Advanta and the Creditors' Committee proves this very point. In *In re Nellson Nutraceutical, Inc.*, 369 B.R. 787 (Bankr. D. Del. 2007) (Sontchi, J.), the court held the modification of an employee bonus program was in the ordinary course because "not only is it common for companies comparable to Debtors to have bonus programs similar to the [one at issue], it is also common for those comparable companies to modify bonus programs *in a manner similar to the Debtors' modifications*." *Nellson Nutraceutical*, 369 B.R. at 797 (emphasis added). Thus, even Advanta's cases hold that the Court must analyze whether the *specific* action taken by the debtor was an "ordinary course" transaction.

17. The issue here is not simply whether it was "ordinary" in general for Advanta to make tax elections. Clearly it was. The issue is whether Advanta's specific waiver of the Refund was "ordinary." Clearly, it was not.

18. In effect, by waiving the Refund, Advanta *rejected* the TSA as to ABC and gave rise to (at minimum) a claim for breach by ABC. It is black letter law that the rejection of an executory contract requires this Court's approval pursuant to Section 365 of the Bankruptcy Code. Accordingly, under both Section 363(b) and Section 365 of the Bankruptcy Code, Advanta was required to seek this Court's approval before waiving the Refund.

II. ADVANTA'S VIOLATION OF SECTION 363(b) RENDERS THE WAIVER OF THE REFUND VOID

19. In an attempt to cure its failure to provide creditors with notice and a hearing as required by Section 363(b) of the Bankruptcy Code, Advanta asserts that the waiver of the

Refund was "a valid exercise of Advanta's business judgment" and asks the Court to "ratify" the waiver. (Objection ¶¶ 30-41.) As an initial matter, whether the waiver of the Refund was a "valid exercise of business judgment" as opposed to "gross and palpable overreaching" is a disputed issue of fact that cannot be resolved without discovery. *Meyerson v. El Paso Nat. Gas Co*., 246 A.2d 789, 794 (Del. Ch. 1967).

20. More important, as Advanta admits, Section 363(b)(1) of the Bankruptcy Code provides, in relevant part, that "[t]he trustee, *after notice and a hearing*, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b) (emphasis added). Noticeably absent from Advanta's argument is any case law holding that this Court can "ratify" Advanta's waiver of the Refund, regardless of Advanta's failure to comply with the notice requirements in Section 363(b).

21. In fact, as Advanta acknowledges, Fed. R. Bankr. P. 2002 contains specific notice requirements (with which Advanta has not complied and now asks this Court to waive). (Objection ¶ 38 n.11.) Bankruptcy Rule 2002 requires that all "parties in interest," which includes "all creditors," must be provided at least twenty-one days notice by mail of the "proposed use, sale, or lease of property of the estate other than in the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice." Fed. R. Bank. P. 2002. Here, ABC–the creditor with the greatest interest in the tax election–was given *no notice*, let alone twenty-one days notice, that Advanta intended to waive the Refund. (Declaration of Kenneth Michael Goldman in Support of Complaint ("Goldman Decl.") ¶¶ 2-9.)

22. Courts have consistently held that, where the notice requirement under Section 363(b) was not met, the challenged act is void *ab initio*.[4] *See, e.g., Med. Malpractice Ins. Ass'n v. Hirsch (In re Lavigne)*, 183 B.R. 65, 70-71 (Bankr. S.D.N.Y. 1995), *aff'd*, 114 F.3d 379, 385 (2d Cir. 1997) (holding debtor-in-possession's attempt to cancel an insurance policy without notice to interested parties was null and void as a violation of the notice provisions of Section 363(b)); *Fernwood Markets v. Title Ins. Co.*, 73 B.R. 616, 619 (Bankr. E.D. Pa. 1987) (collecting "ample authority . . . for the principle that sales within the scope of § 363(b)(1), of which no proper notice was provided, may be set aside.").

23. Advanta also argues that ABC was, in essence, on "constructive notice" of Advanta's intent to waive the Refund because: (i) ABC "has known for months that Advanta could waive the 2009 Carryback in connection with the filing of the Tax Return . . . and urged Advanta to carry back the 2009 NOL five years," (ii) Advanta "consulted extensively" about the waiver with the Creditors' Committee about the waiver, and (iii) "pleadings related to this issue have been on the Court's docket for months." (Objection ¶¶ 38 n.11.)

24. As Advanta itself recognizes, the import of the notice requirement is to allow creditors the "opportunity to review the terms of the proposed transaction and to object if they deem the terms and conditions are not in their best interest." (Objection ¶ 40) (quoting *In re Crystal Apparel, Inc.* 220 B.R. 816, 830 (S.D.N.Y. 1998) (citation omitted)). The reason for the

[4] While a minority line of cases has suggested a "balancing test" to determine the remedy for failure to provide the notice under § 363(b), as one court succinctly stated, "to allow such transactions to stand over objection of creditors who were denied proper notice, even when there has been some benefit to the estate, would subvert the requirements of § 363(b) and encourage transfers to be completed without adherence to the requirements of that section." *In re Weisser Eyecare, Inc.*, 245 B.R. 844, 850 (Bankr. N.D. Ill. 2000).

length of the notice period is to provide *all* interested parties–not just the Creditors' Committee–with sufficient *actual notice* and time to object.[5]

25. Although Advanta claims that it engaged in "lengthy consultation" with its advisors and the Creditors' Committee (Objection ¶ 22), it stonewalled ABC–the creditor with the most at stake in the carryback election and Advanta's own wholly-owned subsidiary. (Goldman Decl. ¶¶ 2-9.) Advanta's purportedly "lengthy" decision making process and its consultation of everyone *but ABC* during that process is further evidence that Advanta understood full well that its waiver of the Refund was not an ordinary course decision.

26. Thus, because ABC did not know that Advanta planned to waive the Refund, nor when Advanta planned to file the 2009 Consolidated Return, ABC could not "review the terms" of the proposed transaction. *In re Crystal Apparel, Inc.*, 220 B.R. at 830. By the time ABC realized that Advanta likely intended to file the 2009 Consolidated Return on March 14, 2010, and waive the Refund, it was too late to object. (Goldman Decl. ¶¶ 2-9.)

27. In short, even if Advanta's waiver of the Refund was a valid exercise of business judgment–which it was not–Advanta was still required to give creditors notice and an opportunity to be heard *before* filing the 2009 Consolidated Return. The Court should not now "ratify" Advanta's flouting of basic due process requirements.

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[5] In addition, the TSA specifically requires that Advanta give ABC access to information concerning Advanta's tax returns. Specifically, Paragraph 12 of the TSA is entitled "Access" and provides in pertinent part:

> All materials, including but not limited to tax returns, supporting schedules, workpapers, correspondence and other documents relating to consolidated income tax returns filed by the Affiliated Group shall be made available to any party of this Agreement during regular business hours.

In contrast to the extensive access given to the Creditors' Committee, Advanta gave ABC virtually no access to documents or other information concerning Advanta's decision to waive the Refund.

III. THE IRS IS NOT A NECESSARY PARTY

28. In a transparent attempt to delay the immediate relief sought by this Motion, Advanta argues that the IRS "may" be a required party and this Court "should not rule on the Motion until the IRS is a [sic] joined as a party to this adversary proceeding." (Objection ¶ 45.) However, the IRS is not a required party because (i) this Court can afford complete relief among the parties and (ii) the IRS can protect its own interests.

29. Federal Rule of Civil Procedure ("FRCP") 19(a), made applicable in this adversary proceeding by Fed. R. Bankr. P. 7019, states that a party is a "Required Party" if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties, or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

FRCP 19(a)(1); *see also* Fed. R. Bankr. P. 7019.

30. The court's first inquiry under FRCP 19 is "whether complete relief can be accorded to the parties to the action in the absence of the unjoined party." *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 405 (3rd Cir. 1993). Completeness is determined on the basis of those persons who are "already parties [to the action], and not as between a party and the absent person whose joinder is sought." *Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel*, 895 F.2d 116, 121 (3rd Cir. 1990) (quoting 3A James W. Moore, *Moore's Federal Practice* ¶ 19.07-1[2] at 19-128 (2nd ed. 1979)). *See also Inclusive Cmtys. Project, Inc. v. Texas Dep't of Hous. and Cmty. Affairs*, No. 08-CV-0546-D, 2008 U.S. Dist. LEXIS 101240, at *26 (N. Dist. Tex. Dec. 11, 2008) (rejecting argument that complete relief could only be done

by amending Tax Code and thus holding that the IRS was not necessary for injunction to be issued against defendant).

31. Advanta argues that voiding Advanta's purported waiver of the Refund would be "contrary to applicable tax law," to which the IRS would give effect only if it was ordered to do so. (Objection ¶¶ 46-47.) Consequently, Advanta claims the IRS must be joined for complete relief to be granted to the parties. This argument misstates applicable law, and is clearly designed to delay the immediate relief being sought.

32. Pursuant to 12 U.S.C. § 1821(d)(2)(A)(i), the FDIC, acting as receiver, succeeds by operation of law to all rights, titles, powers, and privileges, including legal claims, of the insured depository institutions, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution. *See* 12 U.S.C. § 1821(d)(2)(A)(i).

33. Further, pursuant to 12 U.S.C. § 1821(g)(1), and notwithstanding any other provision of federal law, the FDIC, as receiver, is subrogated to all rights of any payment to any depositors upon either payment to depositors or the making of provisions for payment to the depositors of a bank in receivership.

34. Finally, pursuant to Treasury Regulation Section 301.6402-7(b)(3), a "fiduciary" of an insolvent financial institution includes the FDIC and in the case of an insolvent financial institution subsidiary that is a member of an affiliated group filing a consolidated federal income tax return, the fiduciary (here, the FDIC-R) may also act as agent for the group in certain matters relating to the tax liability of the group in the year in which a loss arises (the "loss year group") and for the year to which a claim for refund or application for tentative carryback adjustment relates (the "carryback year group"). *See* 26 C.F.R. § 301.6402-7(b)(3) and 26 C.F.R. § 301.6402-7(c)(1)(i) and (ii). The IRS may deal directly with the common parent or the

fiduciary (or both) as agent for the group to the extent provided in the regulations. *See* 26 C.F.R. § 301.6402-7(a)(2).

35. Pursuant to this agency, the FDIC-R may file a "Loss Year Return" (*i.e.*, a consolidated return for any taxable year in which any member of a carryback year group claims a loss that may be carried back (a "loss year")). Here, the "loss years" would be the 2008 and 2009 taxable years of the Advanta group provided the return is filed in conjunction with the filing of a claim for refund. The FDIC-R may also receive a refund of taxes attributable to losses or credits of ABC and any wholly-owned subsidiary of ABC, which in this case would include Advanta Banking Receivables Corporation ("ABRC"). *See* 26 C.F.R. § 301.6402-7(c)(1)(i) and (ii) and 26 C.F.R. § 301.6402-7(h)(2). The FDIC-R may exercise this agency where it does not accept the loss year return or refund claim filed by Advanta in its capacity as the common parent of the Advanta affiliated group (a "Common Parent Return").

36. In addition, the FDIC-R is not bound by any election filed by Advanta to relinquish the carryback period with respect to consolidated net operating losses or credits attributable to ABC and ABRC. *See* 26 C.F.R. § 301.6402-7(e)(5). The FDIC-R's agency in this regard extends to taxable years before ABC became an insolvent financial institution, and the filing of Common Parent Returns for the 2008 and 2009 taxable years does not preclude the exercise of the FDIC-R's agency.

37. Therefore, although Advanta has already filed the 2008 and 2009 Consolidated Returns, the FDIC-R is not precluded from filing FDIC-R Returns for the 2008 and 2009 taxable years of the Advanta affiliated group, making appropriate elections with respect to the carry back of consolidated net operating losses attributable to ABC and ABRC in those years, claiming refunds of taxes arising from such carrybacks, and receiving payments of refunds with respect to consolidated net operating losses attributable to ABC and ABRC with respect to those years.

This Court can therefore accord complete relief between the parties by (i) voiding Advanta's original election to waive the Refund in the 2009 Consolidated Return and carryback the 2008 NOLs for five years and (ii) permitting the FDIC-R to file the FDIC-R Returns claiming the Refund.

38. The second inquiry under Rule 19(a) is "whether the rights of the parties before [the Court] would impair or impede an absent party's ability to protect its interest in the subject matter of the litigation." *Janney*, 11 F.3d at 406. "Mere presentation of an argument that issue preclusion is possible is not enough to trigger Rule 19(a)(2)(i). Rather, it must be shown that some outcome of the . . . case that is reasonably likely can preclude the absent party with respect to an issue material to the absent party's rights or duties under standard principles governing the effect of prior judgments." *Id.* at 409.

39. The rights of the IRS are not in danger of being jeopardized nor is the IRS at risk of suffering any prejudice. The actions open to the FDIC-R as described above are sanctioned by regulations issued by the United States Treasury and the IRS. In addition, pursuant to 26 C.F.R. § 301.6402(f), the IRS has the sole discretion with respect to whether or not it will adjust a Common Parent Return on the basis of information supplied in a FDIC-R Return. The IRS is not obligated to accept a FDIC-R Return nor is the IRS obligated to accept or pay a claim for refund filed by a fiduciary for a carryback year group. Therefore, the IRS is clearly able to protect its own rights.

40. If this Court voids Advanta's original tax elections in the 2008 and 2009 Consolidated Returns and permits the FDIC-R to file the FDIC-R Returns, the IRS would have only one valid set of elections before it. If, for whatever reason, the IRS refuses to honor FDIC-R's elections and instead acts on Advanta's original elections, then the FDIC-R can take up that issue with the IRS. In any such proceeding, this Court's order voiding the elections in the 2008

and 2009 Consolidated Returns would not have preclusive effect because the IRS was not a party to this litigation or in privity with any party to this litigation. *See Janney*, 11 F.3d at 409 n.12 (stating the elements of collateral estoppel). Accordingly, the IRS will have full ability to protect its interests.[6]

41. The single case cited by Advanta for the proposition that the IRS is a Required Party is inapposite. In *Employer Solutions, Inc. v. United States Department of the Treasury IRS (In re Shared Savings Contracts, Inc.)*, 288 B.R. 827 (Bankr. E.D. Mo. 2001), the plaintiff ("ESI") had a *pending* claim with the IRS for a refund and thus was already in an adversarial relationship with the IRS. *Id.* at 829 ("ESI has filed a request for a refund of the $150,000 it has already remitted to the IRS."). As such, if the court granted ESI's declaratory judgment and held that ESI was not a statutory employer, then ESI would be entitled to the tax refund and the IRS would be automatically required to make the tax refund. For that reason alone, the IRS had an interest in the outcome of the case.

42. Here, by contrast, there is no pending litigation between ABC/FDIC-R and the IRS. In addition, as described above, the IRS has the sole discretion to arbitrate between Common Parent Returns and FDIC-R Returns.

43. The IRS was also already named as a party in the *Shared Savings* action, but was dismissed because of sovereign immunity.[7] *Id.* at 832. As a result, the court analyzed whether the case could continue without the IRS under FRCP 19(b). *Id.* at 833. The court determined

[6] Although Advanta does not raise this argument, the FDIC-R also notes that there is no "substantial risk of [the IRS] incurring double, multiple, or otherwise inconsistent obligations." FRCP 19(a)(1)(B)(ii). That concern is typically an issue when a non-party is a party to other lawsuits involving the same issue. *See, e.g.*, *Janney*, 11 F.3d at 411 (noting district court's concern that inconsistent verdicts might be rendered in separate state and federal actions). Here, however, there is no danger of inconsistent results amongst multiple cases because there is only one case.

[7] Advanta's Objection also does not address whether the IRS would be immune from suit here.

that it could not continue without the IRS because, among other things, the Court "would be unable to protect the IRS's position if ESI's complaint were to proceed." *Id.*

44. Here, by contrast, the IRS has never been a party to this action and will have a full and fair opportunity to assert its own position at the appropriate time. Indeed, even if the IRS were joined to this action, there is little else the IRS could do except for await the Court's ruling, receive any FDIC-R Returns, and then decide whether to honor the elections made in the FDIC-R Returns as opposed to the voided elections made in the returns filed by Advanta. Only if the IRS decides to honor the voided elections would there potentially be any disputed issue with the IRS. However, that "[t]he victorious party may have to face the [IRS] in another forum at another time" is plainly insufficient to make the IRS a necessary party to this action. *Sindia*, 895 F.2d at 123.

IV. THE MOTION IS NOT BARRED BY LACHES

45. In its Joinder, the Creditors' Committee argues that the relief sought by this Motion is barred by the doctrine of laches.[8] (Joinder ¶ 36.) That argument fails because ABC did not unreasonably delay in filing suit and Advanta has not been prejudiced by any delay.

46. "Laches is defined as the neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party and operates as an equitable bar." *McKesson Info. Solutions LLC v. TriZetto Group, Inc.*, 426 F. Supp. 2d 203, 208 (D. Del. 2006) (internal quotations and citations omitted). As the Creditors' Committee points out, "[w]hat constitutes unreasonable delay and prejudice are questions of fact that depend upon the totality of the circumstances." *Hendry v. Hendry (In*

[8] Advanta does not join the Creditors' Committee in making this argument.

re Hendry), Civ. No. 08-232-SLR, 2009 U.S. Dist. LEXIS 120234, at *12 n.9 (D. Del. Dec. 21, 2009) (citing *Hudak v. Procek*, 806 A.2d 140, 153 (Del. 2002)).

47. Here, the "totality of the circumstances" is precisely what sets this case apart from each of the cases cited by the Creditors' Committee in support of its laches argument. ABC is a directly-held wholly-owned subsidiary of Advanta. Given the TSA and Advanta's fiduciary duties to ABC as a subsidiary, ABC had every reason to *trust* that Advanta would act in ABC's best interest or at least inform ABC well in advance of any decisions affecting it. ABC certainly had no reason to believe–until virtually the eve of Advanta's filing of the 2009 Consolidated Return–that Advanta would waive and abandon a $54 million tax refund.

48. Beginning in December 2009, Advanta consistently told ABC that "[n]o decision has been made about NOL carrybacks" by Advanta executives. (*See* E-mail from Philip Browne to Ken Goldman dated Dec. 15, 2009, attached as Ex. A to Advanta's Objection to the Tax Motion.) In addition, Advanta's practice over the past several years has been to seek a six-month extension of the tax return filing date to September 15. (*See* Goldman Decl. ¶ 3.) It was not until Advanta went "radio silent" on March 11, 2010, that ABC became reasonably concerned that Advanta would act against ABC's interests and inconsistently with Advanta's own prior tax filing practices. (*Id.* ¶¶ 4-9.)

49. By contrast, in each of the cases cited by the Creditors' Committee, the parties always were, and had always been, in an adversarial relationship and the complaining party was on full notice of the dispute well before it took legal action. *See, e.g., In re Lukens Inc. S'holder's Litig.*, 757 A.2d 720 (Del. Ch. 1999), *aff'd*, 757 A.2d 1278 (Del. 2000) (dissenting shareholders suit against merging defendant corporations); *Funkhouser v. Fusion Sys. Corp.*, No. Civ. A. 12895, 1993 WL 1502228, at *17 (Del. Ch. Mar. 17, 1993) (minority shareholders challenging existing board of directors); *Cottrell v. Pawcatuck Co.*, 34 Del. Ch. 528, 533 (1954)

(dissenting stockholder complaints regarding liquidation plan); *Plyman v. Glynn County*, 578 S.E.2d 124, 126 (Ga. 2003) (taxpayers complaint regarding new county tax). Here, ABC brought this Motion in neither an "unreasonable" nor an "inexcusable" length of time after knowledge of its claim against Advanta arose. *McKesson*, 426 F. Supp. 2d at 208.

50. The Creditors' Committee further argues that "the relief [ABC] requests would significantly prejudice the Debtors and the creditors of the Debtor's estates" (Joinder ¶ 36) because "the decision to waive the carryback for the consolidated group's 2009 NOLs is irrevocable, as is the decision to amend its consolidated group return to elect the five-year carryback of its 2008 NOLs" (*id.* ¶ 40). This argument is wrong as a matter of law.

51. As discussed above, the FDIC, as receiver, may file a FDIC-R Return on behalf of the consolidated group for the 2009 taxable year. *See* 26 C.F.R. § 301.6402-7(e)(1) and (3). Thus, assuming this Court grants this Motion and the FDIC-R's accompanying motion seeking permission to file a FDIC-R Return, then: (i) the improper elections made by Advanta in the 2009 Consolidated Return would be voided, and (ii) those elections be replaced by the elections made by the FDIC-R in the FDIC-R Return.

52. Not surprisingly, the cases cited by the Creditors' Committee are inapposite. In those cases, the plaintiff sought to enjoin a particular action, and the delay in filing afforded very little notice to the opposing party who wanted the event to proceed. *See, e.g.*, *Cottrell*, 34 Del. Ch. at 533 (seeking injunction to restrain corporation from holding stockholders meeting to obtain liquidation plan from going into action that had in effect already been approved); *In re Blockbuster Entm't Corp. S'holder's Litig.,* Civ. A. No. 13319, 1994 WL 89011, at *1 (Del. Ch. Mar. 1, 1994) (requesting restraint of the close of a tender offer hours before closing).

53. Here, by contrast, there can be no prejudice attributed to any alleged delay in the filing of the Motion. Advanta has *already* filed its 2009 Consolidated Return and *already*

waived the Refund. This Motion seeks to void an improper action that has already been taken. As such, the Creditors' Committee cannot meet its burden in proving either element of its laches defense.

CONCLUSION

54. Advanta's waiver of a $54 million tax refund without receiving any offsetting benefit was not an ordinary course transaction. Advanta was required to give all of its creditors, including ABC, notice and an opportunity to be heard before this Court before Advanta waived the Refund. Accordingly, that waiver is void *ab initio* and should be declared as such.

WHEREFORE, the FDIC-R respectfully requests that this Court enter an Order (i) declaring and nullifying as void (a) Advanta's purported waiver of the Refund; and (b) Advanta's purported election to carryback the 2008 NOLs for five years; and (ii) granting such other and further relief as this Court may deem just and proper.

Dated: May 14, 2010
Wilmington, Delaware

Respectfully submitted,

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re ADVANTA CORP., *et al.*, Debtors.	Chapter 11 Case Nos. 09-13931 (KJC), *et seq.* (jointly administered)
ADVANTA BANK CORP., Plaintiff, v. ADVANTA CORP., Defendant.	Adversary Proc. No. 10-50795-KJC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 14, 2010, I caused copies of the foregoing Reply Of The Federal Deposit Insurance Corporation, As Receiver Of Advanta Bank Corp., In Further Support Of Motion For Declaratory And Injunctive Relief In Connection With Its Amended Complaint to be served via first-class mail, postage prepaid, upon the parties listed on the attached matrix.

Dated: May 14, 2010
Wilmington, Delaware

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