

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

ADVANTA CORP.,
et al.,

Debtors.

Chapter 11

Case No. 09-13931 (KJC)

(Jointly Administered)

Hearing Date and Time: December 16,
2010 at 3:30 p.m.

**(A) JOINDER OF THE BANK OF NEW YORK MELLON, AS TRUSTEE, IN THE
OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO
THE DEBTORS' MOTION FOR AN ORDER (I) APPROVING THE PROPOSED
DISCLOSURE STATEMENT, (II) APPROVING NOTICE AND OBJECTION
PROCEDURES FOR THE DISCLOSURE STATEMENT HEARING,
(III) ESTABLISHING SOLICITATION AND VOTING PROCEDURES,
(IV) SCHEDULING A CONFIRMATION HEARING, AND (V) ESTABLISHING
NOTICE AND OBJECTION PROCEDURES FOR CONFIRMATION OF PROPOSED
PLAN, AND (B) RESERVATION OF RIGHTS IN CONNECTION WITH THE
DEBTORS' JOINT PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE
BANKRUPTCY CODE**

The Bank of New York Mellon, as Trustee (the "Trustee"), hereby (a) joins in and adopts the Objection (the "Objection") of the Official Committee of Unsecured Creditors (the "Creditors' Committee") to the Debtors' Motion for an Order (I) Approving the Proposed Disclosure Statement (the "Disclosure Statement") (II) Approving Notice and Objection Procedures for the Disclosure Statement Hearing, (III) Establishing Solicitation and Voting Procedures, (IV) Scheduling a Confirmation Hearing, and (V) Establishing Notice and Objection Procedures for Confirmation of Proposed Plan (Docket No. 977), and (b) asserts this reservation of rights in connection with the Debtors' Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code (the "Plan"). In support of its joinder and as and for its reservation of rights, the Trustee represents as follows:

BACKGROUND

1. On November 8, 2009 (the “Petition Date”), Advanta Corp. (“Advanta” or the “Debtor”), one of the above-captioned Debtors, filed its Chapter 11 petition and on November 19, 2009, the Trustee was appointed as a member of the Creditors’ Committee in these cases. The Trustee has continuously served on the Creditors’ Committee since its appointment.

2. The Bank of New York Mellon, as successor in interest to Mellon Bank, N.A., is the Trustee pursuant to the Senior Indenture, dated as of October 23, 1995 (the “Indenture”), by and between Advanta, as Issuer, and the Trustee, for holders of certain debt securities (collectively, the “Senior Notes”). The Trustee timely filed a proof of claim for the Senior Notes on or about April 24, 2010.

3. Advanta is also the issuer under an Indenture (the “Subordinated Notes Indenture”), dated as of December 17, 1996, between Law Debenture Trust Company of New York, as Successor Trustee, and Advanta, of 8.99% Junior Subordinated Deferrable Interest Debentures due December 17, 2026 (the “Subordinated Notes”). Section 15.01 of the Subordinated Notes Indenture provides that payment of the principal and premium, if any, and interest on the Subordinated Notes is “subordinated and junior in right of payment to the prior payment in full of all Senior Indebtedness, whether outstanding at the date of this Indenture or thereafter incurred.” Subordinated Notes Indenture at 59 (emphasis added). Section 15.02 of the Subordinated Notes Indenture similarly provides that in the event of acceleration of the maturity of the Subordinated Notes, no payment shall be made by Advanta with respect to the principal, premium, if any, or interest on the Subordinated Notes until the holders of all Senior Indebtedness “shall receive payment in full of all Senior Indebtedness (including any amounts due upon acceleration).” Subordinated Indenture at 60 (emphasis added).

4. Senior Indebtedness is defined in the Subordinated Notes Indenture as “all Indebtedness for Money Borrowed whether outstanding on the date of the execution of [the Subordinated Notes] Indenture or hereafter created, assumed or incurred, unless the terms thereof specifically provide that it is not superior in right of payment to the [Subordinated Notes], and any deferrals, renewals or extension of such Senior Indebtedness.” Subordinated Notes Indenture at 8. “Indebtedness for Money Borrowed” is defined as any obligation of Advanta “for the repayment of borrowed money, whether or not evidenced by bonds, debentures, notes or other written instruments.” Subordinated Notes Indenture at 5. Thus, because the Senior Notes are “Indebtedness for Money Borrowed,” the Senior Notes constitute Senior Indebtedness under the Subordinated Notes Indenture.

5. Section 13.05 of the Subordinated Notes Indenture provides that it shall be governed and construed under New York law. Subordinated Notes Indenture at 54.

6. Pursuant to the Plan, the Debtors propose to allow the claims in respect of the Senior Notes in the amount of \$140,622,493.80, which amount includes principal and prepetition interest, *i.e.*, interest that had accrued and was unpaid on the Petition Date. The Plan further provides that the holders of Senior Notes shall not receive distributions that aggregate more than such amount, and that until such amount is distributed to the holders of the Senior Notes, all the distributions that would otherwise be made to the holders of the Subordinated Notes are to be paid to the holders of the Senior Notes.

RESERVATION OF RIGHTS

7. Although the Subordinated Notes Indenture provides for “payment in full” of the Senior Notes before the holders of the Subordinated Notes receive any distribution, the Plan does not provide that the holders of the Senior Notes are entitled to the payment of outstanding post-petition interest prior to any recovery by the holders of the Subordinated Notes. Instead the Plan

subordinates the payment in respect of the Subordinated Notes only to the payment of principal and prepetition interest in respect of the Senior Notes.

8. The issue of whether senior note holders are entitled to receive post-petition interest before subordinated note holders receive any recovery under the Bankruptcy Code has not been addressed by the Third Circuit or this Court.¹ Moreover, there is no consensus in the Circuit Courts that have considered this issue under the Bankruptcy Code. The Eleventh Circuit has held, after a determination by the New York Court of Appeals that, under New York Law, the Rule of Explicitness survived the enactment of the Bankruptcy Code, that, pursuant to the Rule of Explicitness, senior note holders are not entitled to postpetition interest under New York Law unless the indenture explicitly so provides.² In re Southeast Banking Corp., 179 F.3d 1307, 1310-11 (11th Cir. 1999). Contrary to the Eleventh Circuit's holding in Southeast Banking Corp., the First Circuit has rejected the applicability of the Rule of Explicitness under New York law in cases under the Bankruptcy Code. In re Bank of New England Corp., 364 F.3d 355, 368 (1st Cir. 2004). The First Circuit remanded the case back to the Bankruptcy Court for a decision consistent with the First Circuit's opinion. After an evidentiary hearing, the Bankruptcy Court held that senior note holders were not entitled to postpetition interest. In re Bank of New England Corp., 404 B.R. 17 (Bankr. D. Mass. 2009). On appeal, the District Court affirmed the Bankruptcy Court Decision. In re Bank of New England Corp., 426 B.R. 1 (D. Mass. 2010)). The District Court's Decision is currently on appeal before the First Circuit, which has yet to render a decision (Case No. 10-1456). Thus, the issue of what constitutes "full payment" has not

¹ The Third Circuit addressed this issue under the Bankruptcy Act (see, e.g., In re Time Sales Fin. Corp., 491 F.2d 841, 844 (3d Cir. 1974)), but as other Circuit Courts have pointed out, because the Bankruptcy Code provided for the treatment of subordination agreements in Section 510(a), pre-Bankruptcy Code decisions regarding subordination are not applicable under the Bankruptcy Code. See e.g., In re Southeast Banking Corp., 156 F.3d 1114, 1121-4 (11th Cir. 1998).

² The Rule of Explicitness requires that creditors are not entitled to post-petition interest in bankruptcy cases absent express language to that effect in subordination agreements ordering priorities among the contracting parties. See, e.g., Southeast Banking Corp., 179 F.3d 1307, 1310 (11th Cir. 1999).

been definitively determined by the Circuit Courts and, in any event, neither the First Circuit's ultimate decision or the Eleventh Circuit's decision bind this Court.

9. Pursuant to the Disclosure Statement, the holders of the Senior Notes will recover under the proposed Plan between 64.4% and 100% of the principal and prepetition interest owed by Advanta on the Senior Notes, factoring in the amounts that, but for the subordination provisions of the Subordinated Notes Indenture, would otherwise have been paid to the Subordinated Note holders. This broad range of recovery is due to certain contingencies that remain to be resolved. The most significant contingent factors include whether, pursuant to the settlement between the Debtors and the Federal Deposit Insurance Corporation (the "FDIC"), the FDIC will be asserting a \$50 million general unsecured claim against Advanta, and whether the claims asserted by Dennis Alter and William Rosoff in the aggregate amount of \$51.8 million will be allowed in the amounts as filed. Thus, at this time, there is no certainty as to the percentage of recovery that the Senior Note holders will receive and no assurance that such recovery will be 100% of the principal and accrued prepetition interest.

10. Therefore, in the event that the Debtors are able to distribute sufficient assets to pay holders of the Senior Notes postpetition interest, factoring in the funds that would otherwise be paid to the holders of Subordinated Notes, the Trustee, on behalf of the holders of the Senior Notes, reserves its right to object to the confirmation of the Plan based on the Plan's failure to provide for the full enforcement of the provisions of the Subordinated Notes Indenture. Such provisions as quoted above include a subordination agreement that, pursuant to Section 510(a) of the Bankruptcy Code, is enforceable in a bankruptcy case. Therefore, to comply with Bankruptcy Code Section 1129(a)(1)'s mandate that a plan comply with the applicable provisions of Title 11, the Plan must be amended to reserve the right of the Senior Note holders

to receive postpetition interest on their Senior Notes prior to the Debtors' making a distribution to the Subordinated Noteholders.

11. The Trustee continues to analyze the Disclosure Statement and Plan. As such, the Trustee reserves the right to amend, supplement, alter and/or modify this joinder.

12. Nothing herein affects the Trustee's rights to object to confirmation of the Plan on any other grounds, and the Trustee reserves all rights to object to confirmation of the Plan for the reasons stated herein or for any other reason.

NOTICE

13. The Trustee has served this Reservation of Rights and Joinder on: (i) Advanta Corp., Attn: Jay A. Dubow, (ii) the Office of the United States Trustee, Attn: David M. Klauder; (iii) Attorneys for the Debtors, Weil Gotshal & Manges LLP, Attn: Robert J. Lemons and Victoria Vron; (iv) Attorneys for the Creditors' Committee, Latham & Watkins, LLP, Attn: Roger G. Schwartz and Adam J. Goldberg. The Trustee submits that no other or further notice need be provided.

CONCLUSION

WHEREFORE, the Trustee (a) joins in and adopts the Objection, and (b) reserves all rights to object to confirmation of the Plan, including in the event the assets of the Debtor prove to be sufficient to pay the holders of Senior Notes in full the outstanding principal and pre- and postpetition interest (factoring in the payment to such holders of the amounts otherwise distributable to the holders of Subordinated Notes), to object to the confirmation of the Plan based on the Plan's failure to provide for Senior Noteholders to recover principal, prepetition interest and postpetition interest that has accrued but remains unpaid prior to any recovery to the holders of the Subordinated Notes.

Dated: New York, New York,
December 7, 2010

Respectfully submitted,

/s/ Ronald L. Cohen

Ronald L. Cohen
Laurie R. Binder
SEWARD & KISSEL LLP
One Battery Park Plaza
New York, New York 10004
(212) 574-1200 (Telephone)
(212) 480-8421 (Facsimile)

*Counsel for The Bank of New York Mellon, as
Trustee*

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