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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

DENNIS ALTER and WILLIAM A. ROSOFF, Plaintiffs, v. FEDERAL DEPOSIT INSURANCE CORPORATION, Defendant.	**COMPLAINT** Civil Action No. 2:13-cv-00456 Judge Brooke C. Wells

Plaintiff s Dennis Alter and William A. Rosoff (collectively, "Plaintiffs") hereby allege as follows:

NATURE OF THE ACTION

1. This action arises out of the destruction of Advanta Bank Corp. ("Advanta" or the "Bank"), which was incorporated under Utah law and maintained its headquarters and core of operations in Draper, Utah. It was destroyed by the actions of the Federal Deposit Insurance Corporation ("FDIC").

2. In an effort to cover-up its own wrongdoing that destroyed the Bank, inflicted grievous losses on thousands of people and businesses, and created huge losses for the federal deposit insurance fund, the FDIC has embarked on a campaign to blame Dennis Alter and William Rosoff – former directors or officers of Advanta – for the failure of the Bank. It is bad enough that the FDIC seeks to shift the blame for the Bank's failure by cherry picking Messrs. Alter and Rosoff as targets even though they are only two of the Bank's directors or officers, all of whom participated in and oversaw the decision-making at issue. It is all the more egregious because the FDIC's concoction of claims against Alter and Rosoff is meritless and, moreover, is squarely encompassed by a settlement agreement and release entered into by the FDIC which covers not only Alter and Rosoff, but all of the Bank's Board of Directors. Plaintiffs bring this action to recover both for the harm that the FDIC's pursuit of these claims has caused and for the hundreds of millions of dollars of damages suffered as a consequence of the FDIC's destruction of the Bank.

3. A well-run, highly successful enterprise, Advanta was one of the nation's leading issuers of credit cards to small businesses, such as restaurants, retail shops, and contractors. Messrs. Alter and Rosoff – together with a Board of Directors including some of Utah's most prominent and astute businessmen such as Calvin Boardman, Fred Fairclough, Fred Gonzalez and William Wirthlin – were charting a course of growth and success until 2007 when the financial

meltdown began to devastate the small business community upon which Advanta's business vitally depended. Not surprisingly, Advanta's operations were severely impacted and losses began to mount. While Advanta was struggling to survive one of greatest financial disasters in our nation's history, the FDIC consented to a Board plan (the "Plan") that was crafted to save Advanta. The approved Plan, as the FDIC was fully aware, included several key actions, which, once begun, could not be reversed. In reliance on the FDIC's approval, Advanta began executing on the Plan, a Plan that would have saved the Bank and prevented massive damage. But then – with Advanta committed beyond the point of no return – the FDIC, on orders from the highest levels of the agency in Washington, D.C., revoked its approval in a deliberate decision to put the Bank out of business. Tragically, the FDIC succeeded – its stunning revocation brought things to a crashing, irreversible halt, and the Bank collapsed.

4. The FDIC now seeks to make scapegoats out of Plaintiffs. The story the agency has fabricated is that Messrs. Alter and Rosoff destroyed the Bank through a series of "repricing" campaigns. Repricing is simply raising interest rates, in this case on customers whose credit status has deteriorated. It is a common practice and, indeed, is encouraged by the FDIC as a proper risk mitigation technique. In the 2008 and early 2009 period, the economic downturn forced Advanta to reprice more extensively than it had in the past. But, it had no choice – it had to offset the rapid deterioration in the credit status of many of its customers due to the financial meltdown and the resulting extraordinary losses that it was experiencing.

5. This repricing activity was vetted with and approved by the Bank's Board of Directors. In addition, the FDIC and the Utah Department of Financial Institutions ("UDFI") knew of these repricing campaigns and the ceaseless efforts of Plaintiffs to save the Bank. Indeed,

the FDIC regularly complimented Advanta – Plaintiffs included – prior to and during the financial meltdown. No one worked harder to save the Bank than Plaintiffs. Advanta was their life's work and source of wealth, and they toiled 24/7 to save Advanta. In the end, the repricing campaigns succeeded in generating hundreds of millions of dollars and enabled Advanta to survive well into early 2009 – until officials at highest levels of the FDIC consciously decided to put Advanta out of business.

6. That the FDIC would now claim that Plaintiffs, of all people, were responsible for not exercising enough care as they fought tooth and nail to save the Bank is supremely hypocritical given the FDIC's role in deliberately destroying the Bank. But it gets worse: the FDIC already settled and released the very "repricing" claims it asserts against Plaintiffs. On June 24, 2009, the FDIC executed a Stipulation and Consent to the Issuance of an Order to Cease and Desist, Order for Restitution, and Order to Pay ("Consent Order") with Advanta. *See* Ex. A. Advanta was adamant it had done nothing wrong. But to buy peace and get back to the pressing matter of saving its very existence in a time of crisis, Advanta agreed with the FDIC to pay $21 million in restitution, with no admission of liability. In exchange, the FDIC expressly released Advanta and the Bank Parties (including Plaintiffs and the other directors) "with respect to . . . ***acts or practices relating to the Respondent's repricing of credit card accounts***[.]" *Id.* (emphasis added). The Consent Order further bars the FDIC from "initiat[ing] any further legal action, except an action to enforce the terms of the ORDER, against any of the Bank Parties [including Plaintiffs and the other directors] based on the Release Violations." *Id.* Thus, the FDIC's pursuit of repricing claims plainly violates the release, and is also barred by, among other things, Utah law and the statute of limitations.

7. Accordingly, Plaintiffs bring this action to hold the FDIC liable (i) for the massive harm inflicted on Plaintiffs by the FDIC's deliberate decision to destroy the Bank and (ii) for attempting to shift the blame for the Bank's failure to them in direct violation and breach of the consent order and release.

PARTIES

8. Plaintiff Dennis Alter is the former Chairman of the Bank and was a member of the Bank's Board of Directors.

9. Plaintiff William A. Rosoff is the former Vice Chairman of the Bank.

10. The FDIC is the agency charged by federal law with, among other duties, administering the Federal Deposit Insurance Act and the federal bank deposit insurance system. The FDIC was appointed receiver for the Bank on or about March 19, 2010.

JURISDICTION AND VENUE

11. This action arises under the laws of the United States, including, without limitation, the Federal Deposit Insurance Act, 12 U.S.C. § 1811, et seq., as amended. This Court has subject matter jurisdiction pursuant to 12 U.S.C. § 1819(b)(2)(A) and 28 U.S.C. § 1331.

12. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391(c) because Advanta was chartered under Utah law and was headquartered in this district. Further, key witnesses to the events at issue in this suit include bank regulators from the UDFI, other Utah-based former directors of Advanta, and former employees of Advanta that reside in Utah. A substantial portion of the events giving rise to the Consent Order and to this action also occurred in Utah.

13. In addition, venue in Utah is appropriate particularly because it is consistent with the FDIC's pattern and practice of filing lawsuits against former directors and officers of banks in the state where the bank was chartered. Counsel for Plaintiffs was unable to locate a single case brought by the FDIC against former directors and officers between January 1, 2009 and June 16, 2013 that was not filed in the state where the bank was chartered or headquartered.

FACTUAL BACKGROUND

I. Advanta's Growth and Success

14. Advanta Corp., the Bank's holding company, was founded in 1951 as Teachers Service Organization, Inc. by Dennis Alter's father. The Bank was chartered in 1991 under the laws of Utah. For many years, the holding company successfully served the individuals and small enterprises – including teachers seeking to obtain personal credit, residential homebuyers, and small businesses looking to lease equipment – that form the backbone of the American economy. By 2001, Advanta had focused its business exclusively on the provision of credit cards to the small business community. The holding company did not issue credit cards to small businesses directly. Advanta was the sole vehicle (and one of the company's most substantial assets) though which credit cards were issued.

15. Engaging in a so-called "monoline" business model, as Advanta did, is not novel. Commentators and analysts regularly credit the evolution in thinking from diversification to specialization as a major engine for growth and success.[1] For example, the investment community

[1] *See, e.g.*, Everett Reveley, Davenport Equity Research, *Advanta Corp.: Initiating coverage with a Buy rating and a $53 price target*, Davenport & Company LLC (Jan. 9, 2007) (citing Advanta's business model for its being "well positioned to exploit [the segment's] sizable market opportunity").

praised other financial services companies, residential construction companies, and other businesses for unlocking shareholder value through monoline product or service offerings. All of these businesses were severely impacted during the financial crisis as a result, just like Advanta.

16. Employing its focused business model, Advanta became an engine of outstanding performance. It returned strong earnings, low credit losses, and high returns for its holding company's investors.[2] For each year from 2001 to 2006, Advanta's managed receivables were $2.1 billion, $2.6 billion, $3.2 billion, $3.3 billion, $3.9 billion, and $5.2 billion, respectively. At the same time, Advanta's 30+ day delinquency rate was steadily decreasing: to 6.66% in 2001, 6.15% in 2002, 5.82% in 2003, 4.12% in 2004, 2.96% in 2005, and an astonishingly low 2.58% in 2006. In its October 31, 2006 press release, Advanta's parent announced "strong profits" for the third quarter – with managed receivables having grown by 29% over the same quarter the previous year, and bankruptcy filings among card holders lower than anticipated levels. The propitious data continued unabated well into 2007. In late January 2007, Advanta's parent reported that its 2006 earnings had increased by over 50% and that its managed net credit loss rate had dropped by 230 basis points to 3.41%.

17. The Bank's Board of Directors was comprised of accomplished, highly-qualified individuals. The Board provided regular, continuous, and careful oversight over Advanta's operations and management, including repricing decisions.

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[2] The statement that "[t]he company exceeded our top-line expectation, as greater-than-expected new account originations, strong transaction volumes, and receivables growth drove revenues," Friedman Billings Ramsey, *ADVNB: Core EPS Ahead of Expectations on Strong Revenue Growth – Increasing Price Target to $33* (July 27, 2005), is a good example of the type of reviews given by analysts before the financial meltdown began.

18. Advanta was prudently and conservatively run. For example, Advanta maintained a remarkable Tier One risk-based capital level ratio. To receive the FDIC's highest rating at the time – "well capitalized" – a regulated bank had to maintain a Tier 1 risk-based capital ratio of 6% or greater. *See* 12 C.F.R. § 325.103(b)(1)(ii). During the period leading up to the 2008 financial downturn, Advanta maintained an impressive 20% ratio. *See, e.g.*, Advanta Corp., Form 8-K (Oct. 30, 2008) (press release reporting 3Q 2008 results stated that the Bank had a Tier 1 capital ratio of 22.3%).

19. Also, and equally important, the quality of Advanta's credit card debt was consistently high. FICO scores are an aggregate measure of someone's creditworthiness and risk that they will default on their borrowing obligations (be it borrowing through mortgages, credit cards, automobile loans, etc.). The scores are used to gauge the likelihood that someone will repay his or her debts. In the credit card industry, at the time, FICO scores of 660 and above were considered good. Scores of 720 and above were considered excellent (i.e., the highest likelihood that people would repay their debts). Advanta's new customers' FICO scores at origination averaged 716 in late 2000. The average increased to 730 by 2003, and ranged between 725 and 742 through the end of 2008. Advanta's customers' FICO scores were among the absolute best in the industry.

20. Advanta was also in regular communication with the FDIC and the UDFI, both of which had long-considered the Bank's operation to be highly rated and well-run. For years, the UDFI had worked especially closely with Advanta to ensure the safety of its customers. And, lest there be any doubt, the FDIC and the UDFI repeatedly commended Advanta for a sound, well-run

operation. Prior to the meltdown, there simply were not any flaws, defects, or dangers lurking within the Bank.

II. The Financial Crisis Begins to Unfold.

21. Prior to 2007, most independent observers believed the national economic problems emerging would be limited and of short duration. Donald Kohn, the Vice Chairman of the Federal Reserve, said in a speech that “[t]o date there is little evidence that this correction in the housing market has had any significant adverse spillover effects on other parts of the economy,” and that he expected “the economic expansion to continue.” Donald L. Kohn, Vice Chairman, Federal Reserve, Speech at the Money Marketers of New York University (Oct. 4, 2006). A report from the Office of the Chief Economist at Freddie Mac concluded that “despite the cooling trend in housing, the rest of the economy remains resilient to a steeper downturn. Consumer spending continues to expand at a steady pace.” Freddie Mac, Office of the Chief Economist, October 2006 Economic Outlook, *Finding Solid Ground* (Oct. 10, 2006). Some analysts were even predicting that the housing market would soon start to improve.[3] No one was predicting the upcoming economic tsunami.

22. But as the economy continued to falter and worsen, small businesses were among the hardest hit. Plummeting consumer demand for the goods and services of these small businesses caused them to fall behind on their credit card payments to Advanta. The Great Recession hit small businesses – who were Advanta’s customers – particularly hard. As the CFO

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[3] *See, e.g.*, MSNBC, *Greenspan: Housing Market Worst May Be Over* (Oct. 9, 2006); National Association of Realtors, *September Existing-Home Sales Ease, Setting Stage for Stable Market* (Oct. 25, 2006).

of Bank of America put it in October 2008, the meltdown's effect on small business credit lending was "a damn disaster."[4] As the pressure of the economic downturn began to decimate the small business community in the latter part of 2007, those small businesses began, at ever increasing rates, to default on their credit obligations. Not surprisingly, the Bank was severely impacted.

III. The Efforts to Save Advanta.

23. Plaintiffs, the Bank's Board of Directors, and others at the Bank worked tirelessly to protect it from ruin. In the midst of the downturn, they had few options available, but they tried to maximize the benefits of what they could do.

24. Starting in or around January 2008, Advanta expanded its repricing practices – the historic tool used by Advanta and other credit card issuers to reprice upward credit to those whose situations had worsened and to retain lower pricing for those who remained good credit risks.

25. Repricing is a necessary and well established tool to manage risk associated with unsecured, revolving credit. As a general matter, every credit card issuer engages in repricing, and the Bank always had done so as a risk management practice. Bank regulators and industry experts have recognized the need to reprice to manage risk. *See* Letter from John Dugan, Comptroller of the Currency (Aug. 18, 2008) ("Risk-based pricing, including repricing existing balances, is a key risk-mitigation technique that has allowed issuers to expand credit availability and to reduce the cost of credit for many borrowers."). This is why it was natural for Advanta and other credit card issuers to continue to use repricing during the financial crisis. As Discover Financial Services explained in 2008: "We use an analytical pricing strategy that provides competitive pricing for

[4] Bank of America, Earnings Conf. Call Tr. at 19 (Oct. 6, 2008).

cardmembers and seeks to maximize revenue on a risk-adjusted basis." Discover continued: "We periodically assess individual-level behavior practices and use risk models to determine appropriate pricing terms for our cardmembers, providing lower promotional rates for some customers while assessing higher rates for others who have demonstrated high risk behaviors such as defaulting on their payments." Other issuers, from Bank of America to HSBC to Citigroup, and many more, repeatedly discussed in contemporaneous disclosures the routine nature and value of repricing. And, as would be expected in a time of crisis where the creditworthiness/risk of the customer base was rapidly trending downward, repricing was leaned on even more heavily than usual. One source reported a significant increase in rate adjustments in 2008 – e.g., "94% of credit card solicitations had a penalty rate, compared to 82% as recently as 2003." Even companies that had previously pledged to end repricing were forced to publicly (and embarrassingly) recant their statements, finding repricing in the financial crisis was an essential strategy for survival.

26. During the economic downturn, Advanta (and other credit card companies) needed to adapt its repricing methodology to more accurately reflect the rapidly increasing risk in the portfolio. To state the obvious, however important credit worthiness is normally, it is particularly important during times of economic crisis because one desperately needs to retain high-credit quality and/or low-risk customers. Cognizant of this, Advanta tried not to reprice customers whose credit had not deteriorated, or customers who were considered low-risk.

27. Plaintiffs prudently relied on the advice and expertise of others before engaging in repricing. Each repricing campaign was analyzed from multiple perspectives by many departments within Advanta, both before the campaign, while it was in progress, and afterward to determine its effects. A team of experts within Advanta spent countless hours analyzing the data.

Key personnel from multiple departments and disciplines across Advanta reviewed every proposed campaign, and no campaign was allowed to go forward without those personnel first signing off on it.

28. At each turn, Plaintiffs' decisions were vetted and endorsed by experienced, sophisticated, and independent Directors. The Board of the Bank, a Utah company, reads like a Who's Who of notable individuals in the Utah financial industry. It included Calvin M. Boardman (the Garth Professor of Finance at the University of Utah School of Business), Fred W. Fairclough (the Director of the University of Utah Real Estate Center), Fred P. Gonzales (the President of FPG Ventures), and William Wirthlin (the President of The Associated Group). All of these directors were independent, sophisticated, and informed. They monitored all the key activities of the businesses for which they were responsible and actively participated in each and every key decision at issue in this litigation. Plaintiffs were not acting on their own. To the contrary, they worked closely with, and depended upon, the experienced, knowledgeable professionals who comprised the Board of Directors. The decisions being challenged in this litigation were the considered judgment of the many, not the few.

29. Repricing generated over $200 million in incremental net income in 2008 alone. And, if repricing caused any attrition of customers, that attrition must be viewed in context: First, in any repricing the cost of the large net increase in revenue overall is that certain customers will leave. Second, the loss of certain customers benefitted Advanta because those tend to be high-risk customers who are the most likely to become delinquent. Thus, the cost of losing those customers leads to a net gain of millions of dollars that Advanta otherwise would have been unable to

recover. In the midst of a global economic catastrophe, it would have been irresponsible *not* to have reviewed and adjusted the risk matrix of your customer portfolio.

30. In addition to modifying its repricing strategies, Advanta engaged in a number of other cost-saving measures, such as increased collection activity, reductions in force (contemporaneously made known to the public), and reducing unprofitable new marketing and other marketing expenses, all in an effort to maximize efficiencies.

31. Thus, Advanta – and Plaintiffs specifically – were hardly on a frolic of their own when they turned to repricing in the midst of the financial crisis. Even to this day, long after the worst aspects of the meltdown have diminished, the Federal Reserve continues to note that "risk-based pricing [is] a central element of most credit card plan pricing regimes."

32. The FDIC was quite supportive and even complimentary of Advanta while the events at issue unfolded. In an examination report issued right on the heels of the holding company's refusal to issuance earnings guidance in November 2007 because of the ominous economic signs, the FDIC lauded Advanta, stating that it was "well capitalized," and that the Bank was adequately monitoring and managing its business and risks. The FDIC also complimented Advanta's senior management and the Board, praising them as prudent and open to the FDIC's recommendations. And during a 2009 Board meeting, Darryle Rude of the UDFI and William Cain and Nathan Heizer of the FDIC agreed that the economic crisis had caused Advanta's problems and that – unfortunately for Plaintiffs – regardless of their high-level performance and hard work, the management and the Board unfairly would be blamed. In fact, a subsequent examination report explicitly identified the financial crisis's impact on Advanta's customers as a major reason for the Bank's deterioration.

IV. The FDIC Scuttles the Plan to Save Advanta.

33. In 2009, notwithstanding Plaintiffs' efforts to protect Advanta, credit losses and delinquencies climbed still further for the credit card industry in general and for Advanta in particular. In fact, such losses at Advanta and the industry as a whole increased to four times the historic levels. In response, Advanta designed the Plan to further limit Advanta's credit loss exposure and maximize its income and capital. Plaintiffs approached the FDIC, made clear (notwithstanding the FDIC's protestations to the contrary) that the Bank was in very deep water, and proposed the Plan to save Advanta from failure.

34. The Plan focused on the fact that receivables from Advanta's credit card accounts had been placed in a securitized trust. These receivables were securitized into bonds that the trust sold to investors. If funding to the trust from Advanta affiliates ceased, such that the trust could not satisfy its losses and obligations (e.g., funding transactions from Advanta's credit card accounts), then the trust would go into "early amortization." If this happened, the amounts owing on all bonds would immediately become due (as opposed to becoming due at some future, negotiated date). In mid-2009, the bonds were undervalued by the market.

35. Plaintiffs proposed to purposely cease funding the obligations of the trust – this meant retaining precious capital, instead of shuttling that money off to the trust. As a consequence, the trust would enter early amortization. The senior bonds would be purchased at what were then discounted market rates. Later, if the bonds were paid in full as expected in all circumstances, there would be a substantial profit that would be sufficient to fund the survival and ultimate recovery of Advanta.

36. Once Plaintiffs were able to convince the FDIC of the dangers facing Advanta, Plaintiffs put forth the Plan. The FDIC gave the greenlight. After obtaining the FDIC's approval, the Plan was set in motion: the trust was allowed to go into early amortization, and the bond buyback process commenced at discounted rates. Critically, Advanta also began to institute an additional important piece of the Plan – it shut down all existing credit card accounts by cancelling charging privileges. This was a necessary and inevitable feature of the Plan, because the trust no longer had the money to pay for any future credit card transactions. It was anticipated that a sufficient amount of balances existed at the time that estimated pay-offs of remaining balances (accounting for write-offs) would generate sufficient cash to pay all money due to make good on the senior bonds. Canceling charging privileges meant there was not any new profit from its credit card accounts – whatever was due on the books was it. This very much was the point of no return, and the FDIC knew it.

37. But then, after the irreversible early amortization had occurred, and charging privileges had been cancelled, and bond purchase programs had begun, the FDIC revoked its approval, barring the bond purchases and sealing Advanta's fate. Notably, and tragically, we now know the Plan would have worked – the bonds ultimately were paid in full, meaning that the Plan would have worked, the Bank would have been saved, and the massive losses avoided.

V. In the Midst of the Pending Disaster, the FDIC Investigates Advanta's Repricing Practices, and Settles and Releases All Claims.

38. While Plaintiffs and others at Advanta were fighting desperately to right the ship, the FDIC decided to investigate Advanta's repricing practices – practices about which the FDIC was well-aware.

39. Advanta adamantly believed it had not done anything wrong. But the last thing the Bank wanted in the middle of a crisis was a distracting investigation by its principal federal regulator. To put the matter behind it and to move forward with trying to save itself, Advanta therefore agreed to settle the FDIC's claims without an admission of wrongdoing. On June 24, 2009, the FDIC and the Bank executed a settlement.

40. In connection with the settlement, the Bank paid $21 million to the FDIC in connection with its repricing practices.

41. The FDIC, in turn, expressly tendered a "release by the FDIC of the Respondent and Bank Parties [including Plaintiffs and the other Directors] with respect to the alleged violations arising out of the Respondent's . . . ***acts or practices relating to the Respondent's repricing of credit card accounts.***" *See* Ex. A (emphasis added).

42. The settlement further provides that the FDIC shall be barred from "initiat[ing] any further legal action, except an action to enforce the terms of the ORDER, against any of the Bank Parties based on the Release Violations." *See id.*

VI. The FDIC Kills the Bank.

43. As the meltdown worsened day by day, Advanta was put under ever increasing pressure. The management of Advanta, like the management of so many other businesses caught up in the financial tsunami, fought around the clock to save the business. But, unfortunately for Advanta and all those whose lives in one way or another depended on its survival, the federal government did not rush to Advanta's aid as it did for Advanta's larger and more powerful competitors. It did not even simply leave the Bank to rise or fall on its own. Instead, at the

pivotal determinative moment, the government chose to renege on its prior approval of the Plan, thus applying a stranglehold to Advanta until all signs of life were finally extinguished.

44. Although Advanta fought long and hard to resist the onslaught of the worst economic crisis since the Great Depression, it eventually succumbed as a direct consequence of the FDIC's wrongful conduct. In or about November 2009, the Bank's parent company declared bankruptcy, and in or around March 2010, the Bank was closed and placed into receivership by the FDIC.

COUNT I: BREACH OF CONTRACT

45. Plaintiffs incorporate by reference paragraphs 1 through 44 as if set forth fully herein.

46. In the midst of the debacle involving the FDIC's about-face in 2009, the FDIC investigated certain of Advanta's practices, including repricing.

47. To put the matter behind it and move forward with trying to save itself, Advanta agreed to settle the FDIC's claims without an admission of wrongdoing in the June 24, 2009 Consent Order. *See* Ex. A.

48. The Consent Order defines the "Bank Parties" as Advanta "or any director, officer, employee, agent, successor or assign, or other institution-affiliated party." *See* Ex. A. Plaintiffs were directors and officers of Advanta. Indeed, Plaintiff Alter was a signatory to the Consent Order.

49. In the Consent Order, the FDIC tendered a "release by the FDIC of the Respondent [Advanta] and Bank Parties with respect to the alleged violations of Section 5 identified by the FDIC arising out of the Respondent's . . . acts or practices relating to the Respondent's repricing

of credit card accounts, the Adverse Action Notification Requirements, and any other allegations relating in any manner to the FDIC's Compliance Report of Examination dated January 16, 2007," defined as the "Release Violations." *See id.*

50. The Consent Order further provides that the FDIC shall be barred from "initiat[ing] any further legal action, except an action to enforce the terms of the ORDER, against any of the Bank Parties based on the Release Violations." *See id.*

51. Plaintiffs, as "Bank Parties," are beneficiaries of the FDIC's and Advanta's releases in the Consent Order, and are entitled to enforce the Consent Order's terms.

52. Notwithstanding the Consent Order's express release of Plaintiffs, ever since the FDIC became receiver for Advanta, it has pursued the released repricing claims against Plaintiffs.

53. For example, on June 3, 2013, the FDIC gave Plaintiffs notice that it intends to file suit against Plaintiffs no later than June 19, 2013.

54. On June 14, 2013, the FDIC sent Plaintiffs' counsel a draft complaint focused on Advanta's 2008 repricing practices and stated that the agency intends to file it imminently.

55. As a result of the FDIC's actions which constitute a clear breach of contract, Plaintiffs have incurred costs and fees to respond to the FDIC's threats and investigation. In addition, Plaintiffs have suffered other harm as a result of the FDIC's continued and repeated pursuit of these released claims.

56. Moreover, the FDIC's attempt to press released claims is especially egregious because those claims are now time-barred and not cognizable under Utah law.

57. The Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183, provides the applicable statute of limitations for the FDIC's claims.

58. FIRREA's statute of limitations provision provides: "Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be . . . in the case of any tort claim . . . the longer of — (I) the 3-year period beginning on the date the claim accrues; or (II) the period applicable under State law." 12 U.S.C. § 1821(d)(14)(A) (emphasis added). The period applicable under Utah law also is three years. For purposes of Section 1821(d)(14)(A), "the date on which the statute of limitations begins to run . . . shall be the later of—(i) the date of the appointment of the Corporation as conservator or receiver; or (ii) the date on which the cause of action accrues." 12 U.S.C. § 1821(d)(14)(B).

59. The FDIC was appointed receiver on or around March 19, 2010.

60. Accordingly, the latest the statute of limitations for the FDIC's claims began to run was on or around March 19, 2010. The FDIC's claims expired three years later, on or about March 19, 2013.[5]

61. In addition to the fact that the claims at issue are time-barred, such claims cannot survive under Utah law, which will govern these claims (because Advanta was a Utah bank). Under Utah law, a director or officer of a corporation is not liable to the corporation or any

[5] FIRREA's express language also preempts "any provision of any contract" that alters the three-year statute of limitations. To the extent that the FDIC would attempt to rely upon a tolling agreement to revive its time barred claim, that agreement would be void to the extent it purports to extend the statute of limitations in violation of FIRREA.

receiver for any action unless "(a) the director or officer has breached or failed to perform the duties of the office in compliance with this section; and (b) the breach or failure to perform constitutes gross negligence, willful misconduct, or intentional infliction of harm on the corporation or the shareholders." Utah Code Ann. 16-10a-840. Under Utah law, gross negligence is defined as "the failure to observe even slight care," or "carelessness or recklessness to a degree that shows utter indifference to the consequences that may result." *Blaisdell v. Dentrix Dental Sys., Inc.*, 284 P.3d 616, 621 (Utah 2012) (quoting *Berry v. Greater Park City Co.*, 171 P.3d 442, 449 (Utah 2007)); *see Bingham v. Roosevelt City Corp.*, 235 P.3d 730, 742 (Utah 2010) ("[G]ross negligence is equated with reckless disregard. While negligence generally connotes the failure to observe due care, gross negligence and recklessness are the failure to observe even slight care.") (quotation marks and footnotes omitted). In discharging his or her duties, an officer or director is "entitled to rely on information, opinions, reports, or statements" presented by employees and legal counsel. Utah Code Ann. 16-10a-840.

62. In Advanta's case, it is readily apparent that the FDIC cannot come close to meeting the applicable liability standard. As discussed above, Plaintiffs prudently and conservatively ran the Bank throughout its history, keeping the Bank well above the "well capitalized" requirement, maintaining significant cash reserves, and ensuring that the quality of its credit card debt was consistently high. Also critically important is the fact that their financial interests necessarily made each of them watch the welfare of the Bank like hawks, not ignore it in such a way as to fail to pay even the "slightest care."

63. Furthermore, Plaintiffs' actions were overseen and guided by the Board of Directors of the Bank, which was comprised of a majority of outside directors, all of whom were

independent and sophisticated. The Board was well-informed of the actions of the officers and the business of the Bank, receiving on a monthly basis a large number of reports looking at the business from many perspectives. Under Utah law, that is a separate and independent bar to the FDIC's potential claims.

64. Finally, the FDIC and the UDFI also were well aware of everything that was going on at the Bank, since the Bank was subject to extensive regulatory oversight – particularly during the relevant time period. The FDIC and the UDFI conducted five on-site risk management examinations and one visitation between September 2006 and March 2010, and the FDIC prepared semiannual capital market reviews intended to identify key risks and assist with supervision. The Bank also received excellent ratings through 2007, and was rated a "well-performing institution."

65. Plaintiffs' tireless, vigorous efforts to save the Bank are the antithesis of gross negligence. Indeed, Plaintiffs helped devise the Plan that would have saved the Bank, but for the FDIC's disgraceful breach of its promise.

66. Plaintiffs also were entitled to, and did, rely on the advice and counsel of the Bank's directors, officers, employees, legal counsel, and outside consultants, which precludes liability. *See* Utah Code Ann. § 16-10a-840(2).

67. The claims are also baseless because (i) the Bank has/had no legal basis to challenge the repricing campaigns given that, among other things, the Bank authorized and approved the repricing campaigns; (ii) the Bank obtained substantial financial benefits from the campaigns; and (iii) had the Bank not done the repricing campaigns it would have died earlier.

68. Accordingly, the FDIC has breached the Consent Order, and the FDIC's meritless claims are released, waived, or otherwise barred by the Consent Order, the statute of limitations, and/or the applicable Utah law.

COUNT II: THE FDIC SHOULD BE HELD LIABLE FOR ITS WRONGFUL CONDUCT WHICH WAS THE CRITICAL AND DETERMINING FACTOR IN THE DEMISE OF THE BANK AND THE RESULTANT MASSIVE DAMAGE

69. Plaintiffs incorporate by reference paragraphs 1 through 68 as if fully set forth herein.

70. The FDIC gave its consent to the Plan to save the Bank. This promise served as the critical, determining inducement for proceeding with the Plan. The FDIC made this promise with full knowledge that once execution of the Plan had commenced there would be no turning back, all other survival plans would be precluded, and the failure to successfully complete execution of the Plan necessarily would mean the demise of the Bank and the obliteration of all corporate value.

71. Based on the FDIC's promise, execution of the Plan was commenced. Such execution would not have taken place but for this promise, a promise which was relied upon by, among others, Alter, Rosoff, and the independent directors of the Bank. In the absence of the FDIC promise, a different plan for survival would have been followed.

72. After execution of the Plan had been commenced successfully, the FDIC did a dramatic, complete about face and withdrew its consent to the Plan.

73. This breach by the FDIC was willful, deliberate, and undertaken in bad faith.

74. As the FDIC well understood, the breach of its promise and change of position condemned the Bank to failure. And, in fact, shortly after and because of the FDIC breach, Advanta's parent was forced to declare bankruptcy, and Advanta was forced into receivership.

75. Tragically, subsequent events proved that the Plan would have been successful and but for the breach by the FDIC the Bank would have survived and the consequent massive damage avoided.

76. The wrongful conduct by the FDIC alleged above constituted both a breach of contract and breaches of other duties.

77. The victims of the FDIC's wrongful conduct included Messrs. Alter and Rosoff, as well as numerous other individuals and entities.

78. The damage inflicted by the FDIC as a result of its willful, deliberate, bad faith conduct upon Messrs. Alter and Rosoff, as well as others, amounted to hundreds of millions of dollars.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request judgment in their favor and against the FDIC on all counts as follows:

(a) A judgment against the FDIC for breach of contract and other duties arising out of the FDIC's deliberate decision to kill the Bank;

(b) A judgment against the FDIC for breach of contract arising of its continued pursuit of released claims;

(c) A declaration that:

(i) the FDIC's claims are barred by the applicable statute of limitations;

(ii) the releases and waivers in the Consent Order bar the FDIC's continued pursuit of its claims, in its own capacity or as receiver of the Bank; and/or

(iii) Plaintiffs did not breach their fiduciary or other duties to the Bank;

(d) A preliminary and permanent injunction enjoining the FDIC from continuing to pursue claims against Plaintiffs based on the barred, released, and waived claims; and,

(e) An award of damages, costs, expenses, attorney's fees, and such monetary and other legal or equitable relief as the Court deems just and proper.

Dated: June 17, 2013

Respectfully submitted,

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