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OF THE
STATE OF DELAWARE

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**Re: Fleet Financial Group, Inc.,
et al. v. Advanta Corp., et al.
Civil Action No. 16912-NC
Date Submitted: October 18, 2001**

Dear Counsel:

In an opinion dated October 11, 2001 ("Opinion"), this Court granted partial summary judgment in favor of Fleet on Count IX of Fleet's claim. Advanta then moved for reargument, contending that this Court erred in granting summary judgment on that portion of Fleet's claim that concerns an \$848,571 adjustment to the Prepaid Securitization Transaction Expense Account (the "contested amount"). This is the Court's decision on

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Advanta's Motion for Reargument. For the reasons next discussed, the Motion will be denied.

In its Opinion, this Court held that because Advanta had not addressed the contested amount in its brief or at oral argument, Advanta had conceded its liability to Fleet for that amount. On this motion, Advanta argues that the Court erred in so holding, because: (i) Fleet did not present sufficient evidence to warrant summary judgment on the issue, and (ii) at oral argument Advanta did in fact establish that the contested amount involved a genuine fact dispute.

Advanta concedes, however, that it did not address the contested amount in its summary judgment brief, but argues that it should not be faulted because it was not aware the contested amount was part of Fleet's summary judgment claim. Advanta's argument, expressed in terms of the summary judgment standard, is that Fleet never met its burden of establishing the absence of any disputed material fact on this issue,' because Fleet never presented facts or contentions that put Advanta on notice that it was obligated to dispute the claim.

¹ *Moore v. Sizemore*, Del. Supr., 405 A.2d 679,680 (1979).

As support for its contention, Advanta points to Fleet's opening summary judgment brief, wherein Fleet advanced a broad claim for \$12.6 million, which includes the contested amount.² Of that \$12.6 million claim, Fleet specifically discussed, in the body of its brief, components of the claim which totaled approximately \$11.3 million,³ but did not specifically address the remaining \$1.3 million (of which the contested amount is a portion). That omission, Advanta argues, entitled it (Advanta) to conclude that the remaining \$1.3 million (which included the contested amount) was not being pursued in Fleet's summary judgment motion.

Advanta's argument fails because it ignores the state of the record at the time the summary judgment motion was decided. Fleet's opening brief may not have been a model of clarity, but Fleet did present record evidence showing that Advanta owed Fleet the contested amount.⁴

First, Fleet's opening summary judgment brief took the position that Fleet was entitled to recover the *entire* amount of the \$12.6 million balance

² Fleet Op. Br. at 26.

³ Of that \$11.3 million total, \$7.37 million relates to balance sheet adjustments that Advanta had accepted, and \$3.923 million relates to other adjustments detailed in a report prepared by Robert Swegle, Fleet's accounting expert.

⁴ Once the moving party presents evidence that if undisputed would entitle it to summary judgment, the burden then shifts to the opposing party to dispute the facts by affidavit or proof of similar weight. Moore, 405 A.2d 680.

sheet adjustments alleged in Count IX of Fleet's Complaint. Indeed, in Fleet's brief that \$12.6 million claim is given its own heading in bold, capital letters.⁵ Moreover, in response to an interrogatory from Advanta asking Fleet to itemize the accounts that comprise the \$12.6 million claim, Fleet listed the component accounts, including the \$848,571 claim.

Second, although the contested amount was not highlighted specifically in the *body* of Fleet's summary judgment brief, it was set forth in an *attachment* thereto. Fleet attached, as an exhibit to its brief, a December 8, 1998 letter from Fleet's Controller, Robert Lamb, to Arthur Anderson's John Lafferty (Advanta's auditor). In that letter Mr. Lamb proposed certain adjustments to Advanta's draft of the Closing Balance Sheet-including the \$848,571 adjustment to the Prepaid Securitization Expense Account. Mr. Lamb's letter also included a detailed explanation of why Fleet believed that it was owed that amount. Because that detailed description was contained in a letter that was appended to Fleet's opening brief, for that reason as well, Advanta cannot credibly contend that "Fleet set

⁵ Fleet Op. Br. at 26.

forth no facts or arguments supporting its proposed adjustment of \$858,571.”⁶

Third, in its reply brief Fleet contended that because Advanta had addressed eleven of the twelve items comprising the \$12.6 million claim—but not the twelfth item (*i.e.*, the \$848,571 contested amount)-Advanta had necessarily conceded its liability to Fleet for that amount. Although Advanta had sufficient notice of Fleet’s position regarding the contested amount, Advanta made no effort to dispute that contested item. At no point did Advanta attempt to clarify what it now characterizes as “the misapprehen[sion] . . . of the parties’ dispute on summary judgment [with respect to the \$848,571 claim].”⁷ At the oral argument, which took place eight days after Fleet filed its reply brief, Advanta did not dispute the contention in Fleet’s brief that Advanta had conceded the contested amount. Indeed, Advanta appeared to agree that it had conceded \$11.6 million of the \$12.6 million claim (the contested amount being included in the \$11.6 million, the claim for the remaining \$1 million having been withdrawn). Counsel for Advanta stated that he “agree[d] with [Fleet’s] recitation with

⁶ Advanta Reargument Motion at 1.

⁷ *Id.*

respect to the \$12.6 million claim. . . . \$11.6 million of that, approximately, that we don't dispute Advanta owes.”⁸

Despite the foregoing, Advanta insists that the Court erred in concluding what no reasonable person confronted with this record could fail to conclude-that Advanta did not dispute Fleet's claim for the contested amount. The record, objectively viewed, showed that to be Advanta's position, and the Court did not misapprehend it .

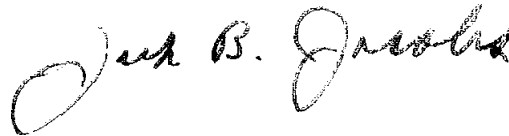
Presumably aware of the (unfavorable to it) state of the record at the time the Court issued its October 11, 2001 Opinion, Advanta attempts to improve that record by submitting the affidavit of David Weinstock, Advanta's Chief Accounting Officer and Vice President of Investor Relations, in support of its Motion. That affidavit offers to explain why Advanta never joined issue on the contested amount claim. The affidavit is improper on a motion

⁸ *Id.* at Ex. 4, pages 5-6. Elsewhere in the argument, in discussing a chart listing the dollar amounts of what Fleet contended were Advanta's concessions, Advanta's counsel stated that he was not sure what “all of these items mean”-including the “\$849,000 number.” *Id.* at page 45. The confusion of Advanta's counsel-as to the amounts Fleet alleges is owed by Advanta-does not constitute a “dispute . . . by affidavit or proof of similar weight.” *Tamer v. International Gen. Indus., Inc.*, Del. Ch., 402 A.2d 382,385 (1979).

for reargument, and therefore it will not be considered.⁹

For the reasons set forth, Advanta's Motion for Reargument is denied. **IT IS SO ORDERED.**

Very truly yours,

A handwritten signature in cursive script, appearing to read "Jack B. Jacobs".

CC: Register in Chancery

⁹ See *Miles, Inc. v. Cookson Am., Inc.*, Del. Ch., 677 A.2d 505, 506 (1995) (holding that "Chancery Rule 59(f) does not . . . authorize submission of affidavits in support of motions for reargument.) (internal citations and quotations omitted). Because the affidavit will not be considered, there is no need to address Fleet's motion to strike it from the record. If Advanta wished to dispute the contested amount, it could have, and therefore should have, done so when the motion for summary judgment was under consideration by this Court. See *Id.* at 505 ("[A] motion for reargument properly seeks only a re-examination of the facts in record a the time of decision .)."