IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FLEETBOSTON FINANCIAL CORPORATION FLEET NATIONAL BANK; FLEET BANK (RI), NATIONAL ASSOCIATION; FLEET CREDIT CARD SERVICES, LP; and FLEET CREDIT CARD HOLDINGS, INC.,

Plaintiffs and Counterclaim-Defendants

v.

ADVANTA CORP.; ADVANTA NATIONAL BANK; ADVANTA INSURANCE COMPANY; and ADVANTA LIFE INSURANCE COMPANY,

Defendants and Counterclaim-Plaintiffs.

C.A. No. 169 12-NC

MEMORANDUM OPINION

Date Submitted: April 10, 2002
Date Decided: January 22.2003

Arthur G. Connolly, III, Esquire, of CONNOLLY, BOVE, LODGE & HUTZ LLP, Wilmington, Delaware; and Peter J. Kahn, Dennis M. Black, and Brian J. Buckelew, Esquires, of WILLIAMS & CONNOLLY, LLP, Washington, D.C.; and John A. Houlihan, Steven M. Cowley, and Mary Patricia Cormier, Esquires, of EDWARDS & ANGELL, LLP, Boston, Massachusetts; and David H. Angeli, Esquire, of STOEL RIVES, LLP, Portland, Oregon; Attorneys for Plaintiffs and Counterclaim-Defendants

Todd Charles Schiltz, Esquire, of WOLF, BLOCK, SCHORR AND SOLIS-COHEN LLP, Wilmington, Delaware; and Jay A. Dubow, Matthew A. White, Nathan E. Kase and Robyn D. Kotzker, Esquires, of WOLF, BLOCK, SCHORR AND SOLIS-COHEN, LLP, Philadelphia, Pennsylvania; Attorneys for Defendants and Counterclaim-Plaintiffs

JACOBS, VICE CHANCELLOR

This action, commenced on January 22, 1999 by Fleet National Group, Inc. and certain affiliates (collectively, "Fleet")* against Advanta Corp. and certain of its affiliates (collectively, "Advanta"),[2] arises out of the February 1998 acquisition by Fleet of Advanta's $12.1 billion consumer credit card business. In its multi-count complaint, Fleet claimed that it was wrongfully caused to overpay for Advanta's credit card business, as a result of which Fleet seeks to recover approximately $141 million in-damages. In its answer, Advanta denied Fleet's allegations of wrongdoing and asserted counterclaims seeking damages of $101 million.

During the first two years of the lawsuit, two summary judgment motions were presented and decided. On January 5, 2000, this Court granted Fleet's motion, and dismissed Counts I and II of Advanta's counterclaim.[3] Thereafter, in an Opinion issued on October 11, 2001, the Court granted Fleet's motion for partial summary judgment on Count IX of its complaint, and Fleet's motion for

[1] The Fleet entities, which are the plaintiffs in this action, are Fleet National Group, Inc., Fleet National Bank, Fleet Bank (RI), National Association, Fleet Credit Card Services, LP, and Fleet Credit Card Holdings, Inc.

[2] The Advanta entities, which are the defendants in this action, are Advanta Corp., Advanta National Bank, Advanta Insurance Company, and Advanta Life Insurance Company.

[3] ***Fleet National Group v. Advanta Corp., 2000*** Del. Ch. LEXIS 4 (Del. Ch. Jan. 5, 2000) (Jacobs, V.C.).

summary judgment dismissing Counts III and IV, and a portion of Count VII, of Advanta's counterclaim.[4]

Thereafter, the matter was scheduled for trial. After the parties completed discovery and resolved certain claims and issues by stipulation, the claims and counterclaims remaining in dispute were tried from November 13 through December 12, 2001. This is the decision of the Court, following post-trial briefing, on the balance of the parties' claims and counterclaims.

1. FACTS COMMON TO ALL CLAIMS

What follows next are the facts that are common to all of the various claims and counterclaims. Because of the diversity and disconnectedness of the groupings of facts that underlie each claim, the facts will be discussed in the particular Analysis section that relates to that claim.

The transaction that gave rise to this lawsuit was the acquisition by Fleet of most of Advanta's consumer card credit business (the "Business") on February 20, 1998. The terms of that transaction were defined by the October 28, 1997 Contribution Agreement entered into by Fleet and Advanta.[5] Under that Agreement, the transaction was structured as a partnership to which the assets and

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[4] *Fleet National Group v. Advanta Cop, 2001* Del. Ch. LEXIS 125 (Del. Ch. Oct. 11, 2001) (Jacobs, V.C.)

[5] The Contribution Agreement was originally executed on October 28, 1997, and was amended on February 20, 1998. See PX 1. Unless otherwise stated, references to the "Contribution Agreement" are to the Contribution Agreement as amended.

liabilities of Advanta's credit card business were contributed. Fleet was to own a 95% interest in the partnership, with Advanta owning the remaining 5%. The consideration for those contributed assets was Fleet's assumption of contributed liabilities having a value which exceeded the value of the contributed assets by an amount equal to the "Agreed Deficit."

Under the Contribution Agreement, the Agreed Deficit was fixed as of February 20, 1998 and was defined by the following formula: (i) $5 10 million, plus (ii) a "Special Adjustment" of approximately $43 million, minus (or plus) (iii) an "Agreed Adjustment." The Agreed Adjustment would increase (or decrease) the Agreed Deficit by an amount that depended upon both the volume (amount) of "Managed Receivables," and the portion of Managed Receivables that were subject to promotional "Introductory [Interest] Rates."[6]

The effect of the Agreed Adjustment would be to increase the Agreed Deficit-meaning that Fleet would assume more liabilities, thereby paying more-if, at the Closing, the Managed Receivables were more than $12.1 billion, or if the level of Introductory Rate Balances was less than $2,192,520. Conversely, Fleet would assume fewer liabilities, thereby paying less, if the Managed Receivables were less than $12.1 billion or if the Introductory Rate Balances were

[6] **"Managed Receivables" and "Introductory Rate Balances" are terms that are defined in the Contribution Agreement.**

less than $2,192,520. Essentially, the claims in this lawsuit concern one or more elements of the formula by which the transaction consideration Fleet paid ***(i.e.,*** the Agreed Deficit) was to be calculated.

II. THE REMAINING CLAIMS AND COUNTERCLAIMS

Three claims asserted by Fleet and two counterclaims asserted by Advanta remain to be decided. They are next sumrnarized.

A. Summary Of Fleet's Claims

1. The "Miscodinn" Claim

Fleet's first claim is that Advanta concealed from Fleet that it had miscoded the interest rates on approximately $1 billion of new accounts receivable ("balance transfers" or "BTs") that Advanta had generated in October, November, and December of 1997 during an ambitious marketing campaign. The miscoding caused more than 500,000 accounts to accrue interest at significantly higher rates than Advanta had promised to the affected customers. Another effect of the miscoding, Fleet claims, was to understate by about $1 billion the amount of Advanta's Introductory Rate Balances as of February 20, 1998. Fleet contends that Advanta knew of the miscoding problem months before the February 20, 3 998 Closing, yet did not disclose the known facts to Fleet, which discovered the problem two months after the Closing, in April 1998.

As a result of the miscoding errors, Fleet ultimately refunded to (former Advanta) customers approximately $42 million. Of that amount, Fleet seeks to recover $4.2 million in this lawsuit.[7] In addition, Fleet seeks to recover approximately $3.3 million it expended to remedy Advanta's miscoding errors. The sum of these amounts ($4.2 million plus $3.3 million = $7.5 million) plus prejudgment interest, represents the damages to which Fleet claims entitlement on alternative theories of misrepresentation, unjust enrichment, and breaches of the Contribution Agreement.

2. The Introductory Rate Balance Claim

Fleet's second claim is that at the Closing Advanta understated the level of Introductory Rate Balances by almost $1 billion, and that as a result Advanta overstated the Agreed Deficit, thereby causing Fleet to overpay for the consumer credit card business. At the Closing, Advanta presented an estimated Introductory Rate Balance level of $1.7 billion. Fleet claims that if properly computed, the Introductory Rate Balance level, which tracks the definition in the Contribution Agreement, should have been $2.67 billion. Fleet claims that the approximate $1 billion understatement of the Introductory Rate Balances caused Fleet to

[7] The $4.2 million that Fleet seeks to recover is the portion of the refunded $42 million of excess interest that had accrued as of February 28, 1998.

overpay for the consumer credit card business by $21,199,200. Fleet seeks damages in that amount, plus prejudgment interest.

3. The "Relationship Management" Claim

Fleet's third claim is that Advanta violated certain covenants in the Contribution Agreement by engaging in an unprecedented "relationship management" campaign that increased credit card receivables at interest rates which were unprofitable and below Advanta's own cost of funds. Advanta did that, Fleet urges, to maximize the level of Managed Receivables-an important variable in the formula that would determine the consideration Fleet would pay. The result, Fleet argues, was to load up the acquired consumer credit card receivables portfolio with money-losing accounts. Fleet claims that it is entitled to damages of $7.6 million, plus prejudgment interest, on its claim that Advanta violated covenants in the Contribution Agreement to conduct marketing campaigns in the ordinary course and consistent with past practices.

Advanta vigorously contests all of these claims.

B. Summary of Advanta's Counterclaims

1. The "SmartMove Accounts" Counterclaim

Advanta's first counterclaim is for damages arising out of Fleet's refusal to accept Advanta's tender of certain "SmartMove" Accounts to Fleet on March 15, 1999. To elaborate, at the Closing, Advanta and Fleet executed Interim Servicing

Agreements that obligated the parties to provide certain support services for each other through 1998, with each party invoicing the other for the services rendered. Typically, each party offset the other party's invoices against the other amounts due.

The parties agree that as a'result of their mutual offsets, a balance is due to Fleet. The parties dispute the precise amount of that balance, however. One of Fleet's interim obligations was to service certain Advanta "Qualified SmartMove Accounts" and then remit the collections to Advanta. That obligation would terminate when Fleet accepted Advanta's valid tender of those accounts to it.

The sole question is on what date were the SmartMove Accounts effectively tendered. If the effective tender date was March 15, 1999, as Advanta contends, then Advanta owes Fleet $1.63 million on this claim. If, however, the effective tender date was May 10, 1999, as Fleet contends, then Advanta owes Fleet $1.7 million. Advanta seeks damages on its counterclaim for whichever of these amounts the Court determines is proper, plus prejudgment interest.

2. The "Improper Solicitation" Counterclaim

Advanta's second counterclaim is for damages claimed to have resulted from an erroneous solicitation, by Fleet in September 1998, of Advanta's business card customers. The solicitation was concededly improper because Fleet had acquired only Advanta's personal-and not its business-credit card portfolio.

Advanta contends that it was damaged in the amount of $3,612,303–an amount it claims represents the costs of communicating with the improperly solicited customers to mitigate the harm, plus the other damages caused by the attrition of Advanta's customer base. Advanta claims damages in that amount, plus prejudgment interest, based on its claim that Fleet tortiously interfered with Advanta's business cardholders. Not surprisingly, Fleet ardently disputes these counterclaims as well.

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The Court next considers and decides the parties' claims and counterclaims. Fleet's claims are addressed *in* Part ***III, infra,*** of this Opinion. Advanta's counterclaims are addressed in Part IV. Finally, in Part V, the Court discusses the matter of prejudgment interest.

III. ANALYSIS OF FLEET'S CLAIMS

A. The Miscoding Claim

1. Pertinent Facts And Contentions

During the Fall of 1997, Advanta embarked upon an ambitious marketing campaign designed to attract new balance transfers. That campaign involved offering prospective credit card customers promotional interest rates for a fixed period of time. A series of computer miscoding errors, however, caused over $1.1 billion of new balance transfers to be charged higher interest rates than the

promotional interest rates Advanta had promised. Although Advanta made assiduous efforts to fix the problem, it failed to accomplish that by the February 20, 1998 Closing. Of equal importance, Advanta did not disclose the miscoding problem to Fleet, and, as a result, Fleet did not learn of it until April 1998–two months after the Closing.

Immediately after learning of the miscoding problem, Fleet's CEO directed that intensive efforts be undertaken to remedy the miscoding errors, and to refund the excess interest to its new customers, as soon as possible. Despite Fleet's best efforts, it took six months, until October 1998, to resolve the miscoding problem. Ultimately, Advanta's miscoding errors were found to have affected 549,971 (formerly Advanta) customer accounts and resulted in Fleet refunding $41,820,842 of excess interest to those new customers. Fleet seeks to recover $4.2 million of that amount, which it claims was the accrued excess interest liability up to February 28, 1998. Fleet also claims that it also incurred $3.3 million of incremental costs to correct the miscoding errors and to refund the excess interest. The sum of those two amounts-$7.5 million-is the total recovery that Fleet seeks on this claim.

Fleet bases its claim upon alternative contract and tort theories, as well as a theory of unjust enrichment.[8] Fleet contends that Advanta breached two provisions of the Contribution Agreement: *first*, § 6.07(a)(v), which obligated Advanta to provide "prompt notice to Fleet" upon the occurrence of any "Material Adverse Effect" occurring between October 28, 1997 and the Closing; and *second*, § 1.06(f) of the First Amendment to the Contribution Agreement, which obligated Advanta to provide Fleet with an accurate Closing Balance Sheet of the Business as of the date required for its submission. Fleet contends that these provisions were breached, because (i) the miscoding problem was a Material Adverse Effect of which Advanta was required to give Fleet prompt notice, and (ii) the Closing Balance Sheet was inaccurate because it did not reflect the excess interest liability caused by the miscoding problem.

Fleet first claims that Advanta's failure to disclose the miscoding problem and its economic impact were material misrepresentations and omissions that are actionable in tort. Fleet contends that Advanta is liable under the doctrine that,

[8] Although Fleet invokes unjust enrichment as an alternative theory of recovery, that claim necessarily depends upon Fleet succeeding on its contract or tort claims. Fleet's claim is that Advanta was "unjustly enriched" by retaining the $4.2 million of excess interest, plus the additional amounts required to fix the problem (claimed to total $3.5 million). But, for Advanta's retention of those amounts to be "unjust," the retention would have to be illegal. Because Fleet's unjust enrichment claim rests upon the validity of its contract and tort claims, the unjust enrichment theory adds nothing independent to the analysis, for which reason that theory will not be further addressed in this Opinion.

even without an affirmative misrepresentation, an omission to disclose a material fact is actionable in tort.

Specifically, Fleet claims that Advanta is liable for concealing from Fleet its knowledge that (i) there were significant miscoding errors that, by February 28, 1998, had affected over 11% of the acquired Business's Managed Receivables, and (ii) those errors had not been resolved, and (iii) as a result, new balance transfers would continue to be erroneously processed. Fleet argues that the evidence shows that Advanta intentionally- or alternatively and in any event, negligently– concealed those facts.

Fleet also contends that Advanta is contractually liable for having affirmatively misrepresented material facts in breach of Sections 4.03(b) and 8.03(b) of the Contribution Agreement. In § 4.03(b), Advanta represented and warranted that "no event has occurred or fact or circumstance arisen that, individually or taken together with all other facts, circumstances, and events, has had, or is reasonably likely to have a Material Adverse Effect upon the acquired Business.[9] Section 8.03(b) required that the above representation "shall be true and correct . . . on and as of the Closing Date [February 20,1998], with the same effect as though [it] had been made on and as of the Closing Date . . .."[10] Fleet further

[9] PX 1 at A-03130.
[10] *Id.* at A-03163.

claims that Advanta overstated the value of the contributed assets on the Closing Balance Sheet by not disclosing its liability to refund $4.2 million of excess interest that, as of the Closing date, had accrued because of the miscoding.

Advanta does not dispute that the miscoding error occurred, or its magnitude. What Advanta argues is that it did not know that the problem was extensive. Only later did it learn the true dimension of the problem. Indeed, Advanta argues, as of the Closing, all it knew was that the problem was of the $80,000 to $100,000 order of magnitude-an immaterial amount given the $12 billion value of the credit card business being acquired. Therefore, Advanta argues (i) it could not conceal from Fleet facts that it did not know and (ii) Advanta's management did disclose to Fleet what it knew in a Monthly Business Review delivered to Fleet before the Closing.

That factual contention is the underpinning of Advanta's defense. Specifically, Advanta argues that it made no intentional misrepresentation, because it did not misstate any facts of which it was aware as of the Closing. To prove actionable misrepresentation, Advanta says, Fleet was required to (but did not) show that Advanta made false statements of material fact with knowledge or reckless disregard of the falsity. Second, Advanta made no negligent misrepresentations, because Advanta disclosed to Fleet all the facts that its management knew before the Closing.

Advanta further argues that Fleet's tort theories of misrepresentation, and one of Fleet's breach of contract theories, must fail, because §§ 4.02 and 8.03 of the Contribution Agreement require that misdisclosed (or nondisclosed) facts rise to the level of a "Material Adverse Event." Advanta contends that Fleet has not shown that the miscoding problem was a Material Adverse Event.[11] Of equal demerit, Advanta insists, are Fleet's remaining tort and breach of contract claims. The reason is that those claims-rest upon the proposition that Advanta did not submit an accurate Closing Balance Sheet-a proposition that fails because Advanta's public accounting firm, Arthur Andersen & Co. ("Andersen"), determined not to adjust the Closing Balance Sheet for the excess interest liability which (Andersen had found) was "immaterial and subjective" for accounting purposes.

Advanta also raises three affirmative defenses. First, it argues that Fleet is barred from recovering in tort for misrepresentation because under Pennsylvania's

[11] "Material Adverse Effect" is defined in $2.01 (ddd) of the Contribution Agreement as including any effect that "is material and adverse to the assets, liabilities, financial position, business or results of operations of the Business, taken as a whole . , .." PX1 at 03125. Advanta contends that the miscoding problem, while constituting an "adverse" effect upon the financial position of the Business, was certainly not "material" in any dollar sense, even accepting Fleet's position that as of February 20, 1998 the excess interest liability was $4.2 million. Nor, urges Advanta, was the miscoding problem a Material Adverse Effect in any legal sense because it was not an effect that would be "consequential to the company's earnings power over a commercially reasonable period, which . . . would be measured in years rather than months." Advanta Post-Trial Br. at 24 (citing ***In Re IBP S'holders Litig.,*** 2001 WL 675330, at *42, (Del. Ch. June 18, 2001) (Strine, V.C.)). Advanta emphasizes that the problem, once discovered by Fleet, was fixed in six months.

"economic loss doctrine" a party cannot recover for purely economic losses that flow from a contractual relationship.[12] Second Advanta contends that Fleet's claims are barred under § 4.20 of the Contribution Agreement, which provides that (i) except for Advanta's explicit representations and warranties, Advanta makes no further representations or warranties regarding the contributed assets, and that (ii) those assets are to be accepted "AS IS . . . without any representation or warranty whatsoever."[13] Because Fleet has not established a breach of any contractual representation or warranty, Fleet is bound by that clause.

Advanta's third affirmative defense is that under § 1.01 of the Contribution Agreement, Fleet assumed all liabilities on Schedule 2. That Schedule included "[a]ll liabilities resulting from or arising out of the Company Contributed Assets . . . to the extent such liabilities arose from the operations of the Business in the ordinary course in a manner substantially similar to the operation of a credit card business by one or more of the 20 largest credit card issuers in the United States."[14] That precludes a recovery, Advanta insists, because the miscoding errors arose out of Advanta's "ordinary course of business" and because at any large credit card company programming errors like these do happen.

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[12] Both sides appear to agree that Pennsylvania law governs Fleet's tort and contract claims, although the parties also cite Delaware case authority in support of their positions.

[13] PX 1, § 4.20 at A-03140-41 (capitals in original).

[14] PX 1, Schedule 2 at A-03522.

Finally, Advanta urges that, even if Fleet is found to have established its entitlement to recover for the miscoding errors, Fleet failed to prove the damages it claims to have suffered. According to Advanta, Fleet's claim for $4.2 million in excess interest is infirm because it rests upon a witness's flawed estimate of the amount that was overbilled as of February 28, 1998, rather than upon proof of what Fleet actually refunded on Advanta's behalf. Also, $2.3 million of the $4.2 million is claimed to represent amounts that were billed *after* February 28, 1998 by Fleet, not Advanta. Lastly, Fleet's damages estimate is undercut by an internal memorandum by a senior Fleet executive which shows that Fleet over-rebated $4.5 million.[15]

Advanta also attacks Fleet's claim for the $3.3 million in incremental costs incurred to fix the miscoding problem. The basis for the attack is that, except for $226,000 paid to First Data Resources ("FDR"), a credit card processor, none of the $3.3 million represents an identifiable incremental, out-of-pocket cost that Fleet actually incurred. According to Advanta, Fleet hired no extra persons to handle the problem, acquired no new facilities or equipment, nor incurred any additional telephone costs. Rather, Fleet retained the sarne level of staff and infrastructure and paid the same salaries. For these reasons, Advanta concludes, the claim for $3.3 million of incremental costs fails for lack of proof.

[15] Advanta is referring to PX 146.

In the Discussion that follows, only two of these claims, and the defenses relating thereto, are considered, because to address all the claims would unnecessarily protract this lengthy Opinion. As explained more fully *infra,* the Court concludes that Advanta's failure to disclose the facts relating to the miscoding problem at or before the Closing constituted violations of Advanta's duties under contract and tort law, specifically, (i) Advanta's obligation under § 1.06(f) of the First Amendment to the Contribution Agreement to provide to Fleet an accurate Closing Balance Sheet and (ii) Advanta's duty under tort law to exercise due care to disclose facts material to the subject matter of the contract. The Court also finds that none of Advanta's affirmative defenses bars Fleet from recovering against Advanta for those violations.

2. Discussion

a. *The Facts That Advanta Knew And Disclosed To Fleet*

Before turning to the specific liability issues that flow from Advanta's nondisclosure of the facts relevant to the miscoding, the Court must first determine what facts Advanta knew, and what facts it disclosed to Fleet, as of the Closing.

As noted, Advanta claims that although it knew there was a miscoding problem it was unaware of that problem's full scope or dollar magnitude. Advanta insists that at the time of the Closing, all it knew was that the miscoding problem was of the $80,000 to $100,000 order of magnitude-insignificant in a $12 billion

transaction. Advanta also claims that the problem was 80% fixed, and was on its way to being fully resolved. Lastly, Advanta contends that all the facts that it knew were disclosed to Fleet before the Closing. The evidence, however, discredits these contentions.

The evidence shows that, by January 1998, Advanta recognized that it faced “a significant breakdown in a process that was critical to the business.”[16] In November and December 1997, customer service call volumes were significantly “over forecast primarily due to unexpected balance transfer errors and general acquisition related inquiries.“” By December 1997, Advanta’s Settlement Group knew that the miscoding problem affected at least $10 million in balances. At a meeting of a special Advanta task force convened on December 17, 1997 to deal with balance transfer problems, the miscoding problem was viewed by one of the participants as “a very highly visible issue” about which there was “a high level of awareness or a high level of sense of importance in getting these issues resolved.“” As of January 27, 1998, Advanta personnel were reporting that 15,000 accounts had been affected (an estimate that continued to grow), that 500 hours would be required just to make the necessary adjustments to those accounts, and that no systematic “fix” had yet been found.[19]

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[16] **Trial Tr. at 823.**
[17] **DX 55 at 2486-87.**
[18] **Trial Tr. at 754,855.**
[19] **PX 61 at 38641; Trial Tr. at 790.**

Although there is some indication that Advanta personnel initially viewed the miscoding problem as "80% fixed," by January 16, 1998 they had concluded that their initial assessment was incorrect, and that the actual percentage of "fixed" accounts would be much less than 80%.[20] Indeed, as the end of January 1998 drew near- only weeks before the Closing-Advanta's customer service group recognized that the problem was not close to being fixed and that "another negative period [was] on the horizon as we deal with customer issues around the BT process problems."[21]

Thus, by the time of the Closing, Advanta personnel knew-and its senior management ought to have known-that on the eve of the sale of its consumer credit card business to Fleet Advanta was experiencing a serious miscoding problem. That problem would only become worse, because as Advanta personnel recognized, there would be "a big stream of post acquisition BT activity."[22] The gravity of the problem is underscored by the fact that as by February 28, 1998, Advanta's miscoding errors had affected 549,97 1 accounts valued at $1.134 billion-approximately 11% of the value of the Business being acquired.

In its Post-Trial Brief, Advanta contends that it "disclosed [to Fleet] what information it had,"[23] but the record shows otherwise. The disclosure upon which

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[20] Trial Tr. at 779-782.
[21] PX 61 at 3864142.
[22] PX 432.
[23] Advanta Op. Post-Trial Br. at 2.

Advanta relies did not occur in any direct communication from senior Advanta officials alerting their counterparts at Fleet to the specific problem. Rather, whatever disclosure was made to Fleet was indirect and oblique. The disclosure is found on pages 12 and 13 of the 15-page Monthly Business Review for December 1 997.[24] That document, Advanta says, "clearly explain[ed]" the problem and "disclosed customer service issues and balance transfer errors."[25] In fact, those pages reveal nothing that would alert a reasonably intelligent reader to the existence, nature, or scope of the miscoding problem. At the trial, William Rosoff, Advanta's President and Vice Chairman, admitted that that document was insufficient to put Fleet on notice of the existence of a serious balance transfer problem.[26]

In short, Advanta did not disclose to Fleet either at or before the Closing the known facts about the serious miscoding problem of which Advanta's own personnel were aware and for which no systemic fix was on the horizon.[27]

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[24] DX 55.

[25] Advanta Op. Post-Trial Br. at 13.

[26] Trial Tr. at 1442- 1443.

[27] In their briefs, the parties devote much discussion to the issue of whether Advanta knowingly or intentionally concealed this information from Fleet. If, in fact, Advanta intentionally concealed this information, such conduct would have amounted to deception, and, quite possibly, fraud. Fleet assiduously argues that Advanta's concealment of the known facts was intentional because the facts were known to Advanta personnel below the senior management level and because senior management was made aware of the efforts to correct the problem. As the proponent of that claim, Fleet has the burden of proof. And while there is evidence from which it can be inferred that Advanta intentionally concealed the known facts from Fleet, Advanta senior management testified that, to their knowledge, the miscoding problem was not one of significant magnitude. Although that testimony is to a degree self-

The issue, therefore, is whether Advanta is liable to Fleet for not disclosing the known facts that related to the miscoding problem. For the reasons now discussed, the answer to that question is "yes."

b. *The Bases For Advanta 's Liability To Fleet*

(i) Section 1.06(f) of the Contribution Agreement

Fleet contends, and Advanta concedes, that § 1.06(f) of the Contribution Agreement required Advanta to provide Fleet with an accurate Closing Balance Sheet of the Business as of February 28, 1998.[28] It is undisputed that Advanta did not disclose to Fleet the existence or extent of Advanta's liability to refund to its customers the "excess interest" resulting from the miscoded balance transfers. The inevitable result of that nondisclosure was that Advanta overstated on the Closing Balance Sheet the value of the assets it was transferring. In that respect, Advanta violated § 1.06(f) of the Contribution Agreement.

Advanta denies that its nondisclosure of the excess interest liability constituted a breach of § 1.06(f), because Advanta did not "knowingly" fail to

serving, there is no evidence that negates the possibility that Advanta's lower echelon management failed to communicate the gravity of the problem to senior management. Such a breakdown in communication would explain why the known facts relating to the miscoding problem were not communicated to Fleet, since one must assume that a communication of such gravity would be by senior management. The end result is that, on the issue of whether Advanta's nondisclosure of the known facts was intentional, the evidence is in equipoise. I therefore am unable to conclude that Advanta's nondisclosure of the known facts was intentional, but I do conclude, elsewhere in this Opinion, that it was the product of negligence.

[28] PX 3 at A-03636 (First Amendment § 1.06 (f)); Fleet Post-Trial Reply Br. at 14; Advanta Revised Op. Post-Trial Br. at 28.

disclose the miscoding-caused interest accrual on the Closing Balance Sheet. Moreover, Advanta asserts that as an accounting matter, the "[interest accrual] adjustments were properly 'passed"' because "Arthur Andersen [Advanta's outside auditor] had concluded that the amounts were immaterial and 'subjective.'"[29]

Advanta's argument is flawed for several reasons. First, the duty imposed on Advanta by § 1.06(f) to provide an accurate Closing Balance Sheet is unqualified and unconditional.- No language in that provision limits the universe of culpable misstatements to those that are "knowing" (as Advanta implicitly suggests), or carves out from its coverage misstatements or omissions that are "unknowing." Hence, Advanta's argument that it committed no breach because its overstatement of assets was "unknowing" is not a defense.

Equally unpersuasive is Advanta's argument that its accounting firm, Andersen, approved the noninclusion of the accrued excess interest adjustment on the Closing Balance Sheet because that adjustment was "immaterial and subjective." On the contrary, the evidence relating to this defense establishes that Anderson believed an adjustment should be made, and that the propriety of its non-inclusion has not been established to the Court's satisfaction.

The only documentary support for Advanta's position is found in a note in Andersen's workpapers, prepared on January 30, 1999, which says "Subjective

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[29] **Advanta Op. Post-Trial Br. at 28.**

amount-disclose in footnotes."[30] Eighteen days later, however, Andersen's Marc Williamson drafted a detailed memorandum entitled "Interest Rate Rebate Analysis," wherein Williamson proposed a $3.7 million adjustment "to reduce the interest overaccrued as a result of a BT program which transferred balances at 13.99% as opposed to the correct amount offered to customers of 3.99%."[31] Similarly, on February 10, 1999–eleven days after Andersen's workpapers were prepared-David Weinstock, an Advanta financial officer, circulated to Elizabeth Mai, Advanta's General Counsel, and to Phil Browne, another Advanta financial officer, an updated draft Closing Balance Sheet that incorporated the $3.7 million adjustment.[32] Mr. Browne reviewed and signed off on the draft Closing Balance Sheet, including the page that disclosed the $3.7 million adjustment.[33] Despite that, Advanta did not make the adjustment on any of the Closing Balance Sheets that it presented to Fleet, nor did it even disclose the problem in a footnote as the Andersen workpapers had proposed.

According to John Lafferty, the Andersen partner with overall responsibility for Advanta's Closing Balance Sheet audit, the adjustment was not made because it was imrnaterial from a GAAP perspective when netted against all of the other

[30] PX 80 at A-01 857.

[31] PX 279. Mr. Williamson did not suggest that the amount was "subjective," or that Andersen required additional detail from Fleet, as Advanta suggests in its brief. See Advanta Post-Trial Br. at 25.

[32] See PX 275 at 5685, 5694; Trial Tr. at 2001-2002.

[33] *Id.*

proposed adjustments that Advanta did not include on the Closing Balance Sheet.[34] Even if that were appropriate as an accounting matter, as a legal matter that did not excuse Advanta from complying with its disclosure obligation under § 1.06(f) in these circumstances. Given the gravity of the miscoding problem, Advanta cannot hide behind that accounting judgment without demonstrating the reasonableness of that judgment. Advanta has made no effort to do that, and the evidence of record shows that the judgment not to disclose the existence of the miscoding problem in some meaningful form was unreasonable.

As earlier discussed, even Advanta's own accounting personnel believed that the adjustment should be made. Mr. Lafferty testified that Andersen "most definitely" thought that the adjustment had been made and posted it to a "proposed adjustment" sheet.[35] John Calamari, Advanta's then Chief Accountant, similarly recalled that Andersen believed the adjustment was appropriate.[36] But the adjustment was not made, and the only reason proffered is that Anderson thought it was not material, but Advanta offers no explanation of why. On what basis was it reasonable to exclude from the Closing Balance Sheet an adjustment that all the relevant players at Advanta and Anderson believed was appropriate? And if the

[34] Lafferty Dep. (9/8/2000) at 305-307.
[35] Lafferty Dep. (9/8/2000) at 305-506.
[36] Calamari Dep. (1 l/8/2000) at 134-135.

adjustment was to be excluded from the Closing Balance Sheet, then why was it reasonable not to make, at a minimum, full disclosure in a footnote of the miscoding problem and the proposed adjustment it might require? Advanta makes no effort to address these questions. In these circumstances the Court cannot, therefore, accept Advanta's defense that the Closing Balance Sheet adjustment was properly excluded as immaterial.

Next, Advanta contends-that even if it is found to have breached §1.06(f) of the Contribution Agreement, it is protected from liability by two other provisions of that Agreement. The first is the "as is" clause, which appears in § 4.20 of the Contribution Agreement. Article IV of that Agreement sets forth the express representations and warranties Advanta made to Fleet concerning its consumer credit card business, and then provides that no other representations or warranties were being made:

> Except as otherwise set forth in this Agreement, the Company Contributed Assets to be contributed and transferred hereunder are to be contributed and transferred and are to be accepted by the LLC in an "AS IS" condition, without any representation or warranty whatsoever. EXCEPT AS OTHERWISE SET FORTH IN THIS AGREEMENT, THE COMPANY MAKES NO REPRESENTATION OR WARRANTY WHATSOEVER, EXPRESS OR IMPLIED, AS TO THE COMPANY CONTRIBUTED ASSETS . . ..[37]

[37] PX 1, $4.20 at A-3140-41 (capitals in original).

Advanta contends that because it made no express representations or warranties relating to the miscoding issue, Fleet was contractually obligated to receive the assets of the Business "as is," and assumed the financial responsibility to remedy any infirmities in those assets, including the miscoding problem. The difficulty with that argument is that, under Pennsylvania law, an "as is" clause covers only defects that were unknown at the time the contract was executed?[38] "As is" clauses do not insulate-sellers from liability for failing to disclose known defects, as Advanta did here.

Advanta's second affirmative defense is that under § 1.01 of the Contribution Agreement, Fleet assumed all of the Liabilities on Schedule 2 (the "Company Transferred Liabilities"), which include:

> (B) All liabilities resulting from or arising out of the Company Contributed Assets prior to the Closing Date to the extent such liabilities arose from the Operations of the Business in the ordinary course in a manner substantially similar to the operation of a credit card business by one or more of the 20 largest credit card issuers in the United States.

This provision applies, Advanta claims, because the miscoding errors arose from the operation of Advanta's consumer credit card business in the ordinary

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[38] *PBS Coals, Inc. v. Burnham Coal Co.*, 558 A.2d 562,564 (Pa. Super. 1989).

course and because "the record shows that computer programming errors are known to happen at other large credit card companies-including Fleet."[39]

This argument is flawed, because although the miscoding error arose in the "course" of Advanta's business, the errors were anything but "ordinary." According to Lorene Storm, a former FDR employee who is currently employed by Fleet, the recovery was "[m]uch, much larger" than anything she had encountered during her nine years at FDR. Indeed, Ms. Storm was unaware of any other recovery in which the dollars of affected balances amounted to even one percent of the issuer's total managed receivables.[40] Here, in contrast, as of February 20, 1998, the miscoding issue had infected more than 11% of the credit card company's receivables.[41] It was Advanta's burden to prove that miscoding errors of that massive magnitude were typical of "the operation of a credit card business by one or more of the 20 largest credit card issuers in the United States." Advanta fell woefully short of carrying that burden.

(ii) Negligent Misrepresentation

Advanta's nondisclosure of the known facts relating to the miscoding problem also renders it liable in tort. As previously found, Advanta personnel

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[39] Advanta Post-Trial Br. at 32.

[40] Trial Tr. at 665.

[41] As of February 28, 1998, Advanta had $11 .839 billion of total managed receivables, of which the mispriced balance transfers accounted for more than $1.34 billion. Tr. 1076-77,1099-1101.

below the senior management level were aware of material facts that were not disclosed to Fleet.[42] Even if senior management were not aware of all the known facts (perhaps because no mechanism was in place to assure that the facts would be communicated to them), that information was so highly important that senior management "ought to have known" of it.[43]

Advanta interposes two doctrinal defenses to Fleet's negligent misrepresentation claim. The first is the "economic loss" doctrine, which under Pennsylvania law precludes parties from recovering, under theories of tort liability, purely economic losses that flow from a contractual relationship.[44] The second is Pennsylvania's "gist of the action" doctrine, which bars a claim in tort if the true nature or gist of the alleged wrong is breach of contract rather than tort.[45] The Court concludes that neither defense bars Fleet's tort claim.

With respect to the economic loss doctrine, the cases Advanta cites indicate that, where negligence claims are asserted, that doctrine is applied primarily in the

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[42] Although the known facts relating to the miscoding problem were material, it does not necessarily follow that the miscoding problem constituted a Material Adverse Effect within the meaning of the Contribution Agreement. Because liability is predicated upon other grounds, it is unnecessary to reach that issue.

[43] *Bortz* v. *Noon, 729* A.2d 555,561 (Pa. 1999) ("The elements of negligent misrepresentation differ from intentional misrepresentation in that the misrepresentation must concern a material fact and the speaker need not know his or her words are untrue, but must have failed to make a reasonable investigation of the truth of these words.")

[44] *See Duquesne Light Co. v. Westinghouse Electric Corp., 66* F.3d 604,618 (3d Cir. 1995).

[45] *See Redev. Auth. of Cambria v. Intern. Ins.,* 685 A.2d 581,590 (Pa. Super. 1996); see *also Bohler-Uddeholm Am., Inc. v. Ellwood Group, 247* F.3d 79,104 n.1 1 (3d Cir. 2001).

products liability and construction law contexts.[46] No effort was made to justify extending that doctrine to these quite different circumstances. As for the "gist of the action" argument, Advanta urges that the doctrine applies because, but for the parties' contract, Advanta would owe no duty of any kind to Fleet in connection with the sale of Advanta's consumer credit card portfolio. But it does not necessarily follow from the fact that the parties entered into a contractual relationship, that as a result all-tort duties are displaced.[47] If (hypothetically) § 1.06(f) had not required the disclosure of the liability caused by the miscoding, Advanta would still have a duty arising in tort to disclose that information before Fleet closed on the transaction. For this reason, the misrepresentation was not rooted solely in the contract thereby rendering the gist of the action contractual.[48] Advanta's two doctrinal affirmative defenses are, therefore, rejected.

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Having concluded that Advanta is liable to Fleet for the costs of rectifying the miscoding error for which Advanta was responsible, I turn to Fleet's damages claim.

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[46] *Cambria,* *685* A.2d at 590, *Bohler-Uddeholm,* *247* F.3d at 104 n-11; *Palco Linings, Inc. v. Pavex, Inc., 755* F. Supp 1269, 1271-72 (M.D. Pa. 1990).

[47] *See Am. Guar. & Liab. Ins. Co. v. Fojanini,* 90 F. Supp.2d 615,622 (E.D.Pa. 2000); *Fox's Foods, Inc. v. Kmart Corp., 870* F. Supp. 599, 608-09 & n.11 (M.D. Pa. 1994).

[48] Where the misrepresentation are rooted in the agreement, however, a contract action will arise. *Werner Kammann Maschinenfabrik v. Max Levy Autograph, Inc.,* 2002 U.S. Dist. LEXIS 1460, at *21 (E.D. Pa. Ian. 31, 2002).

c. Fleet's Damages

As earlier noted, Fleet's $7.5 million damage claim has two components: (i) $4.2 million, representing the portion of the almost $42 million of excess interest, refunded by Fleet to former Advanta customers, that had accrued as of February 28, 1998, plus (ii) $3.5 million of out-of pocket expense (other than the interest refunds) that Fleet claims it incurred to rectify the miscoding problem. Advanta challenges both components. I find, for the reasons next discussed, that Advanta's criticisms lack merit.

The main thrust of Advanta's attack on Fleet's damages claim is that Fleet was unable to "proffer an exact amount" of the damages that it incurred as a result of Advanta's miscoding. But, under Pennsylvania law a plaintiff is not required to establish damages with exactitude; "reasonable certainty" is sufficient.[49] Moreover, any uncertainty must be resolved against Advanta, because "[a] party who has, by his breach, forced the injured party to seek compensation in damages should not be allowed to profit from his breach where it is established that a significant loss has occurred."[50]

Advanta attacks Fleet's $4.2 million excess interest claim on the ground that it represents an estimate, as distinguished from an actual refund, of the excess

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[49] *Exton Drive-In, Inc. v. Home Indem.Co., 261* A.2d **319,324 (Pa. 1969); see** *also Falcon Tankers, Inc. v. Litton Sys., Inc., 380* A.2d **569,588 (Del. Super. 1977).**

[50] *Restatement (Second) of Contracts* § *352,* **cmt. a (1981).**

interest caused by the miscoding error. Advanta contends that before Fleet can recover any monies from Advanta, it must prove that Advanta actually sent out a bill with too high an interest rate and that the customer actually paid that bill.[51] This argument ignores the realities of the case and the nature of the harm caused by Advanta's conduct.

It is undisputed that because of the miscoding errors, interest higher than the promotional rate ("excess interest") had accrued on accounts that eventually totaled over $1 billion. When Fleet acquired the Business, it acquired and paid for a collection of asset and liability accounts. The asset accounts included cash, accounts receivable (including interest that had been billed but not received) and an "unbilled accrual" account, representing interest that had accrued but had not yet been billed. Whether or not the interest had been *billed* or paid as of February 28, did not matter because any credits for amounts that had *accrued* as of February 28 caused a reduction of the assets for which Fleet had paid. When Fleet later credited over-accrued interest erroneously charged to the customers, the offsetting accounting operated to reduce the value of the assets on Fleet's books. Whether the asset reduction was from a cash account, a receivable account or an unbilled accrual account does not matter because under any of these scenarios Fleet suffered the same economic harm.

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[51] **Advanta Op. Post-Trial Br. at 15.**

Thus, Advanta's contention that the excess interest component of the damage claim can only be proved by amounts actually billed to, then paid by, and then refunded to, Advanta customers lacks merit. Of the total dollar amount of excess interest Fleet actually refunded, it was proper for Fleet to seek to recover that portion that had accrued up to February 28, 1998.

It is undisputed that Fleet refunded $4 1,820,842 to Advanta's former customers. After that process was completed, Fleet asked David Mietlicki, a Fleet employee responsible for financial planning, forecasting, and financial analysis, to calculate that portion of the almost $42 million Fleet had paid on Advanta's behalf, which had accrued as of February 28, 1998. Mietlicki performed a series of analyses, as a result of which he concluded that between approximately $4.2 million and $8.7 million of excess interest had accrued to Advanta's benefit, up to February 28, 1998.[52] Fleet selected the lowest point in that range— $4.2 million-which represented only 10% of the total excess interest Fleet actually refunded, and only $5 million more than the $3.7 million Advanta's own accounting firm, Andersen, had calculated. Fleet has shown to the Court's satisfaction that $4.2 million represents Fleet's excess interest damages with the "reasonable certainty" required by Pennsylvania law.

[52] Trial Tr. at 8594378; PX 360, PX 361.

Similarly deficient are Advanta's criticisms of Fleet's claim for $3.3 million of incremental costs that Fleet incurred to rectify the miscoding problem. Most of that amount represents additional labor costs associated with handling the increased call and mail volume and the associated incremental telephone charges and mailing expense.[53] Also included in that amount was $226,5 12.50 that Fleet paid to FDR for FDR's services during the recovery effort.

Advanta contends that except for the $226,5 12.50, which was an identifiable incremental cost,[54] the balance of Fleet's claimed damage figure is not recoverable because it does not represent true incremental costs. Stated differently, Advanta argues that Fleet incurred no other incremental costs (including telephone costs) because it hired no extra persons nor added any new facilities to deal with the miscoding problem but, rather, kept the same staff levels (at the same salaries) and the same infrastructure.

Fleet's response is that, except for $13 1,000 of "QA/Support and Management" expense, the balance of its $3.3 million claim represents actual incremental costs. In particular, Fleet's claim for $1.45 million of telephone expense was an incremental cost based solely on the number of calls related

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[53] **Trial Tr.** at 969-78, 987-89.

[54] **Advanta also contests the $226,000 on the ground that it was paid after the Closing. The argument is frivolous because the issue is when the liability arose, not when it was paid, and in this case, the liability would have arisen before the Closing because the miscoding resulted from Advanta's operation of the Business before the Closing.**

specifically to the miscoding problem, the average duration of such calls, and the variable costs (6 cents per minute) that the telephone company actually charged Fleet for those calls.[55] Because those calls would not have been made but for Advanta's miscoding errors, and because they caused Fleet to pay actual out-of-pocket dollars, the Court agrees that the telephone expense was incremental.

As for the balance of the $3.3 million claim, Advanta has added no credible evidence which persuades the Court that those amounts do not represent incremental, out-of-pocket costs actually incurred to remedy the miscoding problem.

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In summary, Fleet has proved to the Court's satisfaction that it incurred actual damages of $7,369,000[56] as a result of the miscoding problem. Therefore, a judgment in that amount will be entered against Advanta on Fleet's miscoding claim.

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[55] Trial Tr. at 969-77. The evidence shows that the miscoding issue drastically increased the call volume in Fleet's customer service department for months following the Closing. From March to July of 1998, monthly average call volumes increased by approximately 85% from the previous year's monthly averages, and the average time to answer an incoming call increased more than eightfold. Trial Tr. at 947-95 1; PX 206 at 130212. Once the miscoding issue was resolved in the Fall of 1998, call volumes and related performance measures returned to their normal levels. Trial Tr. at 1036; PX 206 at 130212; PX 477.

[56] $7,500,000 less the $13 1,000 of non-incremental "opportunity costs."

B. The Introductory Rate Balance Claim

1. <u>The Nature Of The Dispute</u>

At issue on Fleet's second claim is the correct level of Introductory **Rate** Balances *(i.e.,* customer account balances on which interest accrued at below market or "introductory" rates) that Advanta transferred to Fleet at the February 20, 1998 Closing. This issue is important because the Introductory Rate Balance level affected the Agreed Deficit, which in turn was a critical component of the formula used to compute Fleet's purchase price for the Business.

At the Closing, Advanta presented an estimated Introductory Rate Balance level of $1.7 billion. It is now established, and Advanta concedes, that its initial estimate was too low by at least 25% because Advanta now contends that the true level was $2.14 billion. Fleet claims, however, that the correct Introductory Rate Balance level was $2.67 billion. Thus, on this issue the parties remain approximately one-half billion dollars apart.

Each party's position is supported by analyses prepared by witnesses who testified at the trial. The parties reach different conclusions, not because of their respective choices of methodology, but, rather, because of each party's approach to implementing its methodology. That is, although neither side quarrels with the other side's approach as a matter of theory, both sides criticizes each other's application of that theory to the data at hand.

Both sides agree that the resolution of the Introductory Rate Balance issue boils down to the question of which party's implementation is more reasonable. The starting point for analyzing that question is to summarize each side's methodology. That is done in Part B 2, *infra.* In Part B 3 the Court addresses Advanta's objections to the implementation of Fleet's approach, and in Part B 4 the Court considers and resolves Fleet's objections to the implementation of Advanta's approach.

The starting point for both sides' analyses is the Contribution Agreement's definition of "Introductory Rate Balances," which is:

> consumer credit card receivables [1] accruing finance charges at a special introductory annual percentage rate [2] offered to new credit card customers only at the time of the opening of a credit card account [3 3 for a limited period, referred to as an "introductory rate;" it [being] understood that the term Introductory Rate Balances does not include any portion of a credit card holder's balances (i) resulting from a cash advance and accruing interest at a cash advance rate; (ii) that no longer carry a special introductory rate as a result of a delinquency; or (iii) resulting from any other promotional campaign or relationship management activities.[57]

The definition thus contains three elements (reflected by the inserted bracketed numbers) and three exclusions (reflected by the lowercase Roman numerals in parentheses).

[57] PX 1 at A-0312, § 2.1 (tt) (bracketed numbers added).

2. Summary Of The Parties' Methodologies For Determining The Introductory Rate Balance Level As Of February 20, 1998

a. *Fleet's Analytical Approach*

The analysis performed by Fleet's trial witness, John Matthewson, involved two steps. In Step 1, Matthewson determined the level of Introductory Rate Balance, as of February 20, 1998, from the Advanta database. In Step 2, he determined (from the "miscoded BT file") the Introductory Rate Balances that were erroneously excluded from the February 20, 1998 database because they had been miscoded. Under Matthewson's approach, the sum of the balances arrived at in Steps 1 and 2 equals the Introductory Rate Balances as of February 20, 1998.

(i) Step 1

To capture the three elements of the definition of Introductory Rate Balances as accurately as possible, Mattewson limited his analysis to balances that were "accruing finance charges at a special introductory percentage rate," by including only those balances that were accruing interest at an annual percentage rate (APR) below 10%.[58] To ensure that the special introductory rate was one offered to "new credit card customers only at the time of the opening of a credit card account," Mathewson included only those accounts that had been opened during the twelve

[58] This limitation effectively excluded all balances accruing at the interest rate that would apply when the promotional period expired-the so-called "go to" rate-because there were no "go to" rates below 9.99% in the relevant marketing campaigns. Trial Tr. at 78.

months immediately preceding February 20, 1998. To verify that the analysis covered only special introductory rates offered "for a limited period," Matthewson included only those accounts that had a promotional expiration date that had not expired by February 20, 1998.

Matthewson's analysis also gave effect to the three exclusions. First, to exclude balances "resulting from a cash advance and accruing interest at a cash advance rate," he subtracted out the cash balances of all relevant accounts. Second, by limiting his analysis to balances accruing interest below 10%, Matthewson eliminated those accounts that "no longer carr[ied] a special introductory rate as a result of delinquency," since delinquent accounts were charged a "penalty" interest rate of 2 1.9%.[59] Third, to avoid capturing balances "resulting from any other promotional campaign or relationship management activities," Matthewson included only those balances that had been transferred to an account within 90 days of the date the account was opened. According to Matthewson, that 90-day limitation excluded relationship management activity because no relationship management offers were made during that 90-day period.[60]

[59] PX 434 at 27; see ***also*** Trial Tr. at 1090. PX 434 refers to a penalty-price rate of 21.99%, while the trial testimony refers to a 21.9% penalty-price rate. The difference here is unimportant to the point being made.

[60] Trial Tr. at 1091. Tellingly, Fleet's $1.8 billion figure is in the same ballpark as Advanta's original $1.7 billion estimate derived from the methodology Advanta employed at the Closing, but later abandoned during this litigation. PX 434 at 11; Trial Tr. at 1097-98; ***compare*** PX 71 with PX 434 at 11.

As shown by PX 434, a Powerpoint presentation of Fleet's analysis, Matthewson's Step 1 analysis reveals that as of February 20, 1998, $1.862 billion in balances (i) were accruing interest below 10%, (ii) for a limited period that would expire in the future, (iii) for accounts that were opened between February 1997 and February 20, 1998, (iv) after excluding balances transferred more than 90 days after the date the accounts were opened.[61]

That $1.862 billion figure did not, however, capture the entirety of the Introductory Rate Balances as of February 20, 1998 because Fleet's Step 1 analysis did not reflect the balance transfers that had been miscoded. To that extent, Fleet's Step 1 computation understated the correct level of Introductory Rate Balances. To account properly for the (nonincluded) miscoded balance transfers, Fleet performed a second step that is next described.

(ii) Step 2

To determine the correct amount of miscoded Introductory Rate Balances, Fleet started with the miscoded BT file provided by FDR. From that file, Matthewson was able to identify some-but not all-of the miscoded Introductory Rate Balances as of February 20, 1998. Missing were two key information items that would have to come from other sources.

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[61] Trial Tr. at 1097-98; PX 434 at 11.

The first missing information item was a determination of whether an initially miscoded balance transfer had been "fixed." In other words, there was no acknowledgment of whether the interest rate had been reduced to the proper (introductory) level by the time of the Closing. If the balance transfer had been fixed, then that fixed balance had already been captured in Step 1 of Fleet's analysis. To avoid double counting, therefore, Fleet identified and then eliminated the fixed balance transfers from the miscoded BT file.

Second, although the miscoded BT file reflected the amount of the initial Balance transfer at the time the transfer was made, it did not reflect the amounts that the customer had "paid down" on that initial balance between the date of the balance transfer and the February 20, 1998 Closing. To avoid overstating the level of Introductory Rate Balances as of the Closing, it was necessary for Fleet to determine the level of pay-downs and make the appropriate adjustment.

Fleet corrected these potential overstatements of miscoded Introductory Rate Balance transfers as follows: First, Fleet subtracted from the miscoded BT file all balance transfers made after February 20, 1998. All told, Fleet identified approximately $208 million of post-February 20, 1998 balance transfers in the miscoded BT file.[62]

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[62] PX 434 at 14; Trial Tr. at 1102.

To determine what portion of the remaining $1.134 billion of miscoded BTs had been "fixed," Fleet then matched up the account numbers in the miscoded BT file to the account numbers in the analytical database. That enabled Fleet to determine what portion of the miscoded BTs (erroneously) resided in the Merchandise Balances and what portion was (erroneously) contained in the Promotional Balances.[63] Fleet determined the interest rate at which the balances were accruing in the analytical-database and discarded from the miscoded BT analysis all balances that the database showed were accruing interest at rates below 10%. By that process, Fleet eliminated $253 million of fixed miscoded BTs from the miscoded BT analysis.

Next, Fleet calculated the pay-down rate on the remaining balances. For Promotional Balances the process was simple, because the analytical database showed the exact remaining balance; specifically, that of the $620 million remaining in the Promotional Balances, $24 million had been paid down by February 20, 1998. Fleet eliminated that $24 million from the miscoded BT analysis. For the Merchandise Balances, the process was more difficult because

[63] A credit cardholder's account balances contain three separate components: (1) a Merchandise Balance, representing the amount of purchases made with the credit card; (2) a Cash Balance, representing the amount of "cash advances" made through the credit card; and (3) a Promotional Balance, representing the amount of balances transferred as a result of a promotional campaign. Each component has its own separate interest rate. Merchandise and Promotional Balances may, depending upon the circumstances, accrue interest at an introductory rate.

the miscoding problem had caused those balance transfers to be commingled erroneously with balances resulting from the cardholders' purchases. Because there was no way to separate out the account activity on the balance transfers from the other account activity, Fleet had to estimate the pay-down on the Merchandise Balances. Based on industry experience and other data, Fleet applied a 5% estimated monthly pay-down rate, yielding an estimated $2 1 million paid down on the miscoded BTs in the Mercliandise Balances.

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As a result of its analysis in Step 2, Fleet computed a total of $835 million of miscoded Introductory Rate Balances as of the Closing. Adding that figure to the $1.832 billion of Introductory Rate Balances derived from the analysis in Step 1, Fleet anived at a $2.668 billion total of Introductory Rate Balances as of the Closing. According to Fleet, that approximate $2.7 billion figure translates to damages of $2 1 ,199,200 resulting from Advanta's underestimate of the Introductory Rate Balances.[64]

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[64] Damages are calculated by plugging the correct figure into the Yield Adjustment formula in the Contribution Agreement. Based on that formula, the Yield Adjustment should have been ($2.668B -$2.1925B) x .0438 x .5, which equals $10,413,450 in Fleet's favor. But, because the parties closed their deal based on Advanta's $1.7 billion estimate of Introductory Rate Balances, the result was a Yield Adjustment of ($1.7B - $2.195B) x .0438 x .5, which equals $10,785,750 in Advanta's favor. Fleet's damages are the difference between what the Yield Adjustment should have been ($10,413,450 in Fleet's favor) and the Yield Adjustment figure upon which the parties closed ($10,785,750 in Advanta's favor). The difference is $21,199,200.

b. *Advanta 's Analytical Approach*

Advanta contends that Fleet's methodology is flawed because it overstates the level of Introductory Rate Balances by approximately $500 million as of the Closing. Advanta claims that the correct level of Introductory Rate Balances was $2.14 billion. Advanta's methodology used to arrive at that figure (which it presented through the testimony of its witness, John Derham) differs in key respects from the methodology employed by Fleet.

In simplest terms, Advanta's approach starts with the "total pie" of balances to be classified, and then subtracts from that "total pie" the balances that cannot be Introductory Rate Balances. The amount remaining is equal to the total amount of Introductory Rate Balances. Specifically, Advanta started with a total receivables balance of $11.838 billion on February 20, 1998 and then subtracted those portions that did not qualify as Introductory Rate Balances. The process of identifying the balances that were *not* Introductory Rate Balances required ten separate steps, which are next described.

(i) <u>Steps 1 and 2</u>

Steps 1 and 2 involved eliminating $7.378 billion in balances for accounts that were too old to have Introductory Rate Balances on February 20, 1998, and eliminating another $3 million in balances for accounts that were too new to have Introductory Rate Balances on that date.

(ii) Stens 3 and 4

In steps 3 and 4, Advanta eliminated all balances having introductory rates that expired before February 20, 1998 because beginning on February 20, those balances would be accruing interest at their non-introductory "go to" rate. To determine when the balances went "off intro," Advanta first looked for introductory expiration dates in the database, where available. Excluded were balances on the database having introductory rates that would expire before February 20, 1998. The problem was that of the approximately 900,000 accounts on the database, roughly half showed no expiration dates. For those balances that showed no expiration date, Advanta identified the "job number," the "system code," or both numbers for those accounts, to determine if they showed introductory rates expiring before February 20, 1998. If they did, those balances were excluded. Steps 3 and 4 resulted in the elimination of $1.766 billion of balances from contention as Introductory Rate Balances.

(iii) Steps 5 and 6

These two steps involved identifying balances that were accruing at penalty pricing or at "downsold" annual percentage rates ("APRs"). When an Advanta account became delinquent because the customer failed to make a payment, the account balance would be "repriced" out of the introductory rate, and offered a penalty rate, typically at 2 1.9%. Because these accounts were no longer carrying

an introductory rate, delinquent account balances totaling $4 million were excluded.

The next step was to exclude $54 million of account balances that, in Advanta's view, were not offered introductory rates because of the cardholder's credit rating. Cardholders in this category were "downsold;" that is, they were offered a less preferential rate, usually 16.9%, but in some cases less than 10%.

(iv) Steps 7 and 8

In step 7, Advanta excluded $172 million in balances resulting from merchandise purchases booked to so-called "Interest on Balance Transfer Only" (IOBTO) accounts because, for such accounts, only the balance transfer, but not the merchandise purchases, received the introductory rates. In step 8, Advanta excluded $35 million in cash balances because, by definition, balances accruing interest at a "cash advance" rate were not Introductory Rate Balances.

(v) Step 9

In Step 9, Advanta identified and excluded $212 million in balance transfers posted between February 20 and February 28, 1998, because those balances originated too late to be classified as Introductory Rate Balances on February 20, 1998.

(vi) Step 10

Advanta's final step was to eliminate $104 million of balances transferred more than 21 days after opening the account. Advanta regarded such balances as "relationship management" balance transfers, which were excluded from the Contribution Agreement definition of "Introductory Rate Balances."

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Eliminating the foregoing account balances from the $11.838 billion total value of account balances transferred to Fleet (the "total pie"), resulted in a difference of $2.141 billion, which Advanta claims was the correct level of Introductory Rate Balances as of February 20, 1998.

3. Analysis of Advanta's Objections To Fleet's Analytical Approach

a. *Advanta's Objections Summarized*

Advanta asserts three major objections to Fleet's implementation of its methodology for determining the correct level of Introductory Rate Balances. Advanta's first objection is that Fleet erroneously included $180 million in balances that were not accruing interest at introductory rates as of February 20, 1998. According to Advanta, because Fleet used data sets that had no expiration

dates, it erroneously included account balances with introductory rates that, by February 20, 1998, had already expired?

Advanta's second objection is that Fleet's analysis of the BT file was incomplete and resulted in the over-inclusion of $18 1 million in merchandise and downsold balances. Specifically, Advanta argues that Fleet's analysis of the BT file consisted only of comparing the sub- 10% balances shown on that file to the sub-10% balances shown on the database, and then discarding all balances that matched. The remaining balances on the BT file that were above 10% were then added to Fleet's original calculation on the assumption that those remaining balances were miscoded Introductory Rate Balances. In fact, Advanta argues, that assumption was erroneous, because the BT file contained $155 million in merchandise balances on IOBTO accounts that were correctly accruing interest at APRs above 10%, and that therefore were not miscoded BTs. Moreover, $26 million in balances on the BT file were from downsold accounts, and therefore were also properly accruing interest at rates above 10%. Accordingly, Advanta concludes, Fleet's calculation must be reduced by $18 1 million of improperly included balances that were not Introductory Rate Balances.

[65] Advanta points out that after supplying the missing expiration dates and correcting any erroneous dates in the database, Derharn quantified the magnitude of the mistake at $2 11 million, which he adjusted downward to $18 1 million.

Third, Advanta objects that Fleet inflated its result by an additional $137 million, by improperly (i) failing to eliminate accounts that were too old or too new to have balances at introductory rates on February 20, 1998, (ii) capturing accounts that were accruing interest at high, "penalty" APRs, (iii) capturing account balances generated by relationship management activities, and (iv) assuming that cardholders were paying down their miscoded BT file balances at a rate of 5% per month, whereas a 10% rate was more plausible.

The sum total of these three errors, which Advanta attributes to the flawed implementation of Fleet's methodology, is $498 million ($180M + $18 1M + $137M). Advanta contends that Fleet's computation of Introductory Rate Balances must be reduced by that amount, which results in an Introductory Rate Balance level of $2.17 billion. That result, Advanta claims, independently confirms its own $2.14 billion calculation.

These objections are now addressed.

b. ***Advanta 's Objections Analyzed***

Advanta's first objection-that Fleet erroneously included $180 million of balances that were not accruing introductory rates as of February 20, 1998—rests upon the premise that Fleet included accounts in the miscoded BT file and in the Promotional (or "FLAP") balances that had no associated expiration date. Fleet does not deny having done that, but insists that it had no material effect, because

there were no introductory rate periods that lasted less than 3 months. Indeed, Fleet says, the length of many introductory periods was approximately one year.[66] Therefore, only accounts that were opened before December 1997 could have had their introductory periods expire by February 20, 1998, but Matthewson's analysis of the miscoded BT file revealed less than $3.6 million of such balance transfers whose introductory rate would have expired by February 20, 1998. Because $3.6 million is only one-fifth of one percent (0.2%) of the $1.34 billion of accounts in the miscoded BT file, the Court is persuaded that including those accounts had no material impact.

Advanta has also failed to demonstrate any material error in Matthewson's use of expiration dates in the FLAP files. The record disproves Advanta's contention that Matthewson failed to identify and then exclude FLAP balances having promotional dates that would have expired by February 20, 1998.[67] Second, in cases where the FLAP balances had no corresponding FLAP expiration dates, Matthewson separately analyzed whether those balances had *merchandise* expiration dates going beyond February 20 and included only those that did.[68] The propriety of that approach is evidenced by the fact that Advanta's own witness, Derham, relied on merchandise expiration dates, even for balances having

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[66] Trial Tr. at 1091-92.

[67] See PX 346 at 0177438-39, and at 0177453.

[68] Trial Tr. at 1207.

expiration dates that appeared on the FLAP file.[69] Accordingly, Advanta's first objection to Fleet's methodology is rejected.

Advanta's second objection has two parts. Advanta first claims that Fleet erroneously included $155 million of merchandise balances on IOBTO accounts that Matthewson mistakenly assumed were miscoded balance transfers on the BT file. But the premise of that argument-that there were merchandise balances in the miscoded BT file-finds no support in the record.[70] The miscoded BT file consisted of a list of balance transfers, broken down into the account identification number and the amount and date of each balance transfer that corresponded to the account identification number.[71] Indeed, Advanta has gotten it backwards: some of the balance transfers listed in the miscoded BT files had been misrouted (because of Advanta's miscoding) to the merchandise balances instead of to a FLAP, and, as a result, those balances became commingled with merchandise purchases.[72] But it

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[69] *Id.* at 2129.

[70] Advanta cites to Derham's testimony (Trial Tr. at 2075, 2087) to support that point, but a review of those pages reveals no testimony by Derham to the effect that the miscoded BT file contained merchandise purchase balances.

[71] Trial Tr. at 1099. Matthewson and Derham both recognized the necessity of segregating the balance transfers from the merchandise purchases, although they went about it in different ways. Matthewson identified the amount of the original balance transfers that showed up in the merchandise balances, applied an estimated paydown rate of 5% per month, and then added the resulting estimated "paid down" miscoded balance transfers in the merchandise balances to his calculation. He did not, however, include in his analysis the merchandise purchases that were commingled with the balance transfers.

Advanta does not quarrel with this approach, except to take issue with Matthewson's 5% per month paydown rate. For the reasons discussed elsewhere in this Opinion, the Court rejects Advanta's contention that the 5% rate is unreasonably low.

[72] ***Id.*** at 1110.

is not the case that those merchandise purchases were reflected in the miscoded BT file.

Advanta's other criticism is that Fleet failed to exclude from the miscoded BT file $26 million of downsold accounts that, in fact, were not miscoded BTs because they were accruing interest at rates above 10%. It is true that those accounts were downsold accounts that the miscoded BT file showed were accruing interest at rates above 10%. Even so, however, those accounts had been "counteroffered" (as distinguished from "initially offered") introductory rates below 10%, yet because of the miscoding were accruing interest at their higher "go to" rates. In other words, the downsold accounts that had an expiration date beyond February 20, 1998 were indistinguishable from their counterpart miscoded BT accounts that were not downsold, with one exception: the introductory rate charged to the downsold accounts resulted from a counteroffer rather than an initial offer.[73] Advanta relies heavily on this distinction, arguing that "a counteroffer . . . is not an offer."[74] The short answer is that this distinction finds no support in the Contribution Agreement definition, which refers broadly to an "offer," and does not limit the meaning of that term to "initial offer." For these reasons, Advanta's second objection to Fleet's methodology is also rejected.

[73] As PX 436 shows, downsold accounts do receive introductory rates, albeit less generous ones than the regular accounts receive, Matthewson identified approximately $40 million in balances that were accruing at below 10%. PX 440.

[74] Advanta Op. Post-Trial Br. at 42.

Advanta's final criticism of Fleet's analysis, which comes in four parts, is either without merit or immaterial. The first two parts of Advanta's objection consist of a one sentence statement that Fleet "failed to eliminate accounts that were too old or too new to have balances at Introductory Rates on February 20, 1998 . . . ."[75] So conclusory is that criticism that it cannot be seriously considered.[76] A court would be hard pressed to evaluate or respond to an argument that the proponent does not trouble itself to explain or elaborate.

The third facet of Advanta's objection is more problematic than the others. Advanta argues that, by including all balance transfers made within 90 days of the opening of the account, Fleet erroneously captured account balances that had been generated by relationship management activities. That was erroneous, Advanta contends, because Advanta customarily treated any balance transferred more than 21 days after the account was opened as a relationship management account balance that was excluded under the Contribution Agreement definition of

[75] *id.* at 48.

[76] Fleet interprets the first criticism as referring to $26,000 in balances that Advanta claims were in accounts opened before January 1, 1997, and the second criticism as referring to accounts that were opened after February 20, 1998. Fleet Post-Trial Reply Br. at 26. If Fleet is correct, then in dollar terms the first criticism is trivial, and the second merely reflects the fact that Derham excluded accounts that were opened on February 20, 1998, whereas Matthewson included them. Compare PX 346 with DX 246 at 004990. If Fleet is correct, its second criticism would also be *de minimis*, but further admittedly conjecture since neither side has favored the Court with the amount of the balances represented by accounts opened on February 20, 1998.

Introductory Rate Balances. I conclude, for the following reasons, that Advanta's argument fails both legally and factually.

The Contribution Agreement defines Introductory Rate Balances to include "all credit card receivables accruing finance charges at a special introductory [APR] offered to new credit card customers only at the time of the opening of a credit card account for a limited period." The definition goes on to provide, however, that the term Introductory Rate Balances "does not include any portion of a credit card holder's balance . . . (iii) resulting from . . . relationship management activities."[77] The issue framed by Advanta's argument is whether balance transfers that occurred more than 21 days after the account was opened "result[] from relationship management activities" within the meaning of the Contribution Agreement. The briefs and the record provide only limited assistance in resolving that issue.[78]

To begin with, because "relationship management activities" is not a defined term in the Contribution Agreement, the rules of contract construction require that the term be given the meaning commonly understood in the credit card industry, as

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[77] PX 1 at A-0312, § 2.1 (tt).

[78] Although the parties argue the point in their briefs, their arguments do not frame a precise issue. As a consequence, the analysis is essentially unhelpful to the Court in resolving the "relationship management" question.

established by the record.[79] Unfortunately, neither side has developed a record that establishes the commonly understood meaning, in the industry, of relationship management activity.

Advanta contends that it regarded any balance transfer to an account that occurred over 21 days after the account was opened as having resulted from "management relationship activity." As the proponent, Advanta has the burden of persuasion on that issue.[80] Fleet contends that Advanta has not carried that burden because, under the Contribution Agreement definition, Introductory Rate Balances include *all* balances accruing at the special rate offered to customers at the time they opened their accounts. The so-called "relationship management" accounts fit that description. It is undisputed that customers receiving those offers could continue to make balance transfers at the low introductory rate for the entire

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[79] *Radio Corp. of America v. Philadelphia Storage Battery Co., 6* A.2d 329,334 (Del. 1939) (stating that, where a contracting party engaged in a trade or business employs terms especially understood by persons in the trade, the terms should be interpreted as usually understood by persons in the trade, unless it is clear that they were used in a different sense); *Board of Education of the Appoquinimink School District v. Appoquinimink Education Association,* 1999 Del. Ch. LEXIS 188,*25 (quoting *Restatement (Second) of Contracts* § *202* (5) ("Wherever reasonable, manifestations of intention of the parties to . . . an agreement are interpreted as consistent with . . . usage of trade); *Sunbeam Corp. v. Liberty Mutual Ins. Co., 78* 1 A.2d 1189, 1193-94 (Pa. 2001) ("[I]f words have special meaning or usage in a particular industry, then members of that industry are presumed to use the words in that special way . . . regardless of whether there appears to be any ambiguity *in* the words"); *Restatement (Second) of Contracts* $222 (3) ("unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement").

[80] *Hudak v. Procek,* 806 A.2d 140, 153 (Del. 2002) (stating that a party that seeks to prove a legal theory carries the burden of proving the facts necessary to establish that theory); *Rice v. Shuman,* 519 A.2d 391,395 (Pa. 1986); 2 John W. Strong, *McCormick on Evidence $337* (5th ed. 1999).

introductory period, which generally was for several months and in some cases as long as one year.[81]

The Court's difficulty is that even if Fleet's argument is factually correct, it fails to confront the fact that the Contribution Agreement excludes all accounts resulting from "management relationship activity," a term whose definition Fleet has not attempted to articulate. Advanta, on the other hand, did make an effort, however oblique, to define "management relationship activity," by resorting to *ipse dixit, i.e.,* by asserting that it (Advanta) treated any balances transferred to an account more than 2 1 days after the account was opened as resulting from relationship management activity. The question is whether that showing is adequate to discharge Advanta's burden of proving that assertion. For both legal and factual reasons, the Court concludes that it does not.

From a legal standpoint, had the parties intended to define management relationship activities in terms of the practice then in effect at Advanta specifically (as distinguished from the meaning of that term as commonly understood within the credit card industry), they could easily have done that in their contract. The parties did not, however, and Advanta has made no effort to show that it is legally proper to attribute to Fleet an intent (not supported by any evidence) that the term

[81] **Trial Tr. at 1120-21; 1150-51; 2125-28.**

"relationship management activities" would have whatever meaning Advanta's internal organization understood it to have.

The record also fails to support Advanta's assertions that "Advanta's financial statements classified all balance transfers posted after 21 days as Relationship Management balance transfers," and that "balance transfers posted after 21 days were typically generated by direct relationship management activities such as 'welcome calls,' and 'welcome letters' along with other forms of usage stimulation."[82] The record Advanta cites to support that assertion consists of four pages of Derham's testimony and one page of Advanta's *pro forma* financial statements. Although the financial statement does disclose "Acquisition BT Volume" and "Rel. Mngmt. BT Volume" on separate lines,[83] nowhere does that financial statement "classif[y] all balance transfers posted after 21 days as Relationship Management balance transfers." Nor does Derham's cited testimony on this point clearly or unambiguously establish Advanta's asserted proposition. At best that testimony is vague and imprecise.[84] It is also controverted," and Advanta called no other witnesses to give corroborating testimony on this point.

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[82] Advanta Revised Op. Post-Trial Br. at 44-45.
[83] See DX 44 at 113427.
[84] Derham's testimony on the point consisted of the following:

> Q. What are nonintroductory period promotions?
>
> A. Based on the definition, it excluded any relationship management transfer activity, as stated in the definition above. The business worked that only balance transfers booked off of the application form were considered acquisition balance transfers. Everything else,

Accordingly, insofar as Advanta challenges the reasonableness of Fleet's 90 day method for excluding balances resulting from relationship management activity on the basis that the correct "window period" is 21 days, Advanta's challenge lacks merit.

Advanta's fourth and final criticism is that Matthewson's assumed 5% paydown rate was too low. The 5% paydown rate assumption has a basis in the record, [86] and it was reasonable because it was an industry standard. Advanta has not persuasively rebutted that evidence. All Advanta has done is assert, without evidentiary support, that a 10% paydown rate is more reasonable." That, without more, cannot carry the day.

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For these reasons, Advanta's objections to Fleet's approach to determining Introductory Rate Balances are rejected. The Court concludes that Fleet's analytical approach (including its implementation) is reasonable. The Court next

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> including card carriers, welcome letters, welcome calls, were considered part of the relationship management balance activities. . . . Applications off the balance transfer were processed typically within three weeks.

Trial Tr. at 2067-68.

[85] Matthewson testified that during the 90-day window between the opening of an account and the transfer of a balance to that account, no relationship management offers were being made. Trial Tr. at 1082, 1091.

[86] Trial Tr. at 1110-11.

[87] Advanta cites earlier paydown analyses by Matthewson in support of its position, but Matthewson explained why those earlier analyses were flawed. Trial Tr. at 1218-25.

turns to Fleet's objections to the reasonableness of Advanta's implementation of Advanta's methodology for determining Introductory Rate Balances.

4. Analysis of Fleet's Objections To Advanta's Analytical Approach

a. *Fleet's Objections Summarized*

Fleet contends that even if Advanta's analysis were accepted in its entirety, Fleet would still be entitled to recover $9,767,400 in damages in respect of this claim. But, Fleet says, because Advanta's implementation of its own methodology is flawed in significant respects, Advanta's entire analysis must be rejected, and Fleet is entitled to recover the full amount of its claim.

Fleet has interposed five objections to Advanta's analysis. Two of those objections the Court has previously upheld in its analysis of Advanta's objections to Fleet's methodology for determining Introductory Rate Balances.[88] The first of those objections concerned what window of time separating the opening of an account and the transfer of a balance to that account was more reasonable. The Court determined that Advanta's 2 1 -day window approach is legally and factually flawed, and that Fleet's approach was reasonable. Fleet's second (also-adjudicated) objection relates to whether Fleet properly treated as Introductory Rate Balances all downsold accounts that otherwise fit the contractual definition.

[88] **See Part 3(b),** *supra.*

Fleet argued that Advanta's approach, which excluded all such accounts, was invalid. The Court agreed. Because the Court has effectively upheld two of Fleet's objections to Advanta's methodology (albeit in a different context), it need only address Fleet's three remaining objections, which are next summarized.

Fleet first argues that Advanta's methods for excluding balances based on the expiration date of the introductory rate offers must be rejected because they are internally inconsistent and designed specifically to minimize the level of Introductory Rate Balances. Specifically, Fleet claims that Advanta did not rely consistently upon the stated introductory expiration dates in the analytical database, when determining if a customer's introductory rate offer had actually expired. Rather, Fleet urges, Advanta relied-inconsistently-upon both the merchandise expiration date reflected in the database and upon the expiration date projected on the marketing matrices that related to the particular marketing offer to which the customer had responded, and then used whichever date would result in the account's exclusion.[89]

That is, if the analytical database showed that a merchandise expiration date had expired, Advanta threw out the balance in the entire account without regard to what the marketing matrices did or did not show. If, however, the analytical

[89] A marketing matrix contains the terms that the marketing department intends to assign to accounts at the outset of a new campaign.

database indicated that an expiration date had *not* expired as of the Closing, Advanta did not necessarily include the account balance in its analysis. Rather, Advanta turned to the marketing matrices to ascertain whether, as of the Closing, the expiration date should have expired. If the marketing matrix reflected that a promotional period should have expired, even though the analytical database showed that in fact it had not, Advanta excluded the entire account balance. Fleet's argument, simply put, is that Advanta cannot have it both ways: Advanta may rely upon either the marketing matrices or the expiration date in the database, but it cannot opportunistically pick and choose whatever expiration date results in the balance being excluded.

Fleet's second, and related, objection is that Advanta's use of marketing matrices to determine the introductory expiration dates for certain accounts was inherently flawed and resulted in improperly excluding balances of $150 million. Advanta's use of marketing matrices was erroneous, Fleet claims, because Advanta failed to update the matrices, and, as a result, the matrices were often inaccurate. Indeed, Fleet emphasizes, the inaccuracy of the marketing matrices was a prime cause of the miscoding problem. Even when accurate, the information on the matrices was not determinative because, if as of a given date the customer's promotional offer had not ***in fact*** expired, whether or not the marketing department ***intended*** for that offer to expire, was an irrelevant consideration that cannot serve

as a basis to exclude that customer's balance from the Introductory Rate Balances calculation.

Third, and finally, Fleet claims that it was erroneous for Advanta to subtract $189 million of post-February 20, 1998 balances that were never included in Advanta's analysis to begin with. As Fleet points out, of the $2 12 million of post-February 20 balance transfers that were reflected in the miscoded BT file, $189 million represented accounts that had not been included in the initial database, because they were not opened until after February 20, 1998.

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Fleet contends that Advanta improperly excluded a total of $480 million in balances, and that when the $480 million of improperly excluded balances[90] are restored to Advanta's analysis, the result-$2.6 billion-is virtually the same as the result reached under Fleet's analysis-

I now turn to Fleet's objections.

b. *Fleet's Objections Analyzed*

As already noted, Fleet's first and second objections are interrelated. Fleet first argues that Advanta determined the expiration dates for introductory rate offers opportunistically, that is, by using whichever date-the expiration date appearing on the analytical database or the projected expiration date in the

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[90] $150M + $189M + $101M + $40M = $480M.

marketing matrices derived from job numbers-would result in the exclusion of an account balance. Second, Fleet argues that, in any event, the marketing matrices were so inaccurate that it was error for Advanta to rely on them at all to determine the expiration dates.

Advanta concedes that it used both sets of dates, but responds that it was not improper to do so, because: (i) the job numbers (appended to the marketing matrices) were reliable since they were the same job numbers FDR had relied on to fix the miscoded APRs; and (ii) Advanta used the expiration date on the analytical database (where available) as a starting point to exclude expired introductory rates; but if the rate shown on the database had not expired, then Advanta looked to the job number/system codes to ascertain the expiration date. Advanta further contends that Fleet has not quantified the amount of balances that Advanta purportedly misclassified and that Fleet's criticism ignores Fleet's own inconsistent handling of the miscoded BT file by assuming (but not actually determining whether) the balances on that file at APRs above 10% *were supposed* to be above 10%.

The Court finds Advanta's explanation unpersuasive for several reasons. First, Advanta does not deny that it relied solely on the database expiration date where that date showed an account had expired before February 20, 1998. In cases where that date had not expired, however, Advanta used the marketing matrix

expiration date to exclude the account where the matrix showed that the introductory rate should have expired. Thus, Advanta did, in fact, use whatever date would result in an account being excluded.

Second, if, as Advanta claims, the job numbers were accurate and reliable indicators of when an introductory rate offer would expire and the analytical database was not, why did Advanta use the analytical database expiration dates at all? Advanta makes no effort to explain that gap in its reasoning.

Third, the weight of the credible evidence persuades me that the job numbers upon which Advanta appears to place such reliance were neither accurate nor reliable. Matthewson, whose testimony the Court finds entirely credible, testified that the expiration date on a marketing matrix does not accurately predict whether the accounts that result from that marketing campaign will actually expire on that date.[91] In addition, Lorene Storm, Fleet's FDR production support manager, testified that the inaccuracies in the marketing matrices played a role in causing the BT miscoding because "there had been updates made by marketing that were not either put into the marketing matrix or the marketing matrix was-the update copy was not supplied to the appropriate people to make changes . . . ."[92] Finally, the pervasiveness of the errors in the marketing matrices are described in one of

[91] Trial Tr. at 1138-39 ("Accounts could actually have completely different expiration dates than what are reflected on the matrix").

[92] Trial Tr. at 690-91.

Advanta's own trial exhibits.[93] To the extent Advanta's method for determining expiration dates was an element of its analysis, the Court finds that methodology was unreasonable.

Fleet's final objection is that Advanta was wrong to exclude from the "total pie" database, $189 million of accounts that had never been included in that database to begin with. I find this objection meritorious because Advanta's witness, Mr. Derham, conceded the error in his trial testimony.[94] In its post-trial brief, Advanta nonetheless argues that this subtraction was necessary to bring the database back to the February 20 balance (for which reason Fleet's database was $189 million too high).[95] But neither Derham nor any other witness testified that this was done (as Advanta asserts) to reconcile the February 28 general ledger balance back to the February 20 balance.[96]

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[93] DX 113.

[94] Trial Tr. at 2 106-07.

[95] Advanta Revised Post-Trial Br. at 43-44.

[96] Derham's error in subtracting the $189 million in balances also answers Advanta's argument that Fleet's analytical database was $189 million too high. Fleet and Advanta used the miscoded BT file for very different purposes. Advanta used it to exclude balances from its analysis, for which reason it was incumbent upon Advanta to ensure that the balances were included in its analysis before subtracting them. Fleet, on the other hand, used the miscoded BT file to find balances to add to its analysis. It therefore made sense for Fleet to subtract ($207 million) in post-February 20 balances from the balances that it was adding to its analysis, because under no circumstances should activity after February 20 be reflected in a calculation of Introductory Rate Balances as of February 20, 1998.

To summarize this (unfortunately lengthy) analysis, the Court upholds all of Fleet's objections to Advanta's calculation of Introductory Rate Balances and rejects all of Advanta's objections to Fleet's calculation- The Court finds that Fleet's methodology (and its implementation) for determining Introductory Rate Balances as of the Closing date was reasonable, and that Advanta's methodology (and its implementation) was not. The Court, therefore, concludes that the correct level of Introductory Rate Balances as of February 20, 1998 was $2.668 billion. As a consequence, Fleet is entitled to recover $21,199,200 from Advanta in respect of Fleet's Introductory Rate Balance Claim.

c. The Relationship Management Claim

Fleet's third claim is that, beginning in late 1997, Advanta engaged in an unprecedented "relationship management" campaign that involved offering its current customers very low interest rates. Advanta did this to "hold on" to its current customers and their balances, and also to increase those balances, thereby maximizing the level of Managed Receivables, which, in turn, would increase the consideration Fleet would pay for the Business. Fleet contends that in order to achieve that objective Advanta offered interest at rates below its own cost of funds and far below the rates it had previously offered, based on credit standards that were inconsistent with Advanta's prior credit standards. The result, Fleet claims, was to load up the acquired consumer card receivables portfolio with money-losing

accounts, in violation of §§ 6.0 1 (b)(i) and (b)(xii) of the Contribution Agreement. Those provisions, respectively, obligated Fleet to operate the business in the "ordinary and usual course" between the signing of the Agreement and the Closing,[97] and also to "[c]onduct solicitation campaigns . . . in the ordinary course of business consistent with past practices and in substantial accordance" with the marketing plans that had been disclosed to Fleet.[98] As a consequence of those violations, Fleet claims that it is entitled to recover damages of $7.6 million.[99]

Advanta, not surprisingly, resists this claim. It argues that its Fall 1997 relationship management campaigns were consistent with past practice, profitable, and good for business. The issues that flow from these contentions are whether Advanta's Fall 1997 relationship management campaigns were (i) "in the ordinary course of business," (ii) "consistent with past practice," and (iii) "in substantial accordance with [Advanta's] current marketing plans."[100] It may be concluded that these issues are factual because neither side cites a single case or other legal authority in support of its position.

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[97] PX 1 § 6.01(b)(i) at A-03144.

[98] *Id.* § 6.01(b)(xii) at A-03146.

[99] The damages figure is computed by multiplying the amount of the most unprofitable (below 8%) balances–$347 million–4times the 2.19% premium that Fleet paid for every dollar of Introductory Rate Balances. The result of that computation (.0219 x $347 million) is $7.6 million.

[100] PX 1 § 6.01 (b)(xii) at A-03146.

Fleet's position may be summarized thusly: Advanta's Fall 1997 relationship management campaigns were outside the "ordinary course" of its business when measured by the volume of account balances involved. Fleet compared the level of balances accruing at interest rates below 10% for accounts opened (i) before February 1997, (ii) at the end of October 1997, and (iii) at the time of the Closing. That comparison reveals that at the end of October 1997, the volume of pre-February 1997 accounts that having an APR below 10% was $55 million, but, by the time of the Closing, the value of those accounts had skyrocketed to $625 million.

Fleet next argues that Advanta's Fall 1997 relationship management campaign was inconsistent with past practice because, while virtually no balances were accruing below 8% at month-end October 1997, by the Closing the level of account balances accruing interest below 8% had climbed to $347 million, with most of that amount accruing at below 6%. Fleet claims that Advanta attracted these balances by offering unprofitably low interest rates and also by lowering its credit standards. Both measures were inconsistent with Advanta's past practice.

Finally, Fleet argues, this conduct was not "in substantial accordance with [Advanta's] current marketing plans" because none of the marketing plans Advanta disclosed to Fleet deviated so dramatically from Advanta's prior marketing practices and credit standards.

Advanta concedes many of the facts that underlie Fleet's argument, but it contests the inferences that Fleet draws from those facts, primarily because (Advanta claims) Fleet's inferences ignore other important facts of record.

First, Advanta argues that there was nothing unprecedented about the Fall 1997 relationship management promotional campaign because the volume of relationship management accounts and the APRs applicable to those accounts were consistent with Advanta's past-practices and then current marketing plans. The Court agrees with this position, which has solid record support. The record shows that, as early as March 1997, Advanta announced its intent to conduct a retention marketing program that would build upon existing customer relationships. Fleet knew of those plans through disclosures made by Advanta during due diligence as early as October 15, 1997.[101] The disclosures revealed that Advanta planned to continue engaging in aggressive relationship management through SmartMove balance transfers using lower competitive APRs to build balances in excess of one billion dollars during the latter half of 1997. Advanta forecasted an additional

[101] PX 49; DX 275 at 00113989; Trial Tr. at 1561-62 (financials show "very active fourth quarter" with relationship management at rates below 8.5%). Fleet's own internal memoranda, generated before it signed the Contribution Agreement, confirm its understanding that Advanta was aggressively managing its existing customer relationships with SmartMove offers- Trial Tr. at 192-93; DX 45 at 00138862; Trial Tr. at 203-05 (admitting that Advanta had disclosed lower yields and thus low APRs on relationship management campaigns); DX 38 (413011997 financials disclosed rates as low as 3.9% and 5.9%).

$2.3 billion in relationship management balances in 1997, with $561 million and $736 million being added, respectively, in the third and fourth quarters alone.[102]

The Court is unpersuaded by Fleet's argument that Advanta's relationship management campaign was unprecedented since it offered APRs that were inherently unprofitable (i.e., below the cost of funds). Fleet concedes that it is common for credit card companies to offer new customers introductory rates below the cost of funds, because that is part of the price of enticing a new customer to open an account. What was unprecedented, Fleet says, was that Advanta's relationship management campaign offered below-cost-of-funds rates to its *current* customers.[103]

This argument ignores two critical facts. First, Advanta had always competitively priced introductory offers to its existing customers. Advanta did that to prevent its customers—whose acquisition initially cost between $50 and $60 per customer—from being "teased" away to other issuers.[104] Second, during the Summer and Fall of 1997, competition for customers among the credit card companies had become increasingly fierce, manifesting itself in the form of lower

[102] PX 49 at 134619 (line item 'Relation Mngmnt BTs").
[103] Fleet Op. Post-Trial Br. at 53, n.58.
[104] Trial Tr. at 1483, 2096-98; 1432; 1555-56.

APRs and rates well below 5.9%.[105] Faced with the threat of an exodus of existing balances, Advanta had only one alternative: match its competitors' strategy by offering attractive APRs to its existing customers for balances transferred to Advanta from other issuers.[106] Nothing in the Contribution Agreement, or in any document contemporaneous with the negotiations, suggests that the parties intended for Advanta to be contractually precluded from making relationship management offers that would-be competitive in the marketplace.

The argument made by Fleet that gives the most pause is that Advanta (i) made relationship management offers at rates so low as to be inherently unprofitable, and (ii) lowered its credit standards that attracted new balances, but which were held by less creditworthy customers. The claim that Advanta lowered its credit standards is far broader than the meager evidence cited to support it-a mere single sentence of a 30-page Advanta Monthly Business Review that states: "SmartMove balance transfer program [was being offered] to customers who do not normally qualify."[107] While that sentence suggests that credit standards may have been changed for a particular segment of Advanta's customers, it does not

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[105] Trial Tr. at 1466-67; PX 43 at 03 125 1 (August 1997 Marketplace Observations); PX 52 at 00061383 (Advanta Historical Marketing Overview); PX 49 at 00134482 (Lehman Brothers Industry Overview: "[T]he cost of acquiring and especially retaining good customers is rising"); see *also, id.* at 134525-26 (McKinsey Industry Overview: "[I]ntense competition squeezes margins").

[106] Trial Tr. at 1464-65, 1467-68, 1471-73 (Advanta matched lower APRs and "continued to do what we had historically done . . . to build balances").

[107] PX 463 at 032923.

specify the nature or magnitude of the modification or its dollar impact. Such evidence is too thin to support a factual finding that Advanta lowered its credit standards as dramatically and pervasively as Fleet suggests.

Fleet's argument that Advanta offered low APRs to existing customers at rates that were below its cost of funds is more complex. Advanta does not deny that some of the APRs it offered were below its cost of funds, but it does dispute Fleet's claim that the resulting arrangements were inherently unprofitable. For several reasons, the Court is persuaded that Advanta is correct on this point.

To begin with, because existing customers have known credit records they are less risky and far cheaper to market than new customers.[108] In addition, the balance's profitability at the low APR cannot be considered in isolation. A low APR balance tends to protect a customer's existing balances, which continue to accrue interest at high "go to" rates. As a result, the blended APR of the customer's total balance is much higher than the APR on the relationship management balance, and thus is profitable for Advanta. In addition, customers who remain on the books may generate late fees, over-limit fees, and penalty pricing on the cardholder's entire balance (if they should miss a payment).[109] Finally, Fleet offers no specific evidence that the relationship management

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[108] Trial Tr. at 1454-56, 1470-71, 1541-42, 1546.
[109] Advanta derived millions of dollars from such fees and penalties. Trial Tr. at 1543.

balances acquired in the Fall 1997 campaign were actually unprofitable. There is evidence, however, that the yields from Advanta's relationship management campaigns and SmartMove programs continued to exceed significantly the Business's cost of funds.[110]

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For these reasons, the Court concludes that Fleet's Relationship Management Claim fails for lack of proof, and that judgment will be entered in Advanta's favor on that claim. Having adjudicated Fleet's claims, I turn next to Advanta's counterclaims.

IV. ANALYSIS OF ADVANTA'S COUNTERCLAIMS

A. The SmartMove Accounts Counterclaim

1. Background Facts

Although this claim takes the form of a counterclaim being asserted by Advanta, in reality, the issue is what amount of damages Advanta owes to Fleet. The claim, as earlier noted, arises out of Interim Servicing Agreements executed by Advanta and Fleet at the Closing. Those Agreements obligated the parties to provide certain support services for each other through 1998, with each party invoicing the other for services rendered. The parties agree that, as a result of their

[110] DX 50 at 00063548-49 (1997 Full Year Financials); PX 50 at Appendix, first page; Trial Tr. at 1305; DX 60 at 00079729-30.

mutual offsets, a net balance is due to Fleet, but they disagree on the precise amount of that net balance. Fleet contends that Advanta owes it $1.7 million, while Advanta contends that it owes Fleet only $1.63 million." [1] The resolution of the dispute depends upon the "effective" date that Advanta tendered "Qualified SmartMove Accounts" to Fleet.

By way of background, at the time the Contribution Agreement was executed the parties carved ouf a group of accounts known as the "Retained SmartMove Accounts" from the consumer credit card accounts being transferred to Fleet. This was done because the cardholders on those accounts were potential claimants in several consumer class actions pending against Advanta. The class members claimed (among other things) that Advanta had fraudulently promised them certain rates to induce them to transfer their balances, but then later charged them higher rates. The parties carved out the Retained SmartMove Accounts from the initial transfer of the Business because Fleet wished to avoid any potential liability associatedwith those Accounts. The parties did agree, however, upon a mechanism by which Fleet would assume the SmartMove accounts once the class action claims were dismissed or released. If and when that occurred, the "Retained" SmartMove Accounts would become "Qualified SmartMove Accounts" that Advanta would be entitled to tender to Fleet and that Fleet would

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[111] **See Pretrial Stip. at 22-23, § 48.**

be contractually required to accept. That agreement is expressed in § 6.17(a) of the Contribution Agreement, which reads as follows:

> At any time, and from time to time, on or after the Closing Date, the Company . . . [Advanta] may tender to the LLC [Fleet], and the LLC will accept and assume, within 15 days after such tender, pursuant to documents relating thereto in form reasonably satisfactory to [Fleet] and other parties thereto, Qualified SmartMove Accounts subject to certain liabilities. For purposes of this Section 6.17, "Qualified SmartMove Accounts" are Retained SmartMove Accounts as to which (i) a release of all claims in respect of SmartMove Promotions has been obtained, (ii) a final judgment from which any right to appeal has lapsed has been rendered in connection with litigation relating to such Retained SmartMove Account or (iii) full restitution has been made in respect of the repricing of such Retained SmartMove Accounts or some other event (including, without limitation, the passage of time) shall have occurred relating to such Retained SmartMove Accounts and, in either such case in the reasonable judgment of the LLC, no further liability to the LLC exists in respect of such Retained SmartMove Accounts or an indemnity therefor from the Company in form and substance reasonably acceptable to the LLC is satisfactory to satisfy any such remaining liability.[112]

The relevant clause of the above-quoted provision obligated Fleet to accept a tender of Qualified SmartMove Accounts "within 15 days after [Advanta's] tender, pursuant to documents relating thereto, *in form reasonably satisfactory to [Fleet].*"[113] The purpose of that provision was to assure that there would be no

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[112] PX 1 at 03157-S § 6.17(a).
[113] Id. (emphasis added).

further liability associated with the tendered accounts. Fleet contends that the purpose of the italicized language (quoted immediately above) was to require that the documents submitted in connection with the tender be adequate to show, to Fleet's reasonable satisfaction, that the tendered accounts would not be subject to further liability--i.e., that the tendered SmartMove Accounts were (in the language of the contract) "Qualified."

During the Fall of 1998, certain SmartMove class actions were consolidated in a Delaware Superior Court proceeding, *Stoddard v. Advanta Corp. and Advanta National Bank, U.S.A.* ("*Stoddard*").[114] In November 1998, Advanta and the *Stoddard* plaintiffs executed a Settlement Agreement and Stipulation that would settle the claims in the action. On January 15, 1999, the Superior Court entered an Order Granting Approval of Proposed Class Action Settlement and Judgment.[115] In that Order, the Superior Court dismissed the consolidated *Stoddard* litigation and determined that all class claims "in respect of SmartMove Promotions" were "settled, released, and dismissed with prejudice, with four exceptions: (i) claims of listed persons who 'opted-out' of the class action Settlement, (ii) claims of 'any others having requested exclusion by timely writing,' (iii) claims of customers, otherwise qualifying, who were in bankruptcy proceedings on the date of the

[114] No. 97C-08-206-VAB (Del. Super. Jan. 14, 1989)(Order granting approval of proposed class action settlement and judgment).
[115] *Id.*

Order, and (iv) claims of Advanta employees, officers, and directors."[116] That Order became final on February 15, 1999.

On March 15, 1999, Advanta sent a letter (the "March 15 tender letter") in which Advanta tendered to Fleet the Retained SmartMove Accounts that were the subject of the claims in the now-settled ***Stoddard*** litigation. Advanta tendered all such accounts except for accounts held by two of the four categories of customers that were carved out of ***the Stoddard*** Order, ***i.e.,*** (i) the list of opt-outs and (ii) Advanta customers who were in bankruptcy as of the date of the Order. Enclosed with the March 15 tender letter were a Bill of Sale, an Assignment and Assumption Agreement, the Settlement Agreement and Stipulation, and the ***Stoddard*** Order approving the class action settlement and judgment. In its March 15 tender letter, Advanta took the position that all of the tendered accounts were Qualified SmartMove Accounts.

In a letter dated March 3 1, 1999, Fleet rejected Advanta's March 15 tender for four stated reasons, two of which are relevant here. The first reason was that the ***Stoddard*** Settlement Order had excluded two additional categories from the definition of the settling class-(i) any others who had requested exclusion by timely writing and (ii) Advanta officers, directors, and employees.[117] The

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[116] **DX** 183, ¶ 1, 6.
[117] **PX 458.**

March 15 tender letter made no reference to those additional two categories that had been carved out of the settling class. Accordingly, the March 15 tender letter, on its face, appeared to include two categories of SmartMove accounts that by definition were not Qualified. Fleet, however, could not determine from the tender documents which of the tendered Retained SmartMove accounts fell within those two excluded categories. For that reason, Fleet rejected the March 15 tender.

Fleet rejected that tender for a second reason. The Settlement Stipulation in ***Stoddard*** contained language suggesting that the class claims being asserted by one Jill Fasso, a plaintiff in an action pending in the Superior Court for the State of California, were also not being settled.[118] The March 15 tender letter, however, provided no information about the claims in the ***Fasso*** case, nor did it identify the customers (or their accounts) that would be excluded from the tender as a result of those claims. In other words, Fleet rejected the March 15 tender because, in its view, the documentation supporting that tender was not adequate to enable Fleet to identify which. of the accounts being tendered were Qualified.

On April 9, 1999, Advanta responded to Fleet's March 3 1 letter, and identified which account holders fell within the two excluded categories addressed in the March 15 tender letter.[119] Regarding Ms. Fasso's claims, Advanta's counsel

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[118] DX 183 Settlement Stipulation, ¶ 17 (citing ***Borden, et. al. v. Advanta Cop, et. al., No. 783914*** (Cal. Super.)).
[119] PX 462.

stated that if Fleet had "read the Settlement Agreement more carefully, it would have seen that the claims alleged by Fasso were released by the cardholders whose accounts were tendered. See ¶ 1(o)(4)."[120]

The reference cited above was to the definition of "Settled Claims" in the *Stoddard* Settlement Agreement. That definition did not, however, mention or otherwise refer to Ms. Fasso's claims or her case, and, accordingly, did not adequately respond to Fleet's expressed concerns. As a result, on April 16, 1999, Fleet again wrote to Advanta, advising that Advanta's March 15 tender was still deficient, and that, until Advanta cured the deficiencies, Fleet would neither accept nor assume the accounts that Advanta had purported to tender.'*'

On May 10, 1999, Advanta responded to Fleet's April 16 letter, informing Fleet that the ***Borden*** action in California (which included Ms. Fasso's claims) had been dismissed by stipulation, and that the stipulation was awaiting the judge's signature.'** Only then was Fleet reasonably satisfied that the tendered accounts met the requirements of the Contribution Agreement's definition of Qualified SmartMove Accounts. Accordingly, Fleet accepted Advanta's tender of those accounts, effective as of 15 days after May 10, 1999.

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[120] *Id.* ("Settled Claims").
[121] PX 459.
[122] PX 461.

2. Analysis Of The Claim

The analysis of this claim is relatively straightforward. The facts as recited and found above are undisputed. It is also undisputed that the contract definition of Qualified SmartMove Accounts included a requirement that the tender of those accounts be "pursuant to documents relating thereto in form reasonably satisfactory to [Fleet]."

Fleet argues that it had no obligation to accept the tendered accounts until May 10, 1999 because (i) Fleet's obligation to accept extended only to Qualified SmartMove accounts, and, (ii) until May 10, the documentation Advanta had furnished was not "in a form reasonably satisfactory to [Fleet]" to enable Fleet to determine which of the accounts being tendered were Qualified.

In response, Advanta argues that, the record confirms all of the Retained SmartMove Accounts that were tendered on March 15 were ***in fact*** Qualified as of that date. Advanta also argues that even if the March 15 tender letter and supporting documents did not establish that fact to Fleet's reasonable satisfaction at that time, it is legally irrelevant. Advanta's reason is that the Contribution Agreement's requirement that the tender documents be in a "form reasonably satisfactory to [Fleet]" refers only to the Bill of Sale and Assignment and Assumption—two documents whose form is unquestioned.

The issues generated by these contentions are narrow. The first issue is whether the requirement that the documents relating to the tender be in a form "reasonably satisfactory" to Fleet, applies solely to the Bill of Sale and to the Assignment and Assumption. Advanta argues for this restrictive application. If that argument is correct, Advanta would prevail on this claim. The Court finds Advanta's argument to be without merit, however, because nothing in the contractual definition of Qualified SmartMove Accounts limits that requirement to those two documents.

The second issue is not as simple as the first because the parties have not framed or argued it in any focused way. It is undisputed (albeit only by way of hindsight) that all of the SmartMove Accounts tendered by Advanta on March 15, 1999 were in fact Qualified as of that date. It is also undisputed that this fact was not established by adequate documentation until May 10, 1999. The issue is: what documentation was Advanta contractually required to furnish when tendering the Retained SmartMove Accounts, in order to trigger Fleet's obligation to accept those accounts? If Advanta tendered the Accounts alone, without any documentation establishing that the tendered accounts were Qualified, would that satisfy its obligation to Fleet? For Advanta to prevail, it must argue that Fleet became obligated to accept the tender as of the initial tender date as long as the documents (which could be furnished at any time after the initial tender) establish

that the tendered Accounts were Qualified on the date of the tender. That is only one possibility, however. It is equally arguable that, under the Contribution Agreement, a tender of the Retained SmartMove Accounts would not trigger Fleet's obligation to accept unless and until Advanta submitted documents that were reasonably adequate to satisfy Fleet that the tendered Accounts were Qualified. That has to be Fleet's position for it to prevail.

The difficulty in addressing this issue is that the parties did not clearly frame or argue it in their briefs. Because the Contribution Agreement does not explicitly speak to this precise issue, the focus of the analysis must be upon what result commercially reasonable parties would have intended in this situation.[123] Having considered the issue from that perspective, the Court concludes that the only commercially reasonable interpretation is the one advanced by Fleet, *i.e.*, that a

[123] ***Jacobs v. Kraft*** Cheese Co., 164 A. 774, 776-77 (Pa. 1933) (holding that, where a contract predicated an employee's continued employment on increased sales, there was an implied contractual condition requiring that the employer market the product in a commercially reasonable fashion before judging the sales results); John D. Calamari and Joseph M. Perillo, ***Contracts*** § 2-9 (2) (3d ed. 1987) ("[Where] parties are silent as to [a] material term . . . there is a strong possibility that a term may be implied from the surrounding circumstances or supplied by the court using a gap filler . . ..'[T]erms are implied . . . because they are necessary to give business efficacy to the contract as written, or to give the contract the effect which parties, as fair and reasonable men, presumably would have agreed . . .. '(quoting ***Barco Urban Renewal Corp. v. Housing Auth.***, 674 F.2d 1001, 1007 (3d Cir. 1982) (applying New Jersey law)); ***Restatement (Second) of Contracts*** § 204 (1981) ("When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court"); id. ***$204*** cmt. d. *Cf.* ***Martin v. Star Publishing Co.,*** 126 A.2d 238,244 (Del. 1956) (stating that a court may supply a reasonable implied term or condition into a contract where the court is merely effectuating the intention of the parties).

party accepting the tendered SmartMove Accounts should be obligated to accept such accounts only if the recipient is furnished documentation showing, to the recipient's reasonable satisfaction, that the tendered accounts are Qualified.

The Court concludes that commercially reasonable parties would have intended that result for several reasons. The first is the magnitude of the potential liability. According to Advanta, as of March 15, 1999, the value of the tendered accounts was over $54 million, exclusive of the collections on those Accounts, which totaled almost $17 million. Given the amount at stake, it makes little sense to suppose that a party in Fleet's position would agree to assume Accounts of that magnitude without having reasonable assurance that the tendered Accounts were free from all potential liability flowing from the threatened class litigation. That conclusion is buttressed by the undisputed fact that Fleet was unwilling to acquire any SmartMove Accounts unless and until the claims relating to them had been released or dismissed.

Second, for Advanta's position to prevail, the Court would have to be persuaded that (i) a commercially reasonable party in Fleet's position would be willing to accept a tender of Accounts worth $70 million without any contemporaneous documentary evidence showing that those assets were free of all litigation claims that could impair their value, and (ii) the recipient would accept those Accounts based solely on Advanta's representation that the tendered

Accounts were Qualified. The statement of that proposition may be its own best refutation. But even if that were not so, the detailed, intensely negotiated provisions of the Contribution Agreement, which (if Schedules and Exhibits are included) is several hundred pages long, belies the suggestion that either side would have agreed to place such trust in the other's undocumented word where such a large sum of money was at stake.

The unreasonableness of Advanta's unstated proposition becomes especially apparent if one imagines a scenario whereby Fleet accepts a tender of the SmartMove Accounts based solely on Advanta's undocumented representation that the Accounts were Qualified, and, several months later, Advanta furnishes documents showing that, in fact, many of those Accounts were not Qualified. It cannot reasonably be supposed that Fleet would agree to assume the financial risk that some or all of the tendered (and accepted) Accounts might not turn out to be Qualified. In such circumstances, Fleet, as a commercially reasonable party, would insist upon the right to require Advanta either to take back all Accounts that were not Qualified or, alternatively, to indemnify Fleet for any loss. It would also have been commercially reasonable for that party to insist upon an alternative arrangement that would avoid altogether such post-tender difficulties-requiring Advanta to document the Qualified status of the tendered Accounts "up-front," *i.e.* before any tendered Accounts would have to be accepted. The Court finds the

latter scenario to be the only commercially reasonable interpretation of the Contribution Agreement provision requiring that documentation relating to the tender be "in [a] form reasonably satisfactory to [Fleet]."

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I conclude, for the above reasons, that (i) Fleet was not contractually obligated to accept the tendered SmartMove Accounts unless and until Advanta furnished documentation establishing, to Fleet's reasonable satisfaction, that the tendered Accounts were Qualified within the meaning of the Contribution Agreement, and that (ii) the furnishing of that documentation was not completed until May 10, 1999. Accordingly, the effective date of the tender of the Retained SmartMove Accounts was May 10, 1999. Therefore, the net total due to Fleet from Advanta on this claim is $1.7 million.

B. The Improper Solicitation Counterclaim

Advanta's second counterclaim arises out of Fleet's improper solicitation of Advanta's business credit card customers in September 1998. Advanta seeks to recover $3.621 million in money damages, claiming that Fleet's improper solicitation constituted either intentional or negligent interference with its business relations. Fleet's defense is that Advanta's counterclaim is unsupported by the evidence and is barred by both the parties' contract and Pennsylvania law.

1. Background Of The Dispute

Beginning on September 8, 1998, Fleet sent 197,574 solicitation letters to Advanta's business card customers. The letters stated that: (i) those customers were now "member[s] of Fleet. *Welcome;"* (ii) beginning in October, their Advanta cards "would be serviced by Fleet, one of the nation's premier financial institutions;" and (iii) "[We are] very fortunate to have the opportunity to provide you with 'Best in Class' service."[124] It is undisputed that these statements were incorrect because Fleet had acquired Advanta's *consumer,* not its *business,* credit card accounts. According to Fleet, the error occurred because (as Fleet later learned) FDR had compiled a "Daily Master File" of credit card customers for Fleet, and had erroneously commingled Advanta's business card information with Fleet's consumer credit card information. As a result of FDR's erroneous compilation of the Daily Master File, the improper solicitation letter was sent to approximately half of Advanta's business card holders. There is no evidence that at the time of the mailing, Fleet knew or intended that Advanta business card

[124] PX 447 at 00056823; DX 168 at 00079379.

customers would be included in the mailing.[125] Fleet implicitly concedes in its brief, however, that the erroneous solicitation resulted from its negligence.'*"

Advanta became aware of the improper solicitation on September 8, after it received calls from its customers who asked about the Fleet solicitation letter. Advanta notified Fleet on that same day. Thereafter, Advanta assembled a team of employees which would meet twice daily for a week to assess how to counteract

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[125] Advanta contends that there is such evidence, namely, that (i) Fleet did not inform Advanta of the cause of the improper solicitation (the FDR file mix-up) until September 15, 1998, four days after Fleet itself had learned of FDR's mistake, and (ii) Advanta's own meeting minutes show that Fleet continued sending the solicitation letters to Advanta business card customers until September 15, 1998, one week after Fleet became aware of the problem.

The evidence of record, however, shows otherwise. The letter that informed Advanta of the cause of the erroneous solicitation was drafted for the signature of a Fleet Vice President, Brian T. Moynihan. The draft letter was faxed to Moynihan late on a Friday afternoon, September 11, 1998. DX 168. The letter that was ultimately sent, however, was not signed by Moynihan, but by Fleet's CEO, Joseph Saunders. The Saunders letter was not mailed to Advanta until the following business day, Monday, September 14, 1998. PX 447. In these circumstances, it is more likely (and the Court finds) that the cause of the delay was timing (the intervention of a weekend), rather than a deliberate effort to keep Advanta in the dark so that (as Advanta speculates) Fleet could continue improperly soliciting Advanta's business credit card holders.

Advanta attempts to buttress its claim that Fleet's improper solicitation was intentional by urging that the solicitation continued until September 15, 1998. The only evidence of that "fact," however, is Advanta's own meeting minutes (DX 170), which state that "[t]he initial response from Fleet was that the letters were sent out over a two-week period beginning Sept 1 and going through Sept 15". If this is the case, why did they not pull our cardholders?" The minutes go on to say, however, that "[t]he dates and volumes [of the solicitation] have not been confirmed. If this is true, Mike Noles will contact Elizabeth Mai, Advanta's General Counsel] to address with Fleet." DX 170. Mai never addressed that issue with Fleet, and Advanta never adduced any evidence that any solicitation letters were actually mailed after September 8, 1998.

[126] Fleet Post-Trial Reply Br. at 34. During the post-trial oral argument, however, Fleet attempted to repudiate its concession by arguing that FDR is the only negligent party. Post-Trial Argt. Tr. at 46-48. That argument, coming for the first time at oral argument, lacks merit and grace. The argument lacks merit because, while FDR may well have been negligent, it does not absolve Fleet of legal responsibility, since it was Fleet, not FDR, that solicited Advanta's business credit card customers. That is, if FDR was culpable, so was Fleet. The argument also comes with poor grace because, if Fleet truly held the view that only FDR was culpable, it would have joined FDR as a defendant and asserted a cross-claim against FDR for indemnity. Fleet never asserted any claim against FDR.

the feared effect of the letters. On September 10, 1998, this team learned that the solicitation had reached over 50% of Advanta's business customer base (approximately 105,000 customers on approximately 198,000 accounts).[127]

Advanta's chosen strategy to counteract the Fleet solicitation was (i) to contact all of its Fleet-notified business card customers and offer them a 50% off "restaurant rebate," up to a maximum of $25, and (ii) to attempt to call all Advanta business cardholders and send them apology letters. To carry out that effort, Advanta divided the telemarketing responsibility between its own customer service group and two outside marketing firms, FutureCall and PRO Direct. Advanta also hired a consultant, Princeton Management Resources, to oversee the telemarketing efforts and provide a summary report.

Advanta claims that it suffered $3.62 1 million in damages as a consequence of Fleet's improper solicitation of Advanta's business card customers. Of this amount, $1.005 million represents direct and indirect costs, and $2.616 million represents lost income due to attrition of the solicited accounts and the diminished use of Advanta business cards.

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[127] Trial Tr. at 1741-42; DX 116.

2. Analysis Of The Claim

a. *The Contentions And Issues*

As earlier noted, Advanta relies on two separate tort causes of action: (i) intentional interference with business relations and (ii) negligent interference with business relations. Because the Court has found as fact that Fleet's erroneous solicitation of Advanta's business card customers was unintentional, Advanta's claim for intentional interference is eliminated,[128] leaving only Advanta's claim for negligent interference with business relations.

Fleet's response is twofold. First, Fleet argues that, even if the solicitation of Advanta's business card customers was caused by its (Fleet's) negligence, Advanta's negligent interference claim is not supported under Pennsylvania law and is expressly precluded by the Interim Services Agreement. Second, Fleet contends that, even if Advanta has a legally viable claim for negligent interference, the damages it seeks are speculative and unreasonable.

These contentions raise two issues. The first is whether Advanta has a legally viable, enforceable claim for negligent interference. If it does, the Court must decide the second issue, which is whether Advanta's claimed damages are speculative and unreasonable.

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[128] Under Pennsylvania law, intent to interfere is an element of a claim for intentional interference with business relations. *Leonard A. Feinberg, Inc. v. Cent. Asia Capital Corp., 974* F. Supp. 822,846 (E.D. Pa. 1997) (applying Pennsylvania law); *Triffin v. Janssen, 626* A.2d 571, 574 (Pa. Super. 1993).

b. *The* Issues *Analyzed*

(i) The Sufficiency of Advanta's Negligent Interference Claim

Fleet contends that Advanta does not have a viable negligent interference claim because, under Pennsylvania law, a recovery for purely economic loss (which Advanta seeks here) that was occasioned by tortious interference with contract or economic advantage is not available under a negligence theory. Pennsylvania law does proscribe a negligent interference claim where, absent physical damage or injury, the plaintiff seeks damages solely for economic loss.[129] As Professors Prosser and Keeton have explained:

> The policy against recovery based on negligence is rooted at least in part on what Professor James has called the "pragmatic" objection, that while physical harm generally has limited effects, a chain reaction occurs when economic harm is done and may produce an unending sequence of financial effects best dealt with by insurance, or by contract, or by other business planning devices. The courts have generally followed this policy and The rather limited and narrow exceptions have had virtually no impact on the law.[130]

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[129] ***Aikens v. Baltimore & Ohio R.R. Co.,*** 501 A.2d 277, 278-79 (Pa. Super. 1985); ***Getty Ref.*** *and* ***Mktg. Co. v. MT FADI B., et. al.,*** 766 F.2d 829,832 (3d Cir. 1985) (applying Pennsylvnia law).

W. Prosser & W. Keeton, ***The Law of Torts*** 1001 (5th ed. 1984) (quoted in ***Getty Ref. and Mktg. Co., 766*** F.2d at 832); see also ***Aikens,*** 501 A.2d 279 ("Therefore, negligent harm to economic advantage alone is too remote for recovery under a negligence theory. The reason a plaintiff cannot recover stems from the fact that the negligent actor has no knowledge of the contract or prospective relation and thus has no reason to foresee any harrn to the plaintiff's interest").

The rule does have "limited and narrow exceptions," however. Specifically, a plaintiff will have a cognizable cause of action for negligent interference if the tortious interference involved parties who were in a "special relationship" to one another.[131] Because Advanta contends that that exception applies-a contention that Fleet disputes-the issue becomes whether Fleet and Advanta had a "special relationship" for purposes of this rule.

Fleet argues that no special relationship existed here because that requires "a 'confidential or fiduciary relationship' where 'one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on one side, or weakness, dependence, or justifiable trust, on the other.'"[132] That definition, Fleet argues, does not cover the kind of arms-length commercial relationship that characterized Fleet's dealings with Advanta in Fleet's purchase of the Business.

I cannot agree. While a business relationship typically will not satisfy the requirements for a special relationship, that is not always the case. One Pennsylvania court has found that a business relationship may involve a special relationship "if one party surrenders substantial control over some portion of his affairs to the other."[133] In this case, Advanta surrendered substantial control over

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[131] *Aikens,* 501 A.2d 278.

[132] ***L & A4 Beverage Co. v. Guiness Import Co., 1995*** WL 771113 (E.D. Pa. Dec. 29, 1995) (applying Pennsylvania law).

[133] *Id.*

certain of its business card customer accounts to Fleet under the Interim Services Agreement. Under that Agreement, Fleet functioned as Advanta's agent, and processed all incoming payments for Advanta business card customers. That relationship gave Fleet access to Advanta's proprietary customer information, including the identity of its business cardholders. In these circumstances, therefore, Fleet and Advanta had a special relationship within the meaning of the rule.

A cause of action for negligent interference exists in this case for a second reason. The rationale for the rule proscribing a negligent interference claim in the absence of physical injury or damage or a special relationship is that "the negligent actor has no knowledge of the contract or prospective relation and thus has no reason to foresee any harm to the plaintiffs interest."[134] As one Pennsylvania court has recognized, this implies that "if the parties had knowledge of a contract . . . then a cause of action may possibly lie in negligent interference with a contractual relationship."[135] Here, Fleet clearly "had knowledge of [the] contract[s]," because Fleet obviously knew that Advanta had contractual relationships with its business card customers. Manifestly, it was foreseeable to Fleet that any improper solicitation by Fleet of Advanta's business card customers could economically

[134] *Aikens*, 501 A.2d 278.
[135] *Cox v. Calabrese*, 50 Pa. D. & C. 3d 624,626 (Pa. Corn. Pl. 1986).

harm Advanta. Thus, the policy that underlies the rule prohibiting a negligent interference claim for purely economic loss does not apply in this particular case. Therefore, the prohibition should not apply either. Accordingly, the Court concludes that Advanta's negligent interference claim is not barred under Pennsylvania law.

Fleet's second legal argument is that even if a viable claim for negligent interference exists under Pennsylvania law, the claim is nonetheless barred by the Interim Services Agreement. The argument runs as follows: the improper solicitation was, at most, a violation of the Interim Services Agreement, which obligated Fleet to use its "best efforts . . . to hold[] in confidence" the business card customer information furnished by Advanta. [136] If Fleet breached that obligation, Fleet would be liable under the Agreement, but only for "willful misconduct," "gross negligence," or "bad faith."[137] Because Fleet's conduct amounted, at worst, to ordinary negligence, Advanta's claim for negligent interference is contractually barred.

Fleet's argument lacks merit. Fleet's own conduct violated a duty owed to Advanta under tort law, not a contractual duty owed to Advanta under the Interim Services Agreement, which simply obligates Fleet to collect and apply business

[136] PX 8 at 00051011 at ¶ 11(i).

[137] *Id.* at 00051008 at ¶ 8.

cardholder payments (called "items processing") on behalf of Advanta. That Agreement imposes liability on Fleet for "failure to perform its obligations hereunder."[138] But, Fleet's erroneous solicitation of Advanta's business card customers did not breach of Fleet's obligation to service the business cardholder payments or any other items processing obligation. Nor did Fleet breach the confidentiality provisions of the Agreement, because Fleet did not disclose Advanta's proprietary information to anyone. Rather, what Fleet did was misuse that information. Accordingly, the Interim Services Agreement does not bar Advanta's negligent interference claim.

Having found that Advanta has an enforceable negligent interference claim against Fleet, the Court turns to the damages issue.

(ii) The Sufficiency Of Advanta's Claim For Money Damages

As earlier noted, Advanta claims that it incurred $3.621 million of damages as a result of Fleet's negligent interference with its business card customer relationships. Of that amount, $1,005,102.58 represents direct and indirect costs, while $2,616,200 represents lost income due to attrition and diminished use of Advanta's business cards.

The $1,005,102.58 amount of direct and indirect costs includes $205,179.32 in invoiced services provided by the telemarketing and consulting firms,

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[138] *Id.*

$58 1.67459 in restaurant rebates utilized by solicited cardholders, and $68,113.25 for the cost of a third party servicer to send 105,000 letters to Advanta cardholders. Advanta attributes the balance, $150,135.42, to "opportunity costs," i.e., the costs associated with the inability of Advanta representatives to approve new accounts and credit applications and to save the accounts of customers seeking to cancel. According to Advanta, such costs occurred because those representatives were too busy handling inbound calls and making mitigating outbound calls in an effort to resolve the Fleet solicitation issues.

The $2,616,200 attrition damages figure was calculated by multiplying the number of lost accounts by the revenue generated by each account. The number of lost accounts was determined by making a judgment (based on several factors) that, as a consequence of the Fleet solicitation, 3,000 customers would have closed their accounts and 2,000 would have reduced their charge activity by 50%. The total number of lost accounts is mathematically equivalent to 4,000 accounts.

The lost revenue generated by each lost account was determined by applying Advanta's profit model used in the ordinary course of its business in 1998. That profit model indicated that each business card earned incremental, pre-tax income of $218.70 per year, or $654.05 for the five-year life for each account (discounted to net present value).

Direct and Indirect Costs: Fleet does not dispute that Advanta actually incurred direct and indirect costs of $1,005,102.58. Fleet contends, however, that Advanta's expenditure of almost $1 .1 million to prevent damage to its customer base was unreasonable. That is because (Fleet argues) Princeton Management Resources, Advanta's telemarketing consultant, had reported that it found "no measurable annoyance or other negative reaction toward Advanta related to the Fleet's mailing,"[139] and that "the vast majority of Advanta business Mastercard customers were not annoyed, angered or even unduly concerned with the content of the Fleet letter."[140] Fleet separately criticizes the $150,000 opportunity cost component on the additional ground that it is speculative.

The Court cannot agree with Fleet's criticism that these costs were incurred unreasonably. The indifference and lack of concern that Fleet cites was not determined until after Advanta had telephoned each card holder and offered a rebate.[141] It is unfair to evaluate the reasonableness of this expenditure based on information known only as a result of hindsight. Moreover, the customer indifference may well have been a product (and possibly, a measure of the success) of the mitigation campaign.

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[139] Trial Tr. at 1836-37; DX 173A at 10.
[140] Trial Tr. at 1835; DX 172 at 003358.
[141] See Advanta Revised Op. Post-Trial Br. at 67; Fleet Post-Trial Reply Br. at 39.

The reasonableness of Advanta's decision to incur the costs of(i) sending 105,000 letters to its business card customers that received Fleet's letter and (ii) telephoning its business card customers to offer them a rebate must be viewed in context. The credit card industry is very competitive. Each of its player seeks to garner its competitors' customers for itself. Each business customer account is an asset that no credit card company wants to lose. For Advanta to be confronted with a mass solicitation of its business card customer base by a significant competitor (Fleet) represented a serious threat to which Advanta was entitled to respond with appropriate measures. The propriety of the measures chosen must of necessity be a matter of business judgment, and it is not for Fleet-who caused the problem-or for the Court, to second guess the reasonableness of that judgment unless the solution is shown to be unreasonable on its face. Fleet has made no such showing,

Advanta's claim for $150,135.42 of lost opportunity cost stands on a different footing, however, because it is speculative. The sole support for this claim is a one-page summary that is said to be an internal compilation.[142] While that may be the case, Advanta was unable to identify who prepared the damages

[142] **DX 178** at **207**

compilation or the methodology utilized in its preparation.[143] Given the sparseness of the record on this claim, it must be rejected as speculative and conjectural.[144]

Accordingly, I uphold Advanta's claim for $854,907.16 of its direct and indirect costs ($1,005,102.58 less $150,135.42).

Damages For Attrition of Advanta's Customer Base: The remaining (and largest) component of Advanta's damage claim is for $2,616,200, representing the quantified attrition of Advanta's business customer base. To reiterate, that figure is the product of the estimated number of accounts lost because of Fleet's solicitation (4,000 accounts), multiplied by the estimated loss of income for the five-year life of each account ($654.05).

Fleet criticizes every element of that formula and its underlying assumptions, arguing that the assumptions are "based on rank speculation and flawed numbers."[145] While that criticism is hyperbolic, its message is not off the mark. Advanta has not proved that any accounts were *actually* lost due to Fleet's improper solicitation. Its trial expert simply provided *an estimate.* While that fact, without more, will not invalidate a damages calculation, it does impose upon the claimant the burden of showing that the estimate has a sound factual basis.

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[143] Trial Tr. at 1766.

[144] The Court has similarly rejected Fleet's claim for $13 1,000 of opportunity costs in connection with its miscoding claim. See pp. 35-36, ***supra.***

[145] Fleet Post-Trial Reply Br. at 38.

Advanta has not met that burden, because its estimate was based on "facts" that, the record shows, are highly questionable.

One of those facts was that the "mere change in the issuing bank's name (when a credit card portfolio is sold from one issuer to another) results in 10% attrition."[146] But why would that be true where the customers were informed that their Advanta account had been sold to Fleet, and then only days later, were told that indeed there was no such sale? Advanta made no effort to answer this common sense question.

The second fact was that "[i]n addition to the concerned population, 464 customers [who were] called about the Fleet letter closed their accounts 'due to the Fleet solicitation.'"[147] That is not correct. Mr. Sultzer, Advanta's trial witness who testified on this issue, admitted that the 464 customer figure included customers who had made cancellation requests for reasons other than the Fleet letter, plus all those with inactive accounts (of which there were 23,000), who used the telemarketing call to formally cancel their accounts, apart from the Fleet letter.[148]

The third fact upon which the attrition calculation was based is that "11.5% of the Fleet contacted customers . . . were concerned after the Fleet letter *and*

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[146] Advanta Post-Trial Br. at 67.
[147] *Id.*
[148] Trial Tr. 1844-46, 1853-54; Sultzer Dep. (4/20/01) at 120.

remained concerned even after the telephone call from Advanta . . . ."[149] That statement is misleading and of minimal relevance because the 11.5% figure did not reflect the percentage of Advanta customers who remained "concerned" because of Fleet's solicitation.

By way of explanation, the Princeton Management Resources report categorized the outgoing telemarketing calls and identified customers who were "concerned" and those who were "unconcerned." Of those customers who were aware of the Fleet letter, 85% were "unconcerned." Thirty eight percent of the contacted customers were unaware of the Fleet letter.[150] Moreover, the concerns of the "concerned" customers did not necessarily have anything to do with the Fleet letter. The concerned category captured all business card customers with complaints that the customer service representative could not address, as well as customers who required follow-up for requests (including the need for replacement cards, address changes, or cancellation).[151] Therefore, a customer who was totally unconcerned about Fleet's solicitation but who asked for an address change or a replacement card during the telemarketing call, was included in the "concerned" category.[152]

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[149] Advanta Revised Op. Post-Trial Br. at 67 (emphasis in original).

[150] Trial Tr. at 1753-54, 1838; DX 172 at 3355.

[151] Trial Tr. at 1842, 1839; Sultzer Dep.(4/20/01) at 126; DX 172 at 00353; DX 173A at 6.

[152] Trial Tr. at 1840-42.

These flaws in the assumptions that underlie Advanta's estimate of the number of accounts lost because of the Fleet solicitation are, without more, enough to undermine confidence in the factual underpinning of that estimate. That being the case, it is unnecessary to burden further this already lengthy Opinion by addressing the flaws in the lost revenue component of the calculation. Suffice it to say that the damages model from which the $2.6 million component of Advanta's damage claim was calculated, and the resulting $2.6 million figure, are too uncertain and conjectural to be used as a basis to assess damages.[153] It may well be the case that Advanta lost some business card customers as a result of Fleet's solicitation, but the proof of that loss must be more certain than that which Advanta presented here.

In summary, Advanta is entitled to judgment on its improper solicitation counterclaim in the amount of $864,907.16.

V. PREJUDGMENT INTEREST

The final issue that the parties have presented concerns how prejudgment interest should be determined. Fleet's written treatment of this issue consisted of a one short paragraph footnote in its reply brief. Fleet took the position that the Court should award Advanta no prejudgment interest because Advanta was in

[153] See Birth *Ctr. v. St. Paul Cos.*, 727 A.2d 1144, 1162 (Pa. Super. 1999) ("[L]ost profits may not be awarded where the evidence leaves the trier of fact without any guidance except speculation"), *aff'd*, 787 A.2d 376 (Pa. 2001).

wrongful possession of tens of millions of dollars since the Closing, and therefore, Fleet justifiably set off the amounts it owed Advanta from the SmartMove Accounts referenced in Advanta's first counterclaim. Accordingly, Fleet concluded, for the sake of simplicity and fairness, the Court should follow the "interest on the balance rule," and award prejudgment interest only on the net balance after deducting Fleet's setoff on the SmartMove Accounts. Although Fleet did cite two federal cases, it did not discuss their significance or their application to this case.[154]

In its reply brief-which was the last post-trial brief filed in this case— Advanta advanced in a far more developed way its contrary argument that interest should be calculated before any netting of the opposing judgments. Advanta urged that Fleet's "interest on balance rule" would penalize Advanta by denying it more than $23.7 million it would have enjoyed had Fleet remitted the amounts it owed to Advanta. Citing federal and Delaware cases, Advanta concluded that the Court should award it compound interest of $28,115,672.[155]

Having no further brief to file, Fleet was unable to respond to Advanta's more elaborated legal and factual position, other than in its post-trial oral argument presentation.

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[154] Fleet Post-Trial Reply Br. at 49.
[155] Advanta Post-Trial Reply Br. at 13-14.

Unfortunately, the lopsided manner in which the presentation of this issue developed makes it difficult for the Court to resolve the issue with any degree of comfort. Given the magnitude of the dollars at stake depending on how the interest issue is determined, the Court needs a more elaborated legal and factual exposition of both sides of the issue than the parties have been able to provide thus far. That can be accomplished, however, at the next (and last) stage of this proceeding-the settlement of a form of Final Order and Judgment. At that stage, the parties will submit proposed forms of order that should be identical to the extent they reflect the Court's ruling on the substantive claims and counterclaims, but will differ to the extent they reflect each proposing party's view as to how prejudgment interest should be determined. In support of its proposed form of Final Order and Judgment, each side shall submit a memorandum explicating, as fully as needed, the legal and factual basis for its position on the prejudgment interest question.

VI. CONCLUSION

Based on the rulings set forth in this Opinion:

With respect to Fleet's claims, judgment will be entered in Fleet's favor in the amount of $7,369,000 on Fleet's Miscoding claim, and in the amount of $21,199,200 on Fleet's Introductory Rate Balance claim; and will be entered in Advanta's favor, and against Fleet, on Fleet's Relationship Management claim.

With respect to Advanta's counterclaims, judgment will be entered in Fleet's favor on Advanta's SmartMove Accounts counterclaim in the net amount of $1,700,000; and will be entered in Advanta's favor, and against Fleet, on Advanta's Improper Solicitation counterclaim in the amount of $854,967.16.

The determination of pre-judgment interest shall await the submission of proposed implementing forms of order, and of supporting legal memoranda on the prejudgment interest issue, as instructed in Part V of this Opinion.